VOLUME SEVEN OF EIGHT

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

APPENDIX

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RESPONDENT'S EXHIBIT #12 (JURY PANEL DOCUMENT) 3085

RESPONDENT'S EXHIBIT #13 (EXPERT WITNESS LIST) 3089

RESPONDENT'S EXHIBIT #14 (NOTES) 3090

COURT'S EXHIBIT #1 (ABA GUIDELINES) 3109

PETITIONER'S POST-TRIAL MEMORANDUM 3284

RESPONDENT'S POST-HEARING MEMORANDUM OF LAW 3345

ORDER OF DISMISSAL 3536

MOTION TO RECONSIDER, ALTER AND AMEND 3728

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITIONER'S MOTION TO RECONSIDER, ALTER AND AMEND 3738

ORDER DENYING MOTION TO RECONSIDER, ALTER OR AMEND 3751

PROPOSED ORDER OF DISMISSAL 3752

INDICTMENT 3944

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

APPLICANT'S EXHIBIT #26 (AUDIOTAPE)

APPLICANT'S EXHIBIT #27 (PHOTOGRAPH)

APPLICANT'S EXHIBIT #28 (PHOTOGRAPH)

DOMESTIC INFORMATION

FOR

Marion Linsey

The forms contained in these materials are necessary fo completing documents for your action in Family Court. The form include a Questionnaire which must be completely filled out by yo and a Financial Declaration which will be filed with the Court. Th Financial Declaration is a sworn statement and must be true to th best of your knowledge and ability to complete this form. Finall a Contract for Legal Services is included and should be signed b you before the Law Firm of Gerald G. Wilson, P.A. is retained t represent you. The Contract should set forth the legal fees an cost you can expect in this action.

QUESTIONNAIRE: All blanks on the Questionnaire should b filled in with the appropriate response or where no response i required the letters N/A, for not applicable. Please provide a lis of all property ,both real and personal (ie. real estate, ban accounts, automobiles, pension plans etc.) which you possesse before the marriage and give a value for this property. Next lis all property inherited by you during the marriage and give a value Then list property you and your spouse accumulated during th marriage and give a value.

FINANCIAL DECLARATION: Fill in this form giving figure for income and expenses on a monthly basis. Remember there are 4.3 weeks in an average month. If you are paid bi-weekly, remembe there are 26 pay periods per year which then divided by 12 month will yield a monthly figure. Annual expenses should be divided b 12 to get the monthly amount necessary for that expense. This is sworn statement so be sure your figures for income, expenses an valuation of property are as accurate as possible. Please provid us with your most recent pay check stub or a statement from you employer verifying your income and deductions. If children ar carried on group insurance we need to know the cost of thi insurance for the child.

CONTRACT FOR LEGAL SERVICES: Be sure you have read th Contract for Legal Services and understand the fees and cos associated with this action before you sign the Contract.

CONFIDENTIAL

3002

DOMESTIC INFORMATION QUESTIONNAIRE

PLAINTIFF NAME: Marion Alexander Lindsey

ADDRESS:

PLAINTIFF'S CITY: Moore STATE SC ZIP 29369

DEFENDANT NAME: Ruby Nell (Wright) Lindsey

ADDRESS:

DEFENDANT'S CITY: Inman STATE SC ZIP 29349

CLIENT NAME: Marion

CLIENT PARTY: (PLAINTIFF OR DEFENDANT) II

CLIENT DOB: / / SSN:

OPP PARTY DOB: / / SSN:

CLIENT OCCUPATION: 8-7

OPP PARTY OCCUPATION: SRMC RESTORATIVE CARE

CLIENT ANNUAL INCOME:

OPP PARTY ANNUAL INCOME: $8.05/hr

PLAINTIFF COUNTY: Sptbg

OPP PARTY COUNTY: Spbg

COUNTY LAST RESIDED HUSBAND & WIFE: Spbg

PLAINTIFF STATE: SC

DEFENDANT STATE: SC

1ST Marriage For Both

MARRIAGE DATE: 3/10/96 PLACE: Spartanburg

NUMBER OF CHILDREN BY THIS MARRIAGE:

CHILD 1, NAME: Amax Nerion Alexander AGE: 7 DOB / /

CHILD 2, NAME: Trevins Alexander AGE: 2 DOB: / /

CHILD 3, NAME: AGE: DOB:

CHILD 4, NAME: AGE: DOB:

NUMBER OF EMANICIPATED CHILDREN: _____

SEPARATION DATE: 7/1/99 GROUNDS FOR ACTION: 1yr sep.

DATE ACTS COMMITTED: _____

CUSTODY SOUGHT: Δ

IS PERSONAL PROPERTY OWNED: _____ REAL PROPERTY: _____

HAS REAL PROPERTY BEEN INHERITED: _____

PLAINTIFF MAKE OF AUTO: _____

PLAINTIFF AUTO AMOUNT OWED: $ _____

PLAINTIFF AUTO PAYMENT: $ _____

DEFENDANT AUTO MAKE: _____

DEFENDANT AUTO AMOUNT OWED: $ _____

DEFENDANT AUTO PAYMENT: $ _____

MAIDEN NAME: _____ DIVORCE GROUNDS: _____

VISITATION REQUESTED: _____

CHILD SUPPORT(TO WIFE OR COURT): _____

MEDICAL INSURANCE PAID(BY WIFE OR HUSBAND): _____

DEPENDANT CLAIMED(HUSBAND OR WIFE): _____

MARITAL HOME ADDRESS: _____

MARITAL HOME TITLED IN NAME OF: _____

PURCHASE DATE: _____ PURCHASE PRICE: $ _____

IMPROVEMENTS MADE: _____

_____

TAX BASE: $ _____ PURCHASE MORTGAGE AMT.: $ _____

CURRENT MORTGAGE AMT: $ _____ MORTGAGEE: _____

HUSBAND'S REAL ESTATE: _____

WIFE'S REAL ESTATE: _____

3004

WIFE'S PROFIT SHARE: _____

HUSBAND'S PROFIT SHARE: _____

STOCKS AND BONDS: _____

BUSINESS OF WIFE: _____

BUSINESS OF HUSBAND: _____

NOTES

Divorce 1yr sep.
No prop to be divided
Custody to Δ
child support

Parties have agreed that the Π will pay child support in the amount of $62.50 per month per child for a total of $125.00.

day care
372.38

Δ – 1394.26
– 1212.40 47%
2606.66

319.00

PROPERTY LIST

PROPERTY INHERITED BY WIFE	VALUE

PROPERTY INHERITED BY HUSBAND	VALUE

PROPERTY LIST	
PROPERTY OWNED BY HUSBAND PRIOR TO MARRIAGE	VALUE

PROPERTY LIST	
PROPERTY PURCHASED DURING THE MARRIAGE	VALUE

3008

PLAINTIFF NAME

ADDRESS

DATE OF BIRTH RACE SEX

SOCIAL SECURITY NUMBER

EMPLOYER

EMPLOYER'S ADDRESS

DEFENDANT NAME

ADDRESS

DATE OF BIRTH RACE SEX

SOCIAL SECURITY NUMBER

EMPLOYER

EMPLOYER'S ADDRESS

STATE OF SOUTH CAROLINA)
) VERIFICATION
COUNTY OF SPARTANBURG)

PERSONALLY appeared before me _____

who being duly sworn, deposes and says that he is the

_____ in the within action and has read the

within _____ and knows that the

allegations therein contained are true; except those allegations

alleged on information and belief, and as to these he verily

believes them to be true.

_____

SWORN to before me this _____

day of _____,

_____(SEAL)

NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES:

3010

CASE NUMBER

PLAINTIFF NAME

ADDRESS

DATE OF BIRTH RACE SEX

SOCIAL SECURITY NUMBER

EMPLOYER

EMPLOYER'S ADDRESS

DEFENDANT NAME

ADDRESS

DATE OF BIRTH RACE SEX

SOCIAL SECURITY NUMBER

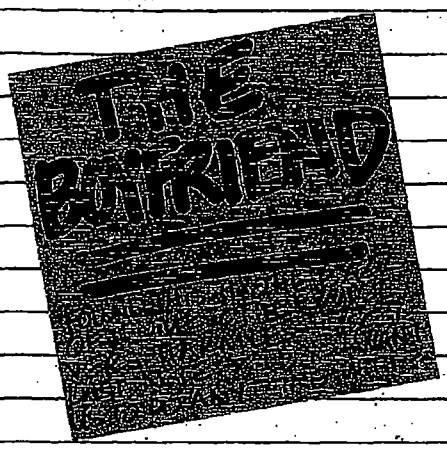
EMPLOYER

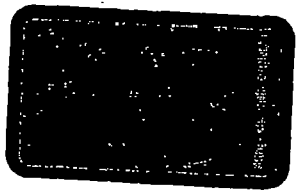
EMPLOYER'S ADDRESS



FROM THE DESK OF RUSTY CLEVENGER
INVESTIGATOR'S PROGRESS REPORT

DATE	NOTES
	State vs. Marion Lindsey
	Phone conversation with Mike Stewart
4-22-04	I spoke to a potential witness via phone in the case against the listed defendant. Mr. Stewart stated on the phone that he had a romantic interest in the deceased victim (Ruby Nell Lindsey) for a short period of time. I advised at that time I needed him to come in and meet with us. He later admitted to having sexual relations with the victim 1 time.





Carolyn Wedrick (Judge Lewis assistant) emailed this to me 1.6.04 & in the confusion of a million other things going on (status conf w/ Hayes, trying to catch up from my being in the 2 DP's, trying to start work on my own DP, etc.) I never saw it in my Inbox... 3013

She left a message for me to call her during the week of 8/9/04 but I was on vacation & proceeded so she told Sheila to ask me to call her the week of 8/16.

Spoke w/ her Tuesday 8.17.04. Found the email. All she needed to know is if any of us (MB, DB, KQ) had any comments for page 11, Q#13. Told her I'd call her back.

Reviewed Report, & The State v. Marion Alexander Lindsey then reviewed it w/ MB ("no comment"). Took it to DB's office, & he brought it back over @ 2:40pm ("no comment") Called Carolyn = left msg w/ Jeff(?) that all 3 had reviewed & neither has any comment. Left my cell # if she or Judge Lewis needs to call me back. Also sent an email to Judge & Carolyn.

REPORT OF THE TRIAL JUDGE

OF THE

COURT OF GENERAL SESSIONS FOR SPARTANBURG COUNTY

SOUTH CAROLINA

The State v. Marion Alexander Lindsey

Docket No. 02-GS-42-4753

A. Data Concerning the Defendant

1. Name Lindsey (Last) Marion (First) Alexander (Middle) 2. Date of Birth (Mo. Day Yr.)

3. Social Security Number [ ] [ ] Unknown

4. Sex: M [X]
F [ ]

5. Race: W [ ]
B [X]
Other (Specify): _____

Court

6. Education – Highest Grade Completed:
1 2 3 4 5 6 7 X8X 9 10 11 12 13 14 15 16
(Circle One) (College)

7. Do you have an opinion as to the defendant's intelligence level?
Yes [X] No [ ]
If so, is it
a. Below Average [X]
b. Average [ ]
c. Above Average [ ]

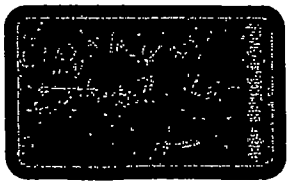
8. Was a psychiatric evaluation performed? Yes [X] No [ ]
a. If performed, by whom? Pratap Narayan, Margaret Melikian
b. If performed, is defendant
(1) Able to distinguish right from wrong? Yes [X] No [ ]
(2) Able to cooperate intelligently in his own defense? [X] [ ]
c. If performed, were character or behavior disorders found?
(If answer is yes, please elaborate)
malingering and borderline intellectual functioning determined by Pratap Narayan

[redacted]

3014

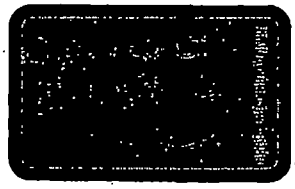
Court

PAM CRAWFORD



Court

TAM CRAWFORD



3016

* 7:30 AM meet w/ MB/DB etcetera together in DB's office

* have MB call you in AM (h) 803-
(p) 803-...
(m) 479-...

meet @ least 2x - couple of hours each

5/20	5/21	5/22
Thurs	Fri	Sat
~~review discussion~~ 9:00 - 9:35 ✓	MEET ✓	MEET ✓
VAL... Pont I 9:35 - 11:00	AFTER SHE REVIEWS RECORDS @ DOUG'S	
11:00 - 11:10		

2 DB got to the jail 5/20/04 @ 9:00 PM - met Crawford - KQ/Crawford met 5 min. → DB & Δ came in 9:05 - Caught her up on what were even doing - told her to let me know if what she gets is missing anything we cover - or if it is an oversight & I'll get it to you - 10:30 - noticed that they were into FACTS & he had gotten to "I saw motion in the back seat" & I respectfully stopped it. NOT to control the eval, but b/c I dont know if the scope of this is to include incident facts. She assured us that she will not disclose "fact" stuff to SOL office; that nobody really made it clear to her what the scope is, but that we all believe that it's MITIGATION - related - mainly to IV him & critique Melikian & Brawley, not to come to a determ of competency, SBM, NGRI, etc. Apologized & just said "to err on side of caution I want to run it by Mike - not preclude it!" She was totally understanding & expressed acknmt

I think I remember that legitimate delusional ~~[illegible]~~ hallucinations / visual

do not take features you can describe (ie. 5'6", dk. brn. skin)

Mike

talk to drs?

Med recs

suicide notes from Rod

(they're just "forms")

talk to verify some stuff

weight loss

pre-pre-pre-post

3018

Fri 5/14/04

11:30 KQ met w/ Lenora Topp — brought missing med recs & more school recs
- discussed Ws

Court

12:45 MB came.
1:00 DB came.

1:20 Lenora left. Faxed med recs to Melikian Brawley Absher

LUNCH w/ MB/DB

2:15 KQ/MB/DB met BJB To look @ Celeste's car & carseat

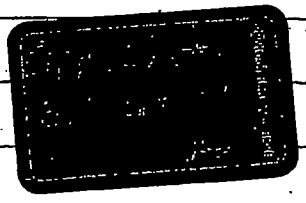
Car in enclosed jail prg lot
back & side windows replaced! w/ clear glass

left impound →
Sled to Mary Lyles.
One tint was like on ® side
not bringing one windows
they say there has a Waiving - fine by us!
Support. Info to MB re: Summons / Pro Bono / Safe Haven

she will ← Kathi
tfy

trying to get docs to Prof Bride & APP

Jeanne asked to Detroit & Waiting & She is told No (Conflict b/c he insisting talked to them re: eviction



(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

"future adaptability to prison life" can come in thru CLINICAL PSYCHOLOGIST b/c it's evid of a Mitig-Cstc."
- St. vs. Matthews (SC 1986) 291 SC 339, 353 SE2d 444
- St. vs. Riddle (SC 1987) 291 SC 232, 353 SE2d 138
- St. Vs Patterson (SC 1986) 290 SC 523, 351 SE2d 853, cert. dm.

vol-intox gets AUTO (6), (7) - n/a here

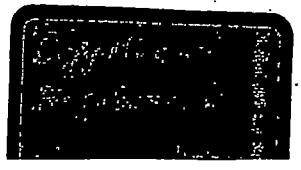
jailers, etc. re: good behavior b/o arrest-trial & would not pose danger if spared (but incarc'd for LWOP)
- relevant (Skipper vs. SC) (USSC 1986) 106 S.Ct. 1669, 476 US 1, 90 LEd2d 1
- if excluded, viols 8th/14th Amds.

8th/14th Am's REQUIRE: sentencer not be precluded from considering as a mitigating factor any aspect of the Δ's char or record and any of the Cstcs of the offense that the Δ proffers as a basis for a sentence < death.
- Eddings vs. Oklahoma, US Okla 1982, 102 SCt 869, 455 US 104

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3020

Court



MB's → 2. 2h of FRI.

DF's Court

2 brother - Calvin - mgr @ BK in Columbus

NS Bill Burton, Macon GA. Snakes in Pond so rifle in veh. due Δ's traff arrest

NS Bill's mom

MB will get w/ Topp's ~~get~~ list.

Dr. Henderson - Topp writing to her from - fam. friend like Burton.

DF's

1. Berry — dep't sent 5/13/04 — went; knee on; someone there ... nobody came to dep. on these.
2. Δs uncle Steven Pelger
3. Amy Osbey — Jamaican FL ≠ so
NS 4. Mom Virginia
NS 5. cous/bro Christopher ~~Lindsey~~ Wilkins

KQ's

1. SO.
2. SCPSO
3. Inman

[redacted]

What our experts can testify to...

For.

Mal. Psychiatr

Brawl. Neurol: Psychiatrist

Abshire Neurologist

" yes - neurol severe issues that need to be addressed" based on what he finds

Allow B's results Bells signif. neurol issues; needs to be seen by neurol also tested Δ. will talk to Δ. Concerned ab ~~recent~~ Retrial issues

Δs MIL on this

Then cont. → will know by Friday - Dew is on board w/ that.

all thought could do w/in time frame. Once in to it & learned more thru tests ... want to do - confer. call & Mal. expt. to Judge. Neurol 2 choose = unsure.

Pro Bono ph
5/16/02 doctrl Ctr to caller.

Court...

rint Date: 04/29/2002

INTAKE SHEET

No.	Suffix a	Suffix b	Old Case No.
20024234278			20020039196

Information

Name	Lindsey, Marion A.,		Home Ph.		
Street 1			Work Ph.		
Street 2			Fax	none	
City, State Zip	Moore, SC		Mobile	none	
County	Spartanburg County				
DOB			Include CSR?		
SSN			Veteran?		Employer
Sex	Male		Translate?		CL Sizemore Body Shop
Race	Black		Literate?	X	
DL No.			Institution?		Work Hours
Marital Status	Estranged		Homeless?		none
Citizen	US		Disabled?	X	
Spouse Name			Migrant?		

[redacted]

sehold Residents

Name	SSN	DOB	Relation	Employer

rmation

...ake Date	04/24/2002	Prob. Type	Divorce/Separation/Annulment
Intake By	EMF	Service	
Fund		HUD	
Office	Legal Aid	Referral	
Program	PDMNT		
Group	N	Conflict?	

ancial Information

No. in Household	1			Number Employed	1
Tot. Income		Eligible?		Tot. Liquid Assets	10.00
w/ Deductions	2600.00	w/ Deductions	Y	Tot. Nonliquid Assets	0.00
w/o Deductions	2600.00	w/o Deductions	Y	Max. General	11075.00
Total Assets	10.00	Other Reason	N/A	Max. Exceptional	16612.50
Total Deductions	0.00				

ponent Information

Name & Address	DOB / SSN	DL No. / Sex	Race / Hair	Eyes / Weight	Height / Opp. Atty.
Lindsey, Ruby Wright,		Female	Black / Brown	Hazel / 200	05'08" / none
Inman, SC 29349					
Spartanburg County					

divorce - 1 year separation
had 2 children, current pkg w/ child support

ADVICE/BRIEF SERVICES CASES ONLY

Date closed: 5-8-2002 Code: A
Entered in computer on: 5-8-02 by: RT Advocate: CKW
Closing letter/survey: (Yes) No Advice given: (Yes) No
Outcome Benefit: U1: Legal Advice provided
Case referred to: Pro Bono N/A
CSR Include: (Yes) No
Reviewed by: CW Date: 5/8/02

Print Date: 04/29/2002

INTAKE SHEET

Case Facts

Client's Desired Results:
LATIS will mail the App a food stamp application.

INITIAL INTAKE WORKER: emf

PENDING COURT ACTION: none
DATE OF SERVICE: none
HEARING DATE: none
COUNTY OF CT. ACTION: none

1. CLIENT WANTS: divorce
2. DATE & PLACE OF MARRIAGE: 3/10/97, Spartanburg, SC.
3. LAST MARITAL HOME (CO./ STATE): Spartanburg, SC.
4. NUMBER OF CHILDREN OF THIS COUPLE: (2)
   PRESENT PHYSICAL CUSTODY: OP
   WILL CUSTODY BE CONTESTED: no
   COURT ORDERS, DATE, COUNTY: no
   DSS INVOLVEMENT. no
5. NO OF CHILDREN BY OTHER PARTIES, AGES, SUPPORT ISSUES: no
6. OP'S EMPLOYMENT AND INCOME: Magnolia Manor, Net Income: $250-300/w.

ATTY: AKK

Caller says that he is staying with a cousin and her little girl. Caller says that all he has to pay is the water bill, approximately 35.00 a month.

7: DO PARTIES MEET RESIDENCY REQUIREMENT? Caller has lived in SC all of his life. Op has lived in SC all of her life.
8. PROPERTY AND DEBT: There is no property. There are no debts.
9. DATE OF SEPARATION & IMMEDIATE CAUSE: Around March, 1998.
10. PHYSICAL ABUSE:. Yes
    DATE OF LAST INCIDENT AND DESCRIPTION:
    WITNESSES:
    POLICE CALLED & DISPOSITION:
    VISIBLE MARKS AND/OR MEDICAL TREATMENT:
    ORDER(S) OF PROTECTION:
    PREVIOUS EPISODES:
11. HABITUAL DRUNKENNESS: No
    ALCOHOL/DRUG OF CHOICE:
    HOW OFTEN & HOW MUCH:.
    ARRESTS & JOB LOSSES:
12. ADULTERY:No
    OPENLY LIVING WITH PARAMOUR.
    CHILDREN, PREGNANCY WITH PARAMOUR:.
    WITNESSES & OTHER EVIDENCE:
13: MARITAL MISCONDUCT BY CLIENT INCLUDING EXTRAMARITAL SEX: 'OP was charged with CDV, twice. One time, charges were dropped.
14. OTHER SIGNIFICANT INFORMATION, EG: IMMEDIATE FORECLOSURE, ANY OTHER ISSUE NOT MENTIONED ABOVE, ETC: There are no foreclosure issues.

The grounds for the divorce is one year's separation. There are two children, ages 2 and 6. Caller says that he does not pay court-ordered child support. Caller says that he takes Pamper, and other necessities.

Plaintiff, as indicated on the above case notes, signed this statement of facts to comply with the requirements of

INTAKE SHEET

product privilege in signing this statement. Plaintiff intends for this statement to be retained in this Legal Services Agency's files and that it not be released to any person except for the auditors and monitors described in federal law or pursuant to the other applicable court rules or a court order.

This Statement of Facts is the above case notes.

Signed: _____
(Client Signature)

Dated: _____



The South Carolina **Centers for Equal Justice**

Teresa Cosby
Executive Director

Joseph D. Shine
Chairman of the Board

May 7, 2002

Mr. Marion Lindsey

Moore, SC

Dear Mr. Lindsey:

We received your information from the Legal Aid Telephone Intake Service. Your case has been accepted for the purpose of providing advice and counsel only. We cannot provide extended representation to you. Unfortunately, we cannot file cases in court for everyone who needs our help due to our limited resources. We are sorry that we cannot help you in court. We hope the following advice helps.

According to the LATIS intake notes, you and your wife were married in March 1997 in Spartanburg County, South Carolina and last lived together in March 1998 while living in Spartanburg, South Carolina. The intake notes indicate that you and your wife have two minor children together, but no marital property or debts to be divided. The intake notes indicate that your wife has custody of the children and that you do not wish to seek custody at this time. The intake notes also indicate that you do not pay court ordered support.

You have requested assistance in getting a divorce. You can file a divorce action in the county where your spouse currently lives or where the two of you last lived together. If that is different counties, it is your choice as to where the action is filed. If your spouse lives in South Carolina, you have to have lived in South Carolina for at least 3 months before you can bring the action. If your spouse lives outside South Carolina, you have to have lived in South Carolina for at least one year before you can bring the action. To get a divorce on one year separation, you and your spouse have to have lived in separate homes for at least one full year. Living together for even a brief time during that year may prevent you from getting a divorce. Your spouse must be served with a copy of the summons

and complaint which starts the lawsuit. You can get other issues taken care of in the divorce action--custody, child support, insurance coverage, help with uncovered medical expenses, property and debt division, and, sometimes, alimony.

Although you provide in-kind support for your children such as diapers and other necessities, you could be ordered to pay child support for your children.

The court normally sets child support by using Child Support Guidelines. The guidelines are a formula that is used to calculate the amount of child support. The formula uses several factors. **One**, the gross monthly income of each parent from all sources. For example, if a parent works and is in the Army reserve, the income from both the job and the reserve should be used. If a parent is not working, the Judge can impute income by pretending that the parent is working even if the parent is not. The Judge bases the income on what the parent could earn if the parent did work. This is usually done by looking at the parent's work history. You should be prepared to show the work history of the other parent as well as your own. This should include the type of work, the period of time worked, and the amount earned. In addition, the Judge can use the average income for a parent if that parent works overtime on a regular basis. **Two**, the cost of day care so that the custodial parent can work. If the custodial parent is not working and the other parent wants income imputed for the custodial parent, the Judge should also impute day care costs if that parent would have to pay day care to work. If you are not working, you should be prepared to show whether or not you would have to pay day care to work and the cost of that day care. **Three**, the cost of health insurance for the children if being paid by either parent. **Four**, child support being paid by either parent to another child or children. **Five**, any child that is living with a parent who is not subject to the action. In other words, if you have a child living with you from a former relationship and you are not getting child support for that child, your income will be adjusted to reflect that extra cost. Step-children or the children of a live-in boyfriend or girlfriend, do not count. **Six**, any alimony that either parent is paying to the other parent. **Seven**, the actual living arrangements of the children. For example, if the children spend more than 110 nights with the other parent during the year, the amount of child support will probably be reduced. Or, if there are two children and one parent has one child and the other parent has the other child, the amount of child support will be affected.

We are referring your case to the South Carolina Bar's Pro Bono Program. This is a program where private attorneys agree to accept a certain number of cases each year without a fee. The Pro Bono Program will try to find an attorney in this area who will help you without a fee. We cannot promise that the Pro Bono Program will be successful. We are not representing you. If you do not hear from the Pro Bono Program within the next three to four weeks, please let us know. You must cooperate with the Pro Bono Program if you want help.

If you would like to contact another attorney, you may call the Lawyer Referral Service in Columbia, South Carolina. Their toll free number is 1-800-868-2284. The private lawyer to whom you are referred will charge a standard fee of $25.00 for the first one-half hour consultation. There may be an additional fee and charges depending upon the agreement reached by you and the attorney.

If you have any questions about the inability of The South Carolina Centers for Equal Justice to represent you, please contact us. You are entitled to appeal our decision. If you appeal, we will review your situation to make sure the decision was correct. Should you wish to appeal, please contact this office immediately by letter, by calling 864-582-0369, or by calling 1-800-922-8176 if you are calling long distance.. If you are still not satisfied with our decision after a review, you will have to come to our office to review the written appeal process to proceed further.

Enclosed you will find a questionnaire designed to help us to continue quality service to our clients. Please complete and return to us. Your help is appreciated.

Sincerely yours,

THE S.C. CENTERS FOR EQUAL JUSTICE

Christy K. Noll

Christy K. Noll
Managing Attorney

CKN:jd
Enclosure

COPY

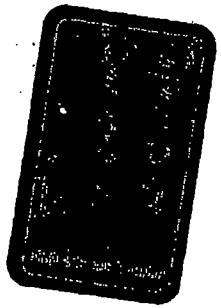
she called Fri. 4/30/04. Judy fed ex'd lots of docs to doc Mon. or Tues., & has MORE that she's Fed ex-ing today. Doc says it's just "too much" & she "can't be ready". Judy took her # - doc said she will NOT be in today (4/30). KQ advised MB.

Per MB, she knew the time constraints before she started & said she'd be OK... He'll call her Monday.

DR. Melikian

843-792-1461

needs cont'd. does she need to do an affidavit stating



Court

Court

I think I remember that legit delusional ~~[illegible]~~ hallucinations

→ visual

do not take features you can describe (ie. 5'6", dk. brn. skin)

Mikl

talk to Drs?

Med recs

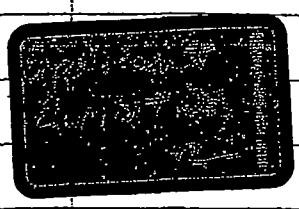
suicide notes from Rod

(they're just "forms")

talk to verify some stuff

weight loss

pre-pre-pre-post



3030

AGENCY I.D.
SC0 420030

FOR JAIL USE ONLY
INCIDENT REPORT

CASE NUMBER:

NCIC: ING. | ENTD.

EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. Information	☑ YES ☐ NO	☐ YES ☑ NO	Pod 5		☐ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Org. ☐ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.
2.	☐ YES ☐ NO	☐ YES ☐ NO			
3.	☐ YES ☐ NO	☐ YES ☐ NO			

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 950 California Avenue Spartanburg SC — ZIP CODE: 29302 — WEAPON TYPE:

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME	LOCATION NO.
10-1-02	0930								Pod V

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT • J S O U	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
Lewis Jerry JR	Sgt				Blk	M	42		596-2607 H / 596-2607 B	

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 California Avenue	Spartanburg	SC	29302	Pod V

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT • J S O U	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
									H / B	H / B

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.

VISIBLE INJURY (VICT. 1) ☐ YES ☐ NO EXPLAIN: — COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐ YES ☐ NO

VICTIM (NO. 1) USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. DRUGS: ☐ YES ☐ NO ☐ UNK. TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/PLAINCL. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ • J – This Jurisdiction S – State O – Out of State U – Unknown

SUBJECT NO. 1

☐ SUSPECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
Lindsey Marion Alexander	Blk	M							

FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 California Avenue	Spartanburg	SC	29302	Pod V

SUBJECT (NO. 1) USING: ALCOHOL ☐ YES ☐ NO ☐ UNK. DRUG: ☐ YES ☐ NO ☐ UNK. TYPE: — ARRESTED NEAR OFFENSE SCENE ☐ YES ☐ NO — TOTAL # ARRESTED — DATE/TIME OF OFFENSE — DATE/TIME OF ARREST

NARRATIVE

On the above date and time this Writer was called By Nurse Collins to come to Medical. Once Arriving in Medical Nurse Collins ask this Writer to take Pictures of Inmate Lindsey Wounds. Because his Lawyer MR Tullis stated that Inmate Lindsey was going to try and hurt himself. This Writer took Picture of Inmate Lindsey Wounds and gave them to the Nurse. For her Records. NO Further Incident to Reports. End of Report.

JURISDICATION OF THEFT LAW ENFORCEMENT AGENCY — JURISDICATION OF RECOVERY LAW ENFORCEMENT AGENCY

PROPERTY DET.

TYPE (GROUP)							TOTAL VALUE
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐ YES ☐ NO — SUBJECT LOCATED ☐ YES ☐ NO — ☐ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED — ☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER — ☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
Jerry Lewis Jr.	10-1-02	W-7			

FOLLOW-UP INVESTIGATION ☐ YES ☐ NO — OFFICER

RECORDS







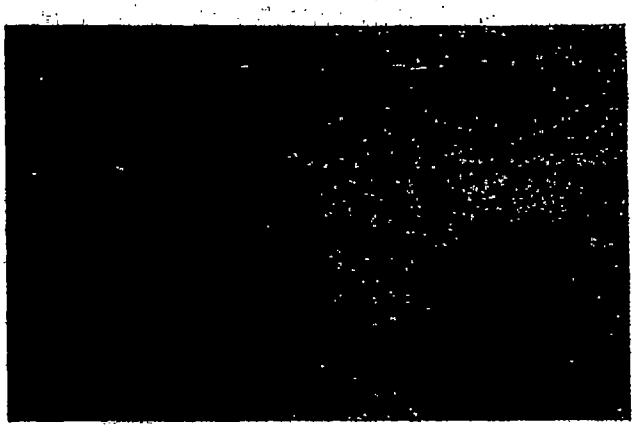


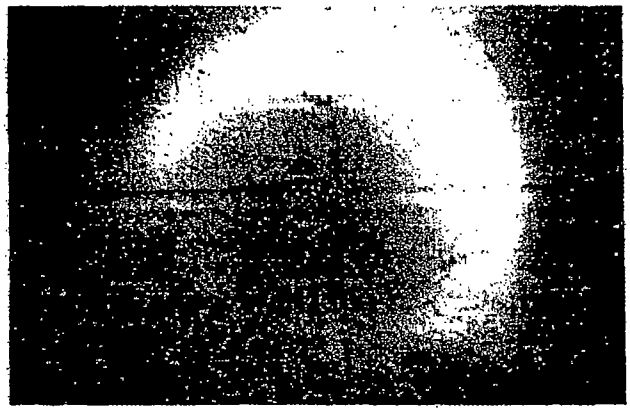
Lindsey Marion

10-1-02



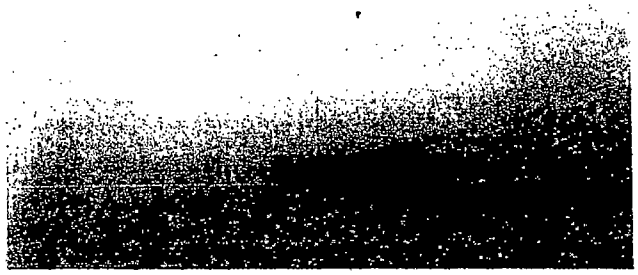


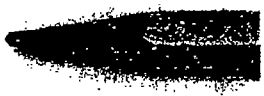












FOR JAIL USE ONLY
INCIDENT REPORT

AGENCY I.D.
SC0 42063C

CASE NUMBER

NCIC
ING. | ENTD.

EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. INFORMATION	☐YES ☐NO	☐YES ☐NO			☐Individual ☐Business ☐Financial Inst. ☐Government ☐Relig. Orgn. ☐Soc./Public ☐Other ☐Unknown ☐Police Off.
2.	☐YES ☐NO	☐YES ☐NO			
3.	☐YES ☐NO	☐YES ☐NO			

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 950 CALIFORNIA AVENUE SPARTANBURG SC | ZIP CODE: 29303 | WEAPON TYPE: —

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DSP. DATE	DSP. TIME	TIME ARRIVED	DEPART. TIME	LOCATION NO.
10-01-2002	915am								POD 5

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
ARTHUR, R.M.	COWORKER			• J S O U					H B	H B

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 CALIFORNIA AVENUE	SPARTANBURG	SC	29303	MAIN JAIL

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
				• J S O U					H B	H B

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.

VISIBLE INJURY (VICT. 1) ☐YES ☐NO EXPLAIN— | COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐YES ☐NO

VICTIM (NO. 1) USING: ALCOHOL ☐YES ☐NO ☐UNK. DRUGS: ☐YES ☐NO ☐UNK. TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ | • J – This Jurisdiction S – State O – Out of State U – Unknown

SUBJECT NO. 1

☐ SUSPECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
LINDSEY, MARION ALEXANDER	B	M							

FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 CALIFORNIA AVENUE	SPARTANBURG	SC	29303	POD 5 CELL 31A

SUBJECT (NO. 1) USING: ALCOHOL ☐YES ☐NO ☐UNK. DRUGS: ☐YES ☐NO ☐UNK. TYPE: | ARRESTED NEAR OFFENSE SCENE ☐YES ☐NO TOTAL # ARRESTED | DATE/TIME OF OFFENSE | DATE/TIME OF ARREST

NARRATIVE

ON OCTOBER 1 2002 AT 915AM ATTORNEY ROD TULLIS APPROACHED THIS OFFICER. ATTORNEY ROD TULLIS INFORMED THIS OFFICER THAT HIS CLIENT INMATE LINDSEY, MARION (FROM POD 5 CELL 31A) TOLD HIM HE HAD BEEN BANGING HIS HEAD AGAINST THE WALL IN ATTEMPT TO INJURE HIMSELF FURTHER. ATTORNEY ROD TULLIS FURTHER STATED THAT INMATE LINDSEY STATED HE WOULD BANG HIS HEAD UNTIL IT WOULD BLEED AND THEN CLEAN THE BLOOD OFF THE WALL SO THE OFFICERS COULD NOT SEE IT. ATTORNEY ROD TULLIS ALSO REQUESTED THAT WE NOT INFORM INMATE LINDSEY THAT HE TOLD US WHAT INMATE LINDSEY TOLD HIM. THIS OFFICER NOTIFIED NURSE PADGETT AND SERGEANT LEWIS OF THE ABOVE INCIDENT.

JURISDICATION OF THEFT LAW ENFORCEMENT AGENCY | JURISDICATION OF RECOVERY LAW ENFORCEMENT AGENCY

PROPERTY EST.

	TYPE (GROUP)							TOTAL VALUE
STOLEN								
DAMAGED								
BURNED								
RECOVERED	will leave note with housing officer							
SEIZED								

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐YES ☐NO | SUBJECT LOCATED ☐YES ☐NO | ☐ACTIVE ☐ADM. CLOSED ☐UNFOUNDED | ☐ARRESTED UNDER 18 ☐ARRESTED 18 AND OVER | ☐EX-CLEAR UNDER 18 ☐EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE. 1. ☐OFFENDER DEATH 2. ☐NO PROSECUTION 3. ☐EXTRADITION DENIED 4. ☐VICTIM DECLINES COOPERATION 5. ☐JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
CPL. R.M. ARTHUR	10-01-2002		[signature]	10-1-02	GW-7

FOLLOW-UP INVESTIGATION ☐YES ☐NO | OFFICER

RECORDS

3034

1 OF 2

FOR JAIL USE ONLY
INCIDENT REPORT

AGENCY I.D.
SCO 42063C

CASE NUMBER

NCIC: INQ. | ENTD.

EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. INFORMATION	☒YES ☐NO	☐YES ☒NO			☐Individual ☐Business ☐Financial Inst. ☐Government ☐Relig. Orgs. ☐Soc./Public ☐Other ☐Unknown ☐Police Off.
2.	☐YES ☐NO	☐YES ☐NO			
3.	☐YES ☐NO	☐YES ☐NO			

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 950 CALIFORNIA AVENUE SPARTANBURG SC — ZIP CODE: 29303 — WEAPON TYPE: —

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME	LOCATION NO.
10-05-02	1040am								POD 5

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
ARTHUR, R.M.	LAWYER			•JSOU					H S	H S

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 CALIFORNIA AVENUE	SPARTANBURG	SC	29303	MAIN JAIL

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
				•JSOU					H S	H S

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.

VISIBLE INJURY (VICT. 1) ☐YES ☐NO EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐YES ☐NO

VICTIM (NO. 1) USING: ALCOHOL ☐YES ☐NO ☐UNK. DRUGS: ☐YES ☐NO ☐UNK. TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASHT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ •J – This Jurisdiction S – State O – Out of State U – Unknown

SUBJECT NO. 1

☐ SUSPECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
LINDSEY MARION ALEXANDER	B	M							

FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 CALIFORNIA AVENUE	SPARTANBURG	SC	29303	POD 5 CELL 31A

SUBJECT (NO. 1) USING: ALCOHOL ☐YES ☐NO ☐UNK. DRUGS: ☐YES ☐NO ☐UNK. TYPE: | ARRESTED NEAR OFFENSE SCENE ☐YES ☐NO | TOTAL # ARRESTED | DATE/TIME OF OFFENSE | DATE/TIME OF ARREST

NARRATIVE

ON OCTOBER 5, 2002 AT 1040am THIS OFFICER WAS CONDUCTING CELL SEARCHES IN POD 5. THIS OFFICER ENTERED CELL 31 WHICH IS ASSIGNED TO LINDSEY, MARION. UPON LIFTING INMATE LINDSEY'S MATTRESS THIS OFFICER OBSERVED A TOWER WITH BLOOD STAINS ALL OVER IT AND A PENCIL WITH BLOOD STAINS AND WHAT APPEARED TO BE SKIN FRAGMENTS. THIS OFFICER FURTHER OBSERVED BLOOD STAINS ON THE WALL AT THE HEAD OF THE BED. THIS OFFICER NOTIFIED LIEUTENANT PILGRIM OF THE ABOVE INCIDENT, AND INFORMED HIM OF THE INFORMATION REPORT THIS OFFICER SUBMITTED ON OCTOBER 1, 2002 TO SERGEANT LEWIS, WHICH STATED THAT INMATE LINDSEY'S ATTORNEY ROD TULLIS WAS INFORMED BY INMATE LINDSEY THAT HE WAS BANGING HIS HEAD AGAINST THE WALL TO CAUSE FURTHER INJURY. BOTH THE TOWER AND PENCIL WERE CONFISCATED AND PLACED IN ZIPLOCK BAGGIES.

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY | JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY

PROPERTY EST.

	TYPE (GROUP)						TOTAL VALUE
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐YES ☐NO | SUBJECT LOCATED ☐YES ☐NO | ☐ACTIVE ☐ADM. CLOSED ☐UNFOUNDED | ☐ARRESTED UNDER 18 ☐ARRESTED 18 AND OVER | ☐EX-CLEAR UNDER 18 ☐EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐OFFENDER DEATH 2. ☐NO PROSECUTION 3. ☐EXTRADITION DENIED 4. ☐VICTIM DECLINES COOPERATION 5. ☐JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
CPL. R. M. ARTHUR	10-05-02			100502	

FOLLOW-UP INVESTIGATION ☐YES ☐NO — OFFICER

RECORDS

FOR JAIL USE ONLY
SUPPLEMENTARY REPORT

AGENCY I.D.
SCO 420330

CASE NUMBER

NCIC IND. UNFD.

☒ ORIGINAL REPORT ☒ SUPPLEMENTAL REPORT ☐ ADDITIONAL VICTIMS ☐ ADDITIONAL STOLEN PROPERTY

PAGE 2 of 2 PAGES.

☐ MODIFIES ORIGINAL ☐ CASE STATUS CHANGE ☐ ADDITIONAL OFFENDERS ☐ ADDITIONAL RECOVERED PROPERTY

NARRATIVE

TO SUBMIT WITH THIS REPORT. PICTURES WERE TAKEN BY THIS OFFICER WITH THE DIGITAL CAMERA OF THE WALL, TOWEL AND PENCIL. INMATE HARDEY WAS EXAMINED BY NURSE ZENA PARKER WITHOUT FURTHER INCIDENT TO REPORT.

ADMINISTRATIVE

SUBJECT IDENTIFIED	SUBJECT LOCATED			
☐ YES ☐ NO	☐ YES ☐ NO	☐ ACTIVE ☐ ADM. CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER	☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH. 2. ☐ NO PROSECUTION. 3. ☐ EXTRADITION DENIED. 4. ☐ VICTIM DECLINES COOPERATION. 5. ☐ JUVENILE-NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
PFC. R. M. ARTHUR	10-05-02		Steven L. Bohn	10/05/02	
			FOLLOW-UP INVESTIGATION ☐ YES ☐ NO		

RECORDS

3036

FOR JAIL USE ONLY

INCIDENT REPORT

AGENCY I.D. SC0-42063C

CASE NUMBER

NCIC INQ. ENTD.

EVENT

INCIDENT TYPE	COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. INFORMATION	☐YES ☐NO	☐YES ☐NO			☐Individual ☐Business ☐Financial Inst. ☐Government ☐Relig. Orgn. ☐Soc./Public ☐Other ☐Unknown ☐Police Off.
2.	☐YES ☐NO	☐YES ☐NO			
3.	☐YES ☐NO	☐YES ☐NO			

INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER): 950 California Ave SPTBG SC — ZIP CODE: 29303 — WEAPON TYPE:

INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK: DISP. DATE	DISP. TIME	TIME ARRIVED	DEPART. TIME	LOCATION NO.
041403	1235								Mental Health

VICTIM NO. 1

COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT • J S O U	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
Pilgrim Lewis E									H 2607 B	H 2142 B

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 California Ave	SPTBG	SC	29303	Mental Health

VICTIM'S NAME (LAST, FIRST, MIDDLE)	RELATIONSHIP TO SUBJECT #1	#2	#3	RESIDENT • J S O U	RACE	SEX	AGE	ETH.	DAYTIME PHONE	EVENING PHONE
									H B	H B

HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.

VISIBLE INJURY (VICT. 1) ☐YES ☐NO EXPLAIN— COMPLAINT OF ANY NON-VISIBLE INJURIES: ☐YES ☐NO

VICTIM (NO. 1) USING: ALCOHOL ☐YES ☐NO ☐UNK. DRUGS: ☐YES ☐NO ☐UNK. TYPE:

TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ • J — This Jurisdiction S — State O — Out of State U — Unknown

SUBJECT NO. 1

☐ SUSPECT ☐ RUNAWAY ☐ WANTED ☐ WARRANT ☐ ARREST ☐ JAIL ☐ SUMMONS

NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
Lindsey Marion Alexander	B	M	38			5-6	165	B	BRO

FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.

ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
950 California Ave	SPTBG	SC	29303	Mental Health

SUBJECT (NO. 1) USING: ALCOHOL ☐YES ☐NO ☐UNK. DRUGS: ☐YES ☐NO ☐UNK. TYPE: — ARRESTED NEAR OFFENSE SCENE ☐YES ☐NO — TOTAL # ARRESTED: — DATE/TIME OF OFFENSE: — DATE/TIME OF ARREST:

NARRATIVE

On April 14, 2003 on or about 0700 hours I Lieutenant Pilgrim transported Mr Lindsey, Marion Alexander to the Department of Mental Health in Columbia South Caroline for his evaluation. On April 14, 2003 on or about 1235 PM the evaluation doctor informed this writer that Mr Lindsey was thinking about taking his own life (SUICIDE). And the first chance he get to get an officer weapon he will do it.

JURISDICATION OF THEFT LAW ENFORCEMENT AGENCY

JURISDICATION OF RECOVERY LAW ENFORCEMENT AGENCY

PROPERTY EST.

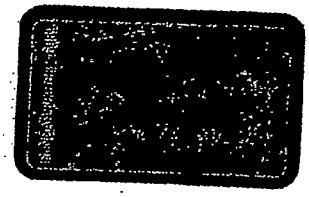
TYPE (GROUP)							TOTAL VALUE
STOLEN							
DAMAGED							
BURNED							
RECOVERED							
SEIZED							

ADMINISTRATIVE

SUBJECT IDENTIFIED ☐YES ☐NO — SUBJECT LOCATED ☐YES ☐NO — ☐ACTIVE ☐ADM. CLOSED ☐UNFOUNDED — ☐ARRESTED UNDER 18 ☐ARRESTED 18 AND OVER — ☐EX-CLEAR UNDER 18 ☐EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐OFFENDER DEATH 2. ☐NO PROSECUTION 3. ☐EXTRADITION DENIED 4. ☐VICTIM DECLINES COOPERATION 5. ☐JUVENILE - NO CUSTODY

REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
PILGRIM LEWIS E	04 14 03				
Lewis E Pilgrim			FOLLOW-UP INVESTIGATION ☐YES ☐NO — OFFICER		



The South Carolina **Centers for Equal Justice**

Teresa Cosby
Executive Director

Joseph D. Shine
Chairman of the Board

May 7, 2002

[redacted]

Mr. Marion Lindsey

Moore, SC

Dear Mr. Lindsey:

We received your information from the Legal Aid Telephone Intake Service. Your case has been accepted for the purpose of providing advice and counsel only. We cannot provide extended representation to you. Unfortunately, we cannot file cases in court for everyone who needs our help due to our limited resources. We are sorry that we cannot help you in court. We hope the following advice helps.

According to the LATIS intake notes, you and your wife were married in March 1997 in Spartanburg County, South Carolina and last lived together in March 1998 while living in Spartanburg, South Carolina. The intake notes indicate that you and your wife have two minor children together, but no marital property or debts to be divided. The intake notes indicate that your wife has custody of the children and that you do not wish to seek custody at this time. The intake notes also indicate that you do not pay court ordered support.

You have requested assistance in getting a divorce. You can file a divorce action in the county where your spouse currently lives or where the two of you last lived together. If that is different counties, it is your choice as to where the action is filed. If your spouse lives in South Carolina, you have to have lived in South Carolina for at least 3 months before you can bring the action. If your spouse lives outside South Carolina, you have to have lived in South Carolina for at least one year before you can bring the action. To get a divorce on one year separation, you and your spouse have to have lived in separate homes for at least one full year. Living together for even a brief time during that year may prevent you from getting a divorce. Your spouse must be served with a copy of the summons

and complaint which starts the lawsuit. You can get other issues taken care of in the divorce action–custody, child support, insurance coverage, help with uncovered medical expenses, property and debt division, and, sometimes, alimony.

Although you provide in-kind support for your children such as diapers and other necessities, you could be ordered to pay child support for your children.

The court normally sets child support by using Child Support Guidelines. The guidelines are a formula that is used to calculate the amount of child support. The formula uses several factors. **One**, the gross monthly income of each parent from all sources. For example, if a parent works and is in the Army reserve, the income from both the job and the reserve should be used. If a parent is not working, the Judge can impute income by pretending that the parent is working even if the parent is not. The Judge bases the income on what the parent could earn if the parent did work. This is usually done by looking at the parent's work history. You should be prepared to show the work history of the other parent as well as your own. This should include the type of work, the period of time worked, and the amount earned. In addition, the Judge can use the average income for a parent if that parent works overtime on a regular basis. **Two**, the cost of day care so that the custodial parent can work. If the custodial parent is not working and the other parent wants income imputed for the custodial parent, the Judge should also impute day care costs if that parent would have to pay day care to work. If you are not working, you should be prepared to show whether or not you would have to pay day care to work and the cost of that day care. **Three**, the cost of health insurance for the children if being paid by either parent. **Four**, child support being paid by either parent to another child or children. **Five**, any child that is living with a parent who is not subject to the action. In other words, if you have a child living with you from a former relationship and you are not getting child support for that child, your income will be adjusted to reflect that extra cost. Step-children or the children of a live-in boyfriend or girlfriend, do not count. **Six**, any alimony that either parent is paying to the other parent. **Seven**, the actual living arrangements of the children. For example, if the children spend more than 110 nights with the other parent during the year, the amount of child support will probably be reduced. Or, if there are two children and one parent has one child and the other parent has the other child, the amount of child support will be affected.

We are referring your case to the South Carolina Bar's Pro Bono Program. This is a program where private attorneys agree to accept a certain number of cases each year without a fee. The Pro Bono Program will try to find an attorney in this area who will help you without a fee. We cannot promise that the Pro Bono Program will be successful. We are not representing you. If you do not hear from the Pro Bono Program within the next three to four weeks, please let us know. You must cooperate with the Pro Bono Program if you want help.

If you would like to contact another attorney, you may call the Lawyer Referral Service in Columbia, South Carolina. Their toll free number is 1-800-868-2284. The private lawyer to whom you are referred will charge a standard fee of $25.00 for the first one-half hour consultation. There may be an additional fee and charges depending upon the agreement reached by you and the attorney.

If you have any questions about the inability of The South Carolina Centers for Equal Justice to represent you, please contact us. You are entitled to appeal our decision. If you appeal, we will review your situation to make sure the decision was correct. Should you wish to appeal, please contact this office immediately by letter, by calling 864-582-0369, or by calling 1-800-922-8176 if you are calling long distance.. If you are still not satisfied with our decision after a review, you will have to come to our office to review the written appeal process to proceed further.

Enclosed you will find a questionnaire designed to help us to continue quality service to our clients. Please complete and return to us. Your help is appreciated.

Sincerely yours,

THE S.C. CENTERS FOR EQUAL JUSTICE

Christy K. Noll

Christy K. Noll
Managing Attorney

CKN:jd
Enclosure

Pro Bono ltr
5/16/02 docket ltr to caller.

Int Date: 04/29/2002

INTAKE SHEET

No.	Suffix a	Suffix b	Old Case No.
20024234278			20020039196

Information

Name	Lindsey, Marion A.,		Home Ph.		
Street 1			Work Ph.		
Street 2			Fax	none	
City, State Zip	Moore, SC		Mobile	none	
County	Spartanburg County				
DOB			Include CSR?		
SSN			Veteran?		Employer
Sex	Male		Translate?		CL Sizemore Body Shop
Race	Black		Literate?	X	
DL No.			Institution?		Work Hours
Marital Status	Estranged		Homeless?		none
Citizen	US		Disabled?	X	
Spouse Name			Migrant?		

Household Residents

Name	SSN	DOB	Relation	Employer

Case Information

Intake Date	04/24/2002	Prob. Type	Divorce/Separation/Annulment
Intake By	EMF	Service	
Fund		HUD	
Office	Legal Aid	Referral	
Program	PDMNT		
Group	N	Conflict?	

Financial Information

No. in Household	1			Number Employed	1
Tot. Income		Eligible?		Tot. Liquid Assets	10.00
w/ Deductions	2600.00	w/ Deductions	Y	Tot. Nonliquid Assets	0.00
w/o Deductions	2600.00	w/o Deductions	Y	Max. General	11075.00
Total Assets	10.00	Other Reason	N/A	Max. Exceptional	16612.50
Total Deductions	0.00				

Opponent Information

Name & Address	DOB / SSN	DL No. / Sex	Race / Hair	Eyes / Weight	Height / Opp. Atty.
Lindsey, Ruby Wright,		Female	Black / Brown	Hazel / 200	05'08" / none
Inman, SC					
Spartanburg County					

divorce - 1 year separation
had 2 children - doesn't pay much support

ADVICE/BRIEF SERVICES CASES ONLY

Date closed: 5-8-2002 Code: A
Entered in computer on: 5-8-02 by: BT Advocate: CKJ
Closing letter/survey: (Yes) No Advice given: (Yes) No
Outcome Benefit: L1: Legal Advice provided
Case referred to: Pro Bono N/A

INTAKE SHEET

Case Facts

Client's Desired Results:
LATIS will mail the App a food stamp application.

INITIAL INTAKE WORKER: emf

PENDING COURT ACTION: none
DATE OF SERVICE: none
HEARING DATE: none
COUNTY OF CT. ACTION: none

1. CLIENT WANTS: divorce
2. DATE & PLACE OF MARRIAGE: 3/10/97, Spartanburg, SC.
3. LAST MARITAL HOME (CO./STATE): Spartanburg, SC.
4. NUMBER OF CHILDREN OF THIS COUPLE(2)
   PRESENT PHYSICAL CUSTODY: OP
   WILL CUSTODY BE CONTESTED: no
   COURT ORDERS, DATE, COUNTY: no
   DSS INVOLVEMENT: no
5. NO OF CHILDREN BY OTHER PARTIES, AGES, SUPPORT ISSUES: no
6. OP'S EMPLOYMENT AND INCOME: Magnolia Manor, Net Income: $250-300/w.

ATTY: AKK

Caller says that he is staying with a cousin and her little girl. Caller says that all he has to pay is the water bill, approximately 35.00 a month.

7. DO PARTIES MEET RESIDENCY REQUIREMENT? Caller has lived in SC all of his life. Op has lived in SC all of her life.
8. PROPERTY AND DEBT: There is no property. There are no debts.
9. DATE OF SEPARATION & IMMEDIATE CAUSE: Around March, 1998.
10. PHYSICAL ABUSE:. Yes
    DATE OF LAST INCIDENT AND DESCRIPTION:
    WITNESSES:
    POLICE CALLED & DISPOSITION:
    VISIBLE MARKS AND/OR MEDICAL TREATMENT:
    ORDER(S) OF PROTECTION:
    PREVIOUS EPISODES:
11. HABITUAL DRUNKENNESS: No
    ALCOHOL/DRUG OF CHOICE:
    HOW OFTEN & HOW MUCH:.
    ARRESTS & JOB LOSSES:
12. ADULTERY:No
    OPENLY LIVING WITH PARAMOUR.
    CHILDREN, PREGNANCY WITH PARAMOUR:.
    WITNESSES & OTHER EVIDENCE:
13. MARITAL MISCONDUCT BY CLIENT INCLUDING EXTRAMARITAL SEX: OP was charged with CDV, twice. One time, charges were dropped.
14. OTHER SIGNIFICANT INFORMATION, EG: IMMEDIATE FORECLOSURE, ANY OTHER ISSUE NOT MENTIONED ABOVE, ETC: There are no foreclosure issues.

The grounds for the divorce is one year's separation. There are two children, ages 2 and 6. Caller says that he does not pay court-ordered child support. Caller says that he takes Pampers and other necessities

INTAKE SHEET

product privilege in signing this statement. Plaintiff intends for this statement to be retained in this Legal Services Agency's files and that it not be released to any person except for the auditors and monitors described in federal law or pursuant to the other applicable court rules or a court order.

This Statement of Facts is the above case notes.

Signed: _____
(Client Signature)

Dated: _____

Marions mint penny —
Tony Bugg —
- Rod Tullis - mental state

WITNESSES / SUBPOENAS
State vs. Marion Lindsey

	WITNESS NAME	RELSHIP	CONTACT INFO	INFO TO BE PROVIDED	S?	SERVED on/by	PHASE	NOTES
SUBPOENAS FOR RECORDS:								
Karen	SPTBG CO. SHERIFF'S OFFICE			All recs of D, V, Celeste	Yes	5/14-JL		
Karen	SPTBG. CITY PD			All recs of D, V, Celeste	Yes	5/14-JL		Rec'd recs 5/14
Karen	INMAN CITY PD			All recs of D, V, Celeste	Yes	5/14-JL		
Karen	SRMC-SRHS / RESTORATIVE CARE			LIST: "sept'02 hourly e'ees" (for name of boyfriend)	Yes	[redacted]		
LAY WITNESSES:								
Doug	**STEVEN PILGRIM**	Uncle	Archer Rd, Sptbg.	Uncle; signed for his prop @ ER 9/18/02	Yes	5/14-KR		
Doug	**AMY OSBEY**	ACQ.	Inman	Can ID Vs last bf; if find name, need her for anything else?	Yes	[redacted]		Virginia's trying to get in touch w/ her
Doug	**CHRIS WILKINS**	3rd Cousin	Campobello	More like bro; IDs bf's FN= Mike; V alw $-driven; kids=D's 1st prio.; '91 Chpmn-grad; NO CRIM Hx; MY gun; there when V moved out: "situ. DIFF than V's later IR"	Yes	5/15-DB	Maybe BOTH phases	DB met w/ him 5/15/04
Mike	**BILL BURTON**	fmr.Spvsr.	Macon GA (MB has?)	Fmr.spvsr@Milliken; mentor/ role model; gun was 4 snakes	N/A – Nonresident			Out-of-State/Volunt.W.
Mike	**BILL BURTON's MOM**	Friend	Macon GA (MB has?)	We took care of him	N/A – Nonresident			Out-of-State/Volunt.W.
Mike	**DR. HENDERSON**	fmr. Dr.			?			
Doug	**VIRGINIA LINDSEY**	Mother			?			Doug met w/ her & some other family 5/15/04 – did he serve?
Mike	**CALVIN _____**	Brother		Brother; mgr @ BK, Columbus NC	N/A – Nonresident			Out-of-State/Volunt.W.
EXPERT WITNESSES:								
Mike	**LENORA TOPP,** MITIGATION INVESTIGATOR	EXPERT	**(828) 273-8996 -others in file**	Mitigation	Yes	5/15-DB	Penalty	
Mike	**DR. TORA BRAWLEY** USC FORENSIC NEUROPSYCHIATRIST	EXPERT	**(803) 434-4300 fax: -4351**		?		PT; Pen.	
Mike	**DR. MARGARET MELIKIAN** MUSC FORENSIC NEUROPSYCHIATRIST	EXPERT	**(843) 792-1461**		?		PT; Pen.	
Mike	**DR. JOHN ABSHER** NEUROLOGIST	EXPERT	**(864) 286-8222**		?			
Doug	**BENJIE STEVENS, ESQ.**	Expert	1188 Asheville Hwy. **598-9172**	Family Law std:"= rt-of-access to kids in absence of ct-order"	Yes	5/13-JL		IS THIS PROPER?

Lenora Topp will get list for KQ this weekend so KQ can get subpoenas ready by Monday morning.

[redacted]

PHYSICIAN'S MEDICATION ORDERS AND SERVICE NOTES

Patient's Name and I.D.#

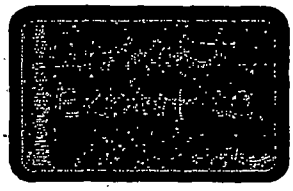
Stephen Pilgrim 9727347

Medications Prescribed and Physician's Service Notes

I last saw Stephen back in May. He has bene maintained on Xanax 1 mg q.i.d. He continues to be quite anxious and today 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. He actually has the idea that his wife is putting something in his food and says that almost everybody in his family believes in the root and root doctors . There is not much question that he is an anxious man and I do not feel that the Xanax is really covering hm, but I do not plan to increase it at this time.

We will maintain him on the same dosage and plan to see him again in three months.

JCD:dsp

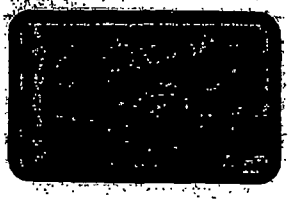


NOV 2 1 2003

Physician's Signature John C. Dunlap, MD

7/15/02
Date

FEB 0 9 2010



ACCUMULATION OF RISK FACTORS

-BORN INTO ENVIRONMENT LACKING IN RESOURCES

-MOTHER UNTREATED FOR GRIEF AND LOSS

-FATHER ABSENT AND UNINVOLVED

-EARLY CHILDHOOD INJURIES

-EXPOSURE TO VIOLENT RELATIONSHIPS OF AUNTS AND UNCLES

-EXPOSURE TO USE OF GUNS, KNIVES AND FISTS TO RESOLVE CONFLICT

-LACK OF POSITIVE MALE OR FEMALE ROLE MODELS IN HOME

-CARED FOR BY AILING GRANDMOTHER WITH MINIMAL SKILLS FOR PARENTING

-LACK OF HELP WITH SPECIAL NEEDS

-LACK OF HELP WITH MENTAL HEALTH NEEDS

-CONFUSION OF CULTURAL PRACTICES (ROOTS)

-UNADDRESSED EMOTIONS AND BEHAVIORS AROUND REJECTION

-EARLY EXPOSURE TO DRUG USE AND DEALING

-COMMUNITY ENVIRONMENT OF DRUGS AND DEALING

-LACK OF UNDERSTANDING OF HEALTHY MALE/FEMALE RELATIONSHIPS

-UNTREATED MENTAL, EMOTIONAL AND BEHAVIORAL PROBLEMS

-FAILED EIGHTH GRADE THREE TIMES; PLACED IN NINTH

-ACADEMIC PROBLEMS UNEXPLORED BY PARENT OR OTHER ADULT

-FAMILY SYSTEM DEFINED BY VIOLENCE AND SUICIDAL BEHAVIORS

-ATTEMPTS SUICIDE AT FIFTEEN BUT CRIES FOR HELP IGNORED

-WITNESSED INFIDELITY AND UNSTABLE RELATIONSHIPS OF FAMILY MEMBERS

PSYCHOLOGICAL BATTERING OF CHILDREN

1.REJECTION-Child is treated in such a way that his needs are not worthy of consideration

a. Abandoned by father; mother not involved in important areas of life
b. Parents do not work together in Marion's best interest
c. Watches brothers leave with their fathers and is left behind

2. ISOLATION-Child is not exposed regularly to activities outside immediate environment

a. Minimal exposure to church, scouts, other positive activities
b. Greatest exposure to negative behaviors within the home
c. No exposure to positive relationships outside home and community

3.TERRORISM-Child is not physically harmed but witnesses threats of harm within the home or immediate environment

a. Marion witnessed uncles fighting and beating girlfriends
b. Marion witnessed his mother shoot at her boyfriend
c. Uncles threw favorite pet into fire

4. IGNORING-Parents or adults fail to notice child's needs and to follow through with appropriate help

a. No understanding of special needs for success in school
b. Ignoring recommendations of doctors for mental health treatment
c. Lack of protection and supervision from other adults in home

5. CORRUPTION-Missocialization of child leading to illegal behavior

a. Witnessed uncles beat girlfriends
b. Witnessed mother shoot at boyfriend's tires
c. Witnessed uncles profit from drug dealing

Family in Marion's Childhood Home With CDV Arrests and/or Convictions

Mother-Virginia	CDV
Uncle Willie	CDV ABWIK ABHAN 15 YEARS
Uncle Steve	CDV ABWIK
Uncle Paul	Shot three cousins
Aunt Bessie	CDV
Aunt Robin	ABWIK KIDNAPPING ROBBERY Currently serving 15 months

HOMES THAT FAIL TO PRODUCE RESILIENCT CHILDREN

-LACK OF GUIDANCE AND MENTAL HEALTH INTERVENTION

-DIVORCE AND SEPARATION

-MULTIPLE MOVES

-ABUSE

-ABANDONMENT

-HOMELESSNESS

-DISABLED FAMILY MEMBER

-IMMIGRANT STATUS

-LACK OF ROLE MODELS

-GROWS UP WITNESSING VIOLENCE

-LACK OF CONSISTENT CARE-GIVING

-INABILITY TO TRUST

-WORRY ABOUT VIOLENCE IN THE HOME

-IMPAIRED COGNITIVE FUNCTIONING

-INABILITY TO DEAL WITH AGGRESSIVE FEELINGS

-REPRESSION OF FEELINGS

-SENSE OF HELPLESSNESS

-POOR PROBLEM-SOLVING SKILLS

THE DEVELOPMENT OF RESILIENCE IN CHILDHOOD

-Unconditional physical and emotional love and verbal affection

-Using soothing words to calm and comfort and teach a child to calm himself

-Enforcing rules without belittling, harming or rejecting

-Modeling behavior that communicates confidence, optimism and results

-Praise for accomplishments

-Encourage to be independent

-Label feelings and help child to recognize feelings

-Use language that helps a child face adversity

-Preparation for adverse situations

-Teach how to problem-solve and to reconcile

-Provide comfort and encouragement in stressful situations

-Provide a stable environment

-Help to manage feelings and impulses

MUSC
INSTITUTE OF PSYCHIATRY
Discovering. Understanding. Healing.

FORENSIC PSYCHIATRY SERVICES
SUITE 104 SOUTH
67 PRESIDENT STREET
PO BOX 250861
CHARLESTON • SC 29425

Ph (843) 792-1461
FAX (843) 792-2254

Received
JUN 07 2004
Office of Public Defender

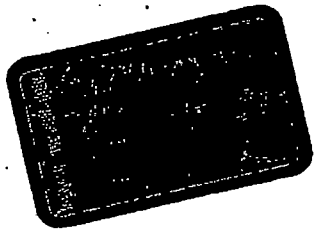
May 26, 2004

Michael Bartosh
Office of the Public Defender
Spartanburg County Courthouse
180 Magnolia Street
Spartanburg, SC 29301

RE: Marion Lindsay

Date	Purpose	Hours	Fee
4/29/04	Phone w/ T. Brawley	.25	62.50
5/3/04	Record Review	1.5	375.00
5/4/04	Evaluation	2.5	625.00
5/7/04	Phone w/ M. Bartosh	.25	62.50
5/10/04	Record Review	1	250.00
5/12/04	Conference Call w/ Judge	.75	187.50
5/14/04	Phone w/ Absure	.25	62.50
5/17/04	Phone w/ Absure	.25	62.50
5/18/04	Phone w/ T. Brawley	.25	62.50
5/19/04	Phone w/ M. Bartosh	.25	62.50
5/20/04	Copying charges*		321.00
5/22/04	Testimony Preparation	.5	125.00
5/23/04	Travel @ $100 per hour	6.5	650.00
5/23/04	Testimony		2500.00
		Total Due	**$5408.50**

Travel rate $100 an hour, Forensic Rate $250 an hour
Copy rate first 30 pages @ .65; next 642 pages @ .50



Thank You.

Margaret Melikian, D.O.
Director, Forensic Psychiatry

Please make check payable to University Medical Associates - Department of Psychiatry and mail to Dr. Melikian at the above address.

Tax ID# 57-0935917

An equal opportunity employer promoting workplace diversity

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2004 MAY -3 PM 3:04
MARC KITCHENS

STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF GENERAL SESSIONS
Warrant No. H252531
H296699
H296700
H296701
H296702

The State of South Carolina)
)
vs.)
)
Marion Lindsey,)
Defendant)
)

EX PARTE ORDER
FOR TRANSPORTATION
FILED UNDER SEAL

[redacted]

This Court has previously issued an ex parte order appointing a psychiatrist to examine the Defendant, Marion Lindsey. The psychiatrist desires to examine and test the Defendant on Tuesday, May 04, 2004, at her office in Charleston, South Carolina. The Defendant is incarcerated at the Spartanburg County Detention Center. The Defendant, by and through his counsel, moves for an order requiring the Spartanburg County to transport him to Dr. Margaret Melikian's office for his appointment and to return him to the Spartanburg County Detention Center upon the conclusion of the examination and testing.

I find and conclude that the Defendant's motion for transportation is reasonable and proper.

IT IS THEREFORE ORDERED that the Spartanburg County Detention Center, on Tuesday, May 04, 2004, shall transport the Defendant, Marion Lindsey, to the office of Dr. Margaret Melikian at Medical University of South Carolina, Institute of Psychiatry, Forensic Psychiatry Services, Suite 104 South, 67 President Street, Charleston, South Carolina 29425, Telephone: (843) 792-1461. in sufficient time to arrive by 1:00 p.m.., and to return the Defendant to the Spartanburg County Detention Center upon the conclusion of the examination and testing. Furthermore, it is ordered that the transporting officer(s) of the Spartanburg County Detention Center shall not disclose to anyone to any entity anything about the examination and testing, including, but not limited to, any statements made by the Defendant, Dr. Melikian, or anyone in Dr. Melikian's office.

IT IS FURTHERMORE ORDERED that the Spartanburg County Detention Center, its officers, agents, employees, and representatives are prohibited and enjoined from disclosing to the Seventh Circuit Solicitor's Offices, its employees, agents, and representatives, the existence, contents, and substance of this order as well as the name and address of the person(s) conducting the examination and testing of the Defendant. The Spartanburg County Detention Center, its officers, agents, employees, and representatives are furthermore prohibited and enjoined from disclosing to the Seventh Circuit Solicitor's Offices, its employees, agents, and representatives, the existence of an order appointing or authorizing funds for the Defendant to hire a psychiatrist.

AND IT IS SO ORDERED.

John C. Few
Judge, Seventh Judicial Circuit

~~April~~ 5/3, 2004

Spartanburg, South Carolina

FILED
CLERK OF COURT
SPARTANBURG COUNTY
2004 MAY -3 PM 3:04
MARC KITCHENS

(186)

CASE# 020901218 **VOLUNTARY STATEMENT** PAGE 1 of 1

STATEMENT OF: VINCENT BELL | AGE: 32 | DATE: 091802

ADDRESS: SPTBG, SC

PHONE #(H) | CELL | DOB: | SSN:

This statement was written by L. Rohrer, while speaking with Vincent Bell at SRMC:

Approx 2039 HRS, 091802, while on scene at Inman Police Dept., Inman, SC with a shooting, I asked the black male what happened to him? He said "I shot myself in the head" Then he said "I shot my wife and I shot myself in the head We went ahead and started packaging him up for transport and get him in the truck. We were halfway to the Hospital and I asked him "Who shot you?" He said "I shot myself in the head" and then I asked who shot your wife? He said "I shot my wife in the head, then I shot myself." Then I asked him why he did it and he said "My wife was fooling around with another man!" We continued the transport onto SRMC and he said nothing else while enroute.

I have read this statement consisting of ONE pages(s), and I swear that the statement that I have just given is the truth, the whole truth, and nothing but the truth, so help me God. I also swear this statement was given freely and voluntarily and I have received a copy of my statement.

This statement was completed at 2210 P M. on the 18TH day of September 20 02

WITNESS: Inv. L. Rohrer

X [signature]
Signature of person giving voluntary statement

SWORN to before me this 18 day of Sept, 20 02

[signature] (Seal)
Notary Public of South Carolina

My Commission expires: 2-26-07

[redacted]

MARION ALEXANDER LINDSEY



SS #

Interviews were conducted on 4/16/04 and 4/25/04 at the Spartanburg Detention Center

- Marion's mother is Virginia Lindsey, who is from Spartanburg. She is 55 years old. Her address is Inman, SC and her phone number is
- Marion's father is Leon McDowell, who is 48-50 years old. Marion called him a "sperm donor". McDowell is a truck driver and owns his own truck. His cell phone # is Marion thought McDowell didn't want to get involved with this situation because of his new family.
- Marion's father never spent any time with him.
- Marion has always felt bitter toward his father—his siblings went off with their dads, but Marion was always left out.
- Marion actually had a hatred toward his dad—friends in school would talk about fishing, camping, etc., with their fathers.
- Marion thinks he became very independent because of being alone.
- He used to see his mother struggle while he was growing up.
- They never had new clothes—they had to wash their clothes out every other night and hang them out behind the wood heater.
- Marion remembers they had the old wringer type washing machine and when they got a "real" washing machine, they burned the motor out by using it so much
- Claude Lindsey, "Bubba", is Marion's older brother.
- *Paul Fredrick Lindsey, Marion's second older brother, was 27 years old when he drowned while canoeing in a lake. This was about 7 years ago. He was in a canoe with a friend and the friend survived, but Fred's body was never found.*
- *Marion said Fred's death seriously affected him for at least three years.*
- Marion cried a lot because of his death.
- He and Fred seemed to fight quite a bit and the only time they got along was when they both moved to West Virginia to work for a construction company. They shared an apartment until Marion became homesick and moved back to his mother's house.
- Marion's younger son, Timothy Sims, is approximately 19 years old.
- Marion feels like he raised Tim—everywhere Marion went, he took Tim with him.
- Tim's father, Timothy Sims, Sr. helped Marion's family for many years. He was the only father figure in Marion's life.
- Mr. Sims is now on disability from Milliken.

- Marion was raised with Mr. Sims' other children. There seemed to be a lot of arguing between them.
- Nancy Sims McDowell (Tim's grandmother) was like Marion's grandmother. He loves her.
- Marion did not know his sister Vanessa. She was killed in a car accident when he thought she was 2 years old. Marion thought this occurred approximately 36 years ago.
- When Marion was growing up, his family was very poor. He said they ate bologna so much because that was all they could afford, that to this day, he will not touch it.
- Marion said when he was about 25 years old, his father's other children suddenly wanted to hang around him—Marion was NOT selling drugs at this time.
- The half-siblings had always felt Marion was an outsider and and they didn't like him at first.
- Leon McDowell, Jr. is 34 yoa and although he took a warrant out on Marion in 2001 for fighting, they have made up.
- Teresa McDowell is 37 yoa and she gets along with Marion.
- Rolanda McDowell is 30 yoa, but still considers Marion to be an outside kid.
- Claude Lindsey, Sr. has 27 year old triplets and they get along with Marion. Marion considers them to be his brother and sisters. They are Marshall Lindsey, Marsha Lindsey and Martha Lindsey. Marsha is married but does not have any children.
- Other persons he considers to be his brothers and sisters are: Sammy Lindsey, age 38-39, who also drives a truck; and Cathy Lindsey, age 36, who has three children.

- Marion recalled his education history as:
  - Boiling Springs Elementary until age 9. He was held back in 1st grade
  - They moved to Spartanburg and he went to Houston Elementary where he took remedial classes
  - He then went to McCracken Jr. High in Spartanburg
  - They moved to Inman and he attended Mabry Jr. High
  - Then he went to Chapman High and quit school in the 10th grade so he could work and help his mother

- Marion also recalled the following disciplinary actions:
  - While at Houston he got no recess for 4-6 months for slapping a girl. He said she slapped him first.
  - While at Mabry, a white kid, Shay Neal, called him "nigger" and hit Marion in the eye.
  - Marion told the baseball coach about it, but the coach didn't do anything about the incident, so Marion punched the kid in his eye—his nose bled, etc.

- Marion was suspended for a week and his mother was very unhappy with the school. Nothing happened to Shay Neal.

- Marion said none of his immediate family finished school. His brother, Tim, just quit 3 years ago and Marion is mad at him for not finishing.
- Marion played a little football at McCracken Jr. High and remembered he had a good coach. He quit because he never had anyone to watch him play—his mother was always working.
- *Marion recalled two traumatic times in his life: 1) Watching his two uncles, Paul and Willie, throw his favorite cat into the wood heater at his house while it was alive and 2) trying to commit suicide. Marion thought he was 12 yoa, but he actually was 15 yoa.*
- Marion also recalled running away from home when he was about 7 or 8 years old. He got mad because his mother wouldn't let him go somewhere, so he laid in a peach field all day. He took a can of corn and a can of Campbell soup with him, but forgot a can opener. He finally got hungry and went back home.
- When he quit school, he went to work at Beecher's Plastic on Hwy 221. His brothers, Claude and Fred worked there, too. His job was to pack containers.
- All three worked the same shift, so they rode together in the same car that Marion drove.
- One day the donut tire on the car blew out and Marion had a bad car accident. The car flipped three times. *He lost some of his memory* and had to have facial surgery. He also broke his hip. He was out of work for a year.
- All three brothers had to quit working at Beecher's because the car was totaled and it was the only one they had.
- When Marion returned to work, he went to Burger King in Inman, SC. Both of his brothers were already working there. Again, they worked the same shift. The manager was Ralph. Marion thought this might be in 1990 or 1991.
- His brother, Claude, is still employed by Burger King in Columbus, NC.
- Marion worked at BK for approximately 1-1/2 years.
- When a new female manager took over, he and she had "words" and she told him to clock off, which he did.
- Marion was out of work for a month
- He then went to United Cloth, Spartanburg/Inman. He had a boring job sorting cloth and had to work with a lot of women, which he hated because of the gossip, etc. He felt he had a good relationship with the employees and management and he stayed there 6-7 months.
- Marion felt he usually advanced pretty quickly in his jobs.

- He was out of work for a year and lived with his brother, Claude, during this time. Marion took care of Claude's children and of the house so Claude and his girlfriend could work. Justin was 16 months and Ashley was 2 yrs old.
- Marion cleaned house and cooked for everyone.
- Then Marion met Stephanie Petty who was his first serious girlfriend. She is Caucasian and they were together from around 1992-1996. Stephanie was working at a daycare.
- When Claude split up w/ his girlfriend, Marion and Claude moved back in with Virginia—maybe around 1993.
- Marion and Fred moved to Ashland, VA, to work a construction job with Floor Daniel Construction.
- They were building a tower (radio or satellite). Marion said he stayed about 10 months <Virginia said about 2 months> and he became homesick and went home after Fred found someone else to share the apartment with.
- Marion said he and Fred got along the best they ever had. He attributes it to being away from home—no jealousy issues.
- Marion was happy to be back home. He and Stephanie were still together.
- He partied some—drank beer—he never did any drugs.
- Marion believes it was 1996 when he once tried to smoke some weed. He didn't like it.
- He was out of work for about 4-6 months, when an old friend, Bill Burton, convinced him to go to work for Milliken.
- Mr. Burton was the plant manager and got him a job.
- Marion knew Mr. Burton from years ago when Mr. Burton was a lifeguard at the recreation center.
- Mr. Burton became Marion's mentor during those younger years—taking Marion home with him to go fishing.
- Mr. Burton's mother also got involved with Marion when he visited their home.
- While at Milliken, Marion started with the mini-shift, but progressed so well he ended up working about 16 hours a day. He was a fork-lift driver and packer.
- Marion worked there approximately 2 years and said it was the best job he ever had.
- Then one night, he and another employee were asked to work overtime, which he readily accepted.
- Marion not only completed his assignment, he worked most of the other employee's assignment while the other employee "fooled around with the girls".
- The next morning, the shift supervisor, Phillip Green, started yelling at Marion for not completing the work.
- Marion tried to explain he was the one who did it all, but Mr. Green wouldn't listen to him.
- When Marion jerked Mr. Green up by his shirt, Mr. Green had Marion fired.

- Mr. Burton tried to help Marion get his job back, but the company had a no rehire policy.
- According to Marion, he made decent money while at Milliken and used it to support his mother to pay the household bills.
- Because he was used to the money, he became quite upset when the phone got cut off and they were scraping for dollars again.
- Marion saw his friends making good money by dealing in drugs, so he began helping by being a courier and he again got into making good money.
- Marion couriered crack and cocaine, but he never used it—he only drank beer.
- Marion was still with Stephanie. He said her father was the former Grand Wizard of the KKK and of course he was not happy that his daughter was dating Marion.
- When her family became really angry, Stephanie moved in with Marion's family.
- Then Marion got a job at Thomas & Betts in Inman. They make computer chips. Marion packed chips sitting at a table with women. He lasted 3 months.
- Marion went to Hudson International in Inman for 8 months. He ran a machine that took expertise like a mechanic to operate it. Marion was in charge of 4-5 machines.
- But Marion didn't like the job. There were no breaks allowed to be taken away from the machines. The employees had to eat their food at their workstations.
- During this time, he and Stephanie moved out to an apartment in Carmain (?)(probably Coleen) Courts and then to a duplex next door. She had started working at Magnolia Manor in Inman.
- Marion began selling drugs again.
- Stephanie's father showed up one day and Marion got in the car with him. Her father told him he was planning on killing Marion. After they started talking, the father calmed down and even began to visit Marion and Stephanie on weekends with his wife. They never stayed in the same house overnight.
- Stephanie's grandmother then began to visit and to cook for Marion and Stephanie.
- One weekend Stephanie and Marion house-sat for her parents in Boiling Springs. Neighbors later told her father that a "black man" was staying with Stephanie and the father allegedly told them to mind their own business.
- Marion began working at Budweiser on Howard Street. He was a fork lift operator in the warehouse. He worked there for almost a year until he was let go because the police arrested him for failure to appear on a traffic ticket.
- Marion had to stay in jail a couple of hours until it was cleared up. When he went back to work, he was told he was fired.
- Marion then went to S&B Body Shop, Scotty and Billy Fowler (son and father). This was at Southport Industrial Park, Spartanburg, SC.

- They taught him how to do body work, painting and priming and how to put parts on.
- Marion worked there for a year until it was shut down because Billy began driving a truck full time.
- In 1994, Marion shot Stafford Wilkins, a black male who used to date Stephanie.
- Apparently, Wilkins had once tried to kill Stephanie and himself by driving his car off a cliff. But they both survived.
- When Wilkins found out about Marion and Stephanie, Marion found himself confronted by Wilkins and some of his friends at several locations in town. Marion would just leave.
- Then one night on a deserted road, Wilkins drove toward Marion and stopped in front of Marion's car. Marion got out of his car and shot through Wilkins' window. He hit him in the shoulder.

GENERAL REFLECTIONS FROM MARION DURING INTERVIEW ON 04/25/04

- Marion always wanted to be a police officer
- He also wanted to stop the drug involvement, but ended up getting into it more because the money was so good
- He usually took his money and saved it to buy stuff for his family.
- He'd take his mother out to eat often.
- When he went to jail the first time, he left money with Nell to provide for her and his child, but she spent it on boyfriends.
- Marion did quit selling drugs off and on.
- With the money he made, he had 3 new cars, 3 houses and the children had all the toys and nice clothes they needed and more.
- *Marion used to give his mother-in-law money—he'd fill her car up with gas on frequent occasions.*
- Marion said he could talk to his mother about anything, especially about girlfriends, but he kept the drug sale away from her and tried to sugar coat things.
- Because Marion never had anyone to depend on, he made sure no one saw his weak side or his downside.
- Only Laneeta and his mom ever saw him cry.
- Marion began having a friend named Jimmy who told him God sent him. Jimmy arrived during Marion's early teens.
- Marion said he is resigned to dying.
- His biggest regret is not having enough time to spend with his kids.

SUBMITTED BY: _____

LENORA TOPP
MITIGATION SPECIALIST



RUBY NELL WRIGHT LINDSEY

INTERVIEW W/ MARION LINDSEY 4/16/04

- Marion knew Nell the whole time they were growing up
- In 1995, he saw her at a friend's house and thought she looked pretty good in her tight jeans
- Then about a week later, he asked her if she wanted a ride in his car and he took her to a store
- *Nell had just had an abortion from a previous boyfriend* and on the first night Nell and Marion were together, they did nothing in a sexual manner
- Because Marion was still with Stephanie, he and Nell had to sneak around to see each other, but when Nell became pregnant, he had to tell Stephanie
- Marion knew he would always take care of his children and give them a father he never had
- Although Stephanie stayed with him, Marion took care of Nell's financial needs—doctor's bills, bought her a car, put a down payment on a trailer
- All during this time, Nell would just pop up at his and Stephanie's house when Nell wanted something
- When his first son was born, Nerion L. , Nell's mother showed up at his house and took Marion to the hospital
- After the baby was born, Marion moved in with Nell at L. St., Inman, SC and Stephanie moved to Spartanburg, SC.
- Then Marion got sentenced to jail for shooting Stafford Wilkins.
- He left Nell $3,000 (three thousand dollars) so she could support themselves, but she spent it on two boyfriends, Kevin Bailey & Shawn Burgess
- Marion heard about this while he was in jail
- Virginia Lindsey made Nell visit Marion in jail so he could see his baby
- Stephanie started visiting Marion in jail and one day, both she and Nell showed up at the same time
- Nell was very angry and it was Stephanie who left
- When Marion got out of jail, Stephanie picked him up and he stayed with Stephanie about 4 months
- Marion continued to provide milk, pampers, clothes, etc. for his son
- After the 4 months, Marion moved back in with Nell until his brother, Claude, (Bubba), moved into the trailer
- Nell and Marion moved to a doublewide on 2 acres of land at Rd, Boiling Springs, SC
- Marion then opened S&P Salvage at Southport Industrial Park. It was a motorcycle parts/car parts salvage business. Scotty Fowler would come over to help him some

- Nell started having "flings" and she moved out 8/25/98 to her mother's house. She took all the furniture with her, other than the bedroom furniture
- Marion then met Stephanie Poates from Boiling Springs--she was a w/f he had know for years. He used to drink at the Poates' house and he knew her sister
- He started dating Poates
- In October 1998, Marion moved in with his cousin Kris Wilkins at 12 Trinity Ave, Spartanburg, SC
- Kris had a wife and one child
- Marion started staying with Poates on a regular basis, although he did not move in with her. She lived on Parrish Bridge Rd and she was divorced and had two children, a boy 8-9 yoa and a girl, 4-5 yoa
- Marion started working at Springs Industry in Lyman, SC--he ran a machine
- In February 1999, he stopped going over to Poates' house as much. He saw a strange car there one night and found his key didn't work for the front door. He knew there was a guy there, so he left after she threatened to call the police. He went back a week later to get his waterbed and his clothes
- Nell started bringing his son around--the son wanted his mom around, too, so she began staying w/ Marion some and she got pregnant again.
- Nell moved in with him maybe March 1999
- About April 1999, they moved to Dr, Spartanburg, SC
- Nell later moved back to her mother's
- It seemed that every time Nell wanted to move out, she'd start fights--complaining he couldn't cook good enough-wasn't keeping the house clean enough
- Marion said he hit Nell twice - she took a warrant out in 1997, saying he threatened her
- One day in 1997, he was working at S&B, and Nell and her mother showed up with no warning
- He was told by Nell's mother that he was going to marry Nell that day and to be at the courthouse at 6pm, which is what he did
- Marion had no part in planning this marriage
- After this, he quit hanging out with the boys - spent more time cleaning and cooking, but nothing seemed good enough for Nell, so he started hanging out again and their relationship improved
- On 8/21/1999, while still pregnant, Nell moved out of the duplex
- Marion, Doug Burgess and Uncle Jimmy Pilgrim started going to clubs
- Marion moved in with Doug in September 1999 at Rd, Inman, SC
- Nell's mother called--the baby was coming so he went to the hospital and Trevias L. was born on
- He was living with his mother
- Trevias looked just like Marion

- When Marion was shot in the leg and robbed of $12,000 by an associate, *Nell and her mother took him to St Luke's hospital in Tryon, NC*
- Nell and her mother didn't want the police involved so they helped Marion keep it from them
- Marion stayed at her mother's house w/ Nell because of the cast on his leg--he was unable to maneuver very well
- After the baby was born, Marion started staying w/ Nell more and more
- They bought an English Bulldog, but Nell's mother didn't like it at her house, so she had a friend call Marion one night to tell him
- This made Nell and him mad and they moved to Doug's house from 1/2000-4/2000
- In April, they moved to Apts, Spartanburg, SC
- While at Doug's, Marion financed Nell to go to nursing school at Spartanburg Technical College. Marion stayed at home w/ the children
- Agnes Smith was a neighbor at Colony and she became friends with Nell
- Then ALL of them became friends--Agnes would help baby sit
- Agnes had a niece named Latresse Smith
- Marion considered all three of them to be gossipers
- Nell would talk to them about her boyfriends and about the problems between Marion and her
- One day Latresse and Marion had sex--in fact, they had sex a total of 4 times during the course of their friendship
- In July 2000, Nell and Marion moved to to Kris' house and took up his house payments--Kris had another house
- In September 2000, Marion got busted by the drug squad--said he got set up, but got out on bond 12 hours later
- When the school found out about Marion's arrest, they expelled Nell from nursing school
- Because of the drug bust, they were scraping pennies again and Marion thought he'd never have to do that again
- Nell started work at Magnolia Manor and Marion did, too, several months later
- His job was floor care
- Soon after, Nell moved back to her mother's and wouldn't let Marion see his children
- But the oldest son began asking for his dad and Nell got back into Marion's life. She moved back in
- One day her cell phone rang and Marion knew it was a boyfriend named Chris
- Marion called him and said Nell was married--Chris said he thought she was divorced
- Nell wanted a new car, but Marion had no money
- She got it anyway because her parents helped her
- In August 2001, he moved to his cousin's house, Lanetta Swindler at Circle, Moore, SC and Nell moved to her mother's.

- They lost the house because he couldn't make the house payments at Kris' house
- He stayed there until 11/2001
- In the meantime, Nell asked to move in with them and he said yes
- Marion started working at Sizemore's Body Shop
- He told Nell she had to make payments on another car--a friend of his had been letting her drive one for 4 months without making payments, which she finally did
- Word came to him that a man in a green Lexus had been seen w/Nell
- Marion's son told him the man, Mark, worked at the hospital with Nell, so Marion took his son to Spartanburg Regional hospital one day to try to find him, but he couldn't
- Marion said he slapped Nell after finding this out and she threatened the son for telling Marion
- Nell did admit to the boyfriend
- Marion said he was going to kill himself after this incident
- He drove to the cliff where Stafford Wilkins had run off the road with Stephanie Petty and sat there and cried for hours
- Nell had moved back w/ her mother by then and blocked his numbers from her phone
- She said he could not see his children anymore
- Marion had his mother call Nell to ask to see his children, but to no avail
- Nell took a domestic violence order out against Marion
- He wrote suicide notes--was going to kill himself, but not in Lanetta's house
- Marion called Latresse and she picked him up
- She noticed his demeanor and asked him if he was going to do something to himself
- She was crying--he was crying
- Latresse drove him to his cousin's truck, but she wouldn't let him drive
- Lanetta called his family
- His uncle gave him some Zanex to calm him down, but it didn't help
- Marion had lost from 225 lbs to 160 lbs in three-four weeks. He was very depressed and cried the whole time
- Nell sent word she was not coming back and was going to get on with her life
- She said Marion wouldn't do anything to himself
- Marion went to Latresse's house and took her car
- He drove to Inman to his mother's house after going by his. He was hoping his brother was home because he could have stopped Marion, but he wasn't
- Marion called his cousin who told him about Nell's boyfriends
- Nell apparently said she was going to let her new boyfriend take care of the children and Nell was going to take Marion's money
- Then Marion saw Nell's cousin in a car (Celeste), along with her mother and her little girl
- He didn't know Nell was in the back seat at the time

- Marion told Celeste he just wanted to see his children
- When he saw Nell, Celeste drove off in a hurry and Marion chased them
- Marion doesn't know how he got there but now knows he shot Nell 4 times in the parking lot of the Inman Police Department
- When he came to, his vision was messed up
- He reached for his gun, put it to his temple, and then heard a voice telling him to put the gun down
- As he rolled over, he was shot 4 times—he said he felt some stings
- While lying on the ground he was told that Nell was 10-27
- Marion said he doesn't remember much more until he was in the hospital
- He said he didn't want to see any of his family while he was there

END OF INTERVIEW

VIRGINIA LINDSEY

Inman, SC

- Never graduated from school
- Virginia is 55 years of age (yoa)
- Married one time to Claude Lindsey, Sr. They were divorced before Marion was born—he had no part in Marion's upbringing
- Virginia had two miscarriages
- First son was Claude "Bubba" Lindsey, Jr.
- Her second child was a daughter, Vanessa, who was killed at 7 months in a car accident. Child was passenger with grandmother driving and they were hit by a car that ran a stop sign. No compensation other than minimum $$.
- Second son was Paul Fredrick Lindsey. Fred drowned in a lake sometime in 1997 and his body was never found
- Third son was Marion Lindsey whose father is Leon McDowell, Sr. Leon never paid child support
- Fourth son was Tim Sims whose father is Timothy Reese Sims, Sr. Mr. Sims helped Virginia and her children for about 17 years. He is now on disability from Milliken
- All three sons have children--Marion is the only one who married the mother of his children
- None of the sons finished high school
- Virginia worked shifts, usually in factories, and usually worked 2nd shift—never at home during evening meals or homework sessions
- Virginia spoiled Marion because he did not have a father who interacted with him or did anything to help him
- Virginia's mother helped raise the children
- Virginia's mother is now deceased
- Virginia and family were very poor

- Virginia has 8 siblings—Bobby Pilgrim (oldest and recently deceased); Lizzie Pilgrim; Bessie Smith; Paul Pilgrim; Steve Pilgrim; Robin Keith; Willie Pilgrim (in the penitentiary); Jimmy Pilgrim
- All siblings have at least 2 children--all five of Bessie Smith's children completed college
- All of Virginia's nieces and nephews grew up with her sons



- *Virginia remembers when Marion was accidentally run over by a car driven by her brother, Paul—She thought Marion was around 18 months old—vehicle tires ran over Marion's head* <medical reports show he was 19 months old>
- Virginia was working at Camp Haven Nursing Home at the time and her sister Bessie took her to the emergency room at Spartanburg Regional
- Marion had a lot of blood on him, with cuts on his head and a bad cut on his ear.
- Virginia recalled Marion falling frequently and always hitting his forehead when he fell---usually on the concrete porch
- Virginia also recalled when Marion was about 10 yoa, he broke his arm and had to stay in the hospital to have pins put in
- The family moved at least five times during Marion's upbringing
- *Virginia thought Marion was about 12 yoa when he tried to commit suicide by swallowing every pill he could find in the medicine cabinet* <medical reports show Marion was actually 15 years old>
- Marion got upset with his mother when she said she was never going to do anything for him again because of his fighting with his brother Fred
- She took him to emergency room where they admitted him and then sent him to the mental health annex for evaluation—he stayed about a week
- Marion was discharged after both he and Virginia told the counselors that he was going to be ok—no further treatment
- Fred and Marion were always fighting. Virginia thought it was because they were so much alike
- Marion practically raised his younger brother, Tim. Everywhere Marion went, he took Tim
- *Virginia said when son Fred drowned while canoeing, Marion took it very hard because he felt guilty about not getting along better with Fred*
- Fred's body was never found in the lake
- Marion gave Virginia $650 to retain Rodman Tullis who said he would assist with obtaining a death certificate and help her with other legal matters regarding Fred's death, but Virginia believes he never followed through with the legal matters
- Virginia now has a death certificate
- *Virginia remembers when her brothers, Paul and Willie, threw Marion's cat into the wood heater in the house—Marion was about 4 or 5* <she and Bessie nervously giggled when asked about this incident—couldn't really tell if they approved or disapproved of the incident>
- Tim moved out of the household in 1993.
- Virginia knew Stephanie Patty and eventually met her grandmother, who liked Marion
- Virginia and Marion liked the grandmother a lot, too
- Stephanie lived with Virginia and Marion for awhile
- Virginia liked Stephanie and her grandmother. They all got along

- Virginia thought Nell was a nice girl and she did love her
- Virginia felt Nell's mother had too much influence on her
- Virginia had to intervene by calling Nell when Nell refused to let Marion see his children
- When Marion didn't have money is when there were problems between Marion and Nell
- Virginia loves her Marion's children and wishes she could see them
- Virginia loves Marion very much
- Virginia knew Marion was selling drugs for awhile, but didn't question him. He did spend money on her and her household during those times

- *In regard to the alleged incident between Sharon Diane Elder and Marion Lindsey, Virginia was at the location. She said Tasha (sp?) Mays was pregnant with Fred's child at the time and Tasha had gone to Marion's house on Coleen Ct because she and Fred were fighting. Fred showed up and Marion tried to stop Fred from hurting Tasha. He and Fred began fighting and Fred ran into Sharon Elder's apartment. Sharon apparently gave Fred a gun and then the police showed up. Virginia was trying to stop the altercation, too. She said Marion <u>never</u> threatened to harm Sharon.*

3070

Hello Stephanie - I have been Court-appointed on BEHALF of Marion Lindsey. My job is to get "mitigation" information that hopefully will save his life. I'm working w/ the Public Defender's Office and I'm desperate to talk to you. If anyone knew Marion, you did. Please call me on my Cell-phone as soon as possible. I'm sorry to have missed you! Thank You!!

Lenora Topp
828-273-8996

[redacted]

State vs. Marion Alexander Lindsey

PENALTY PHASE

■ specific circumstances of the crime ■ characteristics of defendant

MITIGATING CIRCUMSTANCES

§ 16-3-20 Punishment for Murder;
Separate sentencing procedure to determine "Life Without Possibility of Parole" or "Execution

Statutory Mitigating Circumstances:

Melikian says "YES"

~~(1)~~ No significant history of prior criminal conviction involving the use of violence against another person;
(2) Murder was committed while **defendant was under the influence of mental or emotional disturbance**;
~~(3)~~ The Victim was a participant in Defendant's conduct, or consented to the act;
~~(4)~~ Defendant was an accomplice in the murder committed by another person, and his participation was relatively minor;
~~(5)~~ Defendant acted under duress, or under the domination of another person;
~~(6)~~ **Capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired;** Melikian says N
(7) Age or **mentality** of the defendant at the time of the crime;
(8) The Defendant was **provoked** by the victim into committing the murder;
~~(9)~~ Defendant was below the age of 18 at the time of the crime;
Melikian says ND
~~(10)~~ The Defendant had mental retardation at the time of the crime. "Mental retardation" means **significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period**

Other, Non-Statutory Mitigation Factors/Circumstances:

⊙	LOW INTELLECTUAL FUNCTIONING	(LIF)	IF CAN'T GET 2, 6, 7, or 10
•	~~PRISON ADAPTABILITY~~	~~(PA)~~	
⊙	BACKGROUND (what he's seen/known)	(BG)	
•	~~ALCOHOL/DRUG EXPOSURE-ABUSE~~	~~(AD)~~	
⊙	CATCH-ALL	(CA)	
⊙	MERCY		

EXISTENCE OF A CHILD IS **NOT** A MITIGATING CIRCUMSTANCE, AND DOES NOT HAVE TO BE CHARGED (Plath I)

Testimony regarding prior difficulties b/w white D and black V, incl. D's flying rebel flag on 4th of July, did not improperly imply that D was racially prejudiced, and was properly admitted since D's prior disputes w/ the family were relevant to motive.
State vs. Atkins, 303 SC 214, 399 SE2d 760 (1990), cert.denied, 501 US 1259, 111 SCt 2913, 15 LEd2d 1076

We definitely have:
(2) Melikian; Jones vs. Catoe
(7) Melikian

We probably don't have, but we'll try:

WITNESSES:

VIRGINIA LINDSEY	MOTHER
BILL BURTON	FMR. SPUSR.
LEON McDOWELL	FATHER
KRISTOPHER WILKINS	COUSIN
STEVE PILGRIM	UNCLE

LIF BG CA M
BG CA M (desperate poverty)
BG CA M
BG CA M

[redacted]

[redacted]

DISCOVERY / OTHER INFO & RECORDS

RECEIVED FROM SOLICITOR'S OFFICE :

*** Notice of Aggravating Circumstances & Witnesses**
- BJB advised KQ/DB on Friday (4/30/04) that there is a Supplemental Witness List yet to be served
- It was discussed again Thursday (5/6/04) b/w BJB/TG/DW and MB/DB/KQ – "it's coming"
- KQ p/u other additional requested discovery Friday morning (5/7/04) c.10am – didn't get it then
- KQ/MB were at office all afternoon working on this, and nobody came to serve us anything
- As of 5pm Friday (5/7/04) – the 10th day before trial –we had still not received it

*** Supplemental Notice of Aggravating Circumstances & Witnesses**
- served 5/7/04 – less than 10 days before trial
- ADDED LOTS OF NEW EVIDENCE AND WITNESSES

KQ to check LawDesk on Saturday for the propriety of this

*** Second (2nd) Supplemental Notice of Aggravating Circumstances & Witnesses**
- served 5/12/04 – less than 10 days before trial – 4:14 p.m.
- ADDED NEW EVIDENCE AND WITNESSES

KQ to check LawDesk on Saturday for the propriety of this

→ placed @ the END of 17p of discovery (I/R's, FCI stuff, Sara Holmes, etc) w/ NO "flag" that it was there

*** Hand-Numbered Discovery (the "GUTS") – approximately 340 pages**

the "GUTS" (warrants, incident reports, statements, sketches, autopsy report, old incidents, etc.)

* Discovery (Bates-Stamped):	03-16-2004	0001-0122	Pages	
SLED's Verified Chain of Custody		0001-0008	8	
Probation Info (1994 ABWIK)		0009-0024	16	
Ruby Nell's résumé		0025	1	
Certif.of Appt.of Personal Representative–Probate		0026	1	
Application for Death Benefits (SRMC form)		0027	1	
Ruby Nell's SRMC Personnel File		0028-0122	95	// 122 pages

* Discovery (Bates-Stamped):	03-18-2004	0001-0006	Pages	
PROPERTY / EVIDENCE REPORTS:				
Answering Machine Audiotape recovered from Carol Wright 9/24/02		0001	1	
Clothing recovered from Lindsey @ Inman PD 9/19/02		0002	1	
• white shirts 2				
Clothing recovered from Lindsey @ SRMC 9/18/02		0003	1	
• shirt 1 • pair/pants 1				
• socks 2 • shoes 2				
Crime Scene Videotape taken by S.O. 9/18/02		0004	1	
Bullets/Casings recovered by SLED @ Inman PD & SRMC 11/14/02		0005	1	
• 38-cal. LIVE round 1 • 38- cal. SPENT casings 5				
• 9-mm SPENT casings 4 • projectile 1				
• projectile from Lindsey 1				
Other items recovered by SLED 9/19/02		0006	1	// 6 pages
• small Delta bag 1 • 38-cal. LIVE rounds 5				
• blood samples 6 • piece of window tint 1				
• control sample 1				

* Discovery (Bates-Stamped):	04-05-2004	0001-1000	Pages	
SCDC records (PRISON)		0001-0095	95	
SRMC records (HOSPITAL)		0096-0407	312	
SCDF records (MAIN JAIL)		0408-1000	593	// 1000 pages
State's notebook is flagged for pages:				
-0430. -0441. -0456. -0471. -0501.				

* Discovery (Bates-Stamped):	04-21-2004	0001-0016	Pages	
Marion Lindsey's School Records		0001-0016	16	// 16 pages

*** CD – Crime Scene / ER / Autopsy (243 photos)**

243 photographs on CD; MB received original copy; Had to get another copy - KQ received current copy 5/7/04.
CD not "closed" properly when burned @ Sol.Off. & KQ kept getting runaround from Barry & Bobo
Had to call Will @ I.T. 5/12/04 - he had to do "magic I.T. stuff" to it and gave me another CD w/ the pictures properly burned onto it.
KQ keeping all CDs, tapes, etc. – currently w/ Karen

*** 911 Tape + Dispatch / ORIGINAL, NON-ENHANCED**

MB received earlier than 5/7/04; KQ keeping all CDs, tapes, etc. – currently "checked out" by Doug

WITNESSES / SUBPOENAS
State vs. Marion Lindsey

[redacted]

	WITNESS NAME	RELSHIP	CONTACT INFO	INFO TO BE PROVIDED	IS?	Served dt/by	PHASE	NOTES
SUBPOENAS FOR RECORDS:								
Karen	SPTBG CO SHERIFF'S OFFICE			All recs pr D-V Celeste	Yes	5/14-JL		
Karen	SPTBG City PD			All recs pr D-V Celeste	Yes	5/14-JL		Rec'd recs 5/14
Kara	INMAN City PD			All recs pr D-V Celeste	Yes	5/14-JL		
Karen	SRMC-SR167 RESTORATIVE CARE			LIST - Sept 02 hourly c'ees (for name of boyfriend)	Yes	[redacted]		
LAY WITNESSES:								
Doug	**STEVEN PILGRIM**	Uncle	Archer Rd, Sptbg.	Uncle; signed for his prop @ ER 9/18/02	Yes	5/14-KR		
Doug	**SHARON PILGRIM**	Aunt	Same as above	Close to Nell but knows a lot	Yes	DB		
Doug	**AMY OSBEY**	ACQ.	Inman	Can ID Vs last bf; if find name, need her for anything else?	Yes	[redacted]		Virginia's trying to get in touch w/ her
Doug	**KRISTOPHER WILKINS**	3rd Cousin	Campobello	More like bro; IDs bf's FN= Mike; V alw $-driven; kids=D's 1st prio.; '91 Chpmn-grad; NO CRIM Hx; MY gun; there when V moved out: "situ. DIFF than V's later IR"	Yes	5/15-DB	Maybe BOTH phases	DB met w/ him 5/15/04
Doug	**KENNIA WILKINS**	Cousin						
Mike	**BILL BURTON**	fmr.Spvsr.	Macon GA (MB has?)	Fmr.spvsr@Milliken; mentor/ role model; gun was 4 snakes	N/A – Nonresident			Out-of-State/Volunt.W.
Mike	**BILL BURTON's MOM**	Friend	Glendale (Sptbg.Co.)	We took care of him	N/A – Nonresident			Out-of-State/Volunt.W.
Mike	**DR. HENDERSON**	fmr. Dr.			?			
Doug	**VIRGINIA LINDSEY**	Mother			?			Doug met w/ her & some other family 5/15/04 – did he serve?
Mike	**CALVIN** _____	Brother		Brother; mgr @ BK, Columbus NC	N/A – Nonresident			Out-of-State/Volunt.W.
Doug	**BESSIE SMITH**	Aunt						
Doug	**TONY GREGG**	ACQ.						
Doug	**BETH GREGG**	ACQ.						
Doug	**TIMOTHY SIMS**	Cousin						
Doug	**ALEX** L.	Son						
Doug	**TREY** L.	Son						
Doug	**WAYNE** _____							

EXPERT WITNESSES:								
Mike	**LENORA TOPP,** MITIGATION INVESTIGATOR	EXPERT	**(828) 273-8996 -others in file**	Mitigation	Yes	5/15-DB	Penalty	
Mike	**DR. TORA BRAWLEY** USC FORENSIC NEUROPSYCHIATRIST	EXPERT	**(803) 434-4300 fax: -4351**		?		PT; Pen.	
Mike	**DR. MARGARET MELIKIAN** MUSC FORENSIC NEUROPSYCHIATRIST	EXPERT	**(843) 792-1461**		?		PT; Pen.	
Mike	**DR. JOHN ABSHER** NEUROLOGIST	EXPERT	**(864) 286-8222**		?			
Doug	**ROD TULLIS, ESQ.**							
Doug	**BENJIE STEVENS, ESQ.**		1188 Asheville Hwy. **598-9172**	Family Law std:"= rt-of-access to kids in absence of ct-order"	Yes	5/13-JL		IS THIS PROPER?

Lenora Topp will get list for KQ this weekend so KQ can get subpoenas ready by Monday morning.

State vs. Marion Lindsey
SUMMARY OF STATE'S WITNESSES — MORE TO BE ADDED BY SUPPLEMENTAL NOTICE

I. re: THE INCIDENT

A. Present at Incident:

Law Enforcement:
Officer Harvey Godfrey, IPD
Deputy Guy Carter, SO
Investigator Marc Finley, SO
Deputy Dominick Baird, SO

In Car:
Ruby Nell Lindsey (V) — Keori (child)
Celeste Nesbitt (cousin) — Krisha (child)
Julia Martin (Celeste's mother)

B. Responded to Scene:

Coroner's Office:
Investigator Allison Corcoros
Investigator Alan Mason
Investigator Wendy Alley

EMS / EMT:
Vincent Bell (EMS, Sp.County)
Susan Horton (EMS, Sp.County)
Joseph Stewart (NREMT-P, Inman)

[redacted]

C. Sheriff's Investigation:
Investigator Jason Yown
(Fmr.) Inv. Taylor Gardner
Investigator Tim Tucker
Investigator Richard Gary
Sergeant Tony Brown

D. Experts/Professionals:

David Wren, M.D.	Pathologist, SRMC	performed autopsy
Pratap Naravan, M.D.	Forensic Psychiatrist, W.S.Hall	performed MHE
Jeffrey Musick, Ph.D.	Psychiatrist, W.S. Hall	performed MHE
Greg Rock	SLED – Toxicology Dept.	analyzed V's blood (drugs/alc)
Joe Powell	SLED – Trace Evidence Dept.	analyzed GSR data
Dan DeFreese STIP	SLED – Firearms Dept.	analyzed gun, bullets, casings
Jeff Gaines	U.S. Dept. of Treas. – A.T.F.	traced gun used by Lindsey

E. Other(s) Noticed: Sergeant Raymond Gist, SO — rec'd anon.tip that day re: D

II. re: HIS PRIORS (convictions &/or prior bad acts)

A. Involving Ruby Nell Lindsey as Victim

8-1-1996	Dep. B.E. Johnson	Ruby Nell	cussed; threatened to harm/kill
10-8-1996	Dep. B.E. Johnson	Ruby Nell	pushed/shoved
2-19-1999	Dep. D.C. Fox	Ruby Nell	HS only?; any injuries?
8-21-2000	Dep. W.A. Woodward	Ruby Nell	prevented disturbance during move
PIX 12-1-2001	Dep. Wight, **Celeste Nesbitt**	Ruby Nell	Aplbees;slap(torn shirt/swollen face/red eye)

B. Involving Other Females as Victims

7-2-1995	Deps. Alexander & Baird	Sharon Elder	threats to shoot/harm
2-22-1997	Dep. J.Catto	Stephanie Petty	hit/pushed
7-21-1998	Dep. L.A.Stevenson	Carol Wright	forged ck; p-u/stripped bike
2-5-1999	Deps. Miller & Valentine	Carol Wright	kept m'cycle & ret'd diff. one
3-30-1999	Dep. K.Davis	Stephanie Poates	sold car WOC

C. Involving Males as Victims

DISC 2-20-1994	**Dep.Godfrey (nowIPD)**	StaffordWilkins;JessicaCannon	**ABWIK**	(shot in arm in car) – Pled '96
5-23-2000	Dep. C.Haywood	Terry Lee Reed, Jr.	**Assault**	**(co-D=Leon McDowell)**
1-26-2001	Dep. J.Soukup	**Leon McDowell**	**A&B**	(face/FastPhil's);"hx of packing"
7-29-2002	Dep. M.Cole	**Douglas Durrah (KQ)**	**Lynch'g**	(co-D=Tim Lindsey)

D. Other "Criminal" Incidents

DISC 6-28-2000	Inv. C.Smith, SO	Trafficking Crack	Waccamaw
TAPES 9-14-2000	Inv. C.Smith, SO	Traff.Crack; PW/VC	Denny's (Hwy.290)

III. re: OTHER WITNESSES

A. Lay Witnesses:

Latresse Smith	he's borrowed my car; he told me she won't let him see kids
Annette Schaper	co-worker of V; she told me specific fears/precautions

B. Professional Persons:

_____	SCDC / SCDF	"any prior conduct while in either facility"
_____	DPPPS Agent(s)	"any prior conduct while on probation/parole"
_____	Clerk of Court	"prior convictions"
Jimmy Sligh	SCDC	"prison conditions at DOC"

NOTES:
BARRY ADVISED KQ ADDS ON FRI 6/30/04 THAT THEY'RE AMENDING THE R/W/ITNESS LIST AND WE'D BE GETTING IT SOON, AS WELL AS THE PIX OF THE 1994 ABWIK AND CORONER'S PIX FROM THIS INCIDENT.
AT LEAST ONCE (MAYBE TWICE DURING M/T/W) KQ ASKED BARRY ABOUT THEM. HE'D ALWAYS RESPOND "THEY'RE COMING."
ALL PARTIES DISCUSSED ON THURS (6/24/04) THEY ADVISED DT ADDS 10-15 WITNESSES & SAID "ALL ADDS' DISC COMING."
KQ P/U DISC ON FRI 6/7/04; NOT THERE. KQ MB AVAIL ALL DAY. KQ EVEN CALLED CHRISTINA @ 4:30) – NOTHING.
BARRY ADVISED KQ 2 DIFFERENT TIMES ON MON 6/10/04 THAT HE HAD TO GET ADDL STUFF TO US, BUT NEVER DID.

*** 911 Tape + Dispatch / ENHANCED**

KQ rec'd 5/7/04; KQ keeping all CDs, tapes, etc. – currently "checked out" by Doug

Add Rec'd crime scene video & the 2 cassette tapes w/ D's statement following trafficking arrest

*** Pictures from 1994 ABWIK**

- KQ/DB learned of @ Sol.Off. (4/30/04), & requested copy from BJB
- Made 2nd request @ Sol.Off. Thurs .am (5/6/04) to BJB/Rusty; KQ made 3rd request Thurs. afternoon – BJB: "It's coming"
- KQ p/u other addl req'd disc Fri.am (5/7/04) c.10am–not there, but KQ called Christina Fri. a'noon (KQ/MB at office all a'noon & didn't hear from anyone) – she has "zip". As of 5pm Fri. (5/7/04) – 10th day before trial – still haven't recd it (5pm Sat. either)
- KQ rec'd vm from Rusty 5/11 @ 10am – "has Sptbg Photogr called you about pix?" – didn't rec msg till after 5pm Fri (5/14)

EITHER WAY, THEY COULD'VE PROVIDED PRIOR TO 10d PRE-TRIAL, AND DIDN'T – KQ will try to call on Sat.

*** Coroner's Pictures**

SAME AS 1994 ABWIK PIX, ABOVE
KQ will try to call Spartanburg Photographic on Sat. (5/15/04)

*** Sept.'00 Trafficking-Denny's (Bates-Stamped):**	**05:06:2004**	**0001-0014**	**Pages: 14**	
Lytrell Crump's /w/ stmt (9/15/00 to C.Smith, 1-1:06am) – "liar/dealer"		0001-0002	2	
Pre-Interrogation Waiver form (9/15/00 to Calhoun/Henderson, 12:45am)		0003	1	
Permission to Search form (9/15/00 to Calhoun/Henderson, 2:15am re: car)		0004	1	
PARTIAL I/R w/ notes (C.Smith, 9/14/00)(last 5 #s of Case#: 01230 (not a match)		0005	1	
Narc's Case File Cover Sheet (000602184;000800825;000901229)		0006	1	
Mug Shot printout of Lindsey (dob:		0007	1	
Affidavit for Seizure (C.Smith) – gave us duplic-pg.1, and no pg.2 (affid. part)		0008-0009	2	
Digital pictures (proof pgs) - $$;map;tag;gun;him;Lytrell;interior;Myrone;wheel		0010-0013	4	
John Dodd Rd Storage receipt (largely illegible)		0014	1	// 14 pages

*** Discovery (Bates-Stamped):**	**05:07:2004**	**0001-0042**	**Pages: 42**	
Applebees CDV arrest				
Digital pictures (proof pages)		0001-0002	2	
Drug Charges				
Incident Report (6/28/00 @ Waccamaw, C.Smith)- h/w note:"arr.9/15/00"		0003	1	
Drug Report & Affidavit/Form A (7/21/00, A.Harris) – 10.97g crack		0004-0005	2	
Chain-Form B (CI>narc)(CI=Melvin McCrary, /s/ "Miller", referenced "0.5 oz")		0006	1	
Chain-Form C (narc>drop) - ID's CI as Melvin McCrary; not notarized		0007	1	
Chain-Form C (drop>Lab)		0008	1	
CI's stmt (CI targeted Myrone for $500 crack) – date (6/28/00) /w/ over white-out		0009	1	
Buy Report (doesn't name the seller, and also describes seller as a WM)		0010	1	
Officer's Notes (6/27/00-didn't go)(6/28/00-000602184-no video)		0011-0012	2	
Incident Report (8/17/00 @ NewCut McD's, C.Smith) – arr.9/15/00		0013	1	

*** Discovery rec'd via fax from Rusty 5/12/04:** **Pages: 3**

Copy of a faxed subpoena / records request sent to Chapman HS by Sol. Off.

*** Discovery rec'd 1:00pm (Bates-Stamped):**	**05:14:2004**	**0001-0004**	**Pages: 4**
Safe Homes letters to Nell (month pre-death)		0001-0004	4
ALSO SOME COLOR PHOTOS OF V, V w/ KIDS, ETC.			

*** Discovery rec'd 4:50pm (Bates-Stamped):**	**05:14:2004**	**0001-0017**	**Pages: 17**	
Family Court Protective Order Summons, Petition, Motion, Affidavit		0001-0004	4	
Safe Homes Follow-Up Contacts / Hearing Comments form		0005	1	
Safe Homes Report Form (Victim/Offender/Incident Info)		0006	1	
- she stated they'd been separated for 1-½ years				
Ruby Lindsey's Written Statement – taken @ Sptbg.City 9/12/02		0007-0008	2	
Incident Report (9/12/02, B.McAbee, PSO)		0009-0010	2	
Form for use in Fam.Ct. (prob. by Safe Homes), description of Marion		0011	1	
Incident Report (9/12/02, B.McAbee, PSO) *--duplicate--*		0012-0013	2	
Family Violence Report form (9/12/02, B.McAbee, PSO)		0014	1	
~~2nd Supplemental Notice of Witnesses/Exhibits~~ *--details above --*		0015-0017	3	// 17 pages

OBTAINED BY THE DEFENSE (PD's OFFICE)

* Mental Health Records	From	# Pages: 26
Computerized Med-Recs Patient Face Sheet	2002	1 page
Individual Treatment Plan	2002	1 page
Clinical Assessment Form	2002	5 pages
Clinical Service Notes	2/03–present	9 pages
Physician's Med Orders / Svc Notes	2002	1 page
Physician's Med Orders / Svc Notes	2/03–present	9 pages

* Lifetime Hospital Records (Chronologically)		From	c.Age	# Pages: 104
Birth records, Sptbg. General Hospital		1973	b.	4 pages
ER>	Kerosene ingestion	1975	18m	10 pages
ER>	Fractured elbow	1981	8yo	13 pages
ER>Psych.Wd.	Tylenol OD; Adjmt Disorder	1988	12yo	52 pages
ER>	Car wreck	1989	13yo	2 pages
ER> records	Motorcycle wreck	1989	15yo	2 pages
ER> records	Football injury (jaw)	1990	16yo	2 pages
ER> records	Car wreck (knee/eye-surgery)	1992	18yo	19 pages

* SRMC Records	From	# Pages: xx
	9/02	
	10/02	
	2/03	
	3/03	
	8/03	
	9/03	
	10/03	
	1/04	
	2/04	
	3/04	

OBTAINED BY THE DEFENSE (D.BRANNON)

*** VIDEO from WSPA (Ch.7)**

*** Copy of victim's Lease from Roland Mgmt.**

*** V's water bill records: several paid by Marion**

*** Copy of victim's speeding tickets: paid by Marion**

*** SRMC records**
Victim's e'mt recs (personnel file) – Doug says it's the same stuff we already have

Obtained by Lenora Topp – rec'd 5/14/04
More school recs

PRIOR INCIDENTS (Reverse chronological order / Not limited to incidents involving Marion & Nell) :

Incident Date:	Description of Event:	Reported On:	Case No.:	Suspect(s):	Victim(s):	Officer(s):	Warrants	Disposition	NOTES
				2002 :					
9/18/02	**MURDER; AWIK; AWIK/AWIK; AWIK**	9/18/02	020901218	**Marion Lindsey**	**Ruby Lindsey** Julia Martin Klara & Krisha Ofcr.Godfrey (Celeste Nesbitt)	LOTS & LOTS	H-252531 H-296702 -700; -701 H-296699 -none-	P P P P Dism.	
Arrested 9/17/02 from the incid. on 12/1/01	**ARRESTED** for 12/1/01 Applebees CDV (warr. served)			**NOT A NEW "INCIDENT";** - she has personnel meeting @ SRMC - he's arrested for Applebees b/c she'd told SH ab unsv'd warr. from 12/1 (not coincidental) - Judge Simmons set his bond;"he commented" - he makes bond 9/18, and the rest is history.		Find IR & fill in	***see below***	Find out if it's been to ct since jail. NP'd?	
9/13/02	**BONDS OUT; LEAVES PH. MESSAGES**			NOT SO MUCH AN "INCIDENT" (ie. NOT "REPORTED"), BUT STATE GOT TAPE FROM CAROL WRIGHT FOR TRIAL					
9/12/02	**CDV; PL** @ SRMC (kids)	same	09032602	**Marion Lindsey**	**Ruby Lindsey**	McAbee, PSO	H-084948 H-084949	Find out if it's been to ct since jail. NP'd?	@ **SRMC** – rpt'd 2h later, w/o kids; Rec'd via subp. Suppl. Rpt by Boozer (I told V to go to PD) – it's dated 1/03, txscribed 5/04...
7/30/02	LYNCHING	same	020702151	Marion Lindsey Tim Lindsey 2 adult BMs	Douglas Durrah	Cole, M., SO Gist. R. Martinez, R.	No info	No info yet	KO;REPRS V; SOL WONT CALL TIM;BUT ADJURORS;MARTINEZ BRO; DO HIM
4/6/02	**MIPP**	same	020400353	Latrice Smith	**Ruby Lindsey**	Sanders, S.	DENIED		@ address HE uses; Nell said she was "house-sitting"
				2001 :					
12/1/01	CDV (@ Applebees)	same	011200066	**Marion Lindsey** (Tim Lindsey)	**Ruby Lindsey** (Celeste Nesbitt)	Wight, B.	H-094387	***see above***	**@ Applebees**
1/26/01	CDV	same	010101837	Marion Lindsey	Leon McDowell	Soukup, J, SO Diaz, 488	G-605364	No info yet	"punched ½-brother @ gas station..."
				2000 :					
10/16/00	**HIT & RUN**	same	?	Odell Dowdle	Celeste Nesbitt				Rec'd info via subp.
9/14/00	TRAFF;COC; PFDVC	All were UC buys	000901229	Marion Lindsey (Cynthia Crump)		Smith, C., SO	G-335842 G-335843	b/c all 3 are still pending, **OBJECT!!!** The lesser BOP req'd here viols 5th Am & Other Rights to a Fair Trial later.	All 3 warrants were served 9/14 (on the 3rd incident)
8/11/00	TRAFF;COC		000800825	Marion Lindsey		Smith, C., SO Henderson	G-541979 "held"		
6/28/00	TRAFF;COC		000602184	Marion Lindsey		Smith, C., SO Duncan, Lt.	G-541980 "held"		

PRIOR INCIDENTS (Reverse chronological order / Not limited to incidents involving Marion & Nell) **:**

5/23/00	SIMPLE A&B	5/23/00	000501715	Lead: McDowell Marion Lindsey	Terry Lee Reed	Haywood, SO Farish, V. Gray, J.	G-393490 (self-/s/)	No info yet	
				1999 :					
8/21/99	**DISTURB. PREVENTION**	8/21/99	990801718	**Ruby** had requested assistc in getting her things @ **Marion's** – went "w/o incident"; I/R says he made comments; he denies		Woodward, W.			
3/30/99	BREACH OF TRUST	7/20/99	990701396	Marion Lindsey	Stephanie Poates	Davis, K.	Ck IR	Ck IR	"Kept car after breakup"
2/5/99	UW/WOC (related to the forgery)	2/25/99	990201765	Marion Lindsey	Carol Wright	Miller, M.	None indicated by officer	No info	"He gave the mcycle back but stripped it"
				1998 :					
7/21/98	FORGERY	9/8/99		Marion Lindsey	Carol Wright		Ck IR	Ck IR	"Took my ins-ck & cashed; p/u mcycle & keeping WOC"

Get his NCIC and compare once I get all incident reports logged that I've rec'd

State vs. Marion Lindsey

SUMMARY OF STATE'S WITNESSES MORE TO BE ADDED BY SUPPLEMENTAL NOTICE (R.C.)

I. THE INCIDENT: (8:30pm 9/18/02 INMAN POLICE DEPARTMENT)

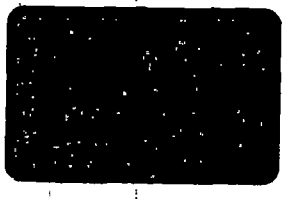
A. Present at Incident:

LAW ENFORCEMENT:

- Off. Harvey **Godfrey** — Inman Police Dept.
- Dep. Guy **Carter** — Sheriff's Office
- Inv. Marc **Finley** — Sheriff's Office
- Dep. Dominick **Baird** — Sheriff's Office

IN CAR:

- (Ruby Nell Lindsey) — Victim
- Celeste Nesbitt — V's cousin
- Julia Martin — Celeste's mother
- Keori — Celeste's child
- Krisha — Celeste's child



B. Responded to Scene:

Coroner's Office:

- Inv. Allison **Corcoros**
- Inv. Alan **Mason**
- Inv. Wendy **Alley**

EMS / EMT:

- Vincent **Bell** — EMS, Sptbg.Co.
- Susan **Horton** — EMS, Sptbg.Co.
- Joseph **Stewart** — NREMT-P, Inman

C. Sheriff's Investigation:

- Inv. Jason **Yown**
- (Fmr) Inv. Taylor **Gardner**
- Inv. Tim **Tucker**
- Inv. Richard **Gary**
- Sgt. Tony **Brown**

D. Experts/Professionals:

David **Wren**, M.D.	(non-For.) Pathologist, SRMC	pfmd **autopsy**	Object! & Suggest Alt Pix	if gross or w/ probe (Phases I,II)
Pratap **Narayan**, M.D.	Forensic Psychiatrist, W.S.Hall	pfmd MHE		
Jeffrey **Musick**, Ph.D.	Psychiatrist, W.S. Hall	pfmd MHE		
Greg **Rock**	SLED – Toxicology Dept.	anlzd **V's blood** (drugs/alc)	Can we object?	It's "0" & we're not putting it in issue...
Joe **Powell**	SLED – Trace Evidence Dept.	anlzd **GSR data**	Should we stipulate?	Why sit thru it if not at issue?
Dan **DeFreese** STIP	SLED – Firearms Dept.	anlzd **gun, bullets, casings**		
Jeff **Gaines**	U.S. Dept. of Treas. – A.T.F.	traced gun D used		

E. Others Noticed:

- Sgt. Raymond **Gist** — Sheriff's Office — rec'd anon.tip 9/18: "D broke into Archer Rd. home looking for gun" (Steve Bonin/Ives Archer)

II. MARION LINDSEY'S PRIORS (INCL. convictions AND prior bad acts):

A. Involving RUBY NELL LINDSEY as "VICTIM" (chronologically):

8-1-1996	Dep. B. **Johnson**	RubyNell = victim	SHE SAID HE . . .	cussed; threatened to harm/kill – NO CHARGE EVER FILED
10-8-1996	Dep. B. **Johnson**	RubyNell = victim	"	pushed/shoved
2-19-1999	Dep. D. **Fox**	RubyNell = victim	"	HS only?; any injuries?
8-21-2000	Dep. W. **Woodward**	RubyNell = victim	"	"prevented disturbance" during move – NO CHARGE EVER FILED (my notes say '99)
Pix 12-1-2001	Dep. **Wight**, Celeste Nesbitt	RubyNell = victim	"	Applique; slap(torn shirt/swollen face/red eye) – ARRESTED 9/17/02 (DAY PRE INCIDENT)

B. Involving Other Females as Victims

7-2-1995	Deps. Alexander & **Baird**	Sharon Elder	threats to shoot/harm
2-22-1997	Dep. J.Catto	Stephanie Petty	hit/pushed
7-21-1998	Dep. L.A.Stevenson	Carol Wright	forged ck; p-u/stripped bike
2-5-1999	Deps. Miller & Valentine	Carol Wright	kept m'cycle & ret'd diff. one
3-30-1999	Dep. K.Davis	Stephanie Poates	sold car WOC

C. Involving Males as Victims

DIGC	2-20-1994	**Dep.Godfrey (nowIPD)**	StaffordWilkins;JessicaCannon	**ABWIK**	(shot in arm in car) – Pled '96
	5-23-2000	Dep. C.Haywood	Terry Lee Reed, Jr.	**Assault**	**(co-D=Leon McDowell)**
	1-26-2001	Dep. J.Soukup	**Leon McDowell**	**A&B**	(face/FastPhil's);"hx of packing"
	7-29-2002	Dep. M.Cole	**Douglas Durrah (KQ)**	**Lynch'g**	(co-D=Tim Lindsey)

D. Other "Criminal" Incidents

DISC/ TAPES	6-28-2000	Inv. C.Smith, SO	Trafficking Crack	Waccamaw
	9-14-2000	Inv. C.Smith, SO	Traff.Crack; PW/VC	Denny's (Hwy.290)

III. OTHER WITNESSES

A. Lay Witnesses:

Latresse Smith	he's borrowed my car; he told me she won't let him see kids
Annette Schaper	co-worker of V; she told me specific fears/precautions

B. Professional Persons:

_____	SCDC / SCDF	"any prior conduct while in either facility"
_____	DPPPS Agent(s)	"any prior conduct while on probation/parole"
_____	Clerk of Court	"prior convictions"
Jimmy Sligh	SCDC	"prison conditions at DOC"

NOTES: BARRY ADVISED KQ-DB ON FRI. 4/30/04 THAT THEY RE AMD GIT HIR W-LIST AND WE'D GET IT SOON AS WELL AS THE PIX OF THE 1994 ABWIK AND CORONER'S PIX FROM THIS INCIDENT. AT LEAST 1X (MAYBE 2X) DURING M/T/W KQ ASKED BB ABOUT THEM. HE D'ALWAYS RESPOND "THEY RE COMING." ALL PARTIES DISCUSSED ON THURS 5/6/04. THEY ADVISED 11 ADDS TO 15 WITNESSES & SAID ALL ADD'L DISC COMING FROM PUBLIC ON FRI (5/7/04). NOT THERE KQ-MB AVAIL ALL DAY. KQ EVEN CALLED CHRISTINA @1430. "NOTHING." BB ADVISED KQ 2 DIFF TIMES ON MON 5/10/04 THAT HE HAD TO GET ADD'L STUFF TO US BUT DIDN'T. ON MONDAY REC'D SUPPL LIST ON WED 5/12 AND A 2ND SUPPL LIST ON FRI 5/14.

DB

State vs. Marion Lindsey
SUMMARY OF STATE'S WITNESSES **MORE TO BE ADDED BY SUPPLEMENTAL NOTICE**

I. THE INCIDENT

A. Present at Incident

Law Enforcement:
Officer Harvey Godfrey, IPD
Deputy Guy Carter, SO
Investigator Marc Finley, SO
Deputy Dominick Baird, SO

In Car:
Ruby Nell Lindsey (V) — Keori (child)
Celeste Nesbitt (cousin) — Krisha (child)
Julia Martin

B. Responded to Scene

Coroner's Office:
Investigator Allison Corcoros
Investigator Alan Mason
Investigator Wendy Alley

EMS / EMT:
Vincent Bell (EMS, Co.)
Susan Horton (EMS, Co.)
Joseph Stewart (NREMT-P, Inman)

C. Sheriff's Investigation

Investigator Jason Yown
(Fmr.) Inv. Taylor Gardner
Investigator Tim Tucker
Investigator Richard Gary
Sergeant Tony Brown

D. Experts/Professionals

David Wren, M.D.	Pathologist, SRMC	performed autopsy
Pratap Narayan, M.D.	Forensic Psychiatrist, W.S.Hall	performed MHE
Jeffrey Musick, Ph.D.	Psychiatrist, W.S. Hall	performed MHE
Greg Rock	SLED – Toxicology Dept.	analyzed V's blood (drugs/alc)
Joe Powell	SLED – Trace Evidence Dept.	analyzed GSR data
Dan DeFreese ***STIP.***	SLED – Firearms Dept.	analyzed gun, bullets, casings
Jeff Gaines	U.S. Dept. of Treas. – A.T.F.	traced gun used by Lindsey

E. Others Noticed

Sgt. Raymond Gist	Sheriff's Office	rec'd anonymous tip same day about D

II. HIS PRIORS (convictions &/or prior bad acts)

A. Involving Victim

8-1-1996	Dep. B.E. Johnson	cussed; threatened to harm/kill
10-8-1996	Dep. B.E. Johnson	pushed/shoved
2-19-1999	Dep. D.C. Fox	HS only?; any injuries?
8-21-2000	Dep. W.A. Woodward	prevented disturbance during move
12-1-2001	Dep. Wight, **Celeste Nesbitt**	Applebees; slap (torn shirt/swollen face/red eye)

B. Involving Other Females

7-2-1995	Deps. Alexander & **Baird**	Sharon Elder	threats to shoot/harm
2-22-1997	Dep. J.Catto	Stephanie Petty	hit/pushed
7-21-1998	Dep. L.A.Stevenson	Carol Wright	forged ck; p-u/stripped bike
2-5-1999	Deps. Miller & Valentine	Carol Wright	kept m'cycle & ret'd diff. one
3-30-1999	Dep. K.Davis	Stephanie Poates	sold car WOC

C. Involving Males

2-20-1994	**Dep.Godfrey (nowIPD)**	Staff.Wilkins;Jess.Cannon	ABWIK (shot in arm in car) – Pled '96
5-23-2000	Dep. C.Haywood	Terry Lee Reed, Jr.	Assault (**co-D=Leon McDowell**)
1-26-2001	Dep. J.Soukup	**Leon McDowell**	A&B(face/FastPhil's);"$h_{(x)}$/packing"
7-29-2002	Dep. M.Cole	**Douglas Durrah (KQ)**	Lynching (co-D=Tim Lindsey)

D. Other Incidents

6-28-2000	Inv. C.Smith, SO	Trafficking Crack	Waccamaw
9-14-2000	Inv. C.Smith, SO	Traff.Crack; PW/VC	Denny's in Duncan

III. OTHER WITNESSES

Lay Witnesses

Latresse Smith	he's borrowed my car; he told me she won't let him see kids
Annette Schaper	co-worker of V; she told me specific fears/precautions

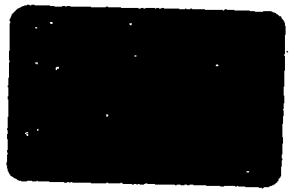
Professional Persons

DOC / SCDF	any prior conduct while in either facility
DPPPS Agent(s)	any prior conduct while on probation/parole
Clerk	prior convictions
Jimmy Sligh, DOC	prison conditions at DOC

DISCOVERY / OTHER INFO & RECORDS

RECEIVED FROM SOLICITOR'S OFFICE

Description	Bates Stamp	Pages	MB/DB/KQ
Notice of Agg. Circs. / Witnesses			Y/N/N
MAKE DB A COPY			
PER BARRY 4/30/04, THERE'S AN AMENDED WITNESS LIST YET TO BE SERVED			
AMENDED Notice of Agg. Circs. / Ws			N/N/N
NEED IT ASAP			
Discovery Packet			Y/N/N
the "GUTS" (warrants, incident reports, statements, autopsy report, SLED reports, etc.)			
Discovery Packet	03-16-2004	0001-0122	Y/N/N
Verified Chain of Custody - SLED		0001-0008	
SCDPPPS doc'n re: 1994 ABWIK		0009-0024	
Victim's resumé		0025	
Certificate of Appointment – Probate		0026	
Application for Death Benefits		0027	
(FYI: employment date 5-20-02)		-	
(FYI: annual salary $15,350.40)		-	
Victim's Personnel File - SRMC		0028-0122	
Property / Evidence Reports	03-18-2004	0001-0006	Y/N/N
Sony 90HF cass.tape (recov. from Carol Wright 9/24/02)		0001	do we have?
2 white shirts from D @ 20 S.Main, Inman 9/19/02		0002	
1 shirt;1 pants;2 sox;2 shoes from D @ SRMC 9/18/02		0003	
1 S.O. VCR tape impounded @ Inman PD 9/18/02		0004	do we have?
1 38cal. live round; 1 projectile from D; 1 projectile;		0005	
5 38cal. spent casings; 4 9mm spent casings			
(recovered by SLED @ scene/hosp. 11/14/02)			
1 small Delta bag; 6 blood samples; 1 control sample;		0006	
5 38 live rounds; 1 piece of window tint			
(recov. by SLED 9/19/02)			
Discovery Packet	04-05-2004	0001-1000	Y/N/N
SCDC records (PRISON)		0001-0095	
SRMC records (HOSPITAL)		0096-0407	
SCDF records (MAIN JAIL)		0408-1000	
State's notebook flagged:			
-0430			
-0441			
-0456			
-0471			
-0501			
Discovery Packet	04-21-2004	0001-0016	Y/N/N
Marion Lindsey's School Records		0001-0016	
CD – Crime Scene / Autopsy Photos			Y/N/N
KQ/DB viewed @ Solicitor's Office 4/30/04 – FIND MB's COPY			
911 tape			Y/N/N
KQ/DB heard @ Solicitor's Office 4/30/04 – FIND MB's COPY			



Pictures from 1994 ABWIK — N/N/N

KQ/DB viewed @ Solicitor's Office 4/30/04 – DO WE NEED TO GET OUR OWN COPY?

Coroner's Pictures — N/N/N

HAVE NOT SEEN – DO WE NEED TO GET A COPY?

OBTAINED BY THE DEFENSE (PD's OFFICE)

Description				MB/DB/KQ
Mental Health Records		**From**	**# Pages: 26**	**Y/N/N**
Computerized Med-Recs Patient Face Sheet		2002	1 page	
Individual Treatment Plan		2002	1 page	
Clinical Assessment Form		2002	5 pages	
Clinical Service Notes		2/03–present	9 pages	
Physician's Med Orders / Svc Notes		2002	1 page	
Physician's Med Orders / Svc Notes		2/03–present	9 pages	
Lifetime Hospital Records (Chronologically)		**From**	**Age: # Pages: 104**	**Y/Y/Y**
Birth records, Sptbg. General Hospital		1973	b. 4 pages	
ER>	Kerosene ingestion	1975	18m 10 pages	
ER>	Fractured elbow	1981	8yo 13 pages	
ER>Psych.Wd.	Tylenol OD; Adjmt Disorder	1988	15yo 52 pages	
ER>	Car wreck	1989	15yo 2 pages	
ER> records	Motorcycle wreck	1989	16yo 2 pages	
ER> records	Football injury (jaw)	1990	16yo 2 pages	
ER> records	Car wreck (knee/eye-surgery)	1992	18yo 19 pages	
SRMC Records		**From**	**# Pages: xx**	**Y/N/Y**
		9/02		
		10/02		
		2/03		
		3/03		
		8/03		
		9/03		
		10/03		
		1/04		
		2/04		
		3/04		

OBTAINED BY THE DEFENSE (D.BRANNON)

VIDEO from WSPA (Ch 7) — From — N/N/Y

DOUG HAS – KQ HAS SEEN

Copy of victim's Lease from Roland Mgmt — N/N/Y

Victim's water bill records — N/N/Y

Copy of victim's speeding tickets — N/N/Y

SRMC records (2) — N/N/Y

ENTIRE JURY PANEL for State vs. Marion Lindsey

Case facts to keep in mind while looking for potential jury:

Victim worked at SRMC / SRHS (Spartanburg Regional Medical Center / Spartanburg Regional Healthcare System)
Victim was well-liked by co-workers and by those in community who knew her
Victim and Defendant had on/off relationship for years; have 2 minor children together; "she's always come back"
At time of incident, victim had been withholding the children from him for approx. 3 weeks, & was seeing someone
Incident was in the city of Inman, within Sptbg. Co., in the parking lot of the Inman Police Dept.
Defendant followed the car victim was in the backseat of, then approached car on foot once at Inman PD
Defendant took 4 shots with revolver, shooting into the back & side windows of that car. All 4 shots hit victim.
Defendant turned gun on self and took a 5th shot (not fatal, obviously)
Inman officer then shot Defendant, who was already on the ground, and unarmed (gun out of his reach)
Officer who shot Defendant fibbed when questioned ("he shot at me"); Investigating officers realized it wasn't true
Officer who shot Defendant had prior knowledge of him; he was arresting officer in Defendant's 1994 ABWIK case
State has 911 tape (enhanced) – victim speaks calmly, hear shots, extended blood-chilling screams from child
State has victim's answering machine tape, with repeated calls/messages from Defendant
Other towns/locations near incident: Campobello; Chapman High School; Landrum

Juror Status, as of May 17, 2004:

[redacted] = "we have some concern" through "absolute conflict"

[redacted] = Sheriff wasn't able to serve; may show up anyway (but we do not have ppwk on most/all of them)

Juror:	Jurors remaining:	Age S/R:	Notes:
3	Shannon G Arrington	27 WF	
4	William T Atkins	50 WM	
6	Michael W Ausberry, Jr.	18 BM	Requested excuse; classes now over
8	Steve B Babb	48 WM	Requested excuse (work); need info
[redacted]	Pamela C Badwell	47 WF	knows V's cousin; attached letter; BAD
10	Dena G Bailey	42 WF	
13	Donald L Banks	41 WM	
14	Jackie D Barham	64 M	
[redacted]	Samuel K Barnwell	54 WM	Kohler 21Y shooting there; USMC E-4
18	Thaddeus A Beck	20 WM	Requested excuse; classes now over
[redacted]	Lori S Bedinton	40	works @ SRMC (know? Heard?)
20	Joseph N Bennett	51 BM	
21	Joshua R Bennett	19 WM	
22	Kimberly A Berry	47 WF	
[redacted]	Betty C Bird		NON-SVC/SHERIFF
[redacted]	Rhonda Y Bird		NON-SVC/SHERIFF
[redacted]	Connie J Blackwell		NON-SVC/SHERIFF
[redacted]	Jesse Boice		NON-SVC/SHERIFF
27	Don J Boyce	40 WM	
28	Sandra L Brady	46 WF	
29	Timothy R Brewton	36 WM	Requested excuse (work); need info
32	Joshua F Brock	25 WM	
[redacted]	Dennis Brown		NON-SVC/SHERIFF
[redacted]	Scott J Brown		NON-SVC/SHERIFF
35	Tommy D Brown	35 WM	
37	Carol S Burdette	33 WF	
[redacted]	Glenn E Burnett		NON-SVC/SHERIFF
39	Lori J Burnett	40 WF	

[redacted]

40	Samantha Butler/Cartee	27 WF	Requested excuse (kids); need info
41	Linda Byard		NON-SVC/SHERIFF
44	Barrie L Calderone	42 WF	Req.exc.(wedding in NY 5/21-26)
45	Otis B Campbell	51 WM	
46	Paula R Calbone		NON-SVC/SHERIFF
48	Kimberly M Carpenter	33 WF	
49	Kevin O Cartledge	29 BM	
50	Candace D Cathcart	26 BF	
51	Alesha M Center	22 WF	
52	Betty L Cochran	60	
53	Leonard F Cogdell	57 WM	
55	Kevin G Cook		NON-SVC/SHERIFF
56	Edward Cooley		NON-SVC/SHERIFF
57	Clara V Copes	51 BF	
59	James R Cottrell	31 WM	
60	James E Creel	46 WM	
61	Travis K Cromer	25 WM	
62	Cesar F Cruz		NON-SVC/SHERIFF
63	Sheril H Cudd	58 WF	
65	Luther M Culpepper	40 WM	
66	Harold L Daniels	60 WM	HAS OPINION - GUILTY - Req.info
67	Shirley E Davis	65 WF	Req.exc(med.) need info;Son convicted-M
68	Michael T Dawson	29 WM	
71	James S Dodd	37 BM	
72	Elizabeth M Donald	35 WF	
74	Cheryl L Dotson	54	
76	Martin K Doyle	54 WM	
77	Ashley Driscoll	20 WF	Requested excuse; classes now over
81	Emma G Ellis	32 BF	
82	Frank L Elmore	41 WM	
84	Dewey L Farrell	57 WM	
85	Stanley F Fields	38 WM	
86	Kenneth J Fields	26 BM	Requested excuse; classes now over
87	Wendy K Fincher	40 WF	
89	Joseph H Floyd	51 WM	
90	Judy D Folk	53 WF	
92	Candy C Fowler	31 WF	
93	Gail L Fowler	57 WF	
95	Linda J Fuller	53 WF	attachment: very familiar w/ case
96	Robin D Gallman	30 BF	non-svc @1st; rec'd Q 5/13
97	Pam L Gardner	54 WF	
100	James B Gedroic	62 WM	
101	James T Gentry	64 WM	
102	Sarah H Gibson Sims	48 BF	
103	Teresa R Gilbert	47 WF	
105	Jane/Jamie Godfrey		NON-SVC/SHERIFF
106	Danny S Gomes	19 WM	Requested excuse; classes now over
107	Shirley A Gosselt		NON-SVC/SHERIFF
109	Melva Graham Martin	31 WF	
110	Leslie Grafton		NON-SVC/SHERIFF
112	Brandon J Greenway	18 WM	
113	Catherine A Grubbs	50 WF	
115	Angela M Haley	35 WF	
117	Amanda J Hamby	18 WF	
118	Rosa L Hammitt	61 WF	
122	Robert D Hensley	36 WM	
123	Leon G Hicks	38 WM	

125	Carole E Hill	60 WF	
126	Elizabeth A Hill	18 WF	Requested excuse; classes now over
127	Todd C Hillstock	21 BM	
128	Benjamin R Hines		NON-SVC/SHERIFF
129	Shirley L Hinson		NON-SVC/SHERIFF
130	Tracy Hollingsworth Powell	24 WF	
132	Anthony L Holman		NON-SVC/SHERIFF
133	John Hovelsrud	48 WM	Requested excuse (work); need info
134	Karla S Howell	39 WF	
135	Donna J Hughes	43 WF	Requested excuse (med.); need info
137	Kylie L Hyder	20 WF	Requested excuse; classes now over
138	Dean T Israel	52 WM	Vacation reservs (5/27–); prob. OK
146	Ricky L Johnson	29 WM	
147	Sophia M Johnson	22 BF	
148	Linda K Jones	56 WF	
149	Benny Keesler		NON-SVC/SHERIFF
151	Matt Kem	37 WM	
152	Betty J Kilpeck		NON-SVC/SHERIFF
153	Jon K Krisher	24 WM	
155	Dorothy Landrum	56 BF	Thinks she knows Lindsey
157	Wilma S Langford	64 WF	
160	Mackenzie A Leake	22 BF	
161	Elaine J Lee	51 WF	
162	Rick Lee	44 WM	
170	Diane K Malev		NON-SVC/SHERIFF
171	Donald L Malone	34 WM	KQ knows; Wife's dad killed by his bro
173	Harold T Marcum	34 WM	
175	Joyce P Martin	43 BF	
176	Miguel A Martinez	49 HM	
179	Larry A Mauldin	55 WM	
180	Justine McAbee		NON-SVC/SHERIFF
185	Shirley McDowell	58 BF	
187	Gary S McHam	55 WM	Requested excuse (work); need info
189	Brent W McKinney	37 WM	
191	John D Medford	35 WM	Requested excuse (work); needs info
192	Dana L Melton	25 WF	
194	Jerlyn M Miller	57 BF	
195	Kathleen C Miller	50 WF	
196	Louis J Miller	__ BM	Requested excuse; need more info
197	Aletha M Misenheimer	53 WF	
199	Laurence D Morda	56 WM	
200	Lynne L Morgan	47 WF	
202	Amanda E Morton	26 WF	
203	Traci Muenzer-Brock	41 WF	
204	Theresa M Nason	52 WF	
205	JoAnn T Netherton	46 WF	Req.Exc.(wk2)-away guests for kid-grad
206	Deborah W Newman	49 WF	
207	Steve Norman		NON-SVC/SHERIFF
208	Thomas N Oliver	23 WM	
210	Gregory W O'Shields		NON-SVC/SHERIFF
212	William D Parnell	52 WM	
213	Rodney C Petty	45 WM	
214	Timothy K Pitts	34 BM	
215	John S Poole	51 WM	Joe knows-VERY conservative
216	Angela A Porter	31 BF	
218	Janet Prasanlack	22 AF	
220	Sheriff cannot locate		

221	Jamie A Puckett	26 WM	
222	Tammy C Queen	39 WF	
223	Donald E Ray	23 WM	
224	Kenneth J Reese	23 WM	
225	Jeffrey A Rhineberger	31 WM	KQ's ex; prob. not good juror anyway
226	Melody M Riddle	19 WF	Requested excuse; classes now over
227	Ronnie H Ridings	48 WM	
228	Timothy J Roberts	44 WM	
229	Regina E Robertson	33 WF	
230	Alonzo M Robinson	43 BM	
232	Kim Rogers	32 BF	
233	Danny R Rollins	51 WM	
234	Victor Roman	W	NON-SVC/SHERIFF
236	Craig C Ruff	40 WM	
238	Anna Rush	W	NON-SVC/SHERIFF
240	Martha J Sallis	55 WF	
242	Shannon D Sanders	19 WF	
243	Lady N Sartor-Norris	23 BF	
246	Tawana N Scott	W	NON-SVC/SHERIFF
247	Jeffrey D Seay	35 WM	
250	Mark P Simmons	32 WM	
253	Brenda H Smith	52 WF	Req exc (work); SL won't consent; BAD
254	Latrice V Black	22 BF	
255	Marvin Smith	37 BM	
256	Matt Smith	_ WM	Maymester guy (no fill out); [redacted] copy editor @ SIL
257	Richard K Smith	46 WM	Requested excuse; classes now over
258	Toni D Smith	39 BF	
260	Ryan Snapp	40 WM	
261	Heather L Snite	19 WF	Req.exc.(heart monitor); need more info
265	Cynthia Stanley	W	NON-SVC/SHERIFF
266	Lynn U Stauber	55 WF	90% medical problems; need info
268	Jami L Sturgeon	34 WF	
269	Tracey A Surrett	40 WF	
270	Lori L Tallent	35 WF	
271	Michael D Taylor	23 WM	
272	Ramniklaw P Thakrar	66 AM	
273	Patricia A Thomas	40 BF	
274	Darcy Thompson	47 BF	
276	Christy M Thorne	W	NON-SVC/SHERIFF
277	Dorothy L Tyner	62 WF	
279	Gary G Tucker	41 WM	
281	Jane V Vellins	62 WF	
282	Sheila M Vlieg	35 WF	
284	Lori Watson	W	NON-SVC/SHERIFF
285	Michael D Weeks	23 WM	
287	Tracy D Whitaker	32 WF	
288	Junie L White	66 WM	owns Exxon/Converse Hts.; knows attys
291	Sherba J Wilkins	49 BF	
292	William Wilkins	W	NON-SVC/SHERIFF
293	Hollie R Williams	55 BM	
294	Isabel Williams	42 BF	Did we excuse?
295	Jeffrey W Williams	23 WM	
297	Thomas A Williams	50 BF	
300	Katherine A Younkin	W	NON-SVC/SHERIFF

EXPERT WITNESSES:

like	**LENORA TOPP,** MITIGATION INVESTIGATOR ✓	EXPERT (10)	**(828) 273-8996 -others in file**	Mitigation	Yes	5/15-DB	Penalty	
like	**DR. TORA BRAWLEY** ~~FORENSIC NEUROPSYCHIATRIST~~ USC	EXPERT	**(803) 434-4300 fax: -4351**	X sent all his stuff to Melikian to do 100 %	?		PT; Pen.	
like	**DR. MARGARET MELIKIAN** MUSC FORENSIC NEUROPSYCHIATRIST	EXPERT (13)	**(843) 792-1461**		?		PT; Pen.	
like	~~**DR. JOHN ABSHER** NEUROLOGIST~~	~~EXPERT~~	**(864) 286-8222**		?			
Doug	**ROD TULLIS, ESQ.** ✓	call						
Doug	~~**BENJIE STEVENS, ESQ.**~~		1188 Asheville Hwy. **598-9172**	Family Law std:"= rt-of-access to kids in absence of ct-order"	Yes	5/13-JL		IS THIS PROPER?

Lenora Topp will get list for KQ this weekend so KQ can get subpoenas ready by Monday morning.

Leon McDowell Sr. ✓ DAD (3)

~~ALLEGRE~~

Ann Howard, MM ✓ (1)

Doris Petty ~~✓~~ not served yet ?

Stephanie Petty ✓ (9)

Robin (5)

MM Ann Howard

Mom Virginia Lindsey

Dad Leon McDowell

MM Bessie Smith

MM Robin Keith

BRO & Claude Lindsey, Sr.

MM Steven Pilgrim

~~MM~~ Sharon Pilgrim

~~Friend~~ Cousin Kris Wilkins

bro ~~Eugene~~ Tim Sims

ex-gf Stephanie Petty

" Lenora Topp

Bill Burton

✓ Dr. Melikian

3090.

E LINDSAY 5/4/09

JUST WANT IT OVER WITH BUT MY LAWYERS KNOW

TYPE OF MAN TO SUPPORT WIFE/KIDS
GAVE HER EVERYTHING,
SOMETIMES MOVE TO (M)'s HOUSE 3 MO
HAVE FLINGS THEN COME BACK
GOT BUSTED DRUGS, # ROUBLES

TRIED TO COMMIT SUICIDE @ 15,16
THEN 2001 HAD GUN PLANNED COUSIN
TALKED ME OUT OF IT
@ END 2001 MOVED IN c (M) INLAW

(W) LEFT 5-6X - WIFE HAVING FLINGS
TELLING THEM WE WERE SEP

1/01 DOING PRETTY WELL. WORKING @
PAINT SHOP THEN BMW

[redacted]

3/18/02 (W) V

(W) SAID LEAVING TAKING KIDS NEVER SEE
AGAIN. MOVED TO COUSINS HOUSE
PLAN TO DRIVE OFF CLIFF - MIGHT
NOT DIE
BOOGED (W)

WROTE SUICIDE LTRS, DONT KNOW WHAT THEY SAID. THEN PLAN SHOOT SELF, COUSIN [redacted] TOOK KEYS, (M)(A)(G)(B) TALK TO (W) BLOCKING #'S ON PHONE OFFERED XANAX CRYING. 225 ↓ 160 # IN 3 WKS GOT IN TOUCH [illegible] (W) @ WORK. TOLD SUICIDE PLAN (W) LAUGHING

ON DAY OF INCIDENT TALK TO LATRICE 2 HRS. DROVE LATRICE CAR'S HOME WOKE UP JUDGE JUDY ON. PLANNED TO GO TO (M) IN (L) & BLOW BRAINS OUT IN FRONT OF. TALKING TO (W)'S COUSIN SAW IMAGE IN BACK, DARK WINDOWS IN CAR. COUSIN DROVE OFF JUST SNAPPED. FOLLOWED THEM, DON'T REM DIDN'T KNOW I HAD SHOT (W) UNTIL EMS TOLD - SHOT 4x, SHOT SELF 1x, POLICE SHOT 4x ASKED AMB DRIVER WHAT HAPPENED TO (W) DIDN'T KNOW SHOT HER EVEN AFTER LEFT HOSP 7 DAYS

SUICIDE WATCH IN JAIL
- TOOK STITCHES OUT
- BANG HEAD ON WALL WHERE SHOT

PICS FROM CALL

ATE 3 TUBES TOOTHPASTE.
DROWN
CHOKE SELF C TOWEL
SUFFOCATE C PILLOW CASE.
STILL DON'T CARE. ONLY REASON GOING ALONG B/C LAWYERS & FAM MAD C ME LIVED FOR WIFE & KIDS
HAPPENED IN PUBLIC PLACE. I AIN'T GONG TO LIVE LONG, WROTE OBIT

ON VPA -
ZYPREXA -

TIRED OF TALKING ABOUT FRIEND JIMMY.

KIDS 2 8yo ALEXANDER
4yo TILANIS ALEXANDER LINUSE
MIDDLE NAME OF DAD
LAST SAW 1 MO PRIOR TO INCIDENT
MGM HAS CUSTODY
KIDS DONT HAVE #. PGM SNUCK TO SCHOOL ON VALENTINES. NOT MUCH FOR XMAS.
NOT GOING TO SCHOOL PAN'S
(M) DEPRESSED SINCE INCIDENT
MOMMA'S BOY, TAKE HER OUT

(B) DROWN 1997 IN LAKE NEVER FOUND BODY. DOTTER B/C OFTEN BOUGHT C (B).

BORN SPARTENBURG 10/10/73
SPARTBURG CO.
BIO (F) 2(B) 1(S) JUST SPERM DONOR
NO ASSOC C UNTIL 16yo

SAME DAD
PAUL LINDSEY 33yo ✝ @ 26yo
CLAUDE LINDSEY 38yo OLDEST (B)
→ INMAN - MGR BURG KING 3 KIDS
TIMOTHY SIMS 19yo
INMAN LIVED C GF & GF'S (M) TWO
VANESSA LINDSEY 35yo ✝ MVA 2yo

(M) DIV MR LINDSEY - HE REMARRIES 5 KIDS
CONSIDER TIMOTHY SIMS BIO (F) AS DAD
(M) DID NOT MARRY ROGER SIMS
SPLIT UP @ 16yo
(M) ALONE SINCE THEN.

LIVED @ HOME UNTIL 22yo
MARRIED RUBYNELL LINDSEY - 10/15/97
WENT TO COURTHOUSE.
1 SON 1995
STARTED SEEING GRACE OTHAL @ 20yo

3094.

EDUC 10TH QUIT, GOT JOB TO HELP (M). NO PROBS IN SCHOOL.
GRADES C, D.
ONLY 2 FIGHTS, REPEATED 1ST GRADE 8TH GRADE.
THINK 1ST & 7TH
SWITCHED SCHOOLS, 9TH GRADE

K - BOILING SPRINGS ELEM
1↓2 REPT 1ST X 2 - SPEECH CLASES, LD.
2↓6 HOUSTON ELEM SPART LD, SPEECH
6↓8 MCCRACKEN JR HIGH
REGT CLASSES
8 MABRY JR HIGH INMAN
9 CHAPMAN HIGH INMAN. REG CLASSES
10 QUIT

EXPELLED - Ø
SUSP MABRY FIGHT X 1
BEST - MATH WORST - SOC STUD

ALL AROUND GUY WHITE/BLACK
WRESTLING @ MCCRACKEN
FOOT BALL @ MCCRACKEN
QUIT 2ND NOBODY TO COME WATCH ME.

DIFF AS CHILD - MADE ME STRIVE HARD TO NOT BE LIKE MY DAD TO MY KIDS.
(E)'S WENT TO DAD'S WEEKEND
MOMMA'S BOY - KEPT HOUSE UP, WATCH YOUNGER (B).

POOR. WASH CLOTHES BY HAND
TAKING CARE OF (M) SINCE 16yo
(M) IS BEST FRIEND.
HAD LOTS OF HATRED TOWARDS DAD.
DID THINGS FOR HIS OTHER CHILDREN.

C 26yo SHOT FELLOW IN SHOULDER.
GOT (F) TO COME TALK TO

1 yr SENTENCE DUTCHMAN CORR
ENDLEE SC, 1996
ADWIK - 2yrs PROB $3000 PAID
ANGER MGMT CLASS.
CUT LOOSE EARLY.

DUS - TICKETING Ø DUI
DRUG CHARGES PENDING - TRAFFICING
SUPPORTING FAMILY. CRACK
INFORMANT SAYS GOT FROM ME
½ oz CRACK FOUND OUT SIDE.

TRAFFIC x 3 CRACK COC - 2000

CDV 1997. WENT TO RUBY HOUSE, SHE TOOK WARRENT BOGUS. DISMISSED CASE

VOLITAL & RUBY – GO TO (M)'S CALL OUT OF BLUE, KIDS WANT TO SEE YOU STILL LOVE HER, IF I COULD EXCHANGE LIFE FOR HER I WOULD. STRIVE TO NOT BE DEAD BEAT DAD. ALWAYS WANTED KIDS TO GROW UP IN FULL HOME = DAD

WISH (M) HAD TOOK ME TO MHR. MOM'S DOC 8-9 MO THINKING ABOUT SUICIDE AT 1ST EVAL GOT UPSET AT 2ND EVAL DR. GOT MAD

ONLY REASON FIGHTING NOW IS FOR FAM & SEE KIDS FOR LAST TIME IF I GET LIFE PENALTY.

MVA 1988 BLACKOUT

STANFORD REESE WILKINS
POSS BF, TRIED TO KILL HIMSELF & HER. SHE GOT HURT
HE & GUYS WERE HARRASING ME @ PAY PHONE. BUT C COUSIN SO LEFT THEN SAW AGAIN.
STOPPED CAR. SHE DON'T WANT YOU LEAVE IT ALONE,
DON'T KNOW HOW MANY TIMES I SHOT. POLICE SAY COURCE. HE BACKED UP, I LEFT. WENT TO POLICE DEPT 4 DAYS IN A ROW DIDN'T HAVE WARRENT. WENT C COUSIN'S (H) SO NOT TREAT ME ROUGH. 2° THEY BOTHERING ME GAVE LESS TIME 2yr SUSP TO 1yr JAIL,

NOT ONE OF THOSE FELONS WHO LIKE JAIL. MISSED LOT OF KIDS LIKE.

IF I COULD A IT I WOULD. EVERYBODY ALWAYS DEPENDED ON ME.
UNDERSTAND NOW JIMMY'S MY ANGEL. CAME TO ME
IF I DIE IT'S MY TIME

SUICIDE NOTES

JIMMY @ 15yo

O.D ON MANY DRUGS. MENTAL INSTITUTION
NEXT TO DUDE THAT LOOKED LIKE MANSON
VOICE CAME TO ME. HE'S MY FRIEND
HAPPY TO HAVE SOMEBODY C ME.
NOT A PSYCHOTIC THING DON'T CARE IF BELIEVE
OR NOT
OLDER GUY, ENCOURAGE ME,
DIFF THAN MY VOICE.
ONE TIME SAID - GO BEAT HIM UP
ONLY ENCOURAGE ME NOT HURT MYSELF
ONLY PERSON I HAD TO COUNT ON
NOW - DOING BETTER NOW.
MOOD SWINGS LOT OF DREAMS PEOPLE SHOOTING
ME. LIKE THAT NIGHT WAKING UP ON
GROUND. HEAR RINGING.

THEY SAID SHOT 4X 38 CAL
1ST CHARGE C SHOOTING @ POLICE
DON'T KNOW TIME LIGHT/DARK
DON'T REM SHOOTING WIFE/SELF
WOKE UP IN PUDDLE
TOLD EMS MAN LET ME DIE

REMEM NOTHING - WOKE UP 7 DAYS LATER
IN HOSP.

3100

TRIED TO BLEED OUT THRU IV ACCESS
TORE 2 TEETH HID HAND IN BED

HOSP → JAIL - SPARTBURG CO JAIL
MEDIMS OK
VISITS FROM (M) (B)'S COUSIN
EVERYBODY BRINGS ME MONEY.

JIMMY PRIOR TO INCIDENT
ONLY ONE WHO WOULD KNOW WOULD
BE CHARLES MANSON LOOKING FELL
TURNED OUT TO BE ALRIGHT FELLOW
ASKED WHO I WAS TALKING TO

MEM ALWAYS BAD - REMEMBER FACES NOT
NAMES

JUST HAD GOTTEN JOB @ BMW FORKLIFT
DRIVER HADN'T STARTED YET
WAS WORKING @ SITEMORE BODY
SHOP PAINTING CARS

BOH 19/0 - NOT BIG BEER DRINKER
CROWN ROYAL,
DRUNK X4 2 HANGOVER
PARTY BDAY
DIDN'T GET PUNISHED 2° HANGOVER

CANN TRIED X2 23YO DIDN'T LIKE
FEEL SLEEPY / TIRED. DON'T
LIKE SMOKING

CIG Ø - DON'T LIKE BUYING FOR (M)

POWDER Ø
CRACK COC - NEVER USED
CARRY MAN MORE THAN TRANSACTION
MAN
PUT (M) THRU SCHOOL. BILLS PAID
1994 - 1999 - 2000 - $15-20K

HEROIN
XTC
PAIN
Ø NEEDLES

Ø DUI NO TROUBLE UNTIL 21/0

WENT TO LAWYER ROD TULLIS
REP SINCE 1994. CDV, TICKET
TALKED W HIM ABOUT GETTING TO
SEE KIDS
WANT TO DO MORE BY KIDS $160/WEEK

ϕ TALK OF SONNY.
NOONE TO THINK I'M WEAK, GOT HISSELF TOGETHER.

ONLY 3 PEOPLE SEE CRY LATTICE LAWYER, CASIN, LAW
-RUBY NEVER SAW CRY-
EVERYBODY ALWAYS DEPENDED ON ME.

16yo- COMMUN CASH WROC STORE
25 JOBS.
GAVE LIST TO LAWYERS & TOPP.

GF's 4x
SISSY COUNTS - 17yo - 6MO
STARTING GROWL & ANOTHER DUDE
1ST BROKEN HEART
STEPHANY PETTY 20yo - 3-4YRS
RUBY GOT PREG. SHE SLEPT & GUY STARTED MESSING & RUBY
TALKED AT & 3 - STAYED & STEPHANIE
MARRIED BUT STOOD BY RUBY.
STEPHANY DOKES - 2 Mo 25yo 32yo &
RUBY CAME BACK.
RUBY - MARRIED.

ϕ OTHER BIG MEN D & COMING

LOVED THAT WOMAN SO MUCH, JUST LOST IT.
TOUGH SO HARD TO BE A FAMILY MAN.
DON'T CARE ABOUT $ CARS HOUSE, ONLY CARE
ABOUT WIFE / KIDS.
B/C (F) & RAISING YOUNGER (B)
ALWAYS MOMMA'S BABY.

Ø OTHER AH F JIMMY.
SAW WIFE'S FACE & INCIDENT. IN WHITE
DRESS,
SOME OF HER ~~FAM~~ MEMBERS IN/AR THREATENED.
(M&M) THREATENED TO SHOOT IF CAME
AROUND 2° SCARED.

Ø WORRIER
STABLE - KEEPING EMOTIONS HID
CHRIS WHIPPLE - COUSIN LIKE (B) CLOSE SINCE 12yo
LIVED & HIM COUPLE TIMES, CONFIDE IN HIM
→ TELL YOU HOW MUCH I LOVED THE KIDS, THEY
NEVER WENT 5. NOT ROUGH KINDA
GUY, IF I GOT IN TROUBLE SOMEBODY
WAS BOTHERING ME.

DAVID BRENNAN.

3104

DP. POLITICS TIME DONT BOTHER ME.

PLEA GUILTY TO ABWIK.
THIS CASE - GET IT OVER W IF GIVE UP
GET TO SEE KIDS EARLIER. OTHER
WAY GO TITLE SYSTEM

IF GOT LIFE - WHAT GOOD TO KIDS?
MIGHT GROW UP TO HATE ME. SOMEBODY
ELSE RAISING MY KIDS THEN I'M
DEADBEAT DAD. LOST EVERYTHING
NO MARK AGAIN.

MOOD - DECENT SORROW 2° TALKING
SLEEPING - OK
SMILING - HOLDING MY PLACE. SHOULD'D DIED
ALREADY. SEE MY KIDS, TALK TO
YOUNGER GUYS.
CHURCH - RIDGEVILLE BAPTIST.
SWITCH TO BLOOMINE CME (BAPT.
OWNS FAMILY 2 CHURCHES.
APPETITE - OK - 160# 172# 231 TODAY
ANHEDONIA - ⊖ TALK TO (PN) EVERYDAY
INTRUSIVE THOUGHTS - "SHOT IN MY DREAMS"
GUILT - LOT WISH I COULD A NOT FOR SELF
USED TO BE INDEPENDENT, NOW HAVE TO MOSTLY FOR KIDS,
DEPEND ON OTHERS.

HOPE? LOOK C FACTS. LIFE OR DEATH ALREADY GOT MY PLAN. IF THERE WAS A WIN LIKE 20-25 YRS WOULD FIGHT. MAYBE HAVE HEARD OURS WILL WAIVE APPEAL IF UP. LOT ON ME, HAM. KIDS

SUICIDE? NOT SUPPOSED TO TAKE OWN LIFE. IF NOT BY MY HAND OK. EVEN IF SET PLAN IN MOTION.

MAY 4, 2004. CHARLESTON,
PRESIDENT ST PSYCH INST RM 104
3/3 DLROW
BUSH → CLINTON → BUSH → OK REAGAN - CARTE
NEWS - TRIAL
STATES - ARIZ, MICH, CA,
COUNTIES - U.S., EDWARDS, DOME, IRAQ, JAIL
APPLE, 1/3
FURN → CHAIR, TABLE
MONEY → COINS → NICKEL PENNY

FAKE C HALL? NO DR. GOT MAD
ASK JIMMY IF WOULD ASK JIMMY
JIMMY NOT HERE NOW? 2 NOT NERVOUS.

DID BEST COULD AS HALL.

3106

⊕ REMORSE

INDEPENDENT PERSON WAS FINE. TRYING TO BE THAT PERFECT GUY, THAT GOOD DAD.

PHYSICAL -X/ BELT 6YO TRYING TO TEACH TO DO THE NASTY C OTHER COUSIN X2 THROWING ROCKS C CAR. OLD WHOOPINS, 10-12 WHOOPINS- Ø PUNCHES, Ø BURNS,

⊕ SEXUAL ABUSE C 8YO MARTHA COX 13YO IN CLUB HOUSE TEACHING SEX DIDN'T LIKE IT. COUSIN DID NEXT DAY TOO.

- 1ST SEX C 15YO 15 PARTNERS Ø MEN Ø ANIMALS, Ø DSS Ø FOSTERCARE - 1° OF HIS FAMILY

- VIOLAT - NOT MUCH Ø KILLER. SAW FRIEND DIE/KILLED LAYING BACKYARD LOOKING C SKY

BEST - FUNNY MAKE PEOPLE LAUGH.

DA XZ C Byo PACKED 2 CANS CORN (SOUP
NO CAN OPENER (A)
SPENT NIGHT C FRIENDS. DID KNOW,
ϕ FIRE
ϕ ANIMAL
NEVER STOLE
ϕ B & E
TRUANT 2-3x YR 14yo STARTED.
ϕ BULLY
ϕ FORCE SEXUAL ACTIVITY
ϕ FIGHT DAUGHT REMARK

ϕ SUPERSTITIONS
SCARED SNAKES. SOME HIGHLIGHTS
ϕ VH,

4x SUICIDE ATTEMPTS
ϕ HOSP - GOT Rx BUT NO REFILL

(B) 5 ϕ LEGAL X TIM DRUGS SELLING CRACK
(ALC) ETOH (A) CRACK ADDICT
(ALC) XZ MH (MA) MH- ϕ HOSP (C) 5-9yo MH
ϕ FAM SUICIDES

LIMITED KNOWLEDGE (E) 5 SIBS

3108

MANIA - LOT STUFF TO DO, HA.

MED HX
MIGRAINES LONG TIMES GIVE HA.
? HTN - NL
? NIDDM - NL

ϕ OTHER MED PROBS.

WORST STUFF THEY'LL SAY C TRIAL
- TX'D HOME BAD ϕ BRUISES T$
- TRIED TO GET AWAY 2 YRS
- DRUG DEALER
- DOG RAN THE STREET

INCARC 2 YRS - THINK UNTIL HAVE HA

ϕ DRUGS THAT DAY. DEDICATED WHOLE LIFE TO SOMETHING THEN LOST WHOLE SENSE OF REALITY.

RECEIVED

MAR -7 2012

SC OFFICE OF
APPELLATE DEFENSE

American Bar Association

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

Revised Edition
February 2003



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Only the text of the black-letter guidelines has been formally approved by the American Bar Association House of Delegates as official policy. Although it does not express the formal position of the American Bar Association, the commentary serves as useful explanation of the black-letter Guidelines. The text of the commentary published herein is the final version, which was officially released by the ABA on October 24, 2003. It supersedes all prior drafts which had been distributed for informational purposes.

Acknowledgments

The American Bar Association gratefully acknowledges the assistance of the members of the Advisory Committee and others who contributed valuable insight and expertise to this endeavor: Barry Alberts, private practitioner, Schiff Hardin & Waite, Chicago, Illinois (Representative from ABA Section of Litigation); Sylvia Bacon, Judge (Retired), Superior Court of the District of Columbia, Washington, D.C. (Representative from ABA Criminal Justice Section); Stephen B. Bright, Director, Southern Center for Human Rights, Atlanta, Georgia (Representative from National Association of Criminal Defense Lawyers); David I. Bruck, private practitioner, Columbia, South Carolina (Representative from Federal Death Penalty Resource Counsel); Mardi Crawford, Staff Attorney, New York State Defenders Association, Albany, New York; Lawrence J. Fox, private practitioner, Drinker Biddle & Reath LLP, Philadelphia, Pennsylvania (Chair, ABA Special Committee on Death Penalty Representation); Stephen K. Harper, Co-coordinator, Capital Litigation Unit, Miami-Dade County Public Defender's Office, Miami, Florida (Representative from National Legal Aid and Defender Association); Randy Hertz, Professor of Law, New York University School of Law, New York, New York; Henderson Hill, private practitioner, Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., Charlotte, North Carolina (Representative from ABA Special Committee on Death Penalty Representation); Denise LeBoeuf, Director, Capital Post-conviction Project of Louisiana, New Orleans, Louisiana; Norman Lefstein, Professor of Law and Dean Emeritus, Indiana University School of Law, Indianapolis, Indiana; Margaret Love, of counsel, Asbill Moffitt & Boss, Chartered, Washington, D.C.; Jill Miller, Forensic Social

Worker, Madison, Wisconsin; L. Jonathan Ross, private practitioner, Wiggin & Nourie, P.A., Manchester, New Hampshire (Chair, ABA Standing Committee on Legal Aid and Indigent Defendants); Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York; Randolph Stone, Professor of Law, University of Chicago School of Law, Chicago, Illinois (Representative from ABA Standing Committee on Legal Aid and Indigent Defendants); Ronald J. Tabak, private practitioner, Skadden, Arps, Slate, Meagher & Flom LLP, New York, New York (Representative from ABA Section of Individual Rights and Responsibilities); Scott Wallace, Director, Defender Legal Services, National Legal Aid and Defender Association, Washington, D.C.; and Denise Young, private practitioner, Tucson, Arizona (Representative from Habeas Assistance and Training Project).

The following ABA staff and ABA entities participated in this project: Terry Brooks; Rebecca Coffee; Shubhangi Deoras; Judith Gallant; Robin Maher; Melanie Mays; Elisabeth Semel; the Association of the Bar of the City of New York; Criminal Justice Section; the Special Committee on Death Penalty Representation; the Section of Individual Rights and Responsibilities; the Standing Committee on Legal Aid and Indigent Defendants; the Section of Litigation; and the Senior Lawyers Division.

Finally, the ABA thanks Raoul Schonemann, Chris Spaulding, and Janice Bergmann, who served as consultants to this project, and expresses its special appreciation to the Reporter, Eric M. Freedman, Professor of Law, Hofstra University School of Law, Hempstead, New York.

INTRODUCTION

This revised edition of the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* is the product of a two-year long drafting effort. In April 2001, the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation jointly sponsored the ABA Death Penalty Guidelines Revision Project to update the Guidelines, which were originally adopted by the ABA House of Delegates in 1989. An Advisory Committee of experts was recruited to review and identify necessary revisions, including representatives from the following ABA and outside entities: ABA Criminal Justice Section; ABA Section of Litigation; ABA Section on Individual Rights and Responsibilities; ABA Standing Committee on Legal Aid and Indigent Defendants; ABA Special Committee on Death Penalty Representation; National Association of Criminal Defense Lawyers; National Legal Aid and Defender Association; Federal Death Penalty Resource Counsel; Habeas Assistance and Training Counsel; and State Capital Defenders Association.

Expert capital litigators were retained as consultants to the ABA Death Penalty Guidelines Revision Project to incorporate the decisions of the Advisory Committee into preliminary drafts of revisions. Drafts were considered by Advisory Committee members during several day-long meetings in Washington, D.C. as well as follow-up discussions. The final working draft of the revisions was approved by the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. The ABA House of Delegates approved the revised edition of the Guidelines on February 10, 2003.

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GUIDELINE 1.1—OBJECTIVE AND SCOPE OF GUIDELINES

A. The objective of these Guidelines is to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.

B. These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation.

Definitional Notes

Throughout these Guidelines:

1. As in the first edition, "should" is used as a mandatory term.

2. By "jurisdiction" is meant the government under whose legal authority the death sentence is to be imposed. Most commonly, this will be a state (as opposed to, e.g., a county) or the federal government as a whole. The term also includes the military and any other relevant unit of government (e.g., Commonwealth, Territory). Where a federal judicial district or circuit is meant, the commentary will so state.

3. The terms "counsel," "attorney," and "lawyer" apply to all attorneys, whether appointed, retained, acting pro bono, or employed by any defender organization (e.g., federal or state public defenders offices, resource centers), who act on behalf of the defendant in a capital case. When modified by "private," these terms apply to both *pro bono* and retained attorneys.

4. The term "custody" is used in the inclusive sense of *Hensley v. Municipal Court*, 411 U.S. 345, 350-51 (1973).

5. The term "post-conviction" is a general one, including (a) all stages of direct appeal within the jurisdiction and certiorari, (b) all stages of state collateral review proceedings (however denominated under state law) and certiorari, (c) all stages of federal collateral review proceedings, however denominated (ordinarily petitions for writs of habeas corpus or motions pursuant to 28 U.S.C. § 2255, but including all applications of similar purport, e.g., for writ of error coram nobis), and including all applications for action by the Courts of Appeals or the United States Supreme Court (commonly certiorari, but also, e.g., applications for original writs of habeas corpus, applications for certificates of probable cause), all applications for interlocutory relief (e.g., stay of execution, appointment of counsel) in connection with any of the foregoing, and (d) all requests, in any form, for pardons, reprieves, commutations, or similar relief made to executive officials, and all applications to administrative or judicial bodies in connection with such requests. If a particular subcategory of post-conviction proceeding is meant, the language of the relevant Guideline or commentary will so state.

6. The terms "defendant," "petitioner," "inmate," "accused," and "client" are used interchangeably.

7. The terms "capital case" and "death penalty case," are used interchangeably.

8. The terms "defender organization," "Independent Authority" and "Responsible Agency" are defined in Guideline 3.1 and accompanying commentary.

9. The term "Legal Representation Plan" is defined in Guideline 2.1.

History of Guideline

The commentary to the original edition of this Guideline stated that it was designed to express existing "practice norms and constitutional requirements." This thought has been moved to the black letter in order to emphasize that these Guidelines are not aspirational. Instead, they embody the current consensus about what is required to provide effective defense representation in capital cases.

The first edition of this Guideline stated that the objective in providing counsel in death penalty cases should be to ensure the provision of "quality legal representation." The language has been amended to call for "high quality legal representation" to emphasize that, because of the extraordinary complexity and demands of capital cases, a significantly greater degree of skill and experience on the part of defense counsel is required than in a noncapital case.

The Guidelines formerly covered only "defendants eligible for appointment of counsel." Their scope has been revised for this edition to cover "all persons facing the possible imposition or execution of a death sentence." The purpose of the change is to make clear that the obligations of these Guidelines are applicable in all capital cases, including those in which counsel is retained or representation is provided on a pro bono basis. The definition of "counsel" reflects this change.

The use of the term "jurisdiction" as now defined has the effect of broadening the range of proceedings covered. In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.

In accordance with the same policy, the words "from the moment the client is taken into custody" have been added to make explicit that these Guidelines also apply to circumstances in which an uncharged prisoner who might face the death penalty is denied access to counsel seeking to act on his or her behalf (e.g., by the federal government invoking national security, or by state authorities exceeding constitutional limitations). This language replaces phraseology in the former Guidelines which made them applicable to "cases in which the death penalty is sought." The period between an arrest or detention and the prosecutor's declaration of intent to seek the death penalty is often critically important. In addition to enabling counsel to counsel his or her client and to obtain information regarding guilt that may later become unavailable, effective advocacy by defense counsel during this period may persuade the prosecution not to seek the death penalty. Thus, it is imperative that counsel begin investigating mitigating evidence and assembling the defense team as early as possible—well before the prosecution has actually determined that the death penalty will be sought.

These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought. The case remains subject to these Guidelines until the imposition

of the death penalty is no longer a legal possibility. In addition, as more fully described in the commentary, these Guidelines also recognize that capital defense counsel may be required to pursue related litigation on the client's behalf.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(c) & cmt. ("The Function of Defense Counsel in Capital Cases"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.1 (3d ed. 1992) ("Objective").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 cmt. (3d ed. 1992) ("Systems for Legal Representation").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.1 (3d ed. 1992) ("Initial Provision of Counsel").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.2 (3d ed. 1992) ("Duration of Representation").

ABA House of Delegates Resolution 8C (adopted Feb. 5, 2002).

Commentary

Introduction

In 1932, Mr. Justice Sutherland, writing for the United States Supreme Court in *Powell v. Alabama*,[1] a death penalty case, acknowledged that a person facing criminal charges "requires the guiding hand of counsel at every step in the proceedings against him."[2]

1. 287 U.S. 45 (1932).
2. *Id.* at 69.

More than seventy years later, death penalty cases have become so specialized that defense counsel have duties and functions definably different from those of counsel in ordinary criminal cases.[3]

The quality of counsel's "guiding hand" in modern capital cases is crucial to ensuring a reliable determination of guilt and the imposition of an appropriate sentence. Today, it is universally accepted that the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles, scientific developments, and psychological concerns. Counsel must be able to develop and implement advocacy strategies applying existing rules in the pressure-filled environment of high-stakes, complex litigation, as well as anticipate changes in the law that might eventually result in the appellate reversal of an unfavorable judgment.

As one writer has explained:

> Every task ordinarily performed in the representation of a criminal defendant is more difficult and time-consuming when the defendant is facing execution. The responsibilities thrust upon defense counsel in a capital case carry with them psychological and emotional pressures unknown elsewhere in the law. In addition, defending a capital case is an intellectually rigorous enterprise, requiring command of the rules unique to capital litigation and constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law.[4]

Due to the extraordinary and irrevocable nature of the penalty, at every stage of the proceedings counsel must make "extraordinary efforts on behalf of the accused."[5] As discussed *infra* in the text accompanying notes 230-31, these efforts may need to include litigation or administrative advocacy outside the confines of the capital case itself

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3. *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) (noting the uniqueness and complexity of death penalty jurisprudence); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 303-04 (1983); *see generally* Andrea D. Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 MERCER L. REV. 695 (1990); Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. ILL. L. REV. 323 (1993).

4. Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 357-58 (1995) (footnote omitted).

5. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION, Standard 4-1.2(c), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

(e.g., pursuit of information through a state open records law,[6] administrative proceedings to obtain or correct a military record, a collateral attack to invalidate a predicate conviction,[7] litigation of a systemic challenge to the jury selection procedures of a jurisdiction or district,[8] or to a jurisdiction's clemency process).[9]

Structure of the Guidelines

This commentary provides a general overview of the areas in which counsel must be prepared to perform effectively and be given appropriate governmental support in doing so. These areas are addressed more specifically in subsequent Guidelines and commentaries. While there is some inevitable overlap, Guidelines 1.1–10.1 contain primarily principles and policies that should guide jurisdictions in creating a system for the delivery of defense services in capital cases, and Guidelines 10.2-10.15.2 contain primarily performance standards defining the duties of counsel handling those cases.

Representation at Trial

Trial attorneys in death penalty cases must be able to apply sophisticated jury selection techniques, including rehabilitation of venire members who initially state opposition to the death penalty and demonstration of bias on the part of prospective jurors who will automatically vote to impose the death penalty if the defendant is convicted on the capital charge.[10] Counsel must be experienced in the utilization of expert witnesses and evidence, such as psychiatric and forensic evidence, and must be able to challenge zealously the prosecution's evidence and experts through effective cross-examination.[11]

6. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467, 526 (1991) (Marshall, J., dissenting) (involving successor federal habeas corpus petition based on documents released as a result of new interpretation of Georgia Open Records Act by Georgia Supreme Court).

7. For example, the defendant prevailed in *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (disallowing use of prior conviction used in aggravation) only after the same pro bono counsel successfully litigated *People v. Johnson*, 506 N.E. 1177, 1178 (N.Y. 1987) (vacating that conviction). *See infra* text accompanying note 22.

8. *Cf.* Amadeo v. Zant, 486 U.S. 214, 219 (1988) (involving federal habeas corpus petitioner who succeeded on jury discrimination claim whose factual predicate was discovered in independent litigation against the county).

9. *See infra* text accompanying notes 65-66.

10. *See infra* Guideline 10.10.2.

11. *See infra* Guideline 5.1.

An attorney representing the accused in a death penalty case must fully investigate the relevant facts. Because counsel faces what are effectively two different trials—one regarding whether the defendant is guilty of a capital crime, and the other concerning whether the defendant should be sentenced to death[12]—providing quality representation in capital cases requires counsel to undertake correspondingly broad investigation and preparation. 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.[13] 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.[14] Comprehensive pretrial investigation is a necessary prerequisite to enable counsel to negotiate a plea that will allow the defendant to serve a lesser sentence,[15] to persuade the prosecution to forego seeking a death sentence at trial, or to uncover facts that will make the client legally ineligible for the death penalty.[16] At the same time, counsel must

12. *See* Bullington v. Missouri, 451 U.S. 430, 438-46 (1981); Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *Legislative Modification of Federal Habeas Corpus in Capital Cases*, 44 REC. ASS'N OF THE BAR OF CITY OF N.Y. 848, 854 (1989) [hereinafter *Legislative Modification*].

> [For a lawyer], taking on such a case means making a commitment to the full legal and factual evaluation of two very different proceedings (guilt and sentencing) in circumstances where the client is likely to be the subject of intense public hostility, where the state has devoted maximum resources to the prosecution, and where one must endure the draining emotional effects of one's personal responsibility for the outcome.

Id.

13. *See infra* text accompanying notes 160-65; *see also* Wiggins v. Smith, 123 S. Ct. 2572 (2003) (holding counsel ineffective on basis of inadequate mitigation investigation; although counsel did arrange psychological testing for client and obtain some government records they thereby "acquired only rudimentary knowledge of his history from a narrow set of sources"); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (notwithstanding fact that trial counsel "competently handled the guilt phase of the trial," counsel's failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *id.* at 415 (O'Connor, J., concurring) ("counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances" amounted to ineffective assistance of counsel); ABA STANDARDS FOR CRIMINAL JUSTICE: Standard 4-4.1(a), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.")

14. *See infra* Guideline 10.4(C)(2) and accompanying commentary.

15. *See infra* Guidelines 10.9.1, 10.9.2.

16. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (mental retardation).

consciously work to establish the special rapport with the client that will be necessary for a productive professional relationship over an extended period of stress.[17]

With respect to the guilt/innocence phase, defense counsel must independently investigate the circumstances of the crime and all evidence—whether testimonial, forensic, or otherwise—purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. As more fully described *infra* in the text accompanying notes 195-204, the defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses—ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home).

Moreover, trial counsel must coordinate and integrate the presentation during the guilt phase of the trial with the projected strategy for seeking a non-death sentence at the penalty phase.[18]

At that phase, defense counsel must both rebut the prosecution's case in favor of the death penalty and affirmatively present the best possible case in favor of a sentence other than death.[19]

If the defendant has any prior criminal history, the prosecution can be expected to attempt to offer it in support of a death sentence. Defense counsel accordingly must comprehensively investigate—together with the defense investigator, a mitigation specialist, and other members of the defense team—the defendant's behavior and the circumstances of the

17. *See infra* Guideline 10.5 and accompanying commentary.

18. *See infra* Guideline 10.10.1 and accompanying commentary; *see also* Stephen B. Bright, *Developing Themes in Closing Argument and Elsewhere: Lessons from Capital Cases*, LITIG., Fall 2000, at 40; Lyon, *supra* note 3, at 708-11; Mary Ann Tally, *Integrating Theories for Capital Trials: Developing the Theory of Life*, THE CHAMPION, Nov. 1998, at 34.

19. *See infra* Guideline 10.11 and accompanying commentary.

conviction.[20] Only then can counsel protect the accused's Fourteenth Amendment right to deny or rebut factual allegations made by the prosecution in support of a death sentence,[21] and the client's Eighth Amendment right not to be sentenced to death based on prior convictions obtained in violation of his constitutional rights.[22]

If uncharged prior misconduct is arguably admissible, defense counsel must assume that the prosecution will attempt to introduce it, and accordingly must thoroughly investigate it as an integral part of preparing for the penalty phase.[23]

Along with preparing to counter the prosecution's case for the death penalty, defense counsel must develop an affirmative case for sparing the defendant's life.[24] A capital defendant has an unqualified right to present any facet of his character, background, or record that might call for a sentence less than death.[25] This Eighth Amendment right to offer mitigating evidence "does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those 'compassionate or mitigating factors stemming from the diverse frailties of humankind.'"[26] Nor will the presentation be persuasive unless it (a) is consistent with that made by the defense at the guilt phase and (b) links the evidence offered in mitigation to the specific circumstances of the client.[27]

Finally, trial counsel, like counsel throughout the process, must raise every legal claim that may ultimately prove meritorious, lest default doctrines later bar its assertion.

> [T]he courts have shown a remarkable lack of solicitude for prisoners—including ones executed as a result—whose attorneys

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20. *See infra* text accompanying notes 222, 301-02.

21. *See, e.g.*, Simmons v. South Carolina, 512 U.S. 154, 160-61 (1994); Gardner v. Florida, 430 U.S. 349, 362 (1977).

22. *See* Johnson v. Mississippi, 486 U.S. 578, 587-88 (1988). Counsel's obligation to prevent the prosecution from using unconstitutionally obtained prior convictions in support of a death sentence, noted *infra* in the text accompanying note 222, may well require counsel to litigate collateral challenges to such prior convictions in the jurisdictions or districts where those convictions were obtained. *See, e.g.*, Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001).

23. *See infra* text accompanying notes 223, 300.

24. *See infra* text accompanying notes 277-92.

25. *See* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion); *infra* text accompanying note 277.

26. Louis D. Bilionis & Richard A. Rosen, *Lawyers, Arbitrariness, and the Eighth Amendment*, 75 TEX. L. REV. 1301, 1316 (1997) (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, & Stevens, JJ.)).

27. *See infra* Guideline 10.11 and accompanying commentary.

> through no fault of the prisoners were not sufficiently versed in the law to . . . consider the possibility that a claim long rejected by local, state, and federal courts nonetheless might succeed in the future or in a higher court.[28]

The commentary to the first edition of this Guideline noted that "many indigent capital defendants are not receiving the assistance of a lawyer sufficiently skilled in practice to render quality assistance" and supported the statement with numerous examples. The situation is no better today.[29] Indeed, problems with the quality of defense representation in death penalty cases have been so profound and pervasive that several Supreme Court Justices have openly expressed concern. Justice Ginsburg told a public audience that she had "yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented

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28. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 11.2(a), at 482 (4th ed. 2001). Thus, for example, within a single week in the spring of 2002, the Supreme Court rendered two major rulings favorable to capital defendants. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that the Constitution bars execution of mentally retarded individuals); Ring v. Arizona, 536 U.S. 584, 608 (2002) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to capital cases). In both cases, the Court squarely overruled governing precedent. *See* Penry v. Lynaugh, 492 U.S. 302, 340 (1989) (holding that the Constitution does not bar the execution of mentally retarded individuals); Walton v. Arizona, 497 U.S. 639, 649-51 (1990) (upholding same statute later invalidated in *Ring* against same challenge); Apprendi v. New Jersey, 530 U.S. 466, 496 (2000) (stating that *Walton* remained good law). It would have been appropriate (and indeed, some Justices might believe, required on pain of forfeiture) for capital counsel to assert these claims at every stage in the proceedings, even though they were then plainly at odds with the governing law. *See infra* Guideline 10.8 and accompanying commentary. One current example is the potential categorical unconstitutionality of the execution of juveniles. In light of a growing body of scientific evidence regarding the diminished culpability of juveniles, Eighth Amendment considerations, and international laws and treaties forbidding the execution for crimes committed while under the age of eighteen, four current Justices have suggested that the Court should absolutely bar the execution of such offenders. *See In re* Stanford, 123 S. Ct. 472, 475 (2002) (Stevens, Souter, Breyer, Ginsburg, JJ., dissenting). Counsel would be remiss not to assert the claim, notwithstanding that the Court has previously rejected it. *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989); Simmons v. Roper, 2003 Mo. LEXIS 123, at *2-4 (Mo., Aug. 26, 2003) (vacating death sentence of defendant who was seventeen at the time of crime on the basis that "the Supreme Court would today hold such executions are prohibited by the Eighth and Fourteenth Amendments"). Similar examples are discussed *infra* at notes 231, 271, 276, 307, 352).

29. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2102-10 (2000); Spec. Comm. on Capital Representation & Comm. on Civ. Rts., Ass'n of the Bar of the City of N.Y., *The Crisis in Capital Representation*, 51 REC. OF ASS'N OF THE BAR OF CITY OF N.Y. 169, 185-87 (1996) [hereinafter *Crisis in Capital Representation*]; Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the* Strickland *Prejudice Requirement*, 75 NEB. L. REV. 425, 428-34 (1996); *see also infra* note 155; *see generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Notes, *The Eighth Amendment and Ineffective Assistance of Counsel in Capital Trials*, 107 HARV. L. REV. 1923 (1994).

at trial" and that "people who are well represented at trial do not get the death penalty."[30] Similarly, Justice O'Connor expressed concern that the system "may well be allowing some innocent defendants to be executed" and suggested that "[p]erhaps it's time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used."[31] As Justice Breyer has said, "the inadequacy of representation in capital cases" is "a fact that aggravates the other failings" of the death penalty system as a whole.[32]

In the past, post-conviction review has often been relied upon to identify and correct untrustworthy verdicts.[33] However, legal changes in the habeas corpus regime,[34] combined with Congress' defunding of post-conviction defender organizations ("PCDOs") in 1995,[35] make it less

30. Anne Gearan, *Supreme Court Justice Supports Death Penalty Moratorium*, ASSOCIATED PRESS, Apr. 10, 2001.

31. Crystal Nix Hines, *Lack of Lawyers Hinders Appeals in Capital Cases*, N.Y. TIMES, July 5, 2001, at A1 (quoting Justice Sandra Day O'Connor).

32. *See Ring*, 536 U.S. at 618 (Breyer, J., concurring). The "failings" to which Justice Breyer refers are many of the same ones that led the ABA to call for a moratorium on the imposition of the death penalty. *See* ABA, REPORT ACCOMPANYING RECOMMENDATION 107, 3 (1997), *available at* www.abanet.org/moratorium/resolution.html ("Today, administration of the death penalty, far from being fair and consistent, is instead a haphazard maze of unfair practices with no internal consistency.").

33. *See* ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY 147-48 (2001) (listing numerous modern examples of injustices in capital cases redressed on federal habeas corpus); HERTZ & LIEBMAN, *supra* note 28, § 11.2(c) (same).

34. In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("the AEDPA"), which imposed substantial restrictions on the availability of federal habeas corpus for state prisoners. The AEDPA established strict deadlines for the filing of a federal habeas petition, limits on the scope of review of state court decisions, restrictions on the availability of evidentiary hearings to develop facts in support of constitutional claims, and placed stringent constraints on federal courts' consideration of additional applications for review by the petitioner. *See generally* 28 U.S.C. §§ 2244-2255, 2261-2264 (2000). There is significant cause for concern that these provisions may "greatly diminish the reliability of the capital system's review process and of the capital verdicts that the system produces." James S. Liebman, *An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 BROOK. L. REV. 411, 427 (2001); *see also* ABA Panel Discussion, *Dead Man Walking Without Due Process? A Discussion of the Anti-Terrorism and Effective Death Penalty Act of 1996*, 23 N.Y.U. REV. L. & SOC. CHANGE 163, 168-86 (1997); Marshall J. Hartman & Jeanette Nyden, *Habeas Corpus and the New Federalism After the Anti-Terrorism and Effective Death Penalty Act of 1996*, 30 J. MARSHALL L. REV. 337, 387 (1997); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 386-93 (1996). One reason for this concern is that portions of the legislation seemed to reduce the level of scrutiny that the federal courts could give to state capital convictions. *See* § 2254 (d)-(e) (providing that writ may not be granted unless state proceedings resulted in a decision that "was contrary to, or involved an unreasonable application of, clearly established Federal law," or "was based on an unreasonable determination of the facts").

35. *See Crisis in Capital Representation*, *supra* note 29, at 200-05 (presenting state-by-state analysis of impact of defunding of PCDOs); Roscoe C. Howard, Jr., *The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 865

likely that such traditional "fail safes" will continue to operate properly in the future. Under the standards set out by the Supreme Court for reviewing claims of ineffective assistance of counsel,[36] even seriously deficient performance all too rarely leads to reversal.[37] Hence, jurisdictions that continue to impose the death penalty must commit the substantial resources necessary to ensure effective representation at the trial stage.[38] In mandating the provision of high quality legal representation at the trial level of a capital case, this Guideline recognizes the simple truth that any other course has weighty costs—to be paid in money and delay if cases are reversed at later stages or in injustice if they are not.

Post-conviction Review

Ensuring high quality legal representation in capital trials, however, does not diminish the need for equally effective representation on appeal, in state and federal post-conviction proceedings, and in applications for executive clemency. Because each of those proceedings has a unique role to play in the capital process, because both legal and social norms commonly evolve over the course of a case, and because of

(1996) (emphasizing the important role that the former PCDOs played in assuring fairness in habeas corpus review of capital convictions); *see also* Ronald J. Tabak, *Capital Punishment: Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 540-43 (1996).

36. *See* Strickland v. Washington, 466 U.S. 668, 687 (1984).

37. *See* McFarland v. Scott, 512 U.S. 1256, 1259 (1994) (Blackmun, J., dissenting) ("Ten years after the articulation of [the *Strickland*] standard, practical experience establishes that the *Strickland* test, in application, has failed to protect a defendant's right to be represented by something more than 'a person who happens to be a lawyer.'") (quoting Strickland v. Washington, 466 U.S. 668, 685 (1984)); Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1465 (2003) ("[T]he ruling has proved disabling to the right to effective assistance of counsel in practice."); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 346 (2002) ("[A]ll who have seriously considered the question agree that *Strickland* has not worked either to prevent miscarriages of justice or to improve attorney performance."); William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 94 (1995) ("*Strickland* has been roundly and properly criticized for fostering tolerance of abysmal lawyering."); *Legislative Modification*, *supra* note 12 at 862 n.28 (criticizing "the strong presumptions of attorney effectiveness mandated by *Strickland*" as applied to capital cases, and urging that "[w]hatever benefits counter-factual presumptions may have in other areas of the law, they are certainly out of place when a human life hangs in the balance"); *infra* note 155.

38. *See, e.g.*, REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 177, 179 (Apr. 15, 2002), *available at* http://www.idoc.state.il.us/ccp/ccp/reports/commission-report/index.html (recommending that the Illinois legislature "significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases," including the full funding of the defense, which "should significantly improve the quality of defense representation of capital defendants").

"the general tendency of evidence of innocence to emerge only at a relatively late stage in capital proceedings,"[39] jurisdictions that retain capital punishment must provide representation in accordance with the standards of these Guidelines, as outlined in Subsection B, "at all stages of the case." Post-judgment proceedings demand a high degree of technical proficiency, and the skills essential to effective representation differ in significant ways from those necessary to succeed at trial. In addition, death penalty cases at the post-conviction stage may be subject to rules that provide less time for preparation than is available in noncapital cases.[40] Substantive pleadings may have to be prepared simultaneously with, or even be delayed for, pleadings to stay the client's execution.[41] For post-judgment review to succeed as a safeguard against injustice, courts must appoint appropriately trained and experienced lawyers.

A. Representation on Direct Appeal

The Constitution guarantees effective assistance of counsel on an appeal as of right.[42] The "guiding hand of counsel" must lead the condemned client through direct review. Appellate counsel must be intimately familiar with technical rules of issue preservation and presentation, as well as the substantive state, federal, and international law governing death penalty cases, including issues which are "percolating" in the lower courts but have not yet been authoritatively resolved by the Supreme Court.[43] Counsel must also be capable of

39. Eric M. Freedman, *Innocence, Federalism, and the Capital Jury: Two Legislative Proposals for Evaluating Post-Trial Evidence of Innocence in Death Penalty Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 315, 316 (1991).

40. Under the AEDPA, "special habeas corpus procedures" may apply to federal habeas corpus petitions in capital cases if a state's post-conviction procedures satisfy certain prerequisites. *See* 28 U.S.C. §§ 2261, 2263 (2000). Thus, the deadline for filing of a federal habeas corpus petition by capital prisoners in qualifying "opt-in" states is 180 days, *id.*, in contrast to the one-year limitations period that would otherwise apply. 28 U.S.C. § 2244(d)(1) (2000). In addition, the AEDPA's "opt-in" procedures accelerate the time for review of the case by the district court and the court of appeals, 28 U.S.C. § 2266(b)(1)(A), (c)(1)(A) (2000), and restrict a capital habeas corpus petitioner's ability to amend a petition after the state files its response. 28 U.S.C. § 2266(b)(3)(B) (2000). *See also* Michael Mello & Donna Duffy, *Suspending Justice: The Unconstitutionality of the Proposed Six-Month Time Limit on the Filing of Habeas Corpus Petitions by State Death Row Inmates*, 18 N.Y.U. REV. L. & SOC. CHANGE 451, 487-92 (1991) (discussing why a six-month limit does not provide an attorney with adequate time to prepare a habeas petition properly); *infra* note 335.

41. *See infra* text accompanying notes 333-38.

42. *See* Evitts v. Lucey, 469 U.S. 387, 396 (1985).

43. *See* Smith v. Murray, 477 U.S. 527, 536-37 (1986) (holding that appellate counsel in a

making complex strategic decisions that maximize the client's chances of ultimate success in the event that the direct appeal is resolved unfavorably.[44]

B. Collateral Review Proceedings

Habeas corpus and other procedures for seeking collateral relief are especially important in capital cases.[45] Quality representation in both state and federal court is essential if legally flawed convictions and sentences are to be corrected.[46]

1. State Collateral Review Proceedings

Counsel's obligations in state collateral review proceedings are demanding.[47] Counsel must be prepared to thoroughly reinvestigate the

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Virginia capital case had waived a legal issue by not raising it at an earlier stage of appeal; the novelty of the issue in Virginia was no excuse because it had been raised, though unsuccessfully, in an intermediate appellate court of another state).

44. *See infra* text accompanying notes 342-47.

45. *See* McFarland v. Scott, 512 U.S. 849, 855 (1994) ("[Q]uality legal representation is necessary in capital habeas corpus proceedings in light of 'the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.'") (citation omitted); *see generally* HERTZ & LIEBMAN, *supra* note 28, § 2.6.

46. A recent comprehensive study finds that of every one hundred death sentences imposed, forty-seven are reversed at the state level, on direct appeal or collateral review. An additional twenty-one are overturned on federal habeas corpus. *See* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995, pt. I, app. A, at 5-6 (2000). These statistics indicate the importance of providing qualified counsel for both state and federal proceedings.

47. Some states provide attorneys at public expense to death-sentenced prisoners seeking state post-conviction relief, but others do not. *See* Andrew Hammel, *Diabolical Federalism: A Functional Critique and Proposed Reconstruction of Death Penalty Federal Habeas*, 39 AM. CRIM. L. REV. 1, 83-99 (2002) (providing state-by-state list); Jennifer N. Ide, *The Case of Exzavious Lee Gibson: A Georgia Court's (Constitutional?) Denial of a Federal Right*, 47 EMORY L.J. 1079, 1099-1110 (1998); Clive A. Stafford Smith & Rémy Voisin Starns, *Folly By Fiat: Pretending that Death Row Inmates Can Represent Themselves in State Capital Post-Conviction Proceedings*, 45 LOY. L. REV. 55, 56 (1999). Moreover, even in those states that nominally do provide counsel for collateral review, the intertwined realities of chronic underfunding, lack of standards, and a dearth of qualified lawyers willing to accept appointment, *see* THE SPANGENBERG GROUP, ABA POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, AN UPDATED ANALYSIS OF THE RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POSTCONVICTION DEATH PENALTY CASES (1996) [hereinafter RIGHT TO COMPENSATION AND EXPENSES], have resulted in a disturbingly large number of instances in which attorneys have failed to provide their clients meaningful assistance. *See, e.g.*, TEX. DEFENDER SERV., A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, ch. 7 (2002), *available at* http://www.texasdefender.org/publications.htm (reporting that a review of 103 post-conviction petitions filed by court-appointed counsel in Texas death penalty cases between 1995 and 2000 indicated that 17.5 percent of the petitions were fifteen pages long or less, and that counsel offered no evidence outside the trial record in 42.7 percent of the cases reviewed). Counsel should

entire case to ensure that the client was neither actually innocent nor convicted or sentenced to death in violation of either state or federal law. This means that counsel must obtain and read the entire record of the trial, including all transcripts and motions, as well as proceedings (such as bench conferences) that may have been recorded but not transcribed. In many cases, the record is voluminous, often amounting to many thousands of pages. Counsel must also inspect the evidence and obtain the files of trial and appellate counsel, again scrutinizing them for what is missing as well as what is present.

Like trial counsel, counsel handling state collateral proceedings must undertake a thorough investigation into the facts surrounding all phases of the case. It is counsel's obligation to make an independent examination of all of the available evidence—both that which the jury heard and that which it did not—to determine whether the decisionmaker at trial made a fully informed resolution of the issues of both guilt and punishment.

Since the reinstatement of the death penalty in 1976,[48] there have been more than 110 known wrongful convictions in capital cases in the United States.[49] As further described *infra* in the text accompanying

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accordingly be alert to the development of both state and federal law respecting the right to the effective assistance of counsel on state post-conviction review. *See infra* notes 74, 204 (citing cases recognizing right); *see also* Celestine Richards McConville, *The Right to the Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 WISC. L. REV. 31, 84-98 (arguing that once a jurisdiction creates a statutory right to post-conviction counsel, the Constitution requires it to provide effective counsel); Leonard Post, *A Fight Over Limits on Pay, Hours: Florida Faces a Suit From a Death Penalty Lawyer*, NAT'L L.J., Mar. 31, 2003, at A1 (describing litigation challenging Florida statutory cap on number of hours for which post-conviction lawyers may be compensated).

In particular, counsel should continue to test the boundaries of *Murray v. Giarratano*, 492 U.S. 1 (1989). Although a plurality of Justices there rejected the constitutional claim of a capital defendant to the appointment of counsel in state post-conviction proceedings, the controlling opinion of Justice Kennedy emphasized that it was based "[o]n the facts and records of this case," in which "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief." *Id.* at 14-15 (Kennedy, J., concurring); *cf. infra* note 334 (citing cases in which states have failed to provide capital prisoners this level of resources).

48. *See* Gregg v. Georgia, 428 U.S. 153 (1976).

49. *See* DEATH PENALTY INFORMATION CENTER: *Innocence and the Death Penalty*, *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, "[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence") (latest release July 28, 2003); *see also* C. RONALD HUFF ET AL., CONVICTED BUT INNOCENT 62-82 (1996); *see generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (updated ed. 2001); EDWARD CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996); Ken Armstrong & Steve Mills, *"Until I Can be Sure": How the*

notes 198-204, these resulted from a variety of causes, including the testimony of unreliable jailhouse informants,[50] the use of dubious or fraudulent forensic scientific methods,[51] prosecutorial misconduct, and

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Threat of Executing the Innocent has Transformed the Death Penalty Debate, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY (Stephen P. Garvey ed. 2003); Michael L. Radelet & Hugo Adam Bedau, *The Execution of the Innocent*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 223 (James Acker et al. eds. 1998).

50. *See generally* Dodd v. State, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (citing "insidious reliability problems" as basis for imposing major procedural restrictions on use of jailhouse informants); Province of Manitoba, Manitoba Justice, The Inquiry Regarding Thomas Sophonow, Manitoba Guidelines Respecting the Use of Jailhouse Informants (Nov. 5, 2001), *available at* http://www.gov.mb.ca/justice/sophonow/appendix/appendixf.pdf (following inquiry into wrongful conviction of Thomas Sophonow, which found jailhouse informants to be "the most deceitful and deceptive group of witnesses known to frequent the courts" (Province of Manitoba Manitoba Justice, The Inquiry Regarding Thomas Sophonow, Jailhouse Informant, Their Unreliability and the Importance of Complete Crown Disclosure Pertaining to Them, *available at* http://www.gov/mb.ca/justice/sophonow/jailhouse), Province bars their use except in limited circumstances and subject to tight safeguards); CONSTITUTION PROJECT, MANDATORY JUSTICE: EIGHTEEN REFORMS TO THE DEATH PENALTY 52 (2001) (noting that a "category of evidence that has a particularly high chance of being an outright lie, exaggerated, or otherwise erroneous is the testimony of jailhouse informants. Their confinement provides evidence of their questionable character, motivates them to lie in order to improve the conditions of their confinement or even secure their release, and often affords access to information that can be used to manufacture credible testimony."); Robert M. Bloom, *Jailhouse Informants*, CRIM. JUST., Spring 2003, at 20 (discussing studies regarding the unreliability of jailhouse informants and the use of their testimony in capital cases); Ted Rohrlich, *Jail House Informant Owns Up to Perjury in a Dozen Cases*, L.A. TIMES, Jan. 4, 1990, at A1 (detailing perjuries committed by Leslie White, an inmate at the Los Angeles County jail who demonstrated to authorities and reporters how he concocted false confessions, and noting confession of another informant, Stephen Jesse Cisneros, to perjury in five murder cases).

51. *See generally* Brief of Amici Curiae Five Innocent Former Death Row Inmates & Centurion Ministries, Schlup v. Delo, 513 U.S. 298 (1995) (No. 93-7901) (reviewing generally unscrupulous practices by investigators and prosecutors that can lead to false convictions); Paul Duggan, *Oklahoma Reviews 3,000 Convictions*, WASH. POST, May 9, 2001, at A2 (discussing Oklahoma review of three thousand convictions based on work of Joyce Gilchrist, an Oklahoma City police chemist, who went far beyond what was scientifically knowable in conducting forensic investigations of local crime); Davidson Goldin, *5th Trooper Pleads Guilty in Scandal*, N.Y. TIMES, Apr. 8, 1995, at A29 (describing scandal in which New York state troopers transferred fingerprints of potential suspects to crime scenes to enhance their cases); Mark Hansen, *Out of the Blue*, 82 A.B.A. J., Feb. 1996 (describing dentist, widely discredited by his peers, who claimed to be able to match bite marks to the teeth that made them); Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. TIMES, Dec. 19, 2002, at A24 (Montana and Washington reviewing approximately one hundred cases based on questionable forensic testimony of Arnold Melnikoff); Armando Villafranca, *Bradford Cites HPD Lab Flap, Urges Hold for 7 on Death Row*, HOUS. CHRON., Mar. 7, 2003 (reporting legislative testimony of Houston Police Chief urging that no execution dates be set for seven death row inmates whose cases may have been affected by shoddy work of Houston police crime laboratory, which was found in a state audit to have had numerous shortcomings in preservation and testing of DNA evidence); Edna Buchanan, *Did FBI Wrongly Aid Death Row Conviction?*, MIAMI HERALD, May 31, 2003, at 1A (although internal review of FBI crime laboratory has identified about three thousand cases of shoddy forensic work, agency has only notified about 150 defendants of problems; suspect cases include those involving hair and fiber

incompetence of defense counsel at trial. Because state collateral proceedings may present the last opportunity to present new evidence to challenge the conviction, it is imperative that counsel conduct a searching inquiry to assess whether any mistake may have been made.

Reinvestigation of the case will require counsel to interview most, if not all, of the critical witnesses for the prosecution and investigate their backgrounds. Counsel must determine if the witness's testimony bears scrutiny or whether motives for fabrication or bias were left uncovered at the time of trial. Counsel must also assess all of the non-testimonial evidence and consider such issues as whether forensic testing must now be performed, either because some technology, such as DNA, was unavailable at the time of trial or because trial counsel failed to ensure that necessary testing took place.[52]

Counsel must conduct a similarly comprehensive reevaluation of the punishment phase to verify or undermine the accuracy of all evidence presented by the prosecution, and to determine whether the decisionmaker was properly informed of all relevant evidence,[53] able to give appropriate weight to that evidence,[54] and provided with a clear and legally accurate set of instructions for communicating its conclusion.[55]

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analyst Michael Malone, on the basis of whose testimony James Duckett faces execution in Florida); Timothy W. Maier, *Inside the DNA Labs*, INSIGHT MAGAZINE, June 10-23, 2003, at 18 (summarizing numerous cases); *Police Review Chemist's Work*, N.Y. TIMES, Mar. 13, 2003, at A22 (reporting that Baltimore County police are reviewing all 480 blood-typing cases handled by former department chemist Concepcion Bacasnot after she falsely testified to a match that resulted in an innocent defendant serving twenty years for rape); *infra* note 200.

52. *See, e.g.*, Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1098-99 (2001) (describing how pro bono counsel in state post-conviction proceeding discovered exculpatory semen stain evidence, which "having been appropriately turned over by the government, lay unappreciated in the files of former defense counsel"); Gwen Filosa, *N.O. Man Cleared in '84 Murder*, NEW ORLEANS TIMES-PICAYUNE, May 9, 2003, at 1 (describing case of John Thompson, who was deterred from taking the stand at his original murder trial by a prior conviction for armed robbery, which, as a defense investigator discovered weeks before the execution date, had been tainted by government suppression of an exculpatory blood test; when retried on the murder charge, Thompson, who had always maintained his innocence, was acquitted).

53. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2527 (2003) (granting habeas corpus relief to petitioner whose trial counsel failed to find and present mitigating evidence); Williams v. Taylor, 529 U.S. 362, 370-71, 374 (2000) (same).

54. *See infra* Guideline 10.10.2(B) and accompanying commentary.

55. For examples of death sentences overturned for failure to comply with this requirement, see Penry v. Johnson, 532 U.S. 782, 796-804 (2001), McKoy v. North Carolina, 494 U.S. 433, 444 (1990), Mills v. Maryland, 486 U.S. 367, 375-80 (1988), and Davis v. Mitchell, 318 F.3d 682, 691 (6th Cir. 2003); *see also* Lenz v. Warden, 579 S.E.2d 194 (Va. 2003) (holding trial counsel ineffective for failure to object to defective penalty phase verdict form); *infra* note 315.

2. Federal Habeas Corpus

In addition to requiring counsel to undertake all the tasks just described in Subsection B(1), federal collateral proceedings present another set of obstacles—ones that highlight the importance of quality representation. From 1973 to 1995, capital habeas corpus petitioners obtained relief at many times the rate of noncapital ones[56] and they should continue to do so in the future. But federal habeas corpus actions are governed by a complex set of procedural rules.[57] Counsel must master these thoroughly.[58] Moreover, restrictions on the availability of federal habeas relief for state prisoners imposed by the AEDPA will continue to raise numerous novel legal issues.

C. Executive Clemency

Executive clemency plays a particularly important role in death penalty cases, as it "provides the [government] with a final, deliberative opportunity to reassess this irrevocable punishment."[59] Because post-judgment proceedings have traditionally provided very limited opportunity for review of questions of guilt or innocence, clemency is

56. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1844, 1849 (2000) (federal habeas relief was granted in forty percent of 599 cases between 1973 and 1995 in which the judgment remained intact after direct appeal and state post-conviction review); *cf.* Eric M. Freedman, *Federal Habeas Corpus in Capital Cases*, *in* AMERICA'S EXPERIMENT WITH CAPITAL PUNISHMENT: REFLECTIONS ON THE PAST, PRESENT AND FUTURE OF THE ULTIMATE PENAL SANCTION 427 (James Acker et al. eds. 1998) ("By the most generous estimates, the rate in non-capital cases does not exceed seven percent, and, if the appropriate statistical methodology is applied, the actual number is less than one percent.").

57. *See, e.g.*, Edwards v. Carpenter, 529 U.S. 446 (2000) (limits on asserting ineffective assistance of counsel as "cause" for procedural default); Schlup v. Delo, 513 U.S. 298 (1995) ("fundamental miscarriage of justice" exception to procedural default rule); Teague v. Lane, 489 U.S. 288 (1989) (non-retroactivity of "new rules" of constitutional procedure); Wainwright v. Sykes, 433 U.S. 72 (1977) (limiting review of constitutional claims due to procedural default). Indeed, on the website of the *New York Times*, its Supreme Court reporter, Linda Greenhouse, has described the Court's habeas jurisprudence as "so complex as to be almost theological" (posted July 6, 2001).

58. *See Legislative Modification*, *supra* note 12, at 854 ("The post-conviction handling of capital cases is a legal specialty requiring mastery of an intricate body of fast-changing substantive and procedural law."). The failure of counsel to fulfill these obligations may entitle the client to relief under federal constitutional or statutory law. *See* Cooey v. Bradshaw, 216 F.R.D. 408 (N.D. Ohio 2003) (granting stay of execution on claim of ineffective assistance by prior counsel appointed under 21 U.S.C. § 848), *motion to vacate stay denied*, No. 03-4001 (6th Cir. July 24, 2003), *motion to vacate stay denied*, No. 03-5472 (U.S. July 24, 2003).

59. Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 214 (1992); *see infra* Guideline 10.15.2 and accompanying commentary.

"the historic remedy for preventing miscarriages of justice where judicial process has been exhausted."[60] As the Supreme Court has recognized, "history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence."[61] Recent advances in the use of DNA technologies, combined with restrictions on the availability of post-conviction review, have elevated the important role that clemency has played as the "fail-safe" of the criminal justice system,[62] and increased the demands on counsel.[63] Moreover, wholly apart from questions of guilt or innocence, executive clemency has been granted in death penalty cases for a broad range of humanitarian reasons.[64] Recognizing these considerations, the Supreme Court has begun to apply due process protection to clemency proceedings.[65] Thus, in addition to assembling the most persuasive possible record for the decisionmaker, counsel must carefully examine the possibility of pressing legal claims asserting the right to a fuller and fairer process.[66]

The Imperative of a Systemic Approach

General statements of expectations about what lawyers should do will not themselves ensure high quality legal representation. Indeed, Guidelines confined to such statements would be ones "that palter with us in a double sense; that keep the word of promise to our ear, and break it to our hope."[67] Attorney error is often the result of systemic problems,

60. Herrera v. Collins, 506 U.S. 390, 411-12 (1993).

61. *Id.* at 415.

62. *See* Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 N.Y.U. REV. L. & SOC. CHANGE 43, 68-77 (1998); *infra* text accompanying note 356.

63. *See, e.g.*, Freedman, *supra* note 52, at 1100-03 (describing detailed oral and written presentations made to two Governors of Virginia by a six-lawyer team to secure DNA testing for death row inmate Earl Washington that resulted in his exoneration); *see also infra* Guideline 10.15.2 and accompanying commentary.

64. *See* Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Cases*, 27 U. RICH. L. REV. 289, 297-99 (1993) (identifying twenty-nine cases between 1972 and 1993 in which death-sentenced inmates had their death sentences commuted to terms of life imprisonment through executive clemency procedures for humanitarian reasons); *infra* text accompanying notes 357-58.

65. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 275-76 (1998); *see also* Ford v. Wainwright, 477 U.S. 399, 405-10, 418 (1986) (invalidating Florida procedure for determining whether inmate was mentally competent to be executed).

66. *See, e.g.*, Wilson v. United States Dist. Ct., 161 F.3d 1185, 1186-87 (9th Cir. 1998) (affirming district court order staying a prisoner's execution on the grounds that his clemency hearing violated due process).

67. WILLIAM SHAKESPEARE, MACBETH act 5, sc. 8.

not individual deficiency.[68] The provision of counsel for indigent capital defendants is too frequently made through ad hoc appointment, a system inimical to effective representation.[69] Although defender offices generally have the experience and dedication to provide high quality legal representation in capital cases, they are commonly overworked and inadequately funded. And private counsel often discover too late that they have taken on a task for which they are unqualified[70] or lack sufficient resources. The Guidelines that follow, therefore, not only detail the elements of quality representation, but mandate the systematic provision of resources to ensure that such representation is achieved in fact, whether counsel is individually assigned, employed by a defender office, or privately retained with or without compensation.[71]

Conclusion

Unless legal representation at each stage of a capital case reflects current standards of practice, there is an unacceptable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[72] Accordingly, any jurisdiction wishing to impose a death sentence must at minimum provide representation that comports with these Guidelines.[73]

68. *See* Liebman, *supra* note 29, at 2108; Goodpaster, *supra* note 3, at 356-59.

69. *See infra* Guideline 2.1(C) and accompanying commentary.

70. *See, e.g.*, Washington v. Murray, 952 F.2d 1472, 1475, 1476 (4th Cir. 1991) (vacating district court's summary dismissal of ineffective assistance of counsel claim based on failure of retained counsel to appreciate exculpatory significance of scientific evidence produced by prosecution).

71. *See infra* Guidelines 4.1, 8.1, & 9.1 and accompanying commentary; *see generally* Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980) (noting that guarantee of Sixth Amendment applies equally whether counsel is retained or appointed).

72. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

73. *Cf. Legislative Modification*, *supra* note 12, at 848 ("[F]or so long as the death penalty continues to exist in this country, capital inmates are entitled to procedures—including ones for the provision of competent counsel—that result in the full and fair review of their convictions and sentences. Correlatively, any state which chooses to impose death sentences must accept the obligation of providing mechanisms for assuring that those sentences are legally and factually correct at the time of their execution.") (citation omitted).

GUIDELINE 2.1—ADOPTION AND IMPLEMENTATION OF A PLAN TO PROVIDE HIGH QUALITY LEGAL REPRESENTATION IN DEATH PENALTY CASES

A. **Each jurisdiction should adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these Guidelines (the "Legal Representation Plan").**

B. **The Legal Representation Plan should set forth how the jurisdiction will conform to each of these Guidelines.**

C. **All elements of the Legal Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence and under conditions that enable them to provide zealous advocacy in accordance with professional standards.**

History of Guideline

The obligation to create a formal "Legal Representation Plan" for provision of representation in death penalty cases was contained in Guideline 3.1 of the original edition. Subsection B is new and is designed to make it easier for jurisdictions to determine the necessary contents of a Plan. Subsection C is drawn from several sections of the original edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 (3d ed. 1992) ("Systems for legal representation").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 (3d ed. 1992) ("Professional Independence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 (3d ed. 1992) ("Supporting Services").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and Professional Development").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 (3d ed. 1992) ("Funding").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-4.1 (3d ed. 1992) ("Chief Defender and Staff").

ABA THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002) ("The Public Defense Function, Including the Selection, Funding, and Payment of Defense Counsel, Is Independent.").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 2.18 (1976) ("Administration of Defense System Funds").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.2 (1989) ("Independence from Judiciary and Funding Source").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Guideline II-1 (1984) ("Purposes").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES Standard II-2 (1984) ("Members").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 10 (1970) ("Office of Defender General").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.8 (1973) ("Selection of Public Defenders").

Commentary

Each jurisdiction should take effective measures to formalize the process by which high quality legal representation will be provided in capital cases. This may be done by statute, court order, regulation or otherwise. The critical element is that the plan be judicially enforceable in full against the jurisdiction.[74]

The Legal Representation Plan should provide standards and procedures that apply to capital cases on a jurisdiction-wide basis. National professional groups concerned with criminal justice issues have for decades advocated that defender services be organized on a state-wide basis.[75] Specifically, the ABA Standards for Criminal Justice endorse state-wide organization "as the best means for service provision."[76] Jurisdiction-wide organization and funding can best ameliorate local disparities in resources and quality of representation,

74. *See, e.g.*, Iovieno v. Comm'r, 699 A.2d 1003 (Conn. 1997) (recognizing claim that statutorily-mandated state post-conviction counsel was ineffective since "'it would be absurd to have the right to appointed counsel who is not required to be competent'") (quoting Lozada v. Warden, 613 A.2d 818, 821 (Conn. 1992)); Spalding v. Dugger, 526 So. 2d 71, 72 (Fla. 1988) (holding that under statute creating office for post-conviction capital representation, "each defendant . . . is entitled, as a statutory right, to effective legal representation" and may enforce that right in post-conviction proceedings); People v. Johnson, 609 N.E.2d 304, 311 (Ill. 1993) (granting relief where, contrary to court rule, appointed post-conviction counsel "made no effort to investigate the claims raised in the defendant's post-conviction petition or to obtain affidavits from any of the witnesses specifically identified in the defendant's pro se petition"); *see also supra* note 47 (noting possible federal constitutional implications of state's decision to grant post-conviction counsel); *see generally infra* note 204.

75. *See, e.g.*, NAT'L LEGAL AID & DEFENDER ASS'N, NAT'L STUDY COMMISSION ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES FINAL REPORT (1976) (calling for a state-wide organization with a centralized administration to "ensure uniformity and equality of legal representation and supporting services and to guarantee professional independence for individual defenders"); Nat'l Conf. of Comm'rs on Unif. State Laws, *Prefatory Note* to UNIFORM LAW COMM'RS MODEL PUBLIC DEFENDER ACT, *in* HANDBOOK OF THE NAT'L CONFERENCE OF COMM'RS ON UNIFORM STATE LAWS 267-268 (1970) (approving recommendation of National Defenders Conference that every state establish a state-wide public defender system "to assure better coordination and consistency of approach throughout the state, [provide] better consultation with the several branches of state government, . . . reduce the administrative burden on court personnel and provide more efficient and more experienced defense counsel services to needy persons accused of crime"); TASK FORCE ON THE ADMIN. OF JUSTICE, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, TASK FORCE REPORT: THE COURTS 52-53 (1967) (recommending that "each State should finance assigned counsel and defender systems on a regular and statewide basis").

76. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2(c) and cmt. (3d ed. 1992, black letter approved 1990, commentary completed 1992).

and insulate the administration of defense services from local political pressures.[77]

This last item is, of course, of critical concern.

> [I]t is essential that both full-time defenders and assigned counsel be fully independent, free to act on behalf of their clients as dictated by their best professional judgment. A system that does not guarantee the integrity of the professional relation is fundamentally deficient in that it fails to provide counsel who have the same freedom of action as the lawyer whom the person with sufficient means can afford to retain.[78]

Therefore, as Guideline 2.1(C) mandates, any acceptable Legal Representation Plan must assure that individual lawyers are not subject to formal or informal sanctions (e.g., through the denial of future appointments, reductions in fee awards, or withholding of promotions in institutional offices) for engaging in effective representation. The same principle applies to the overall architecture of the system. Thus, for example, the head of a public defender office must be subject to judicial supervision only in the same manner and to the same extent as a lawyer in private practice—and not be subject to institutional arrangements that

77. Mississippi, for example, has recently moved from a county-based to a state-based system for the provision of capital defense services. *See* Julie Goodman, *Inmates on Death Row Given Last Hope*, CLARION-LEDGER (Jackson, Miss.), May 13, 2002, at B1 (discussing post-conviction defense office); Emily Wagster, *Capital Defense Job Filled; State Office to Provide Lawyers for Indigent*, SUN HERALD (Biloxi, Miss.), July 7, 2001, at A2 (discussing trial defense office). Similarly, California has adopted state-wide qualifications for appointed trial counsel in capital cases effective January 1, 2003. *See* CAL. R. CT. 4.117; *see generally* Ashley Rapp, Note, *Death Penalty Prosecutorial Changing Decisions and County Budgeting Restrictions: Is the Death Penalty Arbitrarily Applied Based on County Funding?*, 71 FORDHAM L. REV. 2735 (2003) (arguing that inter-county funding disparities may render state capital systems vulnerable to challenges under *Furman v. Georgia*, 408 U.S. 238 (1972)).

78. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 cmt. (3d ed. 1992); *see also* Taylor-Thompson, *supra* note 37, at 1508; ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 and cmt. (2002).

> The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

might enable his or her re-appointment to be blocked by judges irked at the zealous advocacy conducted by his or her office.[79]

Moreover, the system must be structured so as to assure that each client receives defense services "in accordance with professional standards," as noted in Subsection C. For example, it is predictable that there will be conflicts of interest among various actors in the criminal justice system (e.g., co-defendants, co-operating witnesses), who may play different roles in different cases, and the plan must provide a mechanism to assure conflict-free representation.[80]

79. In North Carolina, for example, the Indigent Defense Services Commission, which consists of ten members appointed by, but independent of, the state Bar, the Governor, the Chief Justice, and the legislature, plus three members chosen collectively by those ten, and appoints a Capital Defender who is responsible only to it. *See* Commission on Indigent Services, Minutes of the Meeting of Apr. 19, 2002, *available at* http://www.ncids.org. The Capital Defender supervises a staff of attorneys and also oversees the representation provided by a roster of private lawyers and public defenders who have been certified to provide representation in capital cases. *See* Commission on Indigent Services, Minutes of the Meeting of June 15, 2001, *available at* http://www.ncids.org. *Cf. Retarding Due Process*, ST. PETERSBURG TIMES, Apr. 22, 2002, at A10 (editorial criticizing Florida legislation permanently barring any appointed capital defense attorney seeking compensation in excess of fee schedule from another appointment).

80. For instance, although it may not violate the Sixth Amendment for defense counsel to have previously represented the victim, *see* Mickens v. Taylor, 535 U.S. 162, 164, 173-74 (2002), such a situation most certainly violates ethical norms, *see* Brief of Legal Ethicists and the Stein Center for Law and Ethics as Amici Curiae in Support of Petitioner, Mickens v. Taylor, 535 U.S. 162 (2002), and would not be permitted by any acceptable plan for capital representation. *Cf. Ex parte* McCormick, 645 S.W.2d 801, 806 (Tex. Crim. App. 1983) (en banc) (reversing two capital convictions because same counsel represented both co-defendants); Wm. C. Turner Herbert, Recent Development, *Off the Beaten Path: An Analysis of the Supreme Court's Surprising Decision in* Mickens v. Taylor, 81 N.C. L. Rev. 1268 (2003) (criticizing *Mickens*).

GUIDELINE 3.1—DESIGNATION OF A RESPONSIBLE AGENCY

A. **The Legal Representation Plan should designate one or more agencies to be responsible, in accordance with the standards provided in these Guidelines, for:**

1. **ensuring that each capital defendant in the jurisdiction receives high quality legal representation, and**

2. **performing all the duties listed in Subsection E (the "Responsible Agency").**

B. **The Responsible Agency should be independent of the judiciary and it, and not the judiciary or elected officials, should select lawyers for specific cases.**

C. **The Responsible Agency for each stage of the proceeding in a particular case should be one of the following:**

Defender Organization

1. **A "defender organization," that is, either:**

   a. **a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**

   b. **a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or**

Independent Authority

2. An "Independent Authority," that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

D. Conflict of Interest:

1. In any circumstance in which the performance by a defender organization of a duty listed in Subsection E would result in a conflict of interest, the relevant duty should be performed by the Independent Authority. The jurisdiction should implement an effectual system to identify and resolve such conflicts.

2. When the Independent Authority is the Responsible Agency, attorneys who hold formal roles in the Independent Authority should be ineligible to represent defendants in capital cases within the jurisdiction during their term of service.

E. The Responsible Agency should, in accordance with the provisions of these Guidelines, perform the following duties:

1. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

2. draft and periodically publish rosters of certified attorneys;

3. draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;

4. assign the attorneys who will represent the defendant at each stage of every case, except to

the extent that the defendant has private attorneys;

5. **monitor the performance of all attorneys providing representation in capital proceedings;**

6. **periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these Guidelines;**

7. **conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases; and**

8. **investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.**

History of Guideline

The obligation of the Legal Representation Plan to designate a "Responsible Agency" for the appointment of counsel in death penalty cases was contained in Guideline 3.1 of the first edition. Subsection B makes it clear that the Responsible Agency should be an independent entity, and that lawyer selection should not be performed by the judiciary or elected officials. Subsection C is new and describes the acceptable kinds of Responsible Agencies. Subsection D is new and specifies the obligations of the Responsible Agency in the event of a conflict of interest. Lastly, part of Subsection E is new and details the other duties of the Responsible Agency, including the duty to ensure that qualified attorneys are available to represent defendants in death penalty cases, the duty to promptly investigate complaints about the performance of attorneys, and the duty to take corrective action without delay.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.2 (3d ed. 1992) ("Systems for Legal Representation").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 (3d ed. 1992) ("Professional Independence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-4.1 (3d ed. 1992) ("Chief Defender and Staff").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.8 (1973) ("Selection of Public Defenders").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.10 (1976) ("The Defender Commission").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.11 (1976) ("Functions of the Defender Commission").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.12 (1976) ("Qualifications of the Defender Director and Conditions of Employment").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.13 (1976) ("The Governing Body for Assigned Counsel Programs").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, § 2.18 (1976) ("Administration of Defense System Funds").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.2 (1989) ("Independence from Judiciary and Funding Source").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.1 (1989) ("Establishment of Legal Representation Plan").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.2.1 (1989) ("Creation of Board").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 3.2.2 (1989) ("Functions of Board").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-1 (1984) ("Purposes").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-2 (1984) ("Members").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-3 (1984) ("Duties").

Commentary

As indicated in Guideline 2.1(C) and the accompanying commentary, the Legal Representation Plan must ensure that the capital defense function remains free from political influence. One important mechanism for accomplishing this goal is granting the authority for training, assigning, and monitoring capital defense lawyers to one or more entities independent of the judiciary and wholly devoted to fostering high quality legal defense representation.

This Guideline, based on accumulated experience, contemplates two structures that jurisdictions might employ.

1. In the first structure, the jurisdiction has created (a) a jurisdiction-wide capital trial organization, relying on staff attorneys,

and, optionally, members of the private bar, and/or (b) a jurisdiction-wide capital appellate and/or post-conviction defender organization, relying on staff attorneys, and, optionally, members of the private bar (collectively, "defender organizations").[81]

In this structure, the defender organizations may both provide representation and perform all the functions listed in Subsection E as appropriate to their portion of the system, with one key exception. No defender organization may perform any function that would involve it in a conflict of interest, e.g., monitoring its own performance under Guideline 7.1(A), investigating or disposing of a complaint pursuant to Guideline 7.1(B) against one of its staff lawyers, or making the appointment of counsel in a situation in which there exists a professional conflict. Thus, for example, if two defendants with antagonistic defenses were charged with a capital crime, the agency could assign itself to defend one of them but could play no role in the assignment of counsel to the other. Similarly, as noted in Subsection E(5), a defender organization could not monitor the quality of its own performance (Subsection E(5)).

Accordingly, this structure also contemplates the existence of an "Independent Authority," which will at minimum deal with conflicts such as these.

2. In the second structure, an "Independent Authority," an entity run by defense attorneys with demonstrated knowledge and expertise in the representation of persons facing the possible imposition or execution of a death sentence, performs all the functions listed in Subsection E but does not itself provide representation.

While serving the organization in a formal role, whether paid or unpaid (e.g., officers, directors, staff members), attorneys should not be eligible for appointment to death penalty cases. The idea is that attorneys should not be appointed by an entity in whose operations they are playing a material role. Thus, this provision does not extend to persons who are simply providing occasional advice to the entity.

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81. For example, in 1995, New York enacted a comprehensive legislative plan for a "capital defender office" ("CDO") to provide representation and legal assistance in capital cases. N.Y. JUD. LAW § 35-b(3) (McKinney 2001). The CDO is authorized to represent capital defendants and also to advise and assist other appointed counsel in such cases. *See id.* The office assists in determining qualification standards and presents training programs for attorneys seeking to become certified to accept appointments. *See id.* As described *supra* note 79, North Carolina has also adopted this model. Other states have similar programs for providing representation in post-conviction proceedings. *See, e.g.*, CAL. GOV'T CODE § 68661 (West Supp. 2003) (creating California Habeas Corpus Resource Center, which is authorized to provide representation and serve as a resource in state and federal post-conviction proceedings).

The agency performing the function in the particular case, whether a defender organization or the Independent Authority, is referred to as "the Responsible Agency."

The Responsible Agency must assess the qualifications of attorneys who wish to represent capital defendants, conducting a meaningful review of each request for inclusion on the roster of qualified counsel in light of the criteria listed in Guideline 5.1. In order to make informed decisions on eligibility, the Responsible Agency should have sufficient flexibility to gather as much relevant information as possible to secure a fair picture of the applicant's ability and experience. The Responsible Agency should utilize whatever sources of information it deems appropriate, including in-court observations, writing samples, and information-gathering from the applicant, from judges before whom the applicant has appeared, and from attorneys, supervisors, and former clients who are familiar with the applicant's professional abilities. The performance standards established pursuant to Guidelines 10.1 et seq. should also be used to evaluate the prior performance in capital cases of attorneys seeking to establish eligibility for renewal placement on the roster of qualified counsel.

In assigning attorneys to capital cases, the overriding consideration must always be to provide high quality legal representation to the person facing a possible death sentence. Adherence to a "strict rotation" system for assigning counsel in the interest of fairness to attorneys should never take precedence over the interests of the capital defendant in receiving the best possible representation. Rather, in making assignments of counsel to a particular capital case, the Responsible Agency should give careful consideration to counsel's qualifications, skills, and experience; any aspects of the case that make assignment of a lawyer with specific qualifications or skills necessary or particularly appropriate (e.g., counsel's ability to speak the client's native language); and the relative onerousness of prospective lawyers' existing caseloads. It is also appropriate to give consideration to maintaining continuity of counsel where the defendant has previously been represented by a qualified lawyer at an earlier stage of the proceedings, provided that (a) counsel is also deemed qualified to represent the client at the subsequent stage of the proceedings and (b) counsel's representation of the client at successive stages of the proceedings does not present a conflict of interest.[82] Given the extraordinary demands and pressures placed on

82. Of course, any applicable statutory provisions, e.g., 28 U.S.C. § 2261(d), must also be observed.

counsel in a capital case,[83] the Responsible Agency should, in accordance with Guideline 4.1(A)(1), ensure that at every stage of the proceedings the defendant is represented by counsel who are in a position to provide high quality legal representation. This may require the agency to furnish resources, in the form of additional counsel or otherwise,[84] to private counsel.[85]

The remaining elements of this Guideline reflect the longstanding view of the ABA that "[j]urisdictions that have the death penalty should establish and fund organizations to recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases."[86] Several of these functions are described in greater detail in subsequent Guidelines.[87] The common theme, however, is that the provision of consistently high quality legal representation requires that the duties given to the Responsible Agency by this Guideline be performed by an entity with the authority and resources to discharge them vigorously.

83. *See supra* Guideline 1.1 and accompanying commentary.

84. *See infra* Guideline 4.1 and accompanying commentary.

85. Specifically, the Responsible Agency should in every capital case determine whether retained or pro bono counsel meets the qualification standards set forth in Guideline 5.1 *infra* and, if not, provide as many additional qualified attorneys as are appropriate under the circumstances of the case. In accordance with Guideline 4.1(B), the Responsible Agency must also assure that counsel have the necessary support services.

86. ABA CRIMINAL JUSTICE SECTION, REPORT TO THE HOUSE OF DELEGATES (1990), *reprinted in Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 9 (1990).

87. *See, e.g.*, *infra* Guideline 7.1 (removal of attorneys from roster); Guideline 8.1 (training programs).

GUIDELINE 4.1—THE DEFENSE TEAM AND SUPPORTING SERVICES

A. The Legal Representation Plan should provide for assembly of a defense team that will provide high quality legal representation.

1. The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist.

2. The defense team should contain at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.

B. The Legal Representation Plan should provide for counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The Plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.

1. Counsel should have the right to have such services provided by persons independent of the government.

2. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.

History of Guideline

This Guideline is based on Guideline 8.1 of the original edition. In keeping with the team approach described in the commentary, Subsection A has been added to provide for the assembly of a "defense team." The first sentence of Subsection B is based on the original version of the Guideline and has been revised to emphasize that the purpose of providing adequate support services is to further the overall goal of providing "high quality legal representation," not merely "an effective defense." The second sentence is taken from Standard 5-1.4 of the ABA Standards for Criminal Justice: Providing Defense Services. Subsections B(1) and B(2) are new and reflect the decision to include private attorneys in these Guidelines.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) ("Roles of Mental Health and Mental Retardation Professionals in the Criminal Process").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 (3d ed. 1992) ("Supporting Services").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.14 (1973) ("Supporting Personnel and Facilities").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 2 (1970) ("Right to Representation, Services, and Facilities").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 12 (1970) ("Personnel and Facilities").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-8 (1984) ("Support Staff and Forensic Experts").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 3.4 (1976) ("Nonpersonnel Needs in Defender Offices").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.6 (1989) ("Support Services").

Commentary

Introduction

In a capital case reaffirming that fundamental fairness entitles indigent defendants to the "basic tools of an adequate defense," the United States Supreme Court stated:

> We recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and

> that a criminal trial is fundamentally unfair if the [prosecution] proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.[88]

It is critically important, therefore, that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.[89]

The Team Approach to Capital Defense

National standards on defense services have consistently recognized that quality representation cannot be rendered unless assigned counsel have access to adequate "supporting services [including] secretaries[,] investigators[, and] ... expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and at sentencings."[90]

This need is particularly acute in death penalty cases. The prosecution commits vast resources to its effort to prove the defendant guilty of capital murder. The defense must both subject the prosecution's evidence to searching scrutiny and build an affirmative case of its own.[91] Yet investigating a homicide is uniquely complex and often involves evidence of many different types. Analyzing and interpreting such evidence is impossible without consulting experts—whether pathologists, serologists, microanalysts, DNA analysts, ballistics specialists, translators, or others.[92]

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88. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

89. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992).

90. *Id.*

91. *See* Subcomm. on Federal Death Penalty Cases, Comm. on Defender Services, Judicial Conference of the United States, *Federal Death Penalty Cases: Recommendations Concerning the Cost and Quality of Defense Representation* (1998) [hereinafter *Federal Death Penalty Cases*] (discussing federal death penalty cases), *available at* http://www.uscourts.gov/dpenalty/1COVER.htm (reporting that "both the prosecution and the defense rely more extensively on experts in death penalty cases than in other [] criminal cases").

92. *See, e.g.*, Alec Wilkinson, *A Night at the Beast House*, THE NEW YORKER, Feb. 13, 1995, at 68 (discussing how counsel used an expert to show that victim was not killed in the prosecuting jurisdiction but dragged to the crime scene after her death; client eventually exonerated and released).

In particular, mental health experts are essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row.[93] Evidence concerning the defendant's mental status is relevant to numerous issues that arise at various junctures during the proceedings, including competency to stand trial, sanity at the time of the offense, capacity to intend or premeditate death, ability to comprehend *Miranda* warnings, and competency to waive constitutional rights. The Constitution forbids the execution of persons with mental retardation,[94] making this a necessary area of inquiry in every case. Further, the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase.[95] Creating a competent and reliable mental health evaluation consistent with prevailing standards of practice is a time-consuming and expensive process.[96] Counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination. Diagnostic studies, neuropsychological testing, appropriate brain scans, blood tests or genetic studies, and consultation with additional mental health specialists may also be necessary.[97]

Counsel's own observations of the client's mental status, while necessary,[98] can hardly be expected to be sufficient to detect the array of conditions (e.g., post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation)

93. *See, e.g.*, Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 559-83 (1995) (examining "the structure of the lives of those who commit [capital violence]"); Dorothy Otnow Lewis et al., *Psychiatric, Neurological, and Psychoeducational Characteristics of 15 Death Row Inmates in the United States*, 143 AM. J. PSYCHIATRY 838, 839-44 (1986) (reviewing inmates' "psychiatric evaluations [and] detailed medical, family, social, and educational histories").

94. *See* Atkins v. Virginia, 53 U.S. 304, 350 (2002).

95. *See* Goodpaster, *supra* note 3, at 323-24.

96. *See* John H. Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, THE ADVOCATE, Aug. 1995, *available at* http://www.dpa.state.ky.us/rwheeler/blume/blume.html.

97. *See* Douglas S. Liebert, Ph.D. & David V. Foster, M.D., *The Mental Health Evaluation In Capital Cases: Standards of Practice*, 15:4 AM. J. FORENSIC PSYCHIATRY 43-64 (1994).

98. *See infra* Guidelines 10.5 and 10.15.1(E)(2) and accompanying commentary. Effective representation requires ongoing interactive contact with the client—in person, by mail, on the telephone, and in other ways—both by counsel and, as discussed in the remainder of this commentary, by the other members of the defense team. To the extent that jurisdictions impede such contact—whether by charging excessive fees for telephone calls, limiting mailings, failing to provide convenient and confidential arrangements for visits, restricting the access of non-attorney defense team members to clients, or otherwise—they jeopardize the provision of high quality legal representation in accordance with these Guidelines.

that could be of critical importance. Accordingly, Subsection A(2) mandates that at least one member of the defense team (whether one of the four individuals constituting the smallest allowable team or an additional team member) be a person qualified by experience and training to screen for mental or psychological disorders or defects and recommend such further investigation of the subject as may seem appropriate.

Although mental health issues are so ubiquitous in capital defense representation that the provision of resources in that area should be routine, it bears emphasis that every situation will also have its own unique needs. The demands of each case—and each stage of the same case—will differ. Jurisdictions must therefore construe this Guideline broadly, keeping in mind the superior opportunity of defense counsel to determine what assistance is needed to provide high quality legal representation under the particular circumstances at hand and counsel's need to explore the potential of a variety of possible theories. For example, it might well be appropriate for counsel to retain an expert from an out-of-state university familiar with the cultural context by which the defendant was shaped or a professional who is skilled at retrieving elusive paper or electronic records. While resources are not unlimited, of course, jurisdictions should also be mindful that sufficient funding early in a case may well result in significant savings to the system as a whole.[99]

Effective Assistance of Experts

Subsections B(1) and B(2) are aimed at insuring that the fact of public funding does not diminish the quality of the assistance that counsel is able to obtain from experts. Thus, unless counsel agrees otherwise, the defendant is entitled to experts independent of the government; the jurisdiction may not meet its obligations by relegating

99. For example, in light of the constitutional prohibition on the execution of the mentally retarded, significant resources spent at the pretrial phase in investigating and presenting the defendant's retardation status will be amply repaid in future cost savings since the most likely outcomes are (a) the case is taken off the capital track entirely, very possibly by agreement with the prosecution or (b) the issue is decided against the defendant, thus minimizing the likelihood of it being raised later. *See, e.g.*, Dan Barry, *Ashcroft Says Retarded Man No Longer Faces Death Penalty*, N.Y. TIMES, Mar. 20, 2003, at B1. Similarly, it is not only expensive, but also extremely unjust for exculpatory evidence about which trial counsel should have learned from an expert to lie undiscovered until post-conviction proceedings many years later—years during which an innocent person is incarcerated. *See* Freedman, *supra* note 52, at 1094-95, 1098-99.

him to the state mental hospital or the state crime laboratory.[100] Similarly, doctrines of privilege, work product, and the like should protect the communications between counsel and the experts just as they would if the experts were being paid with private funds. Any procedures for the auditing of public funds should be structured so as to preserve this confidentiality.

The Core Defense Team

In addition to employing the particular nonlegal resources that high quality legal representation requires in each individual case, the standard of practice demands that counsel have certain specific forms of assistance in every case. This Guideline accordingly requires that those resources be provided.[101]

A. The Investigator

The assistance of an investigator who has received specialized training is indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings. Although some investigative tasks, such as assessing the credibility of key trial witnesses, appropriately lie within the domain of counsel, the prevailing national standard of practice forbids counsel from shouldering primary responsibility for the investigation. Counsel lacks the special expertise required to accomplish the high quality investigation to which a capital defendant is entitled and simply has too many other duties to discharge in preparing the case. Moreover, the defense may need to call the person who conducted the interview as a trial witness.[102] As a result, an investigator should be part of the defense team at every stage of a capital proceeding.

100. Of course, non-lawyer professionals on the staff of defender organizations are, even if on the public payroll, "independent of the government" for this purpose.

101. This Guideline contemplates that defense counsel will be primarily responsible for selection of the remaining members of the defense team. Guideline 10.4 discusses in greater detail the division of this responsibility among the attorneys on the team. The Responsible Agency should, however, be prepared to provide assistance in finding qualified individuals to fill these roles.

102. *See infra* Guideline 10.7 and accompanying commentary.

B. The Mitigation Specialist

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have.[103] They have the time and the ability to elicit sensitive, embarrassing and often humiliating evidence (e.g., family sexual abuse) that the defendant may have never disclosed. They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his 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.[104] The mitigation specialist compiles a comprehensive and well-documented psycho-social history of the client based on an exhaustive investigation; analyzes the significance of the information in terms of impact on development, including effect on personality and behavior; finds mitigating themes in the client's life history; identifies the need for expert assistance; assists in locating appropriate experts; provides social history information to experts to enable them to conduct competent and reliable evaluations; and works with the defense team and experts to develop a comprehensive and cohesive case in mitigation.[105]

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103. *See* Dwight H. Sullivan et al., *Raising the Bar: Mitigation Specialists in Military Capital Litigation*, 12 GEO. MASON U. CIV. RTS. L.J. 199, 206-11 (2002).

104. *See* Vivian Berger, *The Chiropractor as Brain Surgeon: Defense Lawyering in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 245, 250 (1991) (noting that many attorneys make no preparations whatsoever for the sentencing phase; because they believe that a lawyer should try to win rather than plan to lose, they "are devastated when the client is convicted and afterward just throw in the towel"); *infra* Guideline 10.10.1 and accompanying commentary; text accompanying notes 273-76; *see also* Head v. Thomason, 578 S.E.2d 426, 430 (Ga. 2003) (finding in state post-conviction proceeding that trial counsel were ineffective at penalty phase; due to their unwarrantedly optimistic belief that the sentencer would not impose death, they were less diligent than they should have been in obtaining mitigation evidence, and failed "to make use of the mitigating evidence and the experts they had").

105. *See generally* Russell Stetler, *Why Capital Cases Require Mitigation Specialists*, *at* http://www.nlada.org/DMS/Documents/998934720.005/Why%20Capital%20Cases%20Require%2

The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death.[106]

For all of these reasons the use of mitigation specialists has become "part of the existing 'standard of care'" in capital cases, ensuring "high quality investigation and preparation of the penalty phase."[107]

Counsel Not Compensated by Public Funds

Finally, in the relatively rare case in which a capital defendant retains counsel, jurisdictions must ensure that the defendant has access to necessary investigative and expert services if the defendant cannot afford them.

> Inability to afford counsel necessarily means that a defendant is unable to afford essential supporting services, such as investigative assistance and expert witnesses. The converse does not follow, however. Just because a defendant is able to afford retained counsel does not mean that sufficient finances are available for essential services. . . . [S]upporting services [should] be made available to the clients of retained counsel who are unable to afford the required assistance.[108]

Of course, the same observations apply where counsel is serving pro bono or, although originally retained, has simply run out of money.

0Mitigation%20Specialists.doc (last visited July 26, 2003) (discussing the role and required skills of the mitigation specialist); TEXAS DEFENDER SERVICE CAPITAL TRIAL PROJECT, DEATH PENALTY MITIGATION MANUAL FOR TRIAL ATTORNEYS ch. 2 (2001) ("The Mitigation Specialist and the Team Approach") [hereinafter TEXAS DEATH PENALTY MITIGATION MANUAL].

106. *See infra* text accompanying note 178.

107. *See Federal Death Penalty Cases*, *supra* note 91. Numerous death penalty jurisdictions, by state statute, court rule, or case law, routinely authorize the payment of funds for mitigation experts pursuant to defense motion. *See, e.g.*, GA. CODE ANN. § 17-12-90 to 97 (1997); 725 ILL. COMP. STAT. 124/10(c) (West 2002); KY. REV. STAT. ANN. § 31.110(1)(b) (Michie 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law Co-op. 2001); TENN. CODE. ANN. § 40-14-207(b) (1997); TENN. S. CT. R. 13 § 5; State v. Bailey, 424 S.E.2d 503, 507 (S.C. 1992) (interpreting § 16-3-26(C)(1) as applied to capital cases, stating that "in today's capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence, the attorney must employ investigators in the course of thoroughly researching the defendant's entire life"). In federal capital trials, mitigation experts are routinely appointed and compensated under 21 U.S.C. § 848(q) (2000).

108. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.4 cmt. (3d ed. 1992); *see also* Edward C. Monahan & James J. Clark, *Funds for Resources for Indigent Defendants Represented by Retained Counsel*, THE CHAMPION, Dec. 1996, at 16.

GUIDELINE 5.1—QUALIFICATIONS OF DEFENSE COUNSEL

A. **The Responsible Agency should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.**

B. **In formulating qualification standards, the Responsible Agency should insure:**

1. **That every attorney representing a capital defendant has:**

   a. **obtained a license or permission to practice in the jurisdiction;**

   b. **demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and**

   c. **satisfied the training requirements set forth in Guideline 8.1.**

2. **That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation. Accordingly, the qualification standards should insure that the pool includes sufficient numbers of attorneys who have demonstrated:**

   a. **substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;**

b. skill in the management and conduct of complex negotiations and litigation;

c. skill in legal research, analysis, and the drafting of litigation documents;

d. skill in oral advocacy;

e. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;

f. skill in the investigation, preparation, and presentation of evidence bearing upon mental status;

g. skill in the investigation, preparation, and presentation of mitigating evidence; and

h. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

History of Guideline

This Guideline has been substantially reorganized for this edition. In the original edition, it emphasized quantitative measures of attorney experience—such as years of litigation experience and number of jury trials—as the basis for qualifying counsel to undertake representation in death penalty cases. In this revised edition, the inquiry focuses on counsel's ability to provide high quality legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.2 (3d ed. 1992) ("Eligibility to Serve").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2 (1995) ("Education, Training, and Experience of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline II-3 (1984) ("Duties").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.9 (1989) ("Standards for Performance of Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(b) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.1 (1989) ("Qualifications of Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 2.15 (1976) ("Establishing the Assigned Counsel Panel").

Commentary

Under Guideline 3.1, it is the duty of the Responsible Agency to provide capital defendants with attorneys who will give them high quality legal representation. This Guideline amplifies that duty. It is designed to be outcome-focused and to leave the Responsible Agency maximum flexibility. The Guideline sets forth the necessary qualifications for all attorneys (Subsection B(1)), and also requires that "the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation." (Subsection B(2)). The qualification standards set by the Responsible Agency must be such as to bring about this result. This functional approach is new to this edition.

As described in the commentary to Guideline 1.1, the abilities that death penalty defense counsel must possess in order to provide high

quality legal representation differ from those required in any other area of law. Accordingly, quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task. An attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster.[109]

There are also attorneys who do not possess substantial prior experience yet who will provide high quality legal representation in death penalty cases.[110] Such attorneys may have specialized training and experience in the field (e.g., as law professors), may previously have been prosecutors, or may have had substantial experience in civil practice.[111] These attorneys should receive appointments if the Responsible Agency is satisfied that the client will be provided with high quality legal representation by the defense team as a whole.

In order to make maximum use of the available resources in the legal community overall, the Responsible Agency needs to devise qualification standards that build upon the contribution that each lawyer can make to the defense team, while ensuring that the team is of such a size and aggregate level of experience as to be able to function effectively.

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109. *See* Bright, *supra* note 29, at 1871 n.209 ("Standards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications.").

110. Because, as the second sentence of Subsection A emphasizes, the overriding goal is to provide high quality legal representation to the client in the individual case, it may also be appropriate for the appointing authority to certify an attorney for a limited purpose, such as to represent a particular client with whom he or she has a special relationship.

111. Superior post-conviction death penalty defense representation has often been provided by members of the private bar who did not have prior experience in the field but who did have a commitment to excellence. *See, e.g.*, Kelly Choi, *Against All Odds*, AM. LAW., Dec. 2000, at 98; *Death-Row Rescue*, STAR TRIB., Jan. 5, 2001, at 18A.

GUIDELINE 6.1—WORKLOAD

The Responsible Agency should implement effectual mechanisms to ensure that the workload of attorneys representing defendants in death penalty cases is maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these Guidelines.

History of Guideline

The original edition of this Guideline stated that "attorneys accepting appointments pursuant to these Guidelines . . . should not accept appointment" if their workload would interfere with the provision of "quality representation or lead to the breach of professional obligations."

Although that admonition has been retained in Guideline 10.3, this Guideline, which in accordance with Guideline 1.1 applies to all defense counsel (not just appointed members of the private bar), has been added to make clear that it is the responsibility of the jurisdiction creating the system to establish mechanisms for controlling attorney workloads.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) ("Workload").

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTIONS Standard 4-1.3 ("Delays; Punctuality; Workload") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.1 (1976) ("Establishing Maximum Pending Workload Levels for Individual Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.2 (1976) ("Statistics and Record-keeping").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) ("Elimination of Excessive Caseloads").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-12 (1984) ("Case and Work-Overload").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(c) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.2 (1989) ("Workload of Attorneys").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973) ("Workload of Public Defenders").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (2002) ("Defense Counsel's Workload Is Controlled to Permit the Rendering of Quality Representation").

Commentary

In order to achieve the goal of providing capital defendants with high quality legal representation, the caseloads of their attorneys must be such as to permit the investment of the extraordinary time and effort necessary to ensure effective and zealous representation in a capital case. As the commentary to the ABA Defense Services Standards notes:

> One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads. . . .
>
> All too often in defender organizations[,] . . . attorneys are asked to provide representation in too many cases. . . . Unfortunately, not even the most able and industrious lawyers can provide quality representation when their workloads are unmanageable. Excessive

defense attorneys in federal capital cases bill for over twelve times as many hours as in noncapital homicide cases.[115] In terms of actual numbers of hours invested in the defense of capital cases, recent studies indicate that several thousand hours are typically required to provide appropriate representation. For example, an in-depth examination of federal capital trials from 1990 to 1997 conducted on behalf of the Judicial Conference of the United States found that the total attorney hours per representation in capital cases that actually proceeded to trial averaged 1,889.[116]

Workloads for lawyers handling direct appeals should also be maintained at levels that are consistent with providing high quality legal representation. Like the responsibilities of counsel at trial, appellate work in a capital case is time-consuming and difficult. A capital trial record, which appellate counsel must review in full and with care, typically runs to thousands or even tens of thousands of pages—even before, pursuant to Guideline 10.7(B)(2), counsel investigates the possibility that the record may be incomplete. Once appellate counsel has reviewed the record, he or she must conduct especially wide-ranging legal research, canvassing both state and federal judicial opinions, before drafting the opening brief. Given the gravity of the punishment, the unsettled state of the law, and the insistence of the courts on rigorous default rules, it is incumbent upon appellate counsel to raise every potential ground of error that might result in a reversal of the defendant's conviction or punishment.[117] Further, counsel must aggressively examine the government's brief and research its legal assertions in order to prepare an adequate reply. Preparing for and presenting oral argument requires counsel to invest still more hours. In California, where the Office of the State Public Defender handled capital appeals in the California Supreme Court, a 1989 study concluded that attorneys' responsibilities should be limited to two to three such proceedings per year.[118]

115. *See Federal Death Penalty Cases*, *supra* note 91.

116. *See id.* This figure was only for the number of hours expended through the end of trial court proceedings, and did not include any post-conviction representation.

117. *See supra* text accompanying notes 42-44. Moreover, counsel must continue to investigate the facts. *See infra* Guideline 10.7 (A); *see also* Orazio v. Dugger, 876 F.2d 1508, 1513 (11th Cir. 1989) (holding appellate counsel ineffective because "[h]e did not review fully the trial court file or talk with petitioner or trial counsel," and hence was unaware of a trial court ruling that should have been appealed).

118. *See* NAT'L CTR. FOR STATE COURTS & THE SPANGENBERG GROUP, WORKLOAD AND PRODUCTIVITY STANDARDS: A REPORT TO THE OFFICE OF THE STATE PUBLIC DEFENDER 86-89 (1989).

Similarly, the workloads of counsel handling collateral proceedings must be carefully limited to allow for high quality legal representation. A 1998 survey of the time and expenses required in Florida capital post-conviction cases concluded that:

> [T]he most experienced and qualified lawyers at Florida's post-conviction defender office, the Office of Capital Collateral Representation[,] have estimated that, on average, over 3,300 lawyer hours are required to take a post-conviction death penalty case from the denial of certiorari by the United States Supreme Court following direct appeal to the denial of certiorari [from state post-conviction proceedings.][119]

It is the duty of the Responsible Agency to distribute assignments in light of each attorney's duty under the Rules of Professional Conduct to "provide competent representation to a client,"[120] which requires the legal knowledge, skill, thoroughness and preparation necessary for a complex and specialized area of the law.[121] Thus, the Responsible Agency must monitor private counsel in accordance with Guideline 7.1, and provide them with additional assistance as necessary. And the Independent Authority must monitor the defender organizations of the jurisdiction and stand ready to supplement their resources with those of the private bar.

Regardless of the context, no system that involves burdening attorneys with more cases than they can reasonably handle can provide high quality legal representation. In the capital context, no such system is acceptable.

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119. THE SPANGENBERG GROUP, AMENDED TIME & EXPENSE ANALYSIS OF POST-CONVICTION CAPITAL CASES IN FLORIDA 16 (1998).

120. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

121. *See id.* cmt. 1; *see also* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.2(d), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION 1.3(a) (1995).

GUIDELINE 7.1—MONITORING; REMOVAL

A. The Responsible Agency should monitor the performance of all defense counsel to ensure that the client is receiving high quality legal representation. Where there is evidence that an attorney is not providing high quality legal representation, the Responsible Agency should take appropriate action to protect the interests of the attorney's current and potential clients.

B. The Responsible Agency should establish and publicize a regular procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation.

C. The Responsible Agency should periodically review the rosters of attorneys who have been certified to accept appointments in capital cases to ensure that those attorneys remain capable of providing high quality legal representation. Where there is evidence that an attorney has failed to provide high quality legal representation, the attorney should not receive additional appointments and should be removed from the roster. Where there is evidence that a systemic defect in a defender office has caused the office to fail to provide high quality legal representation, the office should not receive additional appointments.

D. Before taking final action making an attorney or a defender office ineligible to receive additional appointments, the Responsible Agency should provide written notice that such action is being contemplated, and give the attorney or defender office opportunity to respond in writing.

E. An attorney or defender office sanctioned pursuant to this Guideline should be restored to the roster only in exceptional circumstances.

F. The Responsible Agency should ensure that this Guideline is implemented consistently with Guideline 2.1(C), so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Guideline.

History of Guideline

In the original edition, this Guideline provided that an attorney should receive no additional capital appointments if counsel had "inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client's case." In this edition, the standard has been changed to prohibit future appointment where counsel "has failed to provide high quality legal representation." The change was made because the former language was considered insufficiently stringent. Subsection B is based on commentary to the original edition of the Guideline. Subsections C–E are taken from Subsections A and C of the original edition of the Guideline. Subsection F is new and is intended to emphasize the importance of the principle enunciated in Guideline 2.1(C).

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 (3d ed. 1992) ("Rotation of Assignments and Revision of Roster").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-6.3 (3d ed. 1992) ("Removal").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.4 (1989) ("Supervision of Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.4.2 (1989) ("Monitoring").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5 (1989) ("Disciplinary Policies and Procedures").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.1 (1989) ("Penalties Less than Removal").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.2 (1989) ("Removal from Program Roster(s)").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.5.3 (1989) ("Reinstatement After Removal").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.4 (1976) ("Supervision and Evaluation of Defender System Personnel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.5 (1976) ("Monitoring and Evaluation of Assigned Counsel Program Personnel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-16 (1984) ("Supervision and Evaluation").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002) ("Defense Counsel Is Supervised and Systematically Reviewed for Quality and Efficiency According to Nationally and Locally Adopted Standards").

Commentary

Consistent with its duty to ensure that high quality legal assistance is afforded to indigent capital defendants, the Responsible Agency should monitor the performance of all capital defense counsel, including defender offices. "Admittedly, this is not an easy task and there obviously are difficulties present in having third parties scrutinize the judgments of private counsel. On the other hand, the difficulty of the task should not be an excuse for doing nothing."[122]

While the Responsible Agency should investigate and maintain records regarding any complaints made against assigned counsel by judges, clients and other attorneys,[123] an effective attorney-monitoring program in death penalty matters should go considerably beyond these activities. The performance of each assigned lawyer should be subject to systematic review based upon publicized standards and procedures.[124] Counsel should be removed from the roster when counsel has failed to represent a client consistently with these Guidelines.[125]

In fulfilling its monitoring function, the Responsible Agency should not attempt to micro-manage counsel's work;[126] most lawyering tasks may reasonably be performed in a variety of ways. In order to preserve the nature of the attorney-client relationship, counsel for the accused must have the freedom to represent their client as they deem professionally appropriate. Clients, moreover, should have the right to continue satisfactory relationships with lawyers in whom they have reposed their confidence and trust. Rather, the responsibility of the Responsible Agency is to ensure that, overall, the attorney is providing high quality legal representation. Where counsel fails to do so, whether

122. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 cmt. (3d ed. 1992).

123. *See id.*

124. *See infra* Guidelines 10.1-10.15.2.

125. The standard for denying additional appointments to death penalty lawyers should be more strictly applied than the standard for denying additional appointments in non-capital cases. In non-capital criminal cases, the standard provides that "[w]here there is compelling evidence that an attorney *consistently* has ignored basic responsibilities[,] . . . the attorney's name should be removed from the roster after notice and hearing, with the possibility of reinstatement after removal if adequate demonstration of remedial measures is shown." ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.3 cmt. (3d ed. 1992) (emphasis added). As these Guidelines make clear, low quality representation of a capital defendant may have irrevocable consequences. Accordingly, the Responsible Agency should not wait for an attorney to "consistently . . . ignore[] basic responsibilities." *Id.*

126. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.3 cmt. (3d ed. 1992).

because of a mental or physical impairment,[127] or for any other reason, the Responsible Agency should intervene. This may occur on the Responsible Agency's own motion or as a result of a request by the defendant or the court.[128]

In keeping with the paramount objective of protecting the rights and interests of the defendant, Subsection B provides that the Responsible Agency should have a regularized procedure for investigating and resolving complaints of inadequate representation. The procedure should recognize that many people (e.g., family members of the client, witnesses whom the attorney has interviewed or not interviewed) may be in a position to provide important information. The procedure should be publicized accordingly.

The Responsible Agency must monitor cases, and take appropriate action in the event of any substandard performance. If the jurisdiction has defender organizations, the entity monitoring them must review such problems with an eye towards rectifying both deficiencies on the part of individual staff lawyers and any structural flaws that those deficiencies may reveal. If inadequate training, office workload, or some other systemic problem has resulted in representation of lower quality than required by these Guidelines and the situation is not corrected, the office should be removed from the roster.

Because of the unique and irrevocable nature of the death penalty, counsel or offices that have been removed from the roster should be readmitted only upon exceptional assurances that no further dereliction of duty will occur. The Responsible Agency should not readmit counsel or the office to the roster unless it determines that the original removal was in error, or finds by clear and convincing evidence that the problem which led to the removal of counsel or the office has been identified and

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127. It cannot always be safely assumed that counsel who has been determined to be qualified based on past performance will represent current or future clients satisfactorily. Circumstances can change. For example, the attorney may begin suffering from illness, chemical dependency or some other handicap unknown to the appointing authority, the court or the client. *See* Kirchmeier, *supra* note 29, at 455-60 (discussing cases in which defendants were represented by lawyers who were intoxicated, abusing drugs, or mentally ill).

128. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1(a) (3d ed. 1999) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.").

corrected. It may condition readmission on specific actions (e.g., proof of reduction in workload, proof of additional training and/or experience, substance abuse counseling, or correction of systemic defects in an office).

GUIDELINE 8.1—TRAINING

A. **The Legal Representation Plan should provide funds for the effective training, professional development, and continuing education of all members of the defense team.**

B. **Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the Responsible Agency, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**

1. **relevant state, federal, and international law;**
2. **pleading and motion practice;**
3. **pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
4. **jury selection;**
5. **trial preparation and presentation, including the use of experts;**
6. **ethical considerations particular to capital defense representation;**
7. **preservation of the record and of issues for post-conviction review;**
8. **counsel's relationship with the client and his family;**
9. **post-conviction litigation in state and federal courts;**
10. **the presentation and rebuttal of scientific**

evidence, and developments in mental health fields and other relevant areas of forensic and biological science;

11. the unique issues relating to the defense of those charged with committing capital offenses when under the age of 18.

C. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the Responsible Agency that focuses on the defense of death penalty cases.

D. The Legal Representation Plan should insure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

History of Guideline

The importance of training was addressed in Guideline 9.1 of the original version of the Guidelines for lawyers seeking to receive appointments in capital cases. Subsections A and D have been added to this revised edition to emphasize that the Legal Representation Plan must provide for specialized training of all members of the defense team involved in the representation of capital defendants. Subsections B and C are based on the original edition of the Guideline. This revised edition of the Guideline has been amended to emphasize that qualified training programs must be "comprehensive" in scope. Thus the eleven areas of training set forth in Subsection B are new and are intended to indicate the broad range of topics that must be covered in order for an initial training program to meet minimum requirements. The requirement of participation in a continuing legal education program every two years is also a minimum; many capital defense counsel have discovered that they must attend training programs more frequently in order to provide effective legal representation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.5 (3d ed. 1992) ("Training and Professional Development").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.6 (3d ed. 1993) ("Training Programs"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.16 (1973) ("Training and Education of Defenders").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, MODEL PUBLIC DEFENDER ACT, Section 10 (1970) ("Office of Defender General").

NAT'L LEGAL AID AND DEFENDER ASS'N, DEFENDER TRAINING AND DEVELOPMENT Standards (1997).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES Guideline III-17 (1984) ("Professional Development").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.7 (1976) ("Training Staff Attorneys in a Defender System").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.8 (1976) ("Training Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.2 (1989) ("Orientation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.1 (1989) ("Entry-Level Training").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.3.2 (1989) ("In-Service Training").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (2002) ("Defense Counsel Is Provided with and Required to Attend Continuing Legal Education").

Commentary

As indicated in the commentary to Guideline 1.1, providing high quality legal representation in capital cases requires unique skills. Accordingly, the standard of practice requires that counsel have received comprehensive specialized training before being considered qualified to undertake representation in a death penalty case.[129] Such training is not to be confined to instruction in the substantive law and procedure applicable to legal representation of capital defendants, but must extend to related substantive areas of mitigation and forensic science. In addition, comprehensive training programs must include practical instruction in advocacy skills, as well as presentations by experienced practitioners.

Once an attorney has been deemed qualified to accept appointments in capital cases, the standard of practice requires counsel to regularly receive formal training in order to keep abreast of the field.[130] Continuing legal education, which is required by many state bars as a matter of course for all attorneys, is critically important to capital

129. *See, e.g.*, New York Capital Defender Office, *Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases*, *available at* http://www.nycdo.org/35b/35b-std.html (requiring that applicants submit "a description of specialized criminal defense training programs regularly attended, such as the NITA, the National Criminal Defense College, or bar association criminal practice programs" and specifying that "[a]n attorney shall not be eligible to be appointed as lead counsel or associate counsel in a capital case unless the Capital Defender Office shall certify that the attorney satisfactorily has completed a basic capital training program prescribed by the Capital Defender Office" or qualifies for an Interim Certification because she is otherwise qualified and is "in active pursuit of such training").

130. As one authority has noted, capital defense counsel must exhibit "constant vigilance in keeping abreast of new developments in a volatile and highly nuanced area of the law." Vick, *supra* note 4, at 358; *see also* Taylor-Thompson, *supra* note 37, at 1510.

defense attorneys. As the commentary to Guideline 1.1 indicates, they must not only have mastery of current developments in law, forensics, and related areas, but also be able to anticipate future ones.[131]

In recognition of the central role that ongoing training plays in the provision of effective capital defense representation, a number of professional organizations, including the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the Habeas Assistance Project, the NAACP Legal Defense and Education Fund, Inc., the office of the Kentucky Public Advocate, and the Association of the Bar of the City of New York, have regularly devoted significant efforts to providing educational programs of the quality contemplated by this Guideline.

Many such organizations also provide resources, such as newsletters, that counsel should utilize to learn of new developments and to benefit from the collective wisdom and experience of the capital defense bar.

131. *See supra* text accompanying note 28.

GUIDELINE 9.1—FUNDING AND COMPENSATION

A. **The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.**

B. **Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**

1. **Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**

2. **Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.**

3. **Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

C. **Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**

1. **Investigators employed by defender organizations should be compensated according**

to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.

2. **Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**

3. **Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

D. Additional compensation should be provided in unusually protracted or extraordinary cases.

E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

History of Guideline

This Guideline was Guideline 10.1 in the original edition. The express disapproval of flat or fixed fee compensation provisions and statutory fee maximums is new to this edition. The provision is in keeping with Guideline 10.1(A) of the original edition, which mandates that counsel be fully compensated at a reasonable hourly rate of compensation, and follows the commentary to Standard 5-2.4 of the ABA Standards for Criminal Justice: Providing Defense Services, which observes that "[t]he possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment." Subsection B(2) is new to the Guideline and has been added to provide for compensation of attorneys employed by defender organizations. Subsection B(3) is based on the original edition of the Guideline, but a provision has been added indicating that there should be no distinction between the hourly rates of compensation for services

performed in or out of court. Subsection C is new to this edition and provides for compensation of the other members of the defense team. Subsection D is new to this edition. Subsection E is based on the original edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.4 (3d ed. 1992) ("Compensation and Expenses").

ABA STANDARDS FOR CRIMINAL JUSTICE: CRIMINAL APPEALS Standard 21-2.4 (2d ed. 1980) ("Procedural Devices Intended to Eliminate Frivolous Appeals Before Determination of Their Merits").

ABA STANDARDS FOR CRIMINAL JUSTICE: POSTCONVICTION REMEDIES STANDARD 22-4.3 (2d ed. 1980) ("Appointment of Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.1 ("Assigned Counsel Fees").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.2 ("Method of Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.3 ("Payment of Expenses").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.7.4 ("Only Authorized Compensation") (1989).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.2 (1976) ("Defender System Salaries").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 11 (1970) ("Local Offices").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.7 (1973) ("Defender to Be Full-time and Adequately Compensated").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.11 (1973) ("Salaries for Defender Attorneys").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 13 (1970) ("Court Assigned Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-11 (1984) ("Special Case Compensation").

Commentary

In order to fulfill its constitutional obligation to provide effective legal representation for poor people charged with crimes,[132] "[g]overnment has the responsibility to fund the full cost of quality legal representation."[133] This means that it must "firmly and unhesitatingly resolve any conflicts between the treasury and the fundamental constitutional rights in favor of the latter."[134]

As Subsection A of this Guideline emphasizes, each jurisdiction is responsible for paying not just the direct compensation of members of

132. *See generally* Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama, 287 U.S. 45 (1932).

133. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 (3d ed. 1992).

134. Pruett v. State, 574 So. 2d 1342, 1354 n.17 (Miss. 1990) (quoting Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1986)).

the defense team, but also the costs involved in meeting the requirements of these Guidelines for high quality legal representation (e.g., Guideline 4.1, Guideline 8.1).

As a rough benchmark, jurisdictions should provide funding for defender services that maintains parity between the defense and the prosecution with respect to workload, salaries, and resources necessary to provide quality legal representation (including benefits, technology, facilities, legal research, support staff, paralegals, investigators, mitigation specialists, and access to forensic services and experts). In doing so, jurisdictions must be mindful that the prosecution has access at no cost to many services for which the defense must pay. A prosecution office will not only benefit from the formal resources of its jurisdiction (e.g., a state crime laboratory) and co-operating jurisdictions (e.g., the FBI), but from many informal resources as well. For example, a prosecutor seeking to locate a witness in a distant city can frequently enlist the assistance of a local police department; defense counsel will have to pay to send out an investigator. Yet funding for defense services usually lags far behind prosecution funding.[135]

In particular, compensation of attorneys for death penalty representation remains notoriously inadequate.[136] As Justice Blackmun observed in 1994:

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135. Studies indicate that funding for prosecution is, on the average, three times greater than funding that is provided for defense services at both the state and federal levels. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.6 cmt. (3d ed. 1992) (footnote omitted). The ABA has recently reaffirmed its commitment to the principle of equal funding, calling for a public defense system in which:

> There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense. Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services. No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system. This principle assumes that the prosecutor is adequately funded and supported in all respects, so that securing parity will mean that defense counsel is able to provide quality legal representation.

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYS., Principle 8 (2002) (footnotes omitted), *available at* http://www.abanet.org/legalservices/downloads/sclaid/resolution107.pdf.

136. *See, generally* Ruth E. Friedman & Bryan A. Stevenson, *Solving Alabama's Capital Defense Problems: It's a Dollars and Sense Thing*, 44 ALA. L. REV. 1 (1992); Anthony Paduano &

> [C]ompensation for attorneys representing indigent capital defendants often is perversely low. Although a properly conducted capital trial can involve hundreds of hours of investigation, preparation, and lengthy trial proceedings, many States severely limit the compensation paid for capital defense. . . .
>
> As a result, attorneys appointed to represent capital defendants at the trial level frequently are unable to recoup even their overhead costs and out-of-pocket expenses, and effectively may be required to work at minimum wage or below while funding from their own pockets their client's defense.[137]

Low fees make it economically unattractive for competent attorneys to seek assignments and to expend the time and effort a case may require. A 1993 study of capital representation in Texas, for example, showed that "more and more experienced private criminal attorneys are refusing to accept court appointments in capital cases because of the time involved, the substantial infringement on their private practices, the lack of compensation for counsel fees and experts/expenses and the enormous pressure that they feel in handling these cases."[138] Similarly, a survey of Mississippi attorneys appointed to represent indigent defendants in capital cases found that eighty-two percent would either refuse or be very reluctant to accept another appointment because of financial considerations.[139] A 1998 study of federal death penalty cases reported that "[a]lthough the hourly rates of compensation in federal capital cases are higher than those paid in non-capital federal criminal cases, they are quite low in comparison to hourly rates for lawyers generally, and to the imputed hourly cost of office overhead."[140]

While compensation is generally inadequate for representation at trial, it is even worse—and indeed, in a number of jurisdictions, nonexistent—for representation in state collateral proceedings.[141]

Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991); Vick, *supra* note 4; Albert L. Vreeland, II, Note, *The Breath of the Unfee'd Lawyer: Statutory Fee Limitations and Ineffective Assistance of Counsel in Capital Litigation*, 90 MICH. L. REV. 626 (1991).

137. McFarland v. Scott, 512 U.S. 1256, 1257-58 (1994) (Blackmun, J., dissenting from denial of certiorari).

138. THE SPANGENBERG GROUP, A STUDY OF REPRESENTATION IN CAPITAL CASES IN TEXAS 152 (1993).

139. *See* Friedman & Stevenson, *supra* note 136, at 31 n.148.

140. *Federal Death Penalty Cases*, *supra* note 91, at 28 (footnotes omitted).

141. For a survey of state practices regarding appointment and compensation of post-conviction counsel, see generally Hammel, *supra* note 47, and THE SPANGENBERG GROUP, ABA POSTCONVICTION DEATH PENALTY REPRESENTATION PROJECT, AN UPDATED ANALYSIS OF THE

Thousands of attorney hours are required to represent a death-sentenced prisoner effectively in such cases.[142] Not surprisingly, few attorneys are willing to take on this responsibility for negligible compensation. As a result, a substantial and growing number of condemned inmates who have completed direct review are without legal representation.[143]

It is such inmates—and the justice system—rather than lawyers (who can always move to more lucrative fields) that are victimized when jurisdictions fail to fulfill their financial responsibilities. What is "most important [is that] the quality of the representation often suffers when adequate compensation for counsel is not available."[144] This is not a merely theoretical concern. It is demonstrably the case that, by discouraging more experienced criminal defense lawyers from accepting appointments in capital cases, inadequate compensation has often left capital defense representation to inexperienced or outright incompetent counsel. A series of studies in several death penalty states have found that appointed counsel in death penalty cases have been subject to professional disciplinary action at significantly higher rates than other lawyers.[145]

These realities underlie the mandate of this guideline that members of the death penalty defense team be fully compensated at a rate commensurate with the provision of high quality legal representation. The Guideline's strong disapproval of flat fees, statutory caps, and other arbitrary limitations on attorney compensation is based upon the adverse effect such schemes have upon effective representation.[146] Rather, compensation should be based on the number of hours expended plus the effort, efficiency, and skill of counsel.[147] When assigned counsel is paid

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RIGHT TO COUNSEL AND THE RIGHT TO COMPENSATION AND EXPENSES IN STATE POSTCONVICTION DEATH PENALTY CASES (1996).

142. As discussed *supra* in the text accompanying note 119, a 1998 study of time and expenses required in Florida capital post-conviction cases concluded that on average, over 3,300 lawyer hours are required to represent a death-sentenced prisoner in Florida's post-conviction proceedings. THE SPANGENBERG GROUP, *supra* note 119, at 16.

143. *See* Celestine Richards McConville, *The Right to Effective Assistance of Capital Postconviction Counsel: Constitutional Implications of Statutory Grants of Capital Counsel*, 2003 Wisc. L. Rev. 31, 35 n.22; Smith & Starns, *supra* note 47, at 106-19 (discussing state provisions for appointment of counsel and states that fail to appoint or compensate counsel); *infra* note 334.

144. ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.4 cmt. (3d ed. 1992).

145. *See* Vick, *supra* note 4, at 398 (summarizing studies); *see also* Kirchmeier, *supra* note 29, at 455-60 (listing cases of appointed capital defense counsel who were intoxicated, abusing drugs, or mentally ill).

146. *See* Vick, *supra* note 4, at 399-400.

147. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-2.4 cmt. (3d ed. 1992).

a predetermined fee for the case regardless of the number of hours of work actually demanded by the representation, there is an unacceptable risk that counsel will limit the amount of time invested in the representation in order to maximize the return on the fixed fee.[148]

Moreover, any compensation system that fails to reflect the extraordinary responsibilities and commitment required of all members of the defense team in death penalty cases,[149] that does not provide for extra payments when unusually burdensome representation is provided, or that does not provide for the periodic payment of fees to all members of the defense team will not succeed in obtaining the high quality legal representation required by these Guidelines.

For better or worse, a system for the provision of defense services in capital cases will get what it pays for.[150]

148. *See, e.g.*, Bailey v. State, 424 S.E.2d 503, 506 (S.C. 1992). The court stated:

> [I]t would be foolish to ignore the very real possibility that a lawyer may not be capable of properly balancing the obligation to expend the proper amount of time in an appointed criminal matter where the fees involved are nominal, with his personal concerns to earn a decent living by devoting his time to matters wherein he will be reasonably compensated. The indigent client, of course, will be the one to suffer the consequences if the balancing job is not tilted in his favor.

Id. (quoting Okeekchobee County v. Jennings, 473 So. 2d 1314, 1318 (Fla. Dist. Ct. App. 1985), *quashed sub nom.* Dennis v. Okeechobee County, 491 So. 2d 1115 (Fla. 1986)) (emphasis omitted).

149. *See supra* text accompanying notes 1-8.

150. *Cf.* Martinez-Macias v. Collins, 979 F.2d 1067, 1067 (5th Cir. 1992) (granting habeas corpus relief because "Macias was denied his constitutional right to adequate counsel in a capital case in which actual innocence was a close question. The state paid defense counsel $11.84 per hour. Unfortunately, the justice system got only what it paid for").

GUIDELINE 10.1—ESTABLISHMENT OF PERFORMANCE STANDARDS

A. The Responsible Agency should establish standards of performance for all counsel in death penalty cases.

B. The standards of performance should be formulated so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these Guidelines. The Responsible Agency should refer to the standards when assessing the qualifications or performance of counsel.

C. The standards of performance should include, but not be limited to, the specific standards set out in these Guidelines.

History of Guideline

This Guideline is former Guideline 11.1 with only stylistic revisions.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.1 ("The Function of the Standards"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-1.1 (3d ed. 1992) ("Objective").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.1 (1989) ("Provision of Quality Representation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.9 (1989) ("Standards for Performance of Counsel").

Commentary

The Structure of Guideline 10

Guideline 10 mandates the establishment of performance standards designed to insure the provision of high quality legal representation. Compliance with Guideline 10 may therefore be relevant to a determination as to whether a jurisdiction meets the requirements of Chapter 154 of the AEDPA, which provides governments with procedural advantages if they choose to establish effectual mechanisms "for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent [capital] prisoners[, and] . . . provide standards of competency for the appointment of such counsel."[151]

Guideline 10.1 directs the Responsible Agency to promulgate performance standards. Guidelines 10.2–10.15.1 contain specific standards that should be included in any set of performance standards. They do not constitute a complete set of performance standards, however. They address only those aspects of defense representation in which death penalty cases differ from other types of criminal cases[152] and omit those that are applicable to the defense of criminal cases generally. Such standards should, however, also be included in the set established by the Responsible Agency, with the understanding that in capital cases the acceptable level of adherence to those standards must be higher than in non-capital ones. "[D]eath is . . . different"[153] and, as discussed in the commentary to Guideline 1.1, death penalty cases have become so specialized that defense counsel in such cases have duties and functions definably different from those of counsel in ordinary criminal cases. At every stage of a capital case, counsel must be aware of specialized and frequently changing legal principles and rules, become

151. 28 U.S.C. § 2261(b) (2000). The standards of other Guidelines, such as Guideline 2.1 ("Adoption and Implementation of a Plan to Provide High Quality Legal Representation in Death Penalty Cases"), Guideline 5.1 ("Qualifications of Defense Counsel"), Guideline 7.1 ("Monitoring; Removal"), and Guideline 9.1 ("Funding and Compensation"), should also guide the determination as to whether a jurisdiction has "opted in" to Chapter 154.

152. For a general description of these, see *supra* commentary to Guideline 1.1. Guideline 10 should be read against the background provided by that commentary.

153. Gardner v. Florida, 430 U.S. 349, 357 (1977) (plurality opinion).

educated regarding a wide range of mental health issues and scientific technologies, and be able to develop strategies for applying them in the pressure-filled environment of high-stakes, complex litigation. The level of attorney competence that may be tolerable in non-capital cases[154] can be fatally inadequate in capital ones.[155] The standards of performance established under this Guideline should accordingly insure that all aspects of the representation conform to the special standard of practice applicable to capital cases.[156]

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154. For general standards regarding the performance of criminal defense counsel, see ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); INSTITUTE OF JUDICIAL ADMIN./ABA JUVENILE JUSTICE STANDARDS ANNOTATED, STANDARDS RELATING TO COUNSEL FOR PRIVATE PARTIES (1980); and NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1997).

155. For example, as discussed in the commentary to Guideline 1.1, the current Supreme Court standard for effective assistance of counsel, articulated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), requires the defendant to show that counsel's performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence. The application of this standard to capital cases had long been in an entirely unsatisfactory state, as many commentators observed. "Myriad cases in which defendants have been executed confirm that *Strickland*'s minimal standard for attorney competence in capital cases is a woeful failure. Demonstrable errors by counsel, though falling short of ineffective assistance, repeatedly have been shown to have had fatal consequences." Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 18 (1996). In case after case, attorneys who failed to present any evidence in mitigation of the death penalty, or who presented a bare minimum of such evidence, were found to satisfy *Strickland*, *see, e.g.*, Chandler v. United States, 218 F.3d 1305, 1319, 1327 (11th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1204 (2001), even though "the failure to present mitigating evidence is a virtual invitation to impose the death penalty." White, *supra* note 3, at 341.

There is reason to believe that the Supreme Court has heard these concerns. In no case, capital or non-capital, had the Court ever held counsel to have performed ineffectively under *Strickland* until it determined in *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000), that the lawyers in a capital case had been deficient in failing to conduct a thorough investigation of their client's background for sentencing purposes. The Court followed up with *Wiggins v. Smith*, 123 S. Ct. 2527, 2536-37 (2003), which, relying upon the first edition of these Guidelines as a guide to reasonable professional performance, also held counsel in a capital case to have provided ineffective assistance by failing to conduct a complete mitigation investigation. The effect may be that, at least in capital cases, the lower courts will have to re-interpret *Strickland* as imposing considerably more stringent standards than had hitherto been assumed. *See* Marcia Coyle, *New Standards in Death Cases: High Court Rules on Effective Counsel*, NAT'L L. J., July 14, 2003, at 1 ("The promise of *Williams*—to put teeth into the *Strickland* standards—has not been fulfilled, according to some scholars and litigators. But *Wiggins*, they added, will not be so easily ignored by lower courts."). This view finds support in the fact that Justice O'Connor wrote both *Strickland* and *Wiggins*, reinforcing the point that the former will have to be read in light of the latter.

156. The standards established by the Responsible Agency should clearly state that performance in the capital context should be measured with reference to the special expertise required in capital cases. *See, e.g.*, State v. Davis, 561 A.2d 1082, 1089 (N.J. 1989) (stating that meeting the *Strickland* standard in capital cases requires "capital competence"); *see generally*

Consistent with the overall purpose of these Guidelines[157] the specific standards of Guidelines 10.2-15.2 are intended to describe appropriate professional conduct. Compliance with those standards may therefore be relevant in the judicial evaluation of the performance of defense counsel to determine the validity of a capital conviction or death sentence.[158] They should in any event be utilized by the Responsible Agency in determining the eligibility of counsel for appointment or reappointment to capital cases and when monitoring the performance of counsel.[159]

NEBRASKA COMM'N ON PUB. ADVOCACY, STANDARDS FOR INDIGENT DEFENSE SERVICES IN CAPITAL AND NON-CAPITAL CASES. Review by the Responsible Agency should likewise be intensified, compared to the scrutiny that might be given under a system to appoint counsel in non-capital cases. *See, e.g.*, *supra* note 125.

157. *See supra* Guideline 1.1(A).

158. *See, e.g.*, *Wiggins*, 123 S. Ct. 2527 (2003) (relying on first edition of these Guidelines to hold that counsel's mitigation investigation failed to meet reasonable professional standards); Williams v. Taylor, 529 U.S. 362, 396 (2000) (citing ABA STANDARDS FOR CRIMINAL JUSTICE 4-4.1 cmt. at 4-55 (2d ed. 1980) for proposition that "trial counsel [in a capital case have an] obligation to conduct a thorough investigation of the defendant's background," and concluding that defense counsel performed deficiently in failing to conduct a diligent investigation into his client's background).

159. *See supra* Guidelines 5.1 and 7.1, and accompanying commentary.

GUIDELINE 10.2—APPLICABILITY OF PERFORMANCE STANDARDS

Counsel should provide high quality legal representation in accordance with these Guidelines for so long as the jurisdiction is legally entitled to seek the death penalty.

History of Guideline

This Guideline is based on Guideline 11.3 of the original edition and has been revised for consistency with Guideline 1.1.

Related Standards

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.1 (1973) ("Availability of Publicly Financed Representation in Criminal Cases").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.5 (1989) ("Early Representation").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 2.6 (1989) ("Duration and Continuity of Representation").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002) ("Clients Are Screened for Eligibility, and Defense Counsel Is Assigned and Notified of Appointment, as Soon as Feasible After Clients' Arrest, Detention, or Request for Counsel") (footnote omitted).

Commentary

The Supreme Court has stated that the "existence [of a death penalty statute] on the statute books provide[s] fair warning as to the

degree of culpability which the State ascribe[s] to the act of murder."[160] In accordance with Guideline 1.1 (B), once a client is detained under circumstances in which the death penalty is legally possible, counsel should proceed as if it will be sought.[161]

As described *supra* in the text accompanying footnotes 13-17, early investigation to determine weaknesses in the State's case and uncover mitigating evidence is a necessity, and should not be put off in the hope that the death penalty will not be requested, or that the request will be dropped at a later point.

Moreover, early investigation may uncover mitigating circumstances or other information that will convince the prosecutor to forego pursuit of a death sentence.[162]

Jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty.[163] If required

160. Dobbert v. Florida, 432 U.S. 282, 297 (1977).

161. In a number of cases, courts have found no bar to the prosecution pursuing a death sentence, despite belated notice to the defense. *See, e.g.*, State v. Lee, 917 P.2d 692, 698-99 (Ariz. 1996) (affirming death sentence where state filed its written notice eighty-seven days late under state law, because defendant had actual notice that State intended to pursue death penalty); People v. Dist. Court, Gilpin County, 825 P.2d 1000, 1002-03 (Colo. 1992) (concluding defendant received adequate notice of intent to seek death penalty where prosecution never stated death penalty would not be sought and notice was filed forty-one days before trial, even though discovery had been completed and date for filing pretrial motions had passed).

162. *See, e.g.*, State v. Pirtle, 904 P.2d 245, 254 (Wash. 1995) (noting that under state law, "[b]efore the death penalty can be sought, there must be 'reason to believe that there are not sufficient mitigating circumstances to merit leniency'") (quoting State v. Campbell, 691 P.2d 929, 942 (Wash. 1984)); U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-10.030 (2001) [hereinafter UNITED STATES ATTORNEYS' MANUAL] ("In any case in which a United States Attorney's Office is considering whether to request approval to seek the death penalty, the United States Attorney shall give counsel for the defendant a reasonable opportunity to present any facts, including any mitigating factors, to the United States Attorney for consideration."). "Input from the defendant as to mitigating factors is normally desirable, because the subjective factors are better known to the defendant." State v. Pirtle, 904 P.2d at 254 (citation omitted); *see also infra* text accompanying notes 244-45.

163 Some jurisdictions require the defense be provided formal notice of the government's intent to seek the death penalty well before the guilt/innocence phase. *See, e.g.*, ARIZ. R. CRIM. P. 15.1(g)(1) (requiring a prosecutor to provide the defendant notice of intent to seek the death penalty "no later than 60 days after the arraignment in superior court"); MD. CODE ANN., CRIM. LAW § 2-202(a) (2002) (providing that:

> A defendant found guilty of murder in the first degree may be sentenced to death only if: (1) At least 30 days before trial, the State gave written notice to the defendant of: (i) The State's intention to seek a sentence of death; and (ii) Each aggravating circumstance on which the State intends to rely);

NEV. SUP. CT. R. 250(4)(c) ("No later than 30 days after the filing of an information or indictment, the state must file in the district court a notice of intent to seek the death penalty. The notice must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance."); N.Y. CRIM. PROC. LAW § 250.40(1)-(2) (McKinney 2002) (stating that:

notice has not been given, counsel is under no duty to invite a death penalty prosecution. While preparing for a capital case when notice has not been given, counsel should also prepare to challenge any prosecution efforts that should be barred for failure to give notice.[164]

Counsel must continue to treat the case as capital "until the imposition of the death penalty is no longer a legal possibility."[165]

> A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless . . . the people file with the court and serve upon the defendant a notice of intent to seek the death penalty . . . within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder.);

WASH. REV. CODE ANN. § 10.95.040(2)-(3) (West 2002) (stating the state is precluded from seeking the death penalty unless written notice is served on the defendant or counsel "within thirty days after the defendant's arraignment upon the charge of aggravated first degree murder unless the court, for good cause shown, extends or reopens the period for filing and service of the notice"); UNITED STATES ATTORNEYS' MANUAL, *supra* note 162, § 9-10.030 ("If the United States Attorney decides to request approval to seek the death penalty, the United States Attorney's Office should inform counsel for the defendant.").

Other jurisdictions do not require notice. *See, e.g.*, *Dist. Court, Gilpin County*, 825 P.2d at 1002 ("There is no Colorado statute requiring the prosecutor to give notice of intent to seek the death penalty."); Sireci v. State, 399 So. 2d. 964, 970 (Fla. 1981) ("When one is charged with murder in the first degree, he is well aware of the fact that it is a capital felony punishable by a maximum sentence of death."); Williams v. State, 445 So. 2d 798, 804 (Miss. 1984) ("Anytime an individual is charged with murder, he is put on notice that the death penalty may result."). In jurisdictions where the prosecutor is not statutorily required to give notice of the intent to seek the death penalty, due process nonetheless requires that the defendant have adequate notice. *See* Lankford v. Idaho, 500 U.S. 110, 119-22 (1991) (holding due process was violated where the trial court imposed a death sentence after the prosecution stated it would not recommend a death sentence and the trial judge was silent following the state's decision).

164. *See, e.g.*, Holmberg v. De Leon, 938 P.2d 1110, 1111 (Ariz. 1997) (granting defense motion to strike State's notice of intent to seek death penalty on ground that it violated state court rule requiring notice within 30 days of arraignment); State v. Second Judicial Dist. Court, 11 P.3d 1209, 1211, 1215 (Nev. 2000) (concluding trial court acted within its discretion in denying prosecution motion for leave to file untimely notice of intent to seek death penalty; defense opposed motion). Counsel should be mindful of the possibility that it may be appropriate to pursue the challenge through some collateral proceeding (e.g, application for a writ of prohibition). *See infra* text accompanying note 230.

165. History of Guideline 1.1, *supra*.

GUIDELINE 10.3—OBLIGATIONS OF COUNSEL RESPECTING WORKLOAD

Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation in accordance with these Guidelines.

History of Guideline

This Guideline is based on Guideline 6.1 of the original edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES Standard 5-5.3 (3d ed. 1992) ("Workload").

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-1.3 ("Delays; Punctuality; Workload") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.1 (1976) ("Establishing Maximum Pending Workload Levels for Individual Attorneys").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.2 (1976) ("Statistics and Record-keeping").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 5.3 (1976) ("Elimination of Excessive Caseloads").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-12 (1984) ("Case and Work Overload").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3 (1995) ("General Duties of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1(c) (1989) ("Establishment and General Operation of Assigned Counsel Roster").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.1.2 (1989) ("Workloads of Attorneys").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.12 (1973) ("Workload of Public Defenders").

Commentary

It is each attorney's duty under the Model Rules of Professional Conduct neither to accept employment when it would jeopardize the lawyer's ability to render competent representation[166] nor to handle cases without "adequate preparation."[167] Applying these professional norms to the special context of defense representation in death penalty cases, this Guideline mandates that attorneys maintain a workload consistent with the provision of high quality legal representation, bearing in mind the considerations discussed in the commentary to Guideline 6.1

Once having agreed to represent a capital client, counsel should control their overall workload so as to be able to do so effectively. Counsel who determine, in the exercise of best professional judgment, that accepting new cases or continuing with old ones will lead to providing capital defense representation of less than high quality should take such steps as may be appropriate to reduce pending or projected caseloads, such as seeking assistance from the Responsible Agency, refusing further cases and moving to withdraw from existing cases.

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166. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 (2002).

167. *Id.* at R. 1.1 cmt. 5; *cf.* David J. Williams, Letter to the Editor, LA. B.J., Aug./Sep. 2002, at 86 (Letter from counsel to Leslie Dale Martin, who was executed on May 10, 2002, stating that "the caseload of the lead counsel was such that he only had time to read through the file once before trial. . . . This case cost me most of the respect that I formerly had for the criminal justice system").

In short, an attorney whose workload threatens to cause a breach of his or her obligations under these Guidelines has a duty to take corrective action. Counsel in that situation may not simply attempt to muddle through.

GUIDELINE 10.4—THE DEFENSE TEAM

A. When it is responsible for designating counsel to defend a capital case, the Responsible Agency should designate a lead counsel and one or more associate counsel. The Responsible Agency should ordinarily solicit the views of lead counsel before designating associate counsel.

B. Lead counsel bears overall responsibility for the performance of the defense team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards.

1. Subject to the foregoing, lead counsel may delegate to other members of the defense team duties imposed by these Guidelines, unless:

   a. The Guideline specifically imposes the duty on "lead counsel," or

   b. The Guideline specifically imposes the duty on "all counsel" or "all members of the defense team."

C. As soon as possible after designation, lead counsel should assemble a defense team by:

1. Consulting with the Responsible Agency regarding the number and identity of the associate counsel;

2. Subject to standards of the Responsible Agency that are in accord with these Guidelines and in consultation with associate counsel to the extent practicable, selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes:

a. at least one mitigation specialist and one fact investigator;

b. at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and

c. any other members needed to provide high quality legal representation.

D. Counsel at all stages should demand on behalf of the client all resources necessary to provide high quality legal representation. If such resources are denied, counsel should make an adequate record to preserve the issue for further review.

History of Guideline

This Guideline is new. It supplements Guideline 4.1.

Related Standards

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 (1986) ("Roles of Mental Health and Mental Retardation Professionals in the Criminal Process").

ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-5.7 (1986) ("Evaluation and Adjudication of Competence to Be Executed; Stay of Execution; Restoration of Competence").

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-2.4 ("Special Assistants, Investigative Resources, Experts") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1995) ("Investigation").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS, Standard 13.14 (1973) ("Supporting Personnel and Facilities").

NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, REPORT OF THE TASK FORCE ON THE COURTS Standard 13.15 (1973) ("Providing Assigned Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-8 (1984) ("Support Staff and Forensic Experts").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING & AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING & AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES, Guideline III-10 (1984) ("Compensation").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.1 (1976) ("Assigned Counsel Fees and Supporting Services").

NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, Guideline 3.4 (1976) ("Nonpersonnel Needs in Defender Offices").

NAT'L LEGAL AID & DEFENDER ASS'N, STANDARDS FOR THE ADMINISTRATION OF ASSIGNED COUNSEL SYSTEMS Standard 4.6 (1989) ("Support Services").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 2 (1970) ("Right to Representation, Services, and Facilities").

NAT'L CONF. OF COMM'RS ON UNIF. STATE LAWS, Model Public Defender Act, Section 12 (1970) ("Personnel and Facilities").

Commentary

As reflected in Guideline 4.1 and the accompanying commentary, the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines.[168] The team approach enhances the quality of representation by expanding the knowledge base available to prepare and present the case, increases efficiency by allowing attorneys to delegate many time-consuming tasks to skilled assistants and focus on the legal issues in the case,[169] improves the relationship with the client and his family by providing more avenues of communication, and provides more support to individual team members.[170]

This Guideline contemplates that the Responsible Agency will ordinarily[171] begin by designating lead counsel for a particular case and then, in consultation with that counsel, designate one or more associate counsel.[172] As described in Subsection B, the role of lead counsel is to direct the work of the defense team in such a way that, overall, it provides high quality legal representation in accordance with these Guidelines and professional standards. Accordingly, lead counsel is free

168. *See* TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105.

169. *See* Mahoney v. Pataki, 772 N.E.2d 1118, 1123 (N.Y. 2002).

170. *See* TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105.

171. This term is meant to accommodate the variety of exigent circumstances under which the provision of high quality legal representation might require a different procedure. For example, the client may be so situated that the professionally responsible course is to have a relatively junior attorney deal with the immediate situation, designating lead counsel subsequently. Alternatively, the client might insist on having a particular retained or pro bono attorney involved in the representation.

172. *Cf.* N.Y. JUD. LAW § 35-b(2) (McKinney 2002) ("With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated 'lead' counsel and the other to be designated 'associate' counsel."); CAL. R. CT. R. 4.117(c)(1) (effective Jan. 1, 2003) ("If the court appoints more than one attorney, one must be designated lead counsel . . . and at least one other must be designated associate counsel . . . ."). Because the Responsible Agency has a continuing duty to monitor the performance of the defense team to insure that it is providing high quality legal representation at every stage of the case, *see supra* Guideline 7.1, the Responsible Agency may appropriately change these designations to reflect developments in the case (e.g, it moves to a new post-conviction stage, or lead counsel becomes ill).

to allocate the duties imposed by these Guidelines to appropriate members of the defense team, with two exceptions: (1) duties (such as the one contained in Subsection (C)) that are specifically imposed on "lead counsel," and (2) duties (such as the one contained in Guideline 10.13) that are specifically imposed on "all counsel" or "all members of the defense team."

After designation, lead counsel should assemble the rest of the defense team. The Responsible Agency should give lead counsel maximum flexibility in this regard. For example, counsel should structure the team in such a way as to distinguish between experts who will play a "consulting" role, serving as part of the defense team covered by the attorney-client privilege and work product doctrine, and experts who will be called to testify, thereby waiving such protections.[173] This may well require, in the words of the Guideline, "appropriate contractual arrangements" (Subsection C(2)).

However, Subsection C(2) provides that the Responsible Agency may impose standards on the composition of the defense team that are in accord with these Guidelines. Examples would include a requirement that a staff attorney of a defender organization utilize in-house resources in the first instance, that compensation levels be limited to levels consistent with Guideline 9.1(C), or that non-attorneys meet appropriate professional qualifications.

The defense team should include at least two attorneys, a fact investigator, and a mitigation specialist. The roles of these individuals are more fully described in the commentaries to Guideline 1.1 and Guideline 4.1. In addition, as also described in the commentary to Guideline 4.1, the team must have a member (who may be one of the foregoing or an additional person) with the necessary qualifications to screen individuals (the client in the first instance, but possibly family members as the mitigation investigation progresses) for mental or psychological disorders or defects and to recommend such further investigation of the subject as may seem appropriate.

The team described in the foregoing paragraph is the minimum. In most cases, at least as trial approaches, the provision of high quality

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173. *See* James J. Clark et al., *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, *in* KY. DEP'T OF PUB. ADVOC., MENTAL HEALTH & EXPERTS MANUAL ch. 8 (6th ed. 2002), *available at* http://dpa.state.ky.us/library/manuals/mental/ch08.html; ABA CRIMINAL JUSTICE MENTAL HEALTH STANDARDS Standard 7-1.1 & cmt. (1989) (mental health and mental retardation experts serving as consultants are agents of the attorney, subject to the attorney-client privilege and the work-product doctrine); *accord id.* Standard 7-3.3 & cmt; *see also supra* Guideline 4.1(B)(2).

representation will require at least some contributions by additional lawyers—for example, a specialist to assist with motions practice and record preservation, or an attorney who is particularly knowledgeable about an area of scientific evidence.[174] As discussed in the commentary to Guideline 4.1, because mental health issues pervade capital cases, a psychologist or other mental health expert may well be a needed member of the defense team. As the commentary to Guideline 4.1 also discusses, additional expert assistance specific to the case will almost always be necessary for an effective defense.

At every stage of the case, lead counsel is responsible, in the exercise of sound professional judgment, for determining what resources are needed and for demanding that the jurisdiction provide them. Because the defense should not be required to disclose privileged communications or strategy to the prosecution in order to secure these resources,[175] it is counsel's obligation to insist upon making such requests ex parte and in camera.[176]

If requests for the resources needed to provide high quality legal representation at any stage of the proceedings are denied, counsel should make a full record to preserve the issue for further review.[177]

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174. *Cf.* Freedman, *supra* note 52, at 1089 n.* (noting that each of six primary attorneys and eleven other named professionals were "critical to saving Mr. Washington's life.").

175. *See* Guideline 4.1(B)(2); *see generally* Bittaker v.Woodford, 311 F.3d 715 (9th Cir. 2003).

176. Many jurisdictions provide, by statute or case law, that requests for expert assistance may be made ex parte so that indigent defendants are not required to divulge confidential work product or strategy to the prosecution. *See, e.g.*, 18 U.S.C. § 3006A(e)(1) (2000) (providing for *ex parte* hearings for requests for investigative, expert, or other services for indigent defendants); CAL. PENAL CODE § 987.9(a) (West Supp. 2002); KAN. STAT. ANN. § 22-4508 (1995); MINN. STAT. ANN. § 611.21 (West Supp. 2002); NEV. REV. STAT. ANN. § 7.135 (Michie 1998); N.Y. COUNTY LAW § 722-c (McKinney Supp. 2002); S.C. CODE ANN. § 16-3-26(C)(1) (Law. Co-op. 2001); TENN. CODE ANN. § 40-14-207(b) (1997); *Ex parte* Moody, 684 So. 2d 114, 120 (Ala. 1996); Brooks v. State, 385 S.E.2d 81, 84 (Ga. 1989) (holding that while state could be heard on the issue of indigency, showing of need for expert should be made *ex parte*); McGregor v. State, 733 P.2d 416, 416 (Okla. Crim. App. 1987) (stating that "to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants"); *Ex parte* Lexington County, 442 S.E.2d 589, 594 (S.C. 1994) (equal protection concerns require hearing to be both ex parte and in camera); State v. Barnett, 909 S.W.2d 423, 429 (Tenn. 1995); Williams v. State, 958 S.W.2d 186, 192-94 (Tex. Crim. App. 1997).

177. Under the AEDPA, such a record may be critical to the ability of the client to succeed on federal habeas corpus. *See* Williams v. Taylor, 529 U.S. 420, 437 (2000); *see generally* Stephen B. Bright, *Obtaining Funds for Experts and Investigative Assistance*, THE CHAMPION, June 1997, at 31, 33; Edward C. Monahan & James J. Clark, *Funds for Defense Experts: What a National Benchmark Requires*, THE CHAMPION, June 1997, at 12.

GUIDELINE 10.5—RELATIONSHIP WITH THE CLIENT

A. **Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.**

B.

1. **Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.**

2. **Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.**

3. **Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.**

C. **Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:**

1. **the progress of and prospects for the factual investigation, and what assistance the client might provide to it;**

2. **current or potential legal issues;**

3. **the development of a defense theory;**

4. **presentation of the defense case;**

5. **potential agreed-upon dispositions of the case;**

6. **litigation deadlines and the projected schedule of case-related events; and**

7. **relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).**

History of Guideline

This Guideline collects, and slightly expands upon, material that was found in Guidelines 11.4.2, 11.6.1, and 11.8.3 of the original edition. The major revisions make this standard apply to all stages of a capital case and note expressly counsel's obligation to discuss potential dispositions of the case with the client.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.1 ("Establishment of Relationship"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.2 ("Interviewing the Client"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.8 ("Duty to Keep Client Informed"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 ("Control and Direction of the Case"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.3(c) (1995) ("General Duties of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 2.2 (1995) ("Initial Interview").

ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2000) ("Clients Are Screened for Eligibility, and Defense Counsel Is Assigned and Notified of Appointment, as Soon as Feasible After Clients' Arrest, Detention, or Request For Counsel") (footnote omitted).

Commentary

The Problem

Immediate contact with the client is necessary not only to gain information needed to secure evidence and crucial witnesses, but also to try to prevent uncounseled confessions or admissions and to begin to establish a relationship of trust with the client.

Anyone who has just been arrested and charged with capital murder is likely to be in a state of extreme anxiety. Many capital defendants are, in addition, severely impaired in ways that make effective communication difficult: they may have mental illnesses or personality disorders that make them highly distrustful or impair their reasoning and perception of reality; they may be mentally retarded or have other cognitive impairments that affect their judgment and understanding; they may be depressed and even suicidal; or they may be in complete denial in the face of overwhelming evidence. In fact, the prevalence of mental illness and impaired reasoning is so high in the capital defendant population that "[i]t must be assumed that the client is emotionally and intellectually impaired."[178] There will also often be significant cultural

178. Rick Kammen & Lee Norton, *Plea Agreements: Working with Capital Defendants*, THE ADVOCATE, Mar. 2000, at 31, *available at* http://www.dpa.state.ky.us/library/advocate/mar00/plea.html; *see also* Lewis, *supra* note 93, at 840 (finding forty percent of death row inmates to be chronically psychotic); Dorothy Otnow Lewis et al., *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AM. J. PSYCHIATRY 584, 586-87 (1988) (finding fifty percent of death sentenced juveniles in survey suffered from psychosis and almost all were severely abused as children).

and/or language barriers between the client and his lawyers. In many cases, a mitigation specialist, social worker or other mental health expert can help identify and overcome these barriers, and assist counsel in establishing a rapport with the client.

Counsel's Duty

Although, as described *supra* in the text accompanying notes 103-07, ongoing communication by non-attorney members of the defense team is important, it does not discharge the obligation of counsel at every stage of the case to keep the client informed of developments and progress in the case, and to consult with the client on strategic and tactical matters. Some decisions require the client's knowledge and agreement;[179] others, which may be made by counsel, should nonetheless be fully discussed with the client beforehand.

Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea.[180] Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not—with good reason—trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client's family or others on whom the client relies for support and advice.

179. *See, e.g.*, Nixon v. Singletary, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance for counsel to fail to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); People v. Hattery, 488 N.E.2d 513, 519 (Ill. 1985) (same).

180. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-5.2 & cmt., *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); *see also* Kevin M. Doyle, *Heart of the Deal: Ten Suggestions for Plea Bargaining*, THE CHAMPION, Nov. 1999, at 68 (counsel should not expect client to accept plea bargain unless opinion is founded on experience and leg work investigating the case); White, *supra* note 3, at 371, 374 (thorough investigation and relationship of trust key to persuading client to accept appropriate plea offer).

Often, so-called "difficult" clients are the consequence of bad lawyering—either in the past or present.[181] Simply treating the client with respect, listening and responding to his concerns, and keeping him informed about the case will often go a long way towards eliciting confidence and cooperation.[182]

Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information,[183] the lawyer must understand the client and his life history.[184] To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.[185]

Counsel's Duties Respecting Uncooperative Clients

Some clients will initially insist that they want to be executed—as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to

181. *See* White, *supra* note 3, at 338 ("Often, capital defendants have had bad prior experiences with appointed attorneys, leading them to view such attorneys as 'part of the system' rather than advocates who will represent their interests. Appointed capital defense attorneys sometimes exacerbate this perception by harshly criticizing their clients's [sic] conduct or making it clear that they are reluctant to represent them. A capital defendant who experiences, or previously has experienced, these kinds of judgments understandably will be reluctant to trust his attorney.") (footnotes omitted); *infra* note 313.

182. A lawyer can also frequently earn a client's trust by assisting him with problems he encounters in prison, or otherwise demonstrating concern for his well being and a willingness to advocate for him. *See id.*; Lee Norton, *Mitigation Investigation*, *in* FLORIDA PUBLIC DEFENDER ASS'N, DEFENDING A CAPITAL CASE IN FLORIDA 25 (2001). Accordingly, such advocacy is an appropriate part of the role of defense counsel in a capital case. Indeed, a lawyer who displays a greater concern with habeas corpus doctrine than with recovering the radio that prison authorities have confiscated from the client is unlikely to develop the sort of relationship that will lead to a satisfactory legal outcome.

183. One important example is the fact that the client is mentally retarded—a fact that the client may conceal with great skill, *see, e.g.*, James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 430-31 (1985), but one which counsel absolutely must know. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that mentally retarded defendants may not constitutionally be executed). The issue of mental illness presents a very similar set of challenges.

184. *See* Goodpaster, *supra* note 3, at 321.

185. *See* Norton, *supra* note 182, at 5; White, *supra* note 3, at 375 (jury will be less likely to empathize with defendant if it does "not perceive a bond between the defendant and his attorney").

simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and despair rather than a rational decision in favor of a state-assisted suicide.[186] Counsel should initially try to identify the source of the client's hopelessness. Counsel should consult lawyers, clergy or others who have worked with similarly situated death row inmates. Counsel should try to obtain treatment for the client's mental and/or emotional problems, which may become worse over time. One or more members of the defense team should always be available to talk to the client; members of the client's family, friends, or clergy might also be enlisted to talk to the client about the reasons for living; inmates who have accepted pleas or been on death row and later received a life sentence (or now wish they had), may also be a valuable source of information about the possibility of making a constructive life in prison. A client who insists on his innocence should be reminded that a waiver of mitigation will not persuade an appellate court of his innocence, and securing a life sentence may bar the state from seeking death in the event of a new trial.[187]

Counsel in any event should be familiar enough with the client's mental condition to make a reasoned decision—fully documented, for the benefit of actors at later stages of the case—whether to assert the position that the client is not competent to waive further proceedings.[188]

The Temporal Scope of Counsel's Duties

The obligations imposed on counsel by this Guideline apply to all stages of the case. Thus, post-conviction counsel, from direct appeal through clemency, must not only consult with the client but also monitor the client's personal condition for potential legal consequences.[189] For example, actions by prison authorities (e.g., solitary confinement, administration of psychotropic medications) may impede the ability to present the client as a witness at a hearing or have legal implications,[190]

186. *See infra* Guideline 10.7(A) and accompanying commentary; Kammen & Norton, *supra* note 178.

187. *See* Bullington v. Missouri, 451 U.S. 430, 445-46 (1981); *see also* Sattazahn v. Pennsylvania, 537 U.S. 101 (2003). Moreover, if a mitigation investigator is productive, it may persuade the prosecutor to forgo the death penalty. In that event, the jury will not be "death-qualified" and the client's chances of an acquittal will be enhanced.

188. *See generally* Godinez v. Moran, 509 U.S. 389, 396-402 (1993) (setting forth minimum competency standard that the Constitution requires).

189. *See infra* text accompanying notes 341.

190. *Cf.* Sell v. United States, 123 S. Ct. 2174, 2184 (2003) (holding that "the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if

and changes in the client's mental state (e.g., as a result of the breakup of a close relationship or a worsening physical condition) may bear upon his capacity to assist counsel and, ultimately, to be executed.[191] In any event, as already discussed, maintaining an ongoing relationship with the client minimizes the possibility that he will engage in counter-productive behavior (e.g., attempt to drop appeals, act out before a judge, confess to the media). Thus, the failure to maintain such a relationship is professionally irresponsible.[192]

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the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests"); Riggins v. Nevada, 504 U.S. 127, 137-38 (1992) (defendant was constitutionally entitled to have administration of anti-psychotic drugs cease before trial). The Supreme Court has not addressed the application of these principles to phases of the criminal process other than the trial itself, but those cases should alert capital defense counsel to do so. *See, e.g.*, Rohan v. Woodford, 334 F.3d 803, 818-19 (9th Cir. 2003) (Kozinski, J.) (holding as a matter of statutory construction that mentally incompetent federal habeas petitioner is entitled to a stay of execution and of proceedings until he recovers).

191. *See infra* text accompanying note 341.

192. *See* ABA MODEL RULES OF PROF'L CONDUCT R. 1.4(a) (2002) ("A lawyer shall . . . keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.").

GUIDELINE 10.6—ADDITIONAL OBLIGATIONS OF COUNSEL REPRESENTING A FOREIGN NATIONAL

A. Counsel at every stage of the case should make appropriate efforts to determine whether any foreign country might consider the client to be one of its nationals.

B. Unless predecessor counsel has already done so, counsel representing a foreign national should:

1. immediately advise the client of his or her right to communicate with the relevant consular office; and

2. obtain the consent of the client to contact the consular office. After obtaining consent, counsel should immediately contact the client's consular office and inform it of the client's detention or arrest.

a. Counsel who is unable to obtain consent should exercise his or her best professional judgment under the circumstances.

History of Guideline

This Guideline is new and reflects developments in law and practice since the original edition.

Related Standards

Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, art. 36, 21 U.S.T. 77, T.I.A.S. 6820.

Commentary

The right to consular assistance is contained in Article 36 of the Vienna Convention on Consular Relations, a multilateral treaty ratified

unconditionally by the United States in 1969. Under its provisions, an obligation rests on local authorities to promptly inform detained or arrested foreign nationals of their right to communicate with their consulate. At the request of the foreign national, local authorities must contact the consulate and permit consular communication and access.

There is considerable evidence that American local authorities routinely fail to comply with their obligations under the Vienna Convention.[193]

Any such failure is likely to have both practical and legal implications. As a practical matter, consuls are empowered to arrange for their nationals' legal representation and to provide a wide range of other services. These include, to name a few, enlisting the diplomatic assistance of their country to communicate with the State Department and international and domestic tribunals (e.g., through amicus briefs), assisting in investigations abroad, providing culturally appropriate resources to explain the American legal system, and arranging for contact with families and other supportive individuals. As a legal matter, a breach of the obligations of the Vienna Convention or a bilateral consular convention may well give rise to a claim on behalf of the client.

Enlisting the consulate's support after obtaining the client's consent to do so should therefore be viewed by counsel as an important element in defending a foreign national at any stage of a death penalty case,[194]

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193. *See* Breard v. Greene, 523 U.S. 371, 380-81 (1998) (Breyer, J., dissenting) (finding Paraguayan national's argument for stay of execution not wholly without merit where the United States government had submitted an *amicus* brief acknowledging that the Vienna Convention had been violated); Sandra Babcock, *The Role of International Law in United States Death Penalty Cases*, 15 LEIDEN J. INT. L. 367, 368 (2002) (describing violations as "widespread and uncontested"); *see also* Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.A.), 2003 I.C.J. 128, *at* http://news.findlaw.com/hdocs/docs/deathpen/mxus20503pord.pdf (Order of Feb. 5, 2003 on Request for the Indication of Provisional Remedies) (ordering United States to "take all measures necessary to ensure" that three Mexican nationals under state death sentences are not executed pending resolution of Mexico's claim "that, in the cases of 49 . . . detained Mexican nationals . . . the United States made no attempt at any time to comply with Article 36 of the Vienna Convention").

Furthermore, counsel should be alert to the fact that the United States has bilateral consular treaties with over fifty countries which may impose obligations additional to those under the Vienna Convention. *See generally* U.S. Dep't of State, The Bureau of Consular Affairs, *Consular Notification and Access, Part 5: Legal Material*, *at* www.travel.state.gov/notification5.html#provisions (listing treaties). One example is Article 16 of the Consular Convention Between the United States and the United Kingdom, 3 U.S.T. 3426 (1952), which currently covers thirty-two independent countries around the world that were formerly entities within the British Empire.

194. *See* Valdez v. State, 46 P.3d 703, 710 (Okla. Crim. App. 2002) (granting post-conviction relief because it was ineffective assistance for trial counsel not to "inform Petitioner he could have obtained financial, legal and investigative assistance from his consulate"); *see also* Breard v.

and counsel should also give careful consideration to the assertion of any legal rights that the client may have as a result of any failure of the government to meet its treaty obligations.

Subsection B(2)(a) recognizes, however, that cases do vary. A range of considerations may make clients reluctant to have their consular office informed of their detentions. In many circumstances, such as those in which clients simply fear embarrassment if word of their plight reaches home, the attorney should counsel the client to overcome the reluctance. But if the client is a political dissident and the likely effect of informing the consulate would be to cause adverse consequences to his relatives without obtaining any assistance with the case, the attorney might reasonably abide by the client's direction to withhold notification. The matter should, however, be kept under continuing review, since conditions may well change over time.

Subsection A is included in the Guideline to emphasize that the determination of nationality may require some effort by counsel. A foreign government might recognize an American citizen as one of its nationals on the basis of an affiliation (e.g., one grandparent of that nationality) that would not be apparent at first glance.

Greene, 523 U.S. at 380; Madej v. Schomig, No. 98 C 1866, 2002 WL 31386480, at *2 (N.D. Ill., Oct. 22, 2002) (finding that had Polish Consulate in Chicago been notified as required by Vienna Convention, it "almost certainly" would have "provided Petitioner with an attorney who would have assisted in obtaining constitutionally effective assistance at the [capital] sentencing hearing," rather than one who utterly failed to investigate or prepare. "With that assistance, there is a probability that the outcome of the sentencing hearing would have been different."); Anne-Marie Slaughter, *Editorial: On a Foreign Death Row*, WASH. POST, Apr. 14, 1998, at A15 (noting that under the Vienna Convention on Consular Relations, "[a] citizen is entitled to the protection and advice of his or her government when caught in a foreign legal system and a foreign language [and access to] a translator, local counsel and diplomatic pressure if needed"). Foreign governments often have formal assistance programs in place for nationals facing the death penalty in the United States. *See, e.g.*, Ana Mendieta, *Mexico to Aid Nationals in U.S. Fund Will Help 45 Death Row Inmates*, CHICAGO SUN-TIMES, Oct. 6, 2000, at 18 (describing creation of legal assistance program to defend the rights of Mexican nationals sentenced to death in the United States and bolster recognition of rights under the Vienna Convention); *Court Blocks Execution of Canadian in Texas*, WASH. POST, Dec. 10, 1998, at A47 ("Canada . . . regularly seeks clemency for Canadians sentenced to death abroad.").

GUIDELINE 10.7—INVESTIGATION

A. Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.

1. The investigation regarding guilt should be conducted regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented.

2. The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

B. 1. Counsel at every stage have an obligation to conduct a full examination of the defense provided to the client at all prior phases of the case. This obligation includes at minimum interviewing prior counsel and members of the defense team and examining the files of prior counsel.

2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate.

History of Guideline

This Guideline is based on portions of Guideline 11.4.1 of the original edition. Changes in this Guideline clarify that counsel should conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements

that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty.

Subsection B(1) is new and describes the obligation of counsel at every stage to examine the defense provided to the client at all prior phases of the case. Subsection B(2) is also new and describes counsel's ongoing obligation to ensure that the official record of proceedings is complete.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1 ("Duty to Investigate"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1995) ("Investigation").

Commentary

At every stage of the proceedings, counsel has a duty to investigate the case thoroughly.[195] This duty is intensified (as are many duties) by the unique nature of the death penalty, has been emphasized by recent statutory changes,[196] and is broadened by the bifurcation of capital trials.[197] This Guideline outlines the scope of the investigation required by a capital case, but is not intended to be exhaustive.

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195. *See* Powell v. Alabama, 287 U.S. 45, 57 (1932) (describing "thorough-going investigation" as "vitally important"); ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.1, 4-6.1, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.1 (1997) ("Investigation"); *see also* HERTZ & LEIBMAN, *supra* note 28 at 489 n.41 (discussing duty described in Subsection (B) to conduct full investigation of prior proceedings); *infra* text and accompanying note 240 (same); *infra* note 351 (discussing duty of post-conviction counsel to investigate all potential claims, whether or not previously asserted).

196. *See* 28 U.S.C. § 2254(e)(2) (2000), which, as amended by the AEDPA, precludes certain claims from federal habeas corpus review if the petitioner "has failed to develop the factual basis" of them "in State court proceedings." *See* Williams v. Taylor, 529 U.S. 420, 424 (2000) (construing this section).

197. *See generally* Lyon, *supra* note 3; Vick, *supra* note 4. Numerous courts have found counsel to be ineffective when they have failed to conduct an adequate investigation for sentencing. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2543-44 (2003) (counsel ineffective because, although they obtained some mitigation evidence, they failed to investigate client's social history or explore the

Guilt/Innocence

As noted *supra* in the text accompanying notes 48-51, between 1976 and 2003 some 110 people were freed from death row in the United States on the grounds of innocence.[198] Unfortunately, inadequate investigation by defense attorneys—as well as faulty eyewitness identification, coerced confessions, prosecutorial misconduct, false jailhouse informant testimony,[199] flawed or false forensic evidence,[200] and the special vulnerability of juvenile suspects—have contributed to wrongful convictions in both capital and non-capital cases.[201] In capital cases, the mental vulnerabilities of a large portion of the client

numerous areas of mitigation listed in first edition of these guidelines); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); Douglas v. Woodford, 316 F.3d 1079, 1087-89 (9th Cir. 2003) (although counsel did uncover and present some mitigating evidence, his investigation "was constitutionally inadequate" for failing to dig deeply enough into client's social, medical, and psychological background; nor did counsel adequately prepare the penalty phase witnesses in order to present the material that he did have "to the jury in a sufficiently detailed and sympathetic manner"); Brownlee v. Haley, 306 F.3d 1043, 1070 (11th Cir. 2002) (counsel ineffective for failing to "investigate, obtain, or present *any* mitigating evidence to the jury, let alone the powerful mitigating evidence of Brownlee's borderline mental retardation, psychiatric disorders, and history of drug and alcohol abuse"); *infra* note 205.

As discussed *infra* note 261, another consequence of bifurcation is that counsel must investigate the possibility that the defendant was judged at either the guilt or penalty phases by one or more jurors who were not impartial.

198. *See* DEATH PENALTY INFORMATION CENTER, *Innocence and the Death Penalty* (2003), *at* http://www.deathpenaltyinfo.org/article.php?did=412&scid=6 (stating that, "[s]ince 1973, 111 people in 25 states have been released from death row with evidence of their innocence") (latest release July 28, 2003); *see generally infra* note 231 (suggesting legal implications of these developments).

199. *See, e.g.*, Dodd v. State, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (canvassing special unreliability of such testimony and restricting its use); *supra* note 50.

200. Recent years have seen a series of scandals involving the prosecution's use, knowingly or unknowingly, of scientifically unsupportable or simply fabricated forensic evidence by governmental agents. *See generally* U.S. DEP'T JUSTICE, OFF. INSP. GEN., THE FBI LABORATORY: AN INVESTIGATION INTO LABORATORY PRACTICES AND ALLEGED MISCONDUCT IN EXPLOSIVES-RELATED AND OTHER CASES (1996) (detailing results of eighteen-month investigation into charges by whistleblower Frederic Whitehurst that FBI Laboratory mishandled "some of the most significant prosecutions in the recent history of the Department of Justice" and finding "significant instances of testimonial errors, substandard analytical work, and deficient practices"); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 VA. J. SOC. POL'Y & L. 439, 442-69 (1997) (summarizing numerous cases); *supra* note 51.

201. *See generally* BARRY SCHECK ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT (2001).

population compound the possibilities for error.[202] This underscores the importance of defense counsel's duty to take seriously the possibility of the client's innocence,[203] to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses.[204]

In this regard, the elements of an appropriate investigation include the following:

1. Charging Documents:

   Copies of all charging documents in the case should be obtained and examined in the context of the applicable law to identify:

   a. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

   b. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

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202. *See* Atkins v. Virginia, 536 U.S. 304, 320-21 (2002) ("Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes."); *see also* Jurek v. Estelle, 623 F.2d 929, 938, 941 (5th Cir. 1980) (reviewing "with that suspicion mandated by the Supreme Court" the voluntariness of a confession made by a defendant of "limited intelligence"); Freedman, *supra* note 52, at 1104-06 (noting characteristics of mentally retarded persons making them more likely to confess falsely).

203. As this Guideline emphasizes, that is so even where circumstances appear overwhelmingly indicative of guilt. A recent study that includes both capital and non-capital DNA exonerations has found that in twenty-two percent of the cases the client had confessed notwithstanding his innocence. *See* SCHECK ET AL., *supra* note 201, at 120. *See* Dan Morain, *Blind Justice John Cherry's Killing Left Many Victims; Was the Accused One of Them?*, L.A. TIMES, July 16, 1989, View, at 6 (noting that Jerry Bigelow confessed many times, including to the media, and was eventually found to be innocent).

204. *See* Henderson v. Sargent, 926 F.2d 706, 711-12 (8th Cir. 1991) (granting writ where trial counsel's performance at guilt phase was ineffective in lacking "an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories," and state post-conviction counsel was ineffective for failing to perform full analysis of "trial testimony and the police record [and failing to conduct] interviews with the persons who testified at trial or had firsthand knowledge of the events surrounding the murder"); People v. Johnson, 609 N.E.2d 304, 310-12 (Ill. 1993) (holding state post-conviction counsel ineffective for failing to interview witnesses that client claimed trial attorneys should have called); Steven M. Pincus, *"It's Good to be Free" An Essay About the Exoneration of Albert Burrell*, 28 WM. MITCHELL L. REV. 27, 33-34 (2001).

c. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) that can be raised to attack the charging documents; and

d. defense counsel's right to obtain information in the possession of the government, and the applicability, extent, and validity of any obligation that might arise to provide reciprocal discovery.

2. Potential Witnesses:

a. Barring exceptional circumstances, counsel should seek out and interview potential witnesses, including, but not limited to:

(1) eyewitnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself;

(2) potential alibi witnesses;

(3) witnesses familiar with aspects of the client's life history that might affect the likelihood that the client committed the charged offense(s), and the degree of culpability for the offense, including:

(a) members of the client's immediate and extended family
(b) neighbors, friends and acquaintances who knew the client or his family
(c) former teachers, clergy, employers, co-workers, social service providers, and doctors
(d) correctional, probation, or parole officers;

(4) members of the victim's family.

b. Counsel should conduct interviews of potential witnesses in the presence of a third person so that there is someone to call as a defense witness at trial. Alternatively, counsel should have an investigator or mitigation specialist conduct the interviews. Counsel should investigate all sources of possible impeachment of defense and prosecution witnesses.

3. The Police and Prosecution:

Counsel should make efforts to secure information in the possession of the prosecution or law enforcement authorities, including police reports, autopsy reports, photos, video or audio tape recordings, and crime scene and crime lab reports together with the underlying data therefor. Where necessary, counsel should pursue such efforts through formal and informal discovery.

4. Physical Evidence:

Counsel should make a prompt request to the relevant government agencies for any physical evidence or expert reports relevant to the offense or sentencing, as well as the underlying materials. With the assistance of appropriate experts, counsel should then aggressively re-examine all of the government's forensic evidence, and conduct appropriate analyses of all other available forensic evidence.

5. The Scene:

Counsel should view the scene of the alleged offense as soon as possible. This should be done under circumstances as similar as possible to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions).

Penalty

Counsel's duty to investigate and present mitigating evidence is now well established.[205] The duty to investigate exists regardless of the expressed desires of a client.[206] Nor may counsel "sit idly by, thinking that investigation would be futile."[207] Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case.[208]

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205. *See, e.g.*, Wiggins v. Smith, 123 S. Ct. 2526 (2003) (counsel failed to uncover evidence that client never had a stable home and was repeatedly subjected to gross physical, sexual, and psychological abuse); Williams v. Taylor, 529 U.S. 362, 395-96 (2000) (counsel ineffective for failing to uncover and present evidence of defendant's "nightmarish childhood," borderline mental retardation, and good conduct in prison); Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002) (counsel ineffective for failing to investigate and present evidence of client's brain damage due to prolonged pesticide exposure and repeated head injuries, and failing to present expert testimony explaining "the effects of the severe physical, emotional, and psychological abuse to which Caro was subjected as a child"), *cert. denied*, 536 U.S. 951 (2002); Coleman v. Mitchell, 268 F.3d 417, 449-51 (6th Cir. 2001) (though counsel's duty to investigate mitigating evidence is well established, counsel failed to investigate and present evidence that defendant had been abandoned as an infant in a garbage can by his mentally ill mother, was raised in a brothel run by his grandmother where he was exposed to group sex, bestiality and pedophilia, and suffered from probable brain damage and borderline personality disorder), *cert. denied*, 535 U.S. 1031 (2002); Jermyn v. Horn, 266 F.3d 257, 307-08 (3d Cir. 2001) (counsel ineffective for failing to investigate and present evidence of defendant's abusive childhood and "psychiatric testimony explaining how Jermyn's development was thwarted by the torture and psychological abuse he suffered as a child"); *supra* note 197.

206. *See* Hardwick v. Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty."); Blanco v. Singletary, 943 F.2d 1477, 1501-03 (11th Cir. 1991) (counsel ineffective for "latch[ing] onto" client's assertions he did not want to call penalty phase witnesses and failing to conduct an investigation sufficient to allow their client to make an informed decision to waive mitigation); *see also* Karis v. Calderon, 283 F.3d 1117, 1136-41 (9th Cir. 2002), *cert. denied*, 126 S. Ct. 2637 (2003).

207. Voyles v. Watkins, 489 F. Supp. 901, 910 (N.D. Miss. 1980); *accord* Austin v. Bell, 126 F.3d 843, 849 (6th Cir. 1997) (counsel's failure to investigate and present mitigating evidence at the penalty phase of the trial "because he did not think that it would do any good" constituted ineffective assistance).

208. *See, e.g.*, Wiggins, 123 S. Ct. at 2526 (2003) (counsel's ineffectiveness lay not in failure to present evidence of client's family background, but rather in failure to conduct an investigation sufficient to support a professionally reasonable decision whether to do so); Douglas v. Woodford, 316 F.3d 1079, 1089 (9th Cir. 2003) ("It is, of course, difficult for an attorney to advise a client of the prospects of success or the potential consequences of failing to present mitigating evidence when the attorney does not know that such evidence exists."); Silva v. Woodford, 279 F.3d 825, 838-39 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 342 (2002); *Coleman*, 268 F.3d at 447; Battenfield v. Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) ("In addition to hampering [defense counsel's] ability to make strategic decisions, [defense counsel's] failure to investigate [defendant's background] clearly affected his ability to competently advise [defendant] regarding the meaning of

Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,"[209] "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."[210] At least in the case of the client, this begins with the moment of conception.[211] Counsel needs to explore:

> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

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mitigation evidence and the availability of possible mitigation strategies."); United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989) ("[C]ounsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made."); Knighton v. Maggio, 740 F.2d 1344, 1350 (5th Cir. 1984) (petitioner entitled to relief if record shows that counsel "could not make a valid strategic choice because he had made no investigation").

209. Brown v. State, 526 So. 2d 903, 908 (Fla. 1988) (citing Hitchcock v. Dugger, 481 U.S. 393, 394 (1987)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978); *infra* text accompanying note 277.

210. Russell Stetler, *Mitigation Evidence in Death Penalty Cases*, THE CHAMPION, Jan./Feb. 1999, at 35; *see also* ABA CRIMINAL JUSTICE SECTION, *supra* note 86, at 63.

211. *See* Norton, *supra* note 182, at 2 (mitigation investigation must encompass client's "whole life"); EQUAL JUSTICE INITIATIVE OF ALA., ALABAMA CAPITAL DEFENSE TRIAL MANUAL ch. 12 (3d ed. 1997) [hereinafter ALABAMA CAPITAL DEFENSE TRIAL MANUAL]; Lyon, *supra* note 3, at 703 (observing that "mitigation begins with the onset of the [defendant's] life" because "[m]any [defendants'] problems start with things like fetal alcohol syndrome, head trauma at birth, or their mother's drug addiction during pregnancy"); Vick, *supra* note 4, at 363.

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations.[212]

Accordingly, immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client to:

1. discuss the alleged offense or events giving rise to the charge(s), and any improper police investigative practice or prosecutorial conduct which affects the client's rights;

2. explore the existence of other potential sources of information relating to the offense, the client's mental state, and the presence or absence of any aggravating factors under the applicable death penalty statute and any mitigating factors; and

212. *See supra* text accompanying notes 13-27.

3. obtain necessary releases for securing confidential records relating to any of the relevant histories.

Counsel should bear in mind that much of the information that must be elicited for the sentencing phase investigation is very personal and may be extremely difficult for the client to discuss. Topics like childhood sexual abuse should therefore not be broached in an initial interview. Obtaining such information typically requires overcoming considerable barriers, such as shame, denial, and repression, as well as other mental or emotional impairments from which the client may suffer. As noted *supra* in the text accompanying note 103, a mitigation specialist who is trained to recognize and overcome these barriers, and who has the skills to help the client cope with the emotional impact of such painful disclosures, is invaluable in conducting this aspect of the investigation.

It is necessary to locate and interview the client's family members (who may suffer from some of the same impairments as the client), and virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation, or parole officers, and others.[213] Records—from courts, government agencies, the military, employers, etc.—can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness,[214] and corroborating witnesses' recollections. Records should be requested

213. *See* Goodpaster, *supra* note 3, at 321; Lyon, *supra* note 3, at 704-06; Vick, *supra* note 4, at 366-67.

214. *See* Wiggins v. Smith, 123 S. Ct. 2527 (2003) (inadequacy of trial counsel's mitigation investigation demonstrated by post-conviction presentation of expert's report that demonstrated "the severe physical and sexual abuse petitioner suffered at the hands of his mother and while in the care of a series of foster parents" through "state social services, medical, and school records, as well as interviews with petitioner and numerous family members"); Williams v. Taylor, 529 U.S. 362, 395 (2000) (counsel ineffective where they:

> failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.)

(footnote omitted); Jermyn v. Horn, 266 F.3d 257, 307 (3d Cir. 2001) (counsel ineffective for failing to obtain school records that disclosed childhood abuse); *see also* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 211; TEXAS DEATH PENALTY MITIGATION MANUAL, *supra* note 105, ch. 3; Norton, *supra* note 182, at 32-38.

concerning not only the client, but also his parents, grandparents, siblings, cousins, and children.[215] A multi-generational investigation extending as far as possible vertically and horizontally frequently discloses significant patterns of family dysfunction and may help establish or strengthen a diagnosis or underscore the hereditary nature of a particular impairment.[216] The collection of corroborating information from multiple sources—a time-consuming task—is important wherever possible to ensure the reliability and thus the persuasiveness of the evidence.[217]

Counsel should use all appropriate avenues including signed releases, subpoenas, court orders, and requests or litigation pursuant to applicable open records statutes, to obtain all potentially relevant information pertaining to the client, his or her siblings and parents, and other family members, including but not limited to:

a. school records
b. social service and welfare records
c. juvenile dependency or family court records
d. medical records
e. military records
f. employment records
g. criminal and correctional records
h. family birth, marriage, and death records
i. alcohol and drug abuse assessment or treatment records
j. INS records

If the client was incarcerated, institutionalized or placed outside of the home, as either a juvenile or an adult, the defense team should investigate the possible effect of the facility's conditions on the client's

215. In order to verify or corroborate witness testimony about circumstances and events in the defendant's life, defense counsel must "assemble the documentary record of the defendant's life, collecting school, work, and prison records" which might serve as sources of relevant facts. Vick, *supra* note 4, at 367; *see also* Lyon, *supra* note 3, at 705-06. Contemporaneous records are more credible than witnesses sharing previously undisclosed memories or experts offering opinions that were formed only after the client faced capital charges. Records may also document events that neither the client nor family members remember. *See, e.g., Williams*, 362 U.S. at 395 n.19 (relying on a social worker's graphic description of the Williams home that could not have been provided by client, who was too young, or the adult family members, who were too intoxicated, to recall the scene).

216. *See* Norton, *supra* note 182, at 3 (counsel should "investigate at least three generations" of the client's family).

217. *See id.* (advocating "triangulation" of data).

contemporaneous and later conduct.[218] The investigation should also explore the adequacy of institutional responses to childhood trauma, mental illness, or disability to determine whether the client's problems were ever accurately identified or properly addressed.[219] Even if the institution that responded to the client was not grossly abusive or neglectful, it may have been incompetent in a number of ways. For example, IQ testing or other psychological evaluations may have been performed by untrained personnel or using inappropriate instruments—flaws that might not appear on the face of the institutional records.

The circumstances of a particular case will often require specialized research and expert consultation. For example, if a client grew up in a migrant farm worker community, counsel should investigate what pesticides the client may have been exposed to and their possible effect on a child's developing brain.[220] If a client is a relatively recent immigrant, counsel must learn about the client's culture, about the circumstances of his upbringing in his country of origin, and about the difficulties the client's immigrant community faces in this country.[221] Counsel should also be particularly sensitive in these circumstances to language or translation difficulties that may unwittingly have led to misunderstandings between the client and others, including government officials and members of the community at large, with whom he may have come into contact.

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218. *See* TERRY A. KUPERS, M.D., PRISON MADNESS THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT, 33-34 (1999); David M. Halbfinger, *Care of Juvenile Offenders in Mississippi is Faulted*, N.Y. TIMES, Sept. 1, 2003 at A13 (describing allegations of severely abusive conditions in Mississippi juvenile detention facilities and noting that "what is happening in Mississippi is by no means rare. Arizona, Arkansas, California, Georgia, Louisiana, Maryland, and South Dakota, among other states, have all had scandals in recent years," although the conditions in Mississippi were supposed to have been corrected pursuant to a court order issued in 1977).

219. *See* Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse to Condemn to Death*, 49 STAN. L. REV. 1447, 1467 (1997) (noting damaging effects of "social conditions and experiences" often inflicted on institutionalized juvenile offenders).

220. *See* Caro v. Woodford, 280 F.3d 1247, 1255 (9th Cir. 2002), *cert. denied*, 536 U.S. 951 (2002).

221. *See* Mak v. Blodgett, 970 F.2d 614, 616-18 & n.5 (9th Cir. 1992) (positive testimony from defendant's family, combined with expert testimony about difficulty of adolescent immigrants from Hong Kong assimilating to North America, would have humanized client and could have resulted in a life sentence for defendant convicted of thirteen murders). *See also* Guideline 10.6 and accompanying commentary (noting that foreign government might recognize an American citizen as one of its nationals and provide counsel with extremely valuable assistance).

Miscellaneous Concerns

Counsel should maintain copies of media reports about the case for various purposes, including to support a motion for change of venue, if appropriate, to assist in the voir dire of the jury regarding the effects of pretrial publicity, to monitor the public statements of potential witnesses, and to facilitate the work of counsel who might be involved in later stages of the case.

Counsel must also investigate prior convictions, adjudications, or unadjudicated offenses that could be used as aggravating circumstances or otherwise come into evidence. If a prior conviction is legally flawed, counsel should seek to have it set aside.[222] Counsel may also find extenuating circumstances that can be offered to lessen the weight of a conviction, adjudication, or unadjudicated offense.[223]

Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination in the imposition of the death penalty or in the composition of juries.[224] Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.[225]

As discussed *infra* in the text accompanying notes 249-52, counsel should consider making overtures to members of the victim's family—possibly through an intermediary, such as a clergy member, defense-victim liaison, or representative of an organization such as Murder Victim's Families for Reconciliation—to ascertain their feelings about the death penalty and/or the possibility of a plea.[226]

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222. *See* Johnson v. Mississippi, 486 U.S. 578, 586-87 (1988); *supra* notes 7, 22.

223. *See supra* text accompanying notes 20-28.

224. *See, e.g.*, Miller-el v. Cockrell, 537 U.S. 322, 329-33 (2003) (ruling for habeas petitioner in reliance on evidence regarding prosecutors' racial discrimination during voir dire presented at a pre-trial hearing and in state post-conviction proceedings); Sara Rimer, *In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate*, N.Y. TIMES, Feb. 13, 2002, at A24 (discussing memoranda and training manuals from prosecutor's office documenting policy of racial discrimination in jury selection); Stephen B. Bright, *Challenging Racial Discrimination in Capital Cases*, THE CHAMPION, Jan./Feb. 1997, at 22.

225. *See infra* Guideline 10.10.2; *supra* text accompanying note 7; *infra* text accompanying notes 264-70.

226. *See* Russell Stetler, *Working with the Victim's Survivors in Death Penalty Cases*, THE CHAMPION, June 1999, at 42; *see also* Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. TIMES, Nov. 5, 1999, at A1 (describing widely publicized case in which the prosecutor decided to drop his request for the death penalty because the parents of the victim so requested).

GUIDELINE 10.8—THE DUTY TO ASSERT LEGAL CLAIMS

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should:

1. consider all legal claims potentially available; and

2. thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and

3. evaluate each potential claim in light of:

a. the unique characteristics of death penalty law and practice; and

b. the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and

c. the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and

d. any other professionally appropriate costs and benefits to the assertion of the claim.

B. Counsel who decide to assert a particular legal claim should:

1. present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and

2. ensure that a full record is made of all legal proceedings in connection with the claim.

C. Counsel at all stages of the case should keep under consideration the possible advantages to the client of:

1. asserting legal claims whose basis has only recently become known or available to counsel; and

2. supplementing claims previously made with additional factual or legal information.

History of Guideline

This Guideline is based on Guideline 11.5.1 ("The Decision to File Pretrial Motions") and Guideline 11.7.3 ("Objection to Error and Preservation of Issues for Post Judgment Review") of the original edition. New language makes clear that the obligations imposed by this Guideline exist at every stage of the proceeding and extend to procedural vehicles other than the submission of motions to the trial court.

In Subsection A(3)(b), the phrase "near certainty" is new and replaces the word "likelihood" from the original edition. The change reflects recent scholarship indicating that appellate and post-conviction remedies are pursued by almost 100% of capital defendants who are convicted and sentenced to death.

Subsections B and C are new to this edition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-3.6 ("Prompt Action to Protect the Accused"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-4.5 ("Compliance with Discovery Procedure"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 5.1 (1995) ("The Decision to File Pretrial Motions").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 5.3 (1995) ("Subsequent Filing of Pretrial Motions").

Commentary

"One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review. Failure to preserve an issue may result in the client being executed even though reversible error occurred at trial."[227] For this reason, trial counsel in a death penalty case must be especially aware not only of strategies for winning at trial,[228] but also of the heightened need to fully preserve all potential issues for later review.

As the text of the first sentence of Subsection A makes clear, this obligation is not limited to trial counsel or to motions made to the trial court. For example, if a state post-conviction court rules on the merits of a claim for relief, the claim will be available for federal review even if the state's rules required the issue to be raised at trial.[229] So, too, it may be appropriate for counsel to proceed on some claims (e.g., double jeopardy) by seeking an interlocutory supervisory writ from an appellate

227. Stephen B. Bright, *Preserving Error at Capital Trials*, THE CHAMPION, Apr. 1997, at 42-43. For example, John Eldon Smith was executed by the State of Georgia even though he was sentenced to death by a jury selected from a jury pool from which women were unconstitutionally excluded. The federal courts refused to consider the issue because Mr. Smith's lawyers failed to preserve it. Mr. Smith's co-defendant was also sentenced to death from a jury selected from the same pool. The issue was preserved in the co-defendant's case, and the co-defendant's conviction and death sentence were vacated. At retrial, the co-defendant was sentenced to life imprisonment. *See* Smith v. Kemp, 715 F.2d 1459, 1476 (11th Cir. 1983) (Hatchett, J., concurring in part and dissenting in part).

228. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 5.1 (1995) (listing potential motions).

229. *See* Ake v. Oklahoma, 470 U.S. 68, 75 (1985); *see also* Stewart v. Smith, 536 U.S. 856, 859-60 (2002) (*per curiam*).

court[230] or by otherwise seeking relief outside the confines of the capital litigation itself.[231]

As discussed *supra* in the text accompanying note 28, most jurisdictions have strict waiver rules that will forestall post-judgment relief if an issue was not litigated at the first opportunity. An issue may be waived not only by the failure to timely file a pretrial motion, but also because of the lack of a contemporaneous objection at trial, or the failure to request a jury instruction, or counsel's failure to comply with some other procedural requirement established by statute, court rule, or case law. Counsel must therefore know and follow the procedural requirements for issue preservation and act with the understanding that the failure to raise an issue by motion, objection, or other appropriate procedure may well forfeit the ability of the client to obtain relief on that issue in subsequent proceedings.

Whether raising an issue specific to a capital case (such as requesting individual, sequestered voir dire on death-qualification of the jury) or a more common motion shaped by the capital aspect of the case (such as requesting a change of venue because of publicity), counsel should be sure to litigate all of the possible legal[232] and factual[233] bases

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230. *See, e.g.*, Schumer v. Holtzman, 454 N.E.2d 522, 526 (N.Y. 1983) (granting writ of prohibition sought by non-capital suspect to preclude investigation by improperly designated prosecutor); *cf.* Hynes v. Tomei, 706 N.E.2d 1201, 1207 (N.Y. 1998) (invalidating portion of New York death penalty statute in proceeding for writ of prohibition brought by prosecutor).

231. *See* Bradley v. Pryor, 305 F.3d 1287, 1289-90 (11th Cir. 2002) (holding that action seeking DNA samples for testing to establish the innocence of a capital prisoner is properly brought under Section 1983 rather than as habeas corpus petition), *cert. denied*, 123 S. Ct. 1909 (2003); *supra* text accompanying notes 5-9. As this example suggests, developments in DNA technology and increasing knowledge of the extent and causes of wrongful convictions in capital cases, *see supra* text and accompanying notes 48-51, 198-204, should lead defense attorneys to be aggressive in pursuing the implication of the Court's assumption in *Herrera v. Collins*, 506 U.S. 390, 417 (1993), "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there was no state avenue open to process such a claim." *See* House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert. denied*, 123 S. Ct. 2575 (2003) (relying upon this passage and opinion of Justice O'Connor in *Schlup v. Delo*, 513 U.S. 298 (1995), in certifying to state courts issue of whether procedural vehicle existed to present to them evidence of innocence first uncovered during federal habeas proceedings).

232. Counsel should always cite to any arguably applicable provision of the United States Constitution, the state constitution, and state law as bases for granting a claim. A reviewing court may refuse to consider a legal theory different from that put forward originally. *See* Anderson v. Harless, 459 U.S. 4, 6 (1982) (refusing to consider violation of Due Process Clause of federal Constitution because defense counsel in state courts relied solely upon due process clause of state constitution). For example, courts have refused to consider an assertion that a statement was taken in violation of the Sixth Amendment right to counsel because it was argued in earlier proceedings only that the statement was obtained in violation of the Fifth Amendment protection against self-

for the request. This will increase the likelihood that the request will be granted and will also fully preserve the issue for post-conviction review in the event the claim is denied.

Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case.[234] As described in the commentary to Guideline 1.1, counsel also has a duty, pursuant to Subsection (A)(3)(a)-(c) of this Guideline, to preserve issues calling for a change in existing precedent; the client's life may well depend on how zealously counsel discharges this duty.[235] Counsel should object to anything that appears unfair or unjust even if it involves challenging well-accepted practices.[236]

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incrimination. *See* McCleskey v. Zant, 499 U.S. 467, 502 (1991). Counsel should also present all of the relevant facts as early as feasible. *See generally* Bright, *supra* note 227, at 43, 44.

233. In this regard, as Subsection C indicates, counsel should bear in mind that in capital litigation the courts tend to be much more responsive to supplemental presentations than they might be in other contexts. *See, e.g.*, Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (noting petitioner's multiple applications to the court and addressing them on the merits); Spaziano v. State, 660 So. 2d 1363, 1364, 65-66 (Fla. 1995) (granting motions filed by defendant facing fifth death warrant that "[sought] to open by rehearing an appeal that was finalized more than thirteen years ago and a post-conviction proceeding that was terminated with a denial of rehearing more than nine years ago" and ordering a remand that eventually resulted in an in-court recantation by a key witness and a life sentence); *see also DNA Tests to be Done in '74 Case*, ORLANDO SENTINEL, Dec. 13, 2002, at B3.

234. *See* Bright, *supra* note 227, at 43 ("Failure to make an objection for fear of alienating the judge or jury may be a valid consideration in a case in which there is a good chance of acquittal or the length of sentence will be so short that appellate review will be irrelevant to the client. But in a capital case, it may deprive the client of a life-saving reversal on direct appeal or in habeas corpus proceedings.").

235. *See supra* text accompanying note 28. If a claim, whether meritorious or not, is being litigated anywhere in the country, counsel is likely to be charged with knowledge that the "tools to construct their constitutional claim" exist and be expected to raise it. Engle v. Isaac, 456 U.S. 107, 133 (1982). In *Smith v. Murray*, 477 U.S. 527 (1986), counsel failed to raise a particular issue on behalf of Mr. Smith in one state court because the state supreme court had recently rejected it. *See id.* at 531. Mr. Smith raised the issue in subsequent state and federal collateral proceedings, *see id.*, and, well after these were concluded, the United States Supreme Court ruled favorably on the question. *See id.* at 536. However, because of counsel's previous decision to forego the presentation of a claim that was then meritless, the Court "conclude[d] that . . . [Mr. Smith] must therefore be executed," *Id.* at 540 (Stevens, J., dissenting), and he was. *See Legislative Modification*, *supra* note 12, at 852; *see also infra* note 343.

236. For example, execution by electrocution has become *de facto* unconstitutional because state governments have concluded that challenges to the practice have merit, even though the contrary precedent remains in place. *See In re* Kemmler, 136 U.S. 436, 449 (1890); *cf. Alabama: Optional Execution by Injection*, N.Y. TIMES, Apr. 26, 2002, at A20 (discussing how Alabama enacted a law making lethal injection the state's primary method of execution when it looked as if the Supreme Court might rule that the electric chair was cruel and unusual punishment); Sara Rimer, *Florida Lawmakers Reject Electric Chair*, N.Y. TIMES, Jan. 7, 2000, at A13 (same in Florida).

Because "[p]reserving all [possible] grounds can be very difficult in the heat of battle during trial,"[237] counsel should file written motions in limine prior to trial raising any issues that counsel anticipate will arise at trial. All of the grounds should be set out in the motion.[238] Similarly, requests for rulings during the course of post-conviction proceedings (e.g., for investigative resources pursuant to Guideline 10.4(D)) should be made fully and formally.

In accordance with Subsection B(2), counsel at every stage must ensure that there is a complete record respecting all claims that are made, including objections, motions, statements of grounds, questioning of witnesses or venire members, oral and written arguments of both sides, discussions among counsel and the court, evidence proffered and received, rulings of the court, reasons given by the court for its rulings, and any agreements reached between the parties. If a court refuses to allow a proceeding to be recorded, counsel should state the objection to the court's refusal, to the substance of the court's ruling, and then at the first available opportunity make a record of what transpired in the unrecorded proceeding.[239] Counsel should also ensure that the record is clear with regard to the critical facts to support the claim. For example, if counsel objects to the peremptory strike of a juror as race-based, counsel should ensure that it is clear from the record not only that the prosecutor struck a particular juror, but the race of the juror, of every other member of the venire, and the extent to which the unchallenged venire members shared the characteristics claimed to be justifying the challenge.[240]

Further, as reflected in Guideline 10.7(B)(2), counsel at all stages of the case must determine independently whether the existing official record may incompletely reflect the proceedings, e.g., because the court reporter took notes but did not transcribe them or an interpreter's translation was inaccurate, or because the court clerk did not include legal memoranda in the record transmitted to subsequent courts, or there was official negligence or misconduct.

As the nonexclusive list of considerations in Subsection A(3) suggests, there are many instances in which counsel should assert legal claims even though their prospects of immediate success on the merits

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237. Bright, *supra* note 227, at 45.

238. *See* ALABAMA CAPITAL DEFENSE TRIAL MANUAL, *supra* note 211, at 53.

239. *See* Dobbs v. Zant, 506 U.S. 357, 358 (1993); Robinson v. Robinson, 487 S.W.2d 713, 714-15 (Tex. 1972); 4M Linen & Unif. Supply Co. v. W.P. Ballard & Co., 793 S.W.2d 320, 323 (Tex. Ct. App. 1990).

240. *See* Bright, *supra* note 227, at 46.

are at best modest. Examples of such circumstances (in addition to those in which counsel need to forestall later procedural defenses (Subsection A(3)(c)), include instances where:

- the claim should be preserved in light of foreseeable future events (e.g., the completion of an investigation, a ruling in a relevant case); or
- asserting the claim may increase the government's incentive to reach an agreed-upon disposition; or
- the presentation made in support of the claim may favorably influence other relevant actors (e.g., the Governor).[241]

241. *See* 3 CAL. ATT'YS FOR CRIM. JUSTICE, 3 CALIFORNIA DEATH PENALTY DEFENSE MANUAL 4 (1993).

GUIDELINE 10.9.1—THE DUTY TO SEEK AN AGREED-UPON DISPOSITION

A. **Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.**

B. **Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:**

1. **the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;**

2. **any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;**

3. **the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;**

4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;

7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;

8. concessions that the client might offer, such as:

   a. an agreement to waive trial and to plead guilty to particular charges;

   b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

   c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

   d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;

e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

g. an agreement with the victim's family, which may include matters such as: a meeting between the victim's family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;

h. agreements such as those described in Subsections 8(a)-(g) respecting actual or potential charges in another jurisdiction;

9. benefits the client might obtain from a negotiated settlement, including:

a. a guarantee that the death penalty will not be imposed;

b. an agreement that the defendant will receive a specified sentence;

c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

d. an agreement that one or more of multiple charges will be reduced or dismissed;

e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;

f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;

g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client's confinement;

h. agreements such as those described in Subsections 9(a)-(g) respecting actual or potential charges in another jurisdiction.

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client's initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client's best interest.

F. Counsel should not accept any agreed-upon disposition without the client's express authorization.

G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.

History of Guideline

Guideline 10.9.1 is based on aspects of Guidelines 11.6.1, 11.6.2, and 11.6.3 of the original edition. New language has been added to clarify the importance of pursuing an agreed-upon disposition at every phase of the case, not just as a substitute for proceeding to trial initially. The current version of the Guideline also requires that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences.

This Guideline omits the requirement, which appeared in Guideline 11.6.1 of the original edition, of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. However, Guideline 10.9.2(A) does require counsel to obtain the client's consent before accepting any agreed-upon disposition.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.1 ("Duty to Explore Disposition Without Trial"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.2 ("Plea Discussions"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 (3d ed. 1999) ("Responsibilities of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 6.1 (1995) ("The Plea Negotiation Process and the Duties of Counsel").

Commentary

Guidelines 10.9.1–2 both deal with the subject of agreed-upon dispositions. They and their associated commentaries should be read together.

"Death is different because avoiding execution is, in many capital cases, the best and only realistic result possible"; as a result, plea bargains in capital cases are not usually "offered" but instead must be "pursued and won."[242] Agreements are often only possible after many years of effort. Accordingly, this Guideline emphasizes that the obligation of counsel to seek an agreed-upon disposition continues throughout all phases of the case. As in other sorts of protracted litigation, circumstances change over time (e.g., through replacement of a prosecutor, death of a prosecution witness, alteration in viewpoint of a key family member of the client or the victim, favorable developments in the law or the litigation, reconsideration by the client) and as they do new possibilities arise.[243] Whenever they do, counsel must pursue them.

In many jurisdictions, the prosecution will consider waiving the death penalty after the defense makes a proffer of the mitigating evidence that would be presented at the penalty phase and explains why death would be legally and/or factually inappropriate. In some states and the federal government, this process is formalized and occurs before a decision is made whether to seek the death penalty.[244] In other

242. Kevin McNally, *Death Is Different: Your Approach to a Capital Case Must be Different, Too*, THE CHAMPION, Mar. 1984, at 8, 15; *see also* Doyle, *supra* note 180.

243. Examples of agreed-upon dispositions after extended litigation include the cases of Calvin Burdine, *see* Henry Weinstein, *Inmate in Texas Sleeping-Lawyer Case Pleads Guilty*, L.A. Times, June 20, 2003, at 14 (client agrees to three life sentences), Michael Wayne Williams, *see* Jamie C. Ruff, *Williams Pleads Guilty to Murders*, RICHMOND TIMES-DISPATCH, Mar. 25, 2003, at B1 (client waives parole eligibility and agrees to life term), Lloyd Schlup, *see* Tim O'Neil, *Killer Who Escaped Execution Over New "Evidence" Pleads Guilty*, ST. LOUIS POST-DISPATCH, Mar. 25, 1999, at A15 (client pleads guilty to second-degree murder after new evidence appeared), and Paris Carriger, *see* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 139-40 (1998) (following affirmance of federal habeas corpus relief by *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997) (en banc), client pleaded guilty to lesser offense and was released). Numerous other instances are reported in LIEBMAN ET AL., *supra* note 46, Apps. C, D.; *see also* James Kimberly, *Inmate Snaps Death Sentence for 20 Years*, HOUS. CHRON., Aug. 12, 2003, at 1 (Paul Colella pleads to twenty-year term "just days before a federal judge was to hear evidence on . . . allegations of prosecutorial misconduct and ineffective assistance"); Lynn Thompson, *Life Without Parole in Massacre: Mak Sentenced Again for 13 Wah Mee Deaths in 1983*, Seattle Times, May 21, 2002, at B1 (client sentenced to 13 life terms after prosecution decides not to appeal judge's order that death penalty is unavailable).

244. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 162, § 9-10.030. New York law gives the District Attorney a 120-day "deliberative period" to decide whether to file a notice of intent to seek the death penalty. *See* N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2002); Francois v. Dolan, 731 N.E.2d 614, 616 (N.Y. 2000). During that time, with the assistance of the Capital Defender's Office, counsel is appointed and may attempt to persuade the prosecutor not to file a notice. *See* N.Y. JUD. LAW § 35-b (McKinney 2002). The notice may also be withdrawn at any time. *See* N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney 2002). Between 1995 and mid-2003, District Attorneys in New York formally investigated seeking the death penalty against 780 defendants, but only filed notice that they were seeking the death penalty against forty-eight of

jurisdictions, the process is not formalized and may occur after the prosecution has announced its intention to seek the death penalty. In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.[245]

Although, for the reasons explained in the History to this Guideline, counsel does not need to have obtained client consent before entering into plea discussions, counsel does need to have thoroughly examined the quality of the prosecution's case and investigated possible first-phase defenses and mitigation, as discussed in the commentary to Guideline 10.7. Counsel must also consider the collateral consequences of entering a plea. For example, when the resulting adjudication of guilt could be used as an aggravating circumstance in another pending case, counsel should endeavor to structure an agreement that would resolve both cases without imposition of the death penalty.

In some cases, where there is a viable first-phase defense, it may be possible to negotiate a plea to a lesser charge. And if it is trial counsel's perception that the death penalty is being sought primarily to allow selection of a death-qualified (and therefore conviction-prone) jury, counsel should seek to remedy the situation through litigation in accordance with Guideline 10.8 as well as through negotiation. In many capital cases, however, the prosecution's evidence of guilt is strong, and there is little or no chance of charge bargaining. In these cases, a guilty plea in exchange for life imprisonment is the best available outcome.

These considerations mean that in the area of plea negotiations, as in so many others, death penalty cases are *sui generis*. Many bases for bargaining in non-capital cases are irrelevant or have little practical significance in a capital case,[246] and some uniquely restrictive legal principles apply.[247] Emotional and political pressures, including ones from the victim's family or the media, are especially likely to limit the government's willingness to bargain. On the other hand, the complexity,

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these. *See* New York Capital Defender Office home page, *at* http://www.nycdo.org/caseload/answers.html (last visited June 14, 2003).

245. *See supra* text accompanying note 162; Doyle, *supra* note 180; White, *supra* note 3, at 328-29.

246. A number of concessions that the parties might exchange in the capital context appear in Subsection B.

247. *See* United States v. Jackson, 390 U.S. 570, 583 (1968) (invalidating provision of federal statute carrying capital punishment on basis that it coerced waivers of jury trial rights); Hynes v. Tomei, 706 N.E.2d 1201, 1207 (N.Y. 1998) (applying *Jackson* to invalidate portion of New York death penalty statute); Comm. On Capital Punishment, Ass'n of the Bar of the City of N.Y., *The Pataki Administration's Proposals to Expand the Death Penalty*, 55 REC. ASS'N OF THE BAR OF CITY OF N.Y. 129, 141-44 (2000) (describing mechanisms by which pleas in capital cases were being reached in light of *Hynes*).

expense, legal risks, and length of the capital trial and appellate process may make an agreement particularly desirable for the prosecution.[248]

A very difficult but important part of capital plea negotiation is often contact with the family of the victim.[249] In some states, the prosecution is required to notify and confer with the victim's family prior to entering a plea agreement.[250] Any approaches to the victim's family should be undertaken carefully and with sensitivity. Counsel should be creative in proposing resolutions that may satisfy the needs of the victim's family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim's family and the client if the client is willing and able to do so. As described *supra* in the text accompanying note 226, the defense team should consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims' families in the outreach effort and in crafting possible resolutions. In any event, because the victim's family can be critical to achieving a settlement,[251] defense counsel should make the decision regarding contact on a fully informed and professional basis, rather than because of nervousness over entering a situation that might be emotionally stressful or in reliance on an unsupported guess as to what the response to an approach might be.

Except in unusual circumstances, all agreements that are made should be formally documented between the parties concerned (e.g., in a writing between the client and representatives of the victim). In any event, counsel has an obligation under Guideline 10.13 to maintain in his or her own files a complete written description of any agreement.

Agreements for action or nonaction by government actors in exchange for a plea of guilty are governed by Guideline 10.9.2(B)(2) and, for the client's future benefit, should be set forth as clearly as possible on the record.[252]

In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well. As discussed

248. Plea offers are extended prior to trial in a significant proportion of cases and also commonly occur after protracted litigation, *see supra* note 243.

249. *See* Stetler, *supra* note 226, at 42; *see also* Gail Gibson & Laura Willis, *Tears and Remorse Precede Life Term in Dawson Deaths*, BALTIMORE SUN, Aug. 28, 2003, at 1 (as part of arrangement for life sentence, Darrell L. Brooks makes emotional apology in open court to families of seven victims of his arson).

250. *See, e.g.*, ALA. CODE § 15-23-71 (1995).

251. *See supra* text accompanying note 226.

252. *See* Ricketts v. Adamson, 483 U.S. 1, 7, 10-12 (1987) (where defendant was deemed to have breached terms of plea agreement by refusing to testify against co-defendant at a retrial, double jeopardy did not preclude state from vacating defendant's plea of guilty to second degree murder, trying him for capital murder and sentencing him to death).

in the commentary to Guidelines 10.5 and 10.9.2, a relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.

If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client's best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously (Subsection G).

GUIDELINE 10.9.2—ENTRY OF A PLEA OF GUILTY

A. The informed decision whether to enter a plea of guilty lies with the client.

B. In the event the client determines to enter a plea of guilty:

1. Prior to the entry of the plea, counsel should:

a. make certain that the client understands the rights to be waived by entering the plea and that the client's decision to waive those rights is knowing, voluntary and intelligent;

b. ensure that the client understands the conditions and limits of the plea agreement and the maximum punishment, sanctions, and other consequences to which he or she will be exposed by entering the plea;

c. explain to the client the nature of the plea hearing and prepare the client for the role he or she will play in the hearing, including answering questions in court and providing a statement concerning the offense.

2. During entry of the plea, counsel should make sure that the full content and conditions of any agreements with the government are placed on the record.

History of Guideline

This Guideline amends Guideline 11.6.4 of the original edition to clarify that the decision regarding whether to enter a plea of guilty must be informed and counseled, yet ultimately lies with the client.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.1 ("Duty to Explore Disposition Without Trial") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-6.2 ("Plea Discussions") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.4 (3d ed. 1999) ("Defendant to Be Advised").

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-1.7 (3d ed. 1999) ("Record of Proceedings").

ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY Standard 14-3.2 (3d ed. 1999) ("Responsibilities of Defense Counsel").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 6.3 (1995) ("The Decision to Enter a Plea of Guilty").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 6.4 (1995) ("Entry of the Plea Before the Court").

Commentary

If no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights.

The relationship that the defense team has established with the client and his or her family will often determine whether the client will accept counsel's advice regarding the advisability of a plea. The case must therefore be diligently investigated so that the client will have as realistic a view of the situation as possible. As the commentary to Guideline 10.5 describes, a client will, quite reasonably, not accept

counsel's advice about the case if the attorney has failed to conduct a meaningful investigation.[253]

A competent client is ultimately entitled to make his own choice. Counsel's role is to ensure that the choice is as well considered as possible. This may require counsel to work diligently over time to overcome the client's natural resistance to the idea of standing in open court, admitting to guilt, and perhaps agreeing to permanent imprisonment. Or it may require counsel to do everything possible to prevent a depressed or suicidal client from pleading guilty where such a plea could result in an avoidable death sentence.[254]

Because of the factors described *supra* in the text accompanying notes 178-92, it will often require the combined and sustained efforts of the entire defense team to dissuade the client from making a self-destructive decision. As noted there, the defense team may also need to call on family, friends, clergy, and others to provide information that assists the client in reaching an appropriate conclusion.

253. *See supra* text accompanying note 180.
254. *See supra* commentary to Guideline 10.5.

GUIDELINE 10.10.1—TRIAL PREPARATION OVERALL

As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.

History of Guideline

The revisions to this Guideline, which was formerly Guideline 11.7.1, are stylistic.

Related Standards

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 4.3 (1995) ("Theory of the Case").

Commentary

Formulation of and adherence to a persuasive and understandable defense theory are vital in any criminal case. In a capital trial, the task of constructing a viable strategy is complicated by the fact that the proceedings are bifurcated. The client is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt.[255] At the same time, if counsel takes contradictory positions at guilt/innocence and sentencing, credibility with the sentencer may be damaged and the defendant's chances for a non-death sentence reduced. Accordingly, it is critical that, well before trial, counsel formulate an integrated defense theory[256] that will be reinforced by its presentation at both the guilt and

255. *See* Nixon v. Singletary, 758 So. 2d 618, 624-25 (Fla. 2000) (ineffective assistance where counsel failed to obtain client's explicit prior consent to strategy of conceding guilt to jury in opening statement in effort to preserve credibility for sentencing); People v. Hattery, 488 N.E.2d 513, 518-19 (Ill. 1985) (same).

256. *See infra* text accompanying notes 273-75; McNally, *supra* note 242, at 8-11; White, *supra* note 3, at 356-58.

mitigation stages.[257] Counsel should then advance that theory during all phases of the trial, including jury selection, witness preparation, pretrial motions, opening statement, presentation of evidence, and closing argument.[258]

257. As the text accompanying notes 104-07, *supra*, suggests, for counsel to gamble that there never will be a mitigation phase because the client will not be convicted of the capital charge is to render ineffective assistance.

258. *See* Bright, *supra* note 227, at 40.

GUIDELINE 10.10.2—VOIR DIRE AND JURY SELECTION

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether any procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire.

B. Counsel should be familiar with the precedents relating to questioning and challenging of potential jurors, including the procedures surrounding "death qualification" concerning any potential juror's beliefs about the death penalty. Counsel should be familiar with techniques: (1) for exposing those prospective jurors who would automatically impose the death penalty following a murder conviction or finding that the defendant is death-eligible, regardless of the individual circumstances of the case; (2) for uncovering those prospective jurors who are unable to give meaningful consideration to mitigating evidence; and (3) for rehabilitating potential jurors whose initial indications of opposition to the death penalty make them possibly excludable.

C. Counsel should consider seeking expert assistance in the jury selection process.

History of Guideline

This Guideline is based on Guideline 11.7.2 of the original edition. Subsection A of the Guideline has been amended to make clear that potential jury composition challenges should not be limited to the petit jury, but should also include the selection of the grand jury and grand

jury forepersons. Subsection B has been amended to reflect recent scholarship demonstrating that the starkest failures of capital voir dire are the failure to uncover jurors who will automatically impose the death penalty following a conviction or finding of the circumstances which make the defendant eligible for the death penalty, and the failure to uncover jurors who are unable to consider particular mitigating circumstances. Subsection C is new. Its language is derived from NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 7.2(a)(7) (1995) ("Voir Dire and Jury Selection"), and the accompanying commentary.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-7.2 ("Selection of Jurors"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.1 ("Selection of Prospective Jurors"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.2 ("Juror Questionnaires"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.3 ("Challenge to the Array"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.4 ("Conduct of Voir Dire Examination"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.5 ("Challenges for Cause"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.6 ("Peremptory Challenges"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.7 ("Procedure for Exercise of Challenges; Swearing the Jury"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.8 ("Impermissible Peremptory Challenges"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

ABA STANDARDS FOR CRIMINAL JUSTICE: TRIAL BY JURY Standard 15-2.9 ("Alternate Jurors"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: DISCOVERY AND TRIAL BY JURY (3d ed. 1996).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 (1995) ("Voir Dire and Jury Selection").

Commentary

Jury selection is important and complex in any criminal case.[259] In capital cases, it is all the more critical. Counsel should devote substantial time to determining the makeup of the venire, preparing a case-specific set of voir dire questions, planning a strategy for voir dire, and choosing a jury most favorable to the theories of mitigation that will be presented. Given the intricacy of the process and the sheer amount of data to be managed, counsel should consider obtaining the assistance of an expert jury consultant.[260]

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259. *See* John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1209 & n.1 (2001) ("The conventional wisdom is that most trials are won or lost in jury selection."); NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 & cmt. (1995) ("Voir Dire and Jury Selection").

260. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 7.2 & cmt. (1995) ("Voir Dire and Jury Selection") (noting that the need for jury selection experts is "most obvious in extraordinary cases such as death penalty cases"). In addition, counsel investigating a capital case should be particularly alert to the possibility that, notwithstanding surface appearances, one or more jurors were unqualified to sit at either phase

Counsel's jury selection strategy should minimize the problem of "death qualified" juries that result from exclusion of potential jurors whose opposition to capital punishment effectively skews the jury pool not only as to imposition of the death penalty but as to conviction.[261] Case law stemming from Supreme Court decisions that address capital jury selection procedures[262] has resulted in a highly specialized and technical procedure. As a practical matter, the burden rests with defense counsel to "life qualify" a jury. Counsel should conduct a voir dire that is broad enough to expose those prospective jurors who are unable or unwilling to follow the applicable sentencing law, whether because they will automatically vote for death in certain circumstances or because

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of the trial and make every effort to develop the relevant facts, whether by interviewing jurors or otherwise. Such inquiries can be "critical in discovering constitutional errors." HERTZ & LIEBMAN, *supra* note 28, at 489 n.40; *see, e.g.*, Williams v. Taylor, 529 U.S. 420, 440-43 (2000) (explaining that because state post-conviction counsel made a reasonable effort to investigate possibility that a juror concealed on voir dire a relationship that would have disqualified her from sitting at the guilt phase, petitioner was entitled to pursue claim on federal habeas corpus); Fullwood v. Lee, 290 F.3d 663, 681-84 (4th Cir. 2002) (relying on affidavit from juror obtained during state post-conviction proceedings to order evidentiary hearing on federal habeas corpus claim that extraneous influences prejudiced jury at penalty phase), *cert. denied*, 123 S. Ct. 890 (2003). If applicable law places undue limits on such investigations, it should be challenged.

261. *See* Blume et al., *supra* note 259, at 1232.

> [E]xposure to the death qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty; more likely to assume that the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die; and more likely to believe that the defendant deserves the death penalty;

Id.; *see also* Liebman, *supra* note 29, at 2097 & n.164 (discussing studies demonstrating that death qualification process produces juries more likely to convict than non-death-qualified juries, and that repeated discussion of death penalty during voir dire in capital cases makes jurors substantially more likely to vote for death). Nonetheless, the current state of Supreme Court case law is that a jurisdiction does not violate the federal Constitution by using the death qualification process. *See* Lockhart v. McCree, 476 U.S. 162, 173 (1986).

262. *See, e.g.*, Morgan v. Illinois, 504 U.S. 719, 729 (1992) (holding "juror[s] who will automatically vote for the death penalty in every case" or are unwilling or unable to give meaningful consideration to mitigating evidence must be disqualified from service); Wainwright v. Witt, 469 U.S. 412, 424-26 (1985) (holding that trial judges may exclude from a capital jury persons whose "views on [capital punishment] would 'prevent or substantially impair the performance of [their] duties . . . .'"); Adams v. Texas, 448 U.S. 38, 42, 49 (1980) (invalidating statute disqualifying any juror who would not swear "that the mandatory penalty of death or imprisonment for life would not affect his deliberations on any issue of fact"); Witherspoon v. Illinois, 391 U.S. 510, 519-23 (1968) (holding that persons who have qualms about the death penalty in general and who might be inclined to oppose it as a matter of public policy, but who can put aside those reservations in a particular case, and in compliance with their oaths as jurors, consider imposing the death penalty according to the relevant state law, may not be precluded from serving as jurors in a death penalty case).

they are unwilling to consider mitigating evidence.[263] Counsel should also develop a strategy for rehabilitating those prospective jurors who have indicated opposition to the death penalty. Bearing in mind that the history of capital punishment in this country is intimately bound up with its history of race relations,[264] counsel should determine whether discrimination is involved in the jury selection process. Counsel should investigate whether minorities or women are underrepresented on the jury lists from which grand and petit juries are drawn, or if race or gender played a role in the selection of grand jury forepersons.[265] The defense in a capital case is entitled to voir dire to discover those potential jurors poisoned by racial bias, and should do so when appropriate.[266] Death qualification often results in the removal of more prospective jurors who are members of minority groups than those who are white, because minority jurors are more likely to express reservations about the death penalty.[267] Neither race nor gender may form a basis for peremptory challenges,[268] but a recent empirical analysis of capital murder cases supports the conclusion that "discrimination in the use of peremptory challenges on the basis of race and gender . . . is widespread."[269] Counsel should listen closely to the prosecutor's voir

263. *See* Blume et al., *supra* note 259, at 1247-53; Marshall Dayan, *Using Mitigating Evidence in Jury Selection in Capital Trials*, THE CHAMPION, July 1993.

264. *See* Stephen B. Bright, *Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Infliction of the Death Penalty*, 35 SANTA CLARA L. REV. 433, 439–42 (1995) (examining the historic relationship between racial violence and the death penalty, and describing how racial prejudice continues to influence capital sentencing decisions); William S. Lofquist, *Putting Them There, Keeping Them There, and Killing Them: An Analysis of State-Level Variations in Death Penalty Intensity*, 87 IOWA L. REV. 1505, 1535 (2002) (presenting social science data correlating death penalty intensity with race-specific factors).

265. *See* Campbell v. Louisiana, 523 U.S. 392, 395 (1998); Rose v. Mitchell, 443 U.S. 545, 548 (1979); *cf.* Amadeo v. Zant, 486 U.S. 214, 216-18 (1988) (describing habeas petitioner's challenge to composition of grand jury based on district attorney's policy to under-represent women and racial minorities on master jury lists).

266. *See generally* Turner v. Murray, 476 U.S. 28, 36-37 (1986) (Brennan, J., concurring in part and dissenting in part).

267. *See* Bright, *supra* note 225, at 20.

268. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79, 84, 90 (1986); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128-29 (1994); *see also* Miller-El v. Cockrell, 537 U.S. 322, 329-32 (2003).

269. David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONST. L. 3, 10 (2001); *see generally* Jeffrey S. Brand, *The Supreme Court, Equal Protection and Jury Selection: Denying That Race Still Matters*, 1994 WIS. L. REV. 511 (finding persistent widespread discrimination in the use of peremptory challenges and attributing it to unwillingness or inability of the courts to scrutinize manifestly pretextual nonracial justifications). These findings emphasize the duty of counsel to pursue this area energetically, both factually and legally. *See, e.g.*, Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 124-25 (1990) (proposing Thirteenth Amendment theory entitling a minority

dire, challenges for cause and reasons for exercising peremptory challenges, make appropriate objections, and ensure that all information critical to a discrimination claim is preserved on the record.[270]

defendant to specific number of minority jurors). In particular, in light of the considerations discussed in this paragraph of text and the history described *supra* note 28, counsel would be unwise to assume the permanence of the 5-4 ruling in *McCleskey v. Kemp*, 481 U.S. 279 (1987).

270. *See supra* Guideline 10.8(B)(2) and text accompanying note 238.

GUIDELINE 10.11—THE DEFENSE CASE CONCERNING PENALTY

A. **As set out in Guideline 10.7(A), counsel at every stage of the case have a continuing duty to investigate issues bearing upon penalty and to seek information that supports mitigation or rebuts the prosecution's case in aggravation.**

B. **Trial counsel should discuss with the client early in the case the sentencing alternatives available, and the relationship between the strategy for the sentencing phase and for the guilt/innocence phase.**

C. **Prior to the sentencing phase, trial counsel should discuss with the client the specific sentencing phase procedures of the jurisdiction and advise the client of steps being taken in preparation for sentencing.**

D. **Counsel at every stage of the case should discuss with the client the content and purpose of the information concerning penalty that they intend to present to the sentencing or reviewing body or individual, means by which the mitigation presentation might be strengthened, and the strategy for meeting the prosecution's case in aggravation.**

E. **Counsel should consider, and discuss with the client, the possible consequences of having the client testify or make a statement to the sentencing or reviewing body or individual.**

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

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;

2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s); 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;

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;

4. Witnesses who can testify about the adverse impact of the client's execution on the client's family and loved ones.

5. Demonstrative evidence, such as photos, videos, and physical objects (e.g., trophies, artwork, military medals), and documents that humanize the client or portray him positively, such as certificates of earned awards, favorable press accounts, and letters of praise or reference.

G. In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise

inadmissible aggravating evidence. Counsel should pursue all appropriate means (e.g., motions in limine) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration, and should make a full record in order to support any subsequent challenges.

H. Trial counsel should determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof. If the jurisdiction has rules regarding notification of these factors, counsel at all stages of the case should object to any non-compliance, and if such rules are inadequate, counsel at all stages of the case should challenge the adequacy of the rules.

I. Counsel at all stages of the case should carefully consider whether all or part of the aggravating evidence may appropriately be challenged as improper, inaccurate, misleading or not legally admissible.

J. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

   a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and

   b. the legal and strategic issues implicated by the client's co-operation or non-cooperation;

2. insure that the client understands the significance of any statements made during such an interview; and

3. attend the interview.

K. Trial counsel should request jury instructions and verdict forms that ensure that jurors will be able to consider and give effect to all relevant mitigating evidence. Trial counsel should object to instructions or verdict forms that are constitutionally flawed, or are inaccurate, or confusing and should offer alternative instructions. Post-conviction counsel should pursue these issues through factual investigation and legal argument.

L. Counsel at every stage of the case should take advantage of all appropriate opportunities to argue why death is not suitable punishment for their particular client.

History of Guideline

The substance of this Guideline is drawn from Guideline 11.8.3 of the original edition. The principal changes are the expansion of coverage to counsel at all stages of the proceedings, and language changes to underscore the range and importance of expert testimony in capital cases, the breadth of mitigating evidence, and counsel's duty to present arguments in mitigation.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.1 (1995) ("Obligations of Counsel in Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.2 (1995) ("Sentencing Options, Consequences and Procedures").

Commentary

Capital sentencing is unique in a variety of ways, but only one ultimately matters: the stakes are life and death.

This commentary is written primarily from the perspective of trial counsel. But corresponding obligations rest on successor counsel. This Guideline has been broadened to include them because of the realities that in capital cases (a) more evidence tends to become available to the defense as time passes,[271] and (b) updated presentations of the defense case on penalty in accordance with Guideline 10.15.1(E)(3) may influence decisionmakers both on the bench (e.g., an appellate court considering a claim of ineffective assistance of counsel) and off it (e.g., the prosecutor, the Governor).

The Importance of an Integrated Defense

During the investigation of the case, counsel should begin to develop a theme that can be presented consistently through both the first and second phases of the trial. Ideally, "the theory of the trial must complement, support, and lay the groundwork for the theory of mitigation."[272] Consistency is crucial because, as discussed in the commentary to Guideline 10.10.1, counsel risks losing credibility by making an unconvincing argument in the first phase that the defendant did not commit the crime, then attempting to show in the penalty phase why the client committed the crime.[273] First phase defenses that seek to reduce the client's culpability for the crime (e.g., by negating intent) rather than to deny involvement altogether are more likely to be consistent with mitigating evidence of mental illness, retardation, domination by a co-defendant, substance abuse, or trauma.[274] But whether or not the guilt phase defense will be that the defendant did not

271. *See supra* text accompanying note 39.

272. Lyon, *supra* note 3, at 711.

273. *See id.* at 708; Scott E. Sundby, *The Capital Jury and Absolution*, 38 CORNELL L. REV. 1557, 1596-97 (1998).

274. In fact, most statutory mitigating circumstances, which were typically adapted from the Model Penal Code, are "imperfect" versions of first phase defenses such as insanity, diminished capacity, duress, and self-defense. *See* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 856-57 (1992) (reviewing BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992)). Of course, the defendant's penalty phase presentation may not constitutionally be limited to statutory mitigating circumstances and the jury must be allowed to give full consideration to any non-statutory ones he advances. *See* Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

commit the crime, counsel must be prepared from the outset to make the transition to the penalty phase.[275]

The Defense Presentation at the Penalty Phase

As discussed in the commentary to Guideline 10.7, areas of mitigation are extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise supports a sentence less than death.[276] Often, a mitigation presentation is offered not to justify or excuse the crime "but to help explain it."[277] If counsel cannot establish a direct cause and effect relationship between any one mitigating factor and the commission of a capital offense,

275. For an example of an argument making an effective transition, see Edith Georgi Houlihan, *Defending the Accused Child Killer*, THE CHAMPION, Apr. 1998, at 23. Jurisdictions vary as to whether the defendant has a right to present lingering doubt as a mitigating circumstance. *Compare* People v. Sanchez, 906 P.2d 1129, 1178 (Cal. 1995) (stating that under California law, "the jury's consideration of residual doubt is proper"), *with* Way v. State, 760 So. 2d 903, 916-17 (Fla. 2000) (rejecting claim under Florida constitution that a defendant must be permitted to present mitigating "evidence relevant only to establish a lingering doubt"). Existing case law in the United States Supreme Court suggests that a capital defendant has no federal constitutional right to have lingering doubt considered as a mitigating circumstance at the penalty phase. *See* Franklin v. Lynaugh, 487 U.S. 164, 174 (1988). Given the significant number of death row exonerations, *see supra* text accompanying notes 48-51 & 198-204, and the degree to which these have plainly troubled many Justices, *see* Atkins v. Virginia, 536 U.S. 304, 320 n.25 (2002) ("Despite the heavy burden that the prosecution must shoulder in capital cases . . . in recent years a disturbing number of inmates on death row have been exonerated."), *supra* text accompanying note 31, there is ample reason to doubt the force of this precedent. *See* CONSTITUTION PROJECT, *supra* note 50, at 40-41 (advocating allowing lingering doubt to be considered as a mitigating circumstance); *see generally* Christina S. Pignatelli, *Residual Doubt: It's a Life Saver*, 13 CAP. DEF. J. 307 (2001).

276. *See* Penry v. Lynaugh, 492 U.S. 302, 327-28 (1989) (stating that "it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense"); McCleskey v. Kemp, 481 U.S. 279, 306 (1987) (reaffirming that "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant"); Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986) (holding evidence of defendant's positive adaptation to prison is relevant and admissible mitigating evidence even though it does "not relate specifically to petitioner's culpability for the crime he committed"). Similarly, counsel could appropriately argue to the jury that the death sentence should not be imposed on a client because doing so would tend to incite the client's political followers to avenge him by committing further crimes. *See, e.g.*, Benjamin Weiser, *Jury Rejects Death Penalty for Terrorist*, N.Y. TIMES, July 11, 2001, at B1 (reporting successful use of this argument at trial of defendant convicted of bombing American embassy).

277. Haney, *supra* note 93, at 560. *See* Simmons v. Luebbers, 299 F.3d 929, 938-39 (8th Cir. 2002) ("Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons's attorneys' representation was ineffective."), *cert. denied* 123 S. Ct. 1582 (2003).

counsel may wish to show the combination of factors that led the client to commit the crime.[278] But mitigation evidence need not be so limited. Depending on the case, counsel may choose instead to emphasize the impact of an execution on the client's family, the client's prior positive contributions to the community, or other factors unconnected to the crime which militate against his execution (Subsection F). In any event, it is critically important to construct a persuasive narrative in support of the case for life, rather than to simply present a catalog of seemingly unrelated mitigating factors.[279]

Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's complete social history from before conception to the present. Expert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations.[280] For example, expert testimony may explain the permanent neurological damage caused by fetal alcohol syndrome or childhood abuse, or the hereditary nature of mental illness, and the effects of these impairments on the client's judgment and impulse control.[281] Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an "all-purpose" expert who may have insufficient knowledge or experience to testify persuasively.[282] In order to prepare effectively for trial, and to choose the best experts, counsel should take advantage of training materials and seminars and remain current on developments in fields such as neurology and psychology, which often have important implications for understanding clients' behavior.[283] Counsel should also

278. *See* Haney, *supra* note 93, at 600.

279. For an example of the process working as it should, see Alex Kotlowitz, *In the Face of Death*, N.Y. TIMES MAG., July 6, 2003, at 32. *See generally* Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109, 1140-41 (1997) (noting that jurors find expert testimony unpersuasive if it is not tied into other evidence presented in the case).

280. *See* White, *supra* note 3, at 342-43.

281. *See, e.g.*, Ainsworth v. Woodford, 268 F.3d 868, 876 (9th Cir. 2001) (stating that "the introduction of expert testimony would also have been important" to explain the effects that "'serious physical and psychological abuse and neglect as a child'" had on the defendant).

282. *See* Caro v. Calderon, 165 F.3d 1223, 1226-27 (9th Cir. 1999) (although counsel consulted four experts, including a medical doctor, a psychologist, and a psychiatrist, counsel failed to consult neurologist or toxicologist who could have explained neurological effects of defendant's extensive exposure to pesticides).

283. High quality continuing legal education programs on the death penalty, such as those noted *supra* in the commentary to Guideline 8.1, regularly present such information.

seek advice and assistance from colleagues and experts in the field of capital litigation.

Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions.[284] Community members such as co-workers, prison guards, teachers, military personnel, or clergy who interacted with the defendant or his family, or have other relevant personal knowledge or experience often speak to the jury with particular credibility.[285]

Family members and friends can provide vivid first-hand accounts of the poverty and abuse that characterize the lives of many capital defendants. These witnesses can also humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider.[286] Similarly, acquaintances who can testify to the client's performance of good works in the community may help the decisionmaker to have a more complete view of him. None of this evidence should be offered as counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer, someone for whom one could reasonably see a constricted but worthwhile future.

In addition to humanizing the client, counsel should endeavor to show that the alternatives to the death penalty would be adequate punishment. Studies show that "future dangerousness is on the minds of most capital jurors, and is thus 'at issue' in virtually all capital trials," whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration.[287] Accordingly, counsel should give serious consideration to making an explicit presentation of information on this subject. Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors' fears and reinforce other positive mitigating evidence.[288] Counsel should therefore always

284. *See* Sundby, *supra* note 279, at 1163-84.

285. *See id.* at 1118, 1151.

286. *See id.* at 1152-62; *see also* Wayne A. Logan, *When Balance and Fairness Collide: An Argument for Execution Impact Evidence in Capital Trials*, 33 U. MICH. J.L. REFORM 1, 12-14 (1999).

287. John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 398-99 (2001).

288. *See* Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (stating that jury would "quite naturally" give great weight to "[t]he testimony of ... disinterested witnesses" such as "jailers who would have had no particular reason to be favorably predisposed toward one of their charges");

encourage the client not only to avoid any disciplinary infractions but also to participate in treatment programs and/or educational, religious or other constructive activities.

Counsel is entitled to impress upon the sentencer through evidence, argument, and/or instruction that the client will either never be eligible for parole, will be required to serve a lengthy minimum mandatory sentence before being considered for parole, or will be serving so many lengthy, consecutive sentences that he has no realistic hope of release.[289] In at least some jurisdictions, counsel may be allowed to present evidence concerning the conditions under which such a sentence would be served.[290]

Counsel should also consider, in consultation with the client, the possibility of the client expressing remorse for the crime in testimony, in allocution, or in a post-trial statement. If counsel decides that a trial presentation by the client is desirable, and the proposed testimony or allocution is forestalled by evidentiary rulings of the court either

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Sundby, *supra* note 279, at 1147 (noting tendency of juries to respond favorably to testimony of prison employees).

289. The Supreme Court has held that:

> where a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility, either by a jury instruction or in arguments by counsel.'

Shafer v. South Carolina, 532 U.S. 36, 39 (2001) (quoting Ramdass v. Angelone, 530 U.S. 156, 165 (2000) (plurality opinion)). The precise contours of this rule remain in dispute, *see* Brown v. Texas, 522 U.S. 940, 940-41 (1997), and counsel may appropriately seek to extend them (e.g., by applying the rule to other alternative sentences than life imprisonment without parole or by requiring that the jury receive the information through instructions).

Some state courts have held that the trial court must resolve, before the capital sentencing hearing, issues such as the length of other sentences the defendant would serve and whether he would be eligible for parole. *See* Clark v. Tansy, 882 P.2d 527, 534 (N.M. 1994) (holding that trial court must, upon defendant's request, impose sentence for non-capital convictions prior to jury deliberations on death penalty); Turner v. State, 573 So. 2d 657, 674-75 (Miss. 1990) (stating that trial court should determine defendant's habitual offender status before capital sentencing hearing so jury could be accurately informed of defendant's parole ineligibility). In other jurisdictions, the defense can at least argue that the defendant is *likely* to receive lengthy, consecutive sentences. *See* Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990) (finding length of time a defendant would be "removed from society" if sentenced to life imprisonment is relevant mitigating evidence that the jury must be permitted to consider); Turner v. State, 645 So. 2d 444, 448 (Fla. 1994) (holding that jury could properly consider in mitigation that alternative to death sentences would have been two life sentences with combined minimum mandatory of fifty years).

290. In the federal capital sentencing of a defendant convicted of bombing American embassies overseas, the defense presented evidence about conditions at the federal "Super Max" prison in Florence, Colorado, where the defendant would be incarcerated if sentenced to life without parole. *See* Benjamin Weiser, *Lawyers for Embassy Bomber Push for Prison Over Execution*, N.Y. TIMES, June 27, 2001, at B4; *see also infra* note 311. The defendant was subsequently sentenced to life without parole. *See* Weiser, *supra* note 276.

disallowing it or conditioning it on unacceptable cross-examination, counsel should take care to make a full record of the circumstances, including the content of the proposed statement. In light of the strong common law underpinnings of allocution and the broad constitutional right to present mitigation that has already been described, any such issue is likely to merit the careful examination of successor counsel.

Finally, in preparing a defense presentation on mitigation, counsel must try to anticipate the evidence that may be admitted in response and to tailor the presentation to avoid opening the door to damaging rebuttal evidence that would otherwise be inadmissible.[291]

The Defense Response to the Prosecution's Penalty Phase Presentation

Counsel should prepare for the prosecutor's case at the sentencing phase in much the same way as for the prosecutor's case at the guilt/innocence phase.[292] Counsel should use available discovery mechanisms to ascertain the aggravating and rebuttal evidence the prosecution intends to introduce, and then thoroughly investigate to determine whether this evidence can be excluded, rebutted, or undercut. As discussed in the commentary to Guideline 10.2, jurisdictions vary in whether the defense must be formally notified as to whether the prosecution will seek the death penalty. If required notice has not been given, counsel should also prepare to challenge at the sentencing phase any prosecution efforts that should be barred for failure to give notice.[293]

Counsel should carefully research applicable state and federal law governing the admissibility of evidence in aggravation. Where possible, counsel should move to exclude aggravating evidence as inadmissible, and, if that fails, rebut the evidence or offer mitigating evidence that will blunt its impact.[294]

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291. However, as Subsection G suggests, if there is uncertainty as to the scope of how wide this opening would be or if counsel believes that excessive rebuttal is to be admitted, they should object and make a full record on the issue.

292. *See* White, *supra* note 3, at 358.

293. *See supra* text accompanying notes 163-64.

294. *See* Smith v. Stewart, 189 F.3d 1004, 1010-11 (9th Cir. 1999) (concluding counsel was ineffective in part for failing to challenge the state's use of prior rape convictions in aggravation as prior violent offenses where both of the convictions occurred when Arizona law did not include violence as an element of rape); Parker v. Bowersox, 188 F.3d 923, 929-31 (8th Cir. 1999) (concluding trial counsel was ineffective for failing to present evidence to rebut the only aggravating circumstances); Summit v. Blackburn, 795 F.2d 1237, 1244-45 (5th Cir. 1986) (concluding trial counsel was ineffective for failing to argue the lack of corroborating evidence of the sole aggravating factor when under state law a defendant cannot be convicted based solely on an

If (but only if)[295] the defense presents an expert who has examined the client, a prosecution expert may be entitled to examine the client to prepare for rebuttal.[296] Counsel should become familiar with the governing law regarding limitations on the scope of expert evaluations conducted by prosecution experts, and file appropriate motions to ensure that the scope of the examination is no broader than legally permissible.[297] If the examination is not limited as counsel deem appropriate, Subsection J(1) requires them to give careful consideration to their response (e.g., refuse to participate on possible pain of preclusion, participate at the cost of an irretrievable surrender of information, seek relief from a higher court). Counsel must discuss with the client in advance any evaluation that is to take place and attend the examination in order to protect the client's rights (Subsections J(2)-(3)). Counsel may also seek to have the evaluation observed by a defense expert.

Counsel should integrate the defense response to the prosecution's evidence in aggravation with the overall theory of the case. In some cases, counsel's response to aggravating evidence at the penalty stage converges with the defense presentation at the guilt/innocence phase. The prosecutor will offer no additional evidence at the penalty phase but will simply rely on aggravating factors established by the evidence at the

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uncorroborated confession and the only evidence supporting the aggravating factor was defendant's confession).

295. *See, e.g.*, Estelle v. Smith, 451 U.S. 454, 468 (1981) (per curiam) (stating "[a] criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding").

296. As described *infra* in note 297, several states explicitly limit this right in various ways.

297. *See, e.g.*, FED. R. CRIM. P. 12.2(c)(4) (2003) ("No statement made by a defendant in the course of any [court-ordered psychiatric] examination . . . may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant . . . has introduced evidence"); Abernathy v. State, 462 S.E.2d 615, 616 (Ga. 1995) (holding that where defendant intends "to introduce evidence of mental illness in any phase of trial," he may be required "to submit to an independent psychiatric evaluation or be barred from presenting such evidence, even in mitigation"); State v. Reid, 981 S.W.2d 166, 168 (Tenn. 1998) (stating that once defendant files notice of intent to present expert testimony regarding mitigating evidence, state expert may examine defendant; however, state expert report will be provided only to the defense until after conviction and after defendant confirms intent to rely on expert testimony as part of case in mitigation); *see also* FLA. R. CRIM. P. 3.202(d) (2002) ("After the filing of [notice] . . . to seek the death penalty, the court shall order that, within 48 hours after the defendant is convicted of capital murder, the defendant be examined by a mental health expert chosen by the state. . . . The examination shall be limited to those mitigating circumstances the defendant expects to establish through expert testimony."); Dillbeck v. State, 643 So. 2d 1027, 1030-31 (Fla. 1994) ("[W]here the defendant plans to use only in the penalty phase the testimony of an expert who has interviewed him or her, the State is entitled to examine the defendant only after conviction and after the State has certified that it will seek the death penalty."); State v. Johnson, 576 S.E.2d 831, 835-37 (Ga. 2003).

guilt/innocence phase, such as that the murder was committed during the course of a felony.[298] In such cases, counsel's rebuttal presentation should focus on the circumstances of the crime, and defendant's conduct as it relates to the elements of the applicable aggravating circumstances.

In other cases, the prosecution will introduce additional aggravating evidence at the penalty stage. If the prosecutor seeks to introduce evidence of unadjudicated prior criminal conduct as aggravating evidence, counsel should fully investigate the circumstances of the prior conduct and determine whether it is properly admissible at the penalty stage.[299]

If the prosecution relies upon a prior conviction (as opposed to conduct), counsel should also determine whether it could be attacked as the product of an invalid guilty plea,[300] as obtained when the client was unrepresented by counsel,[301] as a violation of double jeopardy,[302] or on some other basis. Counsel should determine whether a constitutional challenge to a prior conviction must be litigated in the jurisdiction where the conviction occurred.[303]

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298. *See, e.g.*, Lowenfield v. Phelps, 484 U.S. 231, 246 (1988); *see also* FLA. STAT. ANN. § 921.141(5) (West 2001) (listing as an aggravating circumstance the fact that the crime was committed while the defendant was engaged in, or an accomplice to, the commission or attempted commission or flight after committing or attempting to commit any one of twelve enumerated felonies). In some states, the prosecution is essentially limited at the penalty phase to the evidence admitted at the guilt phase. *See, e.g.*, N.Y. CRIM. PROC. LAW § 400.27(3), (6) (McKinney 2002).

299. *See supra* text accompanying notes 23, 222-23. In some jurisdictions, only criminal conduct for which the client has been convicted is admissible at the penalty stage. *See, e.g.*, FLA. STAT. ANN. § 921.141(5) (listing as aggravating circumstance the fact that the defendant was previously convicted of capital felony or a felony involving violence). In others, no conviction is necessary, but the admissibility of a prior bad act may depend on other factors. *See, e.g.*, CAL. PENAL CODE § 190.3 (West 1999) (allowing admission of evidence of other criminal activity at penalty phase even though the defendant was not convicted for it, unless the defendant was prosecuted and acquitted or it did not involve the use or threat of violence); Pace v. State, 524 S.E.2d 490, 505 (Ga. 1999) (prior crime without conviction may be used in aggravation unless there is a previous acquittal). As a matter of constitutional law, the attack on the admission of unadjudicated prior misconduct in capital sentencing, which has long been a powerful one in light of the Court's established recognition of the need for special reliability in that context, *see* Monge v. California, 524 U.S. 721, 731-33 (1998) (collecting authority), has received additional support both from *Ring v. Arizona*, 536 U.S. 584 (2002) and from the Court's elaboration of due process limitations in related contexts. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 123 S. Ct. 1513, 1523 (2003) (in assessing punitive damages a recidivist may be punished more severely than a first offender, but only where the repeated misconduct is of the same sort as that involved in current case).

300. *See* Boykin v. Alabama, 395 U.S. 238, 242-44 (1969).

301. *See* Gideon v. Wainwright, 372 U.S. 335, 339 (1963).

302. *See* Menna v. New York, 423 U.S. 61, 62 (1975).

303. *See* Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 402-04 (2001); *see also supra* note 22.

In jurisdictions where victim impact evidence is permitted, counsel, mindful that such evidence is often very persuasive to the sentencer, should ascertain what, if any, victim impact evidence the prosecution intends to introduce at penalty phase, and evaluate all available strategies for contesting the admissibility of such evidence[304] and minimizing its effect on the sentencer.[305]

In particular, in light of the instability of the case law,[306] counsel should consider the federal constitutionality of admitting such evidence to be an open field for legal advocacy.[307]

Counsel should also evaluate how to blunt certain intangible factors that can be damaging to a capital defendant at sentencing, including the heinous nature of the crime or the sentencer's possible racial antagonism for the client.[308] In jurisdictions where the alternative to a death sentence is life without the possibility of parole, counsel should consider informing the jury of the defendant's parole ineligibility in order to blunt the concern that the defendant may one day be released from custody.[309] If they have not done so previously in building their affirmative case for

304. Limitations on the admission of such evidence exist in a number of jurisdictions as a matter of state law. *See, e.g.*, People v. Edwards, 819 P.2d 436, 464-67 (Cal. 1991); Bivins v. State, 642 N.E.2d 928, 956-57 (Ind. 1994).

305. *See generally* Jeremy A. Blumenthal, *The Admissibility of Victim Impact Statements at Capital Sentencing: Traditional and Nontraditional Perspectives*, 50 DRAKE L. REV. 67 (2001); Randall Coyne, *Inflicting* Payne *on Oklahoma: The Use of Victim Impact Evidence During the Sentencing Phase of Capital Cases*, 45 OKLA. L. REV. 589, 612-15 (1992); Ellen Kreitzberg, *How Much* Payne *Will the Courts Allow?*, THE CHAMPION, Jan./Feb. 1998, at 31; Michael Ogul, *Capital Cases: Dealing with Victim Impact Evidence* (pts. 1 & 2), THE CHAMPION, June 2000, at 43, Aug./Sept. 2000, at 42.

306. *Compare* Booth v. Maryland, 482 U.S. 496, 501-03 (1987) (victim impact evidence unconstitutional), *and* South Carolina v. Gathers, 490 U.S. 805, 810-12 (1989) (prosecutorial argument for death based upon laudable characteristics of victim unconstitutional), *with* Payne v. Tennessee, 501 U.S. 808, 825, 828-30 (1991) (overruling *Booth* and *Gathers* while noting that Due Process Clause is violated if such evidence is unduly prejudicial).

307. Of course, counsel should also pursue all available state law theories that might exclude such evidence, as indicated *supra* in note 232; *see, e.g.*, Olsen v. State, 2003 Wyo. LEXIS 57, 176-93 (April 14, 2003) (reviewing Wyoming statutory scheme and concluding it does not authorize admission of victim impact evidence in capital case); People v. Logan, 224 Ill. App.3d 735 (1st Dist. 1991) (notwithstanding that no death penalty had been imposed, it was ineffective assistance of appellate counsel to fail to challenge victim impact testimony as inadmissible under state law or limit its impact). For example, on the assumption that victim impact evidence in support of the death penalty would be admissible, there is conflicting case law in various states on whether the defense can call members of the victim's family to testify in opposition to the client's execution. *Cf. supra* text accompanying note 277 (noting that Constitution requires defendants to be able to offer any evidence that might cause sentencer to decline to impose a death sentence in the case at hand).

308. *See* White, *supra* note 3, at 359-60.

309. *See supra* text accompanying notes 289-90.

a penalty less than death,[310] counsel should also consider putting on evidence describing the conditions under which the client would serve a life sentence to rebut aggravating evidence of future dangerousness.[311]

Jury Considerations

Personal argument by counsel in support of a sentence less than death is important. Counsel who seeks to persuade a decisionmaker to empathize with the client must convey his or her own empathy.[312] While counsel may choose to discuss the gravity of the sentencer's life and death decision, the fact that the jury will have been death-qualified[313] means that trumpeting absolutist arguments against the death penalty is less likely to move the audience than sounding pro-life, pro-mercy notes that derive their resonance from the specific facts at hand.

It is essential that counsel object to evidentiary rulings, instructions, or verdict forms that improperly circumscribe the scope of the mitigating evidence that can be presented or the ability of the jury to consider and give effect to such evidence.[314] Counsel should also object to and be

310. *See supra* text accompanying note 290.

311. *See* United States v. Johnson, 223 F.3d 665, 671 (7th Cir. 2000) (describing how, to rebut government's assertion of future dangerousness, federal capital defendant put on evidence at penalty phase regarding conditions at "Supermax" prison where defendant would be housed if sentenced to life imprisonment), *cert. denied*, 534 U.S. 829 (2001); *supra* note 290.

312. *See supra* text accompanying note 185; White, *supra* note 3, at 374-75. An attorney whose contempt for his client is palpable cannot provide effective representation. *See, e.g.*, Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997) (describing counsel's "repeated expressions of contempt for his client" as providing the defendant "not with a defense counsel, but with a second prosecutor[;] creating a loathsome image . . . that would make a juror feel compelled to rid the world of him"); Clark v. State, 690 So. 2d 1280, 1283 (Fla. 1997) ("Counsel completely abdicated his responsibility to Clark when he told the jury that Clark's case presented his most difficult challenge ever in arguing against imposition of the death penalty.").

313. *See supra* commentary to Guideline 10.10.2.

314. *See, e.g.*, Penry v. Johnson, 532 U.S. 782, 799-800 (2001) (instructions and verdict form prevented jury from giving effect to mitigating evidence of defendant's mental retardation); McKoy v. North Carolina, 494 U.S. 433, 439-41 (1990) (verdict form and instructions suggesting mitigating circumstances must be found unanimously improperly restricted jurors' ability to give effect to mitigating evidence); Mills v. Maryland, 486 U.S. 367, 384 (1988) (same); Belmontes v. Woodford, 355 F.3d 1024, 1032 (9th Cir. 2003) (granting habeas relief on penalty because "the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and likely become a constructive member of society if incarcerated for life without possibility of parole"); Davis v. Mitchell, 318 F.3d 682, 691 (6th Cir. 2003); Banks v. Horn, 316 F.3d 228, 233 (3d Cir. 2003) ("'Under the United States Supreme Court's cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one the Court dares not risk.'") (quoting Mills, 486 U.S. at 384); Lenz v. Warden, 579 S.E.2d 194,

prepared to rebut arguments that improperly minimize the significance of mitigating evidence[315] or equate the standards for mitigation with those for a first-phase defense.[316] At the same time, counsel should request instructions that will ensure that the jury understands, considers, and gives effect to all relevant mitigating evidence.[317] It is vital that the instructions clearly convey the differing unanimity requirements applicable to aggravating and mitigating factors.[318]

If the jury instructions are insufficient to achieve the purposes described in the previous paragraph or are otherwise confusing or misleading, counsel must object, even if the instructions are the standard ones given in the jurisdiction. If the court does not instruct the jury on individual mitigating circumstances, counsel should spell them out in closing argument.

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196 (Va. 2003) (holding trial counsel ineffective for failure to object to defective penalty phase verdict form).

315. Prosecutors will frequently try to argue, for example, that "not everybody" who is abused as a child grows up to commit capital murder or that mental illness did not "cause" the defendant to commit the crime. *See* Haney, *supra* note 93, at 589-602. Both of these arguments are objectionable on Eighth Amendment grounds because they nullify the effect of virtually all mitigation. *See id.*; *supra* text accompanying notes 277-80. In any event, counsel can seek to counter such arguments by emphasizing the unique combination of factors at play in the client's life and demonstrating that there are causal connections between, for example, childhood abuse, neurological damage, and violent behavior. *See, e.g.*, Phyllis L. Crocker, *Childhood Abuse and Adult Murder: Implications for the Death Penalty*, 77 N.C. L. REV. 1143, 1157-66 (1999) (reviewing psychological and medical "research on the correlation between childhood abuse and adult violence").

316. Arguments confusing the standards for a first phase defense and mitigation also violate the Eighth Amendment. *See generally* Eddings v. Oklahoma, 455 U.S. 104, 113-15 (1982) (finding unconstitutional trial judge's failure to consider defendant's violent upbringing as a mitigating factor at sentencing); *see generally* Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21 (1997).

317. *See* Blume et al., *supra* note 287, at 398-99. *See also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 11-12 (1993) (describing results of study showing jury confusion as to meaning of instructions, particularly about the mitigating circumstance burden of proof); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L.J. 1161, 1167 (1995) (describing results of study showing that a substantial percentage of jurors do not understand instructions concerning aggravating and mitigating evidence, burdens of proof and unanimity).

318. *See* McKoy v. North Carolina, 494 U.S. 433, 444 (1990) (instructions allowing jury to consider only mitigating circumstances found unanimously violated Eighth Amendment); Mills v. Maryland, 486 U.S. 367, 375-80 (1988) (same result where jury could misinterpret instructions to require unanimity); *supra* note 315.

Record Preservation

In some jurisdictions, counsel is required or allowed to either proffer to the court or present to the sentencer mitigating evidence, regardless of the client's wishes.[319] Even if such a presentation is not mandatory, counsel should endeavor to put all available mitigating evidence into the record because of its possible impact on subsequent decisionmakers in the case.

319. *See, e.g.*, Hardwick v.Crosby, 320 F.3d 1127, 1190 n.215 (11th Cir. 2003) ("Even if Hardwick did ask [counsel] not to present witnesses at the sentencing proceeding, . . . [counsel] had a duty to Hardwick at the sentencing phase to present available mitigating witnesses as Hardwick's defense against the death penalty."); Koon v. Dugger, 619 So. 2d 246, 250 (Fla. 1993) (finding that:

> when a defendant, against his counsel's advice, refuses to permit the presentation of mitigating evidence in the penalty phase, counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what that evidence would be.);

State v. Koedatich, 548 A.2d 939, 993-95 (N.J. 1988) (mitigating factors must be introduced regardless of the defendant's position).

GUIDELINE 10.12—THE OFFICIAL PRESENTENCE REPORT

A. If an official presentence report or similar document may or will be presented to the court at any time, counsel should become familiar with the procedures governing preparation, submission, and verification of the report. In addition, counsel should:

1. where preparation of the report is optional, consider the strategic implications of requesting that a report be prepared;

2. provide to the report preparer information favorable to the client. In this regard, counsel should consider whether the client should speak with the person preparing the report; if the determination is made to do so, counsel should discuss the interview in advance with the client and attend it;

3. review the completed report;

4. take appropriate steps to ensure that improper, incorrect or misleading information that may harm the client is deleted from the report;

5. take steps to preserve and protect the client's interests where the defense considers information in the presentence report to be improper, inaccurate or misleading.

History of Guideline

This Guideline is based on Guideline 11.8.4 of the original edition. New requirements in the Guideline include: (1) counsel's obligation to become familiar with the procedures governing preparation, submission, and verification of official presentence reports, where there is a chance that such a report may be presented to the court at any time; (2) counsel's obligation to provide information that is favorable to the client

to the person who is preparing the report; (3) counsel's obligation to prepare the client for and attend an interview with the person preparing the report, provided counsel has first determined such an interview to be appropriate.

Related Standards

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.3 (1995) ("Preparation for Sentencing").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.4 (1995) ("The Official Presentence Report").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.5 (1995) ("The Prosecution's Sentencing Position").

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 8.6 (1995) ("The Defense Sentencing Memorandum").

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.1 ("Sentencing") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

Commentary

In many jurisdictions, an official presentence report may be prepared prior to the imposition of sentence in a capital case.[320] How such reports may be used in the sentencing process differs from jurisdiction to jurisdiction, and counsel should become familiar with the statutes, court rules, case law, and local practice governing their use.[321]

320. *See, e.g.*, Muhammad v. State, 782 So. 2d 343, 363 n.10 (Fla. 2001), *cert. denied*, 534 U.S. 944 (2001); State v. Dunster, 631 N.W.2d 879, 906-08 (Neb. 2001), *cert. denied*, 535 U.S. 908 (2002); *Ex parte* George, 717 So. 2d 858, 859 (Ala. 1998).

321. For example, in Florida, a presentence investigation report is required in every case where the defendant is not challenging the imposition of the death penalty and refuses to present mitigating evidence. *See Muhammad*, 782 So. 2d at 363. In California, although a probation report is prepared

There are also constitutional limits on the use of presentence reports in capital sentencing.[322]

In some jurisdictions, a presentence report is not prepared unless requested by the defense. Counsel should carefully consider the implications of such a request.[323] In jurisdictions where a presentence report is prepared regardless of the wishes of the defense, counsel should submit information favorable to the client, including the client's social history and expert evaluations. If the report preparer does not include the defense materials, counsel should consider how they might otherwise be made part of the client's official records. This information may not only affect the sentencing decision, but also the client's classification, programming and treatment in the prison system following imposition of sentence. In any event, counsel should make a clear record of any inaccuracies they discern in the report.

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prior to the trial court's ruling on a capital defendant's post-trial motion to modify the death verdict, it is error for the judge, in ruling on that motion, to consider information contained in the probation report that was not presented to the jury. *See, e.g.*, People v. Kipp, 956 P.2d 1169, 1189-90 (Cal. 1998).

322. *See* Gardner v. Florida, 430 U.S. 349, 358-62 (1977) (holding that if, in imposing a death sentence, the trial judge relies in part on confidential information in a presentence investigation report, the report must be disclosed to defense counsel or due process is violated).

323. For example, in Ohio, a presentence report is prepared only at the request of the defense and, if the defense requests the preparation of a report, the prosecution is allowed to present victim impact evidence, other crimes evidence, and other information that may not otherwise be admissible at the penalty phase to the jury. *See* OHIO REV. CODE ANN. § 2929.03(D)(1) (Anderson 1999); State v. White, 709 N.E.2d 140, 153-55 (Ohio 1999). Because Ohio provides capital defendants the right to reasonably necessary investigation, experts, or other assistance for trial and penalty phases, *see* OHIO REV. CODE ANN. § 2929.024 (Anderson 1999), capital counsel who request a presentence report instead may be ineffective for doing so. *See* Glenn v. Tate, 71 F.3d 1204, 1209-10 (6th Cir. 1995) (finding counsel ineffective in part because they requested a psychological report under the presentence report statute, rather than as necessary investigation, which mandated the results be shared with the jury).

GUIDELINE 10.13—THE DUTY TO FACILITATE THE WORK OF SUCCESSOR COUNSEL

In accordance with professional norms, all persons who are or have been members of the defense team have a continuing duty to safeguard the interests of the client and should cooperate fully with successor counsel. This duty includes, but is not limited to:

A. maintaining the records of the case in a manner that will inform successor counsel of all significant developments relevant to the litigation;

B. providing the client's files, as well as information regarding all aspects of the representation, to successor counsel;

C. sharing potential further areas of legal and factual research with successor counsel; and

D. cooperating with such professionally appropriate legal strategies as may be chosen by successor counsel.

History of Guideline

This Guideline is new.

Related Standards

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 9.2(c) (1995) ("Right to Appeal").

Commentary

All members of the defense team must anticipate and facilitate the duty of successor counsel, embodied in Guideline 7.1(B)(1), to investigate the defense presentation at all prior stages of the case. As set forth in Subsection A, this duty includes an affirmative obligation to

maintain contemporaneous records that will enable successor counsel to have a factual predicate for the assertion of whatever legal claims may arise. For example, there may be issues as to whether the government produced certain evidence or whether counsel knew of the existence of a particular witness or legal theory. Each counsel's files should be maintained in a manner sufficient to enable successor counsel to answer questions of this sort through appropriate documentation (e.g., notes of client interviews, telephone message slips, etc.).

Even after team members have been formally replaced, they must continue to safeguard the interests of the client. Specifically, they must cooperate with the professionally appropriate strategies of successor counsel (Subsection D). And this is true even when (as is commonly the case) successor counsel are investigating or asserting a claim that prior counsel was ineffective.[324] As the California Bar has ruled in a formal opinion,

> [T]he Rules of Professional Conduct impose a duty upon trial counsel to fully and candidly discuss matters relating to the representation of the client with appellate counsel and to respond to the questions of appellate counsel, even if to do so would be to disclose that trial counsel failed to provide effective assistance of counsel. This decision is in accord with the general rule that the attorney owes a duty of complete fidelity to the client and to the interests of the client.[325]

The duties contained in this Guideline are of enormous practical significance to the vindication of the client's legal rights. "[T]he strategic thinking of the lawyer, and learning this strategic thinking[,] is absolutely critical to the thorough presentation of a post-conviction claim. It should be routinely and openly presented to the post-conviction counsel."[326] To do otherwise is professionally unethical.[327]

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324. *See* David M. Siegel, *My Reputation or Your Liberty (or Your Life): The Ethical Obligations of Criminal Defense Counsel in Postconviction Proceedings*, 23 J. LEGAL PROF. 85, 90-91 (1999) ("While any criminal defense lawyer whose client is convicted is subject to the possibility of a claim for ineffective assistance, lawyers in capital cases are virtually guaranteed such claims.").

325. State Bar of Cal. Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1992-127 (1992), *at* http://www.calbar.ca.gov/calbar/html_unclassified/ca92-127.html. *See* 1 HERTZ & LIEBMAN, *supra* note 28, at 485 n.20 (discussing the duties described in this Guideline and noting that "if former counsel was ineffective, it is his responsibility to the client and the profession to cooperate in redressing the violation") (emphasis omitted).

326. Siegel, *supra* note 324, at 114.

327. *See id.* ("[G]iven the peculiar aspects of the role of counsel whose former client brings a post-conviction action, [it] violates counsel's ethical obligations" to fail to cooperate with successor counsel in "the disclosure to the post-conviction counsel of files and notes from the representation,

GUIDELINE 10.14—DUTIES OF TRIAL COUNSEL AFTER CONVICTION

A. **Trial counsel should be familiar with all state and federal post-conviction options available to the client. Trial counsel should discuss with the client the post-conviction procedures that will or may follow imposition of the death sentence.**

B. **Trial counsel should take whatever action(s), such as filing a notice of appeal, and/or motion for a new trial, will maximize the client's ability to obtain post-conviction relief.**

C. **Trial counsel should not cease acting on the client's behalf until successor counsel has entered the case or trial counsel's representation has been formally terminated. Until that time, Guideline 10.15.1 applies in its entirety.**

D. **Trial counsel should take all appropriate action to ensure that the client obtains successor counsel as soon as possible.**

History of Guideline

This Guideline is based on Guideline 11.9.1 of the original edition. Subsection B has been revised to require that trial counsel take whatever action(s) will maximize the client's ability to obtain post-conviction relief. Additionally, Subsection D has been revised to require that

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the volunteering of absences in the record and the volunteering of counsel's strategic thinking in the case."); Meegan B. Nelson, Note, *When Clients Become "Ex-Clients": The Duties Owed After Discharge*, 26 J. LEGAL PROF. 233, 241 (2002) ("Essentially, a failure to cooperate with the client's new attorney can constitute the same violations as a failure to cooperate with the actual client under Model Rule 1.16."); *see generally* State Bar of Ariz Comm. on the Rules of Prof'l Conduct, Formal Op. 98-07 (1998) (discussing ethical obligations surrounding file retention and surrender to clients and successor counsel); *Returning Client Files After Termination*, HAWAII BAR J., Sept. 1998, at 16 (finding an ethical obligation to release to the client "all file materials which, if not released . . . would prejudice the rights of the client").

counsel take all appropriate action to ensure that the client obtains successor counsel as soon as possible.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.2 ("Appeal"), *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 9.2 (1995) ("Right to Appeal").

Commentary

Post-conviction procedures, and therefore the duties of counsel, vary among jurisdictions.[328] Whatever the procedures, the client should be advised of what will happen following sentencing. For example, if the client will be given any psychological examination or will otherwise be interviewed by prison personnel or others following the court's imposition of sentence, the client should be counseled regarding that interview and advised of the potential legal impact of any statements the client might make there.[329]

The client should also be advised of all available avenues of judicial review[330] and what the client must do to secure review (e.g., sign a notice of appeal or affidavit of indigency). Trial counsel should file the necessary documents and take whatever other steps are needed to preserve the client's right to review, such as ordering transcripts of the trial proceedings and objecting to any governmentally imposed barriers (e.g., failure to provide counsel) to obtaining such review. If there are

328. For example, trial counsel in California is given, by statute, certain post-conviction duties and must remain on the case until the record is certified. *See* CAL. PENAL CODE §§1239(b), 1240.1(e)(1) (West Supp. 2003).

329. *See* CAL. ATT'YS FOR CRIM. JUSTICE & CAL. DEFENDERS ASS'N, CALIFORNIA DEATH PENALTY DEFENSE MANUAL 1-38 to 1-40 (1986).

330. Some death penalty states provide for automatic appellate review. *See, e.g.*, CAL. PENAL CODE § 1239(b); MD. CODE ANN., CRIM. LAW § 2-401(a) (2002); MD. REG. 8-306(c) (2002); N.C. GEN. STAT. § 15A-2000(d)(1) (2001).

any further actions available that might expand the scope of review (e.g., filing a motion for a new trial), trial counsel should take them.[331]

In short, trial counsel is responsible for making sure that the client's legal position does not suffer any harm during the period of transition to successor counsel. To avoid prejudice to the client, trial counsel should, in accordance with Subsection D, make every effort to ensure that this period is as short as possible. But, in any event, trial counsel may not cease acting on the client's behalf until successor counsel has entered the case. As Subsection C provides, until that time trial counsel must discharge the duties common to all post-conviction counsel as set forth in Guideline 10.15.1 (including obtaining a stay of execution if needed).

Trial counsel must also monitor the client's personal condition as set out in Guideline 10.15.1(E)(2). If the client's mental status deteriorates under the impact of the conviction and death sentence, the client may inappropriately decide to cease efforts to secure review, thereby creating a series of problems for the defense team that might well have been avoided.

Once successor counsel are in place, trial counsel continue to be under the obligation, imposed by Guideline 10.13, to recognize a continuing duty to safeguard the interests of the client and to cooperate fully with successor counsel.

331. This comports with the requirements for counsel in all criminal cases. *See* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 9.2(a) (1995); *cf.* Mayo v. Cockrell, 287 F.3d 336, 338, 341 (5th Cir. 2002) (denying federal habeas corpus relief where trial counsel was unaware that he remained on case until replaced, appellate counsel was unaware of his appointment until after expiration of time for filing of new trial motion, and a meritorious new trial motion went unfiled), *cert. denied*, 123 S. Ct. 443 (2002).

GUIDELINE 10.15.1—DUTIES OF POST-CONVICTION COUNSEL

A. **Counsel representing a capital client at any point after conviction should be familiar with the jurisdiction's procedures for setting execution dates and providing notice of them. Post-conviction counsel should also be thoroughly familiar with all available procedures for seeking a stay of execution.**

B. **If an execution date is set, post-conviction counsel should immediately take all appropriate steps to secure a stay of execution and pursue those efforts through all available fora.**

C. **Post-conviction counsel should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under the standards applicable to high quality capital defense representation, including challenges to any overly restrictive procedural rules. Counsel should make every professionally appropriate effort to present issues in a manner that will preserve them for subsequent review.**

D. **The duties of the counsel representing the client on direct appeal should include filing a petition for certiorari in the Supreme Court of the United States. If appellate counsel does not intend to file such a petition, he or she should immediately notify successor counsel if known and the Responsible Agency.**

E. **Post-conviction counsel should fully discharge the ongoing obligations imposed by these Guidelines, including the obligations to:**

1. **maintain close contact with the client regarding litigation developments; and**

2. **continually monitor the client's mental, physical and emotional condition for effects on the client's legal position;**

3. **keep under continuing review the desirability of modifying prior counsel's theory of the case in light of subsequent developments; and**

4. **continue an aggressive investigation of all aspects of the case.**

History of Guideline

This Guideline is based on Guideline 11.9.3 of the original edition. Subsections A, B, and D are entirely new. Subsection C includes new language regarding the manner in which post-conviction counsel must present all arguably meritorious issues. Subsection E includes new language emphasizing the ongoing obligations imposed by these Guidelines upon post-conviction counsel.

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION Standard 4-8.5 ("Post-conviction Remedies") *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION (3d ed. 1993).

Commentary

Almost all of the duties imposed by Guidelines 10.3 et seq. are applicable in the post-conviction context. Subsection E notes this by way of reminder. Post-conviction counsel should consult those Guidelines and accompanying commentaries.

The Paramount Duty to Obtain a Stay

No matter how compelling the client's post-conviction case may be, he faces the risk that his execution will moot it.[332] This is a phenomenon unique to capital litigation and one that must be uppermost in the mind of post-conviction counsel.

When states fail to provide post-conviction counsel entirely or in a timely manner,[333] or request the setting of an execution date to advance the litigation,[334] or impose short periods of time for filing substantive post-judgment pleadings, the result is emergency requests for stays of execution so that substantive pleadings will be considered.[335] Although

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332. *See* Brooks v. Estelle, 702 F.2d 84, 84-85 (5th Cir. 1983) (dismissing appeal, which had received certificate of probable cause from district court, as moot since petitioner had been executed following the denial of a stay by *Brooks v. Estelle*, 697 F.2d 586 (5th Cir. 1982)).

333. There has been no right to state post-conviction counsel in Georgia. *See* Gibson v. Turpin, 513 S.E.2d 186, 188 (Ga. 1999). In August 1996, Georgia Supreme Court Justice Robert Benham noted that several persons under sentence of death in Georgia were in "immediate need of legal representation," and asked area law firms to volunteer. Bill Rankin, *When Death Row Inmates Go To Court Without Lawyers: In the Late Stages of Their Fight to Stay Alive, Some Must Represent Themselves*, ATLANTA J. & CONST., Dec. 29, 1996, at D5 (internal quotation marks omitted). One Atlanta civil firm that volunteered was assigned the case of Marcus Wellons. *See id.* Three days after the firm received a copy of the trial transcript, the trial court set an execution date for two weeks later. *See id.* The firm rushed to the Georgia Supreme Court and asked for more time to submit a formal post-conviction petition. *See id.* Hours before Mr. Wellons's scheduled execution, the Court denied the request by a 4-3 vote. *See id.* As guards were about to shave Mr. Wellons's head for that evening's electrocution, the federal district court granted a stay of execution. *See id.* State counsel and the federal defender were given ten months to prepare the federal petition. *See id.*

A similar instance of legal Russian roulette took place in Alabama in 2001 in the case of Thomas D. Arthur. *See* Arthur v. Haley, 248 F.3d 1302 (11th Cir. 2001) (affirming grant of stay on day before scheduled execution to inmate who had been unrepresented for more than two years following direct appeal); *Agency Claims Death Row Inmates Without Lawyers a Growing Problem*, CHATTANOOGA TIMES FREE PRESS, March 26, 2001, at B8 (describing *Arthur* case and absence of any state funding for post-conviction representation in Alabama). As suggested *supra* note 47, counsel should be aggressive in challenging such irresponsible behavior by the states as a federal constitutional violation.

334. For example, in Kentucky capital cases the Attorney General invariably requests an execution date at the end of direct appeal, and the Governor invariably signs the death warrant. No stay of execution may be granted until the state post-conviction petition is filed. As a result, in order to obtain a stay, counsel must often file a state post-conviction petition well before the time allowed under state law because there is an outstanding execution date. The practice is the same in federal habeas proceedings. *See, e.g.*, *Execution of Killer Delayed*, CINCINNATI ENQUIRER, June 9, 2000, at D1B.

335. When a capital case enters a phase of being "under warrant"—i.e., when a death warrant has been signed—time commitments for counsel increase, "due in large part to the necessary duplication of effort in the preparation of several petitions which might have to be filed simultaneously in different courts." ABA POST-CONVICTION DEATH PENALTY REPRESENTATION PROJECT ET AL., TIME AND EXPENSE ANALYSIS IN POSTCONVICTION DEATH PENALTY CASES 10 (1987).

the ABA and other professional voices have repeatedly condemned this system,[336] defense counsel must make the best of it—by seeking stays or reprieves from any available source and challenging the unfairness of any overly restrictive constraints on the filing of substantive pleadings and/or stays.

And to the extent that counsel can responsibly reduce the stresses imposed upon the client by this often nightmarish system, counsel should of course do so (e.g., by reassuring the client of the unlikelihood of the execution actually occurring on its nominal date, notwithstanding the alarming preparations being made by the prison).[337]

Keeping the Client Whole

Even if their executions have been safely stayed, however, the mental condition of many capital clients will deteriorate the longer they remain on death row. This may result in suicidal tendencies and/or impairments in realistic perception and rational decisionmaking.[338] Counsel should seek to minimize this risk by staying in close contact with the client.[339]

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336. *See* ABA CRIMINAL JUSTICE SECTION, *supra* note 86, at 10-11 (calling for automatic federal stays throughout post-conviction period); *Legislative Modification*, *supra* note 12, at 855 ("We agree with the Powell Committee [appointed by Chief Justice Rehnquist to study reform of capital habeas corpus] that the current mechanisms for obtaining stays of execution are irrational and indefensible. At best, they lead to an enormous waste of legal effort by all participants in the system, and at worst they result in inconsistencies that have fatal consequences."); Ira P. Robbins, *Justice by the Numbers: The Supreme Court and the Rule of Four – Or is it Five?*, 36 SUFF. U. L. REV. 1 (2002); Eric M. Freedman, *Can Justice Be Served by Appeals of the Dead?*, NAT'L L.J., Oct. 19, 1992, at 13 (current situation respecting stays is "no way to run a judicial system").

337. *See, e.g.*, McDonald v. Missouri, 464 U.S. 1306, 1307 (1984) (Blackmun, J., in chambers).

> (I thought I had advised the Supreme Court of Missouri once before, in *Williams*, that . . . I . . . shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.)

Williams v. Missouri, 463 U.S. 1301, 1301-02 (1983) (Blackmun, J., in chambers) (executions scheduled for prior to the expiration of the time for seeking certiorari on direct appeal must be stayed "as a matter of course").

338. *See* C. Lee Harrington, *A Community Divided: Defense Attorneys and the Ethics of Death Row Volunteering*, 25 LAW & SOC. INQUIRY 849, 850 (2000) (noting that "[b]etween 1977 and March 1998, 59 [condemned] inmates had volunteered for execution compared to 382 executed unwillingly"); *see also infra* note 351.

339. *See supra* text accompanying notes 189-92.

B. Collateral Relief—State and Federal

As described in the commentary to Guideline 1.1, providing high quality legal representation in collateral review proceedings in capital cases requires enormous amounts of time, energy, and knowledge. The field is increasingly complex and ever-changing. As state and federal collateral proceedings become ever-more intertwined, counsel representing a capital client in state collateral proceedings must become intimately familiar with federal habeas corpus procedures. As indicated above, for example, although the AEDPA deals strictly with cases being litigated in federal court, its statute of limitations provision creates a de facto statute of limitations for filing a collateral review petition in state court. Some state collateral counsel have failed to understand the AEDPA's implications, and unwittingly forfeited their client's right to federal habeas corpus review.[347]

Collateral counsel has the same obligation as trial and appellate counsel to establish a relationship of trust with the client. But by the time a case reaches this stage, the client will have put his life into the hands of at least one other lawyer and found himself on death row. Counsel should not be surprised if the client initially exhibits some hostility and lack of trust, and must endeavor to overcome these barriers.

Ultimately, winning collateral relief in capital cases will require changing the picture that has previously been presented. The old facts and legal arguments—those which resulted in a conviction and imposition of the ultimate punishment, both affirmed on appeal—are unlikely to motivate a collateral court to make the effort required to stop the momentum the case has already gained in rolling through the legal system.[348] Because an appreciable portion of the task of post-conviction counsel is to change the overall picture of the case, Subsection E(3) requires that they keep under continuing review the desirability of amending the defense theory of the case, whether one has been formulated by prior counsel in accordance with Guideline 10.10.1 or not.

For similar reasons, collateral counsel cannot rely on the previously compiled record but must conduct a thorough, independent investigation

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347. *See generally*, Goodman v. Johnson, No. 99-20452 (5th Cir. Sept. 19, 1999) (unpublished); Cantu-Tzin v. Johnson, 162 F.3d 295 (5th Cir. 1998). Spencer Goodman was executed by Texas in January 2000 and Andrew Cantu-Tzin was executed by Texas in January 1999.

348. *See generally*, Russell Stetler, *Post-Conviction Investigation in Death Penalty Cases*, THE CHAMPION, Aug. 1999, *available at* http://www.criminaljustice.org/public.nsf/championarticles/99aug06/.

in accordance with Guideline 10.7. (Subsection E(4)). As demonstrated by the high percentage of reversals and disturbingly large number of innocent persons sentenced to death, the trial record is unlikely to provide either a complete or accurate picture of the facts and issues in the case.[349] That may be because of information concealed by the state, because of witnesses who did not appear at trial or who testified falsely, because the trial attorney did not conduct an adequate investigation in the first instance, because new developments show the inadequacies of prior forensic evidence, because of juror misconduct, or for a variety of other reasons.

Two parallel tracks of post-conviction investigation are required. One involves reinvestigating the capital case; the other focuses on the client. Reinvestigating the case means examining the facts underlying the conviction and sentence, as well as such items as trial counsel's performance, judicial bias or prosecutorial misconduct. Reinvestigating the client means assembling a more-thorough biography of the client than was known at the time of trial, not only to discover mitigation that was not presented previously, but also to identify mental-health claims which potentially reach beyond sentencing issues to fundamental questions of competency and mental-state defenses.

As with every other stage of capital proceedings, collateral counsel has a duty in accordance with Guideline 10.8 to raise and preserve all arguably meritorious issues.[350] These include not only challenges to the conviction and sentence, but also issues which may arise subsequently.[351] Collateral counsel should assume that any meritorious issue not contained in the initial application will be waived or procedurally defaulted in subsequent litigation, or barred by strict rules governing subsequent applications.[352] Counsel should also be aware that

349. *See supra* text accompanying notes 47-58.

350. *See supra* Guideline 10.8 and accompanying commentary. As Subsection C emphasizes, the duty to investigate and present such claims applies to "all issues, whether or not previously presented." Until previously unpresented issues are fully explored, there is no way to determine whether or not any arguably applicable forfeiture doctrines may be overcome. *See* House v. Bell, 311 F.3d 767 (6th Cir. 2002) (en banc), *cert denied*, 123 S. Ct. 2575 (2003) (certifying to state courts issue of whether procedural vehicle existed to present evidence of innocence first uncovered during federal habeas proceedings).

351. For example, although the Justices disagree on the point, as shown most recently by their varying opinions respecting the certiorari petition in *Foster v. Florida*, 123 S. Ct. 470 (2002), it may well be that after a certain length of time continued confinement on death row ripens into an Eighth Amendment violation.

352. *See* Mason v. Meyers, 208 F.3d 414, 417 (3d Cir. 2000) (stating that as a result of the strict rules governing successive *habeas corpus* petitions enacted by the AEDPA and codified at 28

any change in the availability of post-conviction relief may itself provide an issue for further litigation.[353] This is especially true if the change occurred after the case was begun and could be argued to have affected strategic decisions along the way.

U.S.C. § 2244(b), "it is essential that habeas petitioners include in their first petition *all* potential claims for which they might desire to seek review and relief").

353. *See, e.g.*, Lindh v. Murphy, 521 U.S. 320, 322-23 (1997) (discussing the retroactive application of various procedural provisions in the AEDPA to pending cases).

GUIDELINE 10.15.2—DUTIES OF CLEMENCY COUNSEL

A. Clemency counsel should be familiar with the procedures for and permissible substantive content of a request for clemency.

B. Clemency counsel should conduct an investigation in accordance with Guideline 10.7.

C. Clemency counsel should ensure that clemency is sought in as timely and persuasive a manner as possible, tailoring the presentation to the characteristics of the particular client, case and jurisdiction.

D. Clemency counsel should ensure that the process governing consideration of the client's application is substantively and procedurally just, and, if it is not, should seek appropriate redress.

History of Guideline

This Guideline is based on Guideline 11.9.4 of the original edition. Subsection D of the Guideline was added to reflect the effect of the decision in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), on the duties of clemency counsel.

Related Standards

None.

Commentary

As discussed *supra* in the text accompanying notes 59-66, a series of developments in law, public opinion, and forensic science suggests that clemency petitions in capital cases will in the future enjoy a greater success rate than they do now, which will place additional demands on clemency counsel.

As Subsection B emphasizes, further investigation is critical at this phase. Beyond that, the manner in which clemency is dispensed in the jurisdiction controls what clemency counsel needs to do.[354]

Counsel should be familiar with the clemency-dispenser, and with the factors the clemency-dispenser has historically found persuasive. As possible innocence is the most frequently cited reason for clemency,[355] if there is a possibility that the client is innocent, counsel should mobilize an especially detailed investigation to determine whether confidence in the client's guilt can be undermined. If doubts about the fairness of the judicial proceedings that produced the death sentence have led to clemency in other cases, counsel should consider whether particular instances of procedural unfairness can be set out as to the client's case.[356] If personal characteristics of the condemned, such as youth, mental illness,[357] spousal abuse, or cultural barriers, have proven helpful

354. The states utilize fifty different clemency processes, which can be categorized in the following manner: the Governor has sole authority over the clemency process; the Governor cannot grant clemency without a recommendation from a board or advisory group to do so; the Governor decides clemency after receiving a nonbinding recommendation from a board or advisory group; a board or advisory group makes the clemency determination; or, the Governor sits as a member of the board which makes the clemency determination. The Death Penalty Information Group details the process by state. *See* DEATH PENALTY INFORMATION CENTER, *Clemency*, *at* http://www.deathpenaltyinfo.org/article.php?did=126&scid=13 (last visited Aug. 18, 2003) [hereinafter *Clemency*]. For federal death row inmates, the President alone has pardon power. *See* U.S. CONST. art. II, § 2, cl. 1.

355. The Death Penalty Information Center reports that since 1976, of the thirty-five death row inmates who have been granted clemency for reasons other than the personal convictions of the governor in opposition to the death penalty, the possible innocence of the condemned inmate was provided as the reason for granting clemency in sixteen cases (forty-six percent). *See Clemency*, *supra* note 354.

356. For example, in 1999 the Governor of Arkansas commuted the death sentence of Bobby Ray Fretwell after receiving a letter from a juror at Fretwell's trial stating that he had been "the lone holdout against the death penalty but relented for fear he would be an outcast in the small community where the killing occurred." *See Arkansas Governor Spares Killer's Life After Juror's Plea*, L.A. TIMES, Feb. 6, 1999, at A19. In the case of Charlie Brooks, who was executed in Texas in 1982, counsel enlisted the trial prosecutor to argue before the Board of Pardons and Paroles that it would be unfair to execute the client when his co-defendant was serving a term of years and the state did not know who the triggerman had been. *See* Robert Reinhold, *Groups Race to Prevent Texas Execution*, N.Y. TIMES, Dec. 6, 1982, at A16.

357. As indicated *supra* text accompanying note 64, a broad range of humanitarian concerns unrelated to issues of guilt has traditionally supported executive clemency. For example, in June 2003 Governor Paul E. Patton of Kentucky commuted the death sentence of Kevin Stanford because he had been seventeen at the time of the commission of his crimes. *See* Henry Weinstein, *Death Sentence Commuted for Ky. Man Who Killed at 17*, L.A. Times, June 22, 2003, at 36. In 2002, the Georgia Board of Pardons commuted the death sentence of Alexander Williams to life in prison without parole in large part due to Williams's profound mental illness. *See* Rhonda Cook, *Death Penalty Reduced to Life*, ATLANTA J. & CONST., Feb. 26, 2002, at A1.

in past clemency proceedings, then counsel should discover and demonstrate examples of the client's similar characteristics to the extent possible.

In any event, the presentation should be as complete and persuasive as possible, utilizing all appropriate resources in support (e.g., relevant outside organizations, the trial judge, prominent citizens), and discussing explicitly why the clemency-dispenser should act favorably notwithstanding the repeated reaffirmation of the client's conviction and sentence by the judicial system. For example, counsel may be in a position to argue that the underlying claims were powerful ones but procedural technicalities barred the courts from addressing their merits.

As discussed in the text *supra* accompanying notes 65-66, due process protections apply to clemency proceedings, and counsel should be alert to the possibility of developing the nascent existing law in this area.

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey)	
SCDC No. 6015)	
)	PETITIONER'S
Petitioner,)	POST-TRIAL MEMORANDUM
)	
vs.)	
)	2007-CP-42-2848
State of South Carolina,)	
)	
Respondent.)	

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SPARTANBURG COUNTY
2010 OCT 26 PM 3:41

Procedural History

The Petitioner, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002.

On October 10, 2002, Solicitor Trey Gowdy served his Notice of Intent to Seek the Death Penalty consistent with S.C. Code Ann § 16-3-26. He further served an additional Notice of Life Sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction of assault and battery with intent to kill. Both were personally served on Marion Lindsey and his counsel, Michael Bartosh.

A Notice of Statutory Aggravating Circumstances and Evidence in Support of Aggravating Circumstances was served on the Petitioner on March 10, 2004. The listed statutory aggravator was:

> That the Defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. The Petitioner was present and represented by Spartanburg County Public Defender, Michael Bartosh, Doug Brannon and Karen Quimby (Hatcher). The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance: The offender by his act of murder knowingly created a great risk of death to more than one person *IN A PUBLIC PLACE* (italics added) by means of a weapon which normally would be hazardous to the lives of more than one. The jury was also instructed to consider as mitigating circumstances (1) the murder was committed while the Defendant was under the influence of mental and emotional disturbance and (2) the age or mentality of the Defendant at the time of the crime.

On May 24, 2004, the jury found the existence of the statutory aggravating circumstance and recommended a sentence of death. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice or arbitrary factor. Judge Few then sentenced Lindsey to death in the manner provided by law.

The Petitioner made an appeal to the South Carolina Supreme Court. The Applicant was represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

1. Whether the Court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment that the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?
2. Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?
3. Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close rangeand there was no evidence appellant knowingly created a risk of death to more than one person?
4. Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

The Respondent, through Assistant Deputy Attorney General Donald J. Zelenka, opposed the direct appeal of Petitioner's sentence.

On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. State v. Lindsey, 372 S.C. 185, 642 S.E. 2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29,2007. Lindsey v. South Carolina, 07-5444. In the petition, Lindsey raised the following questions:

> Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

The Respondents filed a Brief in opposition on August 20, 2007. The United States

Supreme Court denied certiorari on October 1, 2007. Lindsey v. S.C., 552 U.S. 917, 128 S.Ct. 274, 169 L.Ed 2d. 200 (2007).

Marion Lindsey filed his initial Application for Post-Conviction Relief on August 14, 2007 and an Amended Application for Post-Conviction Relief on August 6, 2009.

An evidentiary hearing was held on Marion Lindsey's requests for post-conviction relief on July 19th, 20th and 21st, 2010. Marion Lindsey files this Post-Trial Memorandum in compliance with the instructions of the Court at the conclusion of that hearing.

Issues Presented in the Post-Conviction Hearing

At the evidentiary hearing held on July 19th, 20th and 21st, 2010, Petitioner Marion Lindsey presented the following allegations of Ineffective Assistance of Counsel in support of his request for post-conviction relief:

1. Trial Counsel failed to adequately prepare Marion Lindsey for the pre-trial mental health evaluation. Specifically, Marion Lindsey alleges:
    a. Trial Counsel inappropriately allowed Marion Lindsey to take the advice of a "jail house" lawyer to feign mental illness as part of his defense.
    b. Trial Counsel failed to spend sufficient time with Marion Lindsey prior to the evaluation and, as a result, failed to learn of his intentions to feign mental illness and failed to discuss with him the dangers of that course of action.
2. Trial Counsel failed to adequately present the issue of malingering to the jury during the penalty phase. Specifically, Marion Lindsey alleges that Trial Counsel failed to call Dr. Tora Brawley as a witness during the sentencing phase of the

trial. Dr. Brawley is an expert in Clinical Pscyhology with specialty in neuro-psychology who evaluated Marion Lindsey prior to trial, performed psychological testing on Marion Lindsey and reviewed records from his previous evaluations and testing. Dr. Brawley's testimony could have refuted the State's allegations that Marion Lindsey was malingering when he was examined by defense experts and in psychological testing of the Court-examiners and supported the testimony of Dr. Margaret Melikian.

3. Trial Counsel failed to adequately present requests for mercy to the jury during the sentencing phase of the trial. Specifically, Marion Lindey alleges:

   a. Trial Counsel failed to prepare the witnesses who testified on behalf of Marion Lindsey to request that the jury show mercy and impose a life sentence instead of the penalty of death.

   b. Trial Counsel failed to call both family members and non-family members as witnesses during the penalty phase who could have made an effective request for mercy to the jury.

   c. Trial Counsel failed to ask appropriate questions to elicit the requests for mercy from the witnesses during the penalty phase.

   d. Trial Counsel failed to adequately argue the Court's refusal to allow the witnesses to request mercy during the penalty phase of the trial.

   e. Trial Counsel failed to preserve the trial record on the issue of mercy by not presenting adequate arguments to the court in support of their attempts to present the requests for mercy and by not requesting to proffer the testimony of the witnesses on the issue of mercy.

4. Trial Counsel failed to provide sufficient information to Dr. Margaret Melikian to allow her to properly evaluate Marion Lindsey and to testify on his behalf during the penalty phase of the trial. Specifically, Marion Lindsey alleges:

    a. Trial Counsel failed to obtain and provide to Dr. Melikian historical information and records of Marion Lindsey and his family members which were necessary for her to perform a proper evaluation of Marion Lindsey and to present her findings and conclusions to the jury during the penalty phase of the trial.

    b. Trial Counsel failed to seek a continuance of the trial in this action after Dr. Melikian informed them that she needed additional time and information to properly perform her duties and to present her findings and conclusions at trial.

    c. Trial Counsel failed to elicit testimony from Dr. Melikian about statutory mitigating factors during her testimony in the penalty phase of the trial.

5. Trial Counsel failed to adequately present to the jury the history of mental illness and impairment in Marion Lindsey's family and the relevance of that information to the jury's decision on the issue of sentencing. Specifically, Marion Lindsey alleges:

    a. Trial Counsel failed to adequately interview the family members to discover the extent and nature of mental illness and impairment in the family.

    b. Trial Counsel failed to adequately prepare the family members to present the extent and nature of mental illness and impairment in the family.

c. Trial Counsel failed adequately to argue to the Court the admissibility and relevance of the evidence of family mental illness and impairment.

d. Trial Counsel failed to adequately preserve the record relating to family mental illness and impairment by not presenting adequate arguments to the court in support of their attempts to present the testimony of the family members and by failing to proffer the testimony of the family members on this issue.

6. Trial Counsel failed to retain and present a prison adaptability expert during the penalty phase of the trial to testify about Marion Lindsey's ability to adapt to prison life without undue risk to others and the relevance of that information to the jury's sentencing decision.

7. Trial Counsel failed to retain and present a mitigation expert during the penalty phase of the trial to testify regarding the psycho-social history of Marion Lindsey and the relevance of that information to the jury's sentencing decision.

8. Trial Counsel failed to elicit testimony from the EMS workers, Joseph Stewart and Vincent Bell, regarding Marion Lindsey's desire to commit suicide immediately after the death of his Ruby Nell Lindsey. Specifically, Marion Lindsey alleges:

a. Trial Counsel failed to adequately interview the EMS workers to determine what information and testimony they could provide which would be beneficial to Marion Lindsey.

b. Trial Counsel failed to adequately prepare the EMS workers to testify during the penalty phase of the trial.

c. Trial Counsel failed to ask appropriate questions of the EMS workers to elicit admissible testimony regarding Marion Lindsey's state of mind immediately after the shooting occurred.

d. Trial Counsel failed to adequately argue that the testimony of the EMS workers related to Marion Lindsey's words, actions and state of mind immediately after the shooting were admissible.

e. Trial Counsel failed to preserve the trial record regarding the testimony of the EMS workers about Marion Lindsey's words, actions and state of mind immediately after the shooting by not presenting adequate arguments to the court in support of their attempts to present the testimony and by not requesting to proffer the testimony.

9. Trial Counsel failed to commit sufficient time to perform an adequate investigation for the sentencing phase of the trial and to adequately prepare for the presentation of a case in support of mitigation during the sentencing phase of the trial. Specifically, Marion Lindsey alleges:

a. Trial Counsel failed to assemble the complete defense team until approximately one (1) month prior to the trial.

b. Trial Counsel failed to perform an investigation of Marion Lindsey's life history, family history and other relevant factors until approximately two (2) months prior to trial. The first half of the investigation, which lasted approximately four (4) weeks, was conducted without the assistance of a mitigation investigator. The investigation conducted by the defense team only lasted approximately eight (8) weeks, was limited in nature and scope

and failed to uncover information which would have been beneficial to Marion Lindsey during the penalty phase of the trial.

c. Trial Counsel failed to spend sufficient time interviewing potential witnesses to determine what beneficial testimony they could provide on behalf of Marion Lindsey during the penalty phase of the trial.

d. Trial Counsel failed to spend sufficient time preparing witnesses to testify during the penalty phase of the trial so that their testimony would include all the beneficial information available and would be presented in a manner that was clear, logically structured and easily understood by the jury.

10. Trial Counsel failed to adequately argue against the statutory aggravating factors alleged by the state. Specifically, Marion Lindsey alleges that although Trial Counsel did address the statutory aggravating factors alleged by the State he did so in a cursory fashion and failed to present sufficient arguments against the application of those factors to Marion Lindsey.

General Standard of Review

When asserting a claim for ineffective assistance of counsel, an applicant in a Post Conviction Relief action must establish "that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (citing Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) and Strickland v. Washington, 466 U.S. 668 (1984)). These two prongs can be summarized by saying that

the applicant must show both error and prejudice. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004) and Strickland at 687.

To establish error, the applicant must show that counsel's performance fell below an objective standard of reasonable. No specific guidelines have been established by our courts for evaluating claims that trial counsel erred, instead claims of error are evaluated in terms of "reasonableness under prevailing professional norms." Wiggins v. Smith, 539 U.S. 510 (2003) (citing Strickland, supra.).

While the court has rejected specific standards guidelines for evaluating the performance of counsel, both the United States Supreme Court and the South Carolina Supreme Court have acknowledged the standards promugated by the American Bar Association as guides in determining whether or not counsel's performance was reasonable. Strickland at 688 and Council at 174.

To establish prejudice, the applicant "must show that there is a reasonable probablility that, but for counsel's errors, the result of the proceeding would have been different." This standard does not require that the applicant show that it is more likely than not that the result would have been different; in fact that standard was specifically rejected by the Court in Strickland. Instead, the applicant must show a "reasonable probablility" that the result would have been different. "A reasonable probability is a probablility sufficient to undermine confidence in the outcome." Strickland at 693-694. "There is a reasonable probability that at least one juror would have struck a difference balance." Wiggins at 515.

In evaluating whether there exists a reasonable probability of a different outcome, the Court must consider "the totality of the available mitigation evidence"and weigh it

against the evidence in aggravation. The "totality of available mitigation evidence" consists of the evidence presented during the original trial and the evidence presented during the post-conviction procedings. Sears v. Upton, U.S. Supreme Court Opinion No. 09-8854, decided June 29, 2010.

When an applicant establishes that his counsel's performance fell below the reasonable standard of care and his deficiencies were significant enough to undermine confidence in the penalty imposed, then the applicant has met his burden of proof and is entitled to a new hearing on the issue of sentencing.

Witnesses Presented During the Post-Conviction Relief Hearing

Defense Team

N. Douglas Brannon

PCR Testimony – Transcript pages 11 – 69
Trial Testimony – Did not testify

Mr. Brannon was the first witness called by the applicant in this PCR trial. Mr. Brannon was the second chair attorney in Mr. Lindsey's original trial. The remaining members of the original defense team were Mr. Mike Bartosh, who was the lead attorney, Karen Quimby, who was the third chair attorney, and Lenora Topp, who was the mitigation investigator for the team.

Mr. Brannon testified that Mr. Lindsey's case was his first and only death penalty case. He had previously been involved in a murder case but had no experience in capital defense cases.

Mr. Brannon was a young attorney having only been practicing for three years prior to the trial of this case. Mr. Brannon was sworn into the South Carolina Bar in May 2001 and this trial commenced on May 17, 2004.

In addition to his lack of experience at the time of his involvement in this case he was brought into the case only weeks prior to trial. He became involved in this case after receiving a telephone call from the primary attorney for the defense team Mr. Bartosh who asked Mr. Brannon if he would be interested in sitting second chair during this trial. Mr. Bartosh made this phone call because Mr. Brannon had previously expressed an interest in learning how to do capital defense work.

After Mr. Brannon was appointed on March 5, 2004 he had approximately 1 ½ months to prepare for trial. After receiving the phone call from Mr. Bartosh, Mr. Brannon agreed to serve as a second chair in this trial. Once he was appointed on March 5, 2004, Mr. Brannon then met with Mr. Lindsey for the first time on March 12, 2004.

Mr. Brannon continued his preparation over the next few weeks. Mr. Brannon acknowledged that during these weeks of preparation, he had experience in trying a murder case, but admitted that he did not know how to try a death penalty case. Despite his lack of knowledge about Mr. Lindsey and his situation prior to March 5, 2004 and his lack of knowledge about death penalty litigation, Mr. Brannon only devoted 107 hours of time to this death penalty case prior to trial.

Mr. Brannon acknowledged during his testimony that as of the time of trial in this case, he had no knowledge of what a prison adaptability expert was or what a social historian was. Mr. Brannon indicated that his role in this trial was to perform the guilt phase portion of the defense. While Mr. Brannon acknowledged that he did not have any legitimate legal defense, he did acknowledge that the things brought out during the guilt phase would have some impact in the sentencing phase of the trial.

Mr. Brannon only interviewed one family member that he could identify during the investigation of this case. Mr. Brannon acknowledged that he interviewed Mr. Lindsey's mother, Virginia Lindsey, on a Saturday prior to trial. He said he vaguely remembered interviewing another relative who was possibly a brother, but could not give any details about that interview or what they discussed. Mr. Brannon indicated during his testimony that his interview of Ms. Lindsey was focused only on issues related directly to the guilt phase and he did not take any steps to elicit information from Ms. Lindsey which may have been beneficial to Mr. Lindsey's mitigation case.

Karen Quimby Hatcher

PCR Testimony – Transcript pages 229 - 304
Trial Testimony – Did not testify

Ms. Hatcher was the third-chair attorney on Mr. Lindsey's original defense team. Ms. Quimby, along with the first-chair attorney, Mr. Mike Bartosh, was an employee of the Spartanburg County Public Defender's Office.

Ms. Quimby testified that she joined the original defense team approximately 30 days prior to the trial of this case, on May 17, 2004. At the time she became involved in this case, Ms. Quimby had some experience in capital litigation because she had just served as third-chair attorney on a capital defense case that had ended just weeks prior to her involvement in Mr. Lindsey's case. However, Ms. Quimby acknowledged that she had no recollection of any formal training in capital litigation prior to her involvement in Mr. Lindsey's case. She said it was possible that she attended a short breakout session at a continuing legal education seminar a few months prior to Mr. Lindsey's trial, but she could not recollect whether or not she had actually attended that session or not.

Ms. Quimby also testified that during her involvement in this case of approximately 30 days, she was also responsible for over 500 other active criminal defense cases in her role as a public defender, as well as being the lead attorney on another death penalty case which was scheduled to be tried six months after Mr. Lindsey's case, in November 2004. During the 30 days leading up to the trial of Mr. Lindsey's case in which Ms. Quimby was involved as part of the defense team, she was still having to handle the required day-to-day activities on her 500 other cases, as well as the other death penalty case where she was the lead attorney.

Ms. Hatcher also indicated that her role in Mr. Lindsey's case was very limited even though she was the third-chair attorney and had at least been involved in one other death penalty case. She was relegated to the role of an assistant who organized the file, served as a liaison between the first-chair attorney and the mitigation investigator, and, in general, acted as a gopher for the lead attorney. In this role, she reviewed discovery, catalogued discovery, and located documents, but was not involved in the decision-making aspect of this case, either on the guilt phase or the sentencing phase.

Lenora Topp

PCR Testimony – Transcript pages 106 - 162
Trial Testimony – Did not testify

Ms. Lenora Topp was the final member of Mr. Lindsey's original defense team. Ms. Topp testified that she was brought into the defense team to serve as a mitigation investigator.

Ms. Topp was first involved in Mr. Lindsey's defense on April 16, 2004, approximately one month prior to the start of the trial of his case on May 17, 2004. Ms. Topp was the last member of the team to be retained and she acknowledged that once

she became involved the complete defense team had been assembled and had approximately one month to prepare for Mr. Lindsey's defense.

Ms. Topp testified that she did have experience in law enforcement and as a private investigator prior to her involvement in Mr. Lindsey's case, however she had never served in a capital case as a mitigation investigator and had never worked on a capital case in South Carolina.

Once Ms. Topp became involved in Mr. Lindsey's defense team she only performed 40 hours of actual work on the case prior to the start of trial on May 17, 2004. During that time her primary role was attempting to gather documents and identify potential witnesses. Ms. Topp opined during her testimony that she did not have sufficient time to perform her job or obtain the information that was needed for Mr. Lindsey's defense. In fact Ms. Topp testified that even during the actual trial of the case she was still attempting to locate documents and witnesses for the defense. An example of this were the attempts to obtain records of relatives during the trial of the case as shown by medical releases executed by those family members four days after the start of the trial on May 21, 2004.

As part of her testimony Ms. Topp was questioned about her ability to perform the functions of a mitigation expert as described and recommended by the ABA Guidelines. Ms. Topp candidly acknowledged during her testimony that she was not able to perform the functions described in the ABA Guidelines and that no one on the defense team or hired by the defense team was able to perform the recommended functions of a mitigation specialist. Ms. Topp also acknowledged that her late involvement in this case

was contrary to the recommendations of the ABA Guidelines which recommended that a mitigation expert be retained and involved from the early stages of the capital litigation.

Fact Witnesses

Vincent Bell

PCR Testimony – Transcript pages 97 - 106
Trial Testimony – Did not testify

Mr. Bell was one of the EMS workers who arrived at the Inman Police Department shortly after the shooting to provide medical care to the individuals who were involved.

Mr. Bell along with two other paramedics worked Mr. Lindsey that evening. Mr. Bell as part of his evaluation of the situation and treatment of Mr. Lindsey engaged Mr. Lindsey in a conversation that took place both at the scene of the shooting and continued during the ambulance ride to the hospital.

During that conversation Mr. Lindsey acknowledged shooting his wife and himself. Mr. Lindsey went on to explain that he shot his wife and himself because his wife was having an affair.

Mr. Lindsey was also very adamant in his interaction with Mr. Bell that he did not want to be treated for the self-inflicted gunshot wound. Mr. Lindsey was uncooperative in his treatment and stated more than once that he wanted the paramedics to leave him alone and let him die.

Mr. Bell indicated that he was never contacted or interviewed about the statements by Mr. Lindsey or his interaction with Mr. Lindsey by the original defense team. Mr. Bell testified that the only individuals he had spoken with about Mr. Lindsey

and the events of that night were Mr. Lindsey's PCR team and not the original defense team.

Rod Tullis

PCR Testimony – Transcript pages 162 - 199
Trial Testimony – Did not testify

Mr. Rodman Tullis was an attorney who practiced law in Spartanburg and had represented Mr. Lindsey since the late 1990s. Mr. Tullis had represented Mr. Lindsey over the years on a variety of issues, but primarily issues in criminal court and family court.

Mr. Tullis had an ongoing relationship with Mr. Lindsey as his attorney and, as a result, was quite familiar with Mr. Lindsey and his family life.

At the time of the shooting, Mr. Tullis was representing Mr. Lindsey on various criminal matters and had also had a consultation with Mr. Lindsey about his domestic issues involving his wife and children.

Mr. Lindsey had consulted with Mr. Tullis about problems with his wife and children, but at the time of the shooting had not retained Mr. Tullis to file an action in family court. Mr. Tullis indicated that Mr. Lindsey was very concerned about his children and the possible negative impact that Ruby Nell Lindsey's extra-marital affairs may have had on his relationship with his children. Mr. Lindsey had some circumstantial evidence supporting his belief that Ruby Nell Lindsey was having an affair and he was greatly concerned because he did not want another man affecting his relationship with his children by virtue of a relationship with Mrs. Lindsey.

Because of the ongoing relationship between Mr. Lindsey and Mr. Tullis, Mr. Lindsey contacted Mr. Tullis' office shortly before the shooting incident. Mr. Tullis

was not available that afternoon, so Mr. Lindsey left a telephone message for Mr. Tullis. Mr. Tullis testified that the recording of that message was very disturbing and that it was disturbing because Mr. Lindsey was obviously upset and distraught over his current situation. Mr. Tullis testified that Mr. Lindsey did not sound angry or agitated, but just the opposite that he was depressed and upset.

Mr. Tullis filed a notice of appearance and began acting as Mr. Lindsey's attorney on the murder charges almost immediately after his arrest. Because of his ongoing relationship with Mr. Lindsey, Mr. Tullis felt this step was necessary and that he was the only one who could protect Mr. Lindsey's legal rights at that early stage in the proceedings. Mr. Lindsey's family relied on Mr. Tullis as Mr. Lindsey's regular attorney. Because of their trust for Mr. Tullis, the family members turned over to him suicide notes which Mr. Lindsey had written days before the shooting.

Once the Spartanburg County Public Defender's Office took over as Mr. Lindsey's attorney in this case, Mr. Tullis turned over the recording of the telephone message and the suicide notes to the Public Defender's Office. Neither piece of evidence was used during the original trial and, at this point, the tape of the telephone message cannot be located.

In his role as Mr. Lindsey's attorney, Mr. Tullis saw Mr. Lindsey in jail during the weeks following the shooting. Mr. Tullis described Mr. Lindsey as very upset and distraught over what had happened and described incidents where Mr. Lindsey continued to express his desire to die and the actions that he took in an attempt to cause his own death. Mr. Tullis described an incident where he observed Mr. Lindsey bleeding where Mr. Lindsey stated that he had been banging his already injured head against a wall in an

attempt to cause further damage and kill himself. As a result of this incident, Mr. Lindsey was put on suicide watch.

Despite his knowledge of Marion Lindsey's state of mind before and after the shooting, as well as his intimate knowledge of the audio tape and notes which could have provided further documentation of Mr. Lindsey's state of mind, Mr. Tullis was never called as a witness nor was he contacted by the defense team about serving as a witness at the original trial. Mr. Tullis stated that he felt he would have been one of the best witnesses for Mr. Lindsey in the sentencing phase because of his intimate knowledge of his situation and his state of mind. Based on this belief, Mr. Tullis specifically approached Mike Bartosh as the lead attorney for Mr. Lindsey's defense team about testifying. Despite his inquiries, Mr. Tullis was never given the opportunity to fully explain the information that he had to the defense team nor was he given the opportunity to testify.

Bill Burton

PCR Testimony – Transcript pages 304 - 316
Trial Testimony – Transcript pages 2061 - 2070

Mr. Burton was a friend of Marion Lindsey who testified at his original trial. Mr. Burton had been a teenager when Mr. Lindsey was a child. Mr. Burton served as a lifeguard at a local pool and developed a relationship with Mr. Lindsey through his interaction with him at the local pool. Mr. Burton had assumed a role of a mentor and friend to Mr. Lindsey through the years. He had Mr. Lindsey at his home and helped him emotionally and financially at times during his life. Mr. Burton continued that relationship with him into adulthood and even helped Mr. Lindsey obtain employment as an adult.

Mr. Burton testified at the PCR hearing that prior to being called as a witness during the sentencing phase he had only had one short interaction with the defense team. Mr. Burton testified that he had attempted on several occasions to contact Mr. Mike Bartosh, the lead attorney for Mr. Lindsey's defense team, but was unable to reach him. Mr. Burton was interviewed and prepared for his testimony during the sentencing phase during a short meeting which included several potential witnesses for Mr. Lindsey. According to Mr. Burton, the preparation for trial amounted simply to a question by the defense team of "say what you know about Marion". Mr. Burton indicated that he left that group meeting, which occurred the day of his testimony or the day before, with an uneasy feeling and the general impression that the defense team and Mr. Lindsey's case in general were unorganized. Mr. Burton expressed his opinion during the PCR trial that because of the lack of preparation he did not have the composure on the witness stand to adequately present his testimony in support of a life sentence to the jury.

Mrs. Burton

PCR Testimony – Transcript pages 316 - 326
Trial Testimony – Did not testify

Mrs. Burton is the mother of Bill Burton. She was a potential witness during the sentencing phase of Mr. Lindsey's original trial. Unfortunately, she was never contacted by the original defense team or called as a witness during the sentencing phase of Mr. Lindsey's trial.

Mrs. Burton was a middle school science teacher who taught at two local schools, Spartanburg Day School (a local private school) and Dawkins Middle School (a local public school). She was not related to Mr. Lindsey by blood or marriage but yet she has known him since he was 6 or 7 years of age.

Mrs. Burton is a very polite lady who presents very well and is very likeable. Had she been presented by the original defense team she would have been able to humanize Mr. Lindsey through her stories about his childhood and growing up, and her appearance, demeanor, and personal history would have made her a very compelling witness to a jury in support of a life sentence for Mr. Lindsey.

In addition to the stories that she could tell about Mr. Lindsey to humanize him, Mrs. Burton specifically stated during the PCR hearing that if she had been given the opportunity to request mercy on Mr. Lindsey's behalf she would have done so. Again, given her appearance, demeanor, and personal history, a plea for mercy from Ms. Burton would have been compelling to a jury.

Family Members

Virginia Lindsey

PCR Testimony – Transcript pages 327 - 387
Trial Testimony – Transcript pages 1674 – 1677 and 2044 - 2061

Mrs. Virginia Lindsey is the mother of Marion Lindsey. Ms. Lindsey testified at both the original trial and during the PCR hearing. Mrs. Lindsey's testimony during these two proceedings was vastly different. Mrs. Lindsey's testimony during the original trial was very short and did not include detailed information about Mr. Lindsey's childhood, home environment or the events leading up to the shooting. The details and information that were elicited from Mrs. Lindsey during the PCR hearing were the information that was necessary to humanize Marion Lindsey for the jury and to tell her story and also necessary to support the testimony of the mitigation expert that was presented at the PCR hearing.

During her testimony Mrs. Lindsey described the conditions which she faced growing up which included poverty, lack of education and a broken home.

Ms. Lindsey also described the relationships she had as an adult which resulted in the birth of her children. Ms. Lindsey described that she had children by three different men. The oldest two children were born as a result of her marriage but that she eventually divorced her husband. Marion Lindsey was born as a result of a relationship with a man to whom she was not married and her youngest child, Tim Sims, was born to another man who she lived with for many years. Mrs. Lindsey described how Marion was treated differently by his father than the other children. Of her four children, Marion was the only one who did not have an ongoing relationship with his father. The two oldest children visited with her ex-husband and her youngest child, Tim, lived with and then continued to see his father. Marion, by comparison, only saw his father on rare occasions. Ms. Lindsey estimated that he might see his father approximately once a year.

Mrs. Lindsey also described the influence of the men that were around Marion during his childhood. She described the activities of his uncles, Paul and Willie. Both of these men had alcohol problems and were violent men. They each had criminal histories which resulted from their alcohol use and their violent behavior. Their violence was not only towards each other but also towards the women in their lives as well as others in the neighborhood and in the community.

Mrs. Lindsey described one especially traumatic event in Marion's life when the uncles decided to throw his pet cat into the wood-burning stove and burn the cat alive. This event was horrific to the adults in the home and even more traumatic to Marion who had to witness the event but was unable to do anything to protect his pet and then there

was the reminder of that event that remained in the house for some period of time because of the smell from the cat being burned alive in the wood stove.

Mrs. Lindsey also described injuries that Marion experienced during his lifetime. She described four major injuries to his head. The first injury was when his head was run over by an automobile when he was approximately a year old, then two serious falls which resulted in head trauma and the fourth was a car accident when Marion was 16 years old in which he suffered head trauma which is still evidenced by facial scars. In addition to the head injuries, when Marion was approximately 8 months old he ingested kerosene which required immediate medical attention.

Mrs. Lindsey testified about emotional problems Marion has had during his life including a suicide attempt as a teenager. According to Mrs. Lindsey Marion and one of his brothers got into a fight and after Mrs. Lindsey attempted to break up the fight she told Marion that she no longer loved him. In response to the statements by his mother, Marion took a large quantity of pills which resulted in his hospitalization and two weeks of inpatient treatment. Despite the suicide attempt and the inpatient treatment, Marion's mother never sought additional follow-up treatment for his emotional problems.

Marion also experienced difficulties in school growing up. According to Mrs. Lindsey he could not learn and was a D and an F student. As a result of his learning difficulties, Marion dropped out of school at a young age.

After dropping out of school, Marion eventually met and married Ruby Nell Lindsey. They had two sons together. Mrs. Lindsey testified that Marion was very involved in the boys' lives, that he spent a great deal of time with them and loved them dearly.

There were marital problems between Marion Lindsey and his wife, Ruby Nell Lindsey and during the month leading up to the shooting Marion and Ruby Nell were separated. It appears that Marion was able to see his sons during part of their separation but during the weeks leading up to the shooting Ruby Nell Lindsey stopped letting Marion see the boys. Mrs. Lindsey testified that she had attempted to intervene on Marion's behalf so that he could see the children but that Ruby Nell Lindsey had made it very clear she was not going to allow him to see the children anymore.

The marital problems and his inability to see his children caused Marion to become depressed. During the first week of September 2002, just shortly before the shooting, Mrs. Lindsey received a phone call from her youngest son, Tim, telling her that Marion had threatened suicide. Mrs. Lindsey, her sister, Bessie, their brother, Steve, and Marion's younger brother, Tim, all went to Marion the night he threatened to commit suicide. They stayed with him for a few hours that evening, gave him some medication in hopes that it would help him calm down but did not seek any professional help for him that evening and he was not taken to the hospital. That evening, Marion gave to Mrs. Lindsey four suicide notes, one to herself, one to his younger brother, Tim, and the other two to his boys.

Much of the information provided by Mrs. Lindsey during the PCR hearing was not presented to the jury during the original trial. Mrs. Lindsey testified that in preparation for the original trial she spent one hour on a Saturday approximately two weeks prior to trial meeting with one of the attorneys and the mitigation investigator. Mrs. Lindsey stated that this meeting took place at her home and during that hour the attorney and mitigation investigator not only interviewed her but also her sister, Bessie.

Mrs. Lindsey indicated that that was the only preparation for her testimony at trial. By comparison, she testified that she had spent approximately 20 hours preparing for the PCR hearing.

Mrs. Lindsey testified at the PCR hearing that one of the vital pieces of information that was not conveyed to the original defense team was that Dr. Henderson who had treated Marion as a child was a potential witness during the sentencing phase of the original trial. Virginia Lindsey told the original trial team about Dr. Henderson. She told them that Dr. Henderson knew Marion Lindsey not only because he was Marion's doctor but also because Dr. Lindsey's children played together with Marion. Dr. Henderson would have been a good non-family witness to describe who Marion was and what type of person he was. Dr. Henderson was alive at the time of the original trial but has unfortunately passed away since then. Mrs. Lindsey felt that Dr. Henderson would have been an asset and a help to Marion during the sentencing phase of the trial.

One of the other deficiencies that Mrs. Lindsey testified about was that she was directed by the original defense team not to ask the jury for mercy for her son. She did testify very briefly during the original trial about her desire for the jury to have mercy on her son and to give him a life sentence. However she testified at the PCR hearing that she was not prepared to adequately make that request of the jury and that had she been prepared she would have testified differently and in her mind more effectively in requesting mercy for her son. Although the defense team did discuss with Mrs. Lindsey her ability to request that the jury have mercy on her son and her opportunity to do so during the trial she did not feel that she was adequately prepared to make that request. Mrs. Lindsey indicated that she would have testified differently about her desire for the

jury to have mercy on her son and give him a life sentence had she been better prepared by the original defense team.

Bessie Smith

PCR Testimony – Transcript pages 388 – 425
Trial Testimony – Transcript pages 2080 – 2082

Mrs. Bessie Smith is the maternal aunt of Marion Lindsey and the younger sister of Virginia Lindsey his mother. Mrs. Smith testified both in the original trial and also at the PCR hearing. Like Mrs. Virginia Lindsey there was a significant difference between the testimony that was elicited at the original trial and the testimony that she provided during the PCR hearing.

During the PCR hearing Mrs. Smith gave background information which was needed to support and illustrate the findings of the mitigation expert. Some of the information that she provided included a description of the environment she and Virginia Lindsey grew up in in Inman, South Carolina. There were a total of nine siblings growing up in that home. School was something they did occasionally as they were growing up. Mrs. Smith testified that she dropped out of school in the seventh grade to begin working. It was necessary for her and all of her siblings to work to provide food and basic necessities of life because of the poverty that they lived in. She also described the violence and dysfunctional behavior which Marion Lindsey observed from his uncles and his Aunt Robin while he was growing up. She described altercations and the violent behavior these men exhibited. In particular, one example she gave was that his Uncle Paul always carried around a Hawk Build knife and was quick to brandish that knife and use it if necessary when he was threatened.

Mrs. Smith also described events and the environment that existed when Marion was growing up. For example, she described the depressed state that Marion's mother Virginia Lindsey experienced after the death of her daughter. Mrs. Smith indicated that Virginia Lindsey was devastated after the death of her daughter and became very depressed. That depression then led to drinking and ultimately to much of the parenting of Marion being left to his grandmother and other relatives including his uncles Paul and Willy and his Aunt Robin who had exhibited the violent behavior and alcohol abuse when he was younger.

Mrs. Smith was also able to describe the difference between the environment that Marion grew up in and what the majority of society experiences during their formative years. Mrs. Smith testified that as she grew older she was able to get married, obtain a GED, and move away from Virginia Lindsey and her family. She described the differences between the environments that Marion grew up in and the environment her boys grew up in. She also described what a difference that made in where her boys wound up as adults and where Marion Lindsey has come to find himself as an adult.

Mrs. Smith also testified at length about the weeks and events leading up to the shooting of Ruby Nell Lindsey at the Inman Police Department. She described the suicide attempt that Marion Lindsey threatened just weeks before the shooting took place. She testified that that evening that Marion threatened to commit suicide she observed Marion in a depressed state. She indicated that the family went to the home to spend time with him and talk to him. They prayed with him, gave him some medication to help him calm down, but that no professional help was sought that evening. He was not taken to the hospital and eventually the family decided that he was okay and left him alone.

Mrs. Smith also talked to Marion the day immediately before the shooting and a few hours before the shooting took place. During the phone call the day before she described Marion as being upset and crying. She tried to explain to him that things were going to work out and everything would be okay. During that phone call he calmed down and by the time they hung up he indicated that he felt much better about his situation. The following day Marion called Mrs. Smith again. He was upset and depressed once again. During this phone call she tried to talk to him again in hopes of cheering him up. She indicated that somebody else called her phone during that conversation. She put Marion on hold to talk to the other individual and by the time she came back Marion had hung up. Unfortunately this conversation took place a matter of hours before the shooting and she never had the opportunity again to try and talk him out of doing anything irrational.

Finally Mrs. Smith described her preparation for the testimony during Marion's original trial. She indicated that she had one meeting with the defense team a few days or weeks before the trial. She indicated that this meeting lasted 30 to 45 minutes and that she was only able to give some brief information about Marion during that meeting. It was also clear from her testimony that the defense team asked her additional questions about family history which she refused to answer and that the defense team apparently either did not attempt to or did a very poor job of explaining to her why that information was needed for Marion's defense. Mrs. Smith indicated that she did not meet with the attorneys again nor did she have the opportunity to practice her testimony prior to being put on the witness stand during the original trial in Marion Lindsey's case. She concluded that her direct examination by acknowledging that she had no contact from the

defense team from the time of the shooting until a matter of weeks before the trial began in May 2004.

Steve Pilgrim

PCR Testimony – Transcript pages 426 - 453
Trial Testimony – Transcript pages 2078 - 2080

Mr. Steve Pilgrim is the maternal uncle of Marion Lindsey. Mr. Pilgrim like Virginia Lindsey and Bessie Smith also testified at both the original trial and the PCR hearing and like the other two witnesses his testimony at the original trial was truncated and not fully developed. At the PCR hearing Mr. Pilgrim was allowed to testify about family history and events that were important for a jury to hear to understand who Marion Lindsey was but also to support the conclusions of the mitigation expert who testified at the conclusion of the hearing.

Mr. Pilgrim began his testimony by describing suicidal behavior of some of Marion Lindsey's family members. In particular he described suicidal behavior by Marion's mother, Virginia Lindsey, his maternal aunt, Bessie Smith, and another maternal aunt, Robin.

Mr. Pilgrim also testified about the living conditions that Marion experienced during his childhood and adolescence. For example Mr. Pilgrim described the home that Marion spent his first ten years in. It was a four-room house which had no indoor plumbing and was heated only by coal or wood during the winter. In addition to the poverty that Marion experienced he was also exposed to violence by his uncles and his Aunt Robin who lived in the home with him. That violence was not only towards family members and loved ones but also towards others in the community.

Mr. Pilgrim also described his first-hand knowledge of injuries that Marion had experienced during his childhood. In particular he described in detail the incident where Marion Lindsey's head was run over by an automobile when he was just an infant. Mr. Pilgrim also described other head traumas which Marion experienced during his life.

Mr. Pilgrim was also one of those individuals who had contact with Marion during the weeks immediately preceding the shooting of Ruby Nell Lindsey. Mr. Pilgrim was one of the family members who attended to Marion Lindsey just weeks before the shooting when he threatened to commit suicide. Mr. Pilgrim described Marion's demeanor that night as very depressed. He testified that Marion was crying heavily and that that was the first time he had seen Marion cry as an adult. According to Mr. Pilgrim Marion was suicidal because he wanted to see his children but was unable to do so. Mr. Pilgrim confirmed that the family spent only a couple of hours with Mr. Lindsey that evening and then left him alone. They also did not seek any professional help or treatment for Mr. Lindsey as a result of this incident.

Mr. Pilgrim gave additional details about those weeks. One of those details was that Marion had indicated that he wanted to have a gun and shortly thereafter someone broke into Mr. Pilgrim's home apparently looking for a firearm but they were unable to locate and take Mr. Pilgrim's firearm from his home. Mr. Pilgrim also testified about helping out Marion financially and that Marion wanted the money so that he could attempt to do things to help put his marriage back together.

Mr. Pilgrim concluded his testimony by testifying about the preparation that he had for his testimony at the original trial. Mr. Pilgrim testified that he met with Mr. Lindsey's trial team on only one occasion and that was the day before the trial began.

Mr. Pilgrim met for 20 to 30 minutes in a group meeting. Lenora Top and Mr. Bartosh and Mr. Brannon were present for the defense team. Mr. Pilgrim, Virginia Lindsey, Betsy Smith and Bill Burton were there as witnesses. Mr. Pilgrim's preparation meeting was a group meeting in which the defense team talked to the potential witnesses as a group for no more than half an hour. Mr. Pilgrim indicated that he did not feel like he was adequately prepared to testify at the original trial on behalf of Mr. Lindsey.

In addition to the very brief preparation described by Mr. Pilgrim he also indicated that he was told during the preparation meeting that he was not allowed to ask the jury for mercy on behalf of Mr. Lindsey. As a result of those instructions from the defense team Mr. Pilgrim did not ask the jury to have mercy on Marion Lindsey and he did not ask the jury to consider a life sentence instead of the death penalty for his nephew. Mr. Pilgrim did indicate that had he been given that opportunity he would have requested that the jury have mercy on Marion Lindsey and allow him to have a life sentence as opposed to a sentence of death.

Tim Sims

PCR Testimony – Transcript pages 453 - 480
Trial Testimony – Did not testify

Tim Sims is the younger brother of Marion Lindsey who was not called as a witness during the original trial of this case.

During his testimony at the PCR hearing, Mr. Sims testified about growing up with Marion Lindsey. Mr. Lindsey and Mr. Sims had different fathers but they grew up together in the same house where Mr. Sims' father resided. Mr. Sims' father lived in the house with the boys until Mr. Sims was about 11 years of age at which point Mr. Sims' father left because of an illness and Marion took over the role of raising Mr. Sims. Mr.

Sims testified that Marion raised him from the age of 11 until the shooting incident occurred approximately eight years later and that Marion always treated him as a son.

The close relationship between Marion Lindsey and Tim Sims continued as they both grew older. According to Mr. Sims he and Marion saw each other on almost a daily basis up until the time of the shooting. There were even times when Mr. Sims lived in the same home with Marion Lindsey and his wife Ruby Nell Lindsey.

Because he lived with Marion and Ruby Nell Lindsey Mr. Sims was able to testify about their relationship. According to Mr. Sims, Marion Lindsey did everything he could for his wife. Mr. Sims testified that he never saw Marion hit or hurt his wife. He indicated that they had verbal arguments but he never saw any violence between them.

Mr. Sims testified that Marion did work during his teenage and adult years. He indicated that he knew Marion had worked painting cars, that he had worked at Milliken and Company but that eventually he got into selling drugs because he and the family needed money. According to Mr. Sims, Marion Lindsey sold the drugs out of necessity and the need for money and that any money that he made was used to help family members.

Because of their close relationship and their daily contact, Mr. Sims was able to testify about Marion Lindsey's state of mind and activities in the weeks leading up to the shooting of Ruby Nell Lindsey. Mr. Sims described an event that took place about three weeks before the shooting when Marion Lindsey took the entire family including Mr. Sims and his children to eat dinner one night. According to Mr. Sims, Marion Lindsey and Ruby Nell Lindsey were together both before and after the dinner.

Mr. Sims was also able to testify about the night Mr. Lindsey threatened to commit suicide. Mr. Sims is the one that received the phone call from Marion Lindsey about his desire to commit suicide. Mr. Sims stated that Marion was nervous and crying that night and that he had never seen Marion behave that way before. In fact, Mr. Sims testified that he had only seen Marion cry on two occasions. The first was the night he threatened suicide and the second was the night of the shooting. Because of the way Marion behaved during the telephone call, Mr. Sims got family members together to go visit with Marion. The family members arrived to speak to Mr. Lindsey about 30 minutes after the telephone call and they stayed for a couple of hours. One of the family members was able to give Marion some medication to help him calm down but they did not seek any professional treatment or help that evening. Mr. Sims did remember the suicide notes that Marion Lindsey wrote that evening and testified about Marion giving those suicide notes and their contents.

Mr. Sims testified that after that evening Marion Lindsey never really acted like his normal self again. At one point after the night where Marion Lindsey threatened suicide, he asked Mr. Sims to see if his wife Ruby Nell Lindsey had another man at her house. Mr. Sims did as Marion requested and he saw another man's car located at Ms. Lindsey's house but because of Mr. Lindsey's mental condition at that time Mr. Sims lied to him and told him he did not see the boyfriend's car because he did not want to upset Marion any more.

Mr. Sims testified that in the days leading up to the shooting Ruby Nell Lindsey would not talk to Marion. In order to facilitate some communication between them, Mr. Sims did arrange for a three-way phone call between Marion and Ruby Nell Lindsey.

The three-way phone call had to be made because Ruby Nell Lindsey would only answer phone calls coming from Virginia Lindsey's phone and she would not answer any phone calls coming directly from Marion Lindsey. Mr. Sims remained on the telephone during the conversation between Marion Lindsey and Ruby Nell Lindsey. He heard Ms. Lindsey tell Mr. Lindsey that he was not going to get to see his children anymore and during the call one of the boys said he wanted to see Marion Lindsey but Ruby Nell responded to the child that Marion Lindsey was not his father any more. Both Mr. Sims and Mr. Lindsey overheard this exchange.

Just hours before the shooting took place Marion Lindsey learned from another woman about Ruby Nell's boyfriend. This woman was able to confirm Ruby Nell's relationship with the boyfriend and as a result of this information Marion Lindsey was extremely upset. Mr. Sims was concerned because of how upset that information about the boyfriend had made Marion Lindsey. In order to attempt to get Marion Lindsey to calm down, Mr. Sims asked Marion Lindsey to meet him at a relative's house. Mr. Lindsey agreed to meet at the relative's home. Unfortunately, Mr. Lindsey apparently left his home to come pick up Mr. Sims to go to the relative's house and in the process had to drive through the neighborhood where he saw the car Ruby Nell was eventually shot in.

Mr. Lindsey concluded his testimony by describing his availability to testify on behalf of his brother. According to Ms. Sims, none of the defense team ever talked to him prior to the original trial in Mr. Lindsey's case. Mr. Sims was available to help. From the time of the shooting until the time of the trial he was living in the area and available to the defense team. Any of the relatives that did have the opportunity to talk to

the defense team knew where to find him and how to reach him. Mr. Sims indicated that he wanted to help. In fact he became so frustrated that he was unable to help that he approached one of the defense team members, Mr. Doug Brannon, at the trial and asked to be allowed to testify. Mr. Sims indicated that he would have been able to testify and willing to testify at the original trial about the same facts that he presented during the PCR hearing.

Mr. Sims also indicated that in addition to the factual information that he provided during the PCR hearing, had he been given the opportunity he would have asked the jury to have mercy on his brother. He indicated he would have asked the jury to give Marion Lindsey a life sentence instead of a sentence of death.

Expert Witnesses

James Aiken

PCR Testimony – Transcript pages 200 – 228
Trial Testimony – Did not testify

James Aiken was the prison adaptability expert presented by the applicant during the post conviction relief hearing.

After testifying about his extensive education and work history Mr. Aiken was asked to provide an opinion about Marion Lindsey's ability to adapt to prison life. Mr. Aiken's opinion was based on his education, his experience and his review of the records from the Spartanburg County Detention Facility and the South Carolina Department of Corrections which existed at time of the original trial in this case.

Mr. Aiken testified that in his opinion Mr. Lindsey was able to adapt to prison life and that the South Carolina Department of Corrections had the capacity to manager Mr. Lindsey for the remainder of his life without causing unreasonable risk of harm to staff,

inmates or the general community. In explaining his opinion Mr. Aiken cited two factors in support of his opinion. The first was that Mr. Lindsey had successfully completed a prior incarceration and secondly that the South Carolina Department of Corrections had at its disposal the necessary staff equipment, expertise and knowledge necessary to classify, evaluate and manage Mr. Lindsey. Additionally Mr. Aiken pointed out that Mr. Lindsey does not have any ties to groups which pose a security threat within the prison system or to any gangs.

Mr. Aiken also indicated during his testimony that he would have told a jury that a sentence of life without parole was in his opinion a very severe sentence. Mr. Aiken described the redundancy and repetitiveness of prison life for an individual sentenced to life without the possibility of parole in support of this opinion. Finally Mr. Aiken testified that he was an individual capable of providing an opinion about Mr. Lindsey's capacity for rehabilitation and adaptability to prison as suggested by the ABA guidelines but that to his knowledge no lay witness would have been able to provide that same information.

Tora Brawley

PCR Testimony – Transcript pages 70 – 96
Trial Testimony – Did not testify

Dr. Tora Brawley was admitted as an expert in the field of clinical psychology with a specialty in neuropsychology.

Dr. Brawley originally became involved with Marion Lindsey approximately one month prior to the original trial in this case. On April 12, 2004 she received a telephone call from Mr. Lindsey's lead attorney Michael Bartosh. Initially Dr. Brawley indicated that she would not be able to work with Mr. Lindsey on such short notice, however she

had a cancellation and was able to see him on April 27, 2004 just a matter of weeks prior to the trial.

At the time she met with, interviewed and tested Marion Lindsay she had no written documentation available to her. The only information that she had was provided to her verbally by Mr. Bartosh during a short telephone call.

Armed with the limited information she had Dr. Brawley conducted an interview and neuropsychological test of Mr. Lindsey. Dr. Brawley testified that as a result of her interviews and her testing she identified scattered neuropsychological deficits and she made recommendations to the defense team that they obtain medical records, school records and interview collateral sources of information to further investigate the reasons for her findings.

During her testimony Dr. Brawley discussed three areas that she had identified that caused her concern about Mr. Lindsey's neurological functioning. The first area were head traumas that he had experienced throughout his life. She indicated that she had received reports from Mr. Lindsey of multiple falls with head injuries, being run over by a car as an infant and multiple automobile and motorcycle wrecks. Secondly, she indicated that his educational history caused some concern. He reported repeating multiple grades and being involved in special education classes for speech therapy and learning disabilities and eventually dropping out of school after completing the ninth grade. Third, Mr. Lindsey informed Dr. Brawley of his three suicide attempts prior to the shooting in September 2002.

Dr. Brawley testified about several areas of impairment which were disclosed through her neuropsychological testing. Mr. Lindsey's impairments included severely

impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (the ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. In all of these areas Mr. Lindsey fell below the average range of scoring.

Dr. Brawley also performed an IQ test on Mr. Lindsey. Her IQ test showed a full scale IQ of 85, a verbal IQ of 80 and a performance IQ of 92.

Dr. Brawley also performed two objective tests for malingering and both tests showed no indication that Mr. Lindsey was malingering. He was within normal limits for both tests. Additionally there were no indications of malingering by Mr. Lindsey during Dr. Brawley's clinical interview of him.

Following the conclusion of her interview and testing Dr. Brawley provided her results to Dr. Melikian and recommended that the defense team obtain medical records, school records and interview other sources of information. Dr. Brawley suggested this course of action as a follow up to her interview and testing.

Dr. Brawley did not produce a written report because she was told by the defense team that she would not be testifying.

In preparation for the post conviction relief hearing Dr. Brawley was provided with records which she did not have during her first interaction with Mr. Lindsey. For the post conviction relief hearing Dr. Brawley was provided with school records, a report from the William S. Hall Institute, as well as the raw data from the psychological testing performed at the William S. Hall Institute.

Dr. Brawley indicated that from her review of this information, which she did not have in 2002, that there would have been two additional areas she could have provided information on. The first was depression and the second was malingering. With regard to the depression Dr. Brawley indicated that there was a discrepancy between the IQ score which she received when she tested Mr. Lindsey in 2004 and the IQ score which was received by the William S. Hall Institute approximately a year prior. Dr. Brawley testified that depression on the part of Mr. Lindsey could have explained the differences between the two scores. In particular, if Mr. Lindsey was experiencing depression when he took the initial examination which was given closer in time to the shooting in September 2002, that would have negatively impacted his IQ scores. In particular, there were two sub scores which were particularly different between the two tests and both of those sub tests were affected by attention, concentration and abstract reasoning which are all frontal lobe functions and directly affected by depression. Secondly Dr. Brawley would have been able to confirm at the original trial that the objective tests performed at the William S. Hall Institute in 2003 showed no objective basis for a finding of malingering.

Dr. Margaret Melikian

PCR Testimony – Transcript pages 594 - 640
Trial Testimony – Transcript pages 2000 - 2044

Dr. Margaret Melikian was qualified as an expert in forensic psychiatry. She was called by the Defendant in the trial of the case. She was the only expert called by the Defense. Dr. Melikian saw Mr. Lindsey on May 4, 2004. Dr. Melikian is board certified in both forensic and general psychiatry. Dr. Melikian testified that she was contacted by public defender Bartosh on April 6, 2004, approximately six weeks before trial. She did

not receive any medical records to review until April 28, 2004. Before appearing in Spartanburg to testify on May 23, 2004, Dr. Melikian had seven hours and forty-five minutes in the case. Of those seven hours and forty-five minutes, two hours and thirty minutes were spent with Mr. Lindsey on May 4, 2004. This was Dr. Melikian's first death penalty case. She stated that due to her lack of experience at the time, she accepted the case thinking that, if all the mitigation was done, she could be prepared in that amount of time. She states that mitigation had barely just begun at that time and there really wasn't a way they could be prepared for trial. (See PCR Transcript page 600)

Melikian sought an opinion letter from Dr. Tora Brawley since Dr. Brawley had seen Mr. Lindsey. Dr. Melikian was informed by the Defense team that Dr. Brawley would not be testifying and that Dr. Melikian would be putting her information into the record in testimony. She didn't feel comfortable doing that so she requested a written report from Dr. Brawley which was given to her on May 20, 2004, three days after the trial had started. (See PCR Transcript page 602)

With regards to the records that Dr. Melikian reviewed prior to the trial in comparison to the records that she reviewed for PCR preparation, Dr. Melikian stated that the records she received prior to trial was approximately three to four inches thick. In preparation for the PCR hearing, the records presented to her were six to seven times that amount of information. (See PCR Transcript page 603)

Dr. Melikian was asked whether there were records or items that she did not see in the trial that she has now reviewed that may have impacted her view of the case. The following would have been important for her to review:

1. The suicide notes.

2. Complete file from Mental Heath records, Mr. Lindsey's medical records, the Department of Corrections' records. She did not have the incident report or all of the rest of the file information.

3. Interview with Rod Tullis.

4. Complete Family history.

This is relevant in that, in a forensic setting, she is addressing legal matters and needs to know the truth of the matter as much as you can. So you review lots of records to corroborate what a patient or defendant has told you. (See PCR Transcript page 604)

Dr. Melikian testified that had she seen the records, documents and other items presented in the PCR case, her diagnosis would have changed. She did not understand the seriousness of Mr. Lindsey's depression at the time of the incident. She didn't understand the level of depression that Mr. Lindsey was showing at the time of her evaluation and it would have changed the way she looked at his cognitions in terms of the test results that were low.

Dr. Melikian would have explained the severity of his depression and that he was genuinely suicidal at the time of the incident of September 2002.

In addition, she had been provided in the first trial with information that Mr. Lindsey had been charged with Criminal Domestic Violence charges. She only had general information about the charges and not the factual basis for the charges. She didn't know at the time that most of the CDV charges had been dismissed.

Dr. Melikian indicated that all of those things go to paint a more accurate picture of who this person is as opposed to just to list that he did bad in school, his IQ was low, and he's had these charges in the past. (See PCR Transcript page 607) Dr. Melikian

testified that she was not prepared to testify in the first trial to the extent that she called Judge Few to ask for a continuance. She contacted Judge Few by phone. (See PCR Transcript page 608) However, there was no record made of her request for continuance.

With regards to the malingering issue, she did not agree with the William S. Hall report. The reason being is that William S. Hall examiners gave him a diagnosis of malingering based on atypical symptoms, but by objective testing, he didn't meet the criteria for malingering. (See PCR Transcript page 610). Further, she was not made aware of "Jimmy". She would have wanted to know about this imaginary person so that she could have had time to discuss this issue with Mr. Lindsey. In the testimony of Doug Brannon, he testified that when he went to the jail to meet with Marion, he saw him pull up a chair and have Jimmy sit with him. Dr. Melikian was not informed about Jimmy from the attorney. She was told about this only during cross-examination, which did not give her a chance to develop or respond to this issue, which is critical on the issue of malingering.

Dr. Melikian testified that Jimmy would have been the focus of my evaluation on May 4th instead of trying to gather as much information as I could and accepting that as an imaginary friend and going on. (See PCR Transcript page 615)

Dr. Melikian never saw pictures showing Mr. Lindsey had hit his head against the wall at the jail while being charged with this offense. This would have given some corroboration to the extent of his suicide attempts. Dr. Melikian indicated that, in her opinion after fifteen to twenty death penalty cases, this was the least amount of time she has ever been involved in a death penalty case. Further, she testified this case has bothered her since that day and that she recalled, on the day of her testimony, wondering

if it was my ethical duty to refuse to testify, I felt so unprepared. (See PCR Transcript page 620)

Janet Vogelsang

PCR Testimony – Transcript pages 481 – 594
Trial Testimony – Did not testify

Janet Vogelsang qualified as a clinical social worker with expertise in bio-psycho-social assessments in giving opinions based on those findings. The Defense did not have a clinical social worker as part of the Defense team. Ms. Vogelsang interviewed over eleven individuals, including Dr. Tora Brawley and Dr. Margaret Melikian. She also reviewed numerous records including mental health records of those family members who had mental health records, including Bessie Smith, Steve Pilgrim and Robin Pilgrim. Ms. Vogelsang also reviewed the William S. Hall records, the social work history that was done at Hall, the reports of Dr. Narayan and Dr. Musick to see if they had collected any family history prior to the trial. Ms. Vogelsang also visited the community and created visual aids to demonstrate her findings. She also created a family tree that demonstrates Marion's family. Ms. Vogelsang indicated that the family tree can show patterns of behavior that can be passed down from generation to generation as well as patterns of behavior in the family.

Ms. Vogelsang then discussed the social history to which a jury did not hear in the trial.

<u>Argument</u>

Trial Counsel failed to adequately prepare Marion Lindsey for the pre-trial mental health evaluation.

A criminal defense attorney has a duty to consult with his client and to advise the client on the various aspects of the client's case. South Carolina Rules of Professional Conduct Rule 1.4.

In the context of death penalty litigation, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) highlight that duty and give particular guidance on the need for and scope of the defense attorney's relationship with his client. The ABA guideline addressing the defense attorney's relationship with his client reads as follows:

GUIDELINE 10.5—RELATIONSHIP WITH THE CLIENT

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;
2. current or potential legal issues;
3. the development of a defense theory;
4. presentation of the defense case;
5. potential agreed-upon dispositions of the case;
6. litigation deadlines and the projected schedule of case-related events; and
7. relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).

The attorney's obligation to develop a relationship with the client is emphasized by the ABA guidelines because this relationship is the key to open communication between the defendant and his attorneys. Without this communication, the defendant is left unaware of the progress of his case, the strategies and defenses being pursued and the expectations of him held by the criminal justice system in general and by his defense team in particular. Without this communication, the attorneys do not acquire information which is only available from their client and they are unable to guide him in ways that are necessary for him to help himself and to prevent him from causing harm to his defense.

See Comments to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.5 – Relationship with Client.

In particular, the ABA guidelines state that when the defendant is to be interviewed by a witness associated with the government, such as Dr. Naryan, defense counsel should be present. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel "should carefully consider what legal challenges may appropriately be made to the interview or the conditions surrounding it, and the legal and strategic issues implicated by the client's co-operation or non-cooperation; insure that the client understands the significance of any statements made during such an interview; and attend the interview." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

Marion Lindsey's defense team failed to develop and maintain a relationship with him that would have allowed for the open discussion of Mr. Lindsey's decision to create his imaginary friend "Jimmy" at the suggestion of another inmate. Additionally, they failed to properly prepare Marion Lindsey for his psychological evaluation and, specifically, failed to address Mr. Lindsey's intention to feign mental illness through the introduction of "Jimmy". There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not failed to develop and maintain a relationship with Mr. Lindsey and to adequately prepare him for his psychological evaluation.

Trial Counsel failed to adequately present rebut the issue of malingering before the jury during the penalty phase.

The defense team in a capital case has an obligation to present any available evidence which would tend to convince a jury to impose a life sentence instead of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

The duty to present evidence in support of a life sentence includes the obligation to discover and present affirmative evidence but also to discover and present evidence which may negate the assertions of the State in support of a sentence of death. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

Marion Lindsey's defense team did retain Dr. Brawley to evaluate his mental condition. But, the failed to follow-up on her evaluation and as a result they failed to discover both evidence she could have presented which would have affirmatively supported a life sentence and the evidence she could have presented refuting the State's allegations that Mr. Lindsey was a malingerer.

There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had consulted with Dr. Brawley after her evaluation and presented both the affirmative evidence available to her and the evidence refuting the State's allegations of malingering.

Trial Counsel failed to adequately present requests for mercy to the jury during the sentencing phase of the trial.

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, 406 S.E.2d 315 (S.C. 1991) (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48 (1987)). A defendant may not present witnesses who testify about "their

religious or philosophical attitudes about the death penalty . . . Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." Childs at 51.

It is incumbent upon defense counsel to locate, interview and prepare witnesses who know the defendant, care for the defendant and are willing to ask for mercy on his behalf. Once those witnesses have been identified and prepared, the defense attorney has an obligation to properly present that evidence to the jury. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

If the Court does not allow the witnesses to request mercy from the jury, then the defense attorney has the obligation to preserve that issue for appeal. The ABA guidelines correctly assume that all available avenues of post-conviction relief including a direct appeal should be anticipated and prepared for by trial counsel. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.8 – The Duty to Assert Legal Claims and the associated Comments.

There is a reasonable likelihood that if the family members and friends of Marion Lindsey had been allowed to request mercy of the jury the outcome of the sentencing phase of the trial would have been different.

Even if the Court had refused to allow the testimony in the original trial, there is a reasonable probability based on existing case law that if the issue had been reserved for appeal Marion Lindsey's death sentence would have been reversed and the issue remanded for a second sentencing hearing.

Trial Counsel failed to provide sufficient information to Dr. Margaret Melikian to allow her to properly evaluate Marion Lindsey and to testify on his behalf during the penalty phase of the trial.

In any death penalty proceeding, the defense team has an obligation to both identify potential expert witnesses and to provide the experts with sufficient information to perform their role in support of the defendant's mitigation case. The defense team is required to properly investigate the defendant's background and to provide the expert witnesses with sufficient information. Failure to perform an adequate investigation and to provide the information obtained to the defense experts constitutes ineffective assistance of counsel. Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (S.C. 2004); Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2008).

Dr. Melikian needed information and documents related to Marion Lindsey's history in order to properly evaluate him and present her testimony during the sentencing phase of the trial. The defense team failed to perform a proper investigation to identify and locate the information needed by Dr. Melikian. Further, the failed to provide Dr. Melikian with the limited information they did have available to them.

The defense team's failure to investigate Mr. Lindsey's background and to provide the information obtained to Dr. Melikian constituted ineffective assistance of counsel. There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not committed this error.

Trial Counsel failed to adequately present to the jury the history of mental illness and impairment in Marion Lindsey's family and the relevance of that information to the jury's decision on the issue of sentencing.

The U.S. Supreme Court has stated that it is essential that the jury be allowed to consider the individual characteristics of the defendant in a capital murder case when deciding whether to impose the death penalty. Lockett v. Ohio, 438 U.S. 586 (1978). A few years later, the Court affirmed its decision in Lockett and said "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Eddings v. Oklahoma, 455 U.S. 104 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280 (1976)).

"A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings . . ." Woodson at 304 (quoted in Eddings at Footnote 7).

Because of this requirement that the jury be allowed to consider the character and record of the defendant, the defense team is required to investigate and then present evidence of this type during the sentencing phase of a capital case. Failure to investigate and present evidence of this nature can, depending on the individual facts of the case, result in ineffective assistance of counsel which requires that the defendant's death

sentence be set aside and new sentencing proceedings be conducted. Cases illustrating the requirement that the defense team investigate and present evidence of the defendant's character, record and life history include Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (S.C. 2004); Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2008) and Sears v. Upton, U.S. Supreme Court Opinion No. 09-8854, decided June 29, 2010.

Marion Lindsey's defense team failed to indentify and present evidence of mental illness and impairment in Mr. Lindsey's family.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team had identified and presented the available evidence regarding the mental illness and impairment in Mr. Lindsey's family.

Trial Counsel failed to retain and present a prison adaptability expert during the penalty phase of the trial to testify about Marion Lindsey's ability to adapt to prison life without undue risk to others and the relevance of that information to the jury's sentencing decision.

The U.S. Supreme Court has ruled on multiple occasions that evidence of prison adaptability is relevant and admissible in the sentencing phase of a death penalty case. "[E]vidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing. Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such

evidence may not be excluded from the sentencer's consideration." Skipper v. South Carolina, 476 U.S. 1 (1986).

In light of the admissibility of prison adaptability evidence, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) states that defense counsel should consider presenting "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." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

Marion Lindsey's defense team failed to retain and present a prison adaptability expert during the mitigation phase of his trial.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team had retained a prison adaptability expert such as Jim Aiken and presented his testimony to the jury during the penalty phase of his trial.

Trial Counsel failed to retain and present a mitigation expert during the penalty phase of the trial to testify regarding the psycho-social history of Marion Lindsey and the relevance of that information to the jury's sentencing decision.

The defense team in a capital case has an obligation to present any available evidence which would tend to convince a jury to impose a life sentence instead of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

The Court in Eddings specifically stated that evidence related to the defendant's character and record is admissible and a necessary consideration for the jury. Eddings at 110. Accordingly, the ABA guidelines specifically states that defense counsel should consider presenting "expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

Marion Lindsey's defense team failed to retain and present an expert witness to discuss the Mr. Lindsey's psycho-social history to the jury during the mitigation phase of his trial.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team had presented an expert witness to the jury to testify regarding Mr. Lindsey's psycho-social history and its relevance in deciding the appropriate sentence for Mr. Lindsey.

Trial Counsel failed to elicit testimony from the EMS workers, Joseph Stewart and Vincent Bell, regarding Marion Lindsey's desire to commit suicide immediately after the death of his Ruby Nell Lindsey.

The defense team in a capital case has an obligation to present any available evidence which would tend to convince a jury to impose a life sentence instead of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

The Court in Eddings specifically stated that evidence related to the circumstances surrounding the crime are admissible and a necessary consideration for the jury. Eddings at 110.

Marion Lindsey's defense team failed to present evidence of his state of mind at the time of the shooting to the jury. The EMS workers' testimony, had it been presented and developed appropriately, would have given the jury an indication of Mr. Lindsey's state of mind at the time of the commission of this crime.

There is a reasonable probability that the outcome of the sentencing phase would have been different if Mr. Lindsey's defense team had presented and adequately developed the testimony of the EMS workers during the penalty phase of the trial.

Trial Counsel failed to commit sufficient time to perform an adequate investigation for the sentencing phase of the trial and to adequately prepare for the presentation of a case in support of mitigation during the sentencing phase of the trial.

In every capital case, the defense team is obligated to perform an adequate investigation for the sentencing phase of trial. Wiggins v. State, 539 U.S. 510 (2003) (citing Strickland v. Washington, 466 U.S. 668, 690-691 (1984)); *see also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.7 - Investigation.

In both Wiggins and Strickland, the U.S. Supreme Court has cited the ABA guidelines as an appropriate guide in determining whether the defense team provided effective assistance of counsel. Wiggins at 522; Strickland at 688. The defense team's investigation "into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigation evidence and evidence to rebut any aggravating evidence

that may be introduced by the prosecutor.'" Wiggins at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989) (emphasis in original).

The comments to Section 10.7 of the ABA Guidelines entitled "Investigation" have this to say about the defense team's obligation to perform an adequate investigation:

> "Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate against the appropriateness of the death penalty for that defendant,'"'penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." At least in the case of the client, this begins with the moment of conception. Counsel needs to explore:
>
> (1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);
>
> (2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures

of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations."

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Comments to Section 10.7 – Investigation.

When the defense team does not perform an investigation or limits the scope of their investigation, their decision "must be directly assessed for reasonableness in all the circumstances." Wiggins at 533 (citing Strickland at 691). In performing this assessment, "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." Wiggins at 527.

The ABA guidelines recognize that in order to perform the necessary investigation and to prepare for trial, the defense team must make adjust their workload and other work-related obligations. In the comments to Section 6.1 of the ABA guidelines entitled "Workload" the authors note that it is estimated that a capital murder case requires twelve (12) times the amount of time to investigate and prepare that a non-capital case requires. One study conducted between 1991 and 1997 cited by the authors, indicated that the average time required by the defense attorneys in capital cases which went to trial was 1,889 hours per case. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 6.1 – Workload.

Marion Lindsey's defense team failed to devote the necessary time to perform an adequate investigation for the mitigation phase of his trial. Marion Lindsey's defense team failed to devote adequate time to properly prepare for the mitigation phase of his trial.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team has devoted the time necessary to adequately investigate and prepare for the penalty phase of his trial.

Trial Counsel failed to adequately argue against the statutory aggravating factors alleged by the state.

The Sixth Amendment requires that a criminal defendant receive the assistance of counsel. The right to counsel 'is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled. Strickland v. Washington, 466 U.S. 668 (1984).

Part of meeting the case of the prosecution involves addressing the aggravating factors asserted by the State in support of their request for the death penalty. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty (specifically sections (H), (I), and (L). Rompilla v. Beard, 545 U.S. 374 (2005). The only aggravating factor asserted by the State in support of a sentence of death was S.C. Code §16-3-20(C)(a)(3): "The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person."

Defense counsel failed to adequately argue the inapplicability of the sole aggravating circumstances and why that factor should not support a sentence of death. While defense counsel did argue against the sole aggravating factor, his attempt to persuade the court and the jury fell below the level required to constitute effective assistance of counsel.

There is a reasonable probability that the outcome of the sentencing phase would have been different if defense counsel had asserted a constitutionally adequate argument against the sole aggravating factor alleged by the State.

Summary

As in all death penalty cases, the jury is to consider aggravating factors and weigh the aggravating factors with mitigating factors to determine an appropriate penalty. It is undisputed that the only aggravating factor in this case is the fact that the shots that killed Marion Lindsey's wife were fired "in a public place". Had this tragedy occurred in someone's private home, with the children sitting beside the deceased, the death penalty could not have been sought. The aggravating factor requires the following:

1) The act of murder knowingly created a great risk of death to more than one person;
2) In a public place;
3) By means of a weapon or device which normally would be hazardous to the lives of more than one person. (section 16-3-20(c)(a)(3) of the Code of Laws of South Carolina (1976) as amended.)

As outlined in this brief, the mitigating factors are numerous. Many of mitigating factors were never brought to the attention of the jury through testimony, which includes, but is not limited to, Jim Aiken's testimony, Dr. Tora Brawley's testimony and Jan Vogelsang's testimony. In addition, Dr. Melikian would have not only had corroboration by way of Dr. Brawley's testimony, but would have had a much greater understanding of

Marion Lindsey's history and suicidal tendencies that would have been brought to the jury's attention for consideration.

In a review of Sears v. Upton, U.S. Supreme Court Opinion No. 09-8854, decided June 29, 2010 recognizing the amount of time spent on the case by the defense attorneys and the defense team, the Applicant feels that the representation of him was constitutionally inadequate. Strickland v. Washington, 466 U.S. 668 (1984).

When evaluating Sixth Amendment ineffectiveness, the first inquiry is whether counsel's representation "fell below an objective standard of reasonableness" (See Strickland v. Washington, 466 U.S. 668 (1984).

As stated in Sears v. Upton, U.S. Supreme Court Opinion No. 09-8854, decided June 29, 2010, and in referencing Porter v. McCollum, 130 S.Ct. 447 (2009), to assess the probability of a different outcome under Strickland, the Court must consider the totality of the available mitigation evidence – both that adduced at trial, and evidence adduced in the habeas proceedings – and reweigh it against the evidence in aggravation. In considering the totality of the mitigation, the representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Conclusion

Based on the foregoing, Applicant Marion Alexander Lindsey requests that this Court issue an Order vacating his sentence of death and granting him a new trial on the issue of the appropriate sentence for his conviction of murder.

Respectfully submitted:

Date: 10/26/2010

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STATE OF SOUTH CAROLINA) COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS
MARION ALEXANDER LINDSEY, #6015) Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)	C/A No. 07-CP-42-2848 RESPONDENT'S POST-HEARING MEMORANDUM OF LAW

The Respondents, above-named, hereby make a Post-Hearing Memorandum of Law on the application for state postconviction relief filed on August 14, 2007, as amended August 6, 2009.

The initial application was filed by his appointed appellate counsel, Robert M. Dudek, of the South Carolina Office of Appellate Defense. The Respondents made an initial Return and requested under S.C. Rule of Civil Procedure, Rule 12(e), greater particularity and specificity on September 24, 2007. The Applicant, through appointed PCR counsel Richard Vieth and David Collins made an Amended Application for Post-Conviction Relief on August 6, 2009.

The matter was held before the Honorable Paul M. Burch, Presiding Judge, on July 19-21, 2010. The Applicant was present and represented by court-appointed counsel Richard Vieth and David Collins. The Respondent was represented by Assistant Deputy Attorney General

Donald Zelenka and Assistant Attorney General Al Simon. At the hearing, testimony was received from Douglas Brannon, Dr. Tora Brawley, Vincent Bell, Lenora Topp, Rod Tullis, James Aiken, Karen Hatcher, Bill Burton, Mrs. Burton, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Tim Sims, Jan Vogelsang, and Dr. Margaret Melikian. At the conclusion of the hearing, post-hearing memorandum were allowed. The Applicant's memorandum was filed October 26, 2010.

This memorandum by Respondent follows:

I.

PRIOR PROCEDURAL HISTORY

The Petitioner, Marion Alexander Lindsey, was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002. On October 10, 2002, Solicitor Trey Gowdy served his notice of intent to seek the death penalty consistent with S.C. Code Ann. § 16-3-26. He further served an additional notice of life sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction for assault and battery with intent to kill. Both were served on Lindsey and counsel Michael Bartosh personally.

A notice of statutory aggravating circumstances and evidence in support of aggravating circumstances was served on the Petitioner on March 10, 2004. The listed statutory aggravator was:

> That the defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the

> lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. the Petitioner was present and represented by Spartanburg County Public Defender Michael Bartosh, Doug Brennan and Karen Quimby (Hatcher). The prosecution was represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004 the jury convicted Lindsey of murder at 4:45 p.m. R., Tr. p. 1718, l. 14 - p. 1719, l. 5.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance involving "great risk of death to more than one person." R., Tr. 2152-53. The jury was also instructed to consider as mitigating circumstances:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.

2. Age or mentality of the defendant at the time of the crime.

R. Tr.2155-56. On May 24, 2004 the jury found the existence of the statutory mitigating circumstance and recommended a sentence of death. ROA., Tr. p. 2169-2171. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not as a result of passion, prejudice, or arbitrary factor. ROA., Tr. p. 2173, ll. 17-21. He then sentenced Lindsey to death in the manner provided by law. ROA p. 2174.

The Petitioner made an appeal to the South Carolina Supreme Court. The Applicant was

represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

> 1.
>
> Whether the court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment that the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?
>
> 2.
>
> Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?
>
> 3.
>
> Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close range and there was no evidence appellant knowingly created a risk of death to more than one person?
>
> 4.
>
> Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

State v. Lindsey, Final Brief of Appellant, p. 2. The Respondent, through Assistant Deputy Attorney General Donald J. Zelenka, made its *Final Brief of Respondent.* On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. State v. Lindsey, 372 S.C. 185, 642 S.E. 2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

The Petitioner, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. Lindsey v. South Carolina, 07-5444. In the petition, Lindsey raised the following question:

> Whether juror Krisher's belief that life imprisonment without parole was a more

> substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

Petition, p. 2. The Respondents made a Brief in opposition on August 20, 2007. The United States Supreme Court denied certiorari on October 1, 2007. *Lindsey v. S.C.*, 552 U.S. 917, 128 S.Ct. 274, 169 L.Ed. 2d 200 (2007).

RESPONDENT'S VERSION OF THE CASE

In the opinion of the South Carolina Supreme Court, the Court summarized the facts in the following manner:

> Appellant killed his estranged wife, Ruby Nell Lindsey (Victim), on September 18, 2002, in the parking lot of the Inman City Police Department. The jury found a statutory aggravator pursuant to S.C.Code Ann. § 16-3-20(C)(a)(3) (2003) and appellant was sentenced to death. We affirm.
>
> FACTS
>
> Celeste Nesbitt, a close friend of Victim, was the State's witness-in-chief. On the day of the murder, Celeste gave Victim a ride home from work at about 8:00 p.m. In the car were Celeste's two young daughters, four-year-old Keysha and ten-year-old Kiera, who were in the back seat with Victim--Keysha in a car seat behind the front passenger seat, Kiera in the middle, and Victim behind the driver's seat. Celeste was driving and Celeste's mother was in the front passenger seat. The car was a Mercury sedan with dark tinted rear windows.
>
> Victim was separated from appellant at the time and was staying with her mother. As they neared Victim's mother's house, they saw appellant in his girlfriend's car. Celeste pulled into the yard and turned the car around so appellant was facing them in a head-on direction. Celeste rolled down her window and greeted him. Appellant asked her if she had seen Victim. Because Celeste knew appellant had threatened to kill Victim, she lied and answered that she had not seen her in three days.
>
> Celeste's youngest daughter, Keysha, leaned forward in her car seat and greeted appellant. Appellant then asked who else was in the back seat. Celeste told him Kiera, her older daughter, was lying on the back seat asleep. Because the windows were tinted, appellant asked Celeste to roll down the window so he could see. Celeste answered that the window was broken. When appellant said he would get

out to look, Celeste sped off.

Celeste drove to the police department without stopping while Victim dialed 911. When they arrived, Celeste jumped out of the car and urged Victim to get out. Victim was still in the back seat when appellant pulled into the parking lot and ran toward the back of Celeste's car. Celeste saw him pull out a gun and shoot into the car through the rear windshield. She dove for cover as she heard additional shots.

Officer Godfrey was in the police department parking lot when the dispatcher informed him there was a "rolling domestic," meaning a domestic dispute involving a vehicle. He saw the two cars pull into the parking lot, and saw appellant jump out and fire two rounds into Celeste's car. Officer Godfrey took cover and saw two more flashes from a gun. Appellant came around the front of the car and pointed his gun at Officer Godfrey who then fired four rounds at appellant. Appellant was wounded and fell to the ground.

Victim died at the scene. Four bullets from appellant's gun were recovered: three from Victim's head and one from the trunk of Celeste's car. [FN1] The bullet recovered from the trunk had traveled through the back seat of the car into the trunk. The car had two bullet holes in the rear driver's side window and two in the rear windshield.

> FN1. Five shell casings were found but the fifth bullet was not recovered. A paramedic testified for the defense that when he arrived on the scene to transport appellant to the hospital, appellant said he had shot himself in the head.

Other evidence indicated that during their marriage, appellant struck Victim several times in front of witnesses. In December 2001, he beat her in a restaurant parking lot and left the scene before the responding officer could arrest him. On September 17, 2002, the night before the murder, appellant was arrested on a warrant for criminal domestic violence arising from this incident. He was released on a $1,000 bond; one of the conditions of bond was that he have no contact with Victim.

State v. Lindsey, supra. App.p. A1-A2.

II.

In his initial application for post-conviction relief filed August 14, 2007 by appellate counsel Dudek, Lindsey made the following allegations:

I. Ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution for the reasons below and in the attachment to this Application. 10 (A).

1. Defense counsel was ineffective for failing to present available evidence that petitioner was attempting to proceed in family court over the child visitation dispute. Petitioner had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution on a critical issue exploited by the State to petitioner's detriment. 10(b). (EVIDENCE OF FAMILY COURT VISITATION AND SEEKING LEGAL ASSISTANCE).

2. Defense counsel was ineffective for failing to properly argue the "great risk of danger" aggravating circumstance did not apply to petitioner's case since the shot was at close range and it was clear the decedent was the only intended victim. This failure by trial counsel constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This was also an Eighth Amendment violation since petitioner was wrongfully placed in the class of "death eligible" defendants. 10 (c) . (FAILURE TO ADEQUATELY ARGUE INAPPLICABILITY OF "GREAT RISK OF DEATH" AGGRAVATOR).

3. Defense counsel was ineffective for failing to present available evidence showing his wife was engaged in an adulteress relationship to counter the State's evidence that petitioner was completely at fault for the domestic dispute. Failure to present this evidence constituted ineffective assistance of counsel in violation of the Sixth Amendment to the Untied States Constitution. 10 (d). (EVIDENCE IN MITIGATION THAT WIFE WAS ADULTERESS AND PARTIALLY AT FAULT IN RELATIONSHIP).

4. Defense counsel was ineffective for failing to present available mitigating evidence regarding appellant's childhood and his mental capacity since this was relevant evidence. The failure to present available mitigating evidence constituted ineffective assistance of counsel in violation of his rights under the Sixth Amendment to the United States Constitution. 10(e). (APPELLANT'S CHILDHOOD AND MENTAL CAPACITY AS EVIDENCE IN MITIGATION).

5. Defense counsel was ineffective for failing to offer evidence that he was steadily employed to counter the State's evidence that he was a drug dealer. The failure to offer this evidence constituted ineffective assistance of counsel in violation to the Sixth Amendment to the United States

Constitution. 10(f). (EVIDENCE IN MITIGATION OF STEADY EMPLOYMENT).

6. Defense counsel was ineffective for failing to offer evidence appellant was already lying on the ground when he was shot by the police officer. Allowing the state to distort the crime scene evidence to appellant's prejudice constituted ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. 10(g). (FAILURE TO OFFER EVIDENCE THAT LINDSEY ON GROUND WHEN SHOT BY POLICE).

7. Defense counsel was ineffective in violation of the Sixth and Eighth Amendments to the United States Constitution, by virtue its inadequate *voir dire*, and the failure to challenge for cause certain members of the jury that should not have remained on the jury. A death prone jury was consequently selected. 10(h). (INADEQUATE VOIR DIRE AND FAILURE TO CHALLENGE FOR CAUSE UNNAMED JURORS).

On August 6, 2009, received August 7, 2009, the Applicant, through current state PCR appointed counsel Vieth and Collins, made the following amended allegations:

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

11. (A). Counsel failed to adequately investigate, develop and present mitigation evidence including, but not limited to, evidence of Applicant's adaptability to confinement. [Adaptability to Prison Evidence].

(B). Defense counsel was ineffective for failing to present available evidence that Applicant was attempting to proceed in Family Court over the child visitation dispute. [Evidence of Applicant's Attempt to Proceed in Family Court on Visitation].

(C). Applicant had sought legal assistance and the failure to offer this available evidence constituted ineffective assistance of counsel.

(D). Counsel failed to properly present the entire theme of the Applicant's life. [Failure to Present Theme].

(E). Counsel failed to produce a family historian to allow the jury to know the

seriousness of his family history. [Failure to Present Family Historian].

(F). The Applicant's only expert was not provided with sufficient background information prior to trial to allow her testimony to be meaningful and accurate. [Failure to Present Dr. Margaret Melikian with sufficient background information].

Amended Application, ¶ 10, 11, page 3.

In his Post-Hearing Memorandum, the Petitioner set out the following ten specifications:

1. **Ineffective Assistance of Counsel - FEIGNING MENTAL ILLNESS**
   a. failed to prepare Lindsey for pretrial evaluation.
      i. Inappropriately allowed Lindsey to take advice of jail house lawyer to feign Mental illness
      ii. Failed to spend sufficient time with Lindsey and thereby failed to learn intention to feign Mental illness and dangers of course.

MEMO , p. 43

2. **Ineffective Assistance of Counsel- CHALLENGE EVIDENCE OF MALINGERING**

   a. Failed to present issue of malingering to jury.
      i. Failed to call Dr. Brawley in sentencing .
         (1) claims testimony could have refuted allegations that he was malingering when examined by court examiners and Dr. Melikian.

MEMO , p. 46-47.

3. **Ineffective Assistance of Counsel - MERCY REQUESTS FROM FRIENDS AND FAMILY**
   a. Failed to adequately present requests for mercy
      i. Failed to prepare witnesses to testify and request jury to show mercy
      ii. Failed to call family and non-family members on mercy issue
      iii. Failed to ask witnesses appropriate questions to request mercy.
      iv. Failed to argue the Court's refusal to allow witnesses to request mercy
      v. Failed to preserve record on issue of mercy by not presenting adequate arguments in support of attempt to present mercy issue and not requesting proffer.

MEMO, p. 47

4. **Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PRESENT DR. MELIKIAN**
   a. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey
      i. Failed to obtain and provide historical info and records of family members

necessary for proper evaluation.

ii. Failed to seek continuance after Melikian informed them she needed additional time

iii. Failed to elicit from Melikian statutory mitigating factors during testimony.

MEMO, p. 49

5. **Ineffective Assistance of Counsel - FAMILY HISTORY OF MENTAL ILLNESS**

a. Failed to present to jury family history of mental illness

i. Failed to adequately interview family members to discover extent of mental illness.

ii. Failed to prepare family to present extent and nature of illness within family.

iii. Failed to adequately argue to court the admissibility of evidence of family mental illness.

iv. Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.

MEMO, p. 50

6. **Ineffective Assistance of Counsel - PRISON ADAPTABILITY EXPERT**

a. Failed to retain PRISON ADAPTABILITY EXPERT to testify about Lindsey's ability to adapt to prison life others and the relevance of that information to the jury's decision

MEMO, . 51-52.

7. **Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/WORKER**

a. Failed to retain mitigation expert regarding psycho-social history of Lindsey and relevance to jury determination .

MEMO , p. 52-53.

8. **Ineffective Assistance of Counsel - EMS WORKERS TESTIMONY ABOUT DESIRE FOR SUICIDE.**

a. Failed to elicit testimony from EMS worker - Joseph Stewart and Vincent Bell - regarding Lindsey's desire to commit suicide after Nell's death.

i. Failed to interview EMS workers to determine what info and testimony they could provide

ii. Failed to prepare EMS workers to testify in penalty phase.

iii. Failed to ask appropriate questions to elicit admissible info about

Applicant's state of mind

iv. Failed to adequately argue testimony of EMS workers related to Lindsey's words, actions and state of mind after shooting was admissible

v. Failed to preserve record regarding EMS testimony by not presenting adequate arguments in support of attempt to present testimony

MEMO , p. 53.

9. **Ineffective Assistance of Counsel - TIME SPENT IN MITIGATION INVESTIGATION**

a. Failed to commit sufficient time to perform adequate investigation in mitigation

i. Failed to assemble complete defense team until one month prior to trial.

ii. Failed to perform investigation of Lindsey's life history, family history until 2 months prior to trial

(1) first half of investigation done w/o mitigation investigator

(2) investigation lasted only 8 weeks.

iii. Failed to spend sufficient time interviewing witness to determine beneficial testimony

iv. Failed to spend sufficient time preparing witnesses to testify to allow a clear, logically structured and easily understood presentation.

MEMO, p. 54

10. **Ineffective Assistance of Counsel - Statutory Aggravating Factors**

a. Failed to argue against statutory aggravating factors alleged by state.

i. Counsel did address aggravators, it was cursory and failed to present arguments against application to Lindsey

MEMO , p. 58-60.

III.

STANDARDS OF INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish deficient performance, a person challenging a conviction must show that "counsel's representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, at 688 (1984). A court considering a claim of ineffective assistance must apply a "strong presumption" that counsel's representation was within the "wide range" of reasonable professional assistance. Id., at 689. The challenger's burden is to show "that counsel

made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id., at 687.

Strickland does not guarantee perfect representation, only a " 'reasonably competent attorney.' " 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770 (1970)); see also Gentry, supra, at 7. Representation is constitutionally ineffective only if it "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. Strickland, supra, at 686. Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities.

An attorney can avoid activities that appear "distractive from more important duties." Bobby v. Van Hook, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 8). Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies. See Knowles v. Mirzayance, 556 U. S. ___, ___ (2009) (slip op., at 14–15); Rompilla v. Beard, 545 U. S. 374, 383 (2005); Wiggins v. Smith, 539 U. S. 510, 525 (2003); Strickland, 466 U. S., at 699.

Although courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam). After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course

of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's performance, not counsel's subjective state of mind. 466 U. S., at 688. Harrington v. Richter, _ U.S. _ (Jan. 19, 2011).

With respect to prejudice, a challenger must demonstrate "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." Id., at 694. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687. See Harrington v. Richter, _ U.S. _ (Jan. 19, 2011).

Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U. S. ___, ___ (2010) (slip op., at 14). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U. S., at 689–690. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689; see also Bell v. Cone, 535 U. S. 685, 702 (2002); Lockhart v. Fretwell, 506 U. S. 364, 372 (1993). The question is whether an attorney's

representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, 466 U. S., at 690.

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. See Wong v. Belmontes, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 13); Strickland, 466 U. S., at 693. Instead, Strickland asks whether it is "reasonably likely" the result would have been different. Id., at 696. This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters "only in the rarest case." Id., at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id., at 693. Harrington, supra.

II.

Respondent submits that the claims, as stated, are insufficient to show entitlement to relief under Strickland v. Washington based upon the record before the court. As Strickland and its progeny make clear, assessment of th entire record, including the trial record as well as the record from the collateral proceeding is necessary. As Harrington v. Richter makes clear, counsel is presumed to be competent in making strategic decisions. Here, the assessment and the burden of proof is important because the lead counsel, Michael Bartosh died April 5, 2006 prior to this proceeding. It is evident from each of the attorneys involved in the Lindsey case - Doug Brannon and Karen Quimby Hatcher, that Mr. Bartosh was the primary counsel in the case and he particularly focused his efforts and strategy on the penalty phase of the trial.-Each of the 10 specifications of ineffective assistance of counsel address the penalty phase of the trial. In fact,

the only relief sought in this action concerns sentencing. As stated in Harrington, "[A]lthough courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam)."

Throughout the Applicant's posthearing Memorandum he refers to the A.B.A. Guidelines as his standard. However, the United States Supreme Court recently clarified what *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) requires in the context of investigation and preparation of penalty phase mitigating evidence:

> The Sixth Amendment entitles criminal defendants to the " 'effective assistance of counsel' "--that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." That standard is necessarily a general one.... Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place.

Bobby v. Van Hook, --- U.S. ----, ----, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (citations omitted). The U.S Supreme Court held the Federal Circuit Court erred in applying 2003 ABA guidelines pertaining to specifics defense counsel should investigate in preparing mitigation evidence, when such guidelines were announced 18 years after the defendant's trial. The Court then reiterated *Strickland*"s emphasis that such bar standards are " 'only guides' to what reasonableness means, *not its definition*." Id., at 17 (quoting Strickland, at 688).

Any proper Strickland assessment must begin with the trial record and what defense counsel actually presented:

WHAT THE JURY HEARD

In the penalty phase, the defense called a series of mitigation witnesses. **Ann Howard,** Special Services Coordinator with the Spartanburg County Mental Health Center testified that she had seen the Applicant on September 8, 2002 and he presented himself as suicidal, crying and very depressed. She opined under a deferred diagnosis and referred him to a psychiatrist, Dr. Freeman Smith. ROA 1984-85. According to his notes, Dr. Freeman put Lindsey on an anti-psychotic drug - Zyphrexa, and was currently on Celexa - and anti-psychotic, a drug for depression - and a mood stabilizer - Abilify. ROA 1988-89. She testified that he is still receiving medication of Celexa, Depakote, and Abilify. ROA 1989.

On cross-examination, she testified that on his intake interview that the Applicant told her that he did not remember anything about shooting and killing his wife. ROA 1992.

Dr. Margaret Melikian, a forensic psychiatrist retained by the defense [Program Director of Forensic Psychiatry at M.U.S.C.] testified that she saw Applicant on May 4. She stated that she had reviewed:

1. His medical records.
2. The records from a psychiatric hospitalization when he was a teenager.
3. The records from a head injury when he was an infant.
4. His neurological records.
5. His school records.

ROA 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH} evaluation. ROA 2003.

Dr. Melikian opined that Lindsey had problems in school and had a learning disability

and attended special classes for speech therapy. ROA 2004. She also reported that Lindsey was in and accident when he was run over by a car when he was 18/19 months old and suffered a head injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. ROA 2004. She reported that he "had trouble with school." Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing , it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering . ROA 2005-06. She stated that the issue of malingering came up because Lindsey reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is

stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA 2008.

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.[1] She stated that " I would not have made a diagnosis of borderline intellectual functioning" because he does

[1]Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 2004. Applicant's PCR Exhibit 11. This is discussed within this pleading in the section related to preparation of Dr. Melikian.

function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the basis of worrying or seeing him clinically for decreased intelligence. ROA 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was an 18/19 month old. ROA 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA 2013. He stated that he was able to get in touch with his wife at

work where the numbers were not blocked.

Lindsey described to her his weight loss from 225 pounds to 160 pounds. ROA 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tires and wanted to drive to his mother - in - laws and "blow his brains out" in front of the house. While there he was driving and talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA 2013. He then stated that he just snapped. ROA 2013, l. 25. Lindsey told her that he followed them , but did not remember that he shot his wife until the EMS people told him ROA 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. ROA 2014.

She stated that he had a gunshot wound to the head. The wound exited , but did not penetrate the brain. He was shot multiple times by the police. ROA 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. ROA 2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. ROA 2018. She denied that this was evidence of malingering. ROA 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to saw it was Jimmy's fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick's November 13, 2003 report. ROA 2021.

Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong and could conform his conduct. ROA 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. ROA 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stanford Wilkins and was convicted of assault and battery with intent to kill. ROA 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. ROA 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey1, or Latresse Smith. ROA 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. ROA 2041-42. She asserted that these should be considered mitigating factors . ROA 2042. She opined that on September 2002 he was suffering from acute depression. ROA 2043.

Virginia Lindsey, the Applicant's mother, testified that Marion was 30 years old at that time. ROA 2044. She stated that she had four sons, but one died in a drowning. Id. She also had a daughter that had been killed in a car accident in 1969 when she was 7 months old. ROA 2045. She stated that she was never married to Lindsey's father, Leon McDowell, Sr. and raised him by herself. His only male influence was his uncle Steve.

She described living in a two bedroom home with the boys all in one room sharing beds and herself in another room. ROA 2046. She stated that she worked at the Howard Johnson Motel from 8 am to 4 PM. She stated that Uncle Steve was with them when she went to work. ROA 2046.

She described Lindsey as a very loving and sweet child. Id. However, she stated that Lindsey inhaled kerosene when he was 18 months old. She described that she was doing dishes and was crawling around the wood heater. She described hearing him scream and saw he had poured kerosene all over his face and down his clothes. She stated that she grabbed him and tried to give him milk and carried him to the rescue squad and he was treated at the hospital for it. ROA 2047. She stated that one month later, Lindsey was run over by a car driven by her brother - Paul Pilgrim - who accidentally backed up over his head which resulted in scars . She stated that he was treated at the hospital that night and returned home that date. ROA 2048.

She described that her son as slow in school. She stated that he had one fight in junior

high school. She stated that her son did not study and did not like to study, but would go to school. ROA 2048-49. She stated that he had problems with his speech and had to go to speech class. ROA 2049. She said he repeated the eighth grade, but did not recall if he repeated first grade. Id.

Ms. Lindsey stated that her sons each had different fathers. She said that while the fathers would pick them up, Marion did not have his father visit him which caused him to get upset because he could not go with his brothers.

She said that he moved out when he was 20 and quit school when he was 17. ROA 2050. She said that he went to work and gave her money to help pay the bills. ROA 2051. Id.

According to Ms. Lindsey, the Applicant first met Nell Lindsey around 1995. He had been living with a different girlfriend - Stephanie - at that time. She said that Lindsey eventually moved in with Nell and that they had a child July 1995 and a second child in 2002. She described his relationship with Nell as a little arguing, but never saw violence and around her it was good. She described Nell as being like a daughter to her. She said that they would separate and then go back together several times. She stated that Nell would go to her mother's house during the separations. ROA 2053-54. She said that Lindsey would stay with friends then. Id.

She stated that Marion loved her sons and saw that they wore the best. He told her that he wanted to give them a father and did not want them to grow up without a father. They were the most important thing in his life. ROA 2055. She said that he did not want anything to do with his own father.

Ms. Lindsey stated that she had four brothers (one of whom is dead) and three sisters. ROA 2056. She stated that her sister Bessie Smith had attempted suicide. ROA 2056. She stated

that she had been treated. Id.

She said that Marion was 15 and was hospitalized for attempted suicide. She said he stayed in the hospital for four days and was afraid of the man in his room because he looked like Charles Manson. ROA 2057.

She said that while he was in school she never had any teacher call and tell her that he was failing.

At the time of the incident, she thought that they had been separated for a few months. She said that she had attempted to see her grandchildren, but neither her or Marion were allowed to see them. ROA 2057. She said this was for two months before the incident. She said that this made Lindsey upset because his kids had always been with him. She said that she tried calling Nell and learned the phone was blocked 4 days before the incident. ROA 2058. She said that this had an effect on him because all he wanted was to see his kids. Id. He told her that if he could not get his family back that he could not live any longer. She said that last time she saw Lindsey was three days before the incident. She noted that he had lost weight and appeared worried and upset and was very depressed. ROA 2059.

She stated that she heard about the incident at 8:15 on September 18, 2002. She stated that "Marion is my son. I love him very much. And I ask mercy for my son not to be sentenced to death. I know that somebody else's child's life was took. But I don't want my child sentenced to death." ROA 2060.

On cross-examination, Solicitor Gowdy pointed out that Rod Tullis, a lawyer, represented her son. Solicitor Gowdy further inquired whether her son had contacted legal aid. She stated that she did not know whether or not her son had taken efforts to talk to a lawyer

about getting a court order to be able to see the children he wanted to see. ROA 2061.

Bill Burton testified that he knew Lindsey and ran a chemical company for a German firm. ROA 2061. He said he met Lindsey while he was a lifeguard. Lindsey was 6-7 at the time. He said the kids would come to the pool. He said he taught Lindsey how to swim.

Burton described the fact that Lindsey lived in a pretty rough situation. He stated that he would take them to Spartanburg Braves/Phillies baseball games and then to Burger King. On occasion, he would take them to his house to go fishing. He said that he visited Lindsey's home and described it a "desperate poverty." ROA 2063, l. 21. He said that house was about 1000 square feet with 8 people living in it. Id. He said all the children slept in a single bed. He said that house had since been condemned and was torn down. ROA 2064.

Burton described Lindsey as a kid looking for attention and an adult to look up to. He said he never saw violence in Lindsey from either him or his brothers. He said he knew him for 13 years . He said they came over to his house to fish over 20 times and would always call his mother and seek permission. ROA 2065. He described Lindsey as "the picture of politeness' toward Burton's parents. ROA 2065.

Burton stated that after he graduated from college, he became in the position to offer Lindsey a job. Lindsey then went to work for his company. ROA 2064. He stated that Lindsey worked for his company for about a year. ROA 2066.

He stated that Lindsey: "grew up in abject poverty without the befits of parents like normal families. I knew him until he was 20 years old approximately. I never saw the kind of behavior or violent behavior of any sort during that period." ROA 2067.

On cross-examination by Solicitor Gowdy, Burton stated that he had not learned of the

incident when Lindsey at age 20 had shot Stanford Wilkins through the windshield with a hand gun until he came to trial. ROA 2069.

Leon McDowell, Marion's father, declared he was not a father to Marion. ROA 2070-71. He stated that he was married to someone else when Marion was born. He said he was never there with him to go to a baseball game or go to a movie. However, he said he gave them money for clothes and declared if not executed "maybe he can benefit his kids somehow'. ROA 2072

Chris Wilkins , a friend like a brother to Marion, hung out together since 13 and lived together sometimes with Marion and Nell, never saw Marion hit Nell, but saw them argue and believed that Marion loved her and asked for mercy. ROA 2073-74. He stated that he saw Lindsey with his sons and that he was a loving father and proud of his boys. He said he was aware that the Lindseys would separate during their marriage. However, he never saw Lindsey hit Nell. He believed that he loved her.

Wilkins stated that he would hear Lindsey mumble to himself and appear to be chewing his tongue. ROA 2075. He stated that Lindsey tried hard to provide for his family. He never saw Lindsey hurt anyone on purpose. He asked the jury to take into consideration the kind of father he was and have mercy on him. He felt what happened was a big tragedy for everyone, but that Lindsey was a good person. ROA 2076.

On cross-examination by Deputy Solicitor Willingham, he confirmed that he would have helped him if he wanted to have custody of his kids and get a lawyer. ROA 2076-77. He admitted that he was aware of the incident when Lindsey shot through the windshield at Stanford Wilkins. ROA 2077. However, he was not aware of the 2001 incident at Applebee's when he cold-cocked Nell in the parking lot, but has heard of it. ROA 2077.

Steven Pilgrim, Lindsey's nephew testified that he lived with him for 7 years. ROA 2078-79. He stated that he was present at car accident with Lindsey as a child and personally took him to Inman Emergency. ROA 2079. He said that they took him to hospital and stayed with him. Id. He said that he was also knew about when Marion inhaled kerosene . ROA 2080-81. He stated that he suffered from high blood pressure and has a daughter that suffers from panic attacks. ROA 2080.

Bessie Smith, Marion's aunt, testified that she lived at one time in house with Marion. ROA 2081. She described a kitten being thrown by her brother into the heater. She said that Marion was hurt by this action. ROA 2081. She also testified that she had attempted suicide. ROA 2082.

The Applicant waived his right to testify in the penalty phase of the trial. ROA 2084-2089.

The State's Case Against Lindsey

Any understanding of the facts of the case and the propriety of the harshest punishment must begin with a review of State Exhibit 21, the 911 tape, made on September 18, 2002. Within that tape reveals that this act was more than a single victim incident, although only one victim died. Within that tape reveals unique violence and blatant disregard of societal laws where Lindsey, ordered to avoid contact with the victim due to his prior criminal actions, tracks down the victim and kills the victim in cold blood whole she is seeking respite at the Inman S.C. Police Station, in front of law enforcement.

State Exhibit 21, the tape of the 911 telephone call from Ruby Nell Lindsey to the Dispatcher revealed the following:

Dispatch: Spartanburg 911, what is your emergency?

Lindsey: Yes, I just got off work and my sister was going to drop me off and my husband, they signed a warrant on him last night and told him to stay away from me, now he's calling us, and I'm in Inman City. I'm on my way to the police station because he's behind us following us. He's coming down Main Street.

Dispatch: Okay, so you're ma'am! Wait a minute, don't hang up on me!

Lindsey: I'm not gonna hang up on you.

Dispatch: And he's "wanted" you said?

Lindsey: They already picked him up and the judge told him to stay away from me and here he is behind us and now following us.

Dispatch: What's your name?

Lindsey: Uh, Ruby Lindsey.

Dispatch: What's your phone number?

Lindsey: What's my phone number?

Dispatch: Yes ma'am, your cell phone number.

Lindsey: 978-xxxx. He's coming down right beside us.

Dispatch: What's his name?

Lindsey: Marion Lindsey.

Dispatch: Marion Lindsey?

Lindsey: Yep.

Dispatch: What kind of car are you in?

Lindsey: I'm in a gray car; I'm pulling into Inman City Police Station right now.

Dispatch: What kind of car is the male in?

Lindsey: He's in a Nissan Sentra.

Dispatch: What color?

Lindsey: Uh, gold.

Dispatch: Did he pull in behind you?

Lindsey: Yeah he pulled in behind us.

Lindsey: I'm not getting out!

(Children screaming in the background, conversation inaudible)

Dispatch: Hello?

(Child/Children crying in the background)

Dispatch: Hello? Hello? Hello?

State Exhibit 21, 21(a) (tape, enhanced CD).

The evidence of this horrific scene at the sanctuary of the police station parking lot further reveals that the driver, Celeste Nesbitt, after driving them into the parking lot exited the vehicle and tried to get the decedent to leave but she was talking on the telephone to 911. Unsuccessful, Nesbitt saw the Appellant pull into the lot, jump from his car, and run toward the back of the car. [Earlier, he had stopped them and Celeste told him, when he was unable to see through the tinted windows, that her daughters were in the back seat, but denied that there was anyone else there when he declared that somebody else id back there. Tr.p. 1526.] Celeste saw Lindsey pull out a gun and stick it to the rear passenger window and fire into the car. Celeste then

crawled into the nearby police car for her own safety. After the shooting she was advised that they (the police) had got him and she was confronted with her oldest daughter screaming that Nell was dead. Tr.p. 1536.

Inman officer Godfrey described hearing about a "rolling domestic dispute" from the dispatcher. He stated that he saw the cars pull into the parking lot and saw Nesbitt jump out of the car and come running toward him and state that "he's going to get her. . .". He then saw the Appellant with a handgun point at the back glass. When Godfrey reached for his gun and hollered "don't," Lindsey ignored the demand and fired two shots into the back glass. Tr.p. 1567.

At that point, Godfrey took cover. He then saw two more flashes from Lindsey's weapon. Seconds later, Officer Godfrey came out and Lindsey pointed the firearm at him. Godfrey reacted and fired four times at Lindsey. ROA. 1567, ll. 19-24, p. 1575, l.19 -p. 1576, l. 8. Lindsey was hit by him according to Godfrey and went down. [2]

Ruby Nell Lindsey suffered four separate gunshot wounds. Three bullets entered and remained in her head. The first was to the back of the head, 3 1/4 inches from the top and 3/4 of an inch to the left of the midline. The second was to the left temporal region. The third was near the nape of the neck. The fourth wound grazed the lower postural neck midline. ROA p. 1654-1657.

In processing the scene, evidence revealed that shots went through the backside of the back window from the rear drivers side' and also from the driver's side rear window where Mrs. Lindsey was seated. ROA Tr.p. 1588-1590. As throughly set out in the prior arguments, it was by

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[2]Lindsey stated to the paramedics that he had shot himself in the head. Tr.p. 1674. Lindsey sustained wounds to his hip and legs. ROA p. 1669.

fortuity that the children seated in the back seat were not killed or injured beyond the cuts and emotional trauma they received.

As Applicant recognizes the events evolved out of a domestic situation. The evidence presented revealed that Marion Lindsey had beaten his wife previously. ROA Tr.p. 1775-1781, 1823. [Penalty Phase Testimony of Celeste Nesbitt, Sharon Smith]. The victim had made calls contacting lawyers concerning a divorce. ROA Tr. p. 1782. The Applicant referred to his wife as "bitch" and threatened to kill her if "I catch you doing anything." ROA Tr.p. 1782. Testimony was received about an assault by Applicant on his wife at Applebee's Restaurant in December 2001 which resulted in a criminal domestic violence warrant. ROA Tr.p. 1918-1921, 1924-1926.

Evidence also revealed that the Appellant was involved in the sale and distribution of crack cocaine. ROA. p. 1830-1834, 1855-56, 1863-64, 1875 (11.41 grams of crack cocaine in the September 14, 2000 incident).

Importantly, Magistrate Sarah Simmons of Spartanburg County testified about the September 17, 2002 arraignment of the Applicant on a criminal domestic violence charge the night before the victim's murder. ROA p. 1931. She stated that she directed Lindsey that "there was to be no contact with the victim who is Nell Lindsey. ROA p. 1933 - 1936.

Concerning other violent incidents in Lindsey's past, there was evidence presented that on February 20, 1994, Lindsey blocked the vehicle being driven by Stanford Wilkins with Jessica Cannon as a passenger in the middle of the road. Lindsey then got out of his car and shot twice through his windshield, striking Wilkins in the arm. ROA. p. 1943, 1950-51. Lindsey was convicted of assault and battery with intent to kill after a no contest plea on December 14, 1996 and received a two year sentence, suspended to one year and one year probation with restitution.

ROA .p. 1953.

At the sentencing proceeding for this case, victim impact evidence , in addition to the testimony concerning the effect of the trauma on Kiera, include testimony from Stanley Staggs, the victim's father. ROA Tr.p. 1954-1965. This testimony concerned the impact on his life and her children's lives. ROA Tr.p. 1961-1965.

The Prison Life Evidence at Trial

The State presented in the penalty phase the testimony of James Sligh, Division Director of Classification and Records at the Department of Corrections. ROA 1908. In his testimony, he stated that a person sentenced to life imprisonment would initially be housed at a Level 3 high security institution. Id. He stated the cell would be 75 by 100 with two inmates in the cell. He stated that they would have access to the yard and have contact with other individuals. He stated that there could be job assignments or educational classes in a classroom setting. ROA 1909-1910. There could also have contact visitation up to 8 visits a month. ROA 1912.

On cross-examination from counsel Bartosh, Sligh indicated that there were 23, 500 inmates. He guessed that about 1000 were serving life sentences. He described "patrol controlled movement" from cafeteria to the various assignments. He clarified that there was no milling around on the yard. ROA 1914. He stated that it was based upon how the particular inmate is classified to determine his prison setting. ROA 1916. This will initially be done at the Reception and Evaluation Center. ROA 1916. There will be testing then for academic level, mental health issues and security level. ROA 1917.

No questions were asked concerning Lindsey adaptability to prison by either side at trial. The picture the prosecution and evidence revealed was harsh. A violent tempered

criminal involved in the drug trade. It also revealed a person who flaunted his responsibility to obey authority. It also revealed a person with a past history for using a handgun and shooting through windshields. It painted a picture of the type of person for which the death penalty was intended - a violent person with a prior criminal history where correctional rehabilitation had not changed his either his violence or his disrespect for the law.

The Defense Proposed Witness List

Prior to trial, the defense, through appointed counsel Michael Bartosh made written notice of potential witnesses in the case. Particularly, counsel identified the following in his written notice:

LAY WITNESSES
Bill Burton*
Pat Burton
Beth Gregg
AlexL.
TreyL.
Virginia Lindsey*
Amy Osbey
Sharon Pilgrim
Steven Pilgrim*
Timothy Sims
Bessie Smith*
Kennia Wilkins
Kristopher Wilkins*

EXPERT WITNESSES
John Absher, Neurologist
Tora L. Brawley, M.D, USC School of Medicine
Margaret Melikian, D.O., MUSC Institute of Psychiatry*
Lenora Topp, Mitigation
Rod Tullis, Attorney at Law[3]

[3]Rod Tullis was an attorney in Spartanburg. On September 19, 2002, Tullis wrote Sheriff Coffey and hand delivered a letter stating that he was Lindsey's attorney and that "Lindsey is asserting his Fifth Amendment right to remain silent." He further wrote that this will not be

Counsel Bartosh also indicated at that time that additional witnesses may be called in his written notice. [Those marked with * testified].

ANALYSIS OF THE SPECIFICATIONS

I. INEFFECTIVE ASSISTANCE - FEIGNING MENTAL ILLNESS

A. Counsel failed to prepare Lindsey for pretrial evaluation.

(1) Inappropriately allowed Lindsey to take advice of jail house lawyer to feign Mental illness

(2) Failed to spend sufficient time with Lindsey and thereby failed to learn intention to feign Mental Illness and dangers of course.

MEMO , p. 43.

In his first allegation of ineffective assistance of counsel, he contends that his counsel failed to properly prepare him for his pretrial evaluation because Lindsey had allegedly followed the advice of a fellow jail detainee and feigned mental illness after his arrest by creating an imaginary person to try to dupe his counsel and the mental health evaluators.

In the post-hearing memorandum, the Applicant now contends that his counsel failed to maintain an adequate relationship with Lindsey which allowed the faked imaginary friend "Jimmy." Petitioner's Post-Hearing memorandum, p. 43-46. The Applicant now contends that the Applicant's attempt to feign mental illness suggests that his counsel failed to satisfy their duty "to consult with his client and to advise his client of the various aspects of his case", citing S.C.A.C.R. Rule 407, Rules of Professional Conduct, Rule 1.4 and A.B.A. Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.5. He further contends within this section that capital counsel had a duty to be present when

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waived by Lindsey in the absence of his counsel. *Letter, Tullis to Sheriff Coffey, September 19, 2002.*

Lindsey was interviewed by the State mental health examiner, Dr. Pratap Narayan to insure that Lindsey understood the significance of statements made and potential legal challenges. Further, he now contends that the result of the proceeding would have been different if the relationship had been better with counsel.

As set forth more fully below, the Applicant has failed to prove either deficient performance or 6th Amendment prejudice. A defendant cannot be permitted to manufacture a winning IAC claim by sabotaging his own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn their sentence on appeal. Cases confirm that a client who interferes with her attorney's attempts to present mitigating evidence cannot then claim prejudice based on the attorney's failure to present that evidence. See Gardner v. Ozmint, 511 F.3d 420, 427 (4th Cir.2007) (relying on client's non-cooperation when rejecting ineffective assistance claim based on attorney's failure to investigate mitigation evidence); Fautenberry v. Mitchell, 515 F.3d 614, 624 (6th Cir.2008) (counsel is not ineffective for failing to persuade client to cooperate); Lorraine v Coyle, 291 F.3d 416, at 435 (6th Cir. 2002)("Trial counsel cannot be faulted for their client's lack of cooperation."); Taylor v. Horn, 504 F.3d 416, 454-56 (3d Cir.2007) (relying on client's refusal to allow attorney to call witnesses in rejecting ineffective assistance claim); Roberts v. Dretke, 356 F.3d 632, 638 (5th Cir.2004) (holding that "when a defendant blocks his attorney's efforts to defend him, including forbidding his attorney from interviewing his family members for purposes of soliciting their testimony as mitigating evidence during the punishment phase of the trial, he cannot later claim ineffective assistance of counsel."); Bryan v. Mullin, 335 F.3d 1207, 1223-24 (10th Cir.2003) (en banc) (counsel not ineffective for failing to present mental health evidence when client told counsel not to present

any mental health evidence).

Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), does not change this result. Rompilla held that even when the defendant and the defendant's family tell counsel that no mitigating evidence exists, counsel must nevertheless make a reasonable investigation of evidence that counsel expects the prosecution to rely on at trial. Id. at 377, 125 S.Ct. 2456. That is not the situation here. Cf. Keith v. Mitchell, 455 F.3d 662, 671 (6th Cir.2006) (observing that Rompilla held only that "counsel must investigate evidence it knows the state will use against defendant"): Owens v. Guida , 549 F.3d 399, 412 -413 (6th Cir. 2008). Here, defense counsel did investigate the "malingering issue" and addressed it in the penalty phase with Dr. Melikian - although the state did not use such evidence of malingering in its case in chief. He has failed in his burden of proof.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[4] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had

[4] Dr. Melikian stated this was either her first or second trial as a defense expert. PCR Tr. 599, ll. 14-16. She stated that she was subsequently involved in 15 to 20 cases. PCR Tr. 600, l. 22.

barely begun and she now felt that there was no way they could be prepared for trial.[5]

Dr. Melikian indicated that she had received records from defense counsel on April 28, 2004 and made a call on April 28 to get the mental health records from William S. Hall. PCR Tr. 601. Dr. Melikian confirmed that she had requested an opinion letter from Dr. Tora Brawley, a forensic psychologist, who had seen Lindsey. Dr. Melikian stated that she discussed Dr. Brawley's findings with her on April 29. PCR Tr. 601. She later requested a written report from Dr. Brawley on May 18. PCR Tr. 601.

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr. Melikian received the written report on May 20 after the trial had already started on May 17. PCR Tr. 602.

Dr. Melikian stated that "in her limited evaluation", Lindsey did not seem to have a "mental illness defense." PCR Tr. 602, ll. 17-20. She said she went right to mitigation, since he appeared to be competent. PCR Tr. 602, ll. 17-23.

She stated that there was a difference between what she received in 2004 and the material she received in preparation for the PCR hearing which was 6 or 7 times as much. PCR Tr. 603. She stated she had suicide notes, in bits and pieces, and did not have a "complete" file, mental health records, medical records, Department of Corrections' records, or the complete incident

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[5] Counsel for Applicant questioned her about an April 30, 2004 (Friday) note in counsel's records that an amount of documents had been sent to the witness on Monday and Tuesday and more was being sent that date. The note revealed that Dr. Melikian had stated "too much" and that she can't be ready. PCR Tr. 599. Notation included a written remark by Michael Bartosh that Dr. Melikian knew the time constraints before she got involved and said she would be OK. PCR Tr. 599-600.

reports. PCR Tr. 603, ll. 12-23. She stated that she was not given all the information that the 2004 defense team had acquired. PCR Tr. 603, ll. 21-23. [Her original file was 3 to 4 inches thick]. PCR Tr. 603.

Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. Tr. 604. She stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

Dr. Melikian opined that Lindsey does not show much emotion or depression. She declared again that in her one meeting with him, Lindsey was functioning pretty well. PCR Tr. 605. However, in her more recent meetings, she felt that she had misjudged him in 2004 and would have changed her testimony.

Particularly, Dr. Melikian stated that she would have explained the severity of his depression. She had already given that diagnosis in 2004, but saw rather than being depressed and upset, but rarely suicidal to genuinely suicidal. She said he had lost a significant amount of weight with decreased energy. She felt he was not functioning well at all. PCR Tr. 605.

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed his level of cognitive ability decreases quite a bit with is depression. She said that in 2004, Lindsey fit the overall picture because she was aware of his problems in school, his speech impediment and low scores. However, in 2004, with the other things he was able to do, she felt the "borderline intellectual functioning" diagnosis that others had given was probably not correct. In hindsight, she now thinks based upon further record review and I.Q. scores, that it was likely due to his

depression. PCR Tr. 606.

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery charge "appeared to have a large element of self-defense in that" which resulted only in a one year sentence "which would be unusual for a crime that severe." PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. PCR Tr. 607, ll. 1-6.

Dr. Melikian claimed this paints a different picture of Lindsey of rather than just showing that he had been charged and convicted of assault and battery with multiple CDV charges to "a more accurate picture of who this person is as opposed to just a list of he bad in school, his IQ is low, and he's had these charges in the past." PCR Tr. 607, ll. 7-13.

In hindsight, Dr. Melikian stated that she did not feel that she was prepared to testify in 2004. She stated she was not aware of a suicide note, that she had called Bartosh's office and told them she was not prepared, and that she had set up a conference call with Judge Few on May 12 where she told him about not being ready to testify. PCR Tr. 607-08. Dr. Melikian testified that she had originally expected to testify on Monday, May 24, with preparation the day before, but was contacted Saturday night and told to be ready Sunday morning. PCR Tr. 608. She stated she spent 30 minutes on the phone with Bartosh Saturday night to prepare.

She described contacting Judge Few in a conference call on May 12 to tell him that she could not be ready for trial. PCR Tr. 608-10.

Dr. Melikian stated that she did not agree with the 2003 report from the State Hospital on Lindsey's competency. She stated they had diagnosed Lindsey with malingering and borderline intellectual functioning. Their reason for malingering was based on atypical symptoms, but by the objective testing, she felt he did not meet the criteria for malingering. She also noted that Dr. Brawley tested for malingering and that Lindsey did not malinger on those tests. PCR Tr. 610.

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline intellectual functioning. She found that he had higher IQ scores with Dr. Brawley and felt those scores were not accurate because he appeared to be functioning at a higher level, but now knows that he was functioning at a lower level due to his likely depression. PCR Tr. 611. She thought he functioned at a higher level than borderline intellectual functioning [70-80 I.Q.] because he appeared a little better than that and his history revealed he had been able to hold some jobs and do some things at a higher level. PCR Tr. 611, ll. 8-17.

Dr. Melikian's PCR Testimony About Jimmy - Direct Examination.

Dr. Melikian stated that Hall Report that he was malingering was based upon atypical symptoms and his discussions of his friend "Jimmy." PCR Tr. 16-20. Given that and his test scores that showed he was not malingering, Dr. Melikian stated she disagreed with the diagnosis. Id. [This was consistent with her original trial testimony. ROA 2005-2008].

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[6] Dr. Melikian stated

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[6] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, ll. 13-25. See also

when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy. Dr. Melikian stated she would have wanted to know this before she reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. PCR Tr. 614. He had told Dr. Brawley the same thing. "He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner" which she asserted because it was a hostile interview with Dr. Narayan. PCR Tr. 614-15. She recalled during the 2004 trial, he had behaved in the trial in that manner. PCR Tr. 615.

Dr. Melikian felt if she had known what he had done with his lawyers it would have been helpful. She stated in records she had reviewed since the trial, Lindsey was discussing Jimmy while he was incarcerated and made statements that Jimmy had taken over his body or been responsible for the shooting. If she had that information, she felt that "Jimmy" would have been more of a focus of her May 4 evaluation in the limited time that she had as a "mental health defense." PCR Tr. 615, ll. 6-16.

Testimony of Mitigation Investigator Lenora Topp concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

Concerning the jail incident where Lindsey hit his head and former counsel Tullis told them to keep an eye on his client, Dr. Melikian said she never saw pictures in the records she reviewed, although Lindsey told her about it. Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

She stated that the history she received came from Lindsey, although she met with investigator Lenora Topp on the day of the trial and 30 minutes on the telephone with Bartosh the night before. PCR Tr. 616.

Dr. Melikian stated that Dr. Pamela Crawford was present and Melikian knew she was at court to critique her for the State. However, Dr. Melikian stated she already felt unprepared and did not want to speak with Dr. Crawford that day. She said she needed to continue to review records and reports, although she was not aware that Dr. Crawford had seen Lindsey briefly with Karen Quimby. PCR Tr. 617.

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had previously misjudged his cognitive ability in the past. Particularly, she found that he was not depressed, got along with guards and she had contact visits. In reaction to questions about his adaptability in prison, Dr. Melikian described a visit when Lindsey was left unshackled in violation of SCDC policy and the resulting confusion over his shackling. However, she asserted that no one seemed concerned about her safety and that he seemed to be cordial to the guards. PCR Tr. 618-19.

Dr. Melikian, in a proffer after objection, opined this was the least prepared with the least amount of time, since she had been a death penalty case. She stated since then she had calls under similar time constraints and refused to participate. She said she had been bothered by the

case since that date and wondered if she should have refused to testify since she was so unprepared. PCR Tr. 620.

Cross-Examination

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22.

Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004, she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. PCR Tr. 623. She stated she wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. Id. Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624.

On cross, she admitted that during the trial, she claimed the only additional records she wanted were SCDC records. PCR Tr. 624-25. (See ROA 2031).

Further, in addition to Dr. Brawley's report, Dr. Melikian confirmed that her conversation with Dr. Brawley included actual results of the other testing she did, that Lindsey had problems

with attention and concentration. PCR Tr. 626-27. She felt that he had been tested on the RAY Complex Figure Test and tested borderline, rather than the RAY malingering test. PCR Tr. 627. She said Lindsey had been tested for malingering on the SIRS tests and the Test of Malingered Memory (TOMM). PCR Tr. 627.

The Revelation of Feigning Jimmy During the Cross-examination.

Dr. Melikian acknowledged that in 2004 she sought to address the existence of "Jimmy." However, she did not know until the trial that the day "Jimmy" was reported was the day he was served the death notice. As Dr. Melikian stated on cross-examination:

> "One of the reasons that that information would of been so important to me to have is that issue of Jimmy I could have dealt with before trial. As a matter of fact, the first time I met with Mr. Lindsey in preparation, in preparation for this hearing, one of the first things he did was apologize for Jimmy. **When I look back and, you know, now with hindsight, I can see that Mr. Lindsey started out malingering Jimmy. He was told to do this by some other inmates is the information he's given me since, and he was feigning these symptoms because they told him to act crazy.**"

PCR Tr. 629, ll. 11-22 (emphasis added). She stated that when she saw him 2 years later, he did not want to continue this and minimizing it which made it more believable. Dr. Melikian speculated that if she had spent more time with him in 2004 as opposed to meeting him once, "I probably would have gotten that information before trial and would have been able to give much more effective testimony." PCR Tr. 630, ll. 4-7, 12-16.

Dr. Melikian noted that she wished that she had the information in 2004 that he malingered mental illness at the State Hospital evaluation and with his lawyers because he thought it was in his best interest. PCR Tr. 630. She felt she could have explained it with his level of depression and cognitive ability. Dr. Melikian stated in 2004 that Lindsey had a passive

suicidal ideation based upon his expressions that he wanted the death penalty. She stated that was suicidal regardless of why he wanted to die. PCR Tr. 631, ll. 9-17.

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001 at 15 years old, Lindsey had a gun and planned suicide, but his cousin talked him out of it. PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff, but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

Although this was consistent with the information she testified about in 2004, Dr. Melikian opined it was less effective to state that Lindsey told her about his weight loss than records to show he weighed 200 at one point and then was down to 180 or 160. However, she admitted the State never challenged the statement concerning weight loss. PCR Tr. 633.

She stated that the fact it was on T.V. did not concern her because she had forgotten about the cameras when she testified, but felt she was sleep deprived and was more worried about her ethical duty to Mr. Lindsey due to her lack of preparation. PCR 634. Although she was not confident about her opinion when she was cross-examined at trial, she did not feel it was destroyed. PCR Tr. 634.

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey. PCR Tr. 635. She stated that prior to the trial date she had only spent 2½ hours on record review, and then looked at records on that date, but could not recall whether she looked at

the St. Luke records provided to her on April 30. However, she admitted she felt he met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-36.

On re-direct, Dr. Melikian felt that she was not made privy to information from Brannon, Quimby and Topp concerning their interviews prior to the trial. She also claimed that she did not know much about Lindsey's family history. PCR Tr. 636. She felt this affected her credibility, although her diagnosis has not changed. PCR Tr. 637.

Dr. Melikian admitted that she had some family history, information about his earlier crime and a N.C.I.C. report. She stated her notes reflected that they had discussed his education and schools, the first time he thought about suicide and what was in his mind, and his problems in his interview with Dr. Narayan. PCR Tr. 638. She admitted that he had told her about trying to turn himself in four times concerning Standford Wilkins. She admitted that none of this was new information, but she asserted that she did not have another opportunity to see him again, go through his history, review the record again, and corroborate what he told her even though most of it turned out to be true. PCR Tr. 639.

She stated that she would not - in the future - only see a death penalty inmate one time again. She felt repeated evaluations would build a support. She admitted that from May 4 (her meeting with Lindsey) until she testified on May 23, she was not denied access to Lindsey. PCR Tr. 640. She admitted she made no written report in 2004 and the only records were her notes, introduced as Respondent's Exhibit 14. PCR Tr. 640.

PCR TESTIMONY of Dr. TORA BRAWLEY

Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology, testified

that she became involved in Applicant's defense on April 12, 2002 and advised of a May 17, 2002 trial date by Mike Bartosh. PCR Tr. 72. She became involved after a cancellation and met with Lindsey on April 27. Prior to the interview, she was not provided any records but learned certain information from counsel Bartosh. PCR Tr. 72. Particularly, she learned that it was a death penalty trial and Lindsey had a history of a head trauma, a gunshot wound, and a car accident. Bartosh also advised her that there was an issue of malingering. PCR Tr. 72.

Dr. Brawley stated she conducted an extended clinical interview and battery of neuropsychological tests. She also consulted with a neurologist, Dr. Abshur, after her testing. She summarized her findings as scattered neurological deficits and a recommendation that they obtain medical and school records and speak with collateral sources to investigate it. PCR Tr. 73.

Dr. Brawley stated Lindsey reported to her that he had fallen on steps, hit his head 4 to 5 times, and had stitches. He further told her he had been run over by a car at age two, blacked out, and was in a hospital for 2 weeks. PCR Tr. 74. He reported to her he had surgery on his face. According to Lindsey, he had two motorcycle accidents: in 1993 when he was not wearing a helmet and 1998 when he was thrown off and became dazed. PCR Tr. 74. She was also told about the 2002 self-inflicted gunshot wound and a history of migraine headaches.

As to his educational history, he reported to her that he quit school in the 10th grade and had to repeat the 1st and 7th grades. In addition, he reported to having speech therapy and learning classes with a problem in spelling.

As to psychiatric history, she stated that Lindsey reported to her that he had suicide attempts: age 12 with an overdose, a 2001 attempt, another in September 2002, and the

September gunshot to his head. PCR Tr. 75.

Dr. Brawley noted that a history of depression could impact on test performance by slowing and a general decrease in test performance. In an April 27, 2002 I.Q. test, Lindsey had a Full Scale IQ of 85, verbal of 80 and performance of [92]. PCR Tr. 75. 9sic in Transcript of 82). [Applicant's Exhibit 11].

Dr. Brawley, in her 2004 written report to Dr. Melikian, listed a number of impairments, including severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired ability to copy and recall a complex figure. PCR Tr. 76-78. She opined that he fell below the average range of scoring. PCR Tr. 75.

Dr. Brawley could not give an opinion on what caused the brain dysfunction. She noted there were multiple possibilities from the damage to the brain. PCR Tr. 78. She pointed out that she lacked enough information to determine whether it was consistent with where it should be or was due to head injuries. PCR Tr. 78. She pointed out that she did not have medical or school records in 2004. PCR Tr. 78.

Dr. Brawley stated there was nothing inconsistent in her interview with Dr. Melikian's diagnosis of major depressive disorder. PCR Tr. 78.

Dr. Brawley on Malingering

Concerning the question of malingering, she stated she considered the issue in 2004. PCR Tr. 79. She had learned from counsel Bartosh that Lindsey had an imaginary friend and the

State doctors had determined he was malingering. She stated she did malingering tests for cognitive, for memory, and for psychiatric symptoms. She said she gave the Test for Memory Malingering (TOMM) and concluded he was within normal limits. She also gave the Structured Interview of Reported Symptoms (SIRS) test for malingering os psychiatric symptoms. PCR Tr. 80. He again tested within normal limits then. PCR Tr. 81. She determined during her April 2004 interview that there was no evidence of malingering in the testing and reported it to Dr. Melikian and counsel Bartosh. PCR Tr. 81. Dr. Brawley stated she spoke with Bartosh and gave him a verbal report of her conclusions. PCR Tr. 81. She provided the written report to Dr. Melikian pursuant to her request.[7] However, she does not know why she was not called to testify. PCR Tr. 81.

Dr. Brawley stated that she recommended that medical and school records be obtained because she had not been provided with them and it would help indicate whether the deficits existed earlier. PCR Tr. 81-82. Dr. Brawley stated that she received school records after she had made her written report in 2004, but did not look at them because she had already been advised she was not testifying. PCR Tr. 82. In hindsight, she noted the records showed he had been in the 8th grad for 3 years, whereas he had reported repeating the 7th grade. PCR Tr. 82.

In addition to the school records, she received the report from Hall Institute [Applicant's Exhibit 12] and the raw test data. PCR Tr. 83. She noted his Hall IQ test was 76, where her IQ test was 85, with the discrepancy in performance IQ. She opined that the difference could have been due to depression in 2002. PCR Tr. 83-84. She opined that the subtests that reflected the

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[7] In the Applicant's memorandum, he stated that Dr. Brawley did not produce a written report. Memo, p. 38. However, she did provide a report. Applicant's Exhibit 11.

difference in the IQ scores were "attention and concentration" and "abstract reasoning" which is a frontal lobe function. She also opined that Hall testing of the "repeatable battery for the assessment of neuropsychological status" also had subtest that showed scattered deficits consistent with her findings. PCR Tr. 85. Dr. Brawley also confirmed that the State Hospital had also done malingering tests - the TOMM and SIRS - which did not indicate malingering. PCR Tr. 85.

Dr. Brawley on "Jimmy"

On cross-examination, Dr. Brawley indicated that she spent three (3) hours with Lindsey in 2004. She stated that Lindsey did not bring up "Jimmy", so she asked Lindsey about it and he told her "he's like an older role model", that Jimmy came to him at age 12 when he was in mental health for the first time and tried to kill himself. He told her he was in a room with an older man at the time and was scared. He told her that he doesn't tell him to do things but God sent him to Lindsey to help him out. PCR Tr. 87. He told her that he talked to him when he is in trouble and suicidal. PCR Tr. 87. However, Dr. Brawley said - unlike Doug Brannon's experience - he did not say Jimmy was in the room with him at the time. PCR Tr. 87.

Dr. Brawley stated she shared this information verbally with Dr. Melikian two days later on April 29. She stated she gave her the diagnostic impression that he was not a malingerer and that he had scattered neurological deficits. PCR Tr. 87.

More specifically, Lindsey told her about the suicide attempts. As to the incident at age 12, he had taken pills after he had a fight with his brother and his mother told him that he did not love her anymore resulting in his hospitalization for 1½ months. PCR Tr. 88. As to the 2001 attempt, Lindsey told her he was having troubles with his wife and took a gun, but his cousin

took it away. As to the third one in August 2002, his wife had told him she was leaving with the kids and he planned to drive the truck off a cliff, but then decided not to do it. PCR Tr. 88, ll. 12-15. She described another incident in September 2002 when his family talked him out of suicide. PCR Tr. 88, ll. 15-17. The final attempt was the gunshot wound to the head in September 2002 (during the arrest) and resulted in mental health at the jail. PCR Tr. 88.

Dr. Brawley testified about the series of neuropsychological tests she gave. PCR Tr. 89. She testified that he did not show deficits below normal on a number of the tests she gave including:

- immediate visual memory.
- delayed verbal learning for stories
- manual speed on his left hand.
- right handed manual dexterity.

- trail making - Part B.
- non-verbal abstract reasoning.
- sequencing ability.

PCR Tr. 90, ll. 9-23.

Dr. Brawley stated she shared this information about all the results with Dr. Melikian in the verbal consult. As to her written report, she put in the areas of deficits that she found, but not the test results. PCR Tr. 91.

Dr. Brawley confirmed that she consulted with Mr. Bartosh for ½ hour on May 2, 2004. PCR Tr. 91, ll. 10-22. She stated she went over the test results and the other information that she had gathered in the interview. PCR Tr. 91. She recalled that she made a specific request for school records to Dr. Melikian and felt she asked Bartosh for medical records. She stated she received the records on May 20 after she wrote her report. PCR Tr. 92.

Dr. Brawley stated she consulted with Dr. Abshur, the neurologist, and shared her

findings with him. PCR Tr. 92-93.

Dr. Brawley stated her information about suicide ideation came from Applicant. PCR Tr. 94. Similarly, the history represented in her report came from Lindsey that other family members suffered from depression, that he had a chaotic childhood, that his stepfather was a heavy drinker, that his mother worked most of the time, that Lindsey was responsible for his younger sibling and taking care of the home and meals, living with a cousin at the time of the incident, and separated from his wife. PCR Tr. 95-96.

Counsel Brannon's Interaction with Applicant About Jimmy

Counsel Doug Brannon testified that after he was appointed as second counsel on March 5, 2004, he met with Lindsey on March 12, 2004 at the detention center. PCR Tr. 13. He described his initial interview and how it impacted on how the defense handled the case:

> I went over to the Public Defender's Office, and then I, I rode over to the detention center in, in Mr. Bartosh's car, and Mike said something along the lines of Marion is a unique character, and we got over to the detention center and Pod 5 is the, is the, is the lock down pod. And when we got in there, they brought Marion in and there were four chairs around the table. Actually, actually there weren't four chairs around the table. There were four chairs in the room and three chairs around the table, and Marion sat down and I went to sit in the chair next to him and he said no, no, no, no, don't sit there. And, and I said okay, why not and he said cause Jimmy sits in that chair, and I looked at Bartosh and he just kind of pointed at the other chair that was away from the table and I went and drug the chair up to the table and I sat there.
>
> So, every time I met with Marion Lindsey there was an empty chair sitting at the table. Now, sometimes when I met with Marion it was with me and Mr. Bartosh and sometimes it was with me and Ms. Quimby. But there were two or three occasions where it was just he and I, but there was always an empty chair sitting at the table.

PCR Tr. 34, l. 14 - p. 35, l. 11. Brannon testified that after the meeting Bartosh told him that he should have told him about "Jimmy" before their meeting. Brannon stated that in reviewing the reports, it was claimed that it dated back to when Lindsey was previously in the State Hospital and had a roommate who looked like Charles Manson. PCR Tr. 35. Importantly, Brannon stressed that Marion was friendly and that if you asked a question, Lindsey would answer and he never felt threatened by him. PCR Tr. 35-36.

Counsel Brannon stated that he was aware there were mental health issues, but they had Dr. Narayan's report. PCR Tr. 37. Although aware that Lindsey's IQ was lower, Brannon stated that other than the "Jimmy" issue, when asked a question Lindsey would give a clear and lucid answer. ID.

Mr. Lindsey indicated to Brannon that the reason for the crime was that he snapped and that he had contemplated his own demise, but not the murder of his wife. PCR Tr. 37. He said when Lindsey came upon Nell and others in the car and the other people were not his children, he did not know who had the kids and snapped. PCR Tr. 37.

Brannon, in addition to his awareness of Dr. Narayan's report, admitted that he had discussions with Bartosh about Dr. Melikian and Dr. Tora Brawley and the substance of their potential testimony. PCR Tr. 45. He recalled listening to a telephone conversation with Dr. Melikian. PCR Tr. 44. He stated that he talked at length with Bartosh about whether the information from Dr. Melikian and Dr. Brawley created any potential defense of either guilty but mentally ill or a lack of criminal responsibility and resolved it did not. PCR Tr. 46. Brannon stated the basis for everything was Dr. Narayan's report that Lindsey was malingering, but competent to stand trial. PCR Tr. 46. Instead, they desired to focus on the miserable life Lindsey

had, but also that he was the life of any crowd he was in, however recognizing that he was involved in drug sales for years. PCR Tr. 47. They decided to play that he was just intelligent enough to pass the tests. Brannon felt it was believable to have "snapped", that based upon his miserable life and minimal intelligence level. PCR Tr. 47.

Counsel Brannon stated that he spoke with Dr. Narayan with Bartosh concerning his potential testimony in the case. PCR Tr. 60. Based upon their interview and his report, Brannon did not see any basis to call him as a witness in the guilt phase. Particularly, he summarized that Dr. Narayan would call Lindsey "a faker" and he did not want him anywhere near a witness stand. PCR Tr. 61. [Dr. Narayan did not testify in front of the 2004 jury for the State or the defense].

Counsel Brannon confirmed that he was in a factual box in the guilt phase defense. PCR Tr. 64. He was aware that he was not going to get a not guilty on manslaughter charge based upon facts he was presented. PCR Tr. 64. He was aware that the information was looked at to see if it had meaning in the penalty phase. PCR Tr. 64.

Brannon conceded that Lindsey did not gain anything by telling him that Jimmy was there. PCR Tr. 65. Similarly, counsel Brannon testified that they did not have the tape from Rod Tullis when he was handling the case. PCR Tr. 66, ll. 10-16. Counsel did not know if Tullis was subpoenaed from trial (although he was on the witness list).

Brannon recalled when he began his visits with Lindsey that he was on lock down and also wearing a "suicide gown." PCR Tr. 67.

Counsel stated that the reason why he interviewed the paramedic was to show that Lindsey had tried to shoot himself and kill himself. PCR Tr. 67.

Additional Evidence about Jimmy in 2002

Mitigation investigator Lenora Topp also testified at the hearing that she discussed "Jimmy" with Lindsey during her interview on April 16, 2004. She stated that he told her that he had a friend named Jimmy who told him that God sent him. PCR 140. In addition, he stated that he had arrived during his early teens. Id.

ANALYSIS

In this first allegation, the Applicant complains that the defense team performed deficiently because they failed to maintain an adequate relationship and consultation with Lindsey. Though Lindsey never testified at the PCR hearing that their was any relationship lacking, the record is replete with evidence that from the moment of the serving of the notice of intent to seek the death penalty throughout the trial, Lindsey was maintaining the charade of the existence of his imaginary friend Jimmy - an attempt to scam the state doctors and his lawyers by a suggestion that he was crazy. Simply put , this malingering of a mental illness by Lindsey was not the product of his lawyer's work, neglect or omission on the case, but according to Dr. Melikian's recent discovery, Lindsey's own creation at the suggestion of other inmates - a suggestion that acting crazy would aid him. It is only Dr. Melikian's recent post-verdict speculation that had she spent more time with Lindsey prior to the trial, he would have uncloaked the fakery of Jimmy and she could have used it to explain his depression by accepting this action - an action taken by Lindsey only after it did not work where the death verdict still resulted.

The speculation within this allegation is simply unproven. There has been no showing that Mr. Bartosh did not regularly meet with Lindsey. To the contrary, the evidence was that Mr. Bartosh had made a good relationship with a series of visits over the years his representation. The

alleged fact that Lindsey hid the truth concerning the malingering from counsel from October 2002 throughout the trial does not mean that a different attorney-client relationship could have forced the truth from Lindsey - particularly when he was confronted by additional friendly experts about the existence of Jimmy prior to the trial and after the state hospital evaluation in 2003.

Under any *Strickland* analysis, the matter must be viewed from trial counsel's perspective at the time of the trial in 2004. The fiction of Jimmy was imbedded into the meetings between counsel and Lindsey throughout the relationship from 2002 through the trial, as revealed through counsel Brannon and Lenora Topp's testimony. As revealed in the trial testimony and questioning of Dr. Melikian and the pretrial testimony of Dr. Narayan (ROA 133-135), there was evidence of malingering and evidence from testing done by Dr. Brawley and the state hospital that reflected he was not malingering - other than the vision of Jimmy. In fact, at that pretrial competency hearing, Dr. Narayan stated that morning : "we didn't find any evidence of his malingering symptoms today. There's no evidence of that . But we did find evidence of that on the three occasions that Mr. Lindsey came to our institution." ROA 137, l. 13-16.

The reliance upon the ABA guidelines does not shift the burden or support speculation that counsel necessarily could or would have pieced the veil of fakery that Lindsey was intent on portraying through his statements and actions made in October 2002, actions taken during the competency evaluations with Dr. Musick and Dr. Narayan in April and June 2003, through interviews in 2004 with Doug Brannon, Lenora Topp, Dr. Melikian and Dr. Brawley prior to the trial. 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. Nor does the fact that Dr.

Melikian's speculation or hope that had she spent more time with Lindsey, he would have eliminated his lie of Jimmy's existence.[8] The initial allegation is without merit because he failed in his burden of proof of any deficiency by his defense counsel in failing to make Applicant reveal to them that he had recently concocted "Jimmy" his imaginary friend to feign mental illness in the hopes of avoiding a death sentence at the suggestion of other jail inmates.

II. Ineffective Assistance of Counsel- CHALLENGE EVIDENCE OF MALINGERING.
ii. Failed to present issue of malingering to jury.
iii. Failed to call Dr. Brawley in sentencing .
(1) claims testimony could have refuted allegations that he was malingering when examined by court examiners and Dr. Melikian.

MEMO , p. 46-47.

In his second assertion, he argues - *inconsistently with argument 1* - claims that counsel failed to adequately rebut the issue of malingering before the jury. Essentially, he contends that while Dr. Brawley was retained by the defense to evaluate his mental condition, counsel failed to follow-up with her to refute the allegations. Respondent submits that a review of the record at trial and now before the Court with the PCR testimony reveals that counsel did not perform deficiently on the issue of malingering.

As revealed above with ground one, the defense presented in mitigation the testimony of Dr. Melikian. Within her testimony, she presented an opinion that Lindsey was not malingering. She also opined that Lindsey had a "family history of depression." She reported that he was

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[8]Respondent, of course recognize that Applicant has not testified that he concocted Jimmy at the suggestion of other inmates to avoid the death penalty. Further, it does not suggest the reasons when or why Applicant came clean about his deception. Since the State has consistently since 2003 asserted that "Jimmy" was an attempt to feign a mental illness - malingering - for purposes of this pleading we accept that he now admits it was a charade.

treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

Concerning malingering, she asserted at trial that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing , it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering . ROA 2005-06. Importantly, she reported that the results from the objective testing at Hall Institute did not support a conclusion of malingering. Further, she reported that Dr. Brawley retested Lindsey for malingering and he did not show that he was exaggerating a mental illness or faking on either test for symptoms of malingering. ROA 2005. When asked if she believed he was malingering, Dr. Melikian declared that she did not. ROA 2005-2007.

At trial, she then gave her reasons. She stated that the issue of malingering came up because Lindsay reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him. ROA 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it

was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA 2007.

ANALYSIS

Certain salient factors are not clear. First, the State did not affirmatively present testimony at the trial that Applicant was malingering. It was developed to the jury through the testimony of Dr. Melikian where she affirmatively disputed any conclusion that Lindsey was malingering and claimed the prior evaluators misdiagnosed it - apparently in anticipation that the state would challenge the finding on cross-examination of the psychiatrist. Second, although Dr. Brawley did not testify, her findings and conclusions on the issue of malingering were presented through Dr. Melikian. Therefore, plainly the issue of malingering was investigated by counsel and presented to the jury. It cannot be stated, that from counsel's perspective in 2004, that counsel failed to investigate or present evidence on the issue. He must be found to have failed in his burden of proof on that issue.

However, the Applicant has not proven the opposite of his claim - that in fact Lindsey was feigning mental illness when he was evaluated by the state examiners. As Dr. Melikian recently stated, Applicant revealed to her the creation of Jimmy was an attempt to feign mental illness symptoms, apparently for the purpose of duping them to think that he suffered a major illness. Accepting that admission, it undermines their claim and supports the correctness of Dr. Narayan and Dr. Musick's 2003 assessment that he was malingering. He has failed in his burden of proof.

Further, his complaint that Dr. Brawley was not called as a witness on the issue of malingering cannot be deemed to be ineffective. Her results were presented to the jury on the testing that was done and relied upon by Dr. Melikian. Therefore the although admissible would have been cumulative to the decision to call Dr. Melikian. Dr. Brawley stated that she had been advised prior to the trial that she would not be testifying and prepared her written report for use by Dr. Melikian - consistent with her oral consultation with her. This was not neglect by counsel, but a reflect a conscious decision on counsel Bartosh's part on this issue. The evidence was admitted concerning both of Dr. Brawley's malingering tests as well as the conclusion that the state examiner's objective testing did not show malingering. Counsel cannot be deemed deficient under those circumstances. See Harrington v. Richter, supra.

Similarly the failure to present the cumulative evidence from Dr. Brawley cannot be deemed prejudicial under the Sixth Amendment and Strickland v. Washington. See, e.g., Wong v. Belmontes, 130 S.Ct. 363 at 387 ("Some of the evidence [trial counsel Schick was allegedly ineffective for not presenting] was merely cumulative of the humanizing evidence Schick actually presented; adding it to what was already there would have made little difference.... Belmontes cannot establish Strickland prejudice."); Rhode v. Hall, 582 F.3d 1273, 1287 (11th Cir.2009) (finding no prejudice and reasoning, inter alia, that "[c]ounsel is not required to present cumulative evidence"), cert. denied, --- U.S. ----, 130 S.Ct. 3399, 177 L.Ed.2d 313 (2010).

III. Ineffective Assistance of Counsel - MERCY REQUESTS FROM FRIENDS AND FAMILY

- **A. Failed to adequately present requests for mercy.**
- **B. Failed to prepare witnesses to testify and request jury to show mercy.**
- **C. Failed to call family and non-family members on mercy issue.**
- **D. Failed to ask witnesses appropriate questions to request mercy.**
- **E. Failed to argue the Court's refusal to allow witnesses to request mercy.**

F. Failed to preserve record on issue of mercy by not presenting adequate arguments in support of attempt to present mercy issue and not requesting proffer

MEMO, p. 47.

In his third allegation, Applicant contends that counsel were ineffective in failing to present requests of family members for "mercy" in the case. Respondent submits that the Applicant has failed to prove either deficient performance or prejudice.

In State v. Sapp , 366 S.C. 283, 292-294, 621 S.E.2d 883, 887 - 888 (S.C.2005), the Supreme Court clarified the limitations on certain witness requests of a jury. The Court declared:

In State v. Johnson, 338 S.C. 114, 525 S.E.2d 519, cert. denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000), this Court stated:

> In [State v.] Torrence, we adopted the Georgia Supreme Court's distinction between a plea for mercy and the ultimate question to be decided by the jury: "[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, **a defendant may not present witnesses to testify merely to their religious and philosophical attitudes about the death penalty.... Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach."** Torrence, 305 S.C. at 45, 51, 406 S.E.2d 315, at 318 (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48, 60 (1987)).
>
> In Johnson, notwithstanding the ruling that the trial court should have permitted Johnson to inquire of his sister whether she wanted him to die, we found no prejudice to Johnson because the sister was able to make a general plea for mercy on her brother's behalf in the form of testimony concerning their abusive family life, and the fact that she expressed her love and affection for Johnson at trial.
>
> More recently, in State v. Wise, 359 S.C. 14, 596 S.E.2d 475, 481-482, cert. denied 543 U.S. 948, 125 S.Ct. 355, 160 L.Ed.2d 263 (2004), we addressed the issue of whether the trial court erred in refusing to allow a surviving victim to testify on cross-examination during the sentencing phase of the trial that he did not personally believe Wise should receive the death penalty. We reiterated our holding in Johnson, stating, "[a] close relative of a defendant, such as his sister, may be asked whether she wants the defendant to die, which is akin to asking her to make a general plea for mercy and not explicitly directed toward eliciting her opinion of what verdict the jury should reach." 359 S.C. at 26, 596 S.E.2d at 481.

FN2.

> FN2. However, in Wise, we held the trial court properly prohibited the defendant from inquiring of a security officer who had been shot by Wise whether he thought Wise should be sentenced to death, stating, "[w]e accept as true the proffer by Appellant's attorney Vance would testify he told the media shortly after the shootings he did not personally believe Appellant should receive the death penalty. However, such a statement by Vance would not constitute a plea for mercy on behalf of Appellant. Instead, it would constitute Vance' opinion of what verdict-life in prison versus the death penalty-the jury should reach. Accordingly, the trial judge properly disallowed the question, recognizing it was an attempt to elicit an inadmissible opinion from a witness." 596 S.E.2d at 482.

Under Johnson and Wise, Boles should have been permitted to answer the question as to whether she would like to see Sapp put to death. However, we find no prejudice. Initially, it is implicit from Boles' testimony that she would have answered that she did not wish to see Sapp put to death. Further, given Boles' testimony that she loved Sapp and had known him for years, we find her testimony akin to that in Johnson in which Johnson's sister was able to express her love for him.

State v. Sapp, 366 S.C. 283, 292-294, 621 S.E.2d 883, 887 - 888 (S.C.2005).[9]

Against this backdrop, counsel Bartosh made his decision on the witnesses to present and questions to ask. He presented as noted above in the trial summary, a series of family witnesses:

[9]State v. Sapp was decided after the 2004 trial in 2005, but summarizes the Court's logic that existed before the 2004 trial.

mother Virginia Lindsey[10], father Leon McDowell[11] , cousin Chris Wilkens [12], uncle Steve Pilgrim[13] and aunt Bessie Smith. He also called friend mentor Bill Burton who requested : **"please have mercy on him."** ROA 2076.

In their memorandum, Applicant claims that trial counsel failed to adequately present requests for mercy. He claims that counsel failed to locate and ask questions of family members and friends. However, the record of the trial disputes this assertion because four witnesses: mother, father, cousin and mentor - all made specific requests for mercy and the he not be sentenced to death. Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. [14] However, she *felt* she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would

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[10]Mother Virginia Lindsey testified to the 2004 jury that: "Marion was her son I love him very much. **And I ask mercy for my son not to be sentenced to death.** I know that somebody else's child's life was took. But I don't want my child sentenced to death" ROA 2060.

[11]Father Leon McDowell asked the jury: " **if they can see fit not to execute Marion maybe he can benefit to his kids.**" ROA 2072.

[12]Cousin Chris Wilkins stated to the jury: "just please take into consideration the kind of father he was. **Please have mercy on him.** I know what happened was a big tragedy for everybody. But I mean he is a good person." ROA 2076.

[13]Before the witness testified, a bench conference was held and Judge Few declared that:"that was the last closing argument from the witness that I'm going to allow. I'm not going to allow any other witness es to answer the question is there anything you want to tell the jury?" ROA 2078, l. 15-19.

[14]In the Petitioner's Post-hearing Memorandum , p. 25, they write that "one of the deficiencies that Mrs. Lindsey testified about was that she was directed by defense counsel not to ask the jury for mercy for her son." The record of Mrs. Lindsey's PCR testimony does not support this mischaraterization of her testimony. PCR 368-369.

ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8. However, the record reflected that she did make that request. ROA 2060. The claim must be denied.

In his memorandum, he also claims that if the court refused to allow the testimony about a request for mercy, counsel had an obligation to preserve the issue for an appeal. The record reveals, as stated above, after four witnesses had responded to open ended questions about whether there is anything they would like to tell the jury with requests for mercy and not a death sentence, Judge Few stated he would not allow that question to be asked. Counsel Bartosh did not object. When the remaining witnesses uncle Steve Pilgrim[15] and aunt Bessie Smith[16] testified, no open ended question was asked and neither expressed an opinion on mercy - nor were they specifically asked. In light of counsel Bartosh's death, we are not aware why a different quest was asked eliciting a response on mercy consistent with Torrence and Wise (which was decided on May 11, 2004 just before the trial). However, counsel is presumed competent and the Applicant has failed to dispute it.

Apparently, he claims that had counsel objected it is likely the matter would have been reversed on appeal. However, he ignores the proper test that it is his burden to prove by a

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[15]Steve Pilgrim state post-conviction testimony is set forth in detail within this memo. PCR 426-453. Pilgrim stated that counsel had prepared him to ask for mercy. PCR 445. He then asserted that they told him not to ask the jury for mercy. Id. He proffered what he would have told the jury if he had been asked about mercy that he was his favorite nephew and he made a mistake and "I wouldn't want him to , you know, get the death penalty." PCR 445, l. 13-16.

[16]Bessie Smith state PCR testimony is summarized within. Unlike Pilgrim, she did not proffer any evidence concerning a request for mercy at the hearing. PCR 388-425.

preponderance of the that there is a reasonable probability that the result of the proceeding would have been different. To the contrary, four of his six witnesses had made specific mercy requests to the jury as family member and friend. Second, counsel Bartosh made a plea for mercy and a just punishment of life. ROA 2137, 2146. To that extent, the situation is similar to the situation in State v. Sapp where the Court concluded that reversible error could not be shown even though the trial court erred in excluding a question concerning mercy. As in Sapp, there is cumulative evidence of family and friends requesting mercy. He has failed to establish Sixth Amendment prejudice. See State v. Sapp, 366 S.C. 283, 294, 621 S.E.2d 883, 888 (S.C. 2005); State v. Myers, 359 S.C. 40, 596 S.E.2d 488, cert. denied, 543 U.S. 980, 125 S.Ct. 485, 160 L.Ed.2d 359 (2004) (exclusion of testimony is harmless where it is cumulative to other testimony in the record).

IV. Ineffective Assistance of Counsel - FAILURE TO ADEQUATELY PRESENT DR. MELIKIAN.

- **A. Failed to Provide Sufficient Info to Dr. Melikian to allow evaluation of Lindsey.**
- **B. Failed to obtain and provide historical info and records of family members necessary for proper evaluation.**
- **C. Failed to seek continuance after Melikian informed them she needed additional time.**
- **D. Failed to elicit from Dr. Melikian statutory mitigating factors during testimony.**

MEMO, p. 49 .

In his fourth specification, he contends that counsel failed to provide Dr. Melikian with sufficient information. He asserts that Dr. Melikian needed additional information related to his history to properly evaluate him and the defense team failed to locate and investigate his background and claims that they failed to provide her with information. As previously set forth,

the summary of the evidence of the trial and the state PCR hearing shows that Dr. Melikian has the same opinion of the particular illnesses that she found Applicant possess. As revealed in the cross-examination during both the trial and the state PCR proceeding, her opinion and the material she additional would have been required to reveal were a two edge sword that failed to satisfy the Strickland prejudice prong. While more time and additional information may have made Dr. Melikian more comfortable with her assessment, it would not have changed the result. Strickland prejudice has not been shown. Respondent notes that the witnesses summaries within the Petitioner's memorandum does not summarize any particular items that they feel counsel did not provide.

As shown within, a lot of Applicant's proffered mitigation testimony is double-edged or even aggravating. See, e.g., Suggs v. McNeil, 609 F.3d 1218, 1231 (11th Cir.2010) (noting that "evidence of drug and alcohol use is often a 'two-edged sword' that provides an independent basis for moral judgment by the jury," and that evidence that the defendant spent time at military school because of behavioral issues "was potentially damaging" (quotation marks and citation omitted)); Reed v. Secretary, Fla. Dept. Of Corrections, 593 F.3d 1217 at 1246 (11th Cir. 2010) ("[I]t would have been all too easy for the State to use Reed's own mitigation witnesses to paint him as a violent, manipulative person with long-standing drug abuse issues and brushes with the law.... Here, it was not just a reasonable probability, but a virtual certainty that Reed's 'good' mitigation evidence would have led to the introduction of 'bad' evidence."). Nor would any new medical information radically buttress the experts' testimony, causing it to shift from mere "artifice" to gamechanging revelation that creates a reasonably probability of a different outcome. Bean v. Calderon, 163 F.3d 1073, 1081-82 (9th Cir.1998). His assertions must be denied.

The Post-Conviction Testimony of Dr. Melikian

Dr. Margaret Melikian, the forensic psychiatrist retained by the defense prior to trial in 2004, testified that she spent 7 hours and 45 minutes in preparation for her earlier testimony. PCR Tr. 598, ll. 17-19. Of that time, 2½ hours were actually spent with Lindsey on May 4, 2004. Dr. Melikian stated that she was concerned when she was retained whether she would be ready for trial due to her own lack of experience at the time.[17] PCR Tr. 600. She stated that she accepted the case thinking that if all the mitigation investigation was done, she could be prepared. However, in hindsight, she now declared due to her own lack of experience, she did not understand how much was involved in gathering information, and that the mitigation had barely begun and she now felt that there was no way they could be prepared for trial.[18]

Dr. Melikian indicated that she had received records from defense counsel on April 28, 2004 and made a call on April 28 to get the mental health records from William S. Hall. PCR Tr. 601. Dr. Melikian confirmed that she had requested an opinion letter from Dr. Tora Brawley, a forensic psychologist, who had seen Lindsey. Dr. Melikian stated that she discussed Dr. Brawley's findings with her on April 29. PCR Tr. 601. She later requested a written report from Dr. Brawley on May 18. PCR Tr. 601.

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[17] Dr. Melikian stated this was either her first or second trial as a defense expert. PCR Tr. 599, ll. 14-16. She stated that she was subsequently involved in 15 to 20 cases. PCR Tr. 600, l. 22.

[18] Counsel for Applicant questioned her about an April 30, 2004 (Friday) note in counsel's records that an amount of documents had been sent to the witness on Monday and Tuesday and more was being sent that date. The note revealed that Dr. Melikian had stated "too much" and that she can't be ready. PCR Tr. 599. Notation included a written remark by Michael Bartosh that Dr. Melikian knew the time constraints before she got involved and said she would be OK. PCR Tr. 599-600.

Dr. Melikian stated she requested the written report from Dr. Brawley after she was advised that she would be the only one testifying and would put in Dr. Brawley's findings. Dr. Melikian received the written report on May 20 after the trial had already started on May 17. PCR Tr. 602.

Dr. Melikian stated that "in her limited evaluation", Lindsey did not seem to have a "mental illness defense." PCR Tr. 602, ll. 17-20. She said she went right to mitigation, since he appeared to be competent. PCR Tr. 602, ll. 17-23.

She stated that there was a difference between what she received in 2004 and the material she received in preparation for the PCR hearing which was 6 or 7 times as much. PCR Tr. 603. She stated she had suicide notes, in bits and pieces, and did not have a "complete" file, mental health records, medical records, Department of Corrections' records, or the complete incident reports. PCR Tr. 603, ll. 12-23. She stated that she was not given all the information that the 2004 defense team had acquired. PCR Tr. 603, ll. 21-23. [Her original file was 3 to 4 inches thick]. PCR Tr. 603.

Dr. Melikian stated the additional material she reviewed would have changed her diagnosis because she did not understand the level of depression he was showing at the time of the evaluation and that way she looked at his cognition in his low testing results. Tr. 604. She stated this was due to her lack of a family history and did not spend enough time with Lindsey to realize that he was not functioning at his best level.

Dr. Melikian opined that Lindsey does not show much emotion or depression. She declared again that in her one meeting with him, Lindsey was functioning pretty well. PCR Tr. 605. However, in her more recent meetings, she felt that she had misjudged him in 2004 and

would have changed her testimony.

Particularly, Dr. Melikian stated that she would have explained the severity of his depression. She had already given that diagnosis in 2004, but saw rather than being depressed and upset, but rarely suicidal to genuinely suicidal. She said he had lost a significant amount of weight with decreased energy. She felt he was not functioning well at all. PCR Tr. 605.

Dr. Melikian found his test scores at Hall Institute and with Dr. Brawley showed his level of cognitive ability decreases quite a bit with is depression. She said that in 2004, Lindsey fit the overall picture because she was aware of his problems in school, his speech impediment and low scores. However, in 2004, with the other things he was able to do, she felt the "borderline intellectual functioning" diagnosis that others had given was probably not correct. In hindsight, she now thinks based upon further record review and I.Q. scores, that it was likely due to his depression. PCR Tr. 606.

Dr. Melikian stated she had general information in 2004 about the CDV charges and the assault and battery with intent to kill charges. However, she claimed she did not know that he had not been convicted of most of the CDV and the family dynamics of how often the police were called and the severity of the incidents. In addition, she asserted that the assault and battery charge "appeared to have a large element of self-defense in that" which resulted only in a one year sentence "which would be unusual for a crime that severe." PCR Tr. 607. In addition, she claimed that she had not been aware that he had tried to turn himself in 4 times by going to the police. PCR Tr. 607, ll. 1-6.

Dr. Melikian claimed this paints a different picture of Lindsey of rather than just showing that he had been charged and convicted of assault and battery with multiple CDV charges to "a

more accurate picture of who this person is as opposed to just a list of he bad in school, his IQ is low, and he's had these charges in the past." PCR Tr. 607, ll. 7-13.

In hindsight, Dr. Melikian stated that she did not feel that she was prepared to testify in 2004. She stated she was not aware of a suicide note, that she had called Bartosh's office and told them she was not prepared, and that she had set up a conference call with Judge Few on May 12 where she told him about not being ready to testify. PCR Tr. 607-08. Dr. Melikian testified that she had originally expected to testify on Monday, May 24, with preparation the day before, but was contacted Saturday night and told to be ready Sunday morning. PCR Tr. 608. She stated she spent 30 minutes on the phone with Bartosh Saturday night to prepare.

She described contacting Judge Few in a conference call on May 12 to tell him that she could not be ready for trial. PCR Tr. 608-10.

Dr. Melikian stated that she did not agree with the 2003 report from the State Hospital on Lindsey's competency. She stated they had diagnosed Lindsey with malingering and borderline intellectual functioning. Their reason for malingering was based on atypical symptoms, but by the objective testing, she felt he did not meet the criteria for malingering. She also noted that Dr. Brawley tested for malingering and that Lindsey did not malinger on those tests. PCR Tr. 610.

Dr. Melikian asserted her disagreement with the DMH diagnosis for borderline intellectual functioning. She found that he had higher IQ scores with Dr. Brawley and felt those scores were not accurate because he appeared to be functioning at a higher level, but now knows that he was functioning at a lower level due to his likely depression. PCR Tr. 611. She thought he functioned at a higher level than borderline intellectual functioning [70-80 I.Q.] because he appeared a little better than that and his history revealed he had been able to hold some jobs and

do some things at a higher level. PCR Tr. 611, ll. 8-17.

Dr. Melikian PCR Testimony About Jimmy - Direct Examination.

Dr. Melikian stated that Hall Report that he was malingering was based upon atypical symptoms and his discussions of his friend "Jimmy." PCR Tr. 16-20. Given that and his test scores that showed he was not malingering, Dr. Melikian stated she disagreed with the diagnosis. Id. [This was consistent with her original trial testimony. ROA 2005-2008].

Since the trial, Dr. Melikian said she had learned more information about what Lindsey did at the William S. Hall evaluation, that counsel Brannon described Lindsey talking to a hallucinatory person, Jimmy, who was in the room and pulling out chairs.[19] Dr. Melikian stated when she saw Lindsey in 2004 (and Dr. Brawley), Lindsey described Jimmy as an imaginary friend that he knew was not psychotic experience. PCR Tr. 613, ll. 3-8. She felt that given his level of intelligence it was not far out to not believe that and make a malingering diagnosis with the objective testimony that he was not.

Although Brannon had described his knowledge of Jimmy with Lindsey, Dr. Melikian testified that neither Brannon nor Bartosh told her about the particular experiences they had with Lindsey and Jimmy. Dr. Melikian stated she would have wanted to know this before she reviewed the Hall report. She admitted she questioned Lindsey about it on May 4 and that

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[19] See *Testimony of Doug Brannon*, PCR Tr. 34-36 where Brannon describes meeting at Detention Center, Lindsey not letting him sit in Jimmy's chair and the continued presence of the empty chair at their meetings. See also, PCR Tr. 613, ll. 13-25. See also *Testimony of Mitigation Investigator Lenora Topp* concerning April 2004 interview with Lindsey concerning "Jimmy". PCR 140 (Lindsey tell Topp that Jimmy can to him from God in his early teens). Also, Trial Evidence that "Jimmy" first discussed by Petitioner on date notice to seek death penalty served. ROA 136-137, 2017-2019 (no mention of Jimmy in reports until October 10, 2002, the same date that the notice of intent to seek the death penalty).

Lindsey described him as an imaginary friend, but not in a psychotic way, but as a way for someone with a low intelligence to cope. PCR Tr. 614. He had told Dr. Brawley the same thing. "He did tell me that he had done that with Dr. Narayan and pulled a chair out and behaved in that manner" which she asserted because it was a hostile interview with Dr. Narayan. PCR Tr. 614-15. She recalled during the 2004 trial, he had behaved in the trial in that manner. PCR Tr. 615.

Dr. Melikian felt if she had known what he had done with his lawyers it would have been helpful. She stated in records she had reviewed since the trial, Lindsey was discussing Jimmy while he was incarcerated and made statements that Jimmy had taken over his body or been responsible for the shooting. If she had that information, she felt that "Jimmy" would have been more of a focus of her May 4 evaluation in the limited time that she had as a "mental health defense." PCR Tr. 615, ll. 6-16.

Concerning the jail incident where Lindsey hit his head and former counsel Tullis told them to keep an eye on his client, Dr. Melikian said she never saw pictures in the records she reviewed, although Lindsey told her about it. Tr. 615. Since there was no corroboration provided to her, she did not give it much weight.

She stated that the history she received came from Lindsey, although she met with investigator Lenora Topp on the day of the trial and 30 minutes on the telephone with Bartosh the night before. PCR Tr. 616.

Dr. Melikian stated that Dr. Pamela Crawford was present and Melikian knew she was at court to critique her for the State. However, Dr. Melikian stated she already felt unprepared and did not want to speak with Dr. Crawford that day. She said she needed to continue to review records and reports, although she was not aware that Dr. Crawford had seen Lindsey briefly with

Karen Quimby. PCR Tr. 617.

Dr. Melikian said since the trial she has met with Lindsey 3 times. She felt that she had previously misjudged his cognitive ability in the past. Particularly, she found that he was not depressed, got along with guards and she had contact visits. In reaction to questions about his adaptability in prison, Dr. Melikian described a visit when Lindsey was left unshackled in violation of SCDC policy and the resulting confusion over his shackling. However, she asserted that no one seemed concerned about her safety and that he seemed to be cordial to the guards. PCR Tr. 618-19.

Dr. Melikian, in a proffer after objection, opined this was the least prepared with the least amount of time, since she had been a death penalty case. She stated since then she had calls under similar time constraints and refused to participate. She said she had been bothered by the case since that date and wondered if she should have refused to testify since she was so unprepared. PCR Tr. 620.

Cross-Examination

Dr. Melikian testified that her clinical diagnosis in 2004 had changed since because she did not understand the severity of his depression. PCR Tr. 621. However, she admitted her conclusions of mental illness under Axis I, II, III, IV would be the same thing. Id. She admitted that she testified he was depressed in 2004, but she could not elaborate in full the degree. She pointed out that she was aware of suicide notes, but had not seen them. Similarly, she was not aware of the telephone call to Rod Tullis, which would have been useful to understand his mental state close to the time of the offense. PCR Tr. 621-22.

Dr. Melikian confirmed that she had prior to her trial testimony his medical records, his

teenage psychiatric hospitalization records, and his infant head injury records, although she now claimed they may have been incomplete. She admitted that as to neurological records in 2004, she had Dr. Brawley's letter and had spoken with the neurologist, Dr. Abshur. PCR Tr. 623. She stated she wanted Lindsey to see a behavioral neurologist, but he was seen by a clinical general neurologist who would not be specialized in behavior. Id. Also, she said in 2004 she had the school records, but claimed she did not have all of them. However, Dr. Melikian admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624.

On cross, she admitted that during the trial, she claimed the only additional records she wanted were SCDC records. PCR Tr. 624-25. (See ROA 2031).

Further, in addition to Dr. Brawley's report, Dr. Melikian confirmed that her conversation with Dr. Brawley included actual results of the other testing she did, that Lindsey had problems with attention and concentration. PCR Tr. 626-27. She felt that he had been tested on the RAY Complex Figure Test and tested borderline, rather than the RAY malingering test. PCR Tr. 627. She said Lindsey had been tested for malingering on the SIRS tests and the Test of Malingered Memory (TOMM). PCR Tr. 627.

The Revelation of Feigning Jimmy During the Cross-examination.

Dr. Melikian acknowledged that in 2004 she sought to address the existence of "Jimmy." However, she did not know until the trial that the day "Jimmy" was reported was the day he was served the death notice. As Dr. Melikian stated on cross-examination:

> "One of the reasons that that information would of been so important to me to have is that issue of Jimmy I could have dealt with before trial. As a matter of fact, the first time I met with Mr. Lindsey in preparation, in preparation for this hearing, one of the first things he did was apologize for Jimmy. **When I look back and, you know, now with hindsight, I can see that**

> **Mr. Lindsey started out malingering Jimmy. He was told to do this by some other inmates is the information he's given me since, and he was feigning these symptoms because they told him to act crazy."**

PCR Tr. 629, ll. 11-22 (emphasis added). She stated that when she saw him 2 years later, he did not want to continue this and minimizing it which made it more believable. Dr. Melikian speculated that if she had spent more time with him in 2004 as opposed to meeting him once, "I probably would have gotten that information before trial and would have been able to give much more effective testimony." PCR Tr. 630, ll. 4-7, 12-16.

Dr. Melikian noted that she wished that she had the information in 2004 that he malingered mental illness at the State Hospital evaluation and with his lawyers because he thought it was in his best interest. PCR Tr. 630. She felt she could have explained it with his level of depression and cognitive ability. Dr. Melikian stated in 2004 that Lindsey had a passive suicidal ideation based upon his expressions that he wanted the death penalty. She stated that was suicidal regardless of why he wanted to die. PCR Tr. 631, ll. 9-17.

Dr. Melikian admitted that in 2004 she testified that she would not have made a diagnosis of borderline intellectual functioning, that he did have chronic neurological problems, and that she was aware of the existence of the suicide notes from Lindsey. She confirmed that she had learned in 2004 that in 2001 at 15 years old, Lindsey had a gun and planned suicide, but his cousin talked him out of it. PCR Tr. 632. She also recalled that he stated that he wanted to drive off a cliff, but was worried he wouldn't die. She stated that she learned from Lindsey about his weight loss prior to trial.

Although this was consistent with the information she testified about in 2004, Dr. Melikian opined it was less effective to state that Lindsey told her about his weight loss than

records to show he weighed 200 at one point and then was down to 180 or 160. However, she admitted the State never challenged the statement concerning weight loss. PCR Tr. 633.

She stated that the fact it was on T.V. did not concern her because she had forgotten about the cameras when she testified, but felt she was sleep deprived and was more worried about her ethical duty to Mr. Lindsey due to her lack of preparation. PCR 634. Although she was not confident about her opinion when she was cross-examined at trial, she did not feel it was destroyed. PCR Tr. 634.

Dr. Melikian admitted that she met with investigator Lenora Topp, but could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey. PCR Tr. 635. She stated that prior to the trial date she had only spent 2½ hours on record review, and then looked at records on that date, but could not recall whether she looked at the St. Luke records provided to her on April 30. However, she admitted she felt he met the diagnostic criteria for "major depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-36.

On re-direct, Dr. Melikian felt that she was not made privy to information from Brannon, Quimby and Topp concerning their interviews prior to the trial. She also claimed that she did not know much about Lindsey's family history. PCR Tr. 636. She felt this affected her credibility, although her diagnosis has not changed. PCR Tr. 637.

Dr. Melikian admitted that she had some family history, information about his earlier crime and a N.C.I.C. report. She stated her notes reflected that they had discussed his education and schools, the first time he thought about suicide and what was in his mind, and his problems in his interview with Dr. Narayan. PCR Tr. 638. She admitted that he had told her about trying

to turn himself in four times concerning Standford Wilkins. She admitted that none of this was new information, but she asserted that she did not have another opportunity to see him again, go through his history, review the record again, and corroborate what he told her even though most of it turned out to be true. PCR Tr. 639.

She stated that she would not - in the future - only see a death penalty inmate one time again. She felt repeated evaluations would build a support. She admitted that from May 4 (her meeting with Lindsey) until she testified on May 23, she was not denied access to Lindsey. PCR Tr. 640. She admitted she made no written report in 2004 and the only records were her notes, introduced as Respondent's Exhibit 14. PCR Tr. 640.

COMPARED TO 2004 TRIAL TESTIMONY

Dr. Margaret Melikian, testified in 2004 that she saw Applicant on May 4, 2004. She stated that she had reviewed:

1. His medical records.
2. The records from a psychiatric hospitalization when he was a teenager.
3. The records from a head injury when he was an infant.
4. His neurological records.
5. His school records.

ROA 2003. Dr. Melikian testified that she also reviewed the reports and records from the Hall Institute [DMH} evaluation. ROA 2003.

Dr. Melikian opined that Lindsey had problems in school and had a learning disability and attended special classes for speech therapy. ROA 2004. She also reported that Lindsey was in and accident when he was run over by a car when he was 18/19 months old and suffered a head

injury. Id. She further had information that he had inhaled kerosene at one point. Id. She reported that he had several head injuries. Id.

Dr. Melikian stated that Lindsey had completed the ninth grade and then dropped out of school in the tenth grade. ROA 2004. She reported that he "had trouble with school." Id.

In reviewing his neuropsychological records, Dr. Melikian opined he had some abnormalities having to do with naming and being able to copy designs, dexterity and motor skills and that he had some cognitive deficits. Id.

She also opined that Lindsey had a "family history of depression." She reported that he was treated by a psychiatrist after he had an overdose when he was 15 years old. She opined that at the time of the incident, Lindsey appeared to satisfy the diagnostic criteria for depression. ROA 2004, l. 23-25. She opined that he suffers from "major depressive disorder." ROA 2005.

Concerning malingering, she asserted that the records suggested that while he had been diagnosed with malingering because of his report of hearing voices and his friend Jimmy, by their objective testing , it suggested that he was putting forth good effort.

She reported that Lindsey was then seen by Dr. Tora Brawley, a forensic psychologist. Based upon this testing, Dr. Melikian opined that he was not malingering . ROA 2005-06. She stated that the issue of malingering came up because Lindsey reports that when he was in the hospital at age 15 after an overdose, that an imaginary friend named Jimmy came to visit him and he heard voices that were comforting to him. She stated that he never discussed this with anyone but that his roommate noticed him talking to unseen others. Lindsey stated that when he is stressed that his friend Jimmy is with him and tells him good things and supports him. She stated that after the incident, Lindsey was nervous and reported that his friend Jimmy was with him.

ROA 2006-07. He told her that Jimmy first appeared after his overdose when he was in the hospital and felt he had no friends. ROA 2007. She felt that he describes hearing a voice like an auditory hallucination. She asserted that it was atypical and would be misdiagnosed as malingering.

She also reported that the roommate that Lindsey had at the time looked like Charles Manson and that Lindsey was afraid of him and that was when Jimmy showed up. However, he reported that the roommate only looked scary and turned out to be a nice man. ROA 2007.

As to whether Lindsey would have been operating under the influence of mental or emotional disturbance at the time of the incident, she opined that Lindsey had reported that he had been suicidal for several weeks prior to the incident. He reported that he had weight loss with decreased appetite, feelings of hopelessness and helplessness and sad mood. She felt that he would meet the criteria for depression at that time. ROA 2008. His depression was recurrent. She opined that the depression was acute as opposed to chronic. ROA 2008.

She opined that he had cognitive deficits. ROA 2009. She reported that the testing at Hall Institute determined that he had well below average IQ and "borderline intellectual functioning" close to mildly retarded range with an IQ of 76. ROA 2009. However, she noted that when Dr. Brawley tested him, the scores were in the 80's although it is still below average.[20] She stated that " I would not have made a diagnosis of borderline intellectual functioning" because he does function better than what his test scores look like. She stated that his intelligence is low, he had trouble in school, but he does have some functioning abilities that she would not say were the

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[20]Dr. Tora Brawley, a clinical psychologist with a specialty in neuropsychology made a written report to Dr. Melikian on May 20, 2004. Applicant's PCR Exhibit 11. This is discussed within this pleading in the section related to preparation of Dr. Melikian.

basis of worrying or seeing him clinically for decreased intelligence. ROA 2009. She noted that he had problems with verbal fluency, naming words and processing memory. ROA 2009. She opined that in her professional judgement Lindsey had some kind of brain abnormality that causes his low test scores and sudden neurological findings. She concluded that a source of the abnormality could have been from the head trauma or the incident when he injected kerosene when he was an 18/19 month old. ROA 2010. She referred him to a behavioral neurologist after receiving the results from the neuro-psychologist. She also stated that the suicide attempt at age 15 was the result of an overdose of tylenol and other medications.

Dr. Melikian stated that his neurological problems were chronic. She stated that he had a limited ability to cope with things due to his limited intelligence and by his continuing to have an imaginary friend. She stated his stress with his wife and the separation added to the stress which decreased his coping skills. ROA 2012. She stated that he described the killing of his wife. He told Dr. Melikian that his wife was leaving and taking the kids and that he would never see them again. ROA 2012-13. He told her that he had moved into his cousin's house and planned to commit suicide by driving off the cliff, but he was worried that he might not die. Id. He stated that he begged his wife to return and had written suicide notes, but did not recall what he said. He also told her that he planned to shoot himself and that his cousin had taken his keys and that his mother, brother and uncle and talked to him. He told her that he had been unable to reach his wife because she was blocking his numbers on the telephone. He said that he had been crying which was unusual for him. ROA 2013. He stated that he was able to get in touch with his wife at work where the numbers were not blocked.

Lindsey described to her his weight loss from 225 pounds to 160 pounds. ROA 2013.

On the day of the incident, according to Lindsey, he talked with Latresse for a couple of hours and drove the car home. He stated to Dr. Melikian that he was tires and wanted to drive to his mother - in - laws and "blow his brains out" in front of the house. While there he was driving and talking to his wife's cousin and saw an image in the back and then saw his cousin drive off. ROA 2013. He then stated that he just snapped. ROA 2013, l. 25. Lindsey told her that he followed them , but did not remember that he shot his wife until the EMS people told him ROA 2014. He said he shot four times and shot himself one time and that the police also shot him. Id. He stated that he had asked the EMS people at the scene to let him die. ROA 2014.

She stated that he had a gunshot wound to the head. The wound exited , but did not penetrate the brain. He was shot multiple times by the police. ROA 2014.

On cross-examination, Dr. Melikian admitted that she had not prepared a written report, although she admitted that she had prepared reports when she worked at Hall Institute. ROA 2015. She stated that the first mention of Jimmy was on October 10, 2002 which was the same date that he was served with the notice to seek the death penalty. ROA 2018. She denied that this was evidence of malingering. ROA 2019. She saw this as a coping mechanism for Lindsey. Id. She admitted that he tried to saw it was Jimmy's fault and to avoid responsibility. Id.

She also stated that Dr. Narayan reported in July 2003 that Lindsey was claiming that Jimmy was in the room and pulled a chair up for him and started a conversation with him, but she denied he was malingering. She also referred to Dr. Lauri Barwick's November 13, 2003 report. ROA 2021.

Dr. Melikian confirmed that Lindsey was competent to stand trial, knew the difference between right and wrong and could conform his conduct. ROA 2022.

She admitted that the neurologist, Dr. Absher concluded that he had a normal neurological examination. ROA 2024.

She stated that she did not have his earlier Department of Corrections records when he was serving time for the earlier assault and battery with intent to kill in 1996. ROA 2026-27. She stated that Lindsey had acute periods of depression that he recovered from in between. The State inquired whether he was suffering under depression in 1996 when he shot through the windshield of Stanford Wilkins and was convicted of assault and battery with intent to kill. ROA 2027-28. She stated that she did not have a chronology of his moods for his entire life. ROA 2028. She stated that she relied upon records of his 1988 suicide attempt. ROA 2029-30. She stated that she had reviewed various school records and admitted that they were incorrect in that some showed he had quit in the 10th grade according to him yet others showed he had either repeated 8th grade three times or seventh grade twice instead. ROA 2032. The state pointed out that Lindsey had lied on his application for employment at BMW that he had graduated from Chapman High School. ROA 2032-33.

She stated that it might have been helpful if she had been given a copy of the BMW application and could not state that it would have been helpful to review the entire case file, or to speak with either Dr. Crawford or Dr. Narayan (who had diagnosed Lindsey with malingering) (because she had his report) or Officer Benny Godfrey1, or Latresse Smith. ROA 2037-38. She confirmed that much of what she testified to was based upon her discussion with Lindsey who she denied was malingering. Id.

She denied that depression or his low IQ or his neurological impairment caused him to gun down his wife. ROA 2041-42. She asserted that these should be considered mitigating

factors . ROA 2042. She opined that on September 2002 he was suffering from acute depression. ROA 2043.

ANALYSIS

The Applicant has failed to show deficient performance or prejudice under Strickland. It is apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing. PCR 603. However, she was unable to state with any clarity what particular information she lacked in 2004 was critical to a revision in her assessment. In 2004, she had his medical records, the records from a psychiatric hospitalization when he was a teenager, the records from a head injury when he was an infant, his neurological records, and his school records. ROA 2003. She also had the reports from Hall Institute. PCR 601. She also had consulted with Dr. Brawley who did a series of neuro-psychological testing and received and reviewed her written report. PCR 602. Although she complained in hindsight that she had not been provided all the information that the 2004 defense team acquired (PCR 603), Dr. Melikian was unable to 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. Much of her renewed analysis did not concern the way she gave in rendering a mental health opinion, but was more directed toward a characterization that was being made of the Applicant by the state's evidence of his character. PCR 607 (information about arrests that she was not aware in 2004).

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 allowed the Respondent to additionally develop the negative evidence - as the prosecution would have been developed at

trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang. 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 based upon her reliance of the extensive data - but limited data - had to address the bad as well as the beneficial.

Her PCR diagnosis in 2010 of mental illness under Axis I, II, III, IV would be the same thing, only the degree of the severity of the depression was greater. PCR Tr. 621. Similarly, although she was not aware of the telephone call to Rod Tullis, she was not aware that there was no evidence from Lindsey himself that he ever made the call and no evidence that anyone - other than allegedly Tullis - had actually heard the alleged call, including her own discussion with Lindsey. Although she now wished Lindsey had seen a behavioral neurologist rather than a clinical general neurologist, there is no evidence of what such an expert would have revealed that could have transformed her opinion. Although Dr. Melikian claimed she had limited school records , she admitted she received 18 pages of school records faxed to her on May 4, 2004. PCR Tr. 624. She pointed to the fact she now had better evidence of his weight loss but that it was consistent with her testimony. PCR Tr. 633. Similarly, had she been exposed and relied upon the material presented through Jan Vogelsang, the enhancement of the likelihood of a death verdict became more enhanced.[21] Although she met with investigator Lenora Topp, who prepared extensive summaries of the family history from her interviews with Lindsey , his mother and aunt, Dr. Melikian could not recall the specifics of the information she was provided about Lindsey's family and Topp's interview with Lindsey. PCR Tr. 635. She concluded in 2004 and now that her opinion was the same - he met the diagnostic criteria for "major

[21]See summary of PCR testimony of Jan Vogelsang, infra.

depression" whether she looked at those earlier records and still feel he does after reviewing more records given to her since the trial. PCR Tr. 635-37.

Even if we assume that counsel was ineffective in getting certain unidentified material to Dr. Melikian, the alleged deficiency has failed to show prejudice or even a different presentation. See Wong v. Belmontes, --- U.S. ----, 130 S.Ct. 383, 386, 175 L.Ed.2d 328 (2009) (per curiam) (assuming, for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive). Her allegation must be denied.

The Applicant does not argue, but claims that counsel erred in failing to request a continuance for Dr. Melikian to have more time. The Applicant has only shown that she wanted more time, but not that counsel was deficient in failing to make the request. Dr. Melikian was able to render an opinion to a reasonable degree of medical certainty in her area of expertise. Counsel's failure to request a continuance to make her more comfortable has not been shown to be deficient. As shown above, even with the period of time since the trial her opinion of the particular diagnosis has not change, only an opinion - driven in part by a revelation that Lindsey was intentionally feigning mental illness in 2003 and 2004 - the it suggested the severity of his depression was more severe in 2002 - the Applicant has made no probative showing that there was a reasonable probability that the result of the proceeding would have been a life sentence - nor even that Judge Few would have granted a continuance. Top the contrary, the evidence was that he would have likely denied it - through her own testimony - and that she was directed by Mr. Bartosh to get the job done. See Gardner v. Galetka, 568 F.3d 862 (10th Cir 2009) (Capital murder defendant was not prejudiced by his counsel's failure to provide mental health expert with more time to prepare for penalty phase testimony; despite the limitations under which expert was

operating, expert did an effective job of conveying mitigating evidence regarding defendant's family history, possible organic brain damage, and social circumstances, and there was a risk of opening the door to damaging evidence by introducing further potential mitigating circumstances).

Finally, he asserts, but does not argue that Dr. Melikian should have been asked if there was evidence related to specific statutory mitigating factors. While Respondent admits that some expert witnesses in capital cases are asked that question by some defense counsel, the Applicant has failed to show that counsel was deficient in failing to make the inquiry. In fact, the counsel specifically asked Dr. Melikian whether she could give an opinion as to "whether Mr. Lindsey would have been operating under the influence of mental or emotional disturbance when the incident occurred," a statutory mitigating circumstance. ROA 2007, l. 21-24. Nevertheless, Strickland prejudice has not been shown. Judge Few was responsible for reviewing the evidence and instructing on all statutory mitigating factors shown by the evidence. He specifically instructed on the two applicable:

1. Murder was committed while the defendant was under the influence of mental or emotional disturbance.

2. Age or mentality of the defendant at the time of the crime.

ROA. Tr.2155-56, 2188. The alleged omission of this legal interpretation of her evidence by Dr. Melikian does not create that any omission of the question by counsel Bartosh created a reasonable probability that the result of the proceeding would have been different. It must be dismissed.

V. Ineffective Assistance of Counsel - FAMILY HISTORY OF MENTAL ILLNESS. Counsel failed to present to jury family history of mental illness.

1. **Failed to adequately interview family members to discover extent of Mental Illness.**
2. **Failed to prepare family to present extent and nature of illness within family.**
3. **Failed to adequately argue to court the admissibility of evidence of family mental illness.**
4. **Failed to adequately preserve the record relating to family Mental Illness in support of attempt to present evidence and failing to offer proffer.**

MEMO, p. 50.

In his fifth allegation, he contends that counsel failed to adequately interview family members and present evidence on mental impairments within the family. This issue weaves claims and testimony of family members, the surviving lawyers and investigator and proffered social workers. Respondent submits that there was some evidence presented of some family members mental health problems involving whether aunt Bessie Smith had attempted suicide (ROA 2056)(testimony of Virginia Lindsey) (2082)(testimony of Bessie Smith) and that Steven Pilgrim suffered from illnesses of panic attack and anxiety attack and that his daughter was being treated for an illness described as panic attack (ROA 2080) (testimony of Steve Pilgrim). Petitioner however contends that the defense team failed to identify and present evidence that other family members suffered from mental illnesses. Respondent incorporate herein by reference its responses concerning the failure to retain a mitigation expert to complete a psych-social assessment set out in argument 7.

Respondent submits that the Petitioner has failed to show either deficient performance or prejudice for the reasons set forth therein.

VI. Ineffective Assistance of Counsel - Failure to Retain Prison Adaptability Expert. (Memo - 51-52)
Failed to retain PRISON ADAPTABILITY EXPERT to testify about Lindsey's ability to adapt to prison life.

> others and the relevance of that information to the jury's decision.

Memo., p. 51-52.

In his sixth allegation, Applicant asserts that counsel were ineffective in failing to present a "prison adaptability expert" during the penalty phase as evidence in mitigation. The Applicant relies upon Skipper v. S.C., 476 U.S. 1 (1986) which concludes the evidence of prison adaptability which suggests the defendant would not pose a danger if his life was spared and he was incarcerated must be considered mitigating and admissible. He further seeks support from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, Section 10.11 (2003) which states that 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 adaptation to prison..." He asserts that the defense team failed to retain and present a prison adaptability expert. He further contends that the failure to do so created a reasonable probability of a different verdict.

First, there has been no showing that the Applicant would have been "adaptable to prison in the future or was adaptable in the past." It was primarily prison consultant James Aiken's testimony that the Department of Corrections can manage this type of offender for the remainder of his life without causing an unreasonable risk of harm to staff, inmates, as well as the general community." PCR 207-208. Second, the record reveals a series of violent assaults and threats by the Applicant toward loved ones and others, despite the fact he was under orders to avoid them. Finally, it reveals he was a player in a drug dealing outfit. Further, the Petitioner presented a thorough case in mitigation about the Applicant's background and family, albeit with any

evidence concerning prison adaptability.[22]

The Applicant may be relying upon *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). It is unclear whether Lindsey suggests that his proffered evidence was in rebuttal to any specific evidence concerning prison life or otherwise. In *Gardner,* 430 U.S. at 358, 97 S.Ct. 1197, the United States Supreme Court held that a defendant is entitled to due process during the sentencing phase of a criminal trial. The Court concluded that the defendant was "denied due process of law when the death sentence was imposed, at least in part, on the basis of information

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[22] It is unclear from the allegation whether this is an issue related to the Defendant's mental capabilities, attitude or the prison system's ability to confine the Applicant. There may have been a strategic reason for the decision not to pursue this line of mitigation. Recently, the U.S. Supreme Court addressed strategic claims on deciding not to present mental health evidence. In addressing the decision, the Court stated :

> Without expressing a view on the ultimate reasonableness of the decision not to pursue this evidence further, we note that the Eleventh Circuit majority observed that the state court could reasonably have determined that counsel had strategic grounds for their decision. In particular, evidence about Wood's mental deficiencies may have led to rebuttal testimony about the capabilities he demonstrated through his extensive criminal history, an extraordinarily limited amount of which was actually admitted at the penalty phase of the trial. Counsel's decision successfully thwarted the prosecutor's efforts to admit evidence that Wood murdered his ex-girlfriend while on parole for an attempted murder of a different ex-girlfriend that was strikingly similar in execution to the subsequent successful murder. App. 23-24. Moreover, as the Eleventh Circuit majority noted, evidence of Wood's mental deficiencies also could have undercut the defense's argument that he left school to support his family, suggesting instead that he left school because of educational difficulties. 542 F.3d, at 1305-1306. **Counsel's decision about which avenues to investigate can therefore plausibly be described as strategic rather than necessarily being the product of "happenstance, inattention, or neglect,"** *post,* at ----.

Wood v. Allen, 558 U. S. _, 130 S.Ct. 841 (U.S. 2010) (emphasis added).

which he had no opportunity to deny or explain." *Id.* at 362, 97 S.Ct. 1197.

In *Skipper*, 476 U.S. at 3, 8, 106 S.Ct. 1669, the United States Supreme Court held that the trial court erred in excluding evidence that the defendant was well-behaved in jail between the time of his arrest and trial and that such behavior was probative of his future adaptability in prison. The Court stated, "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7, 106 S.Ct. 1669.

Critical to the assessment of counsel Bartosh's and the defense team's performance in not presenting such an expert is what information the defense team had about Lindsey's character and prior incarceration and their awareness of prison adaptability as mitigating evidence. As shown below, the Applicant has failed to satisfy his burden of proof. Although counsel Bartosh is deceased, the assessment by the Court must lead to the conclusion that he was not deficient in presenting the generalized testimony and the evident risk that it would have limited probative value and a higher risk of negatively revealing Lindsey's dangerousness and potential for violence in a prison setting due to his prior involvement in incidents in his earlier incarcerations - a point any seasonal prosecutor would seek to establish. The evidence conclusively reveals that the defense team was aware - through the notations of counsel Quimby Hatcher of the fact that prison adaptability evidence could be presented through lay and expert witnesses. In addition, the record is replete with the facts of his involvement in violent prison incidents with inmates and guards before his death sentence (and after). A review of the testimony presented leads to the conclusion that there was neither deficient performance or prejudice under Strickland.

Counsel's Testimony on Prison Adaptability Issue

Counsel Brannon testified that he had heard of prison adaptability before, but that was not his issue. Since Bartosh was concerned about sentencing, that was his issue. PCR Tr. 51. He knew it was potentially admissible mitigation evidence from the seminars he had attended. PCR Tr. 51. Brannon's experience with Lindsey at the detention center was within the conference room very cordial. However, he was aware that Lindsey had been in a fight in the jail and received a disciplinary that resulted in him being locked down at least for the first 3 to 4 weeks he was involved in the case. PCR Tr. 52. Brannon stated that they would bring him into the room for their interview "completely shackled." PCR Tr. 52.

Counsel Brannon confirmed that with the awareness of the admissibility of prison adaptability evidence and conduct in jail (and the fact Brannon called a witness in the penalty phase), he knew what witnesses Bartosh intended to call in the penalty phase and there were no jail guards on the witness list. PCR Tr. 53. Brannon admitted, however, that he did not review the records of the 1996 incarceration at SCDC. PCR Tr. 55.

Counsel Quimby Hatcher also testified about her records she made in the case. Particularly, she had noted that as a mitigating circumstance to be considered was future adaptability to prison life. PCR Tr. 249. (Exhibit 18). However, she did not know the particular reason Bartosh did not present evidence in the area. PCR Tr. 249-50. See also PCR Tr. 261-62 (Respondent's Exhibit 6). Her records also reflected summaries of the SCDC records and records from the Spartanburg County Detention Facility documenting his disciplinary history which jail and prison assaults and the potential witnesses from the incidents. PCR Tr. 282-83 (Respondent's Exhibit 9).

PCR Testimony of James Aiken

James Aiken, a former South Carolina Department of Corrections Warden, who has a consulting firm relating to death penalty proceedings and jail and prison security testified at the PCR hearing in support of the allegation. PCR Tr. 201-228. He testified that he had reviewed the correctional files concerning Mr. Lindsey, but had never met Lindsey. PCR Tr. 206. He opined that it was not necessary to meet Lindsey before he rendered an opinion about prison adaptability or future dangerousness. PCR Tr. 206. He stated that he relief upon the records of the Spartanburg County Detention Facility and the South Carolina Department of Corrections' records when he was incarcerated for 7½ months in formulating his opinion. PCR Tr. 207. He also admitted that he have reviewed the records since he was on death row, but claimed that it was not included in formulating his opinion. PCR Tr. 206-07. Aiken opined his observations were that Lindsey had been guilty of crimes of violence in the community and that the Department of Corrections "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." He indicated his opinion was based upon the fact that he had done time before and that SCDC had the capacity to classify him, evaluate his behavior, and had the necessary staff, equipment and expertise to manage him. PCR Tr. 208. He noted that Lindsey did not have relationships with "security threat groups" or "gangs." PCR Tr. 208. Further, Aiken opined he had not demonstrated a propensity toward random and systematic violence against others while he's in prison. PCR Tr. 208. Aiken admitted that since prisons are dangerous, things can happen. He testified that a life sentence without parole is a severe sentence and reduces a person to the lowest common denominator. PCR Tr. 209. He stated he could have rendered the same opinion during the trial. PCR Tr. 209.

Aiken opined that he was qualified to give a favorable opinion as to Lindsey's capacity for adaptation to prison. PCR Tr. 210. He opined that lay witnesses were not so qualified. Id.

On cross-examination, the risks of this generalized adaptability testimony was presented. Particularly, he recognized that it was his opinion that inmates in the Department of Corrections can be managed to avoid injury to other inmates, the general public and prison guards. PCR Tr. 211, ll. 22-25. Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated.

Aiken acknowledged that the best predictor of future behavior is past behavior. He was aware that the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr. 214.

Similarly, he was aware that Lindsey had also been arrested for criminal domestic violence. However, in making the assessment, Aiken stated he had no need to speak with Lindsey about his other arrests and crimes of violence he committed, because he was only basing it on adjudications and official records.[23] He stated that being accused of something and being guilty are two distinct matters. Aiken discounted the fact that he had a source in Mr. Lindsey to ask him whether he did do what he was charged with, but still found it unnecessary. PCR Tr. 215, ll. 5-11.

Aiken also admitted - though not mentioned in direct - that he saw in the prison records

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[23] Even though original defense counsel had created a file and record of a number of violent incidents involving Lindsey against a number of individuals. See Respondent's Exhibits 8-10.

that he was recommended for "anger management." PCR Tr. 215, ll. 21-22. He admitted that this reflected "the potential for violence is certainly there" and he felt the recommendation was to prepare him for his return to society. PCR Tr. 216.

Aiken also admitted that his prior prison record reflected he got into fights and indications he acted violently towards others. PCR Tr. 216. In addition to the March 24, 1996 fight at Dutchman, his jail records in Spartanburg reflected that he had a violent assault in the jail when he got into another altercation with an inmate and an officer. PCR Tr. 217. Aiken stated the incident was resolved by 20 days segregation and the inmate got gassed to control his behavior. Aiken noted that gassing an inmate in a fights is not automatic. PCR Tr. 217-18. He further opined that the use of gas against Lindsey appeared appropriate.

Concerning the fight in SCDC, the incident occurred outside the dining hall. However, the February 13, 2004 incident occurred when he left his cell. He described how the officer who broke up the fight got caught in between and another officer gassed him.

Aiken also admitted that Lindsey had two incidents at Lieber since he was sentenced to death in December 2004 with inmate William Bell and a more aggressive fight in December 2006 with inmate Angel Vasquez. PCR Tr. 221-23. However, Aiken would not agree that the incidents showed on those dates that SCDC was unable to manage Lindsey to prevent violence against other inmates. PCR Tr. 223, ll. 9-15.

Aiken clarified that his opinion was only that he could be managed not to create an unreasonable risk of harm. PCR Tr. 224.

ANALYSIS

Respondent submits that this claim is without merit. Deficient performance has not been

shown. Respondents do not disagree that evidence concerning prison adaptability by lay or expert witnesses as a response to claims of future dangerousness and the Applicant's character under *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) is admissible in mitigation in death penalty cases and should be considered by reasonable counsel.[24] While we agree that defense counsel did not retain and expert in this area, it is clear that the defense team ***considered*** the issue.

The evidence concerning that of the defense team consideration of the issue is shown by the fact that counsel Quimby had included in her notes and summaries that future adaptability to prison life was a statutory mitigating factor. PCR 249. (Respondent Exhibit 18). Also included in the defense tam material were the records of SCDC concerning the earlier incarceration and records from the Spartanburg Detention Center concerning his disciplinary history. PCR 282-283. In addition, counsel noted that evidence of prison adaptability could be introduced from a clinical psychologist. PCR 262. In addition, counsel Brannon stated that he was aware that evidence of prison adaptability was a proper matter for mitigation in a capital case from the seminars that he had attended. 51, 53. In addition, counsel were aware of the jail disciplinaries that Lindsey had been involved in from the records and his visits in the jail where he was locked down. PCR 52.

The mere fact that Bartosh is not available to express his decision on why he not

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[24]*See generally Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (evidence of good behavior in prison admissible in mitigation as relevant to future adaptability); *State v. Shafer,* 352 S.C. 191, 573 S.E.2d 796 (2002) (evidence of violent behavior in prison relevant to future dangerousness); *State v. Tucker,* 324 S.C. 155, 478 S.E.2d 260 (1996) (defendant's future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case).

specifically retain a correctional expert for trial does not shift the burden. As recognized in Harrington, although courts may not indulge " post hoc rationalization" for counsel's decisionmaking that contradicts the available evidence of counsel's actions, Wiggins, 539 U. S., at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions. There is a "strong presumption" that counsel's attention to certain issues to the exclusion of others reflects trial tactics rather than "sheer neglect." Yarborough v. Gentry, 540 U. S. 1, 8 (2003) (per curiam).

What is undisputed is that the defense team was aware of the potential for the admission of evidence of prison adaptability, acquired records of his current and prior incarceration and evidence of his actions in jail, which included gassing, segregation and anger management courses. Further, the evidence is undisputed that as the defense team culled and created witness list - with the understanding prison adaptability was a potential mitigating evidence basis - they did not include any witness on the list - jail or prison guards - to testify about this area. Additionally, Brannon opined that this decision would have been left up to Mr. Bartosh.

The failure to investigate or retain a private security expert in this case is supported by reasonable professional judgment. See Strickland, 466 U.S. at 690-91, 104 S.Ct. 2052 (stating that "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation"). Importantly, as in Harrington, the proffered evidence revealed the two-edge sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless information and emphasis by a prosecutor lay in wait for this type of evidence to be presented due to inconsistent history on being adaptable.

Respondent submits that a trial counsel's not presenting this expert future dangerousness testimony "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. First, the Aiken's opinion that Lindsey would be unlikely to harm guards or fellow inmates in prison were based in large part on the fact that prison authorities would classify him as a maximum security inmate based on his murder conviction. His opinion did not focus on any mitigating lack of propensity to violence in his character - because as shown he had propensity for violence and anger, but rather on the fact that the structured, maximum security prison setting likely would control Lindsey and not permit him to act on any desires to escape or commit acts of violence to other inmates or guards, even though he had done so previously and while awaiting trial (as well as with two other death row inmates since his sentence). They also serve to emphasize the point, not favorable to Lindsey, that the prison system would classify him as a high security inmate because it would consider him to present a potential for violence. Aiken clarified that his opinion was only that Lindsey could be managed not to create an unreasonable risk of harm.

Further, a reasonable attorney could simply conclude that the experts' core opinion-that he could be managed and not be an unreasonable risk of harm to inmates, guards and the public in spite of his having recently attacked a jailer and a history of jail incidents -was weak and would not persuade Lindsey's jurors. Additionally, a reasonable lawyer would have known the evidence focused more on the prison's ability to control Lindsey and all inmates, rather than Lindsey own character, which would have been focused by the prosecution with Lindsey's violent incidents while in custody - with the underlying knowledge of his violence against others - male and female - in and out of custody. A decision to prevent or limit that comparison against the

weakened evidence of prison administration would not be unreasonable. A reasonable attorney could decide that under the particular facts of this case the future dangerousness testimony concerning prison adaptability would not be helpful.[25]

Further, Sixth Amendment prejudice was not shown by the failure to present similar testimony by James Aiken in 2004. As revealed in the cross-examination before this Court, the admission of such testimony was weakened and could have made a death sentence more likely rather than less likely since the risks of this generalized adaptability testimony was presented.

- Aiken noted that you can never say never, but the vast majority of prisoners in SCDC can be incarcerated. PCR 212.
- The best predictor of future behavior is past behavior.
    - the prior correctional records of the crime of assault and battery with intent to kill revealed circumstances where there was an altercation on a highway where shots were fired and the victim was wounded. It was then emphasized - like the present case - that he shot into a vehicle! PCR Tr.

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[25]We note that this is not a case in which the State introduced expert testimony about the defendant's future dangerousness and the defendant was denied an opportunity to directly rebut that testimony with his own expert. *See Clisby v. Jones*, 960 F.2d 925, 929 n. 7 (11th Cir.1992). Nor is this a case like *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), in which the State's two experts testified there was a "high probability" that Williams posed a serious continuing security threat and defendant's attorneys failed to elicit: (1) evidence of Williams's "nightmarish childhood," including criminal neglect by his parents, severe abuse by his father, and his time in an abusive foster home; (2) that correctional officers were willing to testify Williams would not pose a danger while incarcerated; (3) that Williams received prison commendations for breaking up a drug ring and returning an officer's wallet; and (4) an admission *from the State's testifying future dangerousness experts* that the defendant would not pose a threat in the future if kept in a structured environment. *Id.* at 368-71, 373 & n. 4, 395-98, 120 S.Ct. at 1500-02 & n. 4, 1514-15.

214.

- Lindsey had also been arrested for criminal domestic violence.
- Aiken never met with Lindsey about his other arrests and crimes of violence he committed and only based his opinion on paperwork. PCR Tr. 215, ll. 5-11.
- Aiken also admitted "the potential for violence is certainly there" and had failed to mention in direct - that he saw in the prison records that he was recommended for "anger management." PCR Tr. 215, ll. 21-22.
- His prior prison record reflected violence with fights and indications he acted violently towards others. PCR Tr. 216.
- March 24, 1996 fight at Dutchman.
- A Spartanburg Jail violent assault in the jail when he got into another altercation with an inmate and an officer. PCR Tr. 217.
- 20 days segregation and the inmate got GASSED to control his behavior.
- Aiken clarified that his opinion was only that he could be managed not to create an ***unreasonable*** risk of harm, not that he would not be harmful to others. PCR Tr. 224.

Even if counsel's performance was allegedly deficient for not presenting such an expert, no prejudice resulted. There is no reasonable probability that the outcome would have been different had such an expert testified because any possible benefit from such expert testimony would pale in comparison to Lindsey's actual behavior both prior to and after his arrest. The

mixed impact it could have had in this particular supports the conclusion that counsel was not ineffective. See Parker v. Sec'y for the Dep't of Corr., 331 F.3d 764, 788-89 (11th Cir.2003) ("Given the strength of the aggravating factors and the relative weakness of the mitigating evidence Parker argues should have been presented, there is no reasonable probability that, absent the deficient performance, the outcome of the proceedings would have been different. The aggravating factors in this case are substantial."). "Moreover, we have rejected prejudice arguments where mitigation evidence was a 'two-edged sword' or would have opened the door to damaging evidence." Wood v. Allen, 542 F.3d 1281, 1313 (11th Cir.2008), cert. granted, --- U.S. ----, 129 S.Ct. 2389, 173 L.Ed.2d 1291 (2009) (citing Gaskin v. Sec'y, Dep't of Corr., 494 F.3d 997, 1004 (11th Cir.2007); Grayson v. Thompson, 257 F.3d 1194, 1227 (11th Cir.2001)); see Wong v. Belmontes , 130 S.Ct. at 387-90 (finding no prejudice where proposed mitigation evidence was either cumulative of evidence already presented at penalty phase, or would have opened door to damaging testimony).

Here, Respondent submits that the thorough presentation of the horrific evidence in aggravation and the alleged omission of prison adaptability evidence would not have undermined confidence in the death sentence verdict. He has failed to show on this unique record which included evidence about his criminal character that there is a reasonable probability that the result of the proceeding would have been different under *Strickland*. The allegation must be dismissed.

VII. Ineffective Assistance of Counsel - FAILURE TO RETAIN SOCIAL HISTORIAN/SOCIAL WORKER

- Failed to retain mitigation expert regarding psycho-social history of Lindsey and relevance to jury determination .

MEMO , p. 52-53.

In his seventh allegation, he contends that Lindsey failed to present a "family historian." Respondent will combine in this area issue concerning the family history presentation of family and friends at trial, the reasonableness of the mitigation investigation and any deficiency and prejudice concerning the failure to retain a social worker to testify about the family history. These claims are encompassed in the Applicant arguments 5, 7, and 9 within his post-hearing memorandum. Although the record reveals that a social worker was not called as a witness by the defense, it revealed that friends and family members, as well as an expert witness, Dr. Melikian, a forensic psychiatrist, testified at trial. In addition, a mitigation investigator, Lenora Topp, a licensed investigator based in Asheville, N.C., was retained and used by the defense team in this matter. At the hearing , counsel presented family members (Virginia Lindsey, Bessie Smith, Steve Pilgrim, and Tim Sims), Lindsey's friends (Bill Burton and Pat Burton) as well defense counsel (Doug Brannon and Karen Quimby Hatcher) and retained mitigation investigator Lenora Topp. The focus of the testimony was on new witness -social worker Jan Vogelsang.

In his memorandum, the Applicant cites to Eddings v. Oklahoma, 455 U.S. 104 (1982) to suggest that a defense counsel has an obligation to present **all** available mitigating evidence. However, he then asserts that the ABA guidelines states that counsel "should consider presenting "expert and lay witnesses along with supporting documentation . . .to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen that client's culpability for the underlying offense." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), § 10.11 - The Defense Case Concerning Penalty. He asserts that the defense team failed to retain and present a social worker. However, other than that fact, he fails

to point to any particular evidence that should have been presented or how it would have uniquely impacted upon the jury.

Respondent submits that the Petitioner has failed to prove either deficient performance or prejudice concerning this matter. As revealed within the evidence, counsel retained a mitigation investigator Lenora Topp who acquired background data concerning the defendant, acquired a understanding of the family from Marion Lindsey and his mother and provided her summaries to the defense team for their use in deciding what information to present. 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. The Applicant has failed to show how this evidence from the social worker - or its absence- undermined the confidence in the verdict under the standards of Strickland.

Respondent submits that reviewing the totality of the circumstances from counsel conduct at the time, reveal that counsel was not deficient. An assessment of counsel's actions must begin with a review of the testimony concerning what was presented at trial - set out in this memorandum at pages 22-28. Respondent incorporates that information by reference.

Counsel's Testimony

Next a review of the testimonies of counsel Doug Brannon and Karen Quimby Hatcher reveals the Applicant's mental, medical, and family history was reviewed and not ignored.

Counsel Brannon stated that Lenora Topp's name was on the witness list, but was not called. PCR Tr. 55. He stated that she was the mitigation investigator the defense had hired. PCR Tr. 55. He felt that she knew Lindsey's family history as well as Lindsey did. Brannon stated that she was helpful in locating witnesses and providing information about the family

history and relationships. PCR Tr. 55.

Brannon stated that he relied upon Bartosh's decision as to who to actually call, describing him as "still is one of the best lawyers that I had ever met in my life." PCR Tr. 56. Brannon stated essentially that he did not question the decision by Bartosh on who to call or not call. PCR Tr. 56-57.

Counsel stated after the guilt phase verdict, they worked the entire day with Lenora Topp going over notes and sharing information that she had learned about the potential witnesses. PCR Tr. 57.

Brannon also testified that Karen Quimby, an assistant public defender, got involved one month prior to trial. He saw her role to assist in organizing the files and summarizing information within the file. PCR Tr. 58. Quimby would create short outlines for each witness and interject cases from research. Brannon felt that she was a full participant in the discussions. However, he recalled that she was not present when Brannon and Topp went to see Mr. Lindsey's mother and the cousin. PCR Tr. 59.

Counsel stated the only penalty phase witnesses he recalled personally interviewing were his mother and Bill Burton. He recalled he met with Mrs. Lindsey that week or ten days before the trial and he met with Burton during the 24 hour recess. PCR Tr. 61. He recalled meeting with the cousin, Chris Wilkins, on the day he met with Lindsey"s mother. PCR Tr. 61. Also PCR Tr. 59. Brannon also recalled interviewing the paramedic by himself, but possibly over the telephone. PCR Tr. 61.

Counsel stated that he interviewed the paramedic to develop that Lindsey had tried to kill himself by shooting himself. PCR Tr. 67.

Counsel stated he interviewed Lindsey about the Wilkins incident.

Counsel said that Lindsey's consistent story was that he was selling drugs and made good money. PCR Tr. 68. He stated Nell would then tell him to stop because she did not want him to get caught and go to prison. Then, Lindsey would stop and get a regular job, but he was not making the money. Brannon opined that Lindsey felt if he kept selling drugs, Nell would leave him because of the potential danger. However, he also felt that if he quit and got a real job, she would leave him because he had no money. PCR Tr. 68.

Testimony of Lenora Topp (PCR Tr. 106-162)

During the PCR hearing, former private investigator Lenora Topp from Asheville testified that she was retained in Mr. Lindsey's case as a mitigation investigator around April 16, 2004, about one month prior to the trial. PCR Tr. 108-09. She stated that the Public Defender advised her that her main job was to gather records and claimed they did not discuss the possibility of testifying as an expert witness until trial. PCR Tr. 108.

After reviewing her voucher and time spent on her mitigation investigation (PCR Tr. 109-113), she opined in hindsight that she did not have sufficient time to do the work that was needed. PCR Tr. 113. She stated that in a North Carolina case, she had spent 3 years in mitigation preparation. PCR Tr. 113. she stated she was not asked to do a genogram. PCR Tr. 113-14.

She testified that she attempted to locate Dr. Barry Henderson, the family doctor, after Virginia Lindsey met with her and Doug Brannon. PCR Tr. 114. She described Dr. Henderson as also a friend whose children played with Lindsey when he was growing up. Topp stated she had a dual purpose in seeking him out for Lindsey's medical records and whether he would be a

mitigation witness for them. PCR Tr. 114. Topp said Virginia had initially given her the wrong name and Lindsey had corrected it while they were in court, but when she contacted his office there was no answer or response to a faxed request. PCR Tr. 116. After the trial, she asserted that Dr. Henderson contacted her stating he was sorry that he could not help, like and trusted Lindsey to play with his children and would have been glad to testify what a good person he was. PCR Tr. 117. Topp stated when she learned this she sent an email to Karen Quimby the day after the trial stating she had continued to contact Dr. Henderson and ask about Applicant's records. She stated - in the email - that Lindsey only told them in court that he wanted Dr. Henderson as a witness because he used to play with his children. In the email, Topp stated that Virginia has seen the doctor recently and had not ask him to be a witness. Topp also expressed in the email that she felt that she had not done enough for Lindsey. PCR Tr. 118. [Dr. Henderson died April 9, 2006]

Topp described that as a mitigation investigator it takes time and multiple meetings to get most witnesses to trust and divulge information. PCR Tr. 115-16. In addition, it may take time to jog memories she asserted. PCR Tr. 116.

Topp also stated that she was not aware of a note from the Solicitor's Office investigator to the defense by a person who had called indicating he had an affair with the victim. She stated that had she known, she would have followed up on it. PCR Tr. 119. (Applicant's Exhibit 6). She stated that she was still seeking records on Robin Keith and (Aunt) Bessie Smith during the trial, with release forms dated May 21, 2004 and May 24. She stated that she was not asked to get family records, other than Marion's. PCR Tr. 120. In addition, she stated she was not asked to interview Rod Tullis. PCR Tr. 121.

On cross-examination, Topp stated this was her first case in South Carolina, but since handled other cases in Greenville and Spartanburg Counties including Kamel Evans. She stated that she did not spend 3 years on those cases, asserted she had spent no more than two months on those also declaring "I didn't have enough time on those cases either." PCR Tr. 122.

Topp testified her first meeting with Lindsey was a 3 hour interview on April 16 when he provided "everything he could remember" about family background starting from the day he was born, the accidents he was in when he was run over, his very poor upbringing and how they shared rooms, and that he was not raised by his father. Lindsey told her he would not want his children raised without a father because he never had a male figure in his life. PCR Tr. 123. She said they talked about everything up to the incident in the police parking lot. PCR Tr. 123.

Lenora Topp stated that she learned about Lindsey's imaginary friend Jimmy, but he was not in the room during her meeting. PCR Tr. 124.

Concerning the reasons he shot his wife, Topp stated that Lindsey would not remember part of it stating he just went to his brother's house to calm down, but he was not there. He told her he was upset with his wife having an affair with a man who would take over raising his children. He told her he saw Celeste, but not who was in the back seat. He said he approached Celeste to ask what was going on and that he wanted to see his children and could not. He described to Topp that when he saw his wife in the back seat, he wanted them to pull over, but they drove off instead. PCR Tr. 124. Lindsey knew he followed them, he just shot when they got to the police station. PCR Tr. 125.

In discussing his mother, Lindsey told Topp she got names and addresses of potential witnesses from him. She recalled two major interviews with Lindsey on April 16 and April 25.

PCR Tr. 125. She noted the summaries of the interviews - State Exhibit 2. The exhibit revealed information about Virginia and father Leon McDowell who had a distant relationship with Applicant and that Lindsey felt bitter towards him. PCR Tr. 127. She confirmed he had hatred towards him because they never could do anything together, describing how others would go off and fish, but not his father. PCR Tr. 128.

Topp stated that Lindsey claimed he had no clothes and had to wash them out every night. PCR Tr. 128-29.

Concerning his relationships with his brothers, Lindsey told her that brother Paul's drowning was emotional for him about 7 years ago. She stated she got his death certificate. PCR Tr. 129. His relationship with Paul Frederick was very close and Lindsey claimed the death affected him for 3 years. She recalled he had moved with Paul to work construction in (West) Virginia, but Applicant got home sick and came back. PCR Tr. 129.

She described that Lindsey felt Tim Sims was the father of the household for Lindsey and he followed him everywhere, but they had different fathers. PCR Tr. 129. She said that Sims' father was the only father figure Applicant had. PCR Tr. 130. Topp reported that Applicant told her that they would eat a lot of bologna as he was growing up as his main food. PCR Tr. 130.

Concerning his drug sales, Topp was told by Lindsey that he sold drugs on and off when he needed the money. He said the drugs afforded him the better lifestyle he wanted to live with including houses, cars and the ability to buy things for his children. PCR Tr. 130. However, Lindsey had denied that he ever used drugs. PCR Tr. 130.

Topp said she was told that his father's family had taken warrants against him (Leon McDowell, Jr.), got along with him (Teresa), and considered Applicant to be an outsider

(Orlando). PCR Tr. 131-32. She was also told about how he related to Claude Lindsey's children. Id.

Topp stated her interview document with Lindsey (Respondent Exhibit 2) was given to Karen Quimby and also included educational history, which reported his school disciplinary actions. These reports included fights against boys and girls, that he was suspended for a week according to Lindsey. PCR Tr. 133.

She reported that Lindsey reported as a traumatic event when his two uncles threw his favorite cat into the wood heater while it was alive. PCR Tr. 134. Topp reported that she reacted with shock and tears and felt it should have impacted on his life and was disturbing. PCR Tr. 134.

She reported that he told her that he quit school and took some jobs. He reported to her a car accident when a tire blew out and claimed a loss of memory and had to have facial surgery and broke his hip. PCR Tr. 135. He told her he was out of work for a year. she 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. He told her that he thought it was a boring job and complained about the women gossiping, but felt he advanced in the job. PCR Tr. 136.

Topp reported that he advised her of his girlfriends. He reported to her that Stephanie Petty was his girlfriend from 1992-1996. Though Topp did not recall the reason for the break-up she did not recall it as an "ill-parting." PCR Tr. 137.

Topp also learned from Applicant about Bill Burton. He reported to her that Burton was a plant manager and had offered him a job. Further, their relationship went back to when Burton was a lifeguard and began a friendship with him then and took him fishing at their pond. PCR

Tr. 137. Further, Topp learned that when he was fired he tried to get him re-employed. Lindsey worked at the plant for two years. PCR Tr. 137. As to Burton's mother (Patsy), Lindsey reported to her that she was friendly and took care of him when Bill was not there (when he went fishing). PCR Tr. 138.

He also related to her generally about past incarcerations and the shooting of Stanford Wilkins. PCR Tr. 139.

Topp reported to the defense her general impressions of Lindsey. PCR Tr. 139. She stated to them that he had a hard time in life and did not want to be a drug dealer but ended up there because the money was good. PCR Tr. 140. she said he gave Nell money to take care of the children, but claimed she spent it on boyfriends. He said he also gave his mother-in-law money and fill her car with gas. Id. He tried to show that in his heart he was a good person and tried to keep the drug dealing from his mother because he did not want her to see his weakness. PCR Tr. 140.

Topp stated Applicant also told her about having a friend named Jimmy who told him God had sent him. Id. She reported that "Jimmy" had arrived in his early teens. Lindsey told her that he was resigned to dying and regretted that he did not have enough time to spend with his children. PCR Tr. 140.

Topp confirmed that her interview notes of the meeting on April 16, 2004 with the Applicant revealed a long interview. PCR Tr. 141. She had broken down her notes into various subsections, including Lindsey, background, educational and employment history, about Nell Lindsey and about his mother Virginia. PCR Tr. 141-42. (Respondent Exhibit 3). She stated she prepared the summaries of her interviews at counsel's request. PCR Tr. 142-43.

Topp also prepared a summary of her interview of Virginia Lindsey which occurred May 15, 2004. PCR Tr. 144. (Respondent's Exhibit 4)

Topp stated she was referred to the defense by Jeff Bloom. She stated the defense asked her to locate identified witnesses, serve subpoenas, and try to get records. PCR Tr. 145.

Topp stated she got some mental health records of Lindsey and sought records for Bessie and Robin. She also retrieved hospital records related to Lindsey's prior injuries, including a return trip about the head trauma when he was run over as a child. PCR Tr. 146. She also received school records for Lindsey, though she said they may not have had all due to the school being burned down. PCR Tr. 147.

Topp stated her role as a mitigation investigator was to gather records and information "to keep him from getting the death penalty." PCR Tr. 147. She clarified that it was to gather information, both negative and positive and then let the counsel sort through it. PCR Tr. 148.

Topp identified and described her own attempts to communicate with Lindsey's former girlfriend, Stephanie Petty, up to 2 days prior to the trial. PCR Tr. 148-49.

Topp claimed she did not know she was to be a potential witness in the trial and has never testified in a death penalty trial. PCR Tr. 149-150. however, Topp stated she talked with counsel Quimby on a regular basis and was in her office frequently. PCR Tr. 150. She stated she continued to seek document s during the trial. PCR Tr. 150. During the trial, she also met with witnesses outside court to keep them calm and tell them to be honest and responsive to the questions. PCR Tr. 152. Prior to trial, she recalled the meetings with Virginia and talking with Bill Burton on the phone. PCR Tr. 153.

Topp recalled that around April 19 sending an email to counsel Bartosh about the impact

of Lindsey's brother's death upon him and probably stated that the psychiatrist would have a lot to work with and "he definitely had anger management problems throughout his life." PCR Tr. 154. Further, she recalled that around May 12, she reported to counsel questioning who tried to help this kid who from day one cried for help and no one did, after she had received school records. PCR Tr. 154-55. Topp also confirmed that she suggested subpoenaing the family members that were using mental health facilities - Bessie, Steve, Paul and Virginia. PCR Tr. 155.

She confirmed that she was not an expert in mental health area. PCR Tr. 158. She stated that she made notes and provided then to Quimby. PCR 160. She stated that she was not retained in the case in 2004, so she was not "involved immediately" in his defense. PCR Tr. 161.

Family and Friends State PCR Testimony

At the PCR hearing, the Applicant present a series of family members and friends who testified concerning the family history and their knowledge of Lindsey's life and worth. Implicitly, the Applicant was claiming that such evidence would assist in presenting a background to a social historian and could have been presented in more detail or in a more persuasive manner. However, contrasted with the information that counsel had in 2004 and what was used at trial; Respondent submits that it reflects a reasonable decision not to use in the unpersuasive and inconsistent detail it was presented. Additionally, the failure to present it in the manner did not show a reasonable probability that the result of the proceeding would have been different under the Strickland test. See, e.g., Johnson v. Bell, 344 F.3d 567, 573-74 (6th Cir.2003) (although testimony from family members would have helped to humanize the defendant, the jury could have concluded that he was even more culpable because he had enjoyed

a loving family and yet had murdered his wife); Martin v. Mitchell, 280 F.3d 594, 613-14 (6th Cir.2002) (defendant did not show prejudice at the mitigation phase where family members testified about his background and a psychological report was given to the jury); Scott v. Mitchell, 209 F.3d 854, 880-81 (6th Cir.2000) (finding that potential mitigating circumstances were overwhelmingly negated by other evidence about the defendant's background).

Virginia Lindsey's PCR Testimony

PCR Tr. 327-386

In his memorandum, the Applicant describes Virginia Lindsey, the Applicant's mother's PCR testimony as "vastly different" than her trial testimony. Applicant's Memorandum, p. 21. Respondent agrees that there was more detail in the post-conviction testimony, but that the He now suggest in lieu of the brevity of her trial testimony (ROA 1674-77, 2044-2061), [26] the alleged details within her PCR testimony was necessary to humanize Lindsey for the jury and to support the testimony of the mitigation expert.

Mrs. Lindsey testified that she grew up in Inman and went to the 10th grade. PCR Tr. 329. She described having three sisters and five brothers and was the third child. PCR Tr. 330. Only one of her sisters graduated from high school. Of the children, she thought only her brother Paul had difficulty learning.

Her parents were Ruth and Smiley Pilgrim, her father leaving when she was 13. PCR Tr. 331. She said the two youngest were not Smiley's children. She said he stopped coming around for seven years, only stopping by later for couple of days when she was 20. PCR Tr. 332.

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[26]A summary of Virginia Lindsey's trial testimony is set out in this Respondent Memorandum, pages 22-24.

She said she went to work at Inman cotton mill from age 17 to 19. Although some fo the family worked either in the mill or a nursing home, money was tight because her mother was unable to work causing them to pick peaches and cotton so they could survive because the father was not providing any money. PCR Tr. 333. She described their house (with 10 people) as a pretty big 2 story house with 4 bedrooms. They used a coal heater to keep warm and used quilts to keep the drafts out around doors and windows. PCR Tr. 333.

Her Children

Mrs. Lindsey stated she married her husband when she was 17 for three years before they divorced. She stated they had three children, Claude, Vanessa (who died in a car accident at 7 months) and Frederick. She stated she still ld with her mother all this time during the marriage. PCR Tr. 335. She described this house as a smaller 4 room house with only two bedrooms.

When Marion Lindsey was born, Mrs. Lindsey stated they lived in her own house on Old Furnace Road. PCR Tr. 336. She recalled that the Applicant was 7 years old when they moved out of her mother's house. She said at various times there were 11 to 12 people living in the 4 room house.

Mrs. Lindsey described her daughter Vanessa's death as "pretty hard" because they had to wait for someone to carry her to the hospital. She felt it took a year to come to her senses and affected her ability to deal with day to day matters.

Mrs. Lindsey stated she had a live-in boyfriend for 20 years, Roger Sims [Tim Sims' father]. However, Roger had a drinking problem and became violent, including toward Marion and the boys. PCR Tr. 339. She said on occasion, the Applicant would run across the street to get her mother when Roger was fighting her and when she got there Roger would leave. PCR Tr.

339.

Mrs. Lindsey stated that the Applicant's father was Leon McDowell. She said he never lived with them and had his own family. PCR Tr. 340. McDowell did not have much interaction with Lindsey "like a father" and every once in a while he would show up about once a year and give him money or allow them to use a credit card for his clothes. PCR Tr. 340-41.

she described how the other children would get to spend time with their fathers on weekends, but Marion was left because his father was not visiting. PCR Tr. 341.

She described head injuries that the Applicant received. She described when he was one year old, her brother Paul backed over him with a car, resulting in scars around his ear and head. PCR Tr. 342. When he was 6 or 7 he fell and injured the front of his head which required him being carried to the doctor. However, two weeks later, Lindsey fell off her girlfriend's porch and hit his head in the same place. Then, when he was 16 he had a car accident and he was injured resulting in scars around his eye. PCR Tr. 342. The Applicant was also accidently poisoned by kerosene when Lindsey was 8 months old when he had poured a jar on his face and clothes and was gasping to catch his breath. Although his mother tried unsuccessfully to get milk down him, they went to the police station and then the rescue squad took him to the hospital. PCR Tr. 344.

Mrs. Lindsey described her brothers, Paul and Willie, who were both heavy drinkers - Paul more than Willie - and would "love to fight a lot and beat their girlfriends." PCR Tr. 345. She described Paul getting into more fights and carrying guns and knives. PCR Tr. 346. She recalled a time when Paul got into a fight at 3 a.m. and came home and kicked in the door and got his mother's pistol and went out the door shooting and then someone shot back through the house. She described everyone getting down on the floor. PCR Tr. 346-47.

She also described an incident concerning Marion's kitten. She said Willie and Paul did not like the cat and one night threw the kitten in the heater. PCR Tr. 347. She said Lindsey was there when this happened. PCR Tr. 347-48.

She described one of the Applicant's brothers Frederick (known as Fred) as not getting along with Lindsey. She said Paul thought she cared more about Marion than him because when Fred and Marion stayed out one night, she gave Paul "a whooping", but not Marion who she "sent to school to punish him." PCR Tr. 348. She said Fred drowned in Jocassee Lake in 1998 when he was 27 without finding his body. PCR Tr. 349. Marion was 23 at the time of his brother's death. Id.

While they were living on Bobo Street, she said they were exposed to drinking, drug dealing and violence in the neighborhood (but not in their apartment). PCR TR. 350. However, she said Marion did not live with them much on Bobo - it was just Tim Sims and her. PCR Tr. 350. She could not state that she saw Lindsey sell drugs on Bobo, but she had a feeling he was selling. PCR Tr. 350.

She described an event when Lindsey was 15 and got into a fight with Fred while she was at work. PCR Tr. 351. She said the oldest son, Claude, called her at work and told her to come home because Marion and Fred were fighting. When she arrived Fred and his half brother were fighting Marion. Id. When she got there they had the Applicant on the ground and Claude had a stick and they got off him. She told Fred and his half brother to leave and don't come back. She said Fred stayed gone for a week or two before he came back. PCR Tr. 351.

She described another incident when Marion and Fred were fighting one night over the use of the telephone. When she tried to stop them, she said Marion "hauled off and held me

down on the bed." She said she told Lindsey to never ask her for anything else in her life because she won't give him anything and "I don't love you no more and you don't treat your mama like that." PCR Tr. 353, ll. 6-15. She stated Lindsey did not like that, went into the bathroom and took a whole lot of pills. While she remained on the bed watching TV, she heard her son Tim call for his father. Next, Roger Sims came to her and told her to call the rescue squad because Marion had taken pills and was on his knees throwing up. She went and saw him by the commode and he had taken Tylenol, Advil, and Ibuprofen. He was carried to the hospital where they pumped his stomach and then was put into mental health treatment for two weeks. She said they sent him home after that and did not tell her to bring him back. PCR Tr. 353. She never sought any follow-up. PCR Tr. 354.

She said Lindsey had difficulty in school. She stated he was always repeating, could not learn, and got D's and F's. PCR Tr. 354. She stated he left school at age 17. PCR Tr. 355.

Although he did not get a job when he left school, his mother felt he got money first from his girlfriend, Stephanie Petty, and then after that by selling drugs. PCR Tr. 355. She said his drug sales helped her because he made the house payments from his proceeds. He also used the money to help her with payments on the mobile home and groceries. PCR Tr. 355-56.

She said Lindsey would briefly get a legitimate job for 3 to 4 months and then quit it to go back into drug dealing. PCR Tr. 356.

Mrs. Lindsey stated that while Lindsey was living with Stephanie Petty, Nell got pregnant with the Applicant. PCR Tr. 356. She described Nell and her mother always showing up at Lindsey's house asking for things for herself and the baby. After a while, Stephanie got tired of it and left. PCR Tr. 357.

She stated that when Stephanie left, Lindsey got more serious and eventually got married after their oldest was 5 or 6. PCR Tr. 357. They had two children. She testified that she observed Marion, Nell, and the two boys at her house all the time. PCR Tr. 357. Mrs. Lindsey opined he took care of them by taking them to the barber, out to eat, to the park. PCR Tr. 358.

She described the relationship with Nell that they argues a lot, but she never saw Lindsey hit Nell and it was all right because everyone is going to have ups and downs. PCR Tr. 358. She said that Nell and Lindsey had already broken up before the shooting, but he had not told her or she did not know it, although he hung at the house a lot. PCR Tr. 358.[27] She said she did not [and could not] have any conversation about a breakup, although Lindsey stayed around her house talking to Nell on her telephone. However, one night he asked her to take groceries over to Nell so the children would have good. PCR Tr. 359.

Concerning the first separation from Nell, she said Lindsey was not angry with her because she would go and come back.

She said that they were separated a month before the shooting, but Mrs. Lindsey felt they were still together because one Sunday they all went out to eat together. PCR Tr. 359. After they ate Lindsey dropped Mrs. Lindsey off and went off with Nell and the family. PCR Tr. 360.

Later, Mrs. Lindsey stated that she learned Lindsey was not seeing the children when he asked her to call Nell and tell her to bring the boys to her house so he could see them. When Mrs. Lindsey called, she said Nell's mother answered the telephone and in response Nell later returned the call and said for her to tell Marion that she was not bringing the boys over there and he was not seeing them. PCR Tr. 360. Mrs. Lindsey said she then called Lindsey and told him

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[27] [contradiction].

and he told her that if she was not going to let him see them that he was going over to get them. When she called Nell back, Nell told her to "come one, come on." PCR Tr. 361. She told him not to go over because Nell would have the police waiting. Fifteen minutes later the police showed up at Mrs. Lindsey's house and she told them that Lindsey did not live there. When she called Nell and asked her why she sent the police, Nell denied sending them. PCR Tr. 361.

Mrs. Lindsey stated after that she did not think Lindsey ever saw his sons. However, Mrs. Lindsey stated that Nell still carried her to bingo. One night, she asked to keep "the baby", and thought Nell would bring him back after she changed his clothes, but never did. PCR Tr. 362.

She described an incident the first week of September. PCR Tr. 362. She stated that she received a telephone call from Tim while she was at work that Marion had called him and was saying he would kill himself. After discussion that she told him to go and talk to Marion, she left work. She arrived with her brother Steve (Pilgrim), her sister Bessie, and Tim and tried to calm him down. She said Steve gave Marion "a nerve pill", Bessie prayed and they stayed with him until 8 p.m. PCR Tr. 362-63. She said Lindsey gave them some suicide letters for her, Tim, and Trey and Alex (his sons). PCR Tr. 363. She said she carried the notes to her house put them in a box and after the later shooting returned them to Rod Tullis. PCR Tr. 363. Though she requested that they call the rescue squad, her sister talked her out of it saying they did not need to. PCR Tr. 363-64.

Virginia Lindsey stated she met with Brannon and Lenora Topp on Saturday evening prior to trial for one hour. She said they talked about what happened and she told them she did not know what or why it happened. PCR Tr. 364. She said they also talked to Bessie that night.

Mrs. Lindsey claimed this was the only meeting in preparation for the testimony. In hindsight, she did not feel that they ask her enough questions and did not ask any background questions. PCR Tr. 365. She felt this meeting was about 2 weeks before the trial. She did not recall being asked to sign any releases for her medical or school records, but would have done so if asked.. PCR Tr. 366.

Mrs. Lindsey admitted that she talked to them about Dr. Barry Henderson. PCR Tr. 367. He was Marion's doctor from when he was a baby til grown. She said he had a relationship with Lindsey because he used to play with his children at a game room that Dr. Henderson owned. Id.. She felt Dr. Henderson could have testified about his treatment of Lindsey, as well as what type person he was. PCR Tr. 368. He is now deceased though. PCR Tr. 368.

Concerning mercy requests, contrary to the assertion in the post-hearing memorandum of Petitioner, p. 25, Virginia Lindsey testified that she did talk to the defense team and "they did" prepare her to request the jury to have mercy on her son. PCR 368, l. 14-18. [28] However, she felt she was not prepared to make a mercy request at trial. She claimed that if she was prepared, she would have asked for mercy on her son because she had lost a son and "would ask for mercy that he not get the death penalty." She stated that he had to be punished, but not the death penalty because it hurts to lose someone. She said she not only lost a son, but that she lost a daughter, a son, and two grandsons. PCR Tr. 369, ll. 1-8.

Mrs. Lindsey asserted that over the last 6 months she had spent around 20 hours with

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[28]In the Petitioner's Post-hearing Memorandum , p. 25, they write that "one of the deficiencies that Mrs. Lindsey testified about was that she was directed by defense counsel not to ask the jury for mercy for her son." The record of Mrs. Lindsey's PCR testimony does not support this mischaraterization of her testimony. PCR 368-369.

professionals, investigators and attorneys. PCR Tr. 371.

On cross-examination, Mrs. Lindsey admitted in her meetings with Doug Brannon and Lenora Topp that they may have also talked about family history. PCR Tr. 372. She corrected herself and admitted at some point that she told them about

- having two miscarriages
- her first son was Claude
- her daughter Vanessa was killed in car crash
- her second son Frederick died in the lake and body was not found in 1998
- Marion's father was Leon McDowell who did not pay child support
- fourth son was Tim Sims
- Tim Sims, Sr. helped out with kids for 17 years
- Tim Sims was on disability from Milliken where he worked until he got sick with a series of strokes

PCR Tr. 373-74.

Virginia also told Brannon and Topp:

- all three of her sons have children
- Marion was the only one who married the mother of his children
- none of her son's finished high school
- she worked shifts in factories, particularly the second shift
- that she had spoiled Marion "a little bit", because he did not have interaction with his father
- that her mother was deceased
- that she and her family were very poor
- that she had 8 siblings and each had 2 or 3 children
- that they grew up together

PCR. 375-76.

Virginia Lindsey also testified that she told them Marion was run over as a child by her brother, but that she was at work when this happened and sister Bessie picked her up. She told them that this resulted in the bad cut to his ear and head. In addition, she told them about Marion

falling and hurting his head on the concrete porch. PCR Tr. 377.

Concerning the pill incident, she confirmed that she talked with Brannon and Topp about it and that

- Fred and Marion always argued
- Marion took it hard

PCR Tr. 377-78. She told them about efforts to get the death certificates.

She also spoke with them about his relationship with Stephanie Petty and liking Petty's grandmother. PCR Tr. 378. Concerning Nell, she told them that she thought she was a nice girl and like her and that Nell and Lindsey had problems over money. She stated to them:

- she knew Lindsey was selling drugs, but did not see it
- she knew he spent money on her and household from selling drugs

PCR Tr. 379.

Concerning the pill overdose incident, she did not recall telling the doctors that he was a stable kid and did not cause any major problems. PCR Tr. 380.

Mrs. Lindsey stated she have talked with them about how his family was important to him, but that she was aware he had other girlfriends while he was married, including at the time of the shooting. PCR Tr. 380-81.

Concerning the car incident, she spoke to them about it, but admitted she did nothing to stop it. PCR Tr. 381.

While she admitted she thought about calling to get help at the September 2004 meeting about talking Lindsey out of suicide, that she did not. She admitted the only time she sought help was when he took the pills. PCR Tr. 381. She recalled meeting with a doctor because of his release, but did not recall what they talked about other than that Mrs. Lindsey did not want him to

go to a mental hospital because he was not crazy. PCR Tr. 382.

On re-direct, she stated that in discussions with Doug Brannon and Topp, she was confirming some information that they already knew. PCR Tr. 384. In addition, she admitted that there was a pattern of behavior in the family to have multiple girlfriends that Marion saw. In addition, she admitted that she saw the older uncles toss the cat into the fire, shoot guns through the house, get into fights in the neighborhood. PCR Tr. 385. She stated Lindsey experienced emotion in these events.

Mrs. Lindsey said she was afraid when the shots were fired through the house and was on the floor with Lindsey. PCR Tr. 385-86. Concerning the cat incident, she said she was surprised when they threw the cat into the heater while she was sitting there and it created an awful smell. She said she did not try to stop it because she was afraid of her brothers: "I didn't know what they might do cause they already done grabbed the cat up and thrown him in the heater. He might have thrown me in there, too." PCR Tr. 386-87.

Bessie Smith - PCR Testimony

Bessie Smith, the Applicant's aunt and Virginia Lindsey's sister, testified at the PCR hearing, as well as at trial. PCR Tr. 388-424. ROA 2080-82.

Smith testified initially about the family history. She testified that she grew up in Inman, S.C. with 9 brothers and sisters. PCR Tr. 389. Her father was Smiley Pilgrim, who left the family when she was in the 4th grade. She went to school until the 7th grade when she left to work to help by picking peaches. She said two years after Smiley left, stepfather Willie Farr came into the picture. Smith described Farr as a godsend and took care of them. She described her mother becoming depressed after Smiley left staying in the bed with the children having to bather and

feed her. PCR Tr. 392.

They relied upon her grandmother to bring them food and clothes. Her step-dad did outside work and tried to keep food in the house. PCR Tr. 392.

Smith stated that her brothers and sisters got married and moved out, but Virginia returned home. PCR Tr. 392. Mrs. Smith got married and moved about 3 miles away. She stated she got a GED and studied at Spartanburg Technical College. She had 5 children. PCR Tr. 393.

She tried to emphasize that her children had a different life than Virginia and Marion. PCR Tr. 393. She described that although Paul was quiet, shy, and timid, yet after he caught his first girlfriend with another boy he was not the same. PCR Tr. 394. She described him as getting into fights and drinking. He then went into the service. PCR Tr. 394. She said Paul gave her mother lots of trouble because he got into fights. She asserted that others were jealous of him and would pick at him, although he did not initiate the fights. She stated that Paul was usually protecting himself "because he grew up without a daddy", or older brother to run to, not because he was mean. PCR Tr. 394-95. She described a man who would come around the house and teach Paul how to open a hawk bill knife. She said Paul would use this technique with his knife to scare them "because Paul was a timid scary kind of person growing up." PCR Tr. 395, ll. 16-17.[29]

Bessie Smith described after Fred returned from the service, he came to live with their mother, got married, and had two girls. She acknowledged worse behavior came along after.

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[29] She said she did not know much about Willie. She said he was away and "on the go." She said he would be out working on his car or out with his friends. PCR Tr. 394.

Bessie Smith stated that her sister Robin did not display the same drinking behaviors growing up, but she started having problems ("you know how teenagers are") with liking boys early. PCR Tr. 396-97. She was described as being smart in school and worked her senior year to pay for graduation by babysitting Marion. However, she stated using drugs resulted in being incarcerated, but claimed she was not violent or robbing people.[30]

Smith stated she was not living with Virginia when her daughter Vanessa died. PCR Tr. 398. She stated that Virginia was devastated and depressed along with her mother. She stated Virginia's mother felt blame for it. After the death, Virginia's husband began to drink more and then started dating Virginia's cousin that was raised with them. That relationship tore Virginia up and she separated from her husband.

After the separation, Virginia and her mother moved closer to Inman. At that time, Virginia started drinking and staying out late, but kept working. PCR Tr. 399. Smith described Virginia's drinking as not daily, but a weekend thing. To clarify, they would work all week and then go out Friday night when they got off work.

Because Virginia worked second shift (3 p.m. to 11/12 p.m.), Smith felt she did not see her children much and they cared for themselves. Virginia's mother would watch them while Marion was small playing outside. She said Steve Pilgrim (her brother) would be working on cars and motorcycles. She said Marion loved to hang around Steve "all the time." PCR Tr. 400.

She said her mother and Virginia also liked to play bingo, but she did not know how much time they spent playing it. PCR Tr. 401, ll. 1-10. She said when they went to play, the

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[30] However, Robin Keith is serving a sentence for assault and battery of a high and aggravated nature.

children were left with Steve or another uncle. She said they played "pretty good much" and "sometimes every night." PCR Tr. 401, ll. 17-20.

Bessie Smith described a period that Marion lived with her when he was around 12 to 13. PCR Tr. 401. She observed that Marion was always smiling, crazy about her husband who he teased about the way her husband talked. PCR Tr. 402. She said Applicant did not like to be around his step-father, but loved being with her family. She said he might have stayed there a few months. PCR Tr. 403.

She described her home as different than Virginia's. She claimed that her sons were in sports and not allowed to run around. She said they knew that they had to finish homework and chores. She said Marion "fell right in there." She said he was a sweet child who she cared about and that he wanted attention. PCR Tr. 403. She said she tried to listen to him, tease him.

Bessie Smith stated that she also worked like Virginia. She saw a difference - in addition to having both parents there - that she was more active in doing things with the children in their sports, activities and schoolwork. She felt Virginia did not push them, did not go to PTA meetings. She said that because she worked second shift, Virginia would be off to work. She said Lindsey's older brother, Bubba, sometimes had to wash the clothes and shoes by hand, claiming Virginia did not have the money to go to the Laundromat. PCR Tr. 405. She also claimed that sometimes the children did not go to school because they did not have clean clothes.

Smith admitted there were problems in her own family, but claimed she had structure with rules, Marion's family "had freedom." She asserted that Virginia loved and cared for her children, and gave them everything she could and that he would have more "bill money" in his pocket than Smith had. PCR Tr. 406. She said her mother took care of everything, so Virginia

never learned about responsibility. PCR Tr. 406-07. Smith said she never gave her own children "bill money." She said though that Virginia was a good mother, but we all had a struggle growing up. PCR Tr. 407, ll. 10-15. she described her own life, growing up rough suggesting at a time she had nothing to eat, nothing to keep warm when her step-father left. PCR Tr. 407.

Bessie Smith described an event a couple of weeks before the shooting at Lindsey's house. She stated she had heard from Virginia that the Applicant was going to kill himself and she went to his house with her sister and brother Steve Pilgrim. She described Lindsey as being depressed, saying he did not have anything to live for and was tired of what was going on. She said they sat down and talked to Lindsey to try to find out why and that he had his whole life. She stayed with Lindsey about an hour or more. PCR Tr. 408-09.

She stated that she told Lindsey that he needed to pray. She left with her brother Steve. She recalled that no ambulance was called although Virginia mentioned that Bessie should call the rescue squad. She said Virginia told her he had tried to kill himself one time before when he took some pills and he stayed and got treatment. PCR Tr. 410.

Bessie Smith stated she talked to Marion later but did not see him. Bessie said she called Lindsey on cell phone days later and he said Nell was trying to take his children from him and he would not see them anymore. PCR Tr. 411-12. He told Bessie that he loved his children, and Bessie said she knew that and don't worry about the woman, and that he'll get to see the children again. PCR Tr. 412. She said he was crying. PCR Tr. 412.

Bessie Smith described receiving a telephone call from him the next day when he stated that he was still upset. He claimed that he got a job at BMW and was supposed to start work that Monday, but that Nell and her mother had taken out warrants against him. He inquired how

could he see his children if he did not have a job. He feared the police would arrest him at BMW and that he would have nothing and would lose the job. PCR Tr. 413. He denied to her what the warrants were for. PCR Tr. 414. She said while they were talking someone clicked in. PCR Tr. 415-16. She tried to call back, but never could reach him. PCR Tr. 415-16. She said the incident happened about 3 hours later. PCR Tr. 416.

Smith said she told Marion that she had seen him with his boys at the duck pond, that Marion loved his children, that he bought shoes and clothes for them and their mother. She also said that he would give Nell money and she shopped all the time and take them to eat.

She described a time one month before the shooting when Lindsey carried Nell, his mother, and the boys to Greenville to eat and shop. PCR Tr. 414-15.

Preparation for Trial

Bessie Smith testified that prior to the trial, Mr. Bartosh, Mr. Brannon and a lady came out to her house a week or a few days before the trial. she said they asked questions and stayed 30 to 40 minutes. PCR Tr. 416. Smith said that she had already divorced her husband by trial time. She claimed this was the only meeting. PCR Tr. 417. She initially claimed they asked "what kind of child he was growing up", and asking "a lot of stuff about me" (Bessie) that she did not want to answer because she was not on trial. She said that they learned about Marion growing up and what type of house he grew up in. PCR Tr. 417.

Smith said she was told and agreed to testify. PCR Tr. 417. She claimed this was the only contact she had with counsel since the incident. She pointed out that she had more preparation in this hearing, meeting about 3 or 4 times. PCR Tr. 418.

On cross-examination, Bessie Smith stated concerning Applicant's potential job at BMW

and Nell's warrants, that she had heard about it from someone other than Applicant. PCR Tr. 419.

Concerning her alleged telephone call with Applicant on the day of the incident, Smith said that Applicant did not say anything about tracking down his wife or looking for her because she had a boyfriend. PCR Tr. 40. She denied that Lindsey ever told her then that Nell and a boyfriend was helping take the kids away. She said Lindsey just kept saying that Nell did not want him to see the kids and was talking about taking the kids away from him. PCR Tr. 420.

Smith denied any knowledge on whether Applicant had a girlfriend during the course of his marriage. PCR Tr. 421. She described that Lindsey had various jobs working on motorcycles and working at the Zeman Plant.

She returned to when he was younger and lived with Smith. She confirmed that he was a "child who like attention." PCR Tr. 422. During alleged suicide threat earlier in September, she stated that she and her brother talked to them. She confirmed that she left after 1½ hours because they thought he would not do it and her brother and sister stated he would be all right. She confirmed that there was a discussion about calling the rescue squad by Virginia and they deferred that decision to Virginia. The rescue squad was not called. PCR Tr. 422-23. She stated while "she loved Marion to death", she would "pretty much" have done something if she thought he was in danger, she also felt this was his mother's call. PCR Tr. 423.

Returning to the phone calls on the date of the incident, Lindsey did not tell her where he was calling from, did not tell her he was going anywhere that day, or about having a gun. Bessie Smith confirmed that when she spoke with Doug Brannon and Lenora Topp, that she told them she had a phone conversation with Lindsey that day. PCR Tr. 424.

Steve Pilgrim (PCR Tr. 426-453)

Steve Pilgrim, the Applicant's uncle, had testified at the original sentencing proceeding. R. 2078-2080. During the PCR proceeding he testified that he was a lifetime resident of Spartanburg, growing up in Inman. PCR Tr. 427. He stated Smiley and Ruth Pilgrim were his parents. He was 6 when Smiley left.[31] PCR Tr. 428.

Pilgrim stated that he spent a good deal of time growing up with Virginia, Bessie, Robin (Keith), Paul, and Willie. PCR Tr. 430-31.

Pilgrim denied that Virginia had a problem with drinking and drugs. PCR Tr. 431, ll. 2-4. However, he stated at one time Virginia displayed suicidal behavior. Pilgrim then described that Marion was not taken care of by Virginia or Marion's father. Virginia allegedly got upset with the father and decided she did not want to live. PCR Tr. 431, ll. 13-17. However, he did not recall if she was hospitalized for it. PCR Tr. 431.

Pilgrim also described when he was around Mrs. Smith and she attempted suicide. He stated it was between her husband and it was rough taking care of them and they broke up 3 or 4 times and Bessie just did not want to live anymore and was hospitalized. PCR Tr. 432.

As to Robin Keith, he thought she had tried to take her life 3 times. PCR Tr. 433. He described her being "kind of depressed for a long time." She also spent time in a hospital more than once.

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[31] At this point a relevance objection was made. Counsel Collins asserted that this information should have been gathered by original counsel and second, the information was essential to later expert witnesses, Dr. Melikian and Ms. Vogelsang. Third, he asserted this information supported their mitigating circumstances and humanized the defendant. Counsel declared he would have presented or proffered this evidence at trial. PCR Tr. 429. With the assertion that they claim all evidence should have been put into trial. The objection was withdrawn.

Contrary to other testimony, Pilgrim stated that Robin had exhibited violent behavior around Marion, but Pilgrim could not remember any circumstances. He confirmed that she was presently incarcerated for violent behavior. PCR Tr. 434.

Pilgrim also stated that brothers Paul and Willie also went to prison for violent behavior. PCR Tr. 434.

Pilgrim testified about the house they lived in on Brock Street in Inman. (Exhibit 27). He stated 10 people lived in the 4 bedroom house, including Marion. PCR Tr. 434-35. He said the Applicant was born there and the family stayed in the house for 10 years. He stated the house lacked indoor plumbing, air conditioning, and was heated with a stove using either wood or coal. PCR Tr. 435.

Pilgrim stated Lindsey experienced violence while living in their house with the actions of Paul and Willie. He described them as being violent toward Pilgrim, other family members, people in the community, and women in their lives. PCR Tr. 436.

Pilgrim described accidents in Lindsey's life. He recalled Lindsey being run over by a car driven by Paul who backed up over him. PCR Tr. 437. When Steve realized it was baby Marion, he grabbed Lindsey and carried him to the Inman Police Department who took him to Spartanburg Regional Hospital. He said Lindsey never cried or moved. PCR Tr. 437. He responded while at the hospital. He was checked and received stitches on his head where the car ran over him. He was released the same evening. PCR TR 437. Pilgrim blamed the fact that Marion would always try to follow him as the reasoning for the accident. He also stated, in general terms, that Lindsey would fall and hit his head other times. PCR Tr. 437-39.

Concerning Lindsey's suicide threat, he recalled about 3 weeks before the shooting, that

he went over to Marion's with his sisters after they called stating Marion had said he was going to kill himself. He said they stayed with Marion 2 to 3 hours. Pilgrim found him real depresses - which was unusual for Lindsey - and talking about wanting to see his kids and that he was having problems with his wife. Pilgrim stated Lindsey was crying that night, which was the first time he had seen him cry. PCR Tr. 439. Pilgrim said that Lindsey had calmed down that evening. PCR Tr. 439.

The next week, Pilgrim stated he received a telephone call from Lindsey telling him that he wanted a gun. PCR Tr. 439-440. Steve Pilgrim thought he was the only one in the family with a gun because his older brothers are not allowed to possess guns (although they had them in the past). PCR Tr. 440. Pilgrim states he no longer has the gun that Applicant asked for. PCR Tr. 440. Pilgrim stated Marion did not get his gun. However, shortly after the phone call, someone broke into his house and trashed the house, but they did not find his gun. PCR Tr. 440.

Pilgrim denied getting another phone call from Lindsey after that. PCR Tr. 1-10.

Pilgrim stated that he would loan Lindsey money to take his wife out to eat because he was trying to get back with her. He stated she went out with him 3 to 4 times before this happened. PCR Tr. 441.

As to his trial preparation, he stated he met with the defense counsel one time the day before the trial started. PCR Tr. 442. He thought that it was on a Saturday for 30 to 40 minutes. He recalled Mrs. Topp, Mr. Bartosh, Mr. Brannon, his sister Virginia, and sister Bessie - the people that were going to be testifying. PCR Tr. 442. He stated they discussed his condition and what he was suffering from that resulted in his disability. He stated that he was depressed, had anxiety [and uncontrolled hypertension]. He stated that they did not request that any of them sign

releases of medical or psychological records that he would have done. PCR Tr. 443.

He said he had lived in Spartanburg from the time of the incident to the trial and was available. In hindsight, he felt he was not adequately prepared to take the witness stand and testify. He said that he had never testified before and was nervous and they did not ask him anything, just about his health. PCR Tr. 444. He said they did not ask about the events leading up to the trial or Marion's personal history. In contrast, for the PCR hearing, Pilgrim described only talking about his health. PCR Tr. 445.

Pilgrim stated that they prepared him and asked him if he wanted to ask for mercy. PCR Tr. 445. In describing it though, Pilgrim stated "they told me not to ask for mercy." PCR Tr. 445, ll. 1-8. Pilgrim stated that he would have asked for mercy, declaring that "we all make mistakes", "I care for my nephew", "he's my favorite nephew and he made a mistake", "and I wouldn't want him ... get the death penalty." PCR Tr. 445, ll. 11-17.

On cross-examination, Pilgrim clarified that he took the picture of the house (Exhibit 27) last Sunday. PCR Tr. 446. Pilgrim further did not recall that at the 2004 trial he testified about being a witness to the car accident (ROA 2079-2080), that he testified about the incident when Lindsey ingested kerosene (ROA 2080), about how long he stayed with the family (ROA 2080) and his own health conditions of high blood pressure and panic attacks. PCR TR. 448. Pilgrim admitted he would have provided this information to counsel. PCR Tr. 448.

Pilgrim testified that he had been followed by Lindsey and he taught him how to fix things and remained involved in his life after he moved out. PCR Tr. 449. He was consistently in contact with the Applicant throughout his life. PCR Tr. 449.

In explaining his earlier reference to violence in the home, he described it as going out

and getting into fights, getting guns and shooting people. He further described drinking and cussing in the home and turmoil. PCR Tr. 450.

In explaining the discussion on mercy, he said it occurred in the 20 to 30 minute meeting with Mr. Bartosh and the others at the office. PCR Tr. 451.

Pilgrim stated that he was not present when either Virginia or Bessie attempted suicide. PCR Tr. 451. He said he was the contact person in the family and would be called whenever anything happened, but he did not see what they did. PCR Tr. 452.

As to Exhibit 27, he stated the house looked the same, except they would mow the grass. PCR Tr. 452.

Timothy Roger Sims (PCR Tr. 453-480)

The Applicant's younger brother, Tim Sims, testified that he is 10 years younger and did not share the same father. PCR Tr. 453. He described his relationship with Applicant as the person who raised him because his own father left when he was 11. Sims stated that Lindsey treated him like he would have wanted his father to treat him. PCR Tr. 454. He said he was 19 when the shooting took place, so for 8 years Lindsey had stood in his place as a father. He said he would see Lindsey everyday and was with him everywhere he went. PCR Tr. 455.

Sims stated that he got into trouble with the law and had a drug charge in 2003 initially on probation until he violated and got 6 months. PCR Tr. 455, ll. 7-16.

He stated that he had been working s a brick mason, but was not working presently. PCR Tr. 455. He said he was getting married next year.

He claimed at the time of the trial (in 2004) he did not have any criminal charges. PCR Tr. 456.

Sims stated that he knew everything about Lindsey's relationship with Nell because he had lived with them and his children. PCR Tr. 456. He described that everything was going good and he would do everything he could for her. However, he said everybody argues and fusses. He said he never saw Lindsey "put his hands on Nell", but he was not there all the time. PCR Tr. 457. He said their fusses were "normal arguments", again asserting that he never saw him hit her. PCR Tr. 457.

Sims described his knowledge of the work history. He said Lindsey painted cars and worked at Milliken or a similar place. However, he said Lindsey got into the drug game to take care of his mother and the rest of the family. PCR Tr. 457, ll. 20-24. [He said his own father left after he got sick and went to live with his mother]. PCR Tr. 457.

Sims said Lindsey had to do what he had to do to survive. PCR Tr. 458. In using his drug proceeds, Sims said Lindsey would take care of anything needed for any family member. PCR Tr. 458.

Sims described three weeks before the shooting going to dinner with Lindsey and Nell at The Junction. He said Lindsey paid for the meals for all the family - Sims, his newborn, Sims' wife, his cousin and her newborn, his cousin's son and niece. PCR Tr. 458-59.

On that evening, he said that Lindsey and Nell picked him up and they went to pick up Lindsey's other son from his grandmother's house. PCR Tr. 459. After dinner, Lindsey drove everyone home, except for Nell and their children who left with Lindsey. PCR Tr. 459.

Sims described going over to Lindsey's home one day with his mother, Aunt Bessie and Steve after he thinks Lindsey had called him. PCR Tr. 460. Sims described Lindsey's voice as nervous and crying and that "I feel like I'm about to take my life." PCR Tr. 460, ll. 18-22. Sims

said he told him not to and asked where he was and told him he's get there. Sims called his mother and they got to Lindsey in 30 minutes. PCR Tr. 461. He found Lindsey at his house laying in the bed, appearing to "let everything go." At that time, Lindsey gave them letters about what he was going to do. He described Lindsey crying for the first time (and a second time on the day of the shooting). PCR Tr. 461.

Sims recalled that he stayed with Lindsey from around 5-6 p.m. until 8:00-9:00 p.m. PCR Tr. 462, ll. 3-5. He said they had talked to him, Uncle Steve gave him "a nerve pill" to calm him down, and left after it looked like everything was all rights. PCR Tr. 462. [The alleged suicide threat notes were addressed to Nell, his boys, Tim Sims, and Virginia]> PCR Tr. 463. He said his mother had the notes when they left that evening. PCR Tr. 463.

Sims said that Lindsey had expressed concern about Nell at the end after he handed them the notes. PCR Tr. 463. Sims felt he was still "down" though. PCR Tr. 463.

Sims described a subsequent situation a day before the shooting when he asked him to drive by Nell's house. Lindsey had called him because he thought she was seeing another man and wanted him to see if he saw a Lexus in the yard. PCR Tr. 464, ll. 21-25. He said he drove by - saw the Lexus - and kept going. However, Sims said he did not want to tell him he saw the car because he knew it would upset him, so he told him it was not there. PCR Tr. 465. He said he was familiar with Nell's car and it was not hers. PCR Tr. 465.

Sims said Lindsey was not able to contact Nell or able to see the children. He had been told not to see them. However, Sims said Lindsey told him to take them food so Sims would go to McDonald's get food and take it to them. PCR Tr. 465.

At one point, Sims said Lindsey called him to try to set up a 3-way call using his mother's

phone that she would answer. When he did, he heard Lindsey tell Nell he knew she didn't want to see him, but to let him see the boys. PCR Tr. 466. In response, Sims said Nell started cussing and he told her no way and that we are staying away from them, while he heard a son in the background as she told him she did not live with him anymore and "that's not your daddy." PCR Tr. 466. This was the day before the shooting, according to Sims. PCR Tr. 466-67.

Sims said he did not see him. However, the next day - around 5 p.m. - Lindsey called and asked her to go down the street from "Shirley" who knew something about Nell. PCR Tr. 467, ll. 10-20. Sims said he wanted her to call him so get her number and give her his number. Sims said he took a shower and then Lindsey called back wanting to know if he had gotten the information. PCR Tr. 467. He told him no. He said Lindsey then sought to speak with his friend Chawny. Sims said Chawny left the house and returned. About 40 minutes later, Sims said Lindsey called back crying saying "she" had told him a lot about Nell and her new boyfriend and he was "going out of his mind" over what was told him. PCR Tr. 469, ll. 4-10. Sims told him to calm down and meet at brother Claude's home. He said ok and Sims left to go to Claude's. Shortly thereafter the shooting took place. PCR Tr. 469.

[Despite his earlier testimony], Sims claimed he did not know where Lindsey was living then, except that it was in Linville Hills. He estimated that it would take 15-20 minutes to get to his mother's house, and he would go by Celeste's house. He said he did not see Marion before the shooting. PCR Tr. 471.

Sims claimed that he never told this information to Bartosh, Brannon or Ms. Quimby. He claimed no one in 2004 talked to him. He said he was not in jail at the time of the trial and saw his mother, Uncle Steve and Aunt Bessie on a regular basis.

However, he said he was present at the trial. He claimed to have approached Doug Brannon and told him "he knew more about Nell and Marion than anybody" and wanted to testify. Counsel told him he would get back to him, but never did. PCR Tr. 472-73.

Sims said if asked he would have testified similarly and would have asked for mercy. PCR Tr. 473. Sims testified that he would have stated that Nell did not deserve what happened to her and Lindsey deserved to be punished, but did not deserve death because his wife was gone and we didn't need him gone. Sims stated his kids did not need to grow up without parents. He said their children would never be able to know what happened and they would want to ask their father what happened. PCR Tr. 473-74.

On cross-examination, Sims stated in reference to whether he had seen Lindsey violent towards Nell, he denied being aware of the August 1996 incident where he allegedly threatened to harm her and the October 1996 incident when he pushed and shoved her.

He confirmed that he was present at the December 2001 incident at Applebee's but denied seeing him slap or tear her clothes, claiming to be on the other side of the car. PCR Tr. 475, ll. 12-24.

He also confirmed that after he had received the telephone call from Lindsey a month before the incident that he did not attempt suicide at that time, just had talked about it, had no weapons and he felt comfortable enough to leave. PCR Tr. 476. Further, on the day of the shooting, Sims was under the impression that Lindsey was going to come to his house and they were going to play games and talk it over. PCR Tr. 476. he confirmed that there was no discussion on that date that Lindsey was looking for Nell, looking for a gun or having a gun. PCR Tr. 476, l. 23 - p. 477, l. 3.

Further, Sims confirmed that when Lindsey asked him to investigate Nell's house, he was looking to see if she was involved with someone else - not to check up on his children. PCR Tr. 477, ll. 7-16. Sims confirmed that Lindsey was also involved with someone else and had girlfriends while he was married. PCR Tr. 477.

Concerning his drug charge, Sims confirmed that in August 2003, he pled guilty and was sentenced to 6 years, suspended to 11 months probation and was on probation at the time of the May 2004 trial. However, he admitted that he had violated probation then and was awaiting to go to court. PCR Tr. 478.

Concerning Lindsey's violence, Sims confirmed he had been a witness to Lindsey being violent in the past. PCR Tr. 478, ll. 19-21.

On re-direct, Sims stated that both Lindsey and Nell had affairs during their marriage. PCR Tr. 479-80.

PCR Testimony of The Burtons

During the PCR hearing, Applicant called Bill Burton who testified at the trial, and his mother, Mrs. Pat Burton, who was on the trial witness list, but did not testify.

Bill Burton's PCR Testimony

Bill Burton testified similar to his trial testimony. PCR Tr. 304-05. He stated prior to his trial testimony, when he learned he would be a character witness, tried to contact Mr. Bartosh because it was his first court experience. He said that he wanted some background on the kinds of questions and information he should provide and how to prepare for trial. He found it difficult to contact Bartosh, an extremely busy man. He stated they met either the day before or the day of trial with many other witnesses and did not have any one-on-one discussions with him. PCR Tr.

305.

Burton stated that he sat in the trial for several days. PCR Tr. 306. He said he was aware that guilt was not as much an issue as sentencing. PCR Tr. 306. He said he was told to "say what you know about Marion." However, Burton felt the case was disorganized and he was concerned about it and did not have a good feeling about preparation. "I wanted to understand the strategy" and how the facts could be used to defend Lindsey and avoid a death sentence. PCR Tr. 307.

Burton stated that he wanted to tell the jury that he got involved as a teenager with Lindsey when he was 6 years old when Burton was giving swimming lessons at a public pool. He found then that Lindsey wanted approval and a parent figure to look up to, anxious to show someone his achievements with swimming, jumping, and fishing. Burton said he later went to Lindsey's house, met his mother and rest of family and began a 13 year relationship. PCR Tr. 309.

Burton reiterated that Lindsey was desperate for approval, attention, and involvement with adults. Burton saw that Lindsey had no supervision at home and they did not have any help or encouragement with their studies which led to Lindsey having a difficult time at school. PCR Tr. 309. He described Lindsey's house, though clean, was falling apart.

Burton felt Lindsey wanted a (normal) family, but his environment made it difficult for him to prepare for that later in life. Lindsey lived on the street, did not do well in school and his education was very limited. PCR Tr. 310.

Burton stated Lindsey did not see much of his father. He saw his role with Marion as a male figure he could look up to and Burton declared he was happy to provide it. PCR Tr. 311.

His last contact with Lindsey was in 1990. PCR Tr. 311, ll. 11-12.

Burton said his company was able to offer Lindsey a job in what he hoped would lead to a good future. However, Burton was transferred and lost touch with Lindsey and learned Lindsey left "for reasons I don't recall." PCR Tr. 311, ll. 17-20.

On cross-examination, Burton did not recall his earlier testimony that when Lindsey left that he had tried to get him his job back. PCR Tr. 313. Although he lost touch in 1990's, Burton said he was aware that Lindsey was continuing to visit his farm and fish through his mother. PCR Tr. 313. He confirmed that he had no contact with Lindsey after he began his relationship with Nell or the actions of Lindsey after he moved. He admitted that he did not know until the trial of the shooting incident of Wilkens, the number of different incidents with his wife, the fact that he was involved in selling drugs, or the reasons why he was let go from the company or if it was due to a conflict with his supervisors. PCR Tr. 314.

Concerning "Jimmy", Burton claimed he was not aware of the imaginary friend during his relationship and became aware of it "later on." PCR Tr. 314-15.

Burton confirmed that in his discussions, he talked with Lindsey about his desires for family and children and having the "ideal family" was a major subject. Burton stated that when asked at trial whether he would have provided financial assistance to get an attorney to help see his children, that he was not aware Lindsey had seen Tullis to get help or Piedmont Legal Services. PCR Tr. 315.

Mrs. Pat Burton's PCR Testimony

Mrs. Burton said she was present at this hearing "because I love Marion." PCR Tr. 316-17. She recounted a letter she had written in 2008 to Judge Burch expressing that her son did not

think he was properly prepared to testify. She also said she was not aware that she was on a witness list in 2004. She only knew about the case through her son when they called him. PCR Tr. 317.

She proffered what her potential testimony in 2004 would have been. She declared that she met the Applicant when he was 6 or 7 years of age, when after the pool closed where her son was a lifeguard, he would bring a bunch of kids in a pick-up and they would fish and play in the lake. PCR Tr. 318. She thought that Lindsey was special to her son because they talked about him all the time, but not about the other kids he brought. She recalled Marion was happy with a smile. She knew that her son was proud of Lindsey when he learned to swim, but felt Marion was sorry he learned because her son would then spend more time teaching others. PCR Tr. 318.

She recalled that he came out to fish and play after her son went to the Air Force Academy and would always thank her. She stated Lindsey's brothers would bring him and Lindsey would always ask her if it was OK to use the pond - the only one who did this. PCR Tr. 319.

She felt that Lindsey became special to her also, even though she did not see him very much. She knew her son would go to Lindsey's house and describe how poor it was and how Lindsey did not have much. PCR Tr. 319. Her son would stop and see Lindsey when he occasionally came home from the Academy. PCR Tr. 319.

Mrs. Burton described her visits to Lindsey after he was sentenced to death. She has visited him "many times" and had written letters for three years once a week. PCR Tr. 320. At one time, she said she talked Lindsey out of dropping his appeals, telling him they might outlaw the death penalty and maybe he would see his sons after they grew up. PCR Tr. 321. She also

described a poem he had written her after his experience and trying to teach others not to follow in his footsteps, that she gave it to a minister who used it in his church. PCR Tr. 321.

She stated that when she visits death row, she sees the interaction he has with other inmates and guards, and asserted there was not a feeling that they were afraid, but one of comradery of a closely knit group. PCR Tr. 321-22.

Mrs. Burton regretted that she had not known him more when he was younger and that she could have been able to help him reach his potential. She said she would have asked for mercy "because I don't think one action on a part of the person defines that person's life." PCR Tr. 323, ll. 4-6.

On cross-examination, she admitted that when he visited in his youth, she did not have any in depth conversations with Lindsey nor any discussions with him about his family. She admitted that she was not aware of his relationship with his wife, of his involvement with selling drugs, of his prior shooting incident, or of any of the incidents of criminal domestic violence. PCR Tr. 325. To the contrary, she only knew him as "a happy little kid" and I did not know him intimately. PCR Tr. 325. Like her son, there was no discussion about Jimmy, the imaginary friend. She said she did not come to Lindsey's trial and did not offer to testify because she did not think she would be any good and was against the death penalty anyway. PCR Tr. 326.

Rod Tullis - PCR Testimony

During the PCR hearing, former attorney Rod Tullis testified. He stated that he had started representing Lindsey in the 1990's until the incident in 2004. PCR Tr. 163. These included criminal, family court, and traffic concerns for Lindsey and family members. Id.

He stated the weeks before the incident, he was representing Lindsey concerning some

drug cases and traffic cases in Greenville and Spartanburg. "There may have been something in Family Court near the end that he had spoken to me about." PCR Tr. 164. At some point he interviewed him about ways to resolve issues concerning his children. He felt surprised that Lindsey and his wife would have issues about his children and their discussion involved offering a payment of child support in order to secure some visitation. PCR Tr. 166, ll. 11-18. He did not know if Lindsey ever offered to do that and Tullis never filed any papers in Family Court for him. Tullis stated that he had not been retained. PCR Tr. 166-67. Tullis felt that at the time of that meeting, Lindsey did not want to be separated from his wife and children nor end his marriage. PCR Tr. 167. He stated that they discussed that he had some evidence his wife may have had an extramarital affair and he was concerned because he did not want someone else to come in "and become daddy to his sons." PCR Tr. 167. Further, he feared if he began family court proceedings that there would be ramifications on the criminal side. PCR Tr. 168. Tullis said Lindsey's fear was that his wife would become a witness for the State, which would also end his relationship with his children because of a prison sentence.[32] PCR Tr. 168.

Tullis claimed that shortly before the shooting took place in September 2002, Lindsey attempted to contact the office. Tullis claimed he learned of this contact after he heard about the incident and went to his office to prepare a notice of representation. PCR Tr. 169. He had learned that Lindsey was in the hospital and had surgery. According to Tullis, when he listened to his answering machine, he heard Lindsey asking for him to pick up the phone. Tullis described Lindsey as sounding distressed and distraught. PCR Tr. 169. Since ne claimed he left the office at noon, he thought the tape was made within the hour before the shooting. PCR Tr.

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[32] This motivation was not developed by the State at the trial.

169-170. Tullis stated that the tone was not angry or agitated, but emotionally down and upset. PCR Tr. 170. Tullis recalled retaining the cassette tape for a period of time. PCR Tr. 170.

Tullis described providing his notice of appearance to the Sheriff, Solicitor, and hospital and was counsel of record for a short period of time. PCR Tr. 171.

Subsequently, the Public Defenders Office became counsel. Tullis recalled contacting Mr. Bartosh and telling him that Lindsey had called his office, that a tape existed, and he was the first person to talk to him when he was released from the hospital to the detention center. He also stated to him that he could be a possible witness in the case. PCR Tr. 171. He stated that he was removed from the case.

Tullis said he later provided the audiotape to the Public Defenders Office. PCR Tr. 172, ll. 15-18. Tullis also stated that he was provided some suicide notes. Tullis said that Lindsey had been shot by officers and then tried to commit suicide by shooting himself in the head. When Tullis visited at the Center for the first time, Lindsey was bandaged and bleeding. Still drugged from the surgery, Lindsey told him he had been bashing his head against the cell concrete wall, the stitches had come lose and he was attempting to kill himself. PCR Tr. 173. After he reported it, Tullis stated they put Applicant on suicide watch. PCR Tr. 173.

Tullis also declared he received notes from family members about an earlier incident when Lindsey threatened suicide weeks before the incident. PCR Tr. 175. Tullis stated that he handed the notes over to the Public Defender. PCR Tr. 175. He felt the Solicitor's Office was aware of the existence of the notes and that he had turned them over to the Public Defender. PCR 176.

Tullis indicated that he was not contacted about testifying, but inquired about it as the

case was proceeding.[33] He felt surprised because he thought he was the best witness as to the state of mind and involvement.

On cross-examination, Tullis recalled that he had received the letters from the family immediately after the shooting. He had reported the jail incidents on October 1, 2002. PCR Tr. 181.

Tullis admitted that he was subpoenaed by the Solicitor's Office on May 21, 2004.[34] PCR Tr. 182. He said he provided the records to the State. PCR Tr. 183. However, he did not know what he provided to the State then, except he felt it was everything he had in possession of his files at that time. PCR Tr. 184. As to the information provided on his worksheet (Applicant Exhibit 13), he did not recall when that was prepared. PCR Tr. 185.

Tullis asserted that some weeks before the incident, he learned that Applicant had been denied access to his children. However, he had no notes about that meeting. PCR Tr. 187. He was aware that the court had issued an "order of protection" just days prior to the incident which ordered him not to have contact with his wife. PCR Tr. 187. Tullis stated Lindsey never contacted him about advice concerning the impact of the order of protection. PCR Tr. 187-88.

As to the message on the answering machine, Tullis attempted to clarify that he did not review the machine until the day after the incident after he learned of the killing the night before. he felt it was probably left the day before, doubting the call was made the next day since he was unable to see him while he was in intensive care. PCR Tr. 189. Tullis also claimed that although

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[33] Note that Tullis was on the witness list by the Public Defender's Office. ROA 150.

[34] On redirect, Tullis indicated that he did not recall being subpoenaed. PCR 195-196. However, he recalled that he would not have had anything to turn over as a result of the subpoena. PCR 196.

he had provided the tape to the Public Defender, he advised the prosecution of it. However, he never provided the prosecution with any copy of the audiotape because he asserted that it was not in his possession when the subpoena was made because he had already given it to the defense. PCR 190.

Tullis agreed that when he prepared the information sheet, there was no discussion that he was being deprived of visitation rights. PCR 191. To the contrary, Tullis thought at that time when Lindsey and his wife came into his office that they were trying to work it out, but the meeting was in anticipation of a divorce or separation. Tullis, however felt that closer to the September incident things had changed. He noted that Lindsey was having relationships with other women, felt he wanted to get back with Nell, but was aware that she was anticipating divorce proceedings. PCR 191. Tullis stated that Lindsey's impressions were not always because both Lindsey and Nell were involved with other people and she did not want to be married to him any longer. PCR 192. Tullis felt the children were being used as a pawn in the adult relationship. He agreed though that there were a series of incidents involving Nell in August 1996, October 1996, February 1999, August 200 and December 2001. Oddly, Tullis reported that Nell would come and pay his fees in representing Lindsey in those incidents.

Tullis admitted that he was no longer practicing law and been disbarred. He stated that he was still a lawyer in May 2004 with an office in Spartanburg. He stated that he did not come to court while the trial was going on, allegedly because he thought he would be a witness in the case and would have been sequestered. He was aware of the trial.

Tullis stated that he spoke with Bartosh and Ms. Quimby as the case was going on. Although he let them know he was available and ready to testify, he did not ask them why he was

not being called as a witness or what their defense was, such that his information might not have been germane to their theory of the case. PCR 194-195.

On re-direct, Tullis confirmed that Lindsey had a family court dispute ongoing with the grandparents at the time over the custody of the children. He stated that matters he had with respect to that dispute were still protected by the attorney-client privilege, including letters in that action. PCR 196. As to the timing of the taped call, he recalled that Lindsey was taken into custody immediately after the shooting. He suggested that at that point of time he would not have had the ability to make phone calls given his medical care and his arrest. This suggested to him that the call had to have been made before the incident. Tullis stated that Lindsey had never been convicted of a criminal domestic violence charge against Mrs. Lindsey or anyone else. PCR 198.

The PCR Testimony of Social Worker Vogelsang Presented The Particular Dangers of Presenting Family Background Testimony concerning Marion Lindsey.

<u>Jan Vogelsang - Social Worker</u> (PCR Tr. 481-594)

Jan Vogelsang, a clinical social worker with expertise in bio-psychological assessments, testified that she conducted such an assessment of Marion Lindsey. She testified that as a part of the assessment she interviewed the Applicant, Virginia Lindsey, Bessie Smith, Steve Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim (Keith), Lenora Topp, Rod Tullis, Dr. Melikian and Dr. Brawley. She also declared she had sat in court and heard testimony of the same. PCR Tr. 495. She described records she reviewed from Ms. Topp and Virginia Lindsey, including medical and criminal domestic violence records, of Bessie Smith (mental health and CDV offense), of Steve Pilgrim (mental health, prior crimes, and medical), of Tim Sims (birth, school, and SCDC records), and of Robin Pilgrim (medical, prison, and mental health and prison visit). PCR Tr. 496. She also reviewed Paul Lindsey's court order declaring death [from drowning

disappearance at Jocassee]. PCR Tr. 496.

Concerning the Applicant, Ms. Vogelsang stated she reviewed his request for legal aid, his medical records, his school records, SCDC records regarding Stanford Wilkens incident, Lindsey's recent letter to the victim's mother, William S. Hall - DMH records, reports of Dr. Narayan and Dr. Musick, and his mental health records. PCR Tr. 496-97. She also read the testimony of family members, Mr. Burton and Dr. Melikian. PCR Tr. 497. Vogelsang testified that she also visited the community and created a family tree. PCR Tr. 497.

Concerning the family tree, Ms. Vogelsang testified generally about the existence of various members. She identified the existence in some members of "substance abuse, possession or distribution", "any mental, emotional, or behavioral impairments", "sexually inappropriate behavior", and "charges of criminal domestic violence, assault, or having served time in prison." PCR Tr. 502. She noted that the members of the home had very difficult childhoods with issues of family poverty, particularly after Smiley left. PCR Tr. 502-03. Vogelsang opined that this was abject poverty. She also asserted that their grandfather, Porter Pilgrim, was sexually inappropriate with some boys in the family. PCR Tr. 503. She opined that some fo the experiences that had been described in the testimony of the aunts and uncles with whom Lindsey lived played a significant role in the things Lindsey experienced growing up in the household. PCR Tr. 504, ll. 20-24.

Vogelsang related that his mother Virginia was abandoned by her father - a theme within the family - and raised by an ill parent. Vogelsang questioned her parenting skills. PCR Tr. 505. As to Lindsey's father, Leon McDowell, she opined he had abandoned Applicant and never acted as a father and had his own family.

She stated that Mrs. Lindsey had been married to Claude with 3 children and had two miscarriages. Applicant was born in 1973 two years after she lost her seven month old daughter. Mrs. Lindsey had no intervention on the death or counseling. She stated Virginia changed after the death, working and would go out and party and was not involved in parenting. PCR Tr. 506.

She stated Lindsey was raised by his grandmother with mostly an absent mother and absent father. PCR Tr. 506. She opined no one was present to help him through the developmental stages. However, Steve Pilgrim was identified as the hardest working and cared deeply about Applicant, but claimed he was not there a lot. PCR Tr. 507. Virginia was working 2nd or 3rd shifts in the mill. PCR Tr. 507.

As to the home living conditions, Vogelsang described that, at times, there were 10 people living in the home, sometimes a 4 bedroom home in rough neighborhoods where conditions were not good, sometimes without indoor plumbing and lacked heating. PCR Tr. 507-08.

Vogelsang identified photographs that she would have used at a trial. She suggested the early photos of Lindsey would have helped to humanize him. PCR Tr. 509.

She opined that Lindsey had traditional medical care, though she did not see his medical records. PCR Tr. 509. She stated that he saw Dr. Henderson and early critical care would by anecdote, involve being carried to the police then to the hospital. She described his injuries as the car accident, the ingestion of kerosene, and falling off the porch. PCR Tr. 510.

She testified generally about child development. PCR Tr. 510-12. She opined that there was no one at home to help Marion through his developmental stages. PCR Tr. 512. She opined that young boys need a strong male adult. She suggested the lack of a positive role model creates

a higher risk to end up in trouble. PCR Tr. 513. This resilience to bad things happening in their lives is learned through child development. PCR Tr. 514.

She opined that Lindsey did not have any strong male figures in his life. PCR Tr. 514. While his family in the home loved and cared for each other, she opined Lindsey was not prepared to face adverse and violent situations and to resolve problems other than through violent options. PCR Tr. 515. She opined there was a lack of guidance and mental health intervention where recommendations were not followed. There were also within the family situation the existence of divorce, separation, and abandonment, as well as emotional abuse and neglect. PCR Tr. 516. She found that the care of children was not the primary concern. PCR Tr. 516. She found a lack of role models and consistent care giving, as well as an inability of trust in relationships. PCR Tr. 517. She also opined there was "worry about violence in the home", "impaired cognitive functioning", "inability to deal with aggressive feelings" (shown through use of guns, knives, and fists), repression of feelings (family representation to mental health stuff that everything is O.K.), and a "sense of helplessness" (poor problem solving skills). PCR Tr. 517-18.

She opined that outside of home, Mr. Burton was a strong male influence on Lindsey. She opined Burton and his mother and their influence may have made a difference in his life and suggest the reason why his school records between 2nd and 6th grade reflect courtesy, respect for authority. PCR Tr. 518.

She opined that Applicant lived everyday with "a threat of harm", which makes children anxious. She asserted that the relationship with Burton gave him his strengths and gave him hope that he could provide. However, she felt his wanting a different type of family resulting in

his guessing how to do that by giving material things. PCR Tr. 519-20.

Vogelsang opined that the community Applicant lived in became exposed to cocaine and crack. She asserts that when he was around 11 that he sees his family dealing and using drugs. PCR Tr. 520. Although there were programs in the community, such as Scouts to help his learning and mental health issues, they did not use them. PCR Tr. 521.

Concerning his schooling, she did not see the disciplinary or conduct problems in his records that the DMH evaluators had the impression of concerning misbehavior, although he did fail the first grade and had speech problems. PCR Tr. 521. She did find that Applicant had slapped a girl, got into a "wrestling match" with a boy when he was thrown and had to get medical treatment for an elbow, and had a fight with another over a racial remark. PCR Tr. 522.

However, Vogelsang asserted in the eighth grade, Lindsey "succumbed to the streets" when Burton left, his mother started 3rd shit, he became absent from school and his brothers got involved with drugs, driving cars, buying jewelry and having girlfriends. PCR Tr. 522. After repeating 8th grade then placed in ninth grade, he quits school after becoming "a street person." PCR Tr. 522.

Vogelsang stated Aunt Robin was the only member to graduate from high school but was not at home traveling and eventually getting addicted to crack cocaine. PCR Tr. 523. The others in the house including Willie who went to prison for 15 years for killing, Paul who got int rouble with drugs and Bessie, Robin, and Steve who got mental health treatment. PCR Tr. 524.

She felt Lindsey would retreat to neighbors homes to avoid the chaos and found him lonely and scared. PCR Tr. 524. She also asserted that when his mother got off work she frequently went with her mother to play bingo. PCR Tr. 524. His uncles were described as

either beating on him, threw his cat into a heater, hit their girlfriends, revealing a powerful threat of harm. Further, he was claimed to have seen his mother shoot at Mr. Sims. Vogelsang stated that Lindsey had no oasis for peace unless he went to his neighbors or Mr. Burton. PCR Tr. 526.[35]

Vogelsang stated that Virginia had a volatile relationship with Mr. Sims - evidenced by fighting and arguing all the time. She stated that one time she shot at him several times and missed which Applicant witnessed. PCR Tr. 527. She also recalled the family all had guns. PCR Tr. 527.

Concerning his suicide attempts, Vogelsang described the event which led to his hospitalization. She stated that Fred returned to the home demanding attention and Applicant needed attention from their mother. The brothers got into a fight and Lindsey went into the bathroom took between 50-60 over-the-counter medicine (Tylenol, Nuprin). PCR Tr. 527-28. At the hospital, Applicant told them initially that his mother told him that she did not love him and that they were going to send him to a boys home which caused him to get upset and want - at that moment - to take his life. PCR Tr. 528. However, Vogelsang reported that his mother told the staff he was stable, but they were looking at his recent fighting conduct school. His mother told them about his temper outbursts. Applicant reported to them that he was seeking attention of his mother and "he wanted to leave that place." PCR Tr. 528. Vogelsang stated his mother resisted the recommendations for further assessment and outpatient treatment. PCR Tr. 528-29.

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[35] Vogelsang asserted that Paul shot at 3 cousins, had CDV charges, was involved in drugs and went to prison. She stated Willie served 15 years for ABHAN and was convicted of CDV. As to Robin, she was convicted of crack and serving a sentence from charges reduced involving an assault, kidnapping and robbery. PCR Tr. 526.

Vogelsang described the "red flag" that suicide gestures of a child and the need to stay in treatment. PCR Tr. 529.

Vogelsang then reviewed the history of suicide "attempts" of Bessie, Robin, and Virginia and declared that the mental health center was not aware of their history when they saw Applicant or that the family members get depressed and take things ending up in mental health facilities. PCR Tr. 530. She felt the center, unaware of the family history, had little to work with, but they requested further evaluation. PCR Tr. 531.

Vogelsang next described the cultural practice of "roots." OCR Tr. 532. She distinguished its use between some families where it is taught and explained as part of their heritage and other families where there be mental illness and violence and this practice further confuses. Vogelsang found a note in the doctor's records treating Steven Pilgrim on July 15, 2002 who was taking Xanax asserting that he was anxious and feared his wife was "putting a root" on him and putting something in his drink or food claiming it caused his penis to draw up inside him. PCR Tr. 533, ll. 14-25. Vogelsang noted that Steve was the person Lindsey looked up to. She reported Steve had previously shot a woman in an earlier relationship and the mental health records reported his conflicts with his wife. PCR Tr. 534.

Vogelsang reported on direct that Lindsey was confused by the practice of roots.[36] She reported that the use of "magical solutions" in a confusing and chaotic family environment only confuses things. PCR Tr. 534-35.

Vogelsang summarized Dr. James Garbarino's theory on psychological battering of

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[36] On cross-examination, Vogelsang admitted she had no reference to discussing "roots" with Lindsey in her interview notes from November 2009. PCR Tr. 575-76, 585.

children and asserted she would have used his model if she would have testified in 2004 with visual aids. PCR Tr. 535. She stated that there was rejection as revealed by his father's abandonment and his mother's alleged lack of involvement in his life. She points to claims that his brothers would leave with their fathers and Applicant would be left behind. She said that suggested his entry into "adulthood" with a fear of rejection and over-reactivity to rejection. PCR Tr. 536.

Another Garbarino factor was "isolation" which she opined there was evidence of minimal exposure to church and scouts, although she claimed he tried to play football, but quit when no one would come to his games. She also saw "exposure to negative behaviors within the home" and other than Mr. Burton, his mother and Steve. PCR Tr. 536

As to "terrorism", she opined he witnessed his uncles fighting, beating up wives and girlfriends, and his uncle throw his cat into the fire. As to the "ignoring" factor, she opined the parents failed to notice his needs for school, mental health, protection and supervision. PCR Tr. 537.

As to the "corruption" factor, she opined it was shown by his uncles' violence, his mother shooting at her boyfriends tires and boyfriend, and his uncle's profit from drugs. PCR Tr. 537. She suggested that these factors mis-socialized the child. PCR Tr. 538.

Vogelsang reported that Lindsey became involved in the drug trade around age 12 as a courier for his uncles. PCR Tr. 538. This initially provided him some money, and Vogelsang claimed he used the money to help pay for his grandmother's medicine, gave money to his mother, yet also used it to buy clothes and shoes for himself. PCR Tr. 539.

Concerning his school performance, she opined he had potential with extra help and

tutoring. PCR Tr. 539. But opportunities were not present.

Vogelsang described Applicant's relationships with women as erratic and chaotic. PCR Tr. 540. An early relationship with an unbeknownst cousin and breakup demanded by his mother caused Applicant to become very sad and upset. She further equates his mother's alleged rejection prior to the pill injection at age 15.

Vogelsang describes that Lindsey began dating and when rejected becomes upset and over-reactive. She describes the shooting of Stanford Wilkins after he was in a "long-term" relationship with Stephanie, causing him to be sent to jail. PCR 540.

Concerning the victim Nell, Vogelsang reported that the relationship began at age 22. She found "incredible instability" in the relationship. She said the relationship with Nell began while living with Stephanie. He has a child with Nell. Although Vogelsang opines that Applicant loves being a father (PCR Tr. 541, ll. 14-15), she describes breakup where each returns to their mother, arguments and violence resulting in at least one conviction and multiple arrests. PCR Tr. 541. They were married in 1997 after he was released from jail after the Wilkins incident. A conflicted relationship, they have a second child in 1999. She reports that while Lindsey gets jobs for a period, then reverts back to drug dealing "where he can get the money he needs to provide" for things he thinks he wants his family to have. PCR Tr. 542.

Vogelsang found that he wanted to be a father, but lacked knowing about fatherhood. She denied any knowledge that he ever abused or hit his children. PCR Tr. 543. he only found that his role was to give them things. PCR Tr. 543.

Vogelsang reported that there was, however, violence in his relationship with Nell. Though one CDV conviction, she had made other reports of violence or aggressiveness toward

her. PCR Tr. 543.

Vogelsang stated the drowning of brother Fred in 1998was a major loss, even though this was the brother he fought with. PCR Tr. 544. They had gotten closer and worked in Virginia together. After his death, she opined he got sad and depressed in a "normal grieving process." PCR Tr. 544.

She opined that Lindsey lacked an understanding of fidelity and being committed in a relationship. Vogelsang described a family pattern of marriage and additional involvement in other relationships. PCR Tr. 545. Vogelsang, however, stated this did not apply to Nell though. However, Vogelsang opined that "he became extremely depressed over the loss of his boys" and Nell. Vogelsang pointed out that is when he threaten to take his life - no one called EMS or took him to the E.R. and "just left him there." PCR Tr. 545.

Vogelsang re-stated the major factor in his life was the family system and behaviors he had witnessed through his development years. She declared this affected his judgment, impulsivity, insight, "and placed him at a higher risk to end up committing a serious act." PCR Tr. 547. she opined that had she been a witness in 2004, she would have testified whether Bessie Smith had attempted suicide or suffered mental illness based upon her knowledge of its foundation, although the Respondents objected to it under hearsay. PCR Tr. 549-550.

On cross-examination, the dangers inherent in presenting social history testimony was revealed. First, Vogelsang admitted that she misstated on direct that Uncle Willie has killed someone, when in fact it was only an assault. PCR Tr. 556-57. Further, she admitted that Lindsey was not identified in the pill incident as attempting suicide by the hospital, but that it was a gesture, that he had no suicidal ideation, did not realize the medicine was toxic and that he