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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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On Petition for Writ of Certiorari to Calhoun County  
Court of Common Pleas  
Honorable Kristi F. Curtis, Circuit Court Judge

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Appellate Case No. 2021-001415

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HERMAN LEE HUGHES,

Petitioner,

vs.

THE STATE,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI  
PURSUANT TO *AUSTIN V. STATE***

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Recognizing the strength and applicability of the presumption that counsel rendered effective assistance, the post-conviction relief judge correctly determined juvenile counsel did not provide constitutionally ineffective assistance for failing to extensively investigate and present evidence to the family court opposing the transfer of Hughes’s case to general sessions where, despite only having two days to prepare, counsel managed to speak extensively with Hughes’s family and one of the detectives prior to the hearing, where a DJJ specialist provided detailed testimony regarding Hughes’s school records, where counsel reasonably believed a pre-waiver evaluation had been completed by DJJ prior to the hearing, and where the family court judge—who is ultimately responsible for making the waiver determination following a “full investigation”—rejected counsel’s request to delay its decision to allow counsel to obtain a DJJ evaluation and because Hughes failed to demonstrate any conceivable prejudice existed such that the family court would have retained jurisdiction even had counsel somehow obtained a DJJ evaluation where the *Kent* factors weighed in favor of transfer and where Hughes was originally sentenced to death per the jury’s recommendation based on the existence of three aggravating circumstances beyond a reasonable doubt. ....16

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### **PETITIONER’S STATEMENT OF ISSUE ON CERTIORARI**

Whether Petitioner’s Sixth and Fourteenth Amendment rights to the effective assistance of counsel were violated at the hearing to determine whether the Family Court would waive jurisdiction to the Court of General Sessions where counsel failed to conduct any investigation whatsoever and present evidence concerning the criteria outlined by the United States Supreme Court in Kent v. United States, 383 U.S. 541 (1966), and where Petitioner was prejudiced because if counsel had conducted a proper investigation and presented such evidence, there is a reasonable probability the outcome of the waiver proceeding would have been different?

### **RESPONDENT’S COUNTERSTATEMENT OF ISSUE ON CERTIORARI**

Recognizing the strength and applicability of the presumption that counsel rendered effective assistance, did the post-conviction relief judge correctly determine juvenile counsel did not provide constitutionally ineffective assistance for failing to extensively investigate and present evidence to the family court opposing the transfer of Hughes’s case to general sessions where, despite only having two days to prepare, counsel managed to speak extensively with Hughes’s family and one of the detectives prior to the hearing, where a DJJ specialist provided detailed testimony regarding Hughes’s school records, where counsel reasonably believed a pre-waiver evaluation had been completed by DJJ prior to the hearing, and where the family court judge—who is ultimately responsible for making the waiver determination following a “full investigation”—rejected counsel’s request to delay its decision to allow counsel to obtain a DJJ evaluation and because Hughes failed to demonstrate any conceivable prejudice existed such that the family court would have retained jurisdiction even had counsel somehow obtained a DJJ evaluation where the *Kent* factors weighed in favor of transfer and where Hughes was originally sentenced to death per the jury’s recommendation based on the existence of three aggravating circumstances beyond a reasonable doubt?

## STATEMENT OF THE CASE

On March 18, 1994, Petitioner Herman Lee Hughes and a cohort, Kelsey Pearce, robbed the Blue Diamond Casino, a video poker parlor in Orangeburg. *State v. Hughes*, 328 S.C. 146, 148, 493 S.E.2d 821, 822 (1997). Pearce remained outside while Hughes requested change from the employee of the casino, twenty-year-old, Kenneth Pressley. *Id.* When Pressley opened the cash drawer, Hughes pulled a gun and told Pressley to give him the money. *Id.* He simultaneously told Pressley's seventeen-year-old girlfriend, Kelly Hoffman, who was sitting behind the desk on the telephone, to get off the phone. *Id.* Hughes then asked Pressley for his car keys. *Id.* As Pressley handed over the keys, Hughes shot him in the head. *Id.* He then turned and shot Hoffman in the chest. *Id.* He shot Pressley in the head again, and then shot Hoffman in the face. *Id.* at 148–49, 493 S.E.2d at 822. Finally, he shot Pressley in the head a third time. *Id.* at 149, 493 S.E.2d at 822. Hughes took the money from the cash draw, then turned out the lights as he left the casino. *Id.* He and Pearce departed in Pressley's Mazda RX-7. *Id.* Hoffman survived the assault while Pressley died. *Id.* Hughes was sixteen years old when he committed these crimes.

### **A. Trial**

On May 26, 1994, the Calhoun County Grand Jury indicted Hughes for murder, ABWIK, armed robbery, and grand larceny of a vehicle.<sup>1</sup> (1994-GS-09-0154, -0155, -0156) (1934–35, 1939–44). Subsequently, on October 31, 1994, the State served its notice of intent to seek the death penalty, notice of aggravating circumstances, and written notice of evidence in aggravation of punishment. (1945–50). Phillip F. Newsom represented Hughes on these charges and First Circuit Solicitor Walter M. Bailey, Jr., prosecuted the case. This Court assigned the case to the Honorable

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<sup>1</sup> Following a waiver hearing on April 8, 1994, the family court entered a written order transferring Hughes's case to the Court of General Sessions. (App'x 2029–32).

Edward B. Cottingham. Following a pre-trial motions hearing on August 22, 1995, the case was called for trial on September 5, 1995. (App’x 1825–1928; 1–1325). At the conclusion of the guilt phase, the jury convicted Hughes as indicted. (App’x 1315–16).

After the requisite twenty-four-hour waiting period, the sentencing phase began on September 11, 1995. (App’x 1327–1756). Following deliberations, the jury found the existence of all three submitted statutory aggravating circumstances and recommended Hughes be sentenced to death. (App’x 1747–48; 1936–38; 1954–56). Judge Cottingham imposed the death sentence for murder. (App’x 1750–51). He additionally sentenced Hughes to consecutive terms of twenty-five years’ imprisonment for armed robbery and twenty-five years for ABWIK. (App’x 1751). Hughes received a five-year concurrent sentence for grand larceny. (App’x 1751).

### **B. Direct Appeal**

Deputy Chief Appellate Defender Joseph L. Savitz represented Hughes on direct appeal to this Court, and briefed the following issue:

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

On October 27, 1997, this Court issued a published opinion affirming Hughes’s convictions and death sentence. *State v. Hughes*, 328 S.C. 146, 493 S.E.2d 821. This Court subsequently denied Hughes’s petition for rehearing by order dated November 20, 1998.

Hughes then filed a petition for a writ of certiorari in the United States Supreme Court, raising the following issue:

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

The State filed its return on March 26, 1998. By opinion dated April 27, 1998, the Court denied Hughes's petition. *Hughes v. South Carolina*, 523 U.S. 1097 (1998).

### **C. Initial Post-Conviction Relief Action and Resentencing**

Following an unsuccessful appeal, Hughes timely filed his first post-conviction relief application on June 19, 1998. (App'x 2187–93). This Court assigned the matter to the Honorable Paula H. Thomas. John H. Blume, Pamela A. Wilkins, and Sheri L. Johnson represented Hughes. Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Jeffrey A. Jacobs represented the State.

The State made its return and motion for a more definite statement on July 21, 1998. (App'x 2194–2222). Hughes subsequently filed three amended applications. (App'x 2223–32; 2233–46; 2363–82). On October 11–13, 1999, Judge Thomas convened an evidentiary hearing. (App'x 2383–3062). Both parties subsequently submitted post-hearing memoranda. (App'x 3063–3202; 3203–3374; 3375–80). By memoranda issued August 1, 2000, Judge Thomas made a preliminary ruling denying relief and instructed the State to prepare a proposed order in accordance with a thirteen-page outline of her findings. (App'x 3381–94). The State submitted a proposed order denying relief on September 7, 2000, to which Hughes filed objections on October 4, 2000. (App'x 3395–3498).

On November 17, 2000, Judge Thomas convened a hearing on the objections and other matters addressed in the post-hearing memoranda. (App'x 3499–3547). Judge Thomas subsequently issued an order denying the application on all grounds and dismissing the action with prejudice on December 8, 2000. (3550–3743). On December 27, 2000, Hughes filed a timely

memorandum and motion to alter or amend pursuant to Rule 59(e), SCRCP. (3744–4540). The State made its return in opposition to Hughes’s 59(e) motion on January 30, 2001. (App’x 4541–48).<sup>2</sup>

Hughes subsequently filed a motion to stay the proceedings pending the outcome of *McCarver v. North Carolina*, 532 U.S. 941 (2001), a case before the United States Supreme Court concerning whether a person who commits murder while under the age of eighteen may be sentenced to death. (App’x 4558–61). On April 5, 2001, the State filed a memorandum in opposition to the motion to stay. (App’x 4562–65). Judge Thomas granted the stay by order issued May 4, 2001. (App’x 4583–85).

During the stay, the United States Supreme Court resolved the issue in *Roper v. Simmons*, 543 U.S. 551, 568 (2005), holding a person under the age of eighteen who is convicted of murder may not be sentenced to death. In light of *Roper*, Hughes filed a motion for partial summary judgment and to alter or amend the judgment on March 15, 2005. (App’x 4587–92). The State filed a response on April 7, 2005, agreeing that an order altering judgment was appropriate and that Hughes was entitled to resentencing in accordance with *Roper*. (App’x 4593–4605). On May 9, 2005, Judge Thomas issued an order vacating Hughes’s death sentence by consent of both parties and granting him a new sentencing proceeding. (App’x 4606–07). Neither party appealed.

On October 10, 2006, Hughes appeared before the Honorable Howard P. King and was resentenced to life without parole for murder. (App’x 2034).

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<sup>2</sup> On March 20, 2001, the State submitted a proposed order denying Hughes’s motion per Judge Thomas’ instructions. (App’x 4549–57). Hughes filed objections to the proposed order submitted by the State denying Hughes’s Rule 59(e) motion. (App’x 4566–79). The State filed a response to Hughes’s objections on April 12, 2001. (App’x 4580–82).

#### **D. Second Post-Conviction Relief Action**

Hughes filed a second post-conviction relief application on June 26, 2007, challenging his 1995 convictions based on multiple allegations of ineffective assistance of trial counsel. (App'x 2056–82). On August 27, 2007, the State made its return and motion to summarily dismiss the application as successive to his 1998 post-conviction relief action. (App'x 2063–2153). Pursuant to this request, the Honorable Diane S. Goodstein, acting in her capacity as Chief Administrative Judge, issued a conditional order of dismissal on September 27, 2007, provisionally denying and dismissing the application as successive while giving Hughes twenty days to show why the dismissal should not become final. (App'x 2154–70).

Hughes filed a response, alleging for the first time that he was entitled to belated appellate review of his 1998 post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). (App'x 2172–73). Judge Goodstein subsequently issued a final order on January 2, 2008, denying and dismissing the application with prejudice. (App'x 2174–75).

#### **E. Appeal of Second Post-Conviction Relief Action**

On July 16, 2010,<sup>3</sup> Hughes filed a notice of appeal and explanation as to why the lower court improperly determined his second post-conviction relief application was barred as successive pursuant to Rule 243(c), SCACR. (App'x 2035–42). Appellate Defender Robert M. Pachak perfected Applicant's appeal by filing a *Johnson*<sup>4</sup> petition for writ of certiorari with the Supreme Court, raising the following issue:

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<sup>33</sup> Although Judge Goodstein issued the final order of dismissal in December 2008, Hughes stated in his notice of appeal that he did not receive written notice of the order until July 9, 2010. (App'x 2035).

<sup>4</sup> *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988) (approving of the withdrawal of counsel in meritless post-conviction appeals in accordance with the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967)).

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

(App'x 2043–51). This Court subsequently transferred the case to the Court of Appeals pursuant to Rule 243(l), SCACR. On February 11, 2014, the Court issued an order denying appellate counsel's motion to be relieved and directed the parties to address the issue raised in the *Johnson* petition and any other questions of arguable merit. (App'x 4609).

Appellate counsel subsequently filed a merits petition for a writ of certiorari on February 14, 2014. (App'x 4610–18). The State filed its return on May 28, 2014, asserting Hughes was not entitled to *Austin* review of his initial post-conviction relief action. (App'x 4619–44). By order dated December 12, 2014, the Court granted Hughes's petition for a writ of certiorari to review the second post-conviction relief court's decision. (App'x 4645). Following briefing and oral argument, the Court reversed and remanded for a hearing to determine whether Hughes knowingly and voluntarily waived the right to appeal the denial of his 1998 post-conviction relief action. (App'x 4646–55; 4656–83; 4686–89).

#### **F. Remand on *Austin* Issue**

On May 20, 2021, a hearing convened before the Honorable Kristi F. Curtis on remand from the Court of Appeals to determine the sole issue of whether Hughes was entitled to seek belated appellate review of his initial post-conviction relief action pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). (App'x 4690–4727). Jonathan D. Waller represented Hughes and Senior Assistant Deputy Attorney General Megan H. Jameson represented the State. Hughes testified at the hearing as did two of his initial post-conviction relief attorneys, John H. Blume and Sheri L. Johnson.

At the conclusion of the hearing, the State conceded that Hughes did not knowingly and voluntarily waive his right to appeal the denial of his initial post-conviction relief action. (App’x 4722). On November 4, 2021, Judge Curtis issued an order granting Hughes the right to seek *Austin* review. (App’x 4728–37).

### **STANDARD OF REVIEW**

The standard of review for post-conviction relief depends on the specific issue before the appellate court. *Smalls v. State*, 422 S.C. 174, 180, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, appellate courts defer to the post-conviction relief court’s factual findings and will uphold them if any probative evidence in the record supports them. *Buckson v. State*, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); *Smalls*, 422 S.C. at 180–81, 810 S.E.2d at 839–40. However, appellate courts give no deference to the post-conviction relief court’s conclusions of law and reviews those conclusions de novo. *Jamison v. State*, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014).

### **LAW APPLICABLE TO CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel’s conduct “was so ineffective as to require reversal” of the applicant’s conviction. *Id.* at 687. To obtain relief, a PCR applicant must prove (1) counsel’s performance fell below an objective standard of reasonableness; *and* (2) there is a reasonable probability the outcome of the proceeding would have been different but for counsel’s deficient performance. *Williams v. State*, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing *Strickland*,

466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Strickland*, 466 U.S. at 700; *see also Bell v. Cone*, 535 U.S. 685, 695 (2002) (explaining that “[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable” (citation and internal quotation marks omitted)). Significantly, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

The applicant bears the heavy burden of establishing both prongs of the *Strickland* standard by a preponderance of the evidence. *Hughes v. State*, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the applicant must establish that, in light of all the circumstances, the acts or omissions complained of “fell below an objective standard of reasonableness” as measured by “prevailing professional norms.” *Strickland*, 466 U.S. at 688. Reviewing courts should apply “a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; scrutinize counsel’s performance in a highly deferential manner; make every effort “to eliminate the distorting effects of hindsight;” and “evaluate the conduct from counsel’s perspective at the time” in light of then-existing circumstances.” *Id.* at 689–91.

“An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” *Id.* at 691. Thus, with respect to prejudice, the applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. A reasonable probability is a probability “sufficient to undermine confidence in the outcome.” *Id.* Significantly, it is not enough “to show the errors had some conceivable effect” on the outcome of

the proceeding—counsel’s errors must be “so serious as to *deprive the defendant of a fair trial.*” *Id.* at 687 (emphasis added); *see id.* at 695–96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case). “[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Id.* at 696.

### **SUMMARY OF WAIVER PROCEEDINGS IN FAMILY COURT**

On March 21, 1994, the State filed juvenile petitions against Hughes in Calhoun County Family Court, alleging he committed murder, assault and battery with intent to kill (ABWIK), armed robbery, and grand larceny of a vehicle. (1994-JU-09-05, -06, -07, -08) (App’x 2010–25). The State subsequently filed a petition to transfer on March 24, 1994, asking the family court to determine whether Hughes should be transferred to the Court of General Sessions. (App’x 2027).

On April 8, 1994, the family court convened a waiver hearing before the Honorable Maxey G. Watson. (App’x 1757–1823). Martin Banks represented Hughes and Assistant Solicitor Reddick Bowman represented the State. Detective Earl Rhudy of the Calhoun County Sheriff’s Department, Community Specialist Dolly Zeigler of the South Carolina Department of Juvenile Justice, and Calhoun County Sheriff Dennis Calvin Jones all testified at the hearing.

First, Det. Rhudy testified generally about his investigation of the death of Ken Presley, the assault of Kelly Hoffman, and the robbery of the Blue Diamond Casino on March 21, 1994. (App’x 1760–70). He testified that Ms. Hoffman was shot in the cheek, as well as in the chest area. (App’x 1770–71). Fingerprints matching Hughes’s were found “inside the cash drawer.” (App’x 1772–73). Subsequently, the stolen vehicle was found. (App’x 1773). After receiving *Miranda* warning, Hughes gave the following statement to the police in his mother’s presence:

On Friday night Kelsey Pearce and myself went into the Blue Diamond. I walked in and asked for the money and shot the woman.

Kelsey was looking through the window and he came in and got the gun and shot the man. We got the money and took the car to Daniel's house and put the money on the bed. We divided up the money and left the house. We drove the grey car to the Ebony Club and left it there.

(App'x 1776). The surviving witness, Kelly Hoffman, later identified Hughes from a photographic lineup. (App'x 1778–79). Det. Rhudy opined that the matter should be transferred to General Sessions Court “due to the seriousness of the crimes,” that Hughes was involved in all crimes, and that Hughes was “close to his seventeenth birthday.” (App'x 1779–80).

On cross-examination, Det. Rhudy stated that Hoffman had told him that she had read press reports of the crime and called Hughes by his first name and that he had gone to school with her little sister, but he did not see how that could taint the lineup. (App'x 1784–86).

Next, Dolly Zeigler testified about Hughes's school record. (App'x 1787). She stated he was last enrolled at John Ford Middle School in the eighth grade and had been suspended in February. (App'x 1787). Further, from November 12, 1993, until January 31, 1994, Hughes had twenty-one absences from school and twenty-one disciplinary infractions, including eighteen instances of disrespect to teacher, one instance of disrupting class, one instance of profanity, and one instance of leaving class without permission. (App'x 1788). She additionally stated that Hughes had been in juvenile detention custody since March 23, 1994. (App'x 1789). His juvenile history included pointing a firearm in March 1993 that was dismissed; runaway on February 15, 1994; a pending charge for possession of stolen vehicle on March 8, 1994; and a pending charge for larceny of a gun on March 21, 1994. (App'x 1790–91).

Ms. Zeigler also testified that Hughes was in regular classes at school. (App'x 1791). Her records further revealed that on February 15, 1994, Hughes's mother and grandmother filed an “incurability” complaint seeking alternative placement for him. (App'x 1792–93). However,

they never completed the materials. (App'x 1794). As to Hughes's living situations, Ms. Zeigler's understanding was that he had resided with his maternal grandmother for the last twelve years. (App'x 1794).

Ms. Zeigler stated that she had "no opinion" on the likelihood of Hughes's rehabilitation within the juvenile justice system or whether he should be waived to general sessions court. (App'x 1795). She confirmed that no DJJ pre-waiver evaluation had been ordered. (App'x 1795).

On cross-examination, Ms. Zeigler specified that the school "disrespect" complaints involved three different teachers. (App'x 1796). She further reiterated that the pointing a gun charge had been dismissed and the stolen vehicle charge was still pending. (App'x 1796). She also testified that either party can request a court order for a DJJ evaluation. (App'x 1797–98).

Finally, Sheriff D. C. "Bing" Jones testified that he also went to the scene of the robbery. (App'x 1800). He stated that, upon his arrival, Ms. Hoffman was sitting in the chair, conscious, and that she was trying to tell the deputies what happened, but then asked them to stop questioning her because she was tired. (App'x 1801–03). He further described taking Hughes's statement on March 20, 1994, when he went with Hughes's mother to pick him up in Columbia. (App'x 1803–04). He stated that Hughes admitted shooting Kelly Hoffman in his mother's presence, that he then took a taped statement, and that his mother returned and that she wrote down his written statement. (App'x 1804–05). Sheriff Jones confirmed that Hughes confessed to shooting Hoffman, taking money from the Blue Diamond, participating in taking the car to Orangeburg, except that he asserted his co-defendant shot Presley. (App'x 1806).

On cross-examination, Sheriff Jones clarified that Hughes told him he took the money from the cash drawer and that Kelsey drove the car. (App'x 1806). He also stated he overheard Kelly

say at the scene that “somebody came in and shot them.” (App’x 1807–08). He stated that it indicated to him that she did not know the identity of the person who shot them. (App’x 1808).

On reply, he clarified that her comments did not mean she could not identify who shot them; but rather, she did not know the individuals by name. (App’x 1808–09). Sheriff Jones further mentioned that he was surprised that Kelly was conscious given her injuries. (App’x 1809). He also stated that Hughes admitted dividing the money. (App’x 1809). Additionally, he testified that he had learned Hughes and Kelsey Pearce had come into the store, went back to a house and got a gun, returned to the store and Hughes requested instruction on how to play a video game, went outside to get some money, and came back with a fifty-dollar bill and shot the woman. (App’x 1810).

No further witnesses testified; however, each side presented a closing argument. Assistant Solicitor Bowman urged that transfer was warranted based on the seriousness of the offenses of murder, armed robbery, ABWIK, and grand larceny. (App’x 1811–12). He further pointed out the violence of these offenses as evidenced by the crime scene; the clear premeditation and planning; and the joint culpability of the participants. (App’x 1812–13). Further, he noted the strength of the State’s evidence, including the identification of Hughes by the victim, the fingerprint on the cash drawer, and his own confession. (App’x 1814). Assistant Solicitor Bowman further asserted that judicial economy supported having both cases disposed of in General Sessions. (App’x 1814). Additionally, he stated that Hughes was sixteen, but “near his seventeenth birthday” and that he was a “very sophisticated individual” who was “street smart.” (App’x 1815).

He additionally pointed out the firearm charge that was ultimately dismissed, as well as his school record of suspension and disrespect that led to expulsion. (App’x 1815). Assistant Solicitor Bowman noted that Hughes was in the “regular academic career” track and not in either special

education or emotional handicap classes. (App’x 1815). In closing, he asserted that protecting society from Hughes is best served by transfer given the particular planned brutality of this incident. (App’x 1816).

Counsel Banks argued that Hughes’s adult co-defendant was the leader who was more deserving of culpability than his client. (App’x 1816–17). Regarding the “judicial economy” claim, Counsel Banks noted that juvenile cases are generally resolved much quicker than those in general sessions. (App’x 1817). He further asserted that the co-defendants would not be tried together. (App’x 1817). Regarding the disciplinary infractions and disrespect incidents at school, Counsel Banks asserted that there may be another side to these incidents. (App’x 1817). Further, he claimed that Hughes was innocent of the gun charge despite what the solicitor stated and similarly stands innocent of the vehicle charge (App’x 1817–18). In conclusion, and because he received notice of the hearing only two days prior, Counsel Banks asked Judge Watson to delay his ruling until DJJ could evaluate Hughes and issue a report. (App’x 1818–19).

Judge Watson did not address Counsel Banks’ request but made an oral ruling at the conclusion of the hearing granting the State’s motion to transfer. (App’x 1819–23). First, he found the existence of probable cause to believe Hughes committed the crimes, noting the signed confession admitting the shooting of the woman, theft of the car, and the identification made by Hoffman. (App’x 1819). Regarding the co-defendant, Judge Watson noted the “hand of one is the hand of all” theory, explaining that both Hughes and Pearce would be criminally liable due to the planning and premeditation of the armed robbery and ultimate murder. (App’x 1819–20). Judge Watson further described the shooting as premeditated and “cold-blooded,” noting that Hughes “[c]ould have committed the armed robbery without shooting these people.” (App’x 1820).

Citing the *Kent*<sup>5</sup> factors, Judge Watson explained that, assuming Hughes had no prior record and no prior adjudication, “the question is whether or not he could be rehabilitated in the juvenile justice system. He noted the seriousness and premeditated nature of these crimes, finding “there is no rehabilitation in the juvenile justice system for this young man for that type of crime.” (App’x 1821). Additionally noting that Hughes was “almost seventeen,” Judge Watson pointed out that the family court would be limited to indeterminate detention not to exceed his twenty-first birthday whereas the court of general sessions has more authority to order detention for whatever amount of time it deems appropriate for rehabilitation. (App’x 1821). The family court found Hughes had the level of maturity and sophistication sufficient to be held accountable for his actions, contrasting his actions to those of a “child that picks up a gun thinking that it’s unloaded and it goes off and it kills somebody. (App’x 1822). Specifically, Judge Watson noted Hughes’s use of a “high powered weapon,” which he pointed at someone and pulled the trigger knowing that “somebody is going to be very seriously injured or maimed or killed.” (App’x 1822). Finally, Judge Watson determined that the juveniles accused of committing crimes involving this level of violence need to be tried in public and by a jury in order to make the public aware that “when a person commits a crime of this nature, the State is doing something about it.” (App’x 1822–34). He noted that requiring Hughes to be tried in general sessions will be a deterrent to others as well as Hughes. (App’x 1823). Judge Hughes filed a written order memorializing these findings and waiving Hughes to general sessions on May 3, 1994. (App’x 2029–32).

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<sup>5</sup> *Kent v. United States*, 383 U.S. 541 (1966)

## ARGUMENT

**Recognizing the strength and applicability of the presumption that counsel rendered effective assistance, the post-conviction relief judge correctly determined juvenile counsel did not provide constitutionally ineffective assistance for failing to extensively investigate and present evidence to the family court opposing the transfer of Hughes’s case to general sessions where, despite only having two days to prepare, counsel managed to speak extensively with Hughes’s family and one of the detectives prior to the hearing, where a DJJ specialist provided detailed testimony regarding Hughes’s school records, where counsel reasonably believed a pre-waiver evaluation had been completed by DJJ prior to the hearing, and where the family court judge—who is ultimately responsible for making the waiver determination following a “full investigation”—rejected counsel’s request to delay its decision to allow counsel to obtain a DJJ evaluation and because Hughes failed to demonstrate any conceivable prejudice existed such that the family court would have retained jurisdiction even had counsel somehow obtained a DJJ evaluation where the *Kent* factors weighed in favor of transfer and where Hughes was originally sentenced to death per the jury’s recommendation based on the existence of three aggravating circumstances beyond a reasonable doubt.**

Family courts in South Carolina have exclusive jurisdiction over cases involving children accused of engaging in criminal activity. *State v. Jones*, 392 S.C. 647, 652, 709 S.E.2d 696, 698 (Ct. App. 2011). However, “jurisdiction of the family court over juveniles is a privilege rather than a matter of right.” *Sanders v. State*, 281 S.C. 53, 56, 314 S.E.2d 319, 321 (1984); *see also In re Shaw*, 274 S.C. 534, 541, 265 S.E.2d 522, 525 (1980) (noting that “[t]he General Assembly has extended the protection of the family court to all juveniles . . . , [t]his protection is not given to juveniles as a matter of right it is given as a privilege”). In certain cases, “[t]he best interests of the public or of the juvenile may require that the juvenile be held accountable as an adult for his criminal conduct.” *Sanders*, 281 S.C. at 56, 314 S.E.2d at 321; *cf. State v. Wright*, 269 S.C. 414, 237 S.E.2d 764 (1977) (noting that the serious nature of the offense is a major factor in the transfer decision).

Accordingly, the family court may transfer jurisdiction over a criminal matter to the court of general sessions. *Jones*, 392 S.C. at 652, 709 S.E.2d at 699. In 1994, section 20-7-430(6)<sup>6</sup> of the South Carolina Code specifically authorized the family court to determine whether it is appropriate to transfer a juvenile charged with murder to the general sessions court. Section 20-7-430(4) further provided that:

If a child sixteen years of age or older is charged with an offense which would be a misdemeanor or felony if committed by an adult and if the court, after full investigation, deems it contrary to the best interest of such child or of the public to retain jurisdiction, the court may, in its discretion, acting as committing magistrate, bind over such child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult.

*See State v. Kelsey*, 331 S.C. 50, 64, 502 S.E.2d 63, 70 (1998) (noting that, upon a motion to transfer jurisdiction, the family court must determine if it is in the best interest of both the child and the community before granting the transfer request). In making that determination, the family court judge must consider the following factors enunciated by the United States Supreme Court in *Kent*:<sup>7</sup>

- (1) The seriousness of the alleged offense.
- (2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner.
- (3) Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
- (4) The prosecutive merit of the complaint.

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<sup>6</sup> S.C. Code Ann. § 20-7-430 was enacted in 1981 and repealed in 1996. Section 20-7-7605 was then enacted in 1996, which was substantially similar to its predecessor statute. S.C. Code Ann. § 20-7-7605 was subsequently repealed and renumbered in 2008 as S.C. Code Ann. § 63-19-1210.

<sup>7</sup> In *Kent*, a juvenile was waived into adult court without a hearing and without counsel. The Supreme Court disapproved of the procedure followed by the judge, holding that the process of transferring a juvenile to adult court is one with such “tremendous consequences” that it should require attendant ceremony with a hearing, assistance of counsel, and a statement of reasons. *Id.* at 554.

- (5) The desirability of trial and disposition of the entire offense in one court.
- (6) The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
- (7) The record and previous history of the juvenile, including previous contacts with law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation, or prior commitments to juvenile institutions.
- (8) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available.

383 U.S. at 566–67; *State v. Pittman*, 373 S.C. 527, 559, 647 S.E.2d 144, 160 (2007). The family court must then issue an order that includes “a sufficient statement of reasons for, and considerations leading to” its decision and include the “salient facts upon which the order is based.” *In re Sullivan*, 274 S.C. 544, 548, 265 S.E.2d 527, 529 (1980) (citing 43 C.J.S. *Infants* § 48 (1978)). If the family court judge determines a transfer is necessary, the court of general sessions then assumes jurisdiction, authority, and power over the juvenile’s case. S.C. Code Ann. § 63-19-1210(8).

Hughes contends the post-conviction relief court erred by failing to find defense counsel Martin Banks provided constitutionally ineffective assistance of counsel prior to and during the waiver hearing. Specifically, Hughes focuses on the alleged failure of Counsel Banks to request an evaluation and recommendation from the Department of Juvenile Justice as it relates to the investigation provision of the transfer statute. In 1994, section 20-7-430(4)<sup>8</sup> of the South Carolina Code provided that jurisdiction over a case involving a juvenile may be transferred:

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<sup>8</sup> S.C. Code Ann. § 20-7-430 was enacted in 1981 and repealed in 1996. S.C. Code Ann. § 20-7-7605 was then enacted in 1996, which was substantially similar to its predecessor statute. S.C.

If a child sixteen years of age or older is charged with an offense which would be a misdemeanor or felony if committed by an adult and if the court, after full investigation, deems it contrary to the best interest of such child or of the public to retain jurisdiction, the court may, in its discretion, acting as committing magistrate, bind over such child for proper criminal proceedings to any court which would have trial jurisdiction of such offense if committed by an adult.

Here, Hughes’s waiver hearing convened on April 8, 1994—only two and a half weeks after the juvenile petitions were filed against Hughes. However, Counsel Banks testified at the PCR hearing that he “probably had in this case about two days’ notice” of the waiver hearing. (App’x 2621); *see Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) (explaining that the reasonableness of an investigation, or a decision by counsel that forecloses the need for an investigation, must be considered *in light of the scarcity of counsel’s time and resources* in preparing for a sentencing hearing . . .” (emphasis added)).

While readily acknowledging that he did not have Hughes evaluated by a mental health professional or interview his teachers in those two days, Counsel Banks testified that he was prepared to present a defense as to why Hughes should not be treated as an adult at the hearing based on the information he was able to obtain. (App’x 2632). For example, he was able to speak with Detective Rhudy—one of the two officers who testified at the waiver hearing—as well as Hughes’s family. (App’x 2632–33). He stated he learned “what type of individual he was and what problems he had had.” (App’x 2633). Although Counsel Banks was not able to thoroughly review Hughes’s school records, he learned about his age, the problems he had in school, and some of the issues within his family. (App’x 2633–34). Accordingly, Hughes’s contention that Counsel Banks “failed to conduct any investigation whatsoever” is directly refuted by the record.

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Code Ann. § 20-7-7605 was subsequently repealed and renumbered in 2008 as S.C. Code Ann. § 63-19-1210.

Hughes points to Counsel Banks' assumption that he would be given a DJJ evaluation as an act or omission that amounts to deficient performance under *Strickland*. However, Counsel Banks explained at the PCR hearing that "without exception in the past, and almost without exception to date" the State, DSS, or DJJ would provide him with a report from the pre-waiver evaluation the day of the hearing. (App'x 2622). When asked on cross-examination whether he was aware he had the right to request an evaluation from DJJ, Counsel Banks went on to explain that the "statute was relatively new, or the changes to the statute were relatively new at that point, and the assumption I was operating under was that it would be done by -- that it would be ordered and done by DJJ." (App'x 2631).

Crucially, *Strickland* states that a "fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Recognizing the strength and applicability of the presumption that counsel rendered effective assistance, the PCR court correctly found that "under these circumstances, taken from counsel's perspective at the time, he acted competently in making the request for the evaluation (and the request to delay) during the transfer hearing." (App'x 3607).

Specifically, the PCR court noted that Judge Watson was fully aware that a pre-waiver evaluation had not been conducted and that DJJ was not making an affirmative recommendation.<sup>9</sup> (App'x 3607). As aforementioned, Counsel Banks nonetheless made the following request at the conclusion of the hearing:

If you decide that you need more information and delay your decision until we request an evaluation from the team at DJJ. I kind

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<sup>9</sup> Pre-waiver evaluations are not statutorily required. As was the case in *Shaw*, Judge Watson received information from DJJ about Hughes' schooling and criminal history sufficient to comply with the investigation requirement of section 20-7-430(4).

of think we are kind of in a bubble in this case but at least if you see yourself leaning toward siding against us that you ought to have at least that input based on the time constraint that was placed on me in this matter.

(App’x 1818–19).

The family court judge—who is ultimately responsible for making the waiver determination following a “full investigation”—rejected the need for any delay and proceeded to order the transfer.<sup>10</sup> Further, Hughes failed to demonstrate that the family court would have ordered the DJJ evaluation if counsel had requested one earlier, which at best would have been two days prior to the hearing. To the contrary, when presented with the matter, the family court chose to proceed without it. Accordingly, nothing in the record supports Hughes’s contention that the family court judge was “deprived of information crucial to the question of waiver” as a result of Counsel Banks’ purported failure to present the unspecified “plethora of evidence” that allegedly was readily available to him. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (“The widespread use of the tactic of attacking counsel by showing what ‘might have been’ proves that nothing is clearer than hindsight—except perhaps the rule that we will not judge counsel’s performance through hindsight.”).

*Strickland* notes that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the [proceeding] cannot be relied on as having produced a just result. 466 U.S. at 686. Here, even if Counsel Banks could have somehow obtained a DJJ evaluation and other records within the two days between the time he received notice of the hearing and the hearing itself or otherwise

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<sup>10</sup> Dr. Jonathan Venn, a clinical psychologist who was working at DJJ from 1989 through 1997, testified at the PCR hearing that requests for pre-waiver evaluations come directly from the family court via order. (App’x 2656–57).

convinced the family court to delay its decision until a DJJ evaluation was completed, Hughes failed to demonstrate a reasonable probability that the family court would have retained jurisdiction instead of transferring his case to general sessions. *See generally* 43 C.J.S. *Infants* § 48 (explaining that “[t]he hearing is not designed primarily to probe the question of guilt or innocence, or to gather facts for the purpose of conducting criminal proceedings against the juvenile, but is merely to determine whether an offense has been committed and whether probable cause exists to believe that the child committed the offense, and if so whether, with regard to the relative best interests of the juvenile and society, it is better that the juvenile be tried as an adult rather than as a juvenile”).

Hughes contends nonetheless that his school records could have provided additional information showing he “suffered from low intellectual functioning and was not at all sophisticated or mature” according to Dr. Jonathan Venn, a clinical psychologist who previously worked at DJJ and evaluated Hughes in 1999 for purposes of the post-conviction relief action. In conducting his evaluation, Dr. Venn testified he interviewed Hughes, spoke with his middle school principal, administered psychological tests, and reviewed various records. (App’x 2641–43). Dr. Venn opined that Hughes should have remained in family court and could have been rehabilitated by the juvenile justice system.<sup>11</sup> (App’x 2643). However, Dr. Venn admitted that his testing suggested an “average risk of re-offending.” (App’x 2648, 2653).

Dr. Venn’s opinion was based in part on his finding that Hughes had not prior adjudications in family court, a fact that was known by the family court. (App’x 2644–45). Additionally, Dr.

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<sup>11</sup> Certain additional “negative” factors, which weigh in favor of transfer, were identified by Dr. Venn, including Hughes’ low IQ, failure to perform well in school, behavioral problems in school, history of running away, abuse of marijuana and alcohol, and conduct problems and hyperactive attention deficient disorder. (App’x 2647–51).

Breyer testified that South Carolina’s juvenile justice system had many deficiencies in the mental health, education, and other facilities in 1994, which the family court judge was also likely aware of. (App’x 2422–43). The post-conviction relief court therefore correctly concluded that Hughes failed to demonstrate that the family court would have retained jurisdiction had it been presented with this information, particularly in light of the fact that the DJJ counselor, Dolly Zeigler, reviewed Hughes’s school records and testified at the waiver hearing about his educational background, disciplinary infractions, and expulsion.

This Court has emphasized that the first *Kent* factor—the seriousness of the alleged offense—is a “major factor in the transfer decision.” *State v. Corey D.*, 339 S.C. 107, 118, 529 S.E.2d 20, 26 (2000); *Jones*, 392 S.C. 647, 709 S.E.2d 696 (transfer upheld where fifteen-year-old defendant was charged with murder, armed robbery, and unlawful possession of a pistol); *Kelsey*, 331 S.C. 50, 502 S.E.2d 63<sup>12</sup> (transfer upheld where sixteen-year-old defendant was charged with murder); *Sanders*, 281 S.C. 53, 314 S.E.2d 319 (transfer upheld where thirteen-year-old defendant was charged with two counts of murder and two counts of assault and battery with intent to kill); *State v. Wright*, 269 S.C. 414, 237 S.E.2d 764 (1977) (transfer upheld where sixteen-year-old defendant was charged with armed robbery and assault and battery with intent to kill). Here, three of the offenses Hughes was charged and ultimately convicted of—murder, ABWIK, and armed robbery—are statutorily classified as violent under S.C. Code Ann. § 16-1-60 and “most serious” under S.C. Code Ann. § 17-25-45.

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<sup>12</sup> In finding the juvenile’s case was properly transferred to general sessions, this Court in *Kelsey* noted the family court’s determination that, if convicted of murder in family court, the juvenile “would get only twenty-four to fifty-four months—this was not in the community’s best interest due to the seriousness of the crime.” 331 S.C. at 66, 502 S.E.2d at 71.

Additionally, ample probative evidence in the record supports the PCR court's conclusion that Hughes failed to meet *Strickland's* prejudice prong. The fact that the jury originally recommended Hughes be sentenced to death weighs heavily in favor of transferring per the first four *Kent* factors. Specifically, the jury found the existence of all three of the following statutory aggravating circumstances submitted by the State:

1. The murder of Kenneth Presley was committed while in the commission of robbery while armed with a deadly weapon;
2. The murder of Kenneth Presley was committed while in the commission of larceny while armed with a deadly weapon; and
3. The offender, by his act of murder of Kenneth Presley, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(App'x 1747–48; 1936–38; 1954–56). Likewise, this Court on direct appeal found “the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. *Hughes*, 328 S.C. at 155, 493 S.E.2d at 825. Accordingly, the PCR court correctly found juvenile did not provide constitutionally ineffective assistance before or during the waiver hearing before the family court. As these findings are supported by probative evidence and do not constitute an error of law, this Court should deny certiorari.

**CONCLUSION**

Based on the foregoing argument, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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