

VOLUME NINE OF TWELVE

4001-4500

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas

Alexander S Macauley, Circuit Judge
2000 CP 01 212

JOHN KENNEDY HUGHEY, #5055
Respondent/Petitioner,

V

STATE OF SOUTH CAROLINA,
Petitioner/Respondent,

APPENDIX

ALAN WILSON
Attorney General

JOHN W McINTOSH
Chief Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

Office of the Attorney General
P O Box 11549
Columbia S C 29211
803 734 6305

COUNSEL FOR
PETITIONER/RESPONDENT

E CHARLES GROSE, Jr
Circuit Public Defender
8th Judicial Circuit
Suite 208 Park Plaza
600 Monument Street, Box P 133
Greenwood S C 29646
864 229 9505

TARA M SCHULTZ
8th Circuit Public Defenders Office
Laurens County Courthouse
100 Hillcrest Drive, Suite P
Laurens, S C 29320
864 984 8807

South Carolina Commission on
Indigent Defense Division of Appellate
Defense
P O Box 11589
Columbia, S C 29211 1589

COUNSEL FOR
RESPONDENT/PETITIONER

RECEIVED

JAN 13 2011

S.C. Supreme Court

INDEX

INDEX	1
VOLUME I	
VOIR DIRE	2
COMPETENCY HEARING MOTION	13
DR. KATINA CLARDY WRIGHT (<i>IN CAMERA</i>)	
Direct Examination by the Defense	14
Cross Examination by the Solicitor	16
Redirect Examination by the Defense	22
Recross Examination by the Solicitor	35
Redirect Examination by the Defense	74
Recross Examination by the Solicitor	79
Redirect Examination by the Defense	81
DR. JAMES EVANS (<i>IN CAMERA</i>)	
Direct Examination by the Defense	81
Cross Examination by the Solicitor	83
Redirect Examination by the Defense	84
Recross Examination by the Solicitor	96
GLORIA WHITE HARRISON (<i>IN CAMERA</i>)	
Direct Examination by the Defense	135
Cross Examination by the Solicitor	141
DR. JAMES EVANS (<i>IN CAMERA</i>)	
Direct Examination by the Defense	168
Cross Examination by the Solicitor	180
Redirect Examination by the Defense	196
Examination by the Court	196
MOTIONS AND RULING	198
JURY ROLL CALL	212
VOIR DIRE	308
MOTION ON BRIAN DALY	345
VOIR DIRE EXCUSALS	361

CONTINUED COMPETENCY HEARING

DR. KATHRYN LEWIS (IN CAMERA)

Examination by the Court	413
Direct Examination by the Defense	415

VOIR DIRE	423

PATTY GRIFFIN

Examination by the Court	423
Examination by the Defense	431
Direct Examination by the Solicitor	433

MARTHA CROCKETT

Examination by the Court	442
Examination by the Defense	449

ROBERT J. ASHE

Examination by the Court	453
Examination by the Defense	459
Examination by the Solicitor	465

RALPH KOERBER

Examination by the Court	470

LINDA MCCALL

Examination by the Court	479
Examination by the Defense	483
Examination by the Solicitor	484

STEVE WHITE

Examination by the Court	486
Examination by the Defense	490
Examination by the Solicitor	495

VOLUME II

WALTER FLEMING

Examination by the Court	501
Examination by the Defense	505

GINA NORRIS

Examination by the Court	508
Examination by the Defense	515
Examination by the Solicitor	516

DAVID HOBBY	
Examination by the Court	524
DANNY BROWN	
Examination by the Court	528
Examination by the Solicitor	536
Examination by the Defense	544
Re-examination by the Court	546
COLLOQUY	551
CURTIS LOMAX	
Examination by the Court	559
DUANNE HALL	
Examination by the Court	567
Examination by the Defense	576
Examination by the Solicitor	579
VICKY MCCLAIN	
Examination by the Court	582
Examination by the Defense	591
Examination by the Solicitor	594
JAMES KLUGH	
Examination by the Court	605
Examination by the Defense	612
Examination by the Solicitor	614
Re-Examination by the Court	621
Re-Examination by the Defense	625
MICHAEL TOMPKINS	
Examination by the Court	629
Examination by the Defense	636
Examination by the Solicitor	639
BRIAN CHRISLEY	
Examination by the Court	642
Examination by the Defense	648
JAMES S. JONES, JR	
Examination by the Court	650
Examination by the Defense	658
Examination by the Solicitor	661

ROY DRAFT		
Examination by the Court	-	664
Examination by the Defense	-	673
Examination by the Solicitor	-	680
COLLOQUY		
		681
ROY DRAFT		
Further Examination by the Court		686
Further Examination by the Defense		690
MARTHA STONE		
Examination by the Court		693
Examination by the Defense	-	700
BARBARA THOMAS		
Examination by the Court	-	702
Examination by the Defense	-	711
Examination by the Solicitor	-	714
WILLIAM L HESSON		
Examination by the Court	-	717
Examination by the Defense		724
Re-Examination by the Court	-	735
SUSAN WILLIAMS		
Examination by the Court	-	738
Examination by the Defense	-	746
Examination by the Solicitor		749
BETTY GILLIAM		
Examination by the Court		757
FRANCES COWART		
Examination by the Court		762
Examination by the Defense		770
Examination by the Solicitor		771
JENNY CLARK		
Examination by the Court		781
Examination by the Defense		789
LINDA HAYNES		
Examination by the Court		791
Examination by the Defense		799

ALDENE LANGLEY	
Examination by the Court	803
Examination by the Defense	813
Examination by the Solicitor	818
Further Examination by the Defense	828
Further Examination by the Court	829
 LEROY MILLS	
Examination by the Court	838
Examination by the Defense	849
 EDDIE WILLIAMS	
Examination by the Court	858
Examination by the Solicitor	861
 COLLOQUY ABOUT PRISON GUARD DALY	866
 BRIAN DALY	
Examination by the Court	872
Examination by the Defense	882
Examination by the Solicitor	885
Further Examination by the Defense	894
 SPENCER SORROW	
Examination by the Court	897
Examination by the Defense	906
Examination by the Solicitor	910
 JAMES B. JONES, JR.	
Examination by the Court	917
Examination by the Defense	924
Examination by the Solicitor	928
 ANDREA BRAMLETT	
Examination by the Court	930
Examination by the Defense	939
Examination by the Solicitor	947
 ADANELL TALLEY	
Examination by the Court	951
 STANLEY ABERNATHY	
Examination by the Court	962
Examination by the Defense	970
Examination by the Solicitor	972

SOPHIA BATTLE	
Examination by the Court	976
Examination by the Defense	986
Examination by the Solicitor	994

VOLUME III

FRAN MORROW	
Examination by the Court	1005
WILLIAM HEATH BOWIE	
Examination by the Court	1022
Examination by the Defense	1028
Examination by the Solicitor	1032
DIANNE DOTSON	
Examination by the Court	1035
SANDRA LOTHBRIDGE	
Examination by the Court	1044
Examination by the Defense	1051
Examination by the Solicitor	1056
Further Examination by the Defense	1066
BOBBY GARNER	
Examination by the Court	1069
Examination by the Defense	1086
Examination by the Solicitor	1091
CHESIREE LOMAX	
Examination by the Court	1102
Examination by the Defense	1110
Examination by the Solicitor	1114
Further Examination by the Defense	1121
Further Examination by the Court	1124
NANCY MURPHEY	
Examination by the Court	1138
Examination by the Defense	1149
Examination by the Solicitor	1149

L T CARTER	
Examination by the Court	1151
Examination by the Defense	1161
Examination by the Solicitor	1167
Further Examination by the Defense	1170
Further Examination by the Court	1170
Further Examination by the Defense	1176
Further Examination by the Court	1179
HAROLD FREESE	
Examination by the Court	1186
Examination by the Defense	1193
Examination by the Solicitor	1198
LINDA S CANFIELD	
Examination by the Court	1200
Examination by the Defense	1209
Examination by the Solicitor	1216
WILLIAM SIMMONS	
Examination by the Court	1239
Examination by the Defense	1248
Examination by the Solicitor	1250
WILLIAM J JONES	
Examination by the Court	1252
Examination by the Defense	1260
Examination by the Solicitor	1263
MOTIONS	1267
ADDITIONAL JURY VOIR DIRE AND EXCUSALS	1284
MOTIONS	1481
	VOLUME IV
NANCY S KING (<i>IN CAMERA</i>)	
Examination by the Solicitor	1502
Examination by the Defense	1518
MOTIONS	1529

SHIRLEY J MCKINSEY (<i>IN CAMERA</i>)	
Examination by the Court	1533
Examination by the Defense	1545
Examination by the Solicitor	1547
Further Examination by the Court	1555
Further Examination by the Solicitor	1558
MARGARET CADE	
Examination by the Court	1561
Examination by the Defense	1563
Examination by the Solicitor	1564
CANDICE J CHARPING	
Examination by the Court	1568
Examination by the Solicitor	1571
Examination by the Defense	1579
Further Examination by the Court	1579
SUSAN W MCCAULEY	
Examination by the Court	1583
Examination by the Defense	1589
Examination by the Solicitor	1590
TYRONE C PEARSON	
Examination by the Court	1592
Examination by the Defense	1603
Examination by the Solicitor	1609
CHAUNCEY COVIN	
Examination by the Court	1622
Examination by the Defense	1631
Examination by the Solicitor	1633
Further Examination by the Court	1637
THOMAS A SOUTHERLAND	
Examination by the Court	1641
DOROTHY J ROUSEY	
Examination by the Court	1648
Examination by the Defense	1658
Examination by the Solicitor	1661
Further Examination by the Defense	1668
Further Examination by the Court	1668
Further Examination by the Solicitor	1674

CARLOS BROWN

Examination by the Court	-	1677
Examination by the Defense		1684
Examination by the Solicitor		1687
Further Examination by the Court		1692

LINDA PAYNE MCELRATH

Examination by the Court		1699
Examination by the Defense	-	1708
Further Examination by the Court		1713

WILLIE BELTON

Examination by the Court	✓	1716
Examination by the Defense		1727
Further Examination by the Court		1737
Further Examination by the Defense	-	1740
Examination by the Solicitor	-	1741

JAMES R LEE, JR.

Examination by the Court		1742
Examination by the Defense		1750
Examination by the Solicitor		1751

CHANDELL C BOGGS

Examination by the Court	✓	1752
Examination by the Defense		1763
Examination by the Solicitor		1770

HAYWOOD BLACK

Examination by the Court		1773
Examination by the Defense		1784
Examination by the Solicitor		1787

JENNIFER N PIERCE

Examination by the Court		1792
Examination by the Defense		1799
Examination by the Solicitor		1807

MR CARTER

Examination by the Court	✓	1815

MS MCCLAIN

Examination by the Court		1816

CHARLES W BOWIE, JR.

Examination by the Court	✓	1820

LUCIOUS PARNELL	
Examination by the Court	1824
JAMES L FREEMAN	
Examination by the Court	1831
Examination by the Defense	1837
AUDREY BANNISTER	
Examination by the Court	1839
Examination by the Defense	1845
Examination by the Solicitor	1850
TOMMY TURMAN	
Examination by the Court	1854
Examination by the Defense	1860
Examination by the Solicitor	1860
BESSIE D BRUCE	
Examination by the Court	1861
Examination by the Defense	1872
Examination by the Solicitor	1874
JIMMY GAINEY	
Examination by the Court	1881
CALVINE WASHINGTON	
Examination by the Court	1883
Examination by the Defense	1891
JAMES L FREEMAN	
Examination by the Court	1892
CHRISTOPHER L MACK	
Examination by the Court	1900
Examination by the Defense	1907
Examination by the Solicitor	1912
Further Examination by the Court	1914
MOTIONS	1917
GARY L ELLIS	
Examination by the Court	1937
Examination by the Defense	1945
Examination by the Solicitor	1947
Further Examination by the Court	1949

BOBBY CUTTER	
Examination by the Court	1952
RICHARD E. BURTON	
Examination by the Court	1960
Examination by the Defense	1964
Examination by the Solicitor	1966
Further Examination by the Defense	1967
Further Examination by the Solicitor	1967
MAMIE LONDON	
Examination by the Court	1969
Examination by the Defense	1981
CALVIN HILL	
Examination by the Court	1984
Examination by the Defense	1998
Examination by the Solicitor	2002

VOLUME V

MOTIONS	2005
CAROL A. CHRISSLY (<i>IN CAMERA</i>)	
Direct Examination by the Defense	2041
Cross Examination by the Solicitor	2053
Redirect Examination by the Defense	2060
Recross Examination by the Solicitor	2061
MOTION TO QUASH	2063
SONJI HILL (<i>IN CAMERA</i>)	
Examination by the Court	2071
Examination by the Defense	2082
Examination by the Solicitor	2087
SELECTION OF THE JURY	2096
OBJECTIONS TO JURY SELECTION	2108
EXHIBITS MARKED AND/OR INTRODUCED	2120
MOTIONS	2140
PROFERRED TESTIMONY OF MARCUS HARRIS	2143

MOTIONS	2158
JURY ENTERS COURTROOM AND OPENING REMARKS	2168
OPENING STATEMENT BY THE SOLICITOR	2181
OPENING STATEMENT BY THE DEFENSE	2191
MARCUS HARRIS	
Direct Examination by the Solicitor	2208
Cross Examination by the Defense	2221
CORPORAL PATRICK NEIL HENDERSON (<i>IN CAMERA</i>)	
Direct Examination by the Solicitor	2253
Examination by the Court	2258
Cross Examination by the Defense	2260
RULING	2268
ANGELA PATTERSON	
Direct Examination by the Solicitor	2273
Cross Examination by the Defense	2285
Redirect Examination by the Solicitor	2290
CORPORAL PATRICK NEIL HENDERSON	
Direct Examination by the Solicitor	2291
Cross Examination by the Defense	2328
Redirect Examination by the Solicitor	2336
LIEUTENANT BARRY NEW	
Direct Examination by the Solicitor	2338
Cross Examination by the Defense	2373
Re-presented	2437
CORPORAL MITCH CHRISTOPHER	
Direct Examination by the Solicitor	2389
Cross Examination by the Defense	2395
MICHAEL ADAMS	
Direct Examination by the Solicitor	2400
Cross Examination by the Defense	2405
MOTION TO RECONSIDER EXCLUSION OF EVIDENCE	2415

KEN GROGAN	
Direct Examination by the Solicitor	2453
Cross Examination by the Defense	2457
DR JOHN LEWALLEN	
Direct Examination by the Solicitor	2461
Cross Examination by the Defense	2467
CHARLTON COXE	
Direct Examination by the Solicitor	2468
Cross Examination by the Defense	2471
DAVID BLACK	
Direct Examination by the Solicitor	2475

VOLUME VI

BRETT WOODARD	
Direct Examination by the Solicitor	2527
Cross Examination by the Defense	2550
DAVID BLACK	
Cross examination by the Defense	2567
GLORIA HARRISON (IN CAMERA)	
Direct examination by the Defense	2625
Cross examination by the Solicitor	2629
RULING	2643
CORPORAL PATRICK NEIL HENDERSON	
Direct Examination by the Solicitor	2650
Cross Examination by the Defense	2652
JOHN BLACK	
Direct Examination by the Solicitor	2653
Cross Examination by the Defense	2661
NANCY SKARABA	
Direct Examination by the Solicitor	2676
Cross Examination by the Defense	2692
Redirect Examination by the Solicitor	2699

LINDA BROOME	
Direct Examination by the Solicitor	2701
Cross Examination by the Defense	2706
NANCY GOFF	
Direct Examination by the Solicitor	2709
Cross Examination by the Defense	2713
Redirect Examination by the Solicitor	2717
Recross Examination by the Defense	2718
EDDIE CLARK (<i>IN CAMERA</i>)	
Direct Examination by the Solicitor	2721
Cross Examination by the Defense	2728
Redirect Examination by the Solicitor	2842
Recross Examination by the Defense	2861
JERRY SLOAN (<i>IN CAMERA</i>)	
Direct Examination by the Solicitor	2740
Cross Examination by the Defense	2745
Redirect Examination by the Solicitor	2869
Recross Examination by the Defense	2878
Redirect Examination by the Solicitor	2882
ROBIN RUCKER (<i>IN CAMERA</i>)	
Direct Examination by the Solicitor	2750
Cross Examination by the Defense	2754
Redirect Examination by the Solicitor	2763
JOHN KENNEDY HUGHEY (<i>IN CAMERA</i>)	
Direct Examination by the Solicitor	2769
Cross Examination by the Defense	2773
BEVERLY KELLY	
Direct Examination by the Solicitor	2799
Cross Examination by the Defense	2803
Redirect Examination by the Solicitor	2808
Recross Examination by the Defense	2809
Redirect Examination by the Solicitor	2810
DAN DEFREESE	
Direct Examination by the Solicitor	2812
Cross Examination by the Defense	2828
Redirect Examination by the Solicitor	2833

EDDIE CLARK	
Direct Examination by the Solicitor	2842
Cross Examination by the Defense	2861
JERRY SLOAN	
Direct Examination by the Solicitor	2868
Cross Examination by Defense	2878
Redirect Examination by the Solicitor	2882
BERNICE JACKSON	
Direct Examination by the Solicitor	2885
Cross Examination by the Defense	2892
Redirect Examination by the Solicitor	2893
GEORGE MACK HARRIS	
Direct Examination by the Solicitor	2898
MOTIONS	2934
CHRIS JESSIE BURTON	
Direct Examination by the Solicitor	2944
Cross Examination by the Defense	2962
Redirect Examination by the Solicitor	2990
Recross Examination by the Defense	2993
GLORIA WHITE HARRISON	
Direct Examination by the Defense	2993

VOLUME VII

GLORIA WHITE HARRISON	
Cross Examination by the Solicitor	3026
JOHN KENNEDY HUGHEY	
Direct Examination by the Defense	3064
Cross Examination by the Solicitor	3163
Redirect Examination by the Defense	3244
DONALD GIRNDT	
Direct examination by the Defense	3253
Cross Examination by the Solicitor	3284
Redirect Examination by the Defense	3348
MOTIONS	3366
CLOSING ARGUMENTS BY THE SOLICITOR	3384

CLOSING ARGUMENTS BY THE DEFENSE	3413
JURY CHARGE	3444
EXCEPTIONS BY THE DEFENSE	3475
JURY REQUEST FOR FURTHER INSTRUCTIONS	3482
RECHARGE OF THE JURY	3483
EXCEPTIONS REITERATED	3491
VERDICT AND POLLING OF THE JURY	3495

VOLUME VIII

MOTIONS	3502

PENALTY STAGE

EVIDENTIARY MATTERS	3508
MOTIONS	3562
OPENING STATEMENT BY THE COURT	3566
OPENING STATEMENT BY THE SOLICITOR	3570
OPENING STATEMENT BY THE DEFENSE	3576
STATEMENT BY THE COURT	3585
MOTIONS	3588
BARRY NEW	
Direct Examination by the Solicitor	3619
DR BRETT WOODARD	
Direct Examination by the Solicitor	3623
Cross Examination by the Defense	3650
ANITA KNEECE	
Direct Examination by the Solicitor	3659
Cross Examination by the Defense	3668

DAVID BLACK	
Direct Examination by the Solicitor	3677
Cross Examination by the Defense	3680
RUTH CONNOR	
Direct Examination by the Solicitor	3696
Cross Examination by the Defense	3699
DORIS BERNICE JACKSON	
Direct Examination by the Solicitor	3701
Cross Examination by the Defense	3718
MARCUS HARRIS	
Direct Examination by the Solicitor	3722
GEORGE ANTHONY HARRIS	
Direct Examination by the Solicitor	3734
Cross Examination by the Defense	3746
MACK HARRIS	
Direct Examination by the Solicitor	3748
ANTHONY WILSON	
Direct Examination by the Defense	3768
Cross Examination by the Solicitor	3793
Redirect Examination by the Defense	3801
Recross Examination by the Solicitor	3801
ANTHONY SCOTT HARRISON	
Direct Examination by the Defense	3803
Cross Examination by the Solicitor	3809
Redirect Examination by the Defense	3813
Recross Examination by the Solicitor	3814
Redirect Examination by the Defense	3816
JESSIE CHRISTOPHER BURTON	
Direct Examination by the Defense	3816
Cross Examination by the Solicitor	3827
NANCY LEIGH RAMEY	
Direct Examination by the Defense	3837
Cross Examination by the Solicitor	3844
REVEREND WENDALL M COX	
Direct Examination by the Defense	3849

GLORIA WHITE HARRISON	
Direct Examination by the Defense	3852
Cross Examination by the Solicitor	3881
Redirect Examination by the Defense	3896
JEFF YOUNGMAN	
Direct Examination by the Defense	3899
Cross Examination by the Solicitor	3933
Redirect Examination by the Defense	3953
Recross Examination by the Solicitor	3956
PAIGE TARR	
Direct Examination by the Defense	3955
Cross Examination by the Solicitor	3960
DR. JAMES EVANS	
Direct Examination by the Defense	3962
Cross Examination by the Solicitor	3989

VOLUME IX

DR. JAMES EVANS	
Redirect Examination by the Defense	4001
Recross Examination by the Solicitor	4002
Redirect Examination by the Defense	4003
EXAMINATION BY THE COURT	4005
MOTIONS	4010
CHARGE CONFERENCE	4013
FINAL ARGUMENTS BY THE ASSISTANT SOLICITOR	4025
FINAL ARGUMENTS BY THE SOLICITOR	4034
FINAL ARGUMENTS BY THE DEFENSE	4036
MOTIONS	4046
CHARGE OF THE COURT	4049
EXCEPTIONS BY THE DEFENSE	4066
VERDICT	4073

POLLING OF THE JURY	4074
MOTIONS	4080
SENTENCING	4087
PRE-TRIAL TRANSCRIPT DATED SEPTEMBER 19, 1997	4093
INDICTMENT	4110
DEFENDANT’S REQUEST TO CHARGE #10	4113
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #11	4116
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #12	4118
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #13	4120
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #14	4122
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #15	4124
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #16	4126
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #17	4128
DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #18	4128
ADDENDUM TO DEFENDANT’S PENALTY PHASE REQUEST TO CHARGE #18	4132
STATE EXHIBIT #95 (PHOTO of VICTIM) ON FILE WITH COURT (Direct Appeal)	
CERTIFICATE OF COUNSEL ON DIRECT APPEAL OF RECORD	4134
[END OF DIRECT APPEAL RECORD ON APPEAL]	
MATTERS FROM STATE POST-CONVICTION RELIEF PROCEEDINGS	
<i>DIRECT APPEAL PLEADINGS</i>	
FINAL BRIEF OF APPELLANT	4135
FINAL BRIEF OF RESPONDENT	4189

FINAL REPLY BRIEF OF APPELLANT	4249
<u>STATE v JOHN K HUGHEY</u> , 339 S C 439, 529 S E 2d 721 (March 27, 2000)	4272
PETITION FOR REHEARING - APRIL 11, 2000	4288
ORDER DENYING PETITION FOR REHEARING, MAY 11, 2000	4296
STATE POST CONVICTION RELIEF PLEADINGS, TRANSCRIPTS AND ORDERS	
APPLICATION FOR POST-CONVICTION RELIEF - OCTOBER 25, 2000	4298
STATE v HUGHEY - S C S Ct - STAY AND ASSIGNMENT ORDER TO JUDGE SAUNDERS - NOVEMBER 2, 2000	4307
APPOINTMENT OF COUNSEL HEARING TRANSCRIPT - NOVEMBER 13, 2000	4309
ORDER ON APPOINTMENT OF P C R COUNSEL - NOVEMBER 16, 2000	4315
RETURN TO APPLICATION FOR POST-CONVICTION RELIEF - JANUARY 19, 2001	4323
MOTION HEARING TRANSCRIPT Ex Parte Hearings - APRIL 29, 2002	4365
ORDER DENYING REQUESTS TO CONDUCT ALL PROCEEDINGS WITH RESPECT TO APPLICANT'S REQUEST FOR EXPERT INVESTIGATION OR OTHER SERVICES, EX PARTE - JULY 26, 2002	4392
ORDER GRANTING MOTION TO RECONSIDER ORDER DENYING REQUESTS TO CONDUCT ALL PROCEEDINGS WITH RESPECT TO APPLICANT'S REQUEST FOR EXPERT INVESTIGATIVE OR OTHER SERVICES EX PARTE - DECEMBER 19, 2002	4402
AMENDED APPLICATION FOR POST-CONVICTION RELIEF - DEC 15, 2006	4405
RETURN TO AMENDED APPLICATION - JANUARY 7, 2008	4411
HUGHEY V STATE, ORDER, S C S Ct AUGUST 17, 2007 ASSIGNING JUDGE MACAULAY, RESCINDING JUDGE SAUNDERS ASSIGNMENT	4468
ORDER OF CONTINUANCE AND FOR MRI - JUNE 6, 2008	4469

APPLICANT'S TRIAL BRIEF WITH ATTACHMENTS - MARCH 31, 2008	4473

VOLUME X (4501)

RESPONDENTS' TRIAL BRIEF WITH ATTACHMENTS - MAY 2, 2008	4570
MAY 22, 2008 MOTION HEARING TRANSCRIPT	4637
EVIDENTIARY HEARING TRANSCRIPT - OCTOBER 13-15, 2008	4654
Index	4655
Witnesses - Robert Tinsley (11-122)	Direct 4664
Jeff Yungman (123-153)	Direct 4775 Cross 4792
Julia Perlotte (153-170)	Direct 4806 Cross 4815 Re-Direct 4821 Re-Cross 4822
Martha Ann Stewart (170-180)	Direct 4823 Cross 4829 Re-Direct 4831
Billy J. Garrett, Jr. (180-304)	Direct 4833 Cross 4879 Re-Direct 4931 Re-Cross 4954
Robert Dudek (305-330)	Direct 4958 Cross 4970 Re-Direct 4980
Paige [Tarr] Haas (330-365)	Direct 4983

VOLUME XI (5001)

Paige [Tarr] Haas	Cross 5005 Re-Direct 5016
Dr. Donna Schwartz-Watts (365-461)	Direct 5018

Cross	5094
Re-Direct	5110
Robert Tinsley, Sr (461-559) Direct	5114
Cross	5157
Re-Direct	5182
CLOSING STATEMENTS	5184
Mr Grose	5184
Mr Zelenka	5194
Mr Grose	5208

EXHIBITS FROM PCR EVIDENTIARY HEARING

APPLICANT'S PCR EXHIBITS

#P-1	Life in the Balance IX Workshop - Handling Your First Case	5212
#P-2	Life in the Balance IX Workshop - Understanding Mental Illness Through Images and Metaphors	5216
#P-3	Outline for Death Penalty Trial	5227
#P-4	Report of Terrence Harvard of 11/5/97	5228
#P-5	Authorization for Expenditure of Funds for Expert Services Dated 5/5/97	5229
#P-6	Affidavit of Paige Munn Tarr	5232
#P-7	Letter of June 17, 1997 and Release - Marlene Eckhardt to Paige Tarr	5245
#P-8	Faxed Statement of 12/9/97 Paige Tarr to Felicia/Robert with Bill and timesheets	5247
#P-9	Patrick B Harris Psychiatric Hospital Reply Notice of 8/21/97 & Subpoena	5252
#P-10	Statement from James R Evans, Ph D Dated 10/20/97 for psychological	5255
#P-11	Letter of 9/10/97 from Jeff Yungman to Robert Tinsley	5256
#P-12	Letter of 10/8/97 and Social History Evaluation Draft (5259) by Yungman	5257
#P-13	Letter and Bill Statement of 10/31/97 from Jeff Yungman to Robert Tinsley	5268

#P-14 Bill Statement of 10/14/97 from Katina Clardy Wright	5272
#P-15 Bill Statement of 11/3/97 from Dr Donald W Morgan	5274
#P-16 Jury Instruction Phase 2 Trial Notes of Robert Tinsley	5276
#P-17 Notice of Evidence in Aggravation of the Punishment - Notes of Tinsley	5278
#P-18 Possible Mitigation Witnesses Notes	5283
#P-19 Handwritten Notes of Robert Tinsley Re Jury Instruction Strategies	5284
#P-20 Handwritten Mitigation Notes	5285
#P-21 Draft Proposed Witness List for Defense	5287
#P-22 Note and Summary of Case Law RE Future Adaptability to Prison Life	5289
#P-23 Handwritten Notes of Robert Tinsley RE Paige Tarr, Denise DelaRue	5295
#P-24 Letter of 1/13/08 Billy J Garrett, Jr to S C Commission on Indigent Defense with timesheet	5296
#P-25 Article Death is Different - Your Approach to a Capital Case Must be Different, Too by Kevin McNalley	5299
#P-26 Memo 12/16/97 Tara Michelle Garrett to Randall Williams	5307
#P-27 Billy Garrett's Handwritten Notes from Meeting 3/6/97 with Family	5308
#P-28 Handwritten Notes from David Bruck Meeting	5310
#P-29 Handwritten Defendant's Possible Witness List	5311
#P-30 Booking Report of Hughey and Detention Center Records	5313
#P-31 Letter of 11/9/97 Jeff Yungman to Paige Tarr about concerns	5366
#P-32 Tarr Handwritten Notes Re Jim Evans and other matters	5368
#P-33 Tarr Mitigation Outline	5369
#P-34 Trial Notes of Paige Tarr about Conflict between counsel	5370

#P-35	Family Court Order of Commitment ,In Re John Kennedy Hughey, 10/6/1986	5371
#P-36	S C Department of Youth Services Plan for Services	5372
#P-37	S C D Y S - Reception and Evaluation Team Report	5373
#P-38	S C D Y S Interdisciplinary Treatment Team Summary (Feb 1987)	5376
#P-39	S C D Y S Interdisciplinary Treatment Team Summary (Sept 1987)	5378
#P-40	S C Vocational Rehabilitation Dept Functional Vocational Assessment Report (3/2/87)	5380
#P-41	S C D Y S R&E Social and Personal Adjustment Form	5383
#P-42	S C D Y S Behavior Reports and Write-ups (May 1987-Aug 1987)	5384
#P-43	S C D Y S Educational Progress Reports (Jan 1987 - Aug 1987)	5393
#P-44	Test of Basic Skills Results from May 1984	5410
#P-45	S C Basic Skills Assessment Program results from May 1984	5411
#P-46	S C D Y S Psychological Evaluation (Dr Siegel) 11/10/86	5412
#P-47	Curriculum Vitae of Dr Donna Schwartz-Watts	5416
#P-48	Psychiatric Evaluation Report of Dr Donna Schwartz-Watts 10/11/2008	5424
#P-49	Final Appellate Brief (Cover) (See App p 4135)	5435
#P-50	Final Reply Brief (Cover) (See App p 4249)	5436
#P-51	Tarr Notes from Phone Conversation with Dr Donald Morgan	5437
#P-52	Discovery Response	5438

RESPONDENT'S PCR HEARING EXHIBITS

#D-1	Defendant's Request to Charge Number 18 with handwritten notation of factors	5440
#D-2	Addendum to Defendant's Request to Charge Number 18 with notations	5442

PLEADINGS AND ORDERS

RESPONDENT'S POST HEARING MEMORANDUM OF LAW -
AUGUST 31, 2009 5444

VOLUME XII (5501)

APPLICANT'S POST HEARING MEMORANDUM - JUNE 8, 2009
(With attachments) 5622

APPLICANT'S POST HEARING REPLY BRIEF - DECEMBER 11, 2009 5840

ORDER GRANTING POST-CONVICTION RELIEF - FILED MAY 14, 2010 5921

APPLICANT'S RULE 59(e) MOTION TO ALTER OR AMEND THE JUDGMENT
MAY 28, 2010 5929

RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT - MAY 28, 2010 5954

**ORDER DENYING RESPONDENT'S MOTION TO ALTER OR AMEND JUDGMENT
PURSUANT TO RULE 59(e)** 5969

1 Q IF HE DECIDES TO MURDER SOMEONE, WOULD THAT
2 CREATE A STRESSFUL SITUATION?

3 A WELL, IT WOULD CREATE A STRESSFUL SITUATION IF
4 YOU THOUGHT YOU WERE GOING TO MURDER YOURSELF,
5 MEANING SUICIDE I GUESS IT WOULD CREATE A
6 STRESSFUL SITUATION IF YOU -- IF YOU HAD ANY
7 CONSCIOUS -- IF YOU WERE THINKING ABOUT KILLING
8 SOMEONE, TOO IT WOULD CERTAINLY MAKE ME STRESSED
9 IF I DECIDED I WAS GOING TO GO KILL SOMEONE

10 Q I DIDN'T ASK YOU HOW IT WOULD MAKE YOU FEEL
11 AND I DIDN'T ASK YOU HOW IT WOULD MAKE SOMEBODY ELSE
12 FEEL WE'RE TALKING ABOUT THIS MAN RIGHT OVER HERE
13 AND, SIR, YOU KNOW THAT I'M ASKING YOU AGAIN,
14 WOULD IT MAKE HIM STRESSFUL, DOCTOR?

15 A I DON'T KNOW BECAUSE I'M NOT IN HIS SHOES I
16 MEAN, THERE ARE SOME PEOPLE -- I'VE SEEN SOME MEN IN
17 PRISON WHO DIDN'T SEEM TO HAVE ANY CONSCIOUS
18 WHATSOEVER AND I KIND OF DOUBT THAT THEY FELT MUCH
19 STRESS WHEN THEY PULLED THE TRIGGER ON SOMEONE

20 Q RIGHT AND YOU DON'T KNOW WHETHER HE'S ONE OF
21 THOSE OR NOT?

22 A I DO NOT

23 MR JONES NO QUESTIONS

24 RE-DIRECT EXAMINATION

25 BY MR TINSLEY

1 Q BUT, DOCTOR, YOU DID -- YOU HAVE WITNESSED HIM
2 DECOMPENSATE IN THE FACE OF STRESS, HAVE YOU NOT?

3 A LAST TIME WE WERE UP HERE I WITNESSED WHAT I
4 BELIEVE TO BE DECOMPENSATION WHEN HE WAS
5 HALLUCINATING HIS MOTHER AUDITORIALY AND VISUALLY

6 Q AND YOU DIDN'T -- DIDN'T DO AN MRI ON MR
7 HUGHEY, DID YOU?

8 A NO, SIR, I DON'T TO MRI'S

9 Q AND YOU DIDN'T TESTIFY AS TO SEIZURE ACTIVITY
10 IN DIRECT, DID YOU?

11 A NO, SIR, I HAVE NO IDEA ABOUT SEIZURE ACTIVITY
12 ONE WAY OR THE OTHER

13 Q AND HIS REACTION TO STRESS THAT YOU HAVE
14 OBSERVED WOULD INDICATE TO YOU, WOULD IT NOT, THAT
15 HE NOT ONE OF THOSE COLD-BLOODED PEOPLE YOU'VE SEEN
16 LIKE YOU'VE SEEN IN PRISON, WOULDN'T IT?

17 A MY IMPRESSION?

18 Q YES, SIR

19 A HE DOESN'T SEEM IT, NO, SIR

20 MR TINSLEY THAT'S ALL

21 RE-CROSS EXAMINATION

22 BY MR JONES

23 Q DIDN'T SEEM IT?

24 A I SAID HE DID NOT SEEM IT TO ME DID NOT SEEM
25 TO BE A COLD-BLOODED MURDERER DID NOT FEEL AT ALL

1 UNCOMFORTABLE SITTING IN THE ROOM WITH HIM WHEN THE
2 DOORS WERE LOCKED AND WE WERE WAITING FOR FIFTEEN
3 MINUTES FOR A JAILOR TO COME OPEN THE DOOR I
4 DIDN'T FEEL LIKE I HAVE IN OTHER SITUATIONS WITH A
5 FEW OTHER PEOPLE I'VE KNOWN

6 Q DID YOU KNOW (INAUDIBLE)*?

7 A NO, SIR

8 Q DO YOU KNOW JAMES SINGLETARY?

9 A I BELIEVE HE'S ONE I EVALUATED YEARS AGO, BUT
10 I'M NOT FOR CERTAIN

11 Q HE DIDN'T CAUSE THE HAIRS TO STAND ON THE BACK
12 OF YOUR NECK, DID HE?

13 A I DON'T REMEMBER HIM

14 Q HAVE YOU SEEN THE PRODUCT OR YOUR CLIENT'S
15 WORK?

16 A NO

17 Q THAT -- THAT'S WHO YOU'RE LOOKING AT THERE
18 HAVE YOU SEEN THAT?

19 A HE PULLED A SHOTGUN ON THEM

20 Q RIGHT YOU KNOW THAT AND HE KNOWS THAT

21 MR JONES I DON'T HAVE ANY FURTHER
22 QUESTIONS

23 RE-DIRECT EXAMINATION

24 BY MR TINSLEY

25 Q IF THAT HAPPENED ALL WITHIN THIRTY SECONDS,

1 THOSE PICTURES YOU JUST SAW

2 A RIGHT

3 Q WOULD THAT IMPACT YOUR INTERPRETATION?

4 A WELL, I'M NOT CERTAIN WHAT -- WHAT VIEWING THE
5 PICTURES -- THAT'S A RESULT I MEAN, THAT'S NOT --
6 I DON'T KNOW WHAT HE WOULD HAVE DONE IF HE HAD AN
7 IMAGE OF THAT BEFORE HE PULLED THE TRIGGER I MEAN,
8 I DON'T SEE THE RELEVANCE OF IT

9 MR TINSLEY THANK YOU SO MUCH,
10 DOCTOR

11 THE COURT YOU MAY STEP DOWN

12 MR TINSLEY GIVE ME ONE SECOND, YOUR
13 HONOR I'M GOING TO LET THE DOCTOR GO?

14 THE COURT ANY OBJECTION TO HIM BEING
15 EXCUSED?

16 MR JONES NO, YOU MAY

17 MR TINSLEY YOUR HONOR, AT THIS THE
18 MITIGATION PHASE OF JOHN KENNEDY HUGHEY RESTS

19 THE COURT ANY REPLY?

20 MR JONES JUDGE, I REALLY DON'T
21 BELIEVE SO IF I COULD JUST TAKE ---

22 THE COURT ALL RIGHT, LET'S TAKE A
23 SHORT BREAK LET ME ASK THE JURORS TO PLEASE GO TO
24 YOUR JURY ROOM WE'LL BRING YOU BACK IN JUST A FEW
25 MINUTES

1 (JURY LEAVES COURTROOM AT 4 57 O'CLOCK P M)

2 THE COURT MR TINSLEY, DID YOU TALK
3 WITH MR HUGHEY ABOUT HIS RIGHT TO ALSO TAKE THE
4 WITNESS STAND AND TESTIFY IN THIS PHASE OF THE
5 TRIAL?

6 MR TINSLEY YES, YOUR HONOR, I HAVE
7 THE COURT HAVE YOU HAD PLENTY OF TIME
8 TO DISCUSS THAT WITH HIM AND TO DETERMINE HIS
9 DECISION IN THAT REGARD?

10 MR TINSLEY YES, SIR, YOUR HONOR, I
11 HAVE

12 THE COURT AND DO YOU BELIEVE THAT ANY
13 DECISIONS HE HAS MADE HAS BEEN MADE FREELY AND
14 VOLUNTARILY HAVING FULL UNDERSTANDING AS TO THE
15 CONSEQUENCES OF THAT DECISION?

16 MR TINSLEY YES, SIR, YOUR HONOR, I
17 CERTAINLY DO

18 THE COURT AND WHAT HAS HE INDICATED
19 TO YOU HIS DECISION IS?

20 MR TINSLEY HE HAS DECIDED THAT HE
21 WILL NOT TAKE THE STAND AT THAT STAGE, RESERVING THE
22 RIGHT TO POSSIBLY MAKE A STATEMENT TO THE JURY
23 LATER

24 THE COURT DO YOU AGREE WITH THAT
25 DECISION?

1 MR TINSLEY YES, SIR, YOUR HONOR, I
2 DO

3 THE COURT ALL RIGHT, MR HUGHEY, I
4 HAVE PREVIOUSLY DISCUSSED WITH YOU YOUR RIGHT TO
5 TAKE THE WITNESS STAND DURING THE TRIAL IN THIS
6 CASE, DURING THE GUILT PHASE OF THIS TRIAL I
7 EXPLAINED THOSE RIGHTS TO YOU AND AT THAT TIME YOU
8 ELECTED TO TAKE THE WITNESS STAND AND TO TESTIFY
9 DURING THAT PHASE OF THE TRIAL DO YOU UNDERSTAND,
10 AS YOUR LAWYER HAS INDICATED, THAT YOU ALSO HAVE THE
11 RIGHT NOW TO TAKE THE WITNESS STAND AND TESTIFY
12 DURING THIS PHASE OF THE TRIAL? DO YOU UNDERSTAND
13 THAT YOU HAVE THAT RIGHT?

14 THE DEFENDANT YES

15 THE COURT HAVE YOU HAD PLENTY OF TIME
16 TO TALK WITH YOUR LAWYERS ABOUT YOUR DECISION AS TO
17 WHETHER YOU WOULD TESTIFY OR NOT TESTIFY DURING THIS
18 PHASE OF THE TRIAL?

19 THE DEFENDANT YES

20 THE COURT AND HAVE THEY EXPLAINED TO
21 YOU THE ADVANTAGES AND ANY DISADVANTAGES OF YOUR
22 TESTIFYING AND OF YOUR NOT TESTIFYING?

23 THE DEFENDANT YES

24 THE COURT AND HAVE YOU HAD PLENTY OF
25 TIME TO THINK ABOUT THE CONSEQUENCES OF THAT

1 DECISION?

2 THE DEFENDANT YES

3 THE COURT DO YOU NEED ADDITIONAL TIME
4 TO TALK WITH YOUR LAWYER ABOUT YOUR DECISION?

5 THE DEFENDANT NO, SIR

6 THE COURT HAVE YOU REACHED A
7 DECISION?

8 THE DEFENDANT YES, SIR

9 THE COURT YOU UNDERSTAND YOU HAVE THE
10 RIGHT TO TESTIFY OR NOT TESTIFY?

11 THE DEFENDANT YES, SIR

12 THE COURT WHAT IS YOUR DECISION?

13 THE DEFENDANT I REST

14 THE COURT SIR?

15 THE DEFENDANT I REST

16 MR TINSLEY I REST HE SAID

17 THE COURT YOU DO NOT WISH TO TESTIFY?

18 THE DEFENDANT NO, SIR

19 THE COURT YOU UNDERSTAND YOU WILL NOT
20 HAVE ANOTHER OPPORTUNITY TO DO SO IF YOU WISH TO?

21 THE DEFENDANT YES, SIR

22 THE COURT OKAY THANK YOU, YOU MAY
23 BE SEATED

24 MR JONES YOUR HONOR, I HAVE TALKED
25 WITH ALL MEMBERS OF THE PROSECUTION TEAM, AND WE

1 DECIDED THAT WE WILL NOT ATTEMPT TO PRESENT ANY
2 REPLY TESTIMONY, SO WE'RE PREPARED TO GO FORWARD
3 WITH ARGUMENT AND CHARGE OF THIS CASE

4 THE COURT OKAY ANY DIFFICULTY OR
5 PROBLEM WITH US HAVING THE ARGUMENTS AND INSTRUCTION
6 IN THE MORNING?

7 MR JONES NOT ON THE PART OF THE
8 STATE, YOUR HONOR

9 MR TINSLEY NOT ON THE PART OF THE
10 DEFENSE, YOUR HONOR

11 THE COURT OKAY BRING THE JURY BACK,
12 PLEASE

13 (JURY RE-ENTERS COURTROOM AT 5 01 O'CLOCK P M)

14 THE COURT ALL RIGHT, LADIES AND
15 GENTLEMEN, AS YOU HEARD BEFORE WE EXCUSED YOU FROM
16 THE COURTROOM THE DEFENSE HAS RESTED THEIR
17 PRESENTATION IN THIS PHASE OF THE TRIAL THE STATE
18 HAS INDICATED THAT THEY HAVE NO ADDITIONAL REPLY,
19 TESTIMONY, OR EVIDENCE TO PRESENT

20 WHAT THAT MEANS IS ALL THE EVIDENCE
21 THAT IS TO BE PRESENTED DURING THE PHASE OF THE
22 TRIAL HAS NOW BEEN RECEIVED WHAT REMAINS TO BE
23 DONE ARE THE FINAL ARGUMENTS TO BE ACCOMPLISHED BY
24 THE LAWYERS, AFTER WHICH I WILL GIVE YOU AN
25 ADDITIONAL LEGAL INSTRUCTION THAT YOU WILL APPLY TO

1 THE FACTS AS YOU DETERMINE THOSE FACTS TO BE IN
2 ORDER TO ARRIVE AT YOUR DECISION IN THE CASE
3 BECAUSE OF THE HOUR, IT'S ALWAYS
4 DIFFICULT IN MOST CASES TO GIVE ANY ACCURATE
5 ESTIMATE AS TO HOW MUCH TIME THAT MIGHT INVOLVE WITH
6 THE FINAL SUMMATIONS, THE INSTRUCTION, AND YOUR
7 CONTINUED DELIBERATIONS

8 AND BECAUSE OF THE HOUR AND BECAUSE I
9 DO ANTICIPATE THAT THAT WILL BE OF SOME LENGTH,
10 WE'RE SIMPLY GOING TO RECESS AT THIS TIME FOR THE
11 EVENING AND WE WILL BEGIN WITH THOSE FINAL ARGUMENTS
12 AND INSTRUCTION IN THE MORNING AT 9 30

13 SO KEEP IN MIND MY PREVIOUS INSTRUCTION,
14 YOU'RE NOT TO DISCUSS THIS CASE IN ANY FASHION WITH
15 ANY PERSON WHATSOEVER HAVE A GOOD EVENING WE
16 WILL SEE YOU BACK HERE AT 9 30 IN THE MORNING --
17 9 30 IN THE MORNING

18 (JURY EXITS THE COURTROOM AT 5 03 O'CLOCK P M)

19 THE COURT BEFORE WE RECESS, MR
20 HUGHEY, LET ME ALSO ADVISE YOU BEFORE WE RECESS FOR
21 THE EVENING, AS I DID AT THE CLOSING STAGES OF THE
22 GUILT PHASE WHEN I INSTRUCTED YOU AND ADVISED YOU
23 THAT YOU HAD A RIGHT TO TESTIFY, NOT TESTIFY, BUT
24 YOU ALSO HAD THE RIGHT TO MAKE A FINAL STATEMENT TO
25 THE JURY, YOU ALSO HAVE THAT SAME RIGHT DURING THE

1 PENALTY PHASE OF THIS TRIAL, AND TOMORROW, AS YOU
2 KNOW, WE WILL BE CONCLUDING WITH THE FINAL ARGUMENTS
3 OF SUMMATIONS TO BE MADE BY YOUR LAWYERS OF
4 COURSE, THE STATE'S LAWYERS WILL ALSO HAVE THAT SAME
5 OPPORTUNITY I WILL INSTRUCT THE JURY ON THE LAW
6 DURING THAT STAGE, IN ADDITION TO YOUR LAWYERS
7 MAKING A STATEMENT TO THE JURY, YOU ALSO HAVE THE
8 RIGHT TO MAKE A STATEMENT TO THE JURY IF YOU WISH
9 TO, SO I TELL YOU THAT SO THAT YOU CAN TALK WITH
10 YOUR LAWYERS ABOUT THAT DURING THE OVERNIGHT RECESS,
11 IF YOU NEED TO, BUT YOU NEED TO BE THINKING ABOUT
12 THAT, BECAUSE IN THE MORNING I WILL BE ASKING YOU AS
13 TO YOUR DECISION AS TO WHETHER OR NOT YOU WISH TO
14 MAKE SUCH A STATEMENT, OKAY?

15 MR HUGHEY OKAY

16 THE COURT ANY OTHER MATTERS THAT WE
17 NEED TO ADDRESS BEFORE WE RECESS?

18 MR JONES CONCERNING THAT STATEMENT,
19 YOUR HONOR, I WOULD ASK IS IT YOUR OPINION THAT HIS
20 STATEMENT, IF HE SO CHOOSES TO MAKE ONE, WOULD BE
21 CONFINED TO THE FACTS AND EVIDENCE IN THE CASE AS
22 ALL OUR ARGUMENTS ARE? IN OTHER WORDS, IF HE WANTS
23 TO TALK TO THE JURY, YOU KNOW, ---

24 THE COURT WELL, HE CAN'T -- WELL,
25 THAT'S SOMETHING THAT I'LL HAVE TO ADDRESS IF HE

1 CHOOSES TO MAKE A STATEMENT OBVIOUSLY HE CAN'T
2 TAKE THAT OPPORTUNITY TO TESTIFY

3 MR JONES RIGHT

4 THE COURT BUT HE HAS PREVIOUSLY
5 TESTIFIED, BUT HE CAN TAKE THAT OPPORTUNITY TO MAKE
6 STATEMENT TO THE JURY PERHAPS OUTSIDE OF WHAT HAS
7 ACTUALLY BEEN RECEIVED INTO EVIDENCE OR REFLECTED
8 INTO EVIDENCE

9 MR JONES YES, STATEMENTS, BUT
10 COMMENTS OR AN ATTEMPT TO INTRODUCE OTHER EVIDENCE

11 THE COURT WELL, OBVIOUSLY HE CAN'T DO
12 THAT

13 MR TINSLEY WE'LL INSTRUCT HIM NOT TO
14 DO THAT, YOUR HONOR, WE CERTAINLY WILL INSTRUCT HIM
15 NOT TO DO THAT

16 MR JONES THANK YOU

17 THE COURT NOW LET ME ASK, BEFORE WE
18 DO GO, LET ME ASK IF EITHER OF YOU HAVE ANY SPECIFIC
19 REQUESTS FOR INSTRUCTION, JURY INSTRUCTION

20 MR TINSLEY YOUR HONOR, MR McCALLUM,
21 MR MARTIN HAVE BEEN WORKING ON THEM I'M GOING TO
22 TAKE THEM, ANALYZE THEM AND I WILL GIVE YOU AND THE
23 STATE A COPY OF OUR REQUEST TO CHARGE BEFORE 9 30 IN
24 THE MORNING

25 THE COURT OKAY

1 MR TINSLEY IF THAT'S OKAY THE ONLY
2 OTHER THING I HAVE IS JUST RENEW ALL PRIOR PHASE TWO
3 MOTIONS

4 MR COULTER YOUR HONOR, WE DECIDED TO
5 PROCEED WITH JUST THE THREE AGGRAVATING
6 CIRCUMSTANCES OF TWO MURDERS COMMITTED IN THE COURSE
7 OF ONE CONDUCT, THE BURGLARY, LARCENY AND COMMISSION
8 OF MURDER WITH A DEADLY WEAPON JUST THOSE THREE
9 THE COURT LARCENY BY THE USE OF A
10 DEADLY WEAPON?

11 MR COULTER CORRECT
12 THE COURT JUST LARCENY BY USE OF A
13 DEADLY WEAPON

14 MR COULTER CORRECT I'LL
15 DOUBLECHECK ON CIRCUMSTANCE AND AGGRAVATION, BUT I
16 THINK THAT'S THE ONLY OTHER THING WE'RE TALKING
17 ABOUT

18 THE COURT THEY ARE LISTED TWO
19 MURDERS IN THE COURSE OF ONE SCHEME OR CONDUCT AND
20 BURGLARY IN THE FIRST DEGREE, MURDER DURING THE
21 COMMISSION OF THE CRIME OF BURGLARY AND MURDER IN
22 THE FIRST DEGREE AND LARCENY BY THE USE OF A DEADLY
23 WEAPON?

24 MR COULTER YES, SIR THAT'S IT
25 THOSE ARE THE THREE

1 THE COURT DURING THE COMMISSION OF A
2 MURDER OKAY IS THE STATE'S POSITION THAT EACH OF
3 THOSE THREE WILL BE APPLICABLE TO EACH OF THE COUNTS
4 OF MURDER OR WOULD ONLY BE APPLICABLE TO MRS
5 JACKSON AND, TWO, BEING BURGLARY IN THE COMMISSION
6 OF TWO MURDERS IN ONE COURSE OF CONDUCT WOULD BE
7 APPLICABLE TO MRS HARRIS'S COUNT OF THE INDICTMENT

8 MR COULTER YES, SIR, JUST FOR
9 LARCENY IN REGARDS TO MRS JACKSON

10 THE COURT ALL RIGHT, ANYTHING FURTHER
11 BEFORE WE RECESS?

12 MR TINSLEY NO, YOUR HONOR

13 MR JONES IF I COULD, JUST ONE
14 SECOND ALL RIGHT, WHATEVER MR COULTER SAID, WE'LL
15 STICK WITH IT I'M NOT GOING TO ARGUE WITH HIM ON
16 LAW I SHOULD KNOW BETTER

17 THE COURT Y'ALL CAN ARGUE IT OVERNIGHT
18 IF YOU WANT TO, BUT WE'LL SEE YOU AT 9 30 IN THE
19 MORNING

20 ***** END OF DAY 17 *****

21 (DAY 18 -- OCTOBER 30, 1997, 9 30 O'CLOCK A M)

22 THE COURT ALL RIGHT, I HAVE THE
23 COPIES OF THE DEFENDANT'S REQUEST TO CHARGE THAT
24 WERE HANDED TO ME SHORTLY AGO DOES THE STATE HAVE
25 COPIES OF THEM?

1 MR COULTER YES, YOUR HONOR

2 THE COURT LET'S GO THROUGH THEM,

3 PLEASE DEFENDANT'S REQUEST NUMBER ELEVEN

4 MR COULTER YOUR HONOR, WE WOULD

5 SIMPLY DEFER TO YOUR HONOR'S REGULAR CHARGE I'M

6 SURE THAT YOUR HONOR'S CHARGE ENCOMPASSES THIS

7 PARTICULAR INDIVIDUAL REQUEST I DON'T SEE IN THIS

8 PARTICULAR ONE ANYTHING THAT ABSOLUTELY CONTRARY AT

9 ALL

10 MR TINSLEY YOUR HONOR, UNDERSTAND

11 I'VE NEVER WITH YOU ON A CASE LIKE THIS, AND I'M

12 SURE YOU'LL COVER ALOT OF THESE

13 THE COURT OH, I UNDERSTAND

14 MR TINSLEY OKAY

15 THE COURT ALL RIGHT, DEFENDANT'S

16 REQUEST NUMBER TWELVE

17 MR COULTER WE WOULD, YOUR HONOR, I

18 BELIEVE HAVE AN OBJECTION TO MITIGATING

19 CIRCUMSTANCES (10)

20 THE COURT ALL RIGHT, THAT'S MENTAL

21 RETARDATION REQUEST?

22 MR TINSLEY I THINK IT'S REALLY THE

23 LANGUAGE THAT WE WERE REFERRING TO "WITH DEFICITS IN

24 ADAPTIVE BEHAVIOR AND MANIFESTED", BUT I'LL GRANT

25 IT'S NOT A MENTAL RETARDATION CASE IT'S A LOW

1 BORDERLINE-INTELLECTUAL FUNCTIONING, WHICH I THINK
2 WE COULD CERTAINLY ARGUE, BUT THE COURT MAY DECIDE
3 NOT TO CHARGE

4 THE COURT I UNDERSTAND YOU'RE GOING
5 TO ARGUE THE MENTALITY OF THE DEFENDANT, BUT AS I
6 UNDERSTAND IT AND I UNDERSTOOD THE TESTIMONY, THERE
7 WAS NO EVIDENCE OF MENTAL RETARDATION

8 MR TINSLEY FAIR ENOUGH, YOUR HONOR
9 THE COURT ALL RIGHT, I'LL EXCLUDE
10 NUMBER TEN LET'S JUST START OVER DO YOU AGREE,
11 SOLICITOR, DO YOU AGREE WITH ONE?

12 MR COULTER YES, SIR

13 THE COURT DO YOU AGREE WITH TWO?

14 MR COULTER AS I UNDERSTAND THE LAW
15 THAT IF ANY TYPE OF TESTIMONY IS SHOWN REGARDING
16 MENTAL DISTURBANCES, THE DEFENDANT IS ENTITLED TO
17 CHARGES ON TWO, SIX AND SEVEN SO WE WOULD HAVE NO
18 OBJECTION TO THOSE THREE, AS I UNDERSTAND IT OR AS I
19 UNDERSTOOD FROM THE CASE LAW, IT'S AUTOMATIC,
20 ALTHOUGH I DISAGREE WITH NUMBER, I BELIEVE IT'S
21 NUMBER SIX

22 MR JONES NO, NO, NO, NO YOUR
23 HONOR

24 THE COURT I DON'T BELIEVE SIX IS
25 AUTOMATIC MAYBE IN THAT CASE YOU READ, IT MIGHT

1 HAVE BEEN AUTOMATICALLY IN THAT CASE, BUT IT'S NOT
2 AUTOMATIC IN EVERY CASE

3 MR COULTER YOUR HONOR, WE OBJECT TO
4 NUMBER SIX AND TEN, YEAH, AND WE DON'T HAVE ANY
5 PROBLEM WITH ONE, TWO AND SEVEN

6 THE COURT WHAT I PROPOSE AND I THINK
7 IS APPROPRIATE ON THE FACTS OF THIS CASE TO INSTRUCT
8 HIM AS TO STATUTORY MITIGATING FACTORS AS ONE, TWO
9 AND SEVEN, AND DECLINE SIX AND TEN AS REQUESTED
10 YOU JUST SEND HIM A COPY OF THOSE INSTRUCTIONS AND
11 FORMS THAT I PROPOSE TO USE IN THIS CASE

12 MR TINSLEY YES, SIR

13 THE COURT THAT TAKES CARE OF NUMBER
14 TWELVE NUMBER THIRTEEN?

15 MR COULTER I DO HAVE AN OBJECTION TO
16 THIS IT'S APPARENTLY TWO PARTS

17 MR TINSLEY THE SECOND WILL BE AN
18 ALTERNATIVE CHARGE JUST LET ME SAY THAT I'LL
19 LISTEN TO THE JUDGE'S CHARGE

20 THE COULTER LET ME ASK YOU THIS MR
21 TINSLEY, IS THIS CHARGE NECESSARY AT ALL UNLESS THE
22 JURY HAS SOME DIFFICULTY UNDERSTANDING WHAT THOSE
23 SENTENCES MEAN? IN OTHER WORDS, THE SENTENCE
24 THEMSELVES IS PLAIN IN MEANING IF THEY HAVE SOME
25 MISUNDERSTANDING ABOUT IT, THEY COULD INQUIRE OF THE

1 COURT AND I COULD GIVE THEM SOME ADDITIONAL
2 INSTRUCTION, BUT I DON'T THINK THERE'S A NEED FOR
3 THIS INSTRUCTION UNLESS THEY HAVE SOME CONFUSION OR
4 MISUNDERSTANDING ABOUT IT, DO YOU?

5 MR TINSLEY I DON'T SEE WHERE PART
6 ONE WOULD BE HARMFUL, YOUR HONOR I AGREE THE
7 SECOND PART WOULD BE NOT NECESSARILY UP FRONT, AND
8 YOU'LL PROBABLY COVER IT IN YOUR PLAIN AND ORDINARY
9 MEANING ANYWAY

10 THE COURT WELL, THAT'S THE PART OF
11 THIS INSTRUCTION I'M REFERRING TO

12 MR TINSLEY YOU INTEND TO GIVE A
13 PLAIN AND ORDINARY MEANING CHARGE? AN LARGE CHARGE?

14 THE COURT IF THERE'S SOME CONFUSION
15 ABOUT WHAT THOSE TERMS MEAN, I WOULD

16 MR TINSLEY I WOULD CERTAINLY ASK FOR
17 A LARGE CHARGE, YOUR HONOR

18 THE COURT WHAT'S THE STATE'S
19 POSITION? ANY?

20 MR COULTER PARDON?

21 THE COURT ANY OBJECTION TO THE JURY
22 BEING INSTRUCTED AS TO THE SENTENCE OF DEATH AND THE
23 SENTENCE OF LIFE SHOULD BE GIVE ITS PLAIN AND
24 ORDINARY MEANING?

25 MR COULTER NO OBJECTION IF IT'S

1 LIMITED TO THAT

2 THE COURT ALL RIGHT, NUMBER FOURTEEN

3 MR COULTER AGAIN, WE DEFER TO YOUR

4 HONOR'S NORMAL CHARGE, SPECIFICALLY WE HAVE

5 OBJECTIONS TO THE FINAL PARAGRAPH OF THAT PARTICULAR

6 CHARGE I DON'T THINK THAT AN APPROPRIATE CHARGE TO

7 THE JURY THE FIRST PAGE MAY BE CHARGED IN SOME

8 WAY WE DEFER TO YOUR HONOR'S DISCRETION ON THAT

9 THE COURT MR TINSLEY, OF COURSE, I

10 WILL INSTRUCT THEM AS TO WHAT A STATUTORY AND

11 MITIGATING CIRCUMSTANCE IS AND HOW IT IS DEFINED I

12 DECLINE TO INSTRUCT ON THE LAST PARAGRAPH CONTAINED

13 ON THE SECOND PAGE OF THAT INSTRUCTION DEFENDANT'S

14 NUMBER FIFTEEN

15 MR COULTER AGAIN WE DEFER TO YOUR

16 HONOR'S NORMAL CHARGE

17 THE COURT MY INSTRUCTION WILL COVER

18 THAT, MR TINSLEY DEFENDANT'S NUMBER SIXTEEN

19 MR COULTER AGAIN, WE DEFER TO YOUR

20 HONOR'S NORMAL CHARGE

21 THE COURT MY GENERAL INSTRUCTION

22 COVERS THAT, MR TINSLEY NUMBER SEVENTEEN

23 MR COULTER WE OBJECT TO EACH ONE,

24 YOUR HONOR WE BELIEVE IT IS A CHARGE THAT MUST GO

25 TO THE HEART OF A POTENTIALLY HUNG JURY I DON'T

1 THINK IT'S A PROPER CHARGE ON THIS PARTICULAR --
2 OTHER THAN SAYING THE DECISION HAS TO BE MADE -- I
3 DON'T THINK THIS IS THE PROPER THING TO SAY

4 THE COURT THE REQUESTED INSTRUCTIONS
5 INCLUDES LANGUAGE THAT YOU DO NOT HAVE TO AGREE IN
6 ORDER TO RECOMMEND A LIFE SENTENCE I DON'T THINK
7 THAT'S TRUE I THINK IN ORDER FOR A JURY TO MAKE
8 ANY RECOMMENDATION, IT MUST BE UNANIMOUS, WHATEVER
9 IT IS

10 MR TINSLEY I SEE WHAT YOU'RE SAYING
11 THE COURT ALL RIGHT, I DECLINE
12 SEVENTEEN THE NEXT IS EIGHTEEN NON-MITIGATING
13 CIRCUMSTANCES

14 MR TINSLEY RIGHT

15 MR COULTER YOUR HONOR, I THINK IT IS
16 PROPER FOR YOUR HONOR TO CHARGE ON, OF COURSE, THE
17 STATUTORY MITIGATING CIRCUMSTANCES AND THEN INSTRUCT
18 THE JURY THEY ARE TO CONSIDER ANY NON-STATUTORY
19 MITIGATING CIRCUMSTANCES, BUT I DON'T THINK IT IS
20 PROPER FOR YOUR HONOR TO CHARGE SPECIFIC CLAIMS AND
21 ALLEGED NON-STATUTORY MITIGATING CIRCUMSTANCES THAT
22 THE DEFENSE MAY HAVE YOU BELIEVE ARE PRESENT I
23 DON'T THINK IT'S PROPER TO CHARGE THOSE SPECIFIC

24 THE COURT LET ME TELL YOU WHAT MY
25 USUAL PRACTICE IS I INSTRUCT THE JURY AS TO NON-

1 STATUTORY MITIGATING CIRCUMSTANCES I ALSO INSTRUCT
2 THEM THAT THESE LISTED BELOW ARE THOSE I DO NOT
3 GIVE THEM WRITTEN INSTRUCTIONS ON THAT, BUT I
4 ORDINARILY INSTRUCT THEM THAT THE FILING OF THOSE
5 THAT THE DEFENDANT CONTENDS SHOULD BE CONSIDERED AS
6 NON-MITIGATING FACTORS MR TINSLEY, WHAT I'M
7 REQUESTING THAT YOU DO IS -- I'M NOT GOING TO LIST
8 JUST EVERY PIECE OF EVIDENCE THE DEFENSE HAS
9 INTRODUCED, BUT I WILL INSTRUCT THEM AS TO SPECIFIC
10 CATEGORIES THE TYPE OF EVIDENCE THAT YOU HAVE
11 OFFERED ON EACH OF THOSE POINTS

12 MR TINSLEY YES, SIR

13 THE COURT IF YOU WANT TO PROVIDE THAT
14 FOR ME, I'LL CONSIDER INSTRUCTING THEM AS TO THAT,
15 SUCH AS THE DEFENDANT'S INJURIES, PHYSICAL INJURIES,
16 THE DEFENDANT'S CHILDHOOD AND REARING, AND THINGS OF
17 THAT NATURE, BUT I'M NOT GOING TO JUST LIST EACH
18 SPECIFIC INDIVIDUAL EVIDENTIARY ITEM THAT'S
19 TESTIFIED TO BY SOME WITNESS

20 MR TINSLEY YES, SIR SO ARE YOU
21 REQUESTING FROM US?

22 THE COURT I'M REQUESTING THAT YOU IN
23 MAKING THE INITIAL REQUEST THAT YOU TAKE THESE ITEMS
24 AND PUT THEM IN SOME TYPE OF CATEGORY AND I'LL
25 CONSIDER INSTRUCTING THEM ON THOSE CATEGORIES

1 MR TINSLEY I'LL GET TO WORK ON IT
2 THE COURT YOU UNDERSTAND WHAT I'M
3 SAYING?

4 MR TINSLEY YES, SIR YES, SIR I
5 THINK SO

6 THE COURT RATHER THAN CHILDHOOD
7 ABUSE, CHILDHOOD EXPOSURE, CHILD OF DYSFUNCTIONAL
8 FAMILY, THOSE THINGS WILL BE CATEGORIZED AS THE
9 CIRCUMSTANCES RELATING TO THE DEFENDANT'S CHILDHOOD

10 MR TINSLEY OKAY I'VE GOT THAT ONE
11 THANK YOU, YOUR HONOR, AND AT THIS TIME ALL I HAVE
12 REMAINING IS TO RENEW PHASE TWO OBJECTIONS AND, IN
13 PARTICULAR, AS TO SOME OF THE INFLAMMATORY
14 PHOTOGRAPHS, YOUR HONOR, THAT'S ALL

15 MR McCALLUM AS TO THE MOTIONS
16 PREVIOUSLY MADE, THEY ARE STILL DENIED

17 THE COURT ANY OTHER REQUEST TO
18 CHARGE?

19 MR COULTER NOTHING FROM THE STATE,
20 YOUR HONOR

21 THE COURT ALL RIGHT, EACH OF YOU HAVE
22 COPIES OF THE ---

23 MR McCALLUM YOUR HONOR, MAY WE BEG
24 THE COURT'S INDULGENCE FOR ONE MOMENT MR TINSLEY
25 HASN'T HAD A CHANCE TO REVIEW THOSE DOCUMENTS THAT

1 YOU HAVE GIVEN TO US

2 THE COURT THERE ARE TWO SEPARATE
3 PACKETS OR GROUPS OF FORMS ONE RELATES TO COUNT
4 ONE AND THE OTHER RELATES TO COUNT TWO?

5 MR COULTER I'M A LITTLE CONFUSED
6 ABOUT PAGE THREE, TALKING ABOUT AGGRAVATING
7 CIRCUMSTANCES

8 THE COURT WELL, THOSE ARE AGGRAVATING
9 CIRCUMSTANCES THAT THEY WOULD LIST THEY CHOSE NOT
10 TO RECOMMEND A DEATH SENTENCE IF THEY FIND
11 AGGRAVATING CIRCUMSTANCES, THEY ARE TO LIST THAT ON
12 THAT FORM AND IF THEY RECOMMENDED THE LIFE SENTENCE
13 OR IF THEY RECOMMENDED NO SENTENCE, I WOULD ASK THEM
14 TO LIST THOSE AGGRAVATING CIRCUMSTANCES FOUND,
15 BECAUSE IT MAKES A DIFFERENCE AS TO THE SENTENCE

16 MR COULTER I UNDERSTAND THE STATE
17 DOESN'T HAVE ANY PROBLEMS WITH IT

18 MR McCALLUM YOUR HONOR, IF I MAY
19 ADDRESS THE COURT ON THAT ISSUE YOUR HONOR, IN THE
20 CASE OF GREGG V THE STATE OF GEORGIA, AND I'M SURE
21 THE COURT'S FAMILIAR WITH THAT CASE, MR GREGG WAS
22 CHARGED WITH TWO COUNTS OF MURDER AS WELL AS A COUNT
23 OF ROBBERY AND THE DEATH WAS IMPOSED THREE DEATH
24 SENTENCES WERE ORIGINALLY IMPOSED BY THE TRIAL
25 COURT, TWO AS TO THE MURDERS AND ONE AS TO THE

1 ROBBERY THE U S SUPREME OPINION THEY SPOKE WITH
2 FAVOR TOWARDS WHAT THE SUPREME COURT OF GEORGIA HAD
3 DONE IN GEORGIA A ROBBERY WAS A CAPITAL OFFENSE
4 THE SUPREME COURT OF GEORGIA SET ASIDE THAT DEATH
5 SENTENCE ON TWO BASES ONE BEING A PROPORTIONALITY
6 REVIEW, BUT THE SECOND BEING THEY SAID IT WAS
7 IMPROPER TO USE THE ROBBERY AS AN AGGRAVATING
8 CIRCUMSTANCE OF MURDER AND THEN USE THE MURDER AS AN
9 AGGRAVATING CIRCUMSTANCE TO ROBBERY

10 AND I THINK THAT'S WHAT THE STATE'S
11 DOING HERE THEY ARE USING MRS HARRISON'S DEATH AS
12 AN AGGRAVATING CIRCUMSTANCE OF MRS JACKSON'S AND
13 THEN MRS JACKSON'S DEATH AS AN AGGRAVATING
14 CIRCUMSTANCE FOR MRS HARRIS

15 THE COURT I THINK THAT'S WHAT OUR
16 STATUTE PROVIDES

17 MR McCALLUM I THINK THAT'S DOUBLE-
18 DIPPING UNDER THE CASE LAW, YOUR HONOR, AND WE
19 OBJECT ON THAT BASIS, THAT THEY SHOULD BE REQUIRED
20 TO ELECT THE DOUBLE MURDER TOWARDS ONE OF THE TWO,
21 BUT SHOULDN'T BE ABLE TO USE IT IN BOTH DIRECTIONS

22 YOUR HONOR, SECONDLY, SINCE YOUR
23 LANGUAGE ON PAGE ONE SAY, "TO LIFE IMPRISONMENT OR
24 DEATH," IN THAT ORDER, WE WOULD REQUEST THAT THE
25 STATUTORY INSTRUCTION SHEET BE FOLLOWED BY A

1 RECOMMENDATION OF LIFE SENTENCE FOLLOWED BY
2 AGGRAVATING CIRCUMSTANCES, AND FINALLY, THE
3 RECOMMENDATION OF SENTENCE IS DEATH, IN THAT ORDER,
4 WHICH IS THE ORDER THAT SHOULD BE PRESENTED TO THE
5 JURY

6 THE COURT YOU WANT ME TO GIVE THEM
7 THE INSTRUCTION ON RECOMMENDING DEATH LAST?

8 MR McCALLUM NO, WE WANT YOU TO GIVE
9 THEM THE SHEET, THE ACTUAL ORDER OF THE PAGES THAT
10 YOU GIVE THEM THE RECOMMENDATION OF THE DEATH
11 SENTENCE WHERE THEY WOULD HAVE TO SIGN BASICALLY THE
12 DEATH WARRANT, THAT SHOULD BE LAST SINCE THE ORDER
13 THAT YOU PLACE IT ON THE FRONT COVER SHEET, THE
14 STATUTORY INSTRUCTION, SAYS LIFE FIRST AND THEN
15 DEATH WE THINK THAT THE DOCUMENTS FOLLOWING SHOULD
16 FOLLOW THAT SAME ORDER

17 THE COURT THANK YOU I'M GOING TO
18 GIVE THEM THE DOCUMENTS IN THE ORDER THAT I GIVE
19 THEM AN INSTRUCTION THANK YOU FOR THAT SUGGESTION
20 ALL RIGHT, ANYTHING FURTHER

21 MR COULTER NOT FROM THE STATE, YOUR
22 HONOR

23 MR TINSLEY NO, YOUR HONOR

24 THE COURT OKAY, BRING THE JURY IN
25 (JURY ENTERS COURTROOM AT 10 14 O'CLOCK A M)

1 THE COURT GOOD MORNING, LADIES AND
2 GENTLEMEN

3 JURY GOOD MORNING

4 THE COURT AS YOU KNOW WHEN WE
5 RECESSED YESTERDAY EVENING, ALL OF THE EVIDENCE HAD
6 BEEN PRESENTED IN THIS PHASE OF THE TRIAL WORK
7 REMAINS TO BE DONE OR THE FINAL ARGUMENTS OR
8 SUMMATIONS TO BE ACCOMPLISHED BY THE LAWYERS, AFTER
9 WHICH I WILL GIVE YOU AN ADDITIONAL LEGAL
10 INSTRUCTION THEN, OF COURSE, YOU'LL BE ASKED TO GO
11 BACK TO BEGIN YOUR DELIBERATIONS IN ORDER TO ARRIVE
12 AT YOUR DECISION AS INDICATED SO I'M GOING TO ASK
13 YOU AT THIS TIME TO PLEASE GIVE THE LAWYERS YOUR
14 CAREFUL ATTENTION AS THEY GIVE YOU THEIR FINAL
15 SUMMATIONS AND ARGUMENTS MR COULTER
16 FINAL ARGUMENTS BY MR COULTER

17 MR COULTER THANK YOU, YOUR HONOR,
18 MAY IT PLEASE THE COURT, LADIES AND GENTLEMEN OF THE
19 JURY, GOOD MORNING

20 JURY GOOD MORNING

21 MR COULTER I WANT TO START LIKE I
22 DID BACK DURING THE GUILT PHASE, OPENING OF THE
23 GUILT PHASE, AND THAT IS BY THANKING YOU THANK YOU
24 VERY MUCH FOR YOUR SERVICE WE APPRECIATE IT I
25 KNOW IT'S BEEN A LONG TIME IT'S BEEN SINCE LAST

1 WEDNESDAY WHEN EACH ONE OF YOU STOOD UP, RAISED YOUR
2 HAND AND TOOK THE OATH THAT YOU TOOK TO DO THE BEST
3 YOU COULD IN RENDERING A TRUTHFUL VERDICT BASED ON
4 THE EVIDENCE AND TESTIMONY HAD BEEN PRESENTED BY
5 THIS STATUTE YOU HAVE DONE THAT AND YOU HAVE DONE
6 THAT DUTY ADEQUATELY AND I APPRECIATE THAT NOW,
7 THE TRIAL HERE HAS KIND OF BEEN IN TWO PHASES TWO
8 DIFFERENT PHASES ONE TO DETERMINE THE TRUTH AS IT
9 HAPPENED, AND ONE TRYING TO FIND OUT WHAT OUGHT TO
10 BE DONE ABOUT IT WHAT OUGHT TO BE DONE ABOUT IT?
11 NOW, WE'RE SITTING IN A VERY DIFFERENT POSITION THAN
12 WE WERE LAST WEDNESDAY WHEN THIS TRIAL STARTED --
13 VERY DIFFERENT BACK / LAST WEDNESDAY THE DEFENDANT
14 SAT BEFORE YOU AND WAS CLOAKED, SURROUNDED BY A
15 PRESUMPTION OF INNOCENCE PRESUMED INNOCENT
16 THAT'S HOW HE SAT BEFORE YOU LAST
17 WEDNESDAY, BUT TODAY HE SITS BEFORE VERY
18 DIFFERENTLY HE SITS BEFORE YOU AT A THIEF, AS A
19 BURGLAR, AS A DOUBLE MURDERER BEYOND A REASONABLE
20 DOUBT THAT HOW HE SITS BEFORE YOU NOW
21 YOU HAVE FOUND WHAT THE TRUTH IS BEYOND
22 A REASONABLE DOUBT NOW THE QUESTION IS WHAT
23 OUGHT TO BE DONE ABOUT IT? NOW THE LEGISLATURE, THE
24 PEOPLE THAT WE SEND DOWN TO COLUMBIA FROM McCORMICK
25 AND GREENWOOD AND ABBEVILLE, THE PEOPLE WE SEND DOWN

1 THERE HAVE COME UP WITH LAWS, AND A LAW IN THIS
2 REGARD STATES, IN FACT, A JURY CAN CONSIDER AND
3 IMPOSE A DEATH SENTENCE ON A DEFENDANT CONVICTED OF
4 MURDER IF AN AGGRAVATING CIRCUMSTANCE IS PRESENT

5 OF COURSE, THAT'S IMPORTANT, BECAUSE
6 NOT EVERY MURDER, AS YOU'VE HEARD AND WILL BE TOLD
7 AGAIN, NOT EVERY MURDER CAN HAVE A SENTENCE OF DEATH
8 CONSIDERED THERE MUST BE AN AGGRAVATING
9 CIRCUMSTANCE FOUND BY YOU AS THE JURORS, BEYOND A
10 REASONABLE DOUBT YOU CAN'T EVEN CONSIDER THE
11 SENTENCE OF DEATH UNTIL YOU FIND BEYOND A REASONABLE
12 DOUBT THAT AGGRAVATING CIRCUMSTANCE

13 AND THE LEGISLATURE HAS LISTED VARIOUS
14 AGGRAVATING CIRCUMSTANCES, LISTED THEM OUT, THAT
15 MUST BE PRESENT AND ACCOMPANYING THE MURDER BEFORE
16 YOU CAN CONSIDER THAT SENTENCE YOUR ROLE HERE
17 TODAY AFTER THE CONCLUSION OF THE ARGUMENTS AND
18 CHARGE WILL BE FIRST TO CONSIDER WHETHER OR NOT
19 THERE HAS BEEN AN AGGRAVATING CIRCUMSTANCE PROVEN
20 BEYOND A REASONABLE DOUBT THAT IS THE FIRST THING
21 YOU HAVE TO DO, AND I'LL TELL YOU NOW, YOU HAVEN'T
22 FOUND JUST ONE AGGRAVATING CIRCUMSTANCE YOU HAVE
23 ALREADY FOUND THREE AGGRAVATING CIRCUMSTANCES BEYOND
24 A REASONABLE DOUBT, THREE

25 YOU HAVE ALREADY FOUND THAT THE

1 DEFENDANT COMMITTED TWO MURDERS IN THE COURSE OF ONE
2 CRIME AT THE SAME TIME YOU HAVE ALREADY FOUND THAT
3 BEYOND A REASONABLE DOUBT THAT ALONE WILL ALLOW
4 YOU TO CONSIDER A POSITION OF THE DEATH SENTENCE,
5 BUT YOU ALSO FOUND TWO MORE YOU'VE FOUND THAT THE
6 DEFENDANT COMMITTED A BURGLARY DURING THE COMMISSION
7 OF A MURDER THAT'S ANOTHER AGGRAVATING
8 CIRCUMSTANCE, AND FINALLY, YOU'VE ALREADY FOUND
9 BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
10 COMMITTED LARCENY WHILE ARMED WITH A DEADLY WEAPON
11 WHEN HE STOLE SHEKA'S CAR BEYOND A REASONABLE DOUBT
12 YOU'VE ALREADY FOUND THOSE THREE
13 AGGRAVATING CIRCUMSTANCES, SO I SUBMIT TO YOU YOUR
14 REFININGS PROBABLY WILL BE VERY SHORT BECAUSE
15 YOU'VE FOUND IT TO BE THE TRUTH NOW EACH OF YOU IN
16 THE PROCESS OF SELECTION HAVE TAKEN THIS WITNESS
17 STAND AND TESTIFIED, YOU TOLD US UNDER OATH, THAT
18 YOU COULD CONSIDER, NOT ONLY CONSIDER THE DEATH
19 PENALTY, BUT YOU COULD IMPOSE IT YOU COULD IMPOSE
20 IT, EACH OF YOU SAYING IT IN A DIFFERENT WAY, ONE
21 WAY OR ANOTHER, IF THE CIRCUMSTANCES WERE BAD
22 ENOUGH, IF THE MURDER WAS BAD ENOUGH WE KNOW WHAT
23 THE TRUTH IS NOW WHAT SHOULD YOU OUGHT TO DO ABOUT
24 IT?

25 NOW, IT'S VERY EASY FOR THE DEFENSE, I

1 SUBMIT TO YOU, TO COME BEFORE YOU AND ARGUE WITH YOU
2 AS MR GARRETT DID DURING HIS GUILT PHASE, COME
3 BEFORE YOU IN THIS GENERAL AREA AND TELL YOU,
4 "ENOUGH OF THE KILLING' ENOUGH OF THE DEATH' "

5 IT'S EASY FOR THEM TO SAY THAT, BECAUSE
6 THEY HADN'T FELT IT IT WAS SHEKA AND LUEVINIA AND
7 THESE PEOPLE WHO FELT THE DEATH THEY'LL COME
8 BEFORE YOU AND TALK TO YOU ABOUT MITIGATING
9 CIRCUMSTANCES, WHICH YOU SAID YOU WOULD ALSO
10 CONSIDER AND YOU NEED TO CONSIDER IN THIS CASE
11 THEY'LL TALK TO YOU ABOUT HOW THE DEFENDANT HAD
12 EXPERIENCED DEATH, HIS MOTHER, FIVE YEARS AGO AND
13 HOW THAT AFFECTED HIM, AND HOW HE HAD A BAD
14 BACKGROUND, BAD-FAMILY UPBRINGING WE CAN'T WE
15 REFUTE THAT? WE DON'T KNOW SO FAR WE'VE GOT THAT
16 HISTORY FROM HIS RELATIVES I DON'T KNOW DID HE
17 HAVE A BAD UPBRINGING? HE POSSIBLY COULD HAVE

18 ALOT OF PEOPLE HAVE BAD UPBRINGINGS
19 ALOT OF PEOPLE HAVE WORSE UPBRINGINGS, BUT IT
20 DOESN'T ELIMINATE THE ABILITY FOR A PERSON TO
21 CHOOSE IT DOESN'T ABSOLVE HIM OF HIS IDEA AND
22 CHOICE BETWEEN RIGHT AND WRONG NO EXPERT TOLD YOU
23 THAT HE DOESN'T KNOW RIGHT FROM WRONG HE DOES HE
24 MADE THE CHOICE HE MADE THE CHOICE TO COMMIT A
25 CRIME HE MADE THE CHOICE TO COMMIT MURDER

1 NOW YOU'VE HEARD THE TESTIMONY HOW THE
2 DEATHS HAVE OCCURRED YOU'VE HEARD THE DEFENDANT
3 SAY OR TAKE THE STAND, I SUBMIT TO YOU LADIES AND
4 GENTLEMEN, THE BASIS AND THE REASON FOR THEIR
5 POSITION AND THE FACTS ARE BASED ON CIRCUMSTANCES
6 WHICH SURROUND US ON HOW THESE MURDERS WERE
7 COMMITTED WHAT HAPPENED ON DECEMBER 4, '95
8 YOU'VE HEARD THE DEFENDANT COME BEFORE YOU AND
9 TESTIFY WHAT HE REMEMBERED AND HE SAYS EVERYTHING
10 WENT SO FAST HE DOESN'T REMEMBER EVERYTHING WENT
11 SO FAST HE DOESN'T REMEMBER

12 WELL, OF COURSE, WE DON'T HAVE LUEVINIA
13 AND TESHEKA HERE TO TESTIFY FOR YOU, BUT I SUBMIT TO
14 YOU THE TIME JUT BEFORE THEIR DEATH NO MATTER HOW
15 LONG OR SHORT THAT WAS, MUST HAVE SEEMED LIKE AN
16 ETERNITY TO THEM THE TERROR AND HORROR THEY MUST
17 HAVE FELT JUST BEFORE THEIR DEATHS ON DECEMBER 4TH
18 OF '95 THE TERROR AND HORROR THAT THEY MUST HAVE
19 FELT AS THE DEFENDANT BUSTED IN THAT DOOR WITH THIS
20 SHOTGUN, THE TERROR AND HORROR THAT THEY MUST HAVE
21 FELT IF THEY TRIED TO REMAIN CALM -- TRIED TO REMAIN
22 CALM, WHY? TO KEEP HIM CALM, LIKE IN A CAGE WITH A
23 HUNGRY LION TRYING TO KEEP CALM -- NOT MAKE ANY
24 SUDDEN MOVES DON'T WANT HIM TO STRIKE THEY WERE
25 IN A ROOM WITH A BLOOD-THIRSTY HUNGRY KILLER THE

1 HORROR THEY MUST HAVE FELT

2 LUEVINIA'S LAST SECONDS, AS THE
3 DEFENDANT COMES DOWN THE HALL WITH THIS GUN, POINTS
4 IT AT HER, RIGHT IN THE FACE, THE HORROR THAT SHE
5 MUST HAVE FELT JUST BEFORE HER DEATH AND SHE COWERS,
6 COWERS, JUST IN AN INSTANCE A FLASH OF THE GUN GOES
7 OFF AND SHE DROPS TO THE FLOOR

8 THE HORROR THAT SHEKA MUST HAVE FELT AS
9 SHE'S IN THE BACK ROOM SEES HER COUSIN DROP IN THE
10 HALLWAY AT THE WRONG PLACE AT THE WRONG TIME IN HER
11 OWN HOME

12 AND THE DEFENDANT CALMLY STEPS OVER THE
13 CORPSE, COOLLY, CALMLY RELOADS THE GUN AND COMES
14 AFTER HER AND SHE SPRANGLES OVER THAT BED, AND THE
15 DEFENDANT GETS UP ON THAT BED, AND WHAT IS SHE
16 THINKING? SHE'S THINKING ABOUT A COUSIN LAYING
17 DEAD, DEAD CORPSE IN THE HALLWAY? IS SHE THINKING
18 ABOUT HERSELF? IS SHE THINKING ABOUT THE KIDS
19 SHE'LL NEVER SEE AGAIN? IS SHE THINKING ABOUT THAT
20 SHOT SHE KNOWS IS COMING? SHE KNOWS AS THE
21 DEFENDANT PULLS HER AND PRODS HER, AND THEN HE
22 THROWS THE GUN DOWN AND CALMLY STEPS OVER THE CORPSE
23 OF LUEVINIA, WALKS RIGHT PAST THEIR KIDS, GETS IN
24 THE CAR AND LEAVES

25 THOSE SAME KIDS THAT THEY ARE GOING TO

1 COME UP HERE AND TRY TO GET YOUR MERCY -- HE WALKS
2 RIGHT BY THEM AND LEFT THERE IN THAT TRAILER WITH
3 THOSE TWO DISFIGURED CORPSES THAT HE MURDERED --
4 LEFT THERE -- LEFT THOSE TWO KIDS TO FIND THEIR
5 MOTHER WITHOUT A FACE' THE HORROR, THE TERROR THEY
6 MUST HAVE FELT

7 HOW BAD IS IT? HOW BAD ARE THESE
8 MURDERS? NOW THEY'LL COME BEFORE YOU AND PRESENT
9 MITIGATING CIRCUMSTANCES -- MITIGATING
10 CIRCUMSTANCES ONE OF WHICH THEY ARE GOING TO COME
11 UP BEFORE YOU AND ARGUE TO YOU "HE HAS NO
12 SIGNIFICANT PRIOR RECORD" PROVIDED THEY ARE GOING
13 TO ARGUE THAT, AND I WONDER WHAT LUEVINIA WOULD HAVE
14 SAID ABOUT THAT MRS LUEVINIA, DID YOU KNOW, DID
15 YOU KNOW THAT JUST BEFORE HE SHOT YOU, JUST BEFORE
16 HE PUT A HOLE IN YOUR FACE, DID YOU KNOW THAT HE HAD
17 NO PRIOR CONVICTED HISTORY OF VIOLENCE?

18 HOW ABOUT SHEKA? SHEKA, DID YOU KNOW
19 THAT JUST BEFORE HE PUT THAT GUN NEXT TO THE SIDE OF
20 YOUR FACE AND BLEW THE LEFT SIDE OF YOUR FACE OFF,
21 DID YOU KNOW THAT THERE WERE INDICATIONS HE HAD
22 ORGANIC BRAIN DYSFUNCTION? DID YOU KNOW THAT?

23 HOW BAD IS IT? HOW BAD ARE THESE
24 MURDERS? HOW BAD ARE THEY? THERE COMES A TIME WHEN
25 A PERSON HAS TO DECIDE WHAT THEY'RE MADE OF, WHAT

1 THEY WILL STAND FOR, AND WHAT THEY WILL PUT UP WITH
2 WHAT THEY WILL PUT UP WITH AND IS IT JUSTICE TO
3 PUT UP WITH THESE TWO MURDERS AND THEN TURN AROUND
4 AND SAY, "WELL, GIVE ME A LIFE SENTENCE "

5 IS IT JUSTICE THAT A PERSON HAS THEIR
6 HOME BURGLARIZED AND TWO GRUESOME, HEINOUS MURDERS
7 ARE COMMITTED AND THEN TURNAROUND AND GIVE THEM A
8 LIFE SENTENCE IS THAT JUSTICE? THE DEFENDANT
9 COMMITTED THESE ULTIMATE CRIMES HE DESERVES THE
10 ULTIMATE PUNISHMENT DEATH EACH OF YOU, EACH OF
11 YOU SAID THAT IF THE CIRCUMSTANCES WERE BAD ENOUGH
12 YOU COULD IMPOSE THE DEATH SENTENCE, AND I ASK YOU
13 NOW HOW MUCH WORSE CAN IT GET?

14 FINAL ARGUMENTS BY MR JONES

15 MR FOREMAN, LADIES AND GENTLEMEN, I
16 JUST HAVE A FEW REMARKS FOR YOU JUST A FEW HIS
17 ACTIONS, HIS ACTIONS, HIS ACTIONS ON DECEMBER 4TH,
18 1995, DO NOT WARRANT LIFE THEY WARRANT, THEY CRY
19 OUT FOR, AND THEY INSIST ON THE ULTIMATE PUNISHMENT
20 THE DEATH PENALTY THAT IS WHAT HIS ACTIONS
21 DESERVE

22 BUT BEFORE THAT JUSTICE CAN BE RENDERED
23 YOU MUST, AS WAS STATED, DETERMINE THAT AN
24 AGGRAVATING CIRCUMSTANCE EXISTS MY COMMENTS TO YOU
25 ARE THIS IN RENDERING YOUR SENTENCE, BASE YOUR

1 SENTENCE, THE BASIS FOR YOUR SENTENCE SHOULD BE THE
2 DEFENDANTS ACTIONS, NOT HIS WORDS HIS LAWYER IS
3 GOING TO TALK TO YOU AND HE HAS THE RIGHT TO TALK TO
4 YOU, AND I SUGGEST TO YOU HE WILL TALK TO YOU THE
5 DEFENDANT WILL HE WILL ASK YOU FOR LIFE HE WILL
6 ASK YOU FOR LIFE, BUT WHAT DID HE GIVE YOU? WHAT
7 DID HE GIVE US? HE'S GOING TO ASK FOR LIFE

8 WHAT WE HAD WAS THIS? IS THIS WHO WE
9 HAD? (PRESENTING EXHIBIT) WE HAD LUEVINIA THIS
10 IS HER WE HAD LUEVINIA LET'S ASSUME WE HAD HER
11 WE ALL HAD HER THIS IS WHO WE HAD, LUEVINIA THIS
12 IS WHAT HE GAVE US (PRESENTING EXHIBIT) THIS IS
13 WHAT HE GAVE US THIS IS WHAT HE GAVE US, BUT HE
14 WANTS YOU AND US TO GIVE HIM LIFE

15 WE HAD SHEKA AND THIS IS WHO SHE WAS
16 AND THIS IS WHAT SHE WAS THIS IS WHAT WE HAD
17 THIS IS WHAT WAS HIS (PRESENTING EXHIBIT) SHEKA, A
18 MOTHER, A LOVING MOTHER, A DAUGHTER, A LOVING
19 DAUGHTER THIS IS WHAT HE LEFT US THIS IS WHAT HE
20 GAVE US THIS IS WHAT HE LEFT US THIS IS WHAT HE
21 DID TO HER THIS IS WHAT HE'S CAPABLE OF
22 (PRESENTING EXHIBITS) WHEN HE DECIDES THAT HE
23 DOESN'T LIKE YOU ANY MORE, AND YOU DON'T DESERVE TO
24 BE HERE ANY MORE, THIS IS WHAT HE GAVE US THIS IS
25 WHAT WE HAD AND THIS IS WHAT HE GAVE US, AND HE

1 WANTS US TO GIVE HIM LIFE

2 HE'S GOING TO ASK YOU FOR LIFE AND HIS
3 LAWYER'S GOING TO ASK YOU FOR LIFE, BUT HIS SENTENCE
4 SHOULD BE BASED ON HIS ACTIONS, NOT ON HIS WORDS
5 HIS SENTENCE SHOULD BE BASED ON HIS ACTIONS, HIS
6 ACTIONS, NOT ON HIS LAWYERS WORDS NO, SIRREE HIS
7 SENTENCE, IF YOU BASE HIS SENTENCE ON HIS ACTIONS
8 AND NOT ON HIS WORDS, IF YOU BASE HIS SENTENCE ON
9 HIS ACTIONS AND NOT ON HIS WORDS, THEN THE SENTENCE
10 SHOULD NOT BE LIFE THE SENTENCE SHOULD NOT BE
11 LIFE

12 AND YOU'VE GOT A NUMBER OF REASONS TO
13 BASE HIS SENTENCE ON HIS ACTIONS AND NOT ON HIS
14 WORDS, BECAUSE YOU KNOW WHAT YOU KNOW ABOUT HIS
15 WORDS HIS WORDS ARE NOT FOUNDED AND HEARTFELT
16 NO, SIRREE HIS WORDS ARE NOT TRUE TO YOU AND HIS
17 WORDS ARE BASED ON WHAT -- THEY AIN'T COMING FORM
18 THE HEART THEY'RE COMING FROM SELF-INTERESTS
19 SELFISH-INTERESTS HIS WORDS TO YOU ARE SELF-
20 INTERESTED, SELF-MOTIVATED AND SELF-SERVING

21 HE GAVE DEATH, YET HE ASKS FOR LIFE
22 IS THAT JUSTICE? THAT'S NOT JUSTICE I SUGGEST TO
23 YOU THAT'S NOT JUSTICE HE GAVE US DEATH, AND HE
24 ASKS FOR LIFE IS THAT JUSTICE FOR LUEVINIA
25 THAT'S NOT JUSTICE FOR LUEVINIA HE GAVE US DEATH

1 TESHEKA HE ASKS FOR LIFE IS THAT JUSTICE FOR
2 SHEKA? THAT'S NOT JUSTICE FOR SHEKA

3 AND THAT'S ALL WE AND THEY WOULD ASK
4 FOR FROM YOU -- IS JUSTICE

5 FINAL ARGUMENTS BY MR TINSLEY

6 THANK YOU SO MUCH, YOUR HONOR, AND MAY
7 IT PLEASE THE COURT LADIES AND GENTLEMEN OF THE
8 JURY, THIS IS MY FINAL OPPORTUNITY TO SPEAK TO YOU
9 AGAIN I ALSO JOIN THE STATE IN THANKING YOU SO
10 MUCH FOR YOUR SERVICE OVER THIS PERIOD OF TIME
11 DURING THE LAST THREE WEEKS

12 NOW THE SOLICITORS HAVE TALKED ABOUT
13 THEIR POSITION AND I ASK YOU TO KEEP AN OPEN MIND
14 AND THE DEFENDANT MAY GET UP AND GIVE A STATEMENT OR
15 HE MAY NOT GIVE OR HE MAY NOT, BUT SOME OF THE
16 THINGS I SEE SITTING OVER HERE BESIDE ME AND BESIDE
17 MR GARRETT, OF COURSE, IS STILL A HUMAN BEING, A
18 CREATURE OF THE LORD NOW HIS BEHAVIOR ON DECEMBER
19 4TH OF '95 WAS CLEARLY, CLEARLY WRONG AND I'M NOT
20 ARGUING ABOUT THAT, BUT I WILL POINT OUT AND I WILL
21 SUBMIT TO YOU THAT THIS IS NOT A DEATH-PENALTY CASE,
22 COMPARED -- THE SOLICITOR MENTIONED YESTERDAY AND
23 ASKED THE WITNESS, DR EVANS, HAD HE INTERVIEWED
24 PEEWEE GASKINS, AND DURING THE INTERVIEWS WAS HE
25 NERVOUS THOSE WERE APPROPRIATE KINDS OF CASES IN

1 WHICH PEEWEE GASKINS KILLED INNUMERABLE PEOPLE OVER
2 A COURSE OF TIME -- MANY, MANY, MANY VICTIMS TWO
3 VICTIMS HERE IS NOT A KILLING AMONG STRANGERS,
4 WHEREAS THOSE OTHER CASES WERE THIS IS A KILLING
5 ARISING FROM INITIALLY A DOMESTIC RELATIONSHIP

6 NOW, YOU THE JURY, HAS SPOKEN AND WE
7 RESPECT THE VERDICT OF MURDER FOR BOTH VICTIMS
8 WE'RE NOT CALLING IT ANYTHING LESS THAN MURDER,
9 BECAUSE MURDER IS WHAT IT IS, BUT WE ENVISION AS A
10 SOCIETY CAPITAL PUNISHMENT IN THE CASE OF A STRANGER
11 KILLING, RAPING A CHILD A STRANGER COMMITTING THE
12 MASS MURDERS OF A FELLOW PEEWEE GASKINS THAT'S ALL
13 WE ASK

14 TYPICALLY IN THE LAW IN CRIMES
15 COMMITTED IN A DOMESTIC SITUATION, THE INDIVIDUAL IS
16 NOT VIEWED AS A THREAT TO OTHERS IT'S THE
17 RELATIONSHIP AND THE STRESS AND THE OPTIONS THAT
18 JOHN KENNEDY HUGHEY FELT AND WAS ABLE TO DEAL WITH
19 ON DECEMBER 4 OF 1995 WERE A RESULT OF THE TOTALITY
20 OF HIS LIFE, AND WHAT TRIGGERED IT? WHAT TRIGGERED
21 IT? WELL, WHEN HE SAW MICHAEL ADAMS, I SUBMIT TO
22 YOU THAT THAT WAS A VERY, VERY DIFFICULT SITUATION
23 FOR THE YOUNG MAN

24 NOW, IT'S NOT A QUESTION SO MUCH OF IN
25 MOTION AS IT IS LOGIC AND ALL THE MITIGATION AND

1 AGGRAVATION AND THAT SORT OF THING I'M NOT GOING
2 TO GET UP HERE AND TALK TOO MUCH ABOUT THIS AND THAT
3 IN TERMS OF MITIGATION, BUT I DARE SAY THAT MR
4 HUGHEY ON DECEMBER 4, 1995, WAS NOT CONCRETE, BUT ON
5 THE CONTRARY HE WAS THE OPPOSITE, BUT I ALSO POINT
6 OUT THAT LIFE IN PRISON IS NO PICNIC -- AND HE CAN
7 BE SENTENCED WITH A RECOMMENDATION OF LIFE,
8 CONSECUTIVE LIFE, CONSECUTIVE LIFE, AND THEN
9 WHATEVER ON THE LARCENY SHOULD YOU DECIDE TO
10 RECOMMEND A SENTENCE OF MERCY

11 NOW, LET ME ASK YOU TO GO BACK NOW AND
12 INCORPORATE INTO YOUR MIND THE TESTIMONY OF DR
13 EVANS, WHO WAS SPECIFICALLY ASKED BY THE SOLICITOR
14 WHO, AND HE HAD, HE HAD INTERVIEWED ONE OF THOSE
15 INDIVIDUALS -- HOW DID HE MAKE AS TO THE
16 DISTINCTION AS TO THE BLOODTHIRSTY, COLD-BLOODED,
17 KILLERS I THINK HE INTERVIEWED SEVERAL OF THEM,
18 AND HE TESTIFIED WITH THOSE HE FELT UNCOMFORTABLE
19 EVEN IN THE PRESENCE OF THE JAIL GUARDS HE DIDN'T
20 FEEL THAT WAY WITH MR HUGHEY, AND DR EVANS
21 CREDENTIALS ARE BEYOND REPROACH

22 NOW GRANTED THE SOLICITOR REFERRED TO
23 MR YOUNGMAN AS A SOCIAL WORKER, WELL, THEY NEED TO
24 TALK TO HIS FAMILY THAT'S WHAT THEY DO THEY ALSO
25 TALK TO HOSPITAL PEOPLE, TO INDEPENDENT PEOPLE,

1 ANYBODY THEY CAN GET TO GET INPUT AND AS SUCH THE
2 THOUGHTS AS IT AFFECTS MR. HUGHEY. NOW WE'LL COME
3 BACK TO THAT SHORTLY, BUT I WILL POINT OUT SOME
4 MITIGATING FACTORS AND I'M NOT GOING TO BELABOR
5 THIS

6 YOU CONSIDER THEM AND WEIGH THEM FOR
7 WHAT THEY ARE WORTH IN EACH INDIVIDUAL POINT. ALL
8 RIGHT. THE DEFENDANT, MR. HUGHEY, HAS NO PRIOR
9 CRIMINAL RECORD. THAT'S A FACTOR. THAT'S A FACTOR,
10 THAT'S CALLED A MITIGATING FACTOR. HE DOESN'T. ALL
11 RIGHT, THE DOMESTIC NATURE OF THE CRIME BETWEEN THE
12 PEOPLE THAT KNEW EACH OTHER VERSUS COMPLETE
13 STRANGERS. THAT IS A FACTOR. HE IS THE FATHER OF
14 THE TWO CHILDREN. HE IS THE REMAINING FATHER. IF
15 HE CAN GET INTO THE PENITENTIARY AND GET A JOB, SEND
16 MONEY TO THEM, THAT WOULD BE A PREFERABLE
17 ALTERNATIVE, AND WHEN THEY GET OLDER, IF THEY
18 CHOOSE, THEY CAN COME TO HIM AND HE CAN EXPLAIN HIS
19 BEHAVIOR TO THEM. THESE FACTS ARE THE REMAINING IS
20 FACTS ARE THAT IT IS INAPPROPRIATE.

21 NOW THE DEFENDANT'S LOW INTELLECTUAL
22 FUNCTION IS ANOTHER FACTOR. THAT WOULD BE WHAT YOU
23 CALL A NON-STATUTORY MITIGATING FACTOR. I ASK YOU
24 TO CONSIDER THAT HE HAS AN I Q OF 80, THE HEAD
25 TRAUMA SUFFERED BY MR. HUGHEY AND YOU'VE SEEN THE

1 SCARS MR HUGHEY, I WOULD ASK YOU TO STAND UP
2 PLEASE AND COME OVER HERE FOR A SECOND (WITNESS
3 STANDS UP AND COMES OVER IN FRONT OF THE JURY)
4 NOW, MR HUGHEY, LOWER YOUR HEAD, OFF DOWN HERE,
5 TURNAROUND, THESE SCARS RIGHT HERE (INDICATING) I
6 WANT YOU TO LEAN OVER MR HUGHEY MR HUGHEY RIGHT
7 THROUGH HERE AND GO HAVE A SEAT THANK YOU, SIR

8 I'M NOT OFFERING THAT AS AN EXCUSE
9 I'M SURE THESE PICTURES ARE INFLAMMATORY AND I DEAL
10 WITH IT ALL THE TIME IT'S ALWAYS UGLY OFTENTIMES
11 IT'S UGLIER THAN THIS -- BELIEVE IT OR NOT PARTICU-
12 LARLY IN ARSON CASES, BUT I'M NOT MITIGATING ON THAT
13 BASIS I'M JUST POINTING THAT SHOULD NOT BE THE
14 CONSIDERATION IN REACHING YOUR VERDICT YOUR
15 RECOMMENDATION OF THE SENTENCE SHOULDN'T BE ON THAT
16 NOT THE PASSION, NOT INFLAMMATORY NATURE OF THINGS,
17 BUT THE LOGIC AND THE REASON, AND I POINT OUT THE
18 CHILDHOOD EXPOSURE TO VIOLENCE OF MR HUGHEY THE
19 ABUSES THAT HE HIMSELF SUFFERED, BUT I SUBMIT TO YOU
20 WHAT WAS WORSE TO MR HUGHEY AND WHAT GOT HIM IN
21 THIS PREDICAMENT TODAY, ORGANIC BRAIN DYSFUNCTION
22 AND THE SCARS SHOW -- HE DIDN'T ASK TO BE THROWN OUT
23 OF A VEHICLE AT THE AGE OF FOUR'

24 BY GOD, EVEN BY HIS DADDY' AND DRUNK
25 AND -- BUT TO SEE THAT MAN KICK THAT GOOD WOMAN, HIS

1 MAMA, WHEN HE GOT DRUNK AND THOSE OLDER THREE KIDS,
2 WITH THEIR WHITE DADDY AND HE'S OUT OF THE PICTURE
3 AND THEN MR AND MRS HUGHEY TOGETHER WHAT AN
4 TORMENT WHAT AN ABSOLUTE TORMENT, AND HE GETS TO
5 DRINKING AND HALFBREED AND EVERYTHING ELSE AND
6 TREATS THOSE THREE LIKE DIRT AND THERE'S JOHN
7 KENNEDY -- WELL, HE NOT MUCH BIGGER THAN THAT A
8 LITTLE BITTY FELLOW OVER THERE WHEN HIS DADDY BEAT
9 HIS MAMA WHEN SHE WAS CARRYING HIM, SO IT GOES BACK
10 TO PREBIRTH PREBIRTH' YOU TALK ABOUT LEARNED
11 BEHAVIOR HE STARTED LEARNING IN HIS MOTHER'S WOMB'

12 NOW I'M NOT SAYING THAT ANY ONE THING
13 IS WHAT BRINGS JOHN KENNEDY HUGHEY HERE TODAY
14 SURELY, THE DEATH OF HIS MOTHER HAD A GREAT IMPACT
15 THE DEATH OF HIS MOTHER IN SUCH A SHOCKING MANNER
16 AND HIS NOT GETTING ANY HELP, NOT GETTING ANY HELP,
17 IS ANOTHER PROBLEM ALL THEY DO IS STITCH HIM UP
18 AND SEND ON DOWN THE ROAD TO GET HIT IN THE HEAD
19 WITH A GOLF CLUB, TO GET HIT IN THE HEAD WITH RAKES,
20 FALL OFF TRACTORS AND THINGS LIKE THAT

21 A THIRTEEN-YEAR OLD IS SITTING OVER
22 THERE AT THAT TABLE HE MAYBE TWENTY-EIGHT YEARS
23 OLD TODAY AND HE WAS TWENTY-SIX YEARS OLD WHEN IT
24 HAPPENED, BUT YOU'VE HEARD TESTIMONY THAT THIS MAN,
25 THIS HUMAN BEING, FUNCTIONS ON THE LEVEL OF A

1 SEVENTH GRADE THAT IS A THIRTEEN YEAR OLD AND
2 TALK ABOUT A DYSFUNCTIONAL FAMILY, WHEN YOU THROW IN
3 THE LEARNING DISABILITY, AND I SUBMIT TO YOU THAT
4 REGARDLESS OF WHAT YOU'VE HEARD, THAT THE YOUNG MAN
5 HAS SOME INHERENT WORTH AS AN INDIVIDUAL, AT LEAST
6 IN THE EYES OF THE LORD

7 NOW, YOU MAY DISAGREE WITH THAT, AND I
8 CERTAINLY RESPECT YOUR OPINION, HOWEVER, THE LAW IS
9 DESIGNED IN THESE CASES TO DEAL HARSHLY AND LIFE
10 SENTENCES ARE VERY HARSH NOW, A LIFE SENTENCE,
11 JUST AS THE NEXT SENTENCE WILL BE GIVEN A PLAIN AND
12 ORDINARY MEANING AND THE JUDGE WILL INSTRUCT YOU
13 ACCORDINGLY

14 CONSIDER THE BOX CONSIDER THE BOX
15 THAT JEFF YOUNGMAN SHOWED YOU THAT MR HUGHEY WAS
16 IN THEY HAD A BOX WHERE HE IS WITH THE WALLS FELL
17 DOWN WHEN HIS MOTHER DIED, AND IT'S A SHAME THAT HE
18 DIDN'T GET ANY HELP AFTER THAT AND IT'S A SHAME
19 THAT MR HUGHEY COULD NOT COPE WITH HEIGHTENED
20 STRESS, AND IT'S HORRIBLE WHAT HE DID AND IT'S
21 WRONG, BUT TO SENTENCE THAT MAN TO DEATH IS NOT
22 GOING TO BRING ANY ONE BACK IT'S NOT GOING TO BE
23 THE APPROPRIATE PUNISHMENT IN HIS CASE IN THIS
24 CASE IN THIS CASE I'LL SUBMIT TO YOU THAT A LIFE
25 SENTENCE, HOWEVER THE JUDGE MAY STRUCTURE IT -- HE'S

1 ALREADY BEEN FOUND GUILTY BY YOU, AND I'VE TOLD YOU
2 SEVERAL TIMES I CERTAINLY RESPECT AND APPRECIATE
3 THOSE VERDICTS -- BUT AS I SAY THE LAW IS DESIGNED
4 TO DEAL WITH THESE KINDS OF CRIMES

5 NOW, MR HUGHEY WITH HIS LIMITED
6 OPTIONS AND HIS PREDICAMENT WHERE HE COULD NOT DEAL
7 WITH THE STRESS -- I GUESS WHAT STARTED THE
8 AVALANCHE OF STRESS IN THIS CASE WAS FIRST THE
9 IMMATURITY OF THIS YOUNG COUPLE, HAVING THESE KIDS,
10 RESPONSIBILITIES, BACK AND FORTH, TOGETHER, AND OFF
11 AND ON AND THAT SORT OF THING YOU ARE STRESSED AND
12 YOU'RE OLD WE ALL HAVE OUR BREAKING POINTS WE
13 ALL HAVE OUT POINT OF DECOMPENSATION WE ALL HAVE
14 OUR POINT OF WEAKNESS WE ALL HAVE THAT AND I
15 THINK THAT WHEN YOU TALK ABOUT THIS POST-TRAUMATIC
16 STRESS, IN THIS CASE, OR BEREAVEMENT OR GRIEF OR
17 WHATEVER YOU WANT TO CALL IT, WHEN HE LOST HIS
18 MOTHER, THE YOUNG MAN LOST HIS DIRECTION HE LOST
19 HIS SENSE OF DIRECTION

20 SHE WAS A GOOD WOMAN SHE WAS A GOOD
21 WOMAN HIS DADDY ON THE OTHER HAND, WHEN HE HAD THE
22 OPPORTUNITY HE TOOK TO STRONG DRINK, AND HE WASN'T
23 ALL RIGHT THEN HE WAS ALL WRONG HE WAS ALL WRONG
24 I'M ALMOST THROUGH I'M NOT GOING TO BELABOR THIS
25 THING, BUT I AM ASKING YOU TO SPARE MY CLIENT'S

1 LIFE, TO SPARE THE LIFE OF JOHN KENNEDY HUGHEY AND
2 I'VE GROWN TO KNOW HIM OVER THE LAST TWO YEARS,
3 DEALT WITH HIM THE YOUNG MAN IS NOTHING BUT
4 CORDIAL, RESPECTFUL AND COOPERATIVE AND THERE'S NO
5 STRESS, ALTHOUGH JAIL HAS GOT SOME STRESS TO IT
6 THERE'S STRESS THERE TOO I SUBMIT TO YOU THAT THE
7 YOUNG MAN FUNCTIONS IN A LESS-STRESSFUL ENVIRONMENT
8 INVOLVING RELATIONSHIP, CHILDREN, JEALOUSLY, SOME
9 IRRESPONSIBILITY, YOUTH

10 IF FOR NO OTHER REASON I SUBMIT TO YOU
11 FOR YOUR CONSIDERATION THAT YOU DEEPLY CONSIDER THIS
12 TIME THAT YOU DEEPLY CONSIDER HIS SISTER GLORIA, HIS
13 SISTER TONY, HIS RELATIVES NOW WE'RE ALL CREATURES
14 OF GOD WE'RE ALL SINNERS WE ALL MAKE MISTAKES,
15 BUT I SUBMIT TO YOU THAT THE ORGANIC BRAIN
16 DYSFUNCTION, THOSE HEAD INJURIES OR WHATEVER, THE
17 BASIS, THE BASIS, ON ITSELF, ARE LIFE-SENTENCING,
18 NOT CONSIDERING THE VIOLENCE OF YOUTH, THE ABUSE,
19 THE DEATH OF HIS MOTHER, TOTALITY OF THE
20 CIRCUMSTANCES ORGANIC BRAIN DAMAGE WHEN YOU'RE
21 ASKED TO SIGN THAT DEATH WARRANT YOU KEEP THAT IN
22 MIND YOU CONSIDER THAT, AND YOU HAVE TO PUT YOUR
23 NAME ON THAT DEATH WARRANT, YOU CONSIDER THAT

24 AND JUST ONE OTHER THING DOLLY'
25 DOLLY MAY' BRING ME ANOTHER WHISKEY' GET IN HERE

1 BOY' GET IN HERE' GET IN HERE' WHERE'S THAT JOHN
2 KENNEDY' WHERE'S THEM HALFBREEDS' WHERE THEY AT'
3 I'LL STRAITEN Y'ALL OUT' BOY' GET IN HERE'
4 ' WHERE'S MY GUN? I'LL STRAIGHTEN THEM OUT' THIS IS
5 JOHN HENRY' JOHN HENRY' GIVE ME ANOTHER DRINK
6 WHAT? LET'S GO TO RIDE YOU GOING TO DRIVE ME DOWN
7 THE ROAD

8 IF YOU CAN CALL ABUSE AN EXCUSE OR
9 WHATEVER YOU WANT TO, BUT IT HAPPENED IT WAS REAL,
10 AND IT WAS REAL TO HIM AND IT'S A BIG PART OF THE
11 REASON HE'S HERE TODAY YOU COUPLE THAT WITH THAT
12 ORGANIC BRAIN DAMAGE AND YOU WEIGH ALL THOSE
13 FACTORS IF YOU DON'T BELIEVE DEATH'S APPROPRIATE
14 IN THIS CASE, DON'T SIGN THAT DEATH WARRANT, DON'T
15 LET ANYBODY MAKE YOU SIGN THAT DEATH WARRANT ONCE
16 IS ENOUGH

17 THIS CASE HAS BEEN ABOUT KILLING AND
18 IT'S BEEN TOO MUCH ALREADY, AND IN JESUS' NAME, IN
19 JESUS' NAME, I ASK YOU TO SPARE MY CLIENT'S LIFE

20 MR COULTER OBJECTION, YOUR HONOR
21 THE COURT ALL RIGHT, MR TINSLEY,
22 LET'S NOT REFER TO RELIGION IN THE ARGUMENT

23 MR TINSLEY I'M DONE I'M DONE

24 THE COURT ALL RIGHT, LADIES AND
25 GENTLEMEN, BEFORE I GIVE YOU A FINAL INSTRUCTION,

1 I'M GOING TO ASK YOU TO GO TO YOUR JURY ROOM FOR
2 JUST A MOMENT AND I'LL BRING YOU BACK
3 (JURY EXITS COURTROOM AT 11 00 O'CLOCK A M)

4 THE COURT MR TINSLEY, WHAT ABOUT
5 YOUR CLIENT MR HUGHEY, DOES HE WISH TO ADDRESS THE
6 JURY?

7 MR TINSLEY YES, YOUR HONOR,
8 APPARENTLY HE DOES

9 THE COURT OKAY

10 MR TINSLEY VERY BRIEFLY

11 THE COURT ALL RIGHT, LET'S TAKE FIVE
12 MINUTES AND THEN WE'LL CONCLUDE I NEED Y'ALL'S
13 LIST

14 MR COULTER THAT'S WHAT I JUST HANDED
15 MR TINSLEY FOR HIS REVIEW
16 (COURT IN RECESS)

17 THE COURT MR TINSLEY, YOU'VE TALKED
18 WITH YOUR CLIENT ABOUT HIS RIGHT TO ADDRESS TO JURY
19 IF HE WISHES TO?

20 MR TINSLEY YES, SIR, YOUR HONOR,
21 I HAVE

22 THE COURT YOU INDICATED EARLIER THAT
23 HE DID WISH TO ADDRESS THE JURY, IS THAT CORRECT?

24 MR TINSLEY YES, SIR, YOUR HONOR, IT
25 IS I'VE DISCUSSED WITH HIM FURTHER DURING THE

1 BREAK HIS RIGHT TO DO IT OR NOT TO DO IT THE FACT
2 THAT I CAN'T TELL HIM TO DO IT, NOR CAN I PREVENT
3 HIM FROM DOING IT IT'S TOTALLY UP TO HIM AND HE
4 HAS DECIDED THAT HE WOULD LIKE TO MAKE A BRIEF
5 STATEMENT

6 THE COURT ALL RIGHT, MR HUGHEY, DO
7 YOU UNDERSTAND YOU'RE PERMITTED TO, YOU'RE NOT
8 REQUIRED TO, THAT'S A DECISION THAT YOU MUST MAKE?

9 THE DEFENDANT YES, SIR

10 THE COURT HAVE YOU ARRIVED AT YOUR
11 DECISION?

12 THE DEFENDANT YES, SIR

13 THE COURT DO YOU WISH TO ADDRESS THE
14 JURY?

15 THE DEFENDANT YES, SIR

16 THE COURT ALL RIGHT ALL RIGHT,
17 BRING THE JURY IN, PLEASE

18 MR COULTER IS YOUR HONOR GOING TO --

19 THE COURT JUST A MINUTE

20 MR COULTER JUDGE, I APOLOGIZE, I
21 JUST DIDN'T KNOW IF YOU WERE GOING TO GO DIRECTLY
22 INTO CHARGES OR --

23 THE COURT I AM

24 MR COULTER -- COULD WE DISCUSS --
25 IS YOUR HONOR GOING TO CHARGE WHAT HAS JUST BEEN

1 SUBMITTED AS I UNDERSTAND IT --

2 THE COURT OH --

3 MR COULTER -- AS I UNDERSTAND IT THE
4 NON-STATUTORY MITIGATION CIRCUMSTANCES

5 THE COURT OH, NO, I'M SORRY NO,
6 WHAT I PROPOSED TO DO AND WHAT I WILL INSTRUCT THEM
7 IS, THAT I WILL INSTRUCT THEM AS TO NUMBER ONE
8 NUMBER FOUR I'VE COMBINED I'LL INSTRUCT THEM THAT
9 THEY MAY CONSIDER THE DEFENDANT'S LEVEL ON
10 INTELLECTUAL FUNCTIONING WHETHER IT WAS A NATURAL
11 CONSEQUENCE OF BIRTH OR AS A RESULT OF ANY PHYSICAL
12 AND/OR EMOTIONAL TRAUMA SUFFERED AS A CHILD OR AS AN
13 ADULT AND ANY OTHER MITIGATING CIRCUMSTANCE THAT
14 THE JURY DETERMINES IS APPROPRIATE FROM THE
15 EVIDENCE

16 MR TINSLEY YOU'RE COMBINING FOUR AND
17 FIVE?

18 THE COURT WELL, I'M COMBINING THEM IN
19 SOME FASHION I'M NOT SURE WHICH ONES

20 MR TINSLEY OKAY

21 THE COURT BUT THAT'S HOW IT WILL BE
22 DONE OKAY?

23 MR COULTER THANK YOU

24 THE COURT ALL RIGHT, BRING THEM IN,
25 PLEASE

1 (JURY RE-ENTERS THE COURTROOM AT 11 10 O'CLOCK A M)

2 THE COURT LADIES AND GENTLEMEN, AT
3 THIS STAGE THE DEFENDANT IS PERMITTED TO ADDRESS THE
4 JURY AND HE WILL DO SO FOLLOWING THAT I WILL GIVE
5 YOU THE INSTRUCTION AS TO THE LAW AND THEN YOU
6 WILL BE ASKED TO GO BACK TO BEGIN YOUR
7 DELIBERATIONS MR HUGHEY

8 MR TINSLEY THANK YOU SO MUCH, YOUR
9 HONOR MAY IT PLEASE THE COURT

10 STATEMENT BY MR HUGHEY

11 FIRST OF ALL, I WOULD LIKE TO SAY I'M
12 SORRY FOR WHAT HAS HAPPENED I'M SORRY Y'ALL HAD TO
13 TAKE Y'ALL'S TIME OFF TO SERVE ON THIS JURY

14 I'M NOT BLAMING ANYONE FOR WHAT I HAVE
15 DONE, BECAUSE WHAT I'VE DONE WAS WRONG AND I'M READY
16 TO ACCEPT RESPONSIBILITY I'M TRULY SORRY I'M
17 SORRY TO EVERYBODY HERE, MY KIDS AND ALL

18 WHAT I DID ON DECEMBER FOURTH, I'M NOT
19 BLAMING ANYONE I'M READY TO ACCEPT WHATEVER --
20 WHATEVER DECISION Y'ALL MAKE I'M READY TO ACCEPT
21 THE RESPONSIBILITY THANK YOU

22 THE COURT ALL RIGHT, LADIES AND
23 GENTLEMEN OF THE JURY, THE DEFENDANT HAVING
24 PREVIOUSLY BEEN FOUND GUILTY BY YOU TWELVE JURORS OF
25 MURDER ON TWO SEPARATE COUNTS OF THE INDICTMENT THAT

1 YOU CONSIDERED IT NOW BECOME YOUR DUTY TO DECIDE
2 WHAT SENTENCE OR WHAT PUNISHMENT SHOULD BE IMPOSED
3 UPON THE DEFENDANT, JOHN KENNEDY HUGHEY, AS TO EACH
4 OF THOSE SEPARATE COUNTS OF THAT INDICTMENT

5 NOW THE INDICTMENT WHEREIN THE
6 DEFENDANT WAS FOUND GUILTY OF MURDER -- OR EXCUSE
7 ME, THE COUNT OF THE INDICTMENT WHEREIN THE
8 DEFENDANT WAS FOUND GUILTY OF MURDER -- OF BURGLARY
9 IN THE FIRST DEGREE, AND THE COUNT IN THE INDICTMENT
10 WHERE THE DEFENDANT WAS FOUND GUILTY OF LARCENY ARE
11 PUNISHMENTS THAT THE COURT WILL DECIDE AND THE COURT
12 WILL IMPOSE

13 THE JURY WILL BE CONSIDERING THE
14 PUNISHMENT OR THE SENTENCE TO BE IMPOSED ONLY AS IT
15 RELATES TO COUNT ONE OF THE INDICTMENT AND COUNT TWO
16 OF THE INDICTMENT EACH OF THOSE WHEREIN THE JURY
17 HAS FOUND THE DEFENDANT TO BE GUILTY OF THE CRIME OF
18 MURDER

19 NOW THERE ARE TWO POSSIBLE VERDICTS
20 THAT YOU WILL CONSIDER AS TO EACH OF THE SEPARATE
21 COUNTS OF THAT INDICTMENT ONE IS A SENTENCE OF
22 DEATH AND THE OTHER IS A SENTENCE OF LIFE
23 IMPRISONMENT YOU WILL MAKE THAT DETERMINATION
24 BASED UPON YOUR CONSIDERATION OF THE EVIDENCE
25 PRESENTED AND MY INSTRUCTION AS TO THE APPLICABLE

1 LAW

2 NOW WHILE THE SENTENCE THAT YOU
3 RECOMMEND IS REFERRED TO IN THE LAW AS A
4 RECOMMENDATION, IT IS A RECOMMENDATION THAT MUST BE
5 FOLLOWED BY THE COURT ACCORDING TO THE LAW AND
6 THEREFORE, THE SENTENCE THAT YOU RECOMMEND WILL BE
7 IMPOSED BY THIS COURT UPON THE DEFENDANT

8 THERE ARE CERTAIN FORMS WHICH I HAVE
9 PREPARED AND THAT YOU WILL HAVE IN THE JURY ROOM
10 WITH YOU THAT RELATE TO THIS PARTICULAR INSTRUCTION,
11 AS WELL AS TO YOUR DUTIES AS JURORS IN THIS CASE
12 NOW YOU WILL HAVE FOUR SEPARATE FORMS THAT YOU WILL
13 BE CONSIDERING YOU WILL HAVE FOUR FORMS AS TO EACH
14 COUNT OF THE INDICTMENT SO THERE WILL BE A TOTAL
15 OF EIGHT FORMS IN THE JURY ROOM YOU WILL BE
16 CONSIDERING EACH OF THOSE AS THEY RELATE TO THIS
17 PARTICULAR CASE

18 NOW, ONE FORM IS SIMPLY A STATUTORY
19 INSTRUCTION FORM IT DOES NOT CONTAIN ALL THE
20 INSTRUCTIONS THAT I WILL BE GIVING YOU DURING THIS
21 INSTRUCTION BUT THAT STATUTORY INSTRUMENT FORM
22 DOES SET FORTH THE STATUTORY AGGRAVATING
23 CIRCUMSTANCES AND THE STATUTORY MITIGATING
24 CIRCUMSTANCES THAT YOU MAY CONSIDER IN YOUR ARRIVING
25 AT A DECISION

1 THE SECOND FORM IS THE FORM WHICH IS
2 THE RECOMMENDATION OF A DEATH SENTENCE ON THAT
3 FORM YOU WILL SEE IT WOULD HAVE A FINDING WHERE THE
4 JURY HAS FOUND BEYOND A REASONABLE DOUBT THE
5 EXISTENCE OF ONE OR MORE STATUTORY AGGRAVATING
6 CIRCUMSTANCES IF THAT BE THE CASE, YOU WILL BE
7 ASKED TO COMPLETE THAT FORM AND EACH JUROR WILL BE
8 ASKED TO SIGN THAT FORM THAT IS THE FORM THAT
9 MAKES A RECOMMENDATION AS TO A DEATH SENTENCE

10 TWO OTHER FORMS THAT YOU WILL HAVE, ONE
11 IS ENTITLED AGGRAVATING CIRCUMSTANCES IN THE EVENT
12 THAT YOU DO NOT RECOMMEND A SENTENCE OF DEATH AS TO
13 THE DEFENDANT, YOU ARE STILL ASKED TO DETERMINE
14 WHETHER OR NOT ANY AGGRAVATING -- STATUTORY
15 AGGRAVATING CIRCUMSTANCE HAS BEEN PROVEN BEYOND A
16 REASONABLE DOUBT SHOULD YOU FIND SUCH TO HAVE BEEN
17 PROVEN YOU WILL BE ASKED TO COMPLETE THAT FOR AND
18 EACH JUROR WILL BE ASKED TO SIGN IT

19 AND THE LAST FORM, OF COURSE, IS THE
20 RECOMMENDATION OF A LIFE SENTENCE FORM AND AS TO
21 THAT FORM SHOULD YOU DETERMINE THAT THE APPROPRIATE
22 SENTENCE IN THE CASE SHOULD BE LIFE IMPRISONMENT,
23 THEN ONLY THE FOREMAN WOULD BE REQUIRED TO SIGN THAT
24 FORM AND THAT WOULD BE PLACED THE DAY'S DATE OF
25 THE ACTUAL REACHING OF THAT VERDICT

1 NOW WITH REGARD TO THE RECOMMENDATION
2 OF A SENTENCE OF DEATH, YOU THE JURY MAY RECOMMEND
3 THAT THE DEFENDANT BE SENTENCED TO DEATH PLEASE
4 NOTE THAT IMMEDIATELY BELOW THE RECOMMENDATION
5 LANGUAGE THERE ARE TWELVE LINES WHICH I REFERRED TO
6 WHERE, IF YOU SHOULD DECIDE THAT THE DEFENDANT
7 SHOULD BE SENTENCED TO DEATH, THAT EACH ONE OF YOUR
8 JURORS WOULD BE REQUIRED TO SIGN YOUR NAME ON THAT
9 PARTICULAR FORM THE LAW REQUIRES THAT A
10 RECOMMENDATION FOR THE IMPOSITION OF A DEATH
11 SENTENCE MUST BE A UNANIMOUS RECOMMENDATION AND
12 EACH JUROR MUST SIGN HIS OR HER NAME TO THAT FORM
13 WHICH WOULD REFLECT THAT UNANIMOUS DECISION

14 IN ORDER FOR YOU TO RETURN A
15 RECOMMENDATION OF THE IMPOSITION OF A DEATH
16 SENTENCE, IT WOULD ALSO BE NECESSARY THAT ALL TWELVE
17 JURORS HAVE UNANIMOUSLY FOUND THE EXISTENCE OF AT
18 LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND
19 A REASONABLE DOUBT AND THAT THE STATUTORY
20 AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES WOULD BE
21 WRITTEN IN THE SPACE PROVIDED ON THE RECOMMENDATION
22 FORM WHICH IS DIRECTLY ABOVE WHERE THE JURORS WOULD
23 EACH SIGN YOUR NAMES

24 NOW AS I HAVE STATED, IN ORDER FOR YOU
25 TO RECOMMEND A SENTENCE OF DEATH, IT WOULD BE

1 NECESSARY THAT THE JURY HAS UNANIMOUSLY FOUND THE
2 EXISTENCE OF AT LEAST ONE STATUTORY AGGRAVATING
3 CIRCUMSTANCE BEYOND A REASONABLE DOUBT THEREFORE,
4 IN ORDER FOR YOU TO UNDERSTAND WHAT THAT IS I WILL
5 DEFINE FOR YOU WHAT IS A STATUTORY AGGRAVATING
6 CIRCUMSTANCE

7 IT IS SIMPLY A FACT, AN INCIDENT, A
8 DETAIL, OR AN OCCURRENCE WHICH THE STATE LEGISLATURE
9 HAD DECLARED BY STATUTE TO BE A CIRCUMSTANCE WHICH
10 MAY MAKE WORSE OR AGGRAVATE THE CRIME OF MURDER WHEN
11 IT ACCOMPANIES THAT OFFENSE IT IS SOMETHING WHICH
12 MAY INCREASE THE ENORMITY OF OR ADDS TO THE
13 INJURIOUS CONSEQUENCES OF THE OFFENSE OF MURDER AND
14 WHICH MAY SUPPORT THE IMPOSITION OF THE DEATH
15 PENALTY AS THE MORE APPROPRIATE PUNISHMENT OR
16 SENTENCE SHOULD YOU THE JURY DETERMINE THAT TO BE
17 THE CASE

18 IN MAKING YOUR DETERMINATION AS TO
19 WHETHER OR NOT TO RECOMMEND A SENTENCE OF DEATH OR A
20 SENTENCE OF LIFE IMPRISONMENT, YOU MAY CONSIDER THE
21 FOLLOWING STATUTORY AGGRAVATING CIRCUMSTANCES AND
22 AS I'VE SAID, MR. FOREMAN AND LADIES AND GENTLEMEN,
23 THIS FORM CONTAINING THOSE STATUTORY AGGRAVATING
24 CIRCUMSTANCES WILL BE IN THE JURY ROOM WITH YOU FOR
25 YOU TO CONSIDER

1 THE FOLLOWING STATUTORY AGGRAVATING
2 CIRCUMSTANCES MAY BE CONSIDERED BY YOU IN MAKING
3 YOUR RECOMMENDATION NUMBER ONE, THAT THE MURDER OF
4 TESHEKA L JACKSON WAS COMMITTED WHILE IN THE
5 COMMISSION OF THE CRIME OR ACT OF BURGLARY IN THE
6 FIRST DEGREE NUMBER TWO, THAT THE MURDER OF
7 TESHEKA L JACKSON WAS COMMITTED WHILE IN THE
8 COMMISSION OF THE CRIME OR ACT OF LARCENY WITH THE
9 USE OF A DEADLY WEAPON AND NUMBER THREE, TWO OR
10 MORE PERSONS WERE MURDERED BY THE DEFENDANT PURSUANT
11 TO ONE SCHEME OR COURSE OF CONDUCT

12 WITH RESPECT TO THE OFFENSE TO BURGLARY
13 IN THE FIRST DEGREE, I HAVE PREVIOUSLY INSTRUCTED
14 YOU TO THAT OFFENSE YOU ARE AWARE OF THE ELEMENTS
15 THAT CONSTITUTE THAT OFFENSE I'VE ALSO PREVIOUSLY
16 INSTRUCTED YOU AS TO THE OFFENSE OF LARCENY AND WHAT
17 ELEMENTS CONSTITUTE THAT OFFENSE

18 WITH RESPECT TO THIS STATUTORY
19 AGGRAVATING CIRCUMSTANCE, LARCENY, IN THIS INSTANCE,
20 MUST BE WITH THE USE OF A DEADLY WEAPON SIMPLY
21 MEANING THAT THE LARCENY MUST BE ACCOMPLISHED BY THE
22 USE OF A DEADLY WEAPON

23 NOW I EMPHASIS TO YOU THAT THESE ARE
24 THE ONLY CIRCUMSTANCES THAT YOU MAY CONSIDER AS
25 AGGRAVATING CIRCUMSTANCES IN MAKING A RECOMMENDATION

1 AS TO A SENTENCE /OF DEATH SHOULD YOU TWELVE JURORS
2 UNANIMOUSLY FIND THE EXISTENCE OF ONE OR MORE OF
3 THESE STATUTORY AGGRAVATING CIRCUMSTANCES LISTED ON
4 THIS INSTRUCTION SHEET BEYOND A REASONABLE DOUBT,
5 THEN YOU MAY -- THAT IS YOU ARE PERMITTED UNDER THE
6 LAW TO CONSIDER RECOMMENDING THE IMPOSITION OF A
7 DEATH SENTENCE FOR THE DEFENDANT

8 YOU WILL ALSO HAVE STATUTORY
9 INSTRUCTIONS AND FORMS RELATING TO COUNT TWO OF THE
10 INDICTMENT THAT BEING THE COUNT WHEREIN THE
11 DEFENDANT HAS BEEN FOUND GUILTY OF THE MURDER OF
12 LUEVINIA H HARRIS

13 WITH RESPECT TO THAT PARTICULAR COUNT
14 OF THE INDICTMENT, I CHARGE YOU THAT THE FOLLOWING
15 STATUTORY AGGRAVATING CIRCUMSTANCES MAY BE
16 CONSIDERED AS TO THAT COUNT OF THE INDICTMENT IN
17 MAKING YOUR DECISION AS TO WHAT SENTENCE TO
18 RECOMMEND

19 THE STATUTORY AGGRAVATING CIRCUMSTANCES
20 THAT YOU MAY CONSIDER ARE THAT THE MURDER OF
21 LUEVINIA HARRIS WAS COMMITTED WHILE IN THE
22 COMMISSION OF THE CRIME OR ACT OF BURGLARY IN THE
23 FIRST DEGREE, AND SECONDLY, TWO OR MORE PERSONS WERE
24 MURDERED BY THE DEFENDANT PURSUANT TO ONE SCHEME OR
25 COURSE OF CONDUCT

1 YOU ARE NEVER REQUIRED TO RECOMMEND THE
2 IMPOSITION OF A DEATH SENTENCE EVEN IF YOU FIND THAT
3 A STATUTORY AGGRAVATING CIRCUMSTANCE HAS BEEN PROVED
4 BEYOND A REASONABLE DOUBT AS I HAVE PREVIOUSLY
5 INSTRUCTED YOU, A REASONABLE DOUBT IS THE KIND OF
6 DOUBT THAT WOULD CAUSE A REASONABLE PERSON TO
7 HESITATE TO ACT

8 SHOULD YOU FIND THAT THE STATE HAS NOT
9 PROVEN TO YOUR SATISFACTION BEYOND A REASONABLE
10 DOUBT THE EXISTENCE OF AT LEAST ONE STATUTORY
11 AGGRAVATING CIRCUMSTANCE, THEN THE JURY WOULD NOT BE
12 AUTHORIZED NOR PERMITTED TO RETURN A RECOMMENDATION
13 FOR THE IMPOSITION OF A DEATH SENTENCE AND YOUR
14 RECOMMENDATION UNDER THAT CIRCUMSTANCE MUST BE LIFE
15 IMPRISONMENT

16 SHOULD YOU FIND BEYOND A REASONABLE
17 DOUBT THE EXISTENCE OF ONE OR MORE OF THE STATUTORY
18 AGGRAVATING CIRCUMSTANCES AS LISTED ON THAT
19 STATUTORY INSTRUCTION FORM ACCOMPANYING THE MURDER,
20 AND SHOULD YOU FURTHER FIND THE DEFENDANT SHOULD BE
21 SENTENCE TO DEATH AFTER ALSO CONSIDERING THE
22 EVIDENCE IN FAVOR OF A RECOMMENDATION OF A LIFE
23 SENTENCE -- ABOUT WHICH I WILL INSTRUCT YOU LATER --
24 THEN IT WOULD BE YOUR DUTY, MR FOREMAN, TO WRITE ON
25 THE RECOMMENDATION OF A DEATH SENTENCE FORM THE

1 STATUTORY AGGRAVATING CIRCUMSTANCES WHICH YOU AND
2 YOUR FELLOW JURORS HAVE FOUND BEYOND A REASONABLE
3 DOUBT

4 THEN, MR FOREMAN, YOU AND EACH OF YOUR
5 FELLOW JURORS WOULD SIGN YOUR NAMES IN THE SPACES
6 PROVIDED INDICATING YOUR UNANIMOUS RECOMMENDATION AS
7 TO THE IMPOSITION OF A DEATH SENTENCE

8 NOW AS I INDICATED TO YOU, YOU'LL ALSO
9 HAVE A FORM WHICH IS A RECOMMENDATION OF A LIFE
10 SENTENCE NOW THAT PARTICULAR FORM JUST SIMPLY
11 STATES AND SETS FORTH THAT YOU TWELVE JURORS HAVE
12 DETERMINED THAT A LIFE SENTENCE HAS BEEN RECOMMENDED
13 IN THIS CASE AND AS I'VE SAID, YOU WILL HAVE TWO
14 SEPARATE FORMS ONE RELATING TO COUNTY ONE OF THE
15 INDICTMENT, ONE RELATING TO COUNTY TWO OF THE
16 INDICTMENT

17 BY THAT RECOMMENDATION-OF-SENTENCE
18 FORM, YOU TWELVE JURORS MAY RECOMMEND THAT THE
19 DEFENDANT BE SENTENCED TO LIFE IMPRISONMENT PLEASE
20 NOTE THAT WHILE A RECOMMENDATION OF A LIFE
21 IMPRISONMENT SENTENCE MUST ALSO BE A UNANIMOUS
22 DECISION BY THE JURY, ONLY THE FOREMAN IS REQUIRED
23 TO SIGN HIS NAME TO THAT RECOMMENDATION-OF-SENTENCE
24 FORM

25 IN ARRIVING AT YOUR DECISION AS TO WHAT

1 THE APPROPRIATE SENTENCE WOULD BE IN THIS CASES, YOU
2 ARE INSTRUCTED THAT YOU MUST ALSO CONSIDER ANY
3 STATUTORY MITIGATING CIRCUMSTANCES THEREFORE, WHAT
4 IS A STATUTORY MITIGATING CIRCUMSTANCE?

5 IT IS A FACT, AN INCIDENT, A DETAIL, OR
6 AN OCCURRENCE WHICH THE STATE LEGISLATURE HAS
7 DECLARED BY STATUTE TO BE A CIRCUMSTANCE WHICH MAY
8 MAKE LESS OR REDUCE THE SEVERITY OF THE CRIME OF
9 MURDER IT IS A CIRCUMSTANCE WHICH MAY BE
10 CONSIDERED AS MITIGATING OR EXTENUATING THE DEGREE
11 OF MORAL CULPABILITY FOR THE COMMISSION OF THE
12 OFFENSE OF MURDER

13 A MITIGATING CIRCUMSTANCE IS NEITHER A
14 JUSTIFICATION NOR AN EXCUSE FOR THE CRIME OF MURDER
15 IT IS SIMPLY SOMETHING WHICH MAY LESSEN THE DEGREE
16 OF THE DEFENDANT'S GUILT OR MAKE THE DEFENDANT LESS
17 BLAMEWORTHY OR LESS CULPABLE

18 IN MAKING YOUR DETERMINATION AS TO
19 WHETHER OR NOT TO RECOMMEND A SENTENCE OF DEATH OR A
20 SENTENCE OF LIFE IMPRISONMENT, YOU SHOULD CONSIDER
21 THE FOLLOWING STATUTORY MITIGATING CIRCUMSTANCES
22 THE FOLLOWING STATUTORY MITIGATING CIRCUMSTANCES ARE
23 SET FORTH ON YOUR STATUTORY INSTRUCTION FORM THEY
24 ARE THE SAME AS TO EACH OF THE COUNTS OF THE
25 INDICTMENT

1 THOSE STATUTORY MITIGATING
2 CIRCUMSTANCES ARE THE DEFENDANT HAS NO SIGNIFICANT
3 HISTORY OF PRIOR CRIMINAL CONVICTION INVOLVING THE
4 USE OF VIOLENCE AGAINST ANOTHER PERSON, TWO, THE
5 MURDER WAS COMMITTED WHILE THE DEFENDANT WAS UNDER
6 THE INFLUENCE OF A MENTAL OR AN EMOTIONAL
7 DISTURBANCE, AND THREE, THE AGE OR MENTALITY OF THE
8 DEFENDANT AT THE TIME OF THE OFFENSE

9 NOW YOU ARE ALSO PERMITTED UNDER THE
10 LAW TO CONSIDER, ANESTHESIA YOU SHOULD CONSIDER, ANY
11 NON-STATUTORY MITIGATING CIRCUMSTANCES WHICH HAVE
12 BEEN SHOWN TO EXIST BY THE EVIDENCE IN THE CASE

13 A NON-STATUTORY MITIGATING CIRCUMSTANCE
14 IS ONE WHICH IS NOT PROVIDED FOR BY STATUTE, BUT IS
15 ONE WHICH THE DEFENDANT CONTENTS SERVES THE SAME
16 PURPOSE THAT IS TO LESSEN OR REDUCE THE DEGREE OF
17 THE DEFENDANT'S GUILT IN THE COMMISSION OF THE CRIME
18 OF MURDER

19 THOSE THAT THE DEFENSE CONTENTS SHOULD
20 BE CONSIDERED ARE ANY PRIOR GOOD ACTS OF THE
21 DEFENDANT, THE DEFENDANT'S LEVEL OF INTELLECTUAL
22 FUNCTIONING WHETHER AS A NATURAL CONSEQUENCE OF HIS
23 BIRTH OR AS A RESULT OF PHYSICAL AND/OR EMOTIONAL
24 TRAUMA SUFFERED AS A CHILD OR AS AN ADULT, AND ANY
25 OTHER EVIDENCE RELATING TO A MITIGATING CIRCUMSTANCE

1 WHICH YOU FIND TO BE APPROPRIATE AND WHICH YOU FIND
2 TO HAVE BEEN ESTABLISHED BY THE EVIDENCE IN THE
3 CASE

4 NOW WHILE THERE MUST BE SOME EVIDENCE
5 WHICH SUPPORTS A FINDING BY YOU OF THE EXISTENCE OF
6 ONE OR MORE STATUTORY OR NON-STATUTORY MITIGATING
7 CIRCUMSTANCES, IT IS NOT NECESSARY THAT YOU FIND THE
8 EXISTENCE OF SUCH OF A CIRCUMSTANCE OR CIRCUMSTANCES
9 BEYOND A REASONABLE DOUBT AND YOU MAY RECOMMEND A
10 SENTENCE OF LIFE IMPRISONMENT AND WHETHER OR NOT YOU
11 FIND THE EXISTENCE OF A STATUTORY OR NON-STATUTORY
12 MITIGATING CIRCUMSTANCE

13 IN MAKING YOUR DETERMINATION AS TO
14 WHICH SENTENCE TO RECOMMEND IN THESE CASES, YOU
15 SHOULD CONSIDER THE STATUTORY AGGRAVATING
16 CIRCUMSTANCES, THE STATUTORY MITIGATING
17 CIRCUMSTANCES, AND ANY NON-STATUTORY MITIGATING
18 CIRCUMSTANCES IN ARRIVING AT YOUR DECISION

19 WHILE YOU MUST FIND THE EXISTENCE OF AT
20 LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND
21 A REASONABLE DOUBT BEFORE YOU MAY CONSIDER
22 RECOMMENDING A SENTENCE OF DEATH, ONCE SUCH A
23 FINDING IS MADE YOU ARE PERMITTED TO RECOMMEND THE
24 SENTENCE OF DEATH EVEN THOUGH YOU MAY ALSO FIND THE
25 EXISTENCE OF ONE OR MORE STATUTORY OR NON-STATUTORY

1 MITIGATING CIRCUMSTANCES

2 THE EXISTENCE OF ANY STATUTORY OR NON-
3 STATUTORY MITIGATING CIRCUMSTANCE IS NOT A BAR TO
4 THE RECOMMENDATION OF A DEATH SENTENCE SO LONG AS
5 YOU HAVE FOUND THE EXISTENCE OF AT LEAST ONE
6 STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A
7 REASONABLE DOUBT

8 CONVERSELY, YOU MAY ALSO RECOMMEND A
9 SENTENCE OF LIFE IMPRISONMENT EVEN THOUGH YOU FIND
10 AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE
11 BEYOND A REASONABLE DOUBT, AND FIND NO MITIGATING
12 CIRCUMSTANCES DO EXISTENCE. SIMPLY STATED, YOU MAY
13 RECOMMEND A SENTENCE OF LIFE IMPRISONMENT FOR ANY
14 REASON OR FOR NO REASON AT ALL OTHER THAN AS AN ACT
15 OF MERCY

16 IN CONSIDERING A SENTENCE OF DEATH OR A
17 SENTENCE OF LIFE, YOU ARE TO GIVE THOSE TERMS THEIR
18 PLAN AND ORDINARY MEANING. WHATEVER YOUR DECISION
19 MAY BE REGARDING A RECOMMENDATION OF SENTENCE, THE
20 DECISION OF THE JURY MUST BE UNANIMOUS. ALL TWELVE
21 MUST AGREE IN ORDER FOR YOU TO RETURN A
22 RECOMMENDATION AS TO SENTENCE

23 NOW MR. FOREMAN AND LADIES AND
24 GENTLEMEN OF THE JURY, LET ME FURTHER INSTRUCT YOU
25 THAT THE FACT THAT THE DEFENDANT DOES NOT TAKE THE

1 WITNESS STAND AND TESTIFY DURING THE TRIAL OF ANY
2 PHASE OF A CRIMINAL TRIAL IS NOT A FACTOR WHICH YOU
3 MAY CONSIDER IN ANY WAY DURING YOUR DELIBERATIONS
4 YOU MAY NOT CONSIDER IT IN ANY FASHION AGAINST THE
5 DEFENDANT, NOR MAY YOU CONSIDER OR DISCUSS IT DURING
6 YOUR DELIBERATIONS

7 NOW MR FOREMAN AND LADIES AND
8 GENTLEMEN OF THE JURY, LET ME JUST SIMPLY GO BACK
9 OVER EACH OF THESE FORMS WITH YOU SO THAT YOU'LL
10 UNDERSTAND, HOPEFULLY CLEARLY, WHAT YOUR OBLIGATION
11 AND DUTIES ARE IN THIS CASE

12 AS I'VE INDICATED, YOU WILL HAVE TWO
13 SETS OF FORMS ONE RELATES TO COUNT ONE OF THE
14 INDICTMENT ONE RELATES TO COUNT TWO OF THE
15 INDICTMENT AS TO EACH OF THOSE COUNTS YOU WILL
16 HAVE A STATUTORY INSTRUCTION SHEET THAT STATUTORY
17 INSTRUCTION SETS FORTH THE STATUTORY AGGRAVATING
18 CIRCUMSTANCES THAT YOU MAY CONSIDER IN ARRIVING AT
19 YOUR RECOMMENDATION AS TO SENTENCE IT ALSO SETS
20 FORTH THE STATUTORY MITIGATING CIRCUMSTANCES THAT YOU
21 MAY CONSIDER IN ARRIVING AT YOUR DECISION IT ALSO
22 STATES THAT YOU MAY CONSIDER ANY NON-STATUTORY
23 MITIGATING CIRCUMSTANCES IN ARRIVING AT YOUR
24 DECISION

25 ACCOMPANYING THE STATUTORY INSTRUCTION

1 FOR WILL BE THE TWO RECOMMENDATION FORMS YOU HAVE
2 A RECOMMENDATION AS TO A SENTENCE OF DEATH YOU
3 HAVE RECOMMENDATION AS TO A SENTENCE OF LIFE IN
4 ORDER FOR YOU TO RECOMMEND A SENTENCE OF DEATH, AS I
5 HAVE INDICATED, IT WOULD BE NECESSARY THAT YOU HAVE
6 FOUND BEYOND A REASONABLE DOUBT AT LEAST ONE
7 STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND A
8 REASONABLE DOUBT

9 SHOULD THAT BE YOUR DECISION IN THE
10 CASE, YOU WOULD NEED TO WRITE THAT STATUTORY OR
11 STATUTORY -- ONE OR MORE STATUTORY AGGRAVATING
12 CIRCUMSTANCES IN THE SPACE PROVIDED AND THEN EACH
13 OF YOU JURORS WOULD BE REQUIRED TO SIGN YOUR NAME
14 INDICATING YOUR UNANIMOUS AGREEMENT WITH THAT
15 DECISION

16 IF YOUR DECISION IS NOT TO RECOMMEND
17 THE SENTENCE OF DEATH BUT YOU WISH TO RECOMMEND A
18 SENTENCE OF LIFE, THEN YOU ALSO HAVE THAT
19 RECOMMENDATION AS TO SENTENCE FORM AND, MR
20 FOREMAN, IT WILL ONLY BE YOU THAT WOULD BE NECESSARY
21 TO SIGN THAT FORM INDICATING THAT THAT WAS THE
22 UNANIMOUS DECISION OF THE JURY

23 YOU ALSO HAVE ANOTHER FORM INDICATING
24 AGGRAVATING CIRCUMSTANCES I ASK YOU TO COMPLETE
25 THAT FORM SHOULD YOU FIND SOME AGGRAVATING

1 CIRCUMSTANCE TO BE PROVEN BEYOND A REASONABLE DOUBT
2 AND COMPLETE THAT FORM EVEN IN THE EVENT THAT YOU
3 ARE TO RECOMMEND A LIFE SENTENCE IN THE CASE SHOULD
4 YOU FIND A STATUTORY AGGRAVATING CIRCUMSTANCE BEYOND
5 A REASONABLE DOUBT

6 YOU HAVE A SET OF THOSE FORMS FOR EACH
7 COUNT OF THE INDICTMENT YOU WILL BE ASKED TO
8 COMPLETE THOSE FORMS AS TO EACH OF THOSE SEPARATE
9 COUNTS OF THE INDICTMENT SIMPLY MEANING THAT YOU
10 WILL BE RENDERING A RECOMMENDATION AS TO SENTENCE AS
11 TO EACH OF THOSE SEPARATE COUNTS

12 IN ARRIVING AT YOUR DECISION, YOU ARE
13 NOT TO CONSIDER ANY BIAS, ANY PREJUDICE, ANY
14 PASSION, ANY CAPRICE, OR ANY ARBITRARY FACTOR YOUR
15 DECISION MUST BE BASED SOLELY UPON THE EVIDENCE IN
16 THE CASE YOUR DETERMINATION AS TO THE APPROPRIATE
17 SENTENCE, PLEASE REFLECT THAT ON THE RECOMMENDATION
18 AS TO SENTENCE FORM AS I PREVIOUSLY INSTRUCTED

19 I'M GOING TO ASK YOU AT THIS TIME TO
20 PLEASE RETIRE TO YOUR JURY ROOM BUT I'M GOING TO
21 ASK THAT YOU NOT BEGIN YOUR DELIBERATIONS UNTIL I
22 SEND YOU WORD TO DO SO I'LL HAVE SOME MATTERS I'LL
23 NEED TO ADDRESS WITH THE LAWYERS IF I DO NOT NEED
24 TO BRING YOU BACK FOR ANY REASON, I WILL SEND BY WAY
25 OF THE BAILIFF ALL THE EXHIBITS WHICH HAVE BEEN

1 INTRODUCED DURING THIS PHASE OF THE TRIAL AND, MR
2 FOREMAN, TO YOU, HE WILL BRING THE VARIOUS FORMS
3 THAT YOU WILL NEED TO COMPLETE PURSUANT TO YOUR
4 DELIBERATIONS

5 SO PLEASE RETIRE TO YOUR JURY ROOM
6 BUT DO NOT BEGIN YOUR DELIBERATIONS UNTIL I SEND YOU
7 WORD TO DO SO

8 (JURY EXITS THE COURTROOM AT 11 33 O'CLOCK A M)

9 THE COURT ANY EXCEPTIONS OR ADDITIONS
10 TO MY INSTRUCTION BY THE STATE?

11 MR COULTER NOT BY THE STATE, YOUR
12 HONOR

13 THE COURT MR TINSLEY?

14 MR TINSLEY YOUR HONOR, I WOULD POINT
15 OUT THAT, OF COURSE, THE COURT HAS CHOSEN NOT TO
16 CHARGE A COUPLE OF OUR REQUESTS AS INCORPORATED IN
17 OUR --

18 THE COURT KEEP THAT DOOR SHUT,
19 PLEASE

20 MR TINSLEY -- RECOMMENDATIONS THE
21 LANGUAGE REFERRING TO THE DEFENDANT CONTENDS ON THE
22 NON-STATUTORY MITIGATION I FELT SHOULD HAVE BEEN
23 CHARACTERIZED AS THE LAW ALLOWS AND PROVIDES
24 WHATEVER THE CASE MAY BE IN THAT LANGUAGE AND --

25 THE COURT YOU'LL HAVE TO -- YOU'LL

1 HAVE TO TELL ME AGAIN WHAT YOU MEAN BY THAT

2 MR TINSLEY GO AHEAD

3 MR McCALLUM YOUR HONOR, MY

4 RECOLLECTION OF YOUR STATEMENT WAS THAT A NON-
5 STATUTORY MITIGATING CIRCUMSTANCE IS ONE WHICH THE
6 DEFENDANT CONTENDS SERVES THE SAME PURPOSE AS A
7 STATUTORY MITIGATING CIRCUMSTANCE AND I DON'T
8 THINK THAT'S AN APPROPRIATE COMMENT

9 I THINK THAT THE LAW PROVIDES THAT A
10 NON-MITIGATING -- OR MITIGATING NON-STATUTORY
11 CIRCUMSTANCES THE LAW PROVIDES IS A BASIS FOR THEM
12 TO REACH THE DECISION IT IS NOT SOMETHING THE
13 DEFENDANT CONTENDS

14 THE COURT WELL, MAYBE YOU
15 MISUNDERSTOOD MY INSTRUCTION THAT INSTRUCTION
16 RELATED TO THOSE SPECIFICALLY THAT THE DEFENDANT
17 CONTENDS ARE NON-STATUTORY MITIGATING CIRCUMSTANCES
18 NON-STATUTORY MITIGATING CIRCUMSTANCES, BY
19 DEFINITION, ARE THOSE THAT ARE NOT SET FORTH IN THE
20 STATUTE

21 AND SO THOSE NON-STATUTORY MITIGATING
22 CIRCUMSTANCES THAT I REFERRED TO IN THAT PART OF THE
23 INSTRUCTION WAS THOSE THAT THE DEFENDANT CONTENDS
24 SHOULD BE CONSIDERED AS NON-STATUTORY MITIGATING
25 CIRCUMSTANCES

1 MR McCALLUM YOUR HONOR, I APPRECIATE
2 THAT WAS THE COURT'S INTENT I DON'T BELIEVE THAT
3 WAS WHAT CAME ACROSS SO PLEASE NOTE OUR EXCEPTION

4 THE COURT OKAY

5 MR TINSLEY YOUR HONOR, BEYOND THAT I
6 WOULD JUST MERELY REFER THE COURT TO OUR REQUEST TO
7 CHARGE ELEVEN THROUGH EIGHTEEN, RENEW ALL THE PRIOR
8 MOTIONS AT THIS TIME IN THE CASE, AND SIT DOWN

9 THE COURT ALL RIGHT, ANYTHING
10 FURTHER?

11 MR JONES NO, YOUR HONOR

12 THE COURT ALL RIGHT, LET ME HAVE THE
13 -- THEY WANT TO TAKE A BREAK? OKAY, BRING ME MY
14 THREE ALTERNATE JURORS OUT, PLEASE MS TALBERT,
15 LET'S JUST HAVE THEM ALL COME OUT AND THEN WE'LL LET
16 THEM TAKE A BREAK

17 (JURY RE-ENTERS COURTROOM AT 11 39 O'CLOCK A M)

18 THE COURT LADIES AND GENTLEMEN, YOUR
19 CUSTODIAN HAD INDICATED THAT YOU'D LIKE TO A BREAK
20 BEFORE YOU BEGINS WITH YOUR DELIBERATIONS AND
21 THAT, OF COURSE, IS PERMITTED

22 LET ME INSTRUCT YOU, HOWEVER, THAT AT
23 ANY TIME THAT YOU FEEL IT NECESSARY TO TAKE A BREAK
24 WHETHER IT'S TO GO OUTSIDE AND GET FRESH AIR, SMOKE
25 A CIGARETTE, OR WHATEVER IT IS THAT YOU'D LIKE TO DO

1 IN ORDER TO TAKE THAT BREAK, KEEP IN MIND, AND THIS
2 IS THE INSTRUCTION OF THE COURT YOU ARE NOT
3 PERMITTED TO DISCUSS THE CASE UNLESS ALL TWELVE
4 JURORS ARE PRESENT IN THE JURY ROOM TO PARTICIPATE
5 IN THOSE DELIBERATIONS

6 SO AT ANY TIME IF YOU TAKE A BREAK TO
7 GO OUTSIDE, DO NOT DISCUSS THE CASE WHILE YOU'RE
8 OUTSIDE OF THE JURY ROOM IF SOME OF YOU CHOOSE TO
9 GO OUTSIDE TO SMOKE AND OTHER DECIDE TO STAY, KEEP
10 IN MIND THE DELIBERATIONS MAY NOT TAKE PLACE UNLESS
11 ALL TWELVE JURORS ARE PRESENT TO PARTICIPATE DURING
12 THE COURSE OF THOSE DELIBERATIONS

13 SO WITH THAT IN MIND, YOU MAY BEGIN
14 YOUR DELIBERATIONS WHEN YOUR CUSTODIANS TAKE YOU
15 BACK TO THE JURY ROOM AFTER YOUR BREAK AND ONCE YOU
16 RECEIVE THE EVIDENCE AND VERDICT FORMS, MR FOREMAN

17 ALL RIGHT, SO YOU MAY BE EXCUSED AT
18 THIS TIME TO TAKE YOUR BREAK BEFORE YOU BEGIN YOUR
19 DELIBERATIONS AND WHEN YOU RETURN, YOU MAY BEGIN
20 THOSE DELIBERATIONS

21 I'M GOING TO ASK THAT THE THREE
22 ALTERNATE JURORS REMAIN HERE WITH ME
23 (JURY EXITS COURTROOM AT 11 40 O'CLOCK A M)

24 THE COURT ALL RIGHT, NOW AS FOR THE
25 THREE ALTERNATE JURORS AS YOU KNOW, YOU'RE NOT

1 PERMITTED TO ENGAGE IN ANY DELIBERATIONS WITH THE
2 PANEL OF TWELVE YOU'RE ONLY PERMITTED TO
3 PARTICIPATE IN THE EVENT THAT ONE OF THOSE TWELVE
4 COULD NOT CONTINUE TO SERVE FOR SOME REASON DURING
5 THOSE DELIBERATIONS

6 SO IT IS NECESSARY THAT WE STILL HAVE
7 YOU SEQUESTERED TO PARTICIPATE IF CALLED UPON BUT,
8 OF COURSE, YOU WILL NOT BE PERMITTED TO STAY WITH
9 THOSE TWELVE JURORS NOW THAT THEY HAVE BEGUN WITH
10 THAT DELIBERATION PROCESS

11 SO YOU'RE GOING TO BE EXCUSED WITH YOUR
12 CUSTODIAN YOU MAY ALSO GO OUTSIDE AND TAKE A
13 BREAK, BUT YOU WILL BE KEPT SEPARATELY FROM THOSE
14 OTHER JURORS DURING THOSE BREAKS AS WELL AS DURING
15 THEIR DELIBERATION AND WILL BE ONLY BROUGHT BACK
16 IN THE EVENT IT'S NECESSARY THAT YOU BECOME ONE OF
17 THOSE ORIGINAL TWELVE SO THANK YOU AGAIN FOR YOUR
18 PARTICIPATION YOU MAY TAKE THOSE JUROR SEPARATELY
19 FOR THEIR BREAK

20 ANY OTHER MATTERS THAT NEED TO BE
21 ADDRESSED?

22 MR JONES YOUR HONOR, I DO HAVE ONE
23 THING I'D LIKE TO SAY AND I THINK I SPEAK ON
24 BEHALF OF ALL THE LAWYERS HERE AND CERTAINLY
25 EVERYONE THAT'S PARTICIPATED IN THE FUNCTION OF

1 THIS TRIAL IT'S BEEN A PLEASURE AND AN HONOR TO
2 WORK BEFORE YOU I WANT YOU TO KNOW THAT I THINK
3 I SPEAK FOR EVERYBODY

4 I WANT TO THANK YOU FOR YOUR PATIENCE
5 THAT YOU'VE SHOWN TO ALL OF US I WANT TO THANK YOU
6 FOR THE FREEDOM THAT YOU'VE GIVEN THE LAWYERS TO DO
7 THEIR JOB IN THE COURTROOM AND I'D LIKE TO THANK
8 YOU FOR THE GUIDANCE THAT YOU'VE SHOWN US IN THIS
9 OCCASION THROUGH THE COURSE OF THIS TRIAL

10 THE COURT THANK YOU, SIR

11 MR TINSLEY WE CERTAINLY JOIN IN THAT
12 STATEMENT, YOUR HONOR

13 THE COURT THANK YOU, MR TINSLEY, I
14 APPRECIATE IT -- YOUR ALL'S COOPERATION DURING THE
15 COURSE OF THE TRIAL I THINK THE TRIAL HAS BEEN
16 WELL TRIED BY BOTH SIDES AND I APPRECIATE THE MANNER
17 IN WHICH Y'ALL CONDUCTED YOURSELVES

18 ALL RIGHT, WE'LL BE AT EASE WHILE THE
19 JURY IS DELIBERATING

20 (COURT IN RECESS)

21 THE COURT THANK YOU PLEASE BE
22 SEATED I'VE BEEN TOLD THAT THE JURY HAS ARRIVED AT
23 A VERDICT ARE WE READY TO RECEIVE THE VERDICT?

24 MR JONES STATE IS READY, YOUR HONOR

25

1 MR TINSLEY YES, YOUR HONOR

2 THE COURT ALL RIGHT, BRING THE JURY
3 IN, PLEASE

4 (JURY RE-ENTERS THE COURTROOM AT 3 13 O'CLOCK P M)

5 THE COURT MR FOREMAN, HAVE YOU AND
6 YOUR FELLOW JURORS REACHED A UNANIMOUS VERDICT AS TO
7 EACH OF THE COUNTS OF THE INDICTMENT TO WHICH YOU
8 WERE TO RETURN A RECOMMENDATION OF SENTENCE?

9 MR FOREMAN YES, WE HAVE, YOUR HONOR

10 THE COURT IF YOU WOULD, PLEASE HAND
11 THOSE VERDICT FORMS UP BY WAY OF THE BAILIFF ALL
12 RIGHT, YOU MAY PUBLISH THE VERDICTS

13 THE CLERK THE STATE VERSUS JOHN
14 KENNEDY HUGHEY, COUNT ONE, WE THE JURY IN THE ABOVE
15 ENTITLED CASE HAVING FOUND BEYOND A REASONABLE DOUBT
16 THE EXISTENCE OF THE FOLLOWING STATUTORY AGGRAVATING
17 CIRCUMSTANCES TO WIT THAT THE MURDER OF TESHEKA L
18 JACKSON WAS COMMITTED WHILE IN THE COMMISSION OF THE
19 -- HELP ME -- OF THE --

20 THE COURT LET ME SEE

21 THE CLERK RIGHT THERE -- CRIME OR
22 ACT OF BURGLARY IN THE FIRST DEGREE THAT THE
23 MURDER OF TESHEKA L KENNEDY WAS COMMITTED WHILE IN
24 THE COMMISSION OF A CRIME AND OF LARCENY, THE USE OF
25 A DEADLY WEAPON, TWO OR MORE PERSONS WERE MURDERED

1 BY THE DEFENDANT PURSUANT TO -- I'M SORRY --
2 PURSUANT TO -- PURSUANT TO ONE SCHEME OR COURSE OF
3 CONDUCT WE HAVE RECOMMENDED THAT THE COURT --
4 THAT THE DEFENDANT, JOHN KENNEDY HUGHEY, BE
5 SENTENCED TO DEATH

6 SIGNED FOREPERSON, JAMES S JONES,
7 JR , JUROR, HAROLD A FREESE, JUROR, WILLIAM JASPER
8 JONES, JR , JUROR ROBERT ASH, JUROR ANDREA BRAMLETT,
9 JUROR SUSAN L WILLIAMS, JUROR BRIAN DALY, JUROR
10 FRANCIS P COWART, JUROR LINDA H CANFIELD, JUROR
11 BARBARA C THOMAS, JUROR WILLIAM H BOWIE, JUROR
12 SANDRA J LOTHRIIDGE ABBEVILLE, SOUTH CAROLINA,
13 OCTOBER 30, 1997

14 THE STATE VERSUS JOHN KENNEDY HUGHEY,
15 DEFENDANT, COUNT TWO WE THE JURY IN THE ABOVE
16 ENTITLED CASE HAVING FOUND BEYOND A REASONABLE DOUBT
17 THAT EXISTENCE OF THE FOLLOWING STATUTORY
18 AGGRAVATING CIRCUMSTANCES NUMBER ONE, THAT THE
19 MURDER OF LUEVINIA H HARRIS WAS COMMITTED WHILE IN
20 THE COMMISSION OF A CRIME OR ACT OF BURGLARY IN THE
21 FIRST DEGREE (NUMBER TWO, TWO OR MORE PERSONS WERE
22 MURDERED BY THE DEFENDANT PURSUANT TO ONE SCHEME OR
23 COURSE OF CONDUCT NOW RECOMMEND TO THE COURT THAT
24 THE DEFENDANT JOHN KENNEDY HUGHEY IS SENTENCED TO
25 DEATH

1 SIGNED, FOREPERSON JAMES S JONES, JR ,
2 JUROR HAROLD A FREESE, JUROR WILLIAM JASPER JONES,
3 JR , JUROR ROBERT J ASH, JUROR ANDREA BRAMLETT,
4 JUROR SUSAN L WILLIAMS, JUROR FRANCIS P COWART,
5 JUROR LINDA H CANFIELD, JUROR BARBARA T THOMAS,
6 JUROR BRIAN DALY, JUROR WILLIAM H BOWIE, JUROR
7 SANDRA J LOTHRIE, ABBEVILLE, SOUTH CAROLINA,
8 OCTOBER 30, 1997

9 MR FOREMAN, LADIES AND GENTLEMEN OF
10 THE JURY, IF THIS BE YOUR VERDICT, PLEASE SAY YOU
11 ALL

12 THE JURY YOU ALL

13 THE COURT PLEASE POLL THE JURY PANEL,
14 MADAME CLERK

15 POLLING OF THE JURY

16 THE CLERK LADIES AND GENTLEMEN OF THE
17 JURY, IF THIS BE YOUR VERDICT, YOU SHALL ANSWER ALL
18 THE FOLLOWING QUESTIONS YES IF IT IS NOT YOUR
19 VERDICT, PLEASE ANSWER BY SAYING NO

20 MR FOREMAN, JAMES S JONES, JR , IS
21 THIS YOUR VERDICT AND IS IT STILL YOUR VERDICT?

22 MR JONES YES

23 THE CLERK ROBERT J ASH, IS THIS YOUR
24 VERDICT AND IS IT STILL YOUR VERDICT?

25 MR ASH YES

1 THE CLERK SANDRA J LOTHBRIDGE, IS
2 THIS YOUR VERDICT AND IS IT STILL YOUR VERDICT?

3 MS LOTHBRIDGE YES

4 THE CLERK BARBARA P THOMAS, IS THIS
5 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

6 MS THOMAS YES

7 THE CLERK SANDRA L WILLIAMS, IS THIS
8 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

9 MS WILLIAMS YES

10 THE CLERK FRANCIS P COWART IS THIS
11 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

12 MR COWART YES

13 THE CLERK BRIAN DALY, IS THIS YOUR
14 VERDICT AND IS IT STILL YOUR VERDICT?

15 MR DALY YES

16 THE CLERK ANDREA B BRAMLETT, IS THIS
17 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

18 MS BRAMLETT YES

19 THE CLERK WILLIAM H BOWIE, IS THIS
20 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

21 MR BOWIE YES, MA'AM

22 THE CLERK HAROLD A FREESE, IS THIS
23 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

24 MR FREESE YES

25 THE CLERK YOUR HONOR, THE JURY HAS

1 BEEN POLLED AND THEY'VE ALL ANSWERED IN THE
2 AFFIRMATIVE

3 THE COURT YOU MISSED MS CANFIELD AND
4 MR JONES

5 THE CLERK OH, I'M SORRY

6 THE COURT YOU FORGOT MS CANFIELD AND
7 MR JONES

8 THE CLERK LINDA H CANFIELD, IS THIS
9 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

10 MS CANFIELD YES

11 THE CLERK WILLIAM J JONES, IS THIS
12 YOUR VERDICT AND IS IT STILL YOUR VERDICT?

13 MR JONES YES

14 THE CLERK NOW, YOUR HONOR, THEY'VE
15 ALL BEEN POLLED AND THEY'VE ANSWERED IN THE
16 AFFIRMATIVE

17 THE COURT THANK YOU, MA'AM ALL
18 RIGHT, LADIES AND GENTLEMEN, FOR A MOMENT I'M GOING
19 TO ASK YOU TO PLEASE GO BACK TO YOUR JURY ROOM AND
20 I'LL BRING YOU BACK SHORTLY

21 (JURY EXITS COURTROOM AT 3 24 O'CLOCK P M)

22 THE COURT ARE THERE ANY MATTERS THAT
23 NEED TO BE ADDRESSED BEFORE WE EXCUSE THE JURY
24 PANEL?

25 MR JONES NOT BEFORE WE EXCUSE THE

1 JURY PANEL ON THE STATE'S PART, YOUR HONOR

2 MR TINSLEY YOUR HONOR, WE'LL HAVE NO
3 MOTIONS AND WE RESERVE THE RIGHT TO INVESTIGATE THE
4 BEHAVIOR OF THE JURY DURING THE PERIOD OF
5 SEQUESTRATION SHOULD ANYTHING COME TO MY ATTENTION
6 OF ANY INAPPROPRIATE BEHAVIOR WHICH WE DO NOT KNOW
7 OF AT THIS TIME, WE WOULD RESERVE THE RIGHT TO MAKE
8 A MOTION UPON SUCH DISCOVER

9 THE COURT ALL RIGHT ANYTHING
10 FURTHER BEFORE I EXCUSE THIS JURY PANEL?

11 MR JONES NOTHING FROM THE STATE,
12 YOUR HONOR

13 THE COURT ALL RIGHT BRING THE JURY
14 PANEL IN ALSO, PLEASE, BRING THE THREE ALTERNATE
15 JURORS

16 (JURY RE-ENTERS THE COURTROOM AT 3 25 O'CLOCK P M)

17 THE COURT ALL RIGHT, LADIES AND
18 GENTLEMEN, BEFORE I EXCUSE YOU, LET ME TELL THE
19 THREE ALTERNATE JURORS THAT THE RECOMMENDATION OF
20 SENTENCE AS TO EACH OF THE COUNTS OF THE INDICTMENT
21 MADE BY THE JURY PANEL IS THAT THE DEFENDANT, JOHN
22 KENNEDY HUGHEY, IS TO BE SENTENCED TO DEATH AS TO
23 EACH OF THOSE SEPARATE COUNTS OF THE INDICTMENT UPON
24 THOSE CONVICTIONS FOR MURDER AGGRAVATING
25 CIRCUMSTANCES HAVING BEEN PROVEN TO THE SATISFACTION

1 OF THE JURY BEYOND A REASONABLE DOUBT IT WILL NO
2 REQUIRE ANY FURTHER PARTICIPATION BY THE JURY BUT
3 I DO WANT TO SINCERELY THANK YOU FOR YOUR SERVICE IN
4 THE TRIAL OF THIS CASE AND NOT JUST THE FACT THAT
5 YOU HAVE SERVED AND PARTICIPATED AS JURORS, BUT I
6 ALSO WANT TO THANK YOU FOR THE MANNER IN WHICH YOU
7 HAVE CARRIED YOUR SERVICE I RECOGNIZE FULLY THAT
8 THIS IS A DIFFICULT DECISION THAT YOU HAVE COME TO
9 MAKE IT WAS A DIFFICULT JOB THAT YOU WERE CALLED
10 UPON TO PERFORM YOU HAVE PERFORMED ADMIRABLY AND
11 WE CERTAINLY APPRECIATE AND COMMEND YOU FOR THE
12 MANNER IN WHICH YOU HAVE CARRIED OUT YOUR SERVICE AS
13 JURORS IN THIS CASE

14 THE LAW PROVIDES THAT I AM TO INSTRUCT
15 YOU AS TO THE POSSIBILITY THAT YOU MAY BE ASKED
16 QUESTIONS ABOUT YOUR VERDICT YOU MAY DISCUSS THE
17 CASE NOW THAT THE CASE HAS BEEN CONCLUDED AND YOU
18 HAVE ARRIVED AT YOUR DECISION YOU'RE NOT REQUIRED
19 TO DISCUSS THE CASE WITH ANYONE YOU ARE PERMITTED
20 TO DO SO IF YOU WISH

21 THE FOLLOWING INSTRUCTIONS PROVIDED FOR
22 YOUR BENEFIT AFTER YOUR SERVICE IN THE TRIAL OF
23 THIS CASE IS CONCLUDED YOU HAVE THE RIGHT TO EITHER
24 REFUSE TO DISCUSS THE VERDICT THAT YOU HAVE RENDERED
25 OR TO DISCUSS THE VERDICT TO THE EXTENT THAT YOU

1 DESIRE IF YOU CHOOSE TO DISCUSS THE VERDICT, YOU
2 ARE FREE TO TERMINATE ANY DISCUSSION ABOUT THAT
3 VERDICT AT ANY POINT IF THE PERSON WITH WHOM YOU
4 ARE SPEAKING CONTINUES TO PURSUE A DISCUSSION OF THE
5 VERDICT AFTER YOU HAVE COMMUNICATED YOUR DESIRE NOT
6 TO DISCUSS THE VERDICT ANY FURTHER, OR IF A PERSON
7 CONTINUES TO HARASS YOU OR TO BOTHER YOU AFTER YOU
8 HAVE REFUSED TO DISCUSS THE VERDICT, YOU SHOULD
9 REPORT THAT FACT TO THE SHERIFF OF ABBEVILLE COUNTY
10 OR TO THE CHIEF OF POLICE OF ABBEVILLE COUNTY

11 I HAVE THOSE NAMES AND THOSE PHONE
12 NUMBERS 'ON THIS INSTRUCTION SHEET IT WILL BE
13 PROVIDED TO YOU BEFORE YOU LEAVE TODAY

14 AGAIN, LET ME THANK YOU FOR YOUR
15 WILLINGNESS TO SERVE I UNDERSTAND THAT IT POSES A
16 GREAT HARDSHIP AND INCONVENIENCE FOR YOU WHEN YOU'RE
17 CALLED UPON TO SERVE, ESPECIALLY IN THE CASE OF THIS
18 DURATION AND THE FACT THAT YOU HAVE BEEN SEQUES-
19 TERED BUT WE DO SINCERELY APPRECIATE YOUR
20 WILLINGNESS TO SERVE AND THE MANNER IN WHICH YOU
21 HAVE CARRIED OUT THAT SERVICE

22 SO YOU MAY BE EXCUSED AND, OF COURSE,
23 IT WILL NOT BE NECESSARY THAT YOU REPORT BACK ANY
24 FURTHER THANK YOU AGAIN FROM THE CITIZENS OF
25 ABBEVILLE COUNTY FOR YOUR SERVICE

1 (JURY EXITS COURTROOM AT 3 29 O'CLOCK P M)

2 THE COURT ALL RIGHT, ANY FURTHER
3 MATTERS PRIOR TO SENTENCING?

4 MR TINSLEY YES, YOUR HONOR, WE HAVE
5 ONE CONSTITUTIONAL ARGUMENT AS TO SOUTH CAROLINA
6 CODE SECTION 16-3-20 AND I'LL TURN THAT OVER TO
7 MR McCALLUM AT THIS TIME

8 THE COURT ALL RIGHT

9 MR McCALLUM MAY IT PLEASE THE COURT
10 YOUR HONOR, SOUTH CAROLINA CODE ANNOTATED 16-3-20 AS
11 IT EXISTED ON DECEMBER 4, 1995, IS BOTH FACIALLY AND
12 SUBSTANTIVELY UNCONSTITUTIONAL IN THAT THE SECOND
13 UNNUMBERED PARAGRAPH AS IT APPEARS IN SUB-SECTION C
14 FOLLOWING THE LIST VIOLATES SECTIONS THREE AND EIGHT
15 OF THE SOUTH CAROLINA CONSTITUTION THAT IS THE
16 DUE-PROCESS CLAUSE AND THE SEPARATION-OF-POWERS
17 CLAUSE

18 ADDITIONALLY, IT OFFENDS THE FIFTH,
19 SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE
20 UNITES STATES CONSTITUTION SPECIFICALLY THIS
21 SECTION THAT'S APPLICABLE IN THIS CASE IS THE 1986
22 VERSION AS IT APPEARS IN ACT NUMBER 462, SECTION
23 TWENTY-SEVEN OF THE SOUTH CAROLINA STATUTES THERE
24 ARE 1990 AND 1992 REVISIONS TO THIS STATUTE WHICH
25 WOULD BE APPLICABLE IN THIS CASE AND THERE ARE

1 SUBSTANTIVE REVISIONS HOWEVER, THEY ARE NOT --
2 THEY DO NOT AFFECT THE PORTIONS THAT WE'RE TALKING
3 ABOUT, AND THEY DO NOT CORRECT THE CONSTITUTIONAL
4 PROBLEMS WITH THIS STATUTE

5 OF COURSE, THE 1995 AND 1996 AMENDMENTS
6 ARE NOT APPLICABLE IN THIS CASE, BECAUSE THIS CRIME
7 WAS COMMITTED PRIOR TO THOSE REVISIONS BECOMING
8 EFFECTIVE AND THEY ALSO DO NOT CORRECT THE DEFECT IN
9 THE SCHEME

10 THE ACT PROVIDES IN PERTINENT PART, AND
11 I'M QUOTING HERE, YOUR HONOR, WHERE THE STATUTORY
12 AGGRAVATING CIRCUMSTANCES FOUND AND A RECOMMENDATION
13 OF DEATH WAS MADE, THE TRIAL JUDGE SHALL SENTENCE
14 THE DEFENDANT TO DEATH THE TRIAL JUDGE BEFORE
15 IMPOSING THE DEATH PENALTY SHALL FIND AS AN
16 AFFIRMATIVE FACT THAT THE DEATH PENALTY WAS
17 WARRANTED UNDER THE EVIDENCE OF THE CASE AND WAS NOT
18 A RESULT OF PREJUDICE, PASSION, OR ANY OTHER
19 ARBITRARY FACTORS

20 YOUR HONOR, IT'S THE DEFENDANT'S
21 POSITION THAT THAT IN ITSELF IS A VIOLATION OF
22 SEPARATION OF POWERS AS IT IS A DIRECTION BY THE
23 LEGISLATURE TO A JUDICIAL OFFICER TO ENTER A FINDING
24 OF FACT WITHOUT ANY DISCRETION AND THE ENTRANCE OF
25 THAT FINDING OF FACT

1 IT ALSO INVADES PROVIDENCE OF THE JURY
2 THIS BEING A JURY TRIAL AND THE SENTENCING PASSED
3 UPON BY THE JURY, THIS STATUTE NOW DIRECTS THE COURT
4 TO STEP IN TO MAKE THE FINDING OF FACT IN THE CASE
5 TO THE DETRIMENT TO THE DEFENDANT

6 YOUR HONOR, IT IS ALSO -- VIOLATES THE
7 DUE PROCESS CLAUSE IN THAT IT CAUSES THE COURT TO
8 ENTER A FINDING OF FACT TO DETRIMENT TO THE
9 DEFENDANT, WHICH THE DEFENDANT DOES NOT HAVE AN
10 OPPORTUNITY TO GO ON RECORD ON WHETHER OR NOT THE
11 JURY MAY HAVE BEEN SWAYED BY UNDUE PASSION,
12 PREJUDICE, OR ANY OTHER ARBITRARY FACTOR

13 SINCE IT IS A FINDING OF FACT, THE
14 CASES ARE NUMEROUS WHERE OUR APPELLATE COURT'S HAVE
15 SAID THAT THEY WILL NOT DISTURB THE FINDING OF FACT
16 IF THERE IS ANY EVIDENTIARY SUPPORT FOR THAT IN THE
17 RECORD THAT CLEARLY NOT THE INTENT OF THE
18 LEGISLATURE, NOR DOES THAT MEET WITH THE STANDARDS
19 LAID DOWN IN GRIGGS V GEORGIA WHICH APPEARED AT 428
20 US 153, A UNITED STATES SUPREME COURT OPINION

21 IN THAT OPINION, THE MAJORITY OPINION
22 OF JUSTICE -- WRITTEN BY JUSTICE STEWART JOINED BY
23 POWELL AND STEVENS SAYS, JUDICIAL REVIEW BY
24 DEFINITION OFTEN INVOLVES A CONFLICT BETWEEN
25 JUDICIAL AND LEGISLATIVE JUDGMENT AS TO WHAT THE

1 CONSTITUTION MEANS OR REQUIRES IN THIS RESPECT,
2 THE EIGHTH AMENDMENT CASES HAS COME TO US AT NO
3 DIFFERENT PROPERTIES

4 IT SEEMS CONCEDED BY ALL THAT THE
5 AMENDMENTS IMPOSES SOME OBLIGATION, SOME JUDICIARY
6 TO JUDGE THE CONSTITUTIONALITY OF PUNISHMENT, AND
7 THAT THERE ARE PUNISHMENTS THAT THE AMENDMENT WOULD
8 BAR WHETHER LEGISLATIVELY APPROVED OR NOT

9 AND UNDER THE DOCTRINES OF SPOUSE UNDER
10 STYLES IN GREGG V GEORGIA, THE FEDERAL SUPREME
11 COURT MADE IT QUITE CLEAR IN DEATH PENALTY CASES
12 THAT THERE HAD TO BE A STATUTORY SCHEME OR SYSTEM OF
13 IMPOSING THE DEATH PENALTY SO AS IT WOULD COMPLY
14 WITH THE EIGHTH AMENDMENT THAT WOULD NOT ALLOW FOR
15 ARBITRARY, CAPRICIOUS, PASSION, OR PREJUDICE TO
16 ENTER INTO WHO GETS THE DEATH PENALTY AND WHO
17 DOESN'T

18 NOW WHEN THE COURT, TRIAL JUDGE HAS THE
19 ABILITY TO OBSERVE THE JURY, OBSERVE THE ATTORNEYS,
20 THE DEMONSTRATIONS THAT GO ON IN THE COURTROOM, AND
21 JUDGE THE INFLECTION OF VOICE AND MANNERISM OF
22 WITNESSES, THE TRIAL JUDGE IS IN A MUCH BETTER
23 POSITION TO JUDGE WHETHER PASSION, PREJUDICE, OR
24 SOME OTHER ARBITRARY FACTOR HAS ENTERED INTO THE
25 JURY'S DECISION?

1 THE STATUTORY SCHEME, EVEN THOUGH IT
2 PROVIDES FOR SUPREME COURT REVIEW OF THE ENTIRE
3 RECORD AND UNDER THE PROPORTIONALITY REVIEW,
4 REQUIRES THAT THE SUPREME COURT MAKE A FINDING PRIOR
5 TO IMPOSING THE DEATH PENALTY THAT NO PASSION,
6 PREJUDICE, OR ARBITRARY FACTOR ENTERED INTO THE
7 DECISION THEY HAVE TO DO SO FROM A COLD RECORD NOT
8 HAVING THE BENEFIT OF THE PERSONAL OBSERVATION OF
9 THE TRIAL THE JUDGE HAS

10 AND, YOUR HONOR, MAKING THAT ABILITY OF
11 PERSONAL OBSERVATION AND THAT ABILITY TO MAKE A
12 DECISION BASED ON FIRST HAND IMPRESSIONS, WE BELIEVE
13 THAT A VIOLATION OF OUR CLIENT'S DUE PROCESS RIGHT

14 YOUR HONOR, THAT IS A SEPARATE AND
15 DISTINCT CONSTITUTIONAL VIOLATION, AND IT SHOULD NOT
16 BE MIXED WITH THE OTHER CONSTITUTIONAL VIOLATION OF
17 SEPARATION OF POWER THE LEGISLATURE HAS MADE AN
18 IMPROPER DIRECT WITH TWO TRIAL JUDGES OF THIS STATE
19 TO MAKING FINDING OF FACT WHICH HAVE INCURRED ALL
20 THE EVIDENCE

21 THE COURT HAS NO DISCRETION IN ENTERING
22 SUCH A FINDING, EVEN IF THE COURT BELIEVES THAT THE
23 JURY HAS NO PROPER BASIS IN THE EVIDENCE FOR A
24 RECOMMENDATION OF DEATH OR HAS USED ARBITRARY,
25 CAPRICIOUS, PASSION, OR PREJUDICE AS FACTORS

1 ENTERING INTO THAT IF I COULD BEG THE COURT TO
2 INDULGENCE

3 FURTHER, YOUR HONOR, WE WOULD POINT OUT
4 THAT EVIDENTLY THE COURT IN THIS CASE AGREES WITH
5 OUR ANALYSIS OF THE STATUTE THAT IT DOES NOT HAVE
6 ANY DISCRETION BECAUSE THROUGHOUT VOIR DIRE AS WELL
7 AS IN THE COURT'S FINAL INSTRUCTIONS I THINK THE
8 COURT MADE CLEAR TO THE JURY THAT THE COURT HAD NO
9 DISCRETION IN GOING FORWARD WITH THIS SENTENCING
10 THAT WAS THE JURY'S RECOMMENDATION

11 THE COURT ARE YOU ARGUING THAT IN
12 TERMS OF MOTION TO SET ASIDE THE VERDICT?

13 MR McCALLUM THAT'S CORRECT, YOUR
14 HONOR

15 THE COURT ON THAT CONSTITUTIONAL
16 GROUND?

17 MR McCALLUM YES, YOUR HONOR

18 THE COURT ALL RIGHT, THE MOTION TO
19 SET ASIDE IS DENIED

20 MR TINSLEY YOUR HONOR, AT THIS TIME
21 I WOULD RENEW ALL PRIOR OBJECTIONS ON GROUNDS STATED
22 BOTH IN PHASES ONE AND TWO AND IN PARTICULAR, IN
23 PHASE TWO AS PREVIOUSLY STATED, THE UNDUE NUMBER OF
24 PARTICULARLY INFLAMMATORY PHOTOGRAPHS THAT WERE
25 SHOWN AND ALLOWED TO BE SHOWN TO THE JURY BEYOND OUR

1 OBJECTIONS AT THAT TIME

2 IN PARTICULAR, THE FACT THAT WE WEREN'T
3 DISPUTING THE SHOTS TO THE HEAD THEY WERE HIGHLY
4 INFLAMMATORY ON ALL PREVIOUSLY STATED GROUNDS, AND
5 THEN TO LET THEM IN IN PHASE TWO, AS I STATED
6 EARLIER, WAS -- WAS -- WAS UNFAIRLY PREJUDICIAL AND
7 VIOLATIVE OF MR HUGHEY'S EQUAL PROTECTION TO DUE
8 PROCESS RIGHT

9 WE FURTHER MOVE THAT THE VERDICT BE SET
10 ASIDE AS FUNDAMENTALLY UNFAIR WE CITE U S
11 CONSTITUTION AMENDMENTS FOUR, FIVE, SIX, EIGHT, AND
12 FOURTEEN PARTICULARLY FOR PROTECTION OF DUE
13 PROCESS AND WELL AS CRUEL AND UNUSUAL PUNISHMENT
14 SOUTH CAROLINA CONSTITUTION SECTION -- ARTICLE ONE,
15 SECTION THREE, ARTICLE ONE, SECTION TWENTY-THREE,
16 ARTICLE FIVE, SECTION SEVENTEEN, ARTICLE EIGHT,
17 SECTIONS THIRTEEN, FOURTEEN, AND FIFTEEN AT THIS
18 TIME

19 AND BASED UPON THOSE GROUNDS WE MOVE
20 FOR -- THAT THE VERDICT BE SET ASIDE AT THIS TIME

21 THE COURT ALL RIGHT, THOSE MOTIONS
22 BASED UPON THOSE GROUNDS AS STATED ARE ALSO DENIED

23 MR TINSLEY AND WOULD, OF COURSE,
24 INCLUDE BACK TO PHASE ONE THE MOTION FOR A NEW
25 TRIAL

1 THE COURT ALSO DENIED WE'RE GOING
2 TO NEED TO TAKE ABOUT FIVE MINUTES I'VE GOT SOME
3 FORMS THAT MUST BE PREPARED SO BEAR WITH ME JUST A
4 MOMENT ALL RIGHT, ANY OTHER MATTERS THAT NEED TO BE
5 ADDRESSED PRIOR TO SENTENCING?

6 MR JONES NOT FROM THE STATE, YOUR
7 HONOR

8 MR TINSLEY NO, YOUR HONOR
9 (COURT IS IN RECESS UNTIL 3 26 O'CLOCK P M)

10 THE COURT ALL RIGHT, MR HUGHEY, COME
11 AROUND, PLEASE IN THE CASE NUMBER 96-GS-01-220
12 COUNT ONE OF THE INDICTMENT FOR WHICH YOU HAVE BEEN
13 FOUND GUILTY OF MURDER, AS THE TRIAL JUDGE IN THE
14 ABOVE ENTITLED ACTION AND PRIOR TO THE IMPOSITION OF
15 THE DEATH SENTENCE UPON THE DEFENDANT JOHN KENNEDY
16 HUGHEY FOR COUNT ONE OF THAT INDICTMENT I FIND AS
17 AN AFFIRMATIVE FACT THAT THE EVIDENCE OF THE CASE
18 WARRANTS THE IMPOSITION OF THE DEATH PENALTY AND
19 IT'S IMPOSITION IS NOT A RESULT OF PREJUDICE,
20 PASSION, OR ANY OTHER ARBITRARY FACTOR

21 MR TINSLEY PLEASE NOTE OUR
22 EXCEPTION, YOUR HONOR, BASED ON MR McCALLUM'S
23 PREVIOUS ARGUMENT

24 THE COURT ALL RIGHT AS TO COUNT ONE
25 OF THE INDICTMENT, IT IS THE SENTENCE OF THE COURT

1 THAT THE DEFENDANT, JOHN KENNEDY HUGHEY, HAS BEEN
2 FOUND GUILTY BY A JURY OF THE OFFENSE OF MURDER,
3 THAT THE JURY HAS RECOMMENDED THAT THE SENTENCE
4 SHOULD BE A SENTENCE OF DEATH AS TO THE DEFENDANT,
5 JOHN KENNEDY HUGHEY IT IS THEREFORE THE JUDGMENT
6 OF THE LAW AND THE SENTENCE OF THIS COURT THAT THE
7 DEFENDANT, JOHN KENNEDY HUGHEY SHALL BE TAKEN TO THE
8 COUNTY JAIL OF ABBEVILLE AND THEN TO THE STATE
9 PENITENTIARY HENCEFORTH TO BE KEPT IN CLOSED AND
10 SAFE CONFINEMENT UNTIL THE THIRTIETH DAY OF DECEMBER
11 OF 1997 UPON WHICH DAY BETWEEN THE HOURS OF SIX
12 O'CLOCK A M AND SIX O'CLOCK P M THE DEFENDANT,
13 JOHN KENNEDY HUGHEY, SHALL SUFFER DEATH BY
14 ELECTROCUTION OR LETHAL INJECTION IN THE MANNER
15 PROVIDED BY LAW

16 AS TO INDICTMENT 96-GS-01-220 COUNT TWO
17 OF THE INDICTMENT WHEREIN YOU HAVE BEEN FOUND GUILTY
18 OF MURDER, I FURTHER FIND THAT AS THE TRIAL JUDGE IN
19 THE ABOVE ENTITLED ACTION AND ON THAT COUNT AND
20 PRIOR TO THE IMPOSITION OF THE DEATH SENTENCE UPON
21 THE DEFENDANT, JOHN KENNEDY HUGHEY, FIND AS AN
22 AFFIRMATIVE FACT THAT THE EVIDENCE OF THE CASE
23 WARRANTS THE IMPOSITION OF THE DEATH PENALTY AND
24 IT'S IMPOSITION IS NOT A RESULT OF PREJUDICE,
25 PASSION, OR ANY OTHER ARBITRARY FACTOR

1 MR TINSLEY PLEASE NOTE OUR EXCEPTION
2 AS PREVIOUSLY STATED ON THE SAME GROUNDS, YOUR
3 HONOR, OF UNCONSTITUTIONALITY OF THE STATUTE

4 THE COURT THEREFORE, AS TO COUNT TWO
5 OF THE INDICTMENT THE SENTENCE OF THE COURT IS JOHN
6 KENNEDY HUGHEY HAVING BEEN FOUND GUILTY BY A JURY OF
7 THE OFFENSE OF MURDER, THE JURY HAVING RECOMMENDED
8 THAT THE DEFENDANT SHOULD BE SENTENCED TO DEATH, IT
9 IS THEREFORE THE JUDGMENT OF THE LAW AND THE
10 SENTENCE OF THIS COURT THAT THE DIFFERENT, JOHN
11 KENNEDY HUGHEY, SHALL BE TAKEN TO THE COUNTY JAIL OF
12 ABBEVILLE AND TRANSPORTED TO THE STATE PENITENTIARY
13 HENCEFORTH TO BE KEPT IN CLOSE AND SAFE CONFINEMENT
14 UNTIL THE THIRTIETH DAY OF DECEMBER OF 1997 UPON
15 WHICH DAY BETWEEN THE HOURS OF SIX O'CLOCK A M AND
16 SIX O'CLOCK P M THE DEFENDANT, JOHN KENNEDY HUGHEY,
17 SHALL SUFFER DEATH BY ELECTROCUTION OR LETHAL
18 INJECTION IN THE MANNER PROVIDED BY LAW

19 AS TO COUNT THREE OF THE INDICTMENT
20 WHEREIN YOU HAVE BEEN FOUND GUILTY OF A JURY FOR THE
21 OFFENSE OF BURGLARY IN THE FIRST DEGREE, THE
22 SENTENCE OF THE COURT IS YOU, JOHN KENNEDY HUGHEY,
23 SHALL BE CONFINED TO THE SOUTH CAROLINA DEPARTMENT
24 OF CORRECTIONS FOR THE TERM OF YOUR NATURAL LIFE

25 AS TO COUNT FOUR OF THE INDICTMENT

1 WHEREIN YOU HAVE BEEN FOUND GUILTY BY A JURY OF THE
2 OF GRAND LARCENY, THE SENTENCE OF THE COURT IS YOU,
3 JOHN KENNEDY HUGHEY, BE CONFINED TO THE SOUTH
4 CAROLINA DEPARTMENT OF CORRECTIONS FOR A PERIOD OF
5 TEN YEARS

6 THOSE ARE THE SENTENCES OF THE COURT
7 DO YOU UNDERSTAND?

8 THE DEFENDANT YES

9 THE COURT ANYTHING FURTHER?

10 MR TINSLEY YES, SIR, YOUR HONOR,
11 BRIEFLY YOUR HONOR AT THIS TIME THE DEFENSE
12 OBJECTS TO THE SENTENCE OF DEATH THE DEFENSE
13 OBJECTS ON THE BASIS OF CRUEL AND UNUSUAL
14 PUNISHMENT AND WE CITE THE UNITED STATES
15 CONSTITUTION, AGAIN SECTIONS FOUR, FIVE, SIX, EIGHT,
16 FOURTEEN AS TO CRUEL AND UNUSUAL PUNISHMENT, ISSUE
17 OF PROTECTION OF THE LAWS, VIOLATION OF HIS RIGHTS
18 TO DUE PROCESS

19 WE SUPPORT THOSE MOTIONS ON SOUTH
20 CAROLINA CONSTITUTION ARTICLE ONE, SECTION THREE AND
21 TWENTY-THREE, ARTICLE FIVE, SIX, AND SEVENTEEN,
22 ARTICLE EIGHT, SECTIONS THIRTEEN, FOURTEEN AND
23 FIFTEEN WE NOTICE THE COURT OF OUR INTENT TO
24 APPEAL WE ARGUE THAT UNDER THE DOCTRINE OF
25 FUNDAMENTAL FAIRNESS BOTH THE -- ALL GROUNDS CITED

1 PRIOR TO THIS TIME AS WELL AS THE CONSTITUTIONAL
2 ARGUMENTS THE WE HAVE MADE AND CONTINUE TO MAKE THAT
3 MR HUGHEY IS ENTITLED TO BOTH A NEW TRIAL AS TO
4 PHASE ONE AND A NEW TRIAL AS TO PHASE TWO AND AT
5 THIS TIME WE RENEW AND RESERVE ALL PRIOR MOTIONS,
6 OBJECTIONS, AND ARGUMENTS BEFORE THE COURT

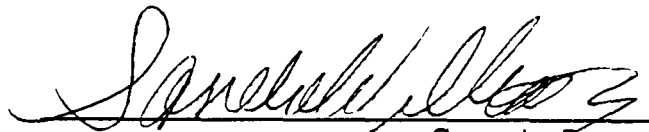
7 THE COURT THANK YOU, SIR YOU MAY
8 TAKE THE DEFENDANT INTO CUSTODY COURT IS
9 ADJOURNED

10 SO ENDETH
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

1
2 I, THE UNDERSIGNED, SANDRA WILLIAMS, CCR-CVR-
3 CM, OFFICIAL COURT REPORTER FOR THE THIRTEENTH
4 JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
5 HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND
6 ACCURATE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD
7 AND EVIDENCE INTRODUCED IN THE TRIAL OF THE
8 CAPTIONED CASE, RELATIVE TO APPEAL, IN THE CRIMINAL
9 COURT FOR GREENVILLE COUNTY, SOUTH CAROLINA, DURING
10 THE PERIOD OCTOBER 13 THROUGH OCTOBER 30, 1997

11 I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
12 COUNSEL NOR INTEREST TO ANY PARTY HERETO
13

14 May 25, 1998

15
16 
17 _____
18 Court Reporter
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE) IN THE COURT OF GENERAL SESSIONS

The State,)
-vs-) TRANSCRIPT OF RECORD
John Kennedy Hughey,) 96-GS-01-220
Defendant) September 19, 1997
Spartanburg, South Carolina

B E F O R E

HONORABLE J DERHAM COLE, JUDGE

A P P E A R A N C E S

MICHAEL COULTER, ESQUIRE
Attorney for the State

ROBERT TINSLEY, ESQUIRE
Attorney for the Defendant

Linda D Moffitt
Circuit Court Reporter

INDEX

Motion — page 3

No sworn testimony, no exhibits entered into evidence

INDEX

Motion — page 3

No sworn testimony, no exhibits entered into evidence

1 (Proceedings September 19, 1997)

2 THE COURT This is in the matter of the State vs
3 John Kennedy Hughey Mr Coulter is representing the state,
4 Mr Tinsley is present, along with Mr Hughey The state
5 has two motions as I understand it

6 MR COULTER Yes, Your Honor, we do

7 First, Your Honor, we would make a motion to compel
8 blood and head hair samples from the defendant As I
9 understand it in regards to the Register case, the state has
10 two bounds, a two-part test, first determining whether there
11 is probable cause to believe the suspect committed the
12 crime, and a clear indication that relevant material be
13 found, and, third, that the method used to secure is safe
14 and reliable

15 Your Honor, on the date of the crime, the alleged
16 crime, the state has presented part of its probable cause
17 that the defendant was, in fact, at the home of the victim,
18 Lavinia Harris, and the second victim, Kisha Jackson, the
19 son of Lavinia Harris and Marcus Harris called that morning
20 and was placed on the speaker phone At the time of being
21 put on the speaker phone, he had discussions with his mother
22 and Kisha Jackson, and he also talked with the defendant,
23 John Kennedy Hughey

24 His mother had told him that John had a gun Mr
25 Harris, Marcus Harris, asked the defendant to leave the

1 house if he, in fact, had a gun

2 He then heard screams He hung up the phone and called
3 9-1-1 and was able to be transferred to Abbeville County and
4 at the time of talking to Abbeville County dispatch
5 determined that police were already on the way to the scene
6 Upon arriving, found both Lavinia Harris shot with a gunshot
7 to the face and Kisha Jackson also shot with a shotgun to
8 the face

9 Half an hour after the murders had occurred, the
10 defendant had used Kisha Jackson's ATM card to withdraw
11 money from Kisha Jackson's bank account Photographs of the
12 defendant withdrawing money were obtained from the ATM
13 machine

14 He had used Kisha Jackson's vehicle to go to the ATM
15 machine in Anderson and ended up taking that same car to
16 Georgia at the home of a sister where he was later picked up
17 by authorities about an hour later

18 The defendant, in a statement, admitted that he was, in
19 fact, on the scene and that the shooting had occurred but
20 claimed that it was an accident

21 The day before the murders a defendant, or, excuse me,
22 a third party was a witness to the defendant telling the
23 victim that he was going to bury her in regards to an
24 argument they had

25 That's the probable cause that the state would present

1 in regards to the first part of the test I would point out
2 to the Court that blood samples were taken from the
3 residence in various locations in the house They have
4 already been compared to blood samples of the victim, and at
5 this point they appear to match

6 There was also a head, or, excuse me, a hat found at
7 the scene of the crime where head hair samples were found
8 That's the basis for the request to make a final comparison
9 to the defendant's blood to the blood found at the residence
10 and head hair to the hat found at the residence

11 Finally, the state would use the methods generally
12 used We would have the defendant taken to the Self
13 Memorial Hospital where blood would be drawn and head hair
14 pulled for the purpose of the comparison

15 As I understand it from Register, after the state has
16 presented those three factors, then there must be a
17 balancing test, one being the seriousness of the crime, the
18 importance of the evidence to the investigation,
19 unavailability of alternative less intrusive means of
20 obtaining the evidence versus concern for the potential
21 witness, and the constitutional right to be free from bodily
22 intrusion on the other hand

23 Your Honor, of course in regards to the seriousness of
24 the crime, it could get no more serious The evidence is
25 important for finally making a final comparison with regard

1 to the blood found in the home to verifying the fact this is
2 the victim's blood as opposed to the defendant's blood at
3 the scene, and also the head hair sample would place him
4 physically there if, in fact, it were to match after the
5 analysis or the evidence was taken from the defendant
6 compared to what was found in the house

7 Certainly those particular aspects of what the state is
8 moving for I think would certainly outweigh any protective
9 intrusion to the defendant

10 THE COURT All right Let me ask Did I understand
11 you to say that Marcus Harris was the son of the decedent?

12 MR COULTER One of the decedents, yes, sir, Lavinia
13 Harris

14 THE COURT All right And Marcus Harris talked to the
15 defendant on the phone

16 MR COULTER Yes, sir

17 THE COURT Shortly after that conversation, he heard a
18 gun blast

19 MR COULTER He heard an argument and then hung up the
20 phone to call 9-1-1 in hopes of getting the police He was
21 in Oklahoma City, Your Honor, at the time

22 THE COURT I understand

23 MR COULTER See, he called 9-1-1 in Oklahoma City who
24 passed it through to the Abbeville Police Department At
25 that time Kisha Jackson had actually called 9-1-1 in the

1 interim and the police were on their way They were there
2 within two minutes of the call, but, unfortunately, by that
3 time the shootings had already occurred

4 THE COURT Well, but did I understand you to earlier
5 say that Mr Harris would testify that the defendant stated
6 he had a gun or that one of the decedents stated that he,
7 the defendant, had a gun?

8 MR COULTER Lavinia Harris, the mother, told Marcus
9 Harris that the defendant had a gun

10 THE COURT Okay, okay All right Mr Tinsley

11 MR TINSLEY Thank you so much, Your Honor

12 May it please the Court, Your Honor, the concern that I
13 have in this matter is the timing of it Obviously it's on
14 the eve of trial

15 There has been some breakdown in communications here
16 I am not blaming anybody Mr Frank Addey was the solicitor
17 in charge of Abbeville County, and I talked with him surely
18 a year ago on this from his motion for blood and hair and
19 was willing to consent

20 Now, and somehow, and I'm not blaming Solicitor Coulter
21 nor former Solicitor Addey He left the office during this
22 period, but now I feel like I am forced to object to it on
23 the basis of the fact that it is on the eve of trial and
24 that it -- and I understand what the state is saying the
25 purpose is here, but I can't I can't say what they would

1 use it for and what it would lead to scientifically in the
2 area of the need for our retention of an expert possibly,
3 and, of course, the requisite funding for such

4 That's my objection It's strictly a time matter so
5 close to the eve of trial It could lead to some very
6 important scientific developments Maybe, maybe not, and I
7 would hate to see something like this delay the start of the
8 trial I certainly appreciate your consideration

9 THE COURT All right Anything in response, Mr
10 Coulter?

11 MR COULTER Only, Your Honor, that I had served them
12 with notice of this motion back in December of '96 and never
13 had gotten an indication from them that there would be any
14 consent in this matter

15 We would certainly -- I have already arranged, if the
16 Court would be willing to grant the state's motion, to have
17 SLED agents available on Monday to get the sample and take
18 it to SLED and complete the analysis expediently

19 THE COURT Well, I think, of course, Mr Tinsley's
20 concern is what the state is trying to develop from the
21 obtaining of those samples and what that might lead to so
22 far as any necessity by the defense to hire independent
23 experts Is the state intending to -- what exactly does the
24 state wish to do with the samples, assuming they're
25 obtained?

1 MR COULTER Judge, let me tell you what we've got
2 We've got the samples from the home They've already been
3 compared to the samples taken from the victims

4 What we have is areas in the home where blood type and
5 PGM types have been developed Based on all of the blood
6 typing and all of the PGM typing -- I may not be using the
7 rights words, but the PGM tests and the blood type, all the
8 stains and samples taken from relevant portions of the home,
9 and even the car that had been taken, all appear to match
10 that of both the victims

11 Now, if the only way that I can be sure that they are
12 the victims is if, in fact, the defendant does not share the
13 same blood type or PGM I am going to assume that he does
14 not The PGM tests are not as great as DNA as far as
15 exclusion It's still a very -- it goes much further than
16 just the blood type So basically we are requesting it for
17 purposes of exclusion If his blood type doesn't match,
18 then we know what we have

19 THE COURT Well, so you are just simply wanting to
20 have a sample of blood to do a typing examination

21 MR COULTER Typing and PGM which is -- I am not quite
22 sure what that entails, but it's not much more than the
23 typing It doesn't take too much longer

24 These SLED results, as far as of the matching of the
25 victim's blood to the samples that were taken from the

1 scene, have been in the possession of the defense well over
2 a year now, and certainly if they felt there was any need
3 for experts in that regard they could have obtained them
4 before now

5 THE COURT All right Anything further?

6 MR TINSLEY Judge, I would simply say that if you
7 decide to grant this motion that it would be on a limited
8 basis, as you were speaking then, and went into the typing
9 and possibly this PGM aspect of it

10 THE COURT Well, as I understand it, now, and let's be
11 sure this is clear for the record, but as I understand it
12 that is all that the state is asking to be done

13 MR COULTER Yes, sir

14 THE COURT Is that correct?

15 MR COULTER Yes, sir

16 THE COURT Now, the difficulty being that if the state
17 is requesting any further type of examination that might
18 require any significant length of time, depending upon those
19 results, obviously the defendant would be entitled to the
20 same opportunity to have the benefit of that evidence to
21 conduct tests of his own---

22 MR COULTER Certainly

23 THE COURT ---which might result in a continuance of
24 the case

25 MR COULTER I understand that, Your Honor /

1 At this point I really don't have any indications that
2 this ought to be the defendant's blood, but I am just using
3 this as one last opportunity to exclude that possibility,
4 and hopefully that will be the end with this test, the PGM
5 I don't think it will go any further

6 THE COURT What was the blood type of the decedents?
7 Also, while you're looking for that, were there any wounds
8 to the defendant or were there any noticeable wounds at the
9 time of his arrest?

10 MR COULTER No, sir, other than at the time of his
11 arrest he did cut his wrist just prior to being arrested,
12 but that was well after He was in Georgia at that time

13 THE COURT I am thinking of any wound that might have
14 resulted in blood being spilled at the crime scene

15 MR COULTER I am not aware of any wounds that he had
16 at the crime scene The blood types that were found from
17 the samples were O with PGM subtype one minus and one plus
18 I don't know what that PGM means, but O is quite common, and
19 also blood ABO Group B with subtype one plus

20 THE COURT All right Anything further?

21 MR COULTER No, sir

22 MR TINSLEY I merely obviously reserve the right to
23 make a continuance motion later on should it be necessary

24 THE COURT Oh, sure

25 MR TINSLEY And also employ an expert in this case

1 should that be necessary

2 THE COURT All right Based upon the showing made, I
3 am going to grant the state's motion, and obviously other
4 motions might be necessary, depending upon those results

5 Second motion

6 MR COULTER Your Honor, the second motion was to ask
7 the Court to order that any juvenile records that the
8 defendant may have be opened for the state Of course once
9 we receive them, we will provide certainly copies of those
10 to the defense

11 THE COURT Do you wish to be heard on that, Mr
12 Tinsley?

13 MR TINSLEY Briefly, Your Honor

14 The young man is almost 28 years old At the time of
15 the juvenile adjudications of delinquency that he may or may
16 not have were, of course, going through the age of 17

17 So I think we are getting into an area of remoteness
18 here that quite possibly would make this record irrelevant
19 to the case at hand, and, as I say, too remote to be a real
20 consideration anyway

21 On that basis, we would object to that and feel like it
22 is not a situation where we are dealing with adult records
23 within ten years We are obviously dealing with a juvenile
24 record that goes back in excess of ten years Thank you

25 THE COURT All right Mr Coulter, do you wish to be

1 heard in response?

2 MR COULTER Yes, sir, just briefly

3 Of course South Carolina has now adopted basically the
4 federal rules of evidence, and the federal rules of evidence
5 do allow for juvenile records to be used during the trial as
6 long as they are of the same nature that would be allowable
7 if it were an adult criminal conviction, being at least one
8 year or over as far as potential sentence, but in terms of
9 remoteness, I don't think there is any limit, Your Honor,
10 based on what could be presented by the state in terms of
11 potential presentation in aggravation

12 I think the Court and the jury would certainly have the
13 right to know all they can about the defendant, not only in
14 mitigation but certainly in aggravation I think these are
15 things for the jury to consider, regardless of when they
16 were committed I don't think there is any rule in regards
17 to remoteness for that purpose in aggravation

18 THE COURT All right The state's motion to have the
19 juvenile criminal record of the defendant released is
20 granted

21 MR TINSLEY If it please, note my exceptions, Your
22 Honor

23 THE COURT Mr Tinsley, understand that I am just
24 requiring that those records be released to the state, and,
25 of course, they will be released to you also

1 You still may make whatever motion you deem necessary
2 to prevent that from being used at trial should it be
3 offered

4 MR COULTER I have prepared two orders, Your Honor
5 I will hand those to the defense

6 THE COURT All right Show those to Mr Tinsley

7 MR TINSLEY Your Honor, these appear to be in order
8 Of course the last couple of lines of the first one doing
9 the blood is more broad in terms of scientific development
10 That's my only concern, but they do basically reflect what
11 the Court has granted here today

12 THE COURT Well, I'll address that matter should
13 anything be done outside the parameters of my decision here
14 today

15 Let me ask of Mr Coulter and Mr Tinsley, are there
16 any other motions outstanding that need to be heard prior to
17 the call of this case?

18 MR COULTER Not from the state, Your Honor

19 MR TINSLEY Your Honor, Mr Garrett may have a couple
20 of motions coming up Unfortunately, he couldn't be here
21 today because he's going into a trial, day certain, Monday
22 At this time though the answer is no

23 THE COURT All right, sir Was there a mental
24 evaluation requested or ordered in this case?

25 MR COULTER I don't believe there was

1 MR TINSLEY No, sir
2 THE COURT All right
3 MR COULTER Not from the state, Your Honor
4 MR TINSLEY No, Your Honor
5 END OF REQUESTED TRANSCRIPT OF RECORD
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I, the undersigned Linda D Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 19th day of September 1997

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



Linda D Moffitt

Circuit Court Reporter

INDICTMENT FOR

The State of South CarolinaCounty of Abbeville

- (1) MURDER
- (2) MURDER
- (3) BURGLARY, 16-11-311(A) (1) (a) (b)
- (4) GRAND LARCENY OF A MOTOR VEHICLE
- (5) VIOLATION SECTION 16-14-20
- (6) VIOLATION SECTION 16-14-60 (a) (1)

At a Court of General Sessions convened on the 11th day of March
1996 the Grand Jurors of Abbeville County present upon their oath

COUNT ONE

(1) That JOHN KENNEDY HUGHEY

did in the county and state aforesaid on or about the 4th day of December
19 95 with malice aforethought kill one Tesheka Lanyra Jackson
 by means of shooting and that the said Tesheka Lanyra Jackson did
 die in Abbeville County as a proximate result thereof on or about
 the 4th day of December, 1995

COUNT TWO

(2) That JOHN KENNEDY HUGHEY

did in the county and state aforesaid on or about the 4th day of December
19 95 with malice aforethought kill one Luevinia H Harris by means
 of shooting and that the said Luevinia H Harris did die in Abbeville
 County as a proximate result thereof on or about the 4th day of Dec
 1995

COUNT THREE

4111

(3) That JOHN KENNEDY HUGHEY

state aforesaid
did in Abbeville County/on or about the 4th day of December
1995, wilfully and unlawfully enter a dwelling without consent and with
intent to commit a crime therein and either, when in effecting entry or
while in the dwelling or in immediate flight therefrom he or another
participant in the crime was armed with a deadly weapon or explosive
or caused physical injury to a person who was not a participant in the
crime, or used or threatened the use of a dangerous instrument or
displayed what was or appeared to be a knife, pistol revolver, rifle,
shotgun, machine gun or other firearm, the said dwelling being occupied
by Tesheka Lanyra Jackson and Luevinia H Harris

COUNT FOUR

(4) That JOHN KENNEDY HUGHEY

state aforesaid
did in Abbeville County/on or about the 4th day of December
1995, feloniously take and carry away the personal property, to wit
one (1) 1995 Mitsubishi, VIN 4A3Aj46G1SE049420, of another to wit
Tesheka Lanyra Jackson, of the value of more than One thousand and
NO/100 (\$1,000 00) dollars with intent to deprive the owner permanently
of such property

COUNT FIVE

(5) That JOHN KENNEDY HUGHEY

state aforesaid
 did in Abbeville County/on or about the 4th day of December
1995, wilfully and unlawfully take, obtain or withhold a financial
 transaction card from the person, possession, custody or control of
 another without the carholder's consent or received a financial
 transaction card that he knew to have been lost, mislaid or delivered
 under a mistake as to the identity or address of the cardholder and
 retained possession with intent to use it or sell it or transfer it
 to a person other than the issuer or the cardholder, to wit NationsBank
 N A of South Carolina, Incorporated, Greenwood, South Carolina and
 Tesheka Lanyra Jackson

COUNT SIX

(6) That JOHN KENNEDY HUGHEY

state aforesaid
 did in Abbeville County/on or about the 4th day of December
1995, wilfully and unlawfully use for the purpose of obtaining money,
 goods, services or anything else of value a financial transaction card
 obtained or retained, or which was received with knowledge that it was
 obtained or retained, in violation of Section 16-14-20 or Section
 16-14-40, or a financial transaction card which he knew was forged,
 altered, expired, revoked or was obtained as a result of a fraudulent
 application in violation of Section 16-14-60(c) with intent to defraud
 NationsBank, N A of South Carolina, Incorporated, Greenwood, South
 Carolina, First Citizens Bank, Incorporated, Anderson, South Carolina and
 Tesheka Lanyra Jackson

Against the peace and dignity of the State and contrary to the statute in such case and made and
 provided

W. Townes Jones
 Solicitor

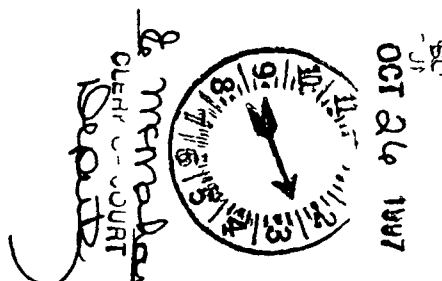
STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	DEFENDANT'S
	)	REQUEST TO CHARGE
v	)	No 10
	)	
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding manslaughter as follows

Section 16-3-50 of the South Carolina Code defines voluntary manslaughter as "the unlawful killing of another without malice, express or implied " This is commonly deemed as the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation It involves intent on the part of the perpetrator, but not malice

Thus, voluntary manslaughter is the felonious killing of a human being without malice in sudden heat of passion on sufficient legal provocation and that, if malice existed, the felonious homicide with malice would be murder, even though done in heat of passion upon provocation by the deceased The law does not reduce from a murder charge to a manslaughter charge every homicide committed in the heat of passion, it must be passion justly excited by legal provocation

The sudden heat of passion upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection to produce what, according to human experience, may be called an uncontrollable impulse to do violence



In determining whether an act that caused death was impelled by heat of passion or by malice, all surrounding circumstances and conditions are to be taken into consideration, including previous relations and conditions connected with the tragedy as well as those existing at the time of the killing

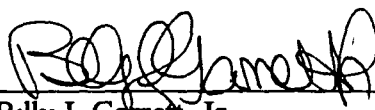
If one intentionally kills another with a deadly weapon or dangerous instrumentality, an implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive. If it is proved beyond a reasonable doubt that malice existed, then the killing cannot be voluntary manslaughter. Where death is caused by the use of a deadly weapon or dangerous instrumentality, words alone, no matter how insulting, are not sufficient to constitute legal provocation. Of course, words accompanied by hostile acts may, according to the circumstances, reduce a killing from murder to manslaughter.

Examples of acts of provocation that would be sufficient to negate malice are [pulling a knife on the defendant] [pointing a gun at the defendant] [a humiliating assault such as spitting in the defendant's face] [an assault of a family member] [sudden mutual combat in which one of the participants is killed by the other without a previously informed intention to do so] [finding one's spouse in the act of adultery] [the deceased having molested your minor child]

Insulting words, no matter how terrible, are not enough to mitigate a homicide from murder to manslaughter when the death was caused by a deadly weapon, even if the language was calculated to arouse the wrath of the ordinary man. If the insulting words are accompanied by overt threatening acts or by a physical encounter, the total provocation or at least its physical manifestation, may suffice. Insulting words may be distinguished from words of information

One need not witness the act of provocation if learning of it inflames your passions [Such as learning of your spouse's adultery]

October 26, 1997
Abbeville, South Carolina



Billy J. Garrett, Jr
Attorney for the Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 11 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding Defendant's aggravation and mitigation as follows

You should consider any mitigating circumstances as well as any aggravating factors as listed in the statute, in determining the appropriate punishment *See, State v Bellamy*, 359 S E 2d 63,65 (1987)

An aggravating circumstance must be found beyond a reasonable doubt S C Code Ann § 16-3-20(c) However, as to mitigating circumstances, the burden is upon you to weigh the evidence submitted and determine whether a mitigating factor or factors exists and, if so, the significance to be accorded it *State v Linder*, 278 S E 2d 335, 339 (1981)

While an aggravating factor must be found beyond a reasonable doubt and your decision must be unanimous, a mitigating factor may be considered by you even if not proven beyond a reasonable doubt and your decision to consider a mitigating factor does not have to be unanimous *See, McKoy v North Carolina*, 494 U S 433 (1990) and *State v Patrick*, 345 S E 2d 481, 485 (1986), over ruled on other grounds, *State v Torrence*, 406 S E 2d 315 (1991)

You could find the existence of one or more aggravating circumstances and no mitigating circumstances and still recommend a life sentence for any reason or no reason at all *See, Lockett*

v *Ohio*, 438 U S 586 (1978)

October 29, 1997
Abbeville, South Carolina

15/ 
Robert J Tinsley
Attorney for the Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 12 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding mitigation as follows

There are statutory mitigating circumstances which may apply to a defendant. Most of the circumstances listed deal with individual characteristics of the defendant. The other circumstances deal with the facts surrounding the defendant's participation in the homicide. Mitigating circumstances include but are not limited to considering

NOTE Defendant does not request or believe the Court should charge those circumstances bearing an "*"

(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;

~~*(8)~~ 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, and,

(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,

S C Code Ann § 16-3-20(C)(b) (Supp 1994)

In addition to the circumstances I have just instructed you to consider, I now instruct you that you may, in your discretion, consider any other mitigating circumstance which you find to exist and which would favor your sentencing the Defendant to life in prison *Lockett v Ohio*, 438 U S 586, 587 (1978)

October 29, 1997
Abbeville, South Carolina

15/ 
Robert J Tinsley
Attorney for the Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 13 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding effect of sentencing as follows

For your deliberations, you should understand that the General Assembly has provided that "A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life If the state seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment " The term "life imprisonment" should be given its plain and ordinary meaning

Simmons v South Carolina, 512 U S 154 (1994), *Skinner v South Carolina*, 476 U S 1 (1986) (state may not exclude evidence tending to establish capital defendant's likely future non-dangerousness if sentenced to life imprisonment), *California v Ramos*, 463 U S 992 (1983) (future disposition of defendant under state law relevant to issue of defendant's likely dangerousness), *Gardner v Florida*, 430 U S 349 (1977) (defendant must be given fair opportunity to rebut any evidence or argument justifying death sentence), *McCleskey v Kemp*, 481 U S 279 (1987) ("State cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty "), *but see, State v Torrence*, 406 S E 2d 315 (S C 1991)

II.

In the event that the above request is denied, the defendant requests in the alternative, reserving and not waiving his rights under the preceding request that the Court charge the jury as follows

In deciding whether to sentence the defendant to death or to life imprisonment, you are to understand each of these sentences in their plain and ordinary meaning That is to say, if you recommend that the defendant be sentenced to death, he actually will be executed If you recommend that the defendant be sentenced to life imprisonment, he will be sentenced to imprisonment in the South Carolina Department of Corrections for the rest of his natural life

That is what these sentences mean, and that is how you are to understand them in your deliberations You are not to speculate that these sentences mean anything other than what I have just told you, because what I have just told you is exactly what will happen to the defendant, depending on what sentence you impose

State v Davis, 411 S E 2d 220 (S C 1991) , *State v Atkins*, 360 S E 2d 302 (S C 1987), *Caldwell v, Mississippi*, 472 U S 320 (1985)

October 29, 1997
Abbeville, South Carolina

15/ 
Robert J Tinsley
Attorney for the Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 14 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding mitigating circumstances as follows

As I indicated previously, if you find the existence of a statutory mitigating circumstance ~~to be reasonable doubt~~, you must also consider mitigating circumstances before deciding on the appropriate punishment. The General Assembly has identified several statutory mitigating circumstances for you to consider. You must also consider all statutory mitigating circumstances that are supported by the evidence.

What is a statutory mitigating circumstance? Statutory mitigating circumstances, members of the jury, are facts, details, incidents, or occurrences that the General Assembly has declared by statute that mitigate the offense of murder. You must also consider any other mitigating circumstances, even those not set out in the statute, which in fairness and mercy must be considered as extenuating or as reducing the defendant's moral culpability for the commission of the act of murder. You must consider mitigating circumstances because if you are to make an individualized assessment of the appropriateness of the death penalty in the defendant's case, which the law of this state requires you to do, evidence about the defendant's background and character is very relevant.

This is true for several reasons First, is the "belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, are less culpable than defendants who have no such excuse"¹ Second, in arriving at the appropriate punishment it is essential for you to "consider any compassionate or mitigating factors stemming from the diverse frailties of humankind"² It is also important for you to consider any positive attributes of the defendant's character in mitigation of punishment

~~_____~~

~~_____~~

Penry v Lynaugh, 492 U S 302 (1989), *Eddings v Oklahoma*, 455 U S 104 (1982), *Lockett v Ohio*, 438 U S 586 (1978), *Woodson v North Carolina*, 428 U S 280 (1976), S C Code Ann § 16-3-20

¹ *California v Brown*, 479 U S 538, 545 (1987) (O'Connor, J concurring),

² *Woodson v North Carolina*, 428 U S 8, 280 (1976)

October 29, 1997
Abbeville, South Carolina

15/ RJA 27
Robert J Tinsley
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 15 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding proof of mitigating circumstances as follows

As you will recall, I instructed you that before you can consider the death penalty in this case, you must first find unanimously and beyond a reasonable doubt that the state has proven to you the existence of the statutory aggravating circumstance. No such requirements exist for consideration of mitigating circumstances. Therefore, in deciding the appropriate punishment in this case, each individual juror must consider each mitigating circumstance that he or she finds to be supported by the evidence. It is not necessary that the entire jury unanimously agree on the existence of any mitigating factor before you as jurors may consider it. Rather, the existence of mitigating circumstances, and the weight to be given to those factors, are matters that each juror must determine for himself or herself.

You must also be aware that with regard to the mitigating circumstances, you do not have to find that any of them exist beyond a reasonable doubt before any, of you may consider it. The defendant does not bear any such burden of proving the existence of such mitigating circumstances, rather you are to consider each and every mitigating circumstance that you find to be supported by the evidence before you.

McKoy v North Carolina, 494 U S 433 (1990), *Mills v Maryland*, 486 U S 367 (1988), *Eddings v Oklahoma*, 455 U S 104 (1982), *Hitchcock v Dugger*, 481 U S 393 (1987), *Skapper v South Carolina*, 476 U S 1 (1986), *Mak v Blodgett*, 970 F 2d 614, 625 (9th Cir 1992), *Kubet v Thieret*, 867 F 2d 351, 373 (7th Cir 1989), *State v Patrick*, 345 S E 2d 481, 485 (S C 1986), THEODORE EISENBERG & MARTIN T WELLS *Deadly Confusion Juror Instructions in Capital Cases*, 79 Cornell L Rev 1, 11 (1993)

October 29, 1997
Abbeville, South Carolina


Robert J Tinsley
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	- IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 16 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding mercy or sentencing the defendant to life for no reason at all as follows

In reaching your decision as to the sentence, you will consider the aggravating and mitigating circumstances. While an aggravating circumstance must be found before you can even consider the death penalty, once such a finding is made beyond a reasonable doubt, you may sentence the defendant to death even though you find the existence of a mitigating circumstance. In other words, the existence of a mitigating circumstance is not a bar to the imposition of the death penalty.

If you should conclude that a statutory aggravating circumstance exists, you may consider whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all. This is what has been traditionally referred to as a "sentence of mercy." Should such be your decision, you would so indicate on Part A of the form entitled Jury's Verdict on the Sentence To Be Imposed. Only the foreman of the jury needs to sign the verdict form if a life sentence is chosen. In other words, you may choose to sentence the defendant, to life imprisonment if you find a mitigating circumstance, or you may sentence him to life imprisonment

for no reason at all, that is, as an act of mercy Should you choose to sentence to life imprisonment, the foreman alone would be required to sign the sentencing form

Woodson v North Carolina, 428 U S 280 (1976), *State v Goolsby*, 268 S E 2d 31 (S C 1980),
State v Tyner, 258 S E 2d 559 (S C 1979)

October 29, 1997
Abbeville, South Carolina

15/ 
Robert J Tinsley
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No ~~14~~ (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding effect of a failure to arrive at a unanimous decision as to sentence to recommend as follows

I.

I have instructed you that, in order to recommend a sentence of death, the jury must first reach a unanimous decision about the existence of the statutory aggravating circumstance and then the jury must reach a unanimous decision to sentence the defendant to death. There is, however, no requirement that the jury reach a unanimous decision to sentence the defendant to life imprisonment. In other words, all twelve of you must agree to a sentence of death, but even if only one of you makes a final decision in favor of life, then a life sentence will be imposed. You do not all have to agree in order to recommend a sentence of life.

Gardner v Florida, 430 U S 349 (1977), *Eddings v Oklahoma*, 455 U S 104 (1982), *Caldwell v Mississippi*, 472 U S 320 (1985), *Simmons v South Carolina*, 512 U S 154 (1994), *Kubat v Theret*, 867 F 2d 351, 373 (7th Cir, 1989), S C Code Ann §16-3-20(C), *but see, State v Copeland*, 300 S E 2d 63 (S C 1982)

II

Alternative Request to Charge

In the event that the above request is denied, the defendant requests, in the alternative,

reserving and not waiving his rights under the preceding request, that the Court refrain from representing to the jury that there must be unanimous agreement in order to recommend a sentence of life

S C Code 6 1-6-3-20(C)

October 29, 1997
Abbeville, South Carolina

15/ R. J. Tinsley
Robert J Tinsley
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
	)	
STATE OF SOUTH CAROLINA	)	
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 18 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, by and through his undersigned attorney and request this Court instruct the Jury regarding jury's duty to disregard speculation about the alleged deterrent effect of a death sentence as follows

In deciding whether to impose a sentence of life imprisonment or death upon the defendant, you are not to speculate on which, if either, of the sentences is more likely to deter other persons from committing similar crimes in the future

There is no evidence before you as to whether the death penalty will deter crimes like the one in this case any more effectively than will life imprisonment. Therefore, you should disregard anything you may have heard one way or the other on this subject, and should set aside any preconceived opinions that you may hold as to whether life imprisonment or the death penalty is the more effective deterrent to murder. Such questions cannot be resolved in a trial such as this one. Therefore, they should play no role in your deliberations, and should not even be mentioned or thought of by you in the jury room. I instruct you that your sentencing decision must be based only on the evidence that has been presented in this case pertaining to the particular circumstances of this crime and the character and background of this defendant.

State v Truesdale, 393 S E 2d 168, 172 (S C 1990)(Finney, A.J , dissenting)("Since evidence of the deterrent effect of capital punishment may not be introduced at trial, jury arguments which open the door for consideration of this issue are inappropriate "), *State b Jones*, 378 S E 2d 594, 598 (S C 1989), *cert denied*, 110 S Ct 1534 (1990)(Finney, A.J , dissenting)(dissent holding that it was improper for solicitor to argue deterrent effect of death penalty), *State v Woomer*, 299 S E 2d 317, 320 (S C 1982), *cert denied*, 463 U S 1229 (1983) (admonishing use of evidence showing lack of deterrent)

October 29, 1997
Abbeville, South Carolina

15 /

Robert J Tinsley
Attorney for Defendant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF GENERAL SESSIONS
	)	
COUNTY OF ABBEVILLE	)	EIGHTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA	)	ADDENDUM TO
	)	DEFENDANT'S
v	)	REQUEST TO CHARGE
	)	No 18 (PENALTY PHASE)
JOHN KENNEDY HUGHEY,	)	96-GS-01-65,220
DEFENDANT	)	
	)	

COMES NOW the Defendant, pursuant to the Court's request and sets forth the following categories of non-statutory mitigating circumstances to be charged to the jury

When considering mitigating circumstances, I have instructed you previously that you may give full consideration to non-statutory mitigating circumstances. The defendant has requested that you consider the following when reaching your decision

- (1) Prior good acts of the defendant,
- (2) The domestic nature of the crime, as opposed to a crime between strangers,
- (3) The impact of the death penalty on the defendant's family including the defendant's children,
- (4) The defendant's low average intellectual functioning whether as a natural consequence of his birth or as a result of physical head trauma suffered as a child or adult
- (5) The emotional trauma suffered by the defendant as a result of his dysfunctional family as a child and the loss of his mother as an adult,
- (6) The inherent worth of Mr Hughey as an individual, and,
- (7) Any other mitigating circumstance which you the jury determine is supported by

the evidence

Hitchcock v Dugger, 481 U S 393 (1987), *Skapper v South Carolina*, 476 U S 1 (1986), *Eddings v Oklahoma*, 455 U S 104 (1982), *Lockett v Ohio*, 438 U S 586 (1978), *Woodson v North Carolina*, 428 U S 280 (1976)

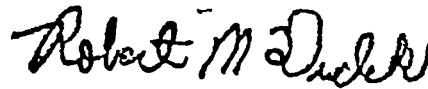
October 30, 1997
Abbeville, South Carolina

15/

Robert J Tinsley
Attorney for Defendant

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material



Robert M. Dudek
Assistant Appellate Defender

South Carolina Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S C 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

May 12, 1999

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

J Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V

JOHN KENNEDY HUGHEY,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S C 29201 ,
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	11
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	3
ARGUMENTS	

1

The judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S C Code §24-3-930 provides that all guards and officers employed at a Penitentiary shall be exempted from service on a jury. The answers on Daly's questionnaire also indicated he considered himself a member of law enforcement, and he should also have been excused for that reason.

4

2

The judge erred by refusing to instruct appellant's request to charge that gave well-accepted examples of legal provocation that may be sufficient to reduce murder to voluntary manslaughter. The jury was left without any guidance as to what conduct could constitute a sufficient legal provocation, and the judge therefore neglected his duty to fashion an appropriate charge to the facts and circumstances of this case.

9

3

The judge erred by allowing the widower of Luevinia Harris to testify during the guilt stage of the trial that he cleaned the victim's blood off of the floor of his home several days after the shooting. This evidence was not relevant, and was highly prejudicial.

24

4

The judge erred by refusing to instruct the jury on the statutory mitigating circumstance contained in S C Code

§16-3-20(C)(b)(6) This statutory mitigating circumstance would have allowed the jury to consider the defendant's capacity to appreciate the criminality of his conduct, or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired. There was evidence supporting this mitigating circumstances submission to the jury, and the failure to charge it entitles appellant to a new sentencing hearing 28

5

The judge abused his discretion by allowing the state's victim impact witnesses to give narrative testimony. It resulted in a prejudicial denunciation of appellant by the family far beyond the permissible scope of *Payne v Tennessee* 35

6

Whether the judge erred by instructing the jury that non-statutory mitigating circumstances were those "the defendant contends serve the same purpose [as statutory mitigating circumstances]" The instruction improperly disparaged this evidence 40

7

The judge denied appellant's right to a fair sentencing hearing, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, by admitting state's exhibit 95. This was a horribly graphic photograph of the victim's brain matter coming through her eyes. The photograph was so inflammatory that any probative value it had was outweighed by its unduly prejudicial effect 44

CONCLUSION 46

TABLE OF AUTHORITIES

Cases

<u>Atlas Food Systems and Services, Inc. v. Crane National Vendors</u> , 319 S C 556, 462 S E 2d 858 (1995)	7
<u>Duke Power Co v S C Public Service Comm'n</u> , 284 S C 81, 326 S E 2d 395 (1986)	7
<u>Eddings v Oklahoma</u> , 455 U S 104, 102 S Ct 869 (1982)	43
<u>Gardner v Florida</u> , 430 U S 349, 97 S Ct 1197, 1977)	45
<u>Lucas v Evatt</u> , 308 S C 31, 416 S E 2d 646 (1992)	39
<u>McKoy v North Carolina</u> , 494 U S 433, 110 S Ct (1990)	33
<u>Miranda v Arizona</u> , 384 U S 436, 86 S Ct 1602 (1966)	13
<u>Payne v Tennessee</u> , 501 U S 808, 111 S Ct 2597 (1991)	38, 39
<u>Penry v Lynaugh</u> , 492 U S 302, 109 S Ct 2934 (1989)	34, 43
<u>Skipper v South Carolina</u> , 476 U S 1, 106 S Ct 1669 (1986)	34
<u>State v Alexander</u> , 303 S C 377, 401 S E 2d 146 (1991)	25, 45
<u>State v Allen</u> , 266 S C 468, 224 S E 2d 881 (1976)	26
<u>State v Bell</u> , 302 S C 18, 393 S E 2d 364 (1990)	41
<u>State v Bellamy</u> , 293 S C 103, 359 S E 2d 63 (1987)	33
<u>State v Blassingame</u> , 271 S C 44, 244 S E 2d 528 (1978)	21, 23
<u>State v Brown</u> , 289 S C 581, 347 S E 2d 882 (1986)	7
<u>State v Caldwell</u> , 300 S C 494, 388 S E 2d 816 (1990)	34
<u>State v Cooper</u> , 291 S C 332, 353 S E 2d 441, 442 (1986)	8
<u>State v Copeland</u> , 278 S C 572, 300 S E 2d 63 (1982)	42
<u>State v Davis</u> , 309 S C 326, 422 S E 2d 133 (1992)	22

<u>State v Franklin</u> , 310 S C 122, 425 S E 2d 758 (Ct App 1992)	20
<u>State v Fuller</u> , 297 S C 440, 377 S E 2d 328 (1989)	20, 22, 23
<u>State v Gallman</u> , 79 S C 229, 60 S E 682 (1908)	22
<u>State v Gardner</u> , 219 S C 97, 64 S E 2d 130 (1993)	19
<u>State v Gilliam</u> , 296 S C 395, 373 S E 2d 596 (1988)	20
<u>State v Green</u> , 301 S C 347, 392 S E 2d 157 (1990)	8
<u>State v Hendrix</u> , 270 S C 653, 244 S E 2d 503 (1978)	20
<u>State v Johnson</u> , Op No 24851, Shearouse' Adv Sh # 35 (filed November 9, 1998)	20
<u>State v Johnson</u> , 306 S C 119, 410 S E 2d 547 (1991)	33
<u>State v Kornahrens</u> , 290 S C 281, 350 S E 2d 180 (1986)	45
<u>State v Livingston</u> , 327 S C 17, 488 S E 2d 313 (1997)	26
<u>State v Lowry</u> , 315 S C 396, 434 S E 2d 274 (1993)	19
<u>State v Lucas</u> , 285 S C 37, 328 S E 2d 63 (1985)	42
<u>State v Manning</u> , 305 S C 413, 409 S E 2d 372 (1991)	43
<u>State v McDaniel</u> , 320 S C 33, 462 S E 2d 882 (1995)	39
<u>State v Nichols</u> , 325 S C 111, 481 S E 2d 118 (1987)	19
<u>State v Patrick</u> , 289 S C 301, 345 S E 2d 481 (1986)	45
<u>State v Pilgrim</u> , 320 S C 409, 465 S E 2d 108 (Ct App 1995), aff'd as modified, <u>State v Pilgrim</u> , 326 S C 24, 482 S E 2d 562 (1997)	23
<u>State v Ross</u> , 272 S C 56, 249 S E 2d 159 (1978)	38
<u>State v Schmidt</u> , 288 S C 301, 342 S E 2d 401 (1986)	25
<u>State v Singleton</u> , 284 S C 388, 326 S E 2d 153 (1985)	42
<u>State v Smith</u> , 304 S C 129, 403 S E 2d 162 (Ct App 1991)	21, 22

<u>State v Wiggins</u> , 330 S C 538, 500 S E 2d 489 (1998)	19
<u>Ulatowski v Apro</u> , 95 Wis 2d 737, 291 N W 2d 660 (1980)	38
<u>Woodson v North Carolina</u> , 428 U S 280, 96 S Ct. 2978, 1976)	45

Statutes

S C Code §14-7-820	8
S C Code §14-7-840	4, 7
S C Code §16-3-20(C)	33
S C Code §16-3-20(C)(b)(6)	28, 32, 33, 34
S C Code §16-3-20(C)(b)(2)(6)	34
S C Code §16-3-20(C)(b)(2)(7)	34
S C Code §24-3-930	4, 6, 7, 8

Other Authorities

Collins, <u>South Carolina Evidence</u> (1985 Ed)	26, 38
Ervin , <u>South Carolina Requests to Charge - Criminal</u> (1994)	21
Rule 401, SCRE	25

STATEMENT OF ISSUES ON APPEAL

1

Whether the judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S C Code §24-3-930 provides that all guards and officers employed at a Penitentiary shall be excepted from service on a jury, and also because Daly was the functional equivalent of a law enforcement officer?

2

Whether the judge erred by refusing to instruct the jury on examples of acts of legal provocation, since the jury was left without any guidance on what might constitute a legal provocation, and the judge had a duty to fashion an appropriate charge to the facts and circumstances of this case?

3

Whether the judge erred by allowing Mack Harris, the husband of the decedent Harris, to testify during the guilt phase about the blood he cleaned off the floor of his home after the shooting, since this testimony was not relevant, and was highly prejudicial?

4

Whether the judge erred by refusing to charge the statutory mitigating circumstance contained in S C Code §16-3-20(C)(b)(6), which allows the jury to consider the capacity of the defendant to appreciate the criminality of his conduct or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired, since there was evidence supporting that mitigating circumstance?

5

Whether the judge erred by allowing the victim impact witnesses to testify in narrative form, rather than proper question-answer format, since it resulted in the victim's family personally chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v Tennessee*?

6

Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

7

Whether the judge erred by admitting State's Exhibit #95, since this photograph of the victim's face showed brain matter coming from beneath her eyes, was unduly prejudicial, was calculated to inflame the passions of the jury, and denied appellant a fair sentencing hearing?

STATEMENT OF THE CASE

Appellant was indicted at the March 11, 1996 term of the Abbeville County grand jury for two counts of murder, burglary in the first degree, and grand larceny R p 4110 His case came on for trial on October 13, 1997, before the Honorable J Derham Cole, and a jury Billy J Garrett, Edward McCallum, and Robert Tinsley represented appellant The solicitors were W Townes Jones, IV, and Mike Coulter R p 1

At the conclusion of court on October 13, 1997, appellant was ordered submitted to the William S Hall Institute for a psychiatric evaluation R 206, ll 21-24 Jury selection began on October 17, 1997 R 209, ll 9-10 A jury was selected, and opening statements began on October 22, 1997 R. 2097, l 8 - 2107, l 14, R 2181, ll 11-17

On October 27, 1997, the jury returned with guilty verdicts as to each count R 3495, ll 9-17

The penalty stage commenced on October 28, 1997, at 11 00 a m R 3508, ll 1-2 On October 30, 1997, the jury returned with verdicts of death as to both murder counts R 4073, ll 3-25 Judge Cole then imposed sentences of death as to each murder count R 4087, l 24 - 4089, l 18

This appeal follows

ARGUMENT

1

The judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution and S C Code §24-3-930 provides that all guards and officers employed at a Penitentiary shall be exempted from service on a jury. In addition, Daly considered himself a law enforcement officer, and he should also have been disqualified for that reason.

Relevant Facts

Prior to Brian Daly being called for voir dire, the trial judge noted that S C Code 24-3-930 provides "that all guards or keepers and other offices [officers] employed in a penitentiary shall be exempted from serving on a jury." The judge said he interpreted the statute to mean the exception "lies with the juror or the witness [sic]" R 866, l 18 - 867, l 5

Defense counsel McCallum disagreed. He argued that the "shall be exempted" language in the prison guard statute meant the juror was disqualified from service. R 868, l 11, 869, l 1. Defense counsel also argued that the language contained in S C Code §24-3-930 that stated prison guards shall be exempt differed from the language of S C Code §14-7-840 that had been interpreted to make the exemption "one personal to the juror." R 867, l 6 - 869, l 1

McCallum argued that "[t]he shall be exempt language in the prison guard statute makes it clear that that's something the Court should enforce as being an absolute exemption because of their close association with prisons, **people who have been convicted of crimes**, how that may influence their thought patterns." R. 868, l 11 - 869, l 1 (emphasis added)

Defense counsel Garrett then argued

[I] would just direct the court's attention to the way he filled out his questionnaire, specifically on page three question eighteen, have you or any member of your family ever worked for a law enforcement agency or a prosecutor's office or an officer or otherwise? Yes, the Department of Corrections It seems clear that he considers himself to be a law enforcement officer or a person associated with law enforcement from the way that he's filled out the questionnaire which, once again, would go to his inappropriateness as to be a fair and impartial juror

R 871, l 19 - 872, l 6 (emphasis added)

When questioned by the judge, Daly confirmed that the South Carolina Department of Corrections employed him, R 873, ll 1-3 The following then occurred upon the judge's questioning of Daly

Q Under the law of this state, a guard who's employed within the South Carolina Department of Corrections is exempt from jury service if you wish to be exempt In other words, that's simply a choice that you have a right to make I cannot require that you serve, but if you wish to be exempt, you may be exempt

A I'll go on

Q You wish to participate?

A Sure

R 873, ll 4-13

When asked if Daly could sentence someone to death, he responded that he had never given the subject much thought Daly concluded, "if that's, you know, the protocol, yeah " R 877, l 18 - 878, l 3

On cross-examination by defense counsel, Daly stated that he had been employed at McCormick Correctional Institution for the past six years R 882, ll 9-15 Daly said he

had not worked on Death Row, but had been to death row during his orientation with the Department of Corrections R. 884, ll 6-16

Following Daly's voir dire, defense counsel Tinsley renewed the defense objections to Daly being qualified to serve The judge qualified Daly over defense objections R 895, ll 21-25 ¹

Prior to jury selection, defense counsel Tinsley again renewed his objections to several jurors being qualified to serve, including Daly He told the judge he was concerned about being placed in "an awkward position when they're called up" for selection R 2006, l 2 - 2007 L 12, 2038, l 24 - 2039, l 23

The trial judge ruled, "I don't find it necessary that you object if they are called -- or when they're called up from the audience to be selected or excused You've already objected, your objection is noted on the record, I've already ruled [on] the objection " R 2007, ll 13-18

Defense counsel used all ten of his preemptory challenges during jury selection R 2097, l 8 - 2103, l 24 Brian Daly was seated as a juror in this case R 2100, ll 20-21, R 4075, ll 13-15 Defense counsel again renewed his objection to Juror Daley following Daley being seated ² R 2108, l 16 - 2109, l 9

¹ The solicitor asked Daly, "What comes to your mind when I mention the word, execution-style murder?" Appellant's objection to this question was sustained R 891, ll 7-10

² It must also be noted that appellant had to use preemptory challenges on other potential jurors he moved to strike for cause Venireman Hesson was working for the Abbeville fire department when called The solicitor acknowledged that court had to be held at times at the fire department where the police department also resided The defense unsuccessfully sought to remove Hesson pursuant to S C Code §14-7-820 since he was employed within the walls of any courthouse R 724, l 6 - 736, l 12 The defense also

Discussion

The specific statute, S C Code §24-3-930 provides that "all guards, keepers, employees and other officers employed at the Penitentiary shall be exempted from serving on juries and from military or street duty " The general statute, S C Code §14-7-840 provides that "No person is exempt from service as a juror in any court of this State except men and women sixty-five years of age or over "

"Laws giving specific treatment to a given situation take precedence over general laws on same subject, and later legislation takes precedence over earlier laws " State v Brown, 289 S C 581, 347 S E 2d 882, 883 (1986), Atlas Food Systems and Services, Inc. v Crane National Vendors, 319 S C 556, 462 S E 2d 858 (1995), Duke Power Co v S C Public Service Comm'n, 284 S C 81, 326 S E 2d 395 (1986) Thus, S C Code §24-3-930 takes precedence over S C Code §14-7-840

Defense counsel correctly argued strong policy reasons why prison guards should be disqualified from service in general, and Daly in particular Prison guards have to work daily with persons convicted by a jury of a crime Correctional Officers appropriately consider themselves part of law enforcement They owe a duty to the public to protect society from the people they are charged with guarding

sought to remove venireman Draft because he was a cousin of one of the victim's In addition, Mr Harris, the spouse of the other victim had assisted Draft with his tax returns R 673, l 17 - 692, l 1 Spencer Sorrow was a county councilman Council met in the Opry house that was attached to the courthouse, or at least right next to it Sorrow denied he would have feared political consequences if he served on appellant's jury 897, l 4 - 913, l 5 In the final analysis, the defense had to strike these potential jurors, and others, it had challenged for cause R 2099, l 6 - 2105, l 13

Here, Daly wrote on his questionnaire that he was a member of law enforcement. As defense counsel argued, this was the best evidence of Daly's affiliation.

Daley was the functional equivalent of a law enforcement officer. Further, this Court has always taken a functional rather than a rigid formalistic approach in interpreting and applying the provisions of S C Code §14-7-820 governing law enforcement officers. See State v. Cooper, 291 S C 332, 353 S E 2d 441, 442 (1986) ³

Daly had been to death row as part of his training with the Department of Corrections. Daly obviously knew that as a SCDC correctional officer that inmates are routinely transferred, and it certainly was conceivable that appellant could be assigned to his institution at some time in the future if he had received a life sentence ⁴

In short, Daly was disqualified pursuant to S C Code §24-3-930. Daly also considered himself a member of law enforcement, and should have also been disqualified for that reason. The defense used all ten of its peremptory challenges. Because Daley was wrongfully qualified, and because he served on the jury, appellant is entitled to a new trial. State v. Green, 301 S C 347, 392 S E 2d 157 (1990)

³ Daly also stated that he could vote for the death penalty if that is what "protocol" required.

⁴ Indeed, by sentencing this defendant to death, this juror assured himself that he would never have to meet with appellant in a prison setting.

The judge erred by refusing to instruct appellant's request to charge that gave well-accepted examples of legal provocation that may be sufficient to reduce murder to voluntary manslaughter. The jury was left without any guidance as to what conduct could constitute a sufficient legal provocation. The judge erred reversibly when he did not fashion an appropriate charge to the facts and circumstances of this case.

Relevant Facts

Valerie Bernice Jackson was the mother of twenty-two year old Sheka Jackson, one of the decedents. R. 2885, ll 15-20. Jackson testified appellant dated her daughter "off and on" from 1987 until 1995. Appellant and Sheka had two children together. R. 2887, ll 4-16. Sheka met one Michael Adams about two weeks before her death on December 5, 1995. R. 2885, ll 4-10.

Thirty-one year old Jessie Christopher Burton had lived in Abbeville all his life. He became a friend with appellant in the ninth grade. R. 2944, ll 4-25. Tashka Jackson was Burton's cousin, and his close friend. R. 2946, l 22 - 2947, l 18.

Burton testified appellant and Sheka Jackson appeared to be happy, and to have a loving relationship immediately before their fatal domestic dispute. R. 2948, ll 16-24. Burton was not aware of any relationship between Jackson and Michael Adams at the time. R. 2949, ll 5-12.

Appellant had a joint checking account with Jackson R 2952, ll 9-15 Burton also said that appellant bought an automobile for Jackson, who enjoyed having a car of her own R 2954, ll 12-20

Although Burton did not know a relationship had developed between Jackson and Michael Adams, he recalled that on December 3, 1995 that he saw appellant crying Appellant told Burton that he "couldn't take it no more " R 2971, l 6 - 2973, l 12

Thirty-three year old Gloria Harrison was appellant's older sister R 2994, l 2 - 2995, l 25 Harrison said appellant and Jackson began dating in 1987 R 3001, ll 9-15

Harrison testified appellant and Jackson dated continuously However, Harrison recalled that they would separate from time to time "[they'd] be away from each other for a while, then they'd get back together It's like they had a bond that wouldn't let go " R 3003, l 22 - 3004, l 3

Appellant was very close to their mother, and had lived with her on Maple Street in Abbeville Mrs Hughey was tragically killed by a drunk driver who drove off the road Harrison said appellant was extremely upset about his mother's death He became very withdrawn from those around him R 2919, l 19 - 3000, l 25

Following their mother's death, appellant lived with Sheka Jackson at their house on Maple Street Harrison recalled seeing their joint bank statement at the Maple Street address R 3016, l 1 - 3018, l 1

The events of December 3, 1995, when appellant first encountered Jackson and her new boyfriend, Michael Adams, were disputed Harrison testified that she took appellant over to Jackson's grandmother's house to pick up his two children R 3018, l 22 - 3019, l

15 When they arrived, Jackson "and someone [were] sitting in the car in the front yard " R 3019, ll 19-20

Harrison observed appellant and Jackson in the presence of Michael Adams. Harrison testified appellant did not strike or push Jackson. After their conversation, Harrison said appellant said, "Come on, Gloria, let's go " R 3020, ll 6-25

The state called Michael Adams as a witness R 2399, ll 22-23. Adams testified he knew about Jackson's relationship with appellant. Adams also understood that the couple had two children. However, Adams said, "we never really discussed it " R 2401, ll 8-11

Adams recalled that on December 3, 1995, he was sitting in his car with Jackson when appellant arrived. Adams recalled, "He [appellant] came up, they was talking and he asked me a few questions and I told her, well -- he asked if we were dating and I said that's not any of his business, his concern, you know " R 2401, l 8 - 2402, l 21

Appellant was calm at the time R. 2402, l 22 - 2403, l 3. However, Adams claimed appellant then pushed Sheka Jackson. Adams claimed appellant told him, "he was going to kill both of us " R. 2403, ll 4-20. Adams maintained that Jackson went into the house to call the police, "[a]nd that's when he took on off to the woods or wherever he went " R. 2404, ll 8-18

Angela Patterson was the dispatcher at the Abbeville police department on December 4, 1995. She received a call from a woman at 401 Ritchie Street. This was the home of Mack and Luevinia Harris, Sheka Jackson's uncle and aunt. The woman told Patterson she needed the police R. 2273, l 13 - 2276, l 20

Patterson remembered that the woman sounded agitated and upset R 2276, ll 21-24. Patterson said she heard the woman say, "Don't shoot that gun in here " Patterson then

heard a gunshot, and about five or six seconds later, another gunshot R 2278, l 15 - 2279, l 25

Gloria Harrison testified appellant arrived at her home in Gainesville, Florida, after the shooting incident Appellant was "real, real shaken up and I knew something was wrong and I asked him what was wrong and he said that something had happened " R 3021, ll 12-20 She recalled that appellant was bleeding He was holding napkins against his hand R 3021, l 23 - 3022, l 5

Harrison remembered the police surrounded her house while appellant was inside The police telephoned her, and asked to talk to appellant R 3023, ll 4-25 Harrison recalled appellant was crying, told her the shooting had been an accident, and that he "couldn't take it anymore " R 3050, ll 16-24

After appellant was arrested at Harrison's home in Gainesville, he was returned to Abbeville Appellant was given his *Miranda*⁵ warnings R 2850, ll 6-10 Appellant did not give the police a written statement, but told them he wanted to tell them what had happened R 2854, ll 17-19, R. 2863, ll 17-22

Appellant told the police he got out of bed about ten o'clock that morning He found out that his wife, or girlfriend, Tesheka, was staying at Mack Harris's house Appellant went to Harris's house to talk with her R. 2856, ll 9-16

Appellant told SLED agent Eddie Clark that he talked with Tesheka and her aunt outside the Harris mobile home Appellant and Tesheka began to argue Ms Harris told them to go inside the trailer R. 2856, ll 17-21

⁵ Miranda v Arizona, 384 U S 436, 86 S Ct 1602 (1966)

However, once inside the trailer, the argument continued. Clark said appellant told him that "there was some little altercation there that Tesheka threw a vase at him and a knife or two or something like that, and that he had rocked his son to sleep and carried his son to the bedroom at the far end of the trailer. And that Tesheka came into the house with the gun that she had gotten out of the car that was parked outside---" R. 2857, ll 1-9. Clark said appellant told him as they struggled over the gun, "it went off." R. 2857, ll 13-24. Appellant told Clark he was scared, and that he continued to fight over the gun with Tesheka. The gun went off. R. 2857, l 23 - 2858, l 3.

Twenty-eight year old appellant, John Kennedy Hughey, took the stand in his own defense. R. 3064, l 17 - 3065, l 8. Appellant was born and raised in Abbeville. R. 3065, l 11 - 3066, l 8.

Appellant testified Tesheka Jackson considered herself his wife. They had two children together. R. 3069, l 1 - 3071, l 19. The defense introduced a birthday card from Jackson to appellant that was signed, "Love you, your dear wife, Tesheka, I love you." R. 3072, ll 14-25.

Appellant testified he had a joint bank account with Jackson, and Jackson had a key to his Maple Street home. R. 3088, l 6 - 3091, l 24. Appellant testified they combined the dates on which they were born -- 1969 and 1973 -- to form the pin number for their joint bank account.⁶ R. 3095, l 13 - 3096, l 9.

⁶ This only became an issue because the state introduced evidence appellant withdrew a small amount of money from the account following the shooting, while he was on his way to Gainesville, Georgia.

Appellant testified Jackson had two weeks vacation after Thanksgiving in 1995. She stayed at his house on Maple Street during this time off. R. 3098, l 14 - 3099, l 8

Appellant testified Jackson usually stayed with her grandmother "over on Blue Hill" in Abbeville. R. 3103, ll 4-8. Appellant remembered that he met Michael Adams for the first time that Sunday before the fatal incident. R. 3105, ll 15-17

Appellant asked his sister, Gloria, to take him to Jackson's grandmother's house to pick up the children that day. R. 3106, ll 1-14. When he arrived, appellant said "I found Sheka and him [Adams] inside a Mustang. So I asked Sheka who he was." R. 3106, ll 15-23. Appellant said that he was hurt at the time because Jackson had his children with Adams. Appellant learned "they had spent the night together and had the kids with them." R. 3107, ll 2-5

Appellant testified that this was only one of two times in his life that he could remember that he was so upset that he cried. R. 3108, ll 2-15. Appellant said he planned to kill himself. He left a note on his door that read, "after this morning, I'll be dead, love ya'll, please take care of my kids." Appellant remembered, "That was after me and Sheka had gotten into it." R. 3112, ll 1-11

On the morning of December 4, 1995 appellant rode his brother's bicycle over to Jackson's aunt's [Ms. Harris'] mobile home. Appellant denied carrying a shotgun on his bicycle through the streets of Abbeville on the way to Harris' mobile home.⁷ R. 3122, l 17 - 3123, l 12

⁷ The state's theory of the case was that appellant planned to kill Jackson, and strongly insinuated that appellant brought the gun with him to Harris' mobile home.

Appellant recalled that as he rode into Harris' yard, one of his sons said, "Dad, I want to ride " Appellant asked the aunt, Ms Luevinia, "Where can I put this bicycle because I don't want anybody to steal because it's my brother's bicycle " R 3124, ll 4-16

Appellant was going to tell Ms Harris about Jackson's relationship with Adams However, "[Jackson] slapped me for fixing to tell Luevinia what was going on " R 3125, ll 21-24

Luevinia asked them to come inside when she noticed the conflict R 3129, ll 11-20 Appellant remembered that once inside the mobile home, the argument only got worse Luevinia's son, Marcus Harris, happened to call from out of state while this argument was taking place R 2132, l 16 - 2133, l 3

When Marcus Harris called, "Ms Luevinia picked it up " R 3210, l 10 - 3211, l 3 Appellant sat on the couch rocking his son Sheka was rolling her eyes at him and "talking mean " Sheka got this way because he had raised the subject of Jackson sleeping with Michael Adams the previous evening R 3211, l 2 - 3212, l 5

Jackson then pushed him, and he pushed her back The altercation escalated, and Jackson "threw the vase and I blocked it with the chair and she grabbed the knife She threw one knife and I heard the dishes rattle I looked up and she had the other knife She came at me with the other knife and I blocked her and I pushed her back and then she just came back at me with the knife " ⁸ R. 3133, l 21 - 3134, l 5

⁸ When SLED agent David Black entered the mobile home following the homicide He recalled "As I stepped into the door and went towards the right and looked on the floor I saw a knife And on the knife towards the tip, again, appeared to be blood on the tip " R 2488, ll 12-21

Jackson was a little taller than him, and weighed thirty pounds more R 3135, ll 9-18 Appellant recalled, "she had the knife running after me, trying to kill me with the knife, and I ran out to [Jackson's car] and got the gun " R 3140, ll 21-24

When he got the gun out of the trunk, Jackson was "standing right at the top of the steps with the knife and she stood there hollering and cussing me out " R 3141, ll 10-16 Appellant recalled, "she was hollering she was going to kill me She was going to kill me " R 3224, l 23 - 3225, l 2 He told Jackson, "If you want to talk, let's talk You put the knife down, I'll put the gun down " R 3142, ll 13-16

Jackson tried to slam the door when he tried to reenter the mobile home R 3142, ll 17-24 Jackson then spit on him R 3142, l 25 - 3143, l 2 Appellant said he began struggling with Jackson "because she still had the knife, I remember tussling and that's when the shot went off " R 3144, ll 2-8

Appellant acknowledged he was angry He admitted that he was trying to shoot at Jackson Appellant testified, "I was mad and I didn't know what I was doing " R 3145, l 21 - 3146, l 2

Appellant remembered Ms Luevinia was "coming out the door and, you know, the hallway is kind of narrow All I remember Sheka when she was running down the hallway and somehow Ms Luevinia got hit and she fell I was still coming down the hall " Appellant said he did not mean to shoot Ms Luevinia R 3145, ll 7-22

Appellant said he did not realize he had been cut until he got "about halfway to Georgia " R 3149, ll 4-8 Appellant said he stopped at an ATM machine at 12 35 a m on the way to his sister's house in Georgia R 3148, l 13 - 3149, l 8

Appellant told his sister in Gainesville that "me and Sheka had gotten into it and it was where a gun was involved and I accidentally -- I made a mistake by when I shot Luevinia, she was just in the wrong place at the wrong time " R 3153, ll 5-10 Appellant denied he shot anyone "execution style," and said he intended to kill himself after the shootings occurred R 3151, l 22 - 3152, l 13

Appellant testified the shooting was not premeditated, and admitted that he was guilty of voluntary manslaughter R 3157, ll 13-21

Request for Voluntary Manslaughter Instruction

Defense counsel Tinsley requested that the judge charge defense request to charge #10 "Our examples came right out of Ervin's book, Section 29-9, pages 224 and 25, of course, the solicitor Coulter objected to our paragraph seven We further point they were examples right out of the book, and Solicitor Jones actually argued a couple of those " R 3442, ll 11-17

The judge said he did not "feel comfortable" giving this instruction He added that if the jury came back wanting a further explanation, "then I'll consider giving them some type of explanation " R. 3442, ll 18-25

The judge charged the jury that "voluntary manslaughter is the felonious taking of the life of another human being in sudden heat of passion provided it is based upon a sufficient legal provocation " R. 3465, ll 6-9

Sudden heat of passion aroused by sufficient legal provocation which may reduce a felonious killing from that of murder to that of manslaughter need not dethrone reason entirely or shut out knowledge and volition, but it refers to an unlawful killing provoked by such circumstances that would

naturally disturb the sway of reason and render the mind of an ordinary, reasonable, and prudent person incapable of cool reflection And to produce what, according to human experience may be called an uncontrollable impulse to do violence

Now in order for a felonious killing to be reduced from that of murder to that of manslaughter it must have occurred in sudden heat of passion aroused by sufficient legal provocation The killing of a human being, even in the heat of passion, is murder if there was no sufficient legal provocation That is the slayer had no reasonable cause for his anger

R 3465, l 17 - 3466, l 10

Following the judge's instructions, defense counsel Tinsley took exception to the judge's refusal to charge his request to charge, and renewed "all motions in that regard "

R 3475, l 15 - 3478, l 3 The judge made the request to charge a court exhibit R 3479, ll 15-20

Jury question

The jury sent the judge a note requesting that they be re-instructed on the definitions of murder and voluntary manslaughter R. 3482, l 23 - 3483, l 8 The judge repeated his generic instruction to the jury, again deleting the examples of a sufficient legal provocation in appellant's request to charge R. 3482, l 23 - 3490, l 23

Defense counsel Tinsley objected to the judge's failure to give the examples of a sufficient legal provocation contained in paragraph seven of defense request to charge #10 R 3491, ll 3-7

Discussion

"Voluntary manslaughter is defined as the intentional killing of a human being in the sudden heat of passion resulting from a sufficient legal provocation " State v Wiggins, 330 S C 538, 500 S E 2d 489 (1998), State v Nichols, 325 S C 111, 481 S E 2d 118 (1987) To warrant a court from eliminating the offense of voluntary manslaughter, it must very clearly appear "that there is no evidence whatsoever tending to reduce the crime from murder to manslaughter " State v Lowry, 315 S C 396, 434 S E 2d 274 (1993), State v Gardner, 219 S C 97, 64 S E 2d 130 (1993)

In this case, there was evidence Sheka Jackson threw a vase at appellant, and attacked him with a butcher knife SLED agent Black found a knife near the door of the mobile home following the homicide

Appellant also testified that Jackson spit on him, cursed him, and hit him Thus, there was an abundance of evidence justifying a voluntary manslaughter charge based on the physical assault, fear, exasperation and anger See, State v Gilliam, 296 S C 395, 397, 373 S E 2d 596, 597 (1988), State v Franklin, 310 S C 122, 125, 425 S E 2d 758, 760 (Ct App 1992), State v Johnson, Op No 24851, Shearouse' Adv Sh # 35 (filed November 9, 1998)

The problem in this case was that the jury was not provided any guidance on what could constitute a sufficient legal provocation Voir dire in capital cases teaches that juror misconceptions about the law -- - when one can act in self-defense and what constitutes a legal provocation -- are routine

The trial judge here stated that he would consider giving a more detailed instruction citing examples if the jury returned for a further charge on voluntary manslaughter Yet,

when the jury returned for a further charge on voluntary manslaughter, the judge did not give the more detailed instruction citing the examples contained in defense request to charge #10. As seen, appellant took exception to the judge's refusal to cite examples of what could constitute a sufficient legal provocation.⁹

The judge committed reversal error by his failure to give an adequate voluntary manslaughter instruction. In State v. Fuller, 297 S C 440, 377 S E 2d 328, 330 (1989), this Court held that a trial judge must fashion an appropriate charge considering the facts and circumstances of the case at bar. In Fuller, the judge gave a correct instruction on self-defense, but refused requests to charge additional instructions that were legally accurate.

The judge here stated that he would consider giving the more specific requests to charge contained in defense requests #10 if the jury returned for further instructions.

However, it became clear that the jury had focused on whether this homicide constituted murder or voluntary manslaughter when it returned for further instructions. In State v. Blassingame, 271 S C 44, 244 S E 2d 528, 529 (1978), this Court held it was reasonable to assume the jury had focused its critical attention on the meaning of the difference between murder and manslaughter when it asked to be readvised of the definition of each offense. The same was obviously true here.

⁹ Defense counsel went beyond the call of duty in protecting the record in this regard, since this Court held in State v. Johnson, Op No 24851, Shearouse' Adv Sh # 35, n 1 (filed November 9, 1998), that defense counsel is not obligated to again take exception following the judge's instruction when he has protected the record with a prior request to charge.

Despite his earlier assurance that he would reconsider his generic charge if the jury returned for further instructions, the judge gave the same standard voluntary manslaughter instruction to which appellant had earlier objected

Moreover, the portion of defense request to charge #10 the judge refused to charge was unquestionably good law The judge refused to charge

"Examples of acts of provocation that would be sufficient to negate malice are [pulling a knife on the defendant] [pointing a gun at the defendant] [humiliating assault such as spitting in the defendant's face] [an assault of a family member] [sudden mutual combat in which one of the participants is killed by the other without a previously informed intention to do so] [finding one's spouse in the act of adultery] [the deceased having molested your minor child]

Defense Request to Charge #10, R p *

This proposed defense instruction was taken directly from Ervin , South Carolina Requests to Charge - Criminal, 1994, Sec 29-9 (manslaughter) at pgs 224-225

In State v Smith, 304 S C 129, 403 S E 2d 162 (Ct App 1991), the court held the trial judge committed reversible error by limiting his instruction on voluntary manslaughter to two examples of provocation Both of those examples dealt with provocation by an assault upon the accused

The court in State v Smith aptly stated controlling principle of law applicable to the manslaughter instruction in this case "it is not always sufficient for a judge to simply open a charge book and read a generic statement of the law to a jury, no matter how correct the statement may be in the abstract in this respect, the judge must be an artist, not a mere technician " State v Smith, 403 S E 2d at 164, citing State v Fuller, 297 S C 440, 443, 377 S E 2d 328, 330 (1989)

The examples of what could constitute a sufficient legal provocation were essential to the jury having an understanding and appreciation of the law of voluntary manslaughter. Courts commonly recognize that charging an inference of malice from the use of a deadly weapon is hardly a worthwhile instruction when not giving the jury examples of what can constitute a deadly weapon. See, State v. Davis, 309 S C 326, 422 S E 2d 133, 144 (1992). In Davis, the jury was instructed that a fist could constitute a deadly weapon because that instruction was fashioned to the facts and circumstances of the case.

Similarly, juries are traditionally instructed the law on assault and battery of a high and aggravated nature by way of examples. "Some examples of circumstances of aggravation are the use of a deadly weapon, the infliction of serious bodily injury, the intent to commit a felony, a difference in sexes or disparity in the ages or physical conditions of the parties." State v. Pilgrim, 320 S C 409, 465 S E 2d 108, 110 (Ct App 1995), *aff'd as modified*, State v. Pilgrim, 326 S C 24, 482 S E 2d 562 (1997).

The judge erred by initially refusing to give a full, complete, and accurate instruction on voluntary manslaughter. The judge also erred by refusing to charge the examples in defense requests to charge #10 when the jury returned for a further definition of murder and manslaughter. See, State v. Blassingame, supra, State v. Fuller, supra.

There was an abundance of evidence in this case that the homicide resulted from a domestic dispute. There was evidence of a classic manslaughter arising from a lovers' triangle, and a fatal argument that turned violent.

The jury was sufficiently focused on voluntary manslaughter that it requested an additional instruction on the difference between murder and voluntary manslaughter. Appellant was entitled an appropriately crafted instruction on voluntary manslaughter.

instruction which cited examples of what can constitute a sufficient legal provocation State
v. Fuller, supra Appellant is entitled to a new trial

The judge erred by allowing the widower of decedent Luevinia Harris to testify during the guilt stage of the trial that he cleaned her blood off of the floor of his home several days after the shooting. This evidence was not relevant, and was highly prejudicial

Relevant Facts

During the **guilt** stage of the trial, the solicitor called George Mack Harris, the widower of Luevinia Harris R 2898, l 15 - 2900, l 18 Harris testified he returned to his mobile home on December 4, 1995, between 12 30 and 1 00 p m He was met there by police officers R 2904, ll 15-24 A bicycle was parked outside R 2905, ll 4-8 The police would not allow Harris to go into his home, and informed him "that there was two murders in my house " R 2916, l 10 - 2917, l 10

Harris explained that the police allowed him back into his home about three days after the homicides R 2917, l 16 - 2918, l 5 This was on a Thursday night Harris wanted to retrieve some clothes for his wife's burial

Harris testified he went into his home, and cleaned up the house R 2917, l 16 - 2918, l 5 The following then occurred on direct examination of Harris

Q When you got back in that house, did you notice any **red colored substance** on the floor of your kitchen?

MR GARRETT Objection, Your Honor, **relevance?**

THE COURT Overruled

THE WITNESS When I got back in my house **I cleaned that blood up, I (witness is crying) me and another friend I removed all that blood** There was blood on the floor, blood down the hall in that door into that back bedroom,

there was blood and fragments of bone on that floor The police officers that told me ---

MR GARRETT Objection, Your Honor As to what the police officers said

MR JONES Don't tell me what they told you, just tell me---

THE COURT The questions is simply if you saw that on the floor or if it was there before you left?

EXAMINATION CONTINUED

BY MR JONES

Q Was it on the floor before you left at 10 50?

A No, sir

Q Was it there when you came back?

A Yes, it was

MR JONES Answer any questions for the defense

MR GARRETT I have no questions

R 2918,1 23 - 2920,1 1 (emphasis added)

Discussion

Evidence is relevant if it tends to establish or make more or less probable some matter in issue upon which it directly or indirectly bears State v Alexander, 303 S C 377, 401 S E 2d 146 (1991), State v Schmidt, 288 S C 301, 342 S E 2d 401 (1986) Rule 401, SCRE, provides "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of action more probable or less probable than it would be without the evidence "

As seen, during the guilt stage evidence the solicitor asked Harris if he noticed any "red colored substance" on the floor of his kitchen. The judge then allowed Harris to testify over objection, and very emotionally, about how he cleaned his wife's blood up off of the floor of his home four days after the homicide. This evidence was not relevant because it did not make any matter at issue or of consequence more or less probable.

Further, "the modern view has been to treat materiality as a matter of relevancy. Evidence is immaterial when there is no logical or rational connection between the fact to be presented and a matter in issue." Collins, South Carolina Evidence, Sec 9 1(D)(2) at p 173 (1985 Ed). Again, there was not any logical or rational connection between Mr. Harris cleaning up his wife's blood, and any matter in issue. The testimony was irrelevant and immaterial.

Mr. Harris began crying during his emotionally charged testimony. That was to be expected since what the solicitor asked him to relate to the jury. His testimony in this regard was naturally intended to have the emotional impact upon the jury.

This Court in State v. Allen, 266 S. C. 468, 224 S. E. 2d 881, 888 (1976), held that references to the victim's family are uncalled for and will not be tolerated because of their tendency to inflame the jury's passions. State v. Allen was a death penalty case. Thus, Allen still correctly holds that calling attention to the suffering of the victim's family is totally improper during the guilt portion of the trial.

That was exactly what happened here. The solicitor called attention to Mr. Harris' emotional suffering while he cleaned up his dead wife's blood.

This case is also similar to State v. Livingston, 327 S. C. 17, 488 S. E. 2d 313 (1997), wherein the state argued that a photograph of the victim was relevant in a felony DUI case.

The photograph was not relevant to any matter at issue in the felony DUI case, and it also had to tendency to arouse the sympathy or prejudice of the jury

Here, similarly, Mr Harris' testimony about cleaning up the blood in his home four days after the homicide was not relevant to any matter at issue during the guilt phase of appellant's trial. The emotional impact of this testimony had to be obvious to the solicitor before he asked the question.

In this case it was undisputed that Harris and Jackson were killed in Harris' mobile home. It was undisputed that they bled from their gunshot wounds. Mr Harris' gut wrenching testimony about cleaning up the blood in the mobile did not make any matter at issue more or less probable. It was not relevant.

The question the solicitor asked of Mr Harris did not further any relevant legitimate line of inquiry. It was calculated to inflame the jury, and the solicitor's illegitimate success in this regard entitles appellant to a new trial.

The judge erred by refusing to instruct the jury on the statutory mitigating circumstance contained in S C Code §16-3-20(C)(b)(6). This statutory mitigating circumstance would have allowed the jury to consider that the defendant's capacity to appreciate the criminality of his conduct, or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired. There was evidence supporting this mitigating circumstances, and the failure to charge it entitles appellant to a new sentencing hearing.

Relevant Facts

During the penalty stage of the trial, appellant's half-brother, Anthony Wilson, testified appellant was the sixth of seven children. R. 3771, ll 2-8. The first three children were fathered by a white man, and that his step-father, John Hughey, therefore "hated us. And he took it out on us." He commonly beat the children. R. 3771, l 9 - 3773, l 17.

Wilson recalled one incident where his stepfather was drunk, and appellant fell out of the automobile when "he [the step-father] jerked the car in reverse real fast." R. 3778, ll 3-9. Appellant was only about four years old at the time. He cut his head open so badly that his skull was visible. R. 3778, ll 3-25.

Appellant had emergency surgery for the injury, and stayed in the hospital for about six days. R. 3779, ll 1-10. Wilson recalled two other serious head injuries suffered by appellant. Appellant was once hit with a golf club in the face. Another time, he was in a bad automobile accident, and hit his head on the windshield. R. 3779, l 14 - 3780, l 21.

Appellant's sister, Gloria Harrison, also recalled appellant's severe head injury as a child R 3860, l 10 - 3861, l 8 Harrison remembered an additional incident where appellant was sniffing gasoline, fell off a piece of farm equipment, and was injured R 3861, l 9 - 3862, l 4 He was about six-years-old at that time R 3862, ll 3-4

Appellant complained of migraine headaches, and had suffered blackouts during his life R 3863, ll 3-13 His were badly exacerbated by his mother's tragic death Appellant became very withdrawn after his mother's death, and his personality changed R 3871, l 5 - 3973, l 22 Appellant told his sister that he would hear different things in the house following their mother's death He "would say that it sounded just like Momma walking through the house " R 3874, ll 3-8

Jeff Youngman, a former police officer in New Orleans, later earned two Master's degrees He was employed as a social worker R. 3903, ll 5-23 Youngman researched appellant's social history to determine if his head injuries as a child affected his decision-making ability Youngman also studied how the death of appellant's mother affected appellant's behavior R 3904, ll 3-13

Youngman testified, "In 1973, he fell out of a car driven by his father In 1976, he fell off a tractor In 1991, he was hit in the head with a shovel In 1994, he was in an automobile accident where he suffered head trauma In 1995, another automobile accident with head trauma And also in 1995, he was hit in the head with a golf club -- an iron " R 3906, ll 2-8 Youngman confirmed that the incident when appellant was hit in the head with the golf club occurred the same year as the homicide R 3906, ll 2-11

Youngman testified appellant had an IQ of 80, "which is on the bottom end of the low average range of intelligence " R 3909, ll 21-25 Youngman also testified appellant

began huffing gasoline as a way to deal with the "beatings that he would receive " R 3908, 1 13 - 3909, 1 4

Appellant became withdrawn after the death of his mother. He suffered from "some auditory hallucinations in that he felt that he could hear his mother in his house. He would not listen to what other people say, would not take advice, would not take chances to get some help. He was easily provoked " R 3912, 11 8-14. Youngman testified appellant's behavior was consistent with someone suffering from post-traumatic stress disorder. R 3913, 1 1 - 3914, 1 23

Family members related that appellant suffered blackouts, and that "some of them said he was dazed. Some of them said he was out of it. But there was something and also [he] experienced severe headaches " R 3931, 11 6-17

Youngman's testimony about appellant's head injuries was not offered as an excuse for appellant's crime, but rather as an explanation for why appellant acted as he did. Appellant made poor decisions in stressful situations because of these problems. R 3931, 1 18 - 3933, 1 16

Dr. James Evans specialized in neuropsychology. R 3962, 1 11 - 3963, 1 19. Dr. Evans evaluated appellant, and concluded he was not malingering. R 3968, 11 3-15

Dr. Evans testified appellant suffered from a brain dysfunction. R 3970, 1 12 - 3971, 1 24. Dr. Evans testified

Q You're offering them as explanations for his individual characteristics?

A [H]e's different from the average person in many ways. And those are the ways we've talked about now. And those certainly there is question whether they were factors -- **it needs to be asked are those**

factors in the crime And they may well have been

Q In your opinion, they could definitely have impacted him on December 4, '95?

A They could have been factors, yes

Q And, doctor, in your medical opinion as neuropsychologist, if an individual who suffers from organic brain disfunction is exposed to violence at an early age, abused, and then suffers a serious of head traumas, in your opinion as an expert, would those factors affect that person's ability to cope and deal with stress and life itself?

A Yes

Q And, doctor, in your evaluation and study of John Kennedy Hughey, have you found organic brain disfunction?

A I found a lot of converging evidence for organic brain disfunction to the point that I would say, yes, it exists

R 3988, l 18 - 3989, l 20 (emphasis added)

Charge Conference

When the aggravating and mitigating circumstances to be charged to the jury were discussed, the assistant solicitor said, "As I understand the law that if any type of testimony is shown regarding mental disturbances, the defendant is entitled to charges on two, six and seven So we would have no objection to those three, as I understand it, or as I understood from the case law, it's automatic, although I disagree with number, I believe it's number six." R. 4015, ll 13-21 (emphasis added)

The solicitor disagreed with his assistant, and the judge ruled that mitigating circumstance number six was not automatically charged when there was evidence of a mental disturbance R 4015, l 24 - 4016, l 2 The assistant solicitor then changed his mind and objected to mitigating circumstance number six being charged R 4016, ll 3-5 The judge ruled that he would not instruct this statutory mitigating circumstance [S C Code §16-3-20(C)(b)(6)] R 4016, ll 3-11

Jury Instruction

The judge charged the jury the statutory mitigating circumstances that the defendant had no significant history of prior criminal convictions involving the use of violence The judge also instructed the jury on the mitigating circumstances of murder when committed while the defendant was under the influence of a mental or emotional disturbance, and the age and mentality of the defendant at the time of the offense R 4016, ll 1-8 The judge refused to charge that the jury could consider appellant's capacity to appreciate the criminality of his conduct, or that it could consider that his ability to conform his conduct to the requirements of the law was substantially impaired See S C Code §16-3-20(C)(b)(6)

Exceptions

Defense counsel Tinsley took exception to the judge's refusal to instruct on the defense requests to charge pursuant to S C Code §16-3-20(C)(b)(6) R 4066, l 13 - 4068,

l 8 R p *

Discussion

S C Code §16-3-20(C)(b)(6) states that the jury may consider "the capacity of the defendant to appreciate the criminality of his conduct or [consider that his ability] to conform his conduct to the requirements of law was substantially impaired " Dr Evans testified that appellant's head injuries, and other problems could have been factors in what "impacted him on December 4, 1995 " R 3989, ll 4-6 There was also evidence appellant could not handle stressful situations There was evidence of a ferocious argument, and a physical altercation involving a butcher knife immediately before the shooting The entire encounter from appellant learning of Jackson's new relationship with Adams, to the fatal altercation in the Harris mobile home was obviously stressful

"The trial judge has a duty to review the statutory mitigating circumstances and submit any which may be supported by the evidence S C Code §16-3-20(C) In determining which statutory mitigating circumstances are supported, the judge is concerned only with the existence of evidence and not its weight ' State v Bellamy, 293 S C 103, 359 S E 2d 63 (1987) " State v Johnson, 306 S C 119, 410 S E 2d 547, 557 (1991)

Further, the sentencer, as a matter of law, must be able to consider any mitigating evidence McKoy v North Carolina, 494 U S 433, 110 S Ct (1990), Penry v Lynaugh, 492 U S 302, 328, 109 S Ct 2934, 2952 (1989), Skipper v South Carolina, 476 U S 1, 106 S Ct 1669 (1986)

In State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990), this Court held the trial judge committed reversible error by refusing to instruct the jury on the mitigating circumstances found in S C Code §16-3-20(C)(b)(2), (6) and (7) The defense psychologist in State v Caldwell testified that Caldwell had an anti-social personality, which is

synonymous with a "psychopathic personality " State v Caldwell, 388 S E 2d at 823 This Court held "because this evidence raised the inference that Caldwell was suffering from a mental disorder at the time the murder was committed, the trial judge erred in failing to instruct the statutory mitigating circumstances pursuant to S C Code §16-3-20(C)(b)(2), (6), and (7) Caldwell's psychopathic personality was described as one wherein an individual is not constrained by societal norms and is unlikely to obey rules on his own

Here, matters beyond appellant's control, and not a psychopathic personality caused appellant's lack of ability to cope There was evidence that appellant's head injuries, organic brain dysfunction, blackouts, decompensation over his mother's death, and his inability to handle stressful situations all may have impacted on his conduct on December 4, 1995

Given this evidence, the judge committed reversible error by failing to instruct the jury on the mitigating circumstance contained in S C Code §16-3-20(C)(b)(6) Appellant is entitled to a new sentencing hearing

The judge abused his discretion by allowing the state's victim impact witnesses to give narrative testimony. When the judge allowed narrative testimony, rather than the proper question and answer format. It resulted in the family chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v Tennessee*.

Relevant Facts

The state's first witness during the penalty stage was Tasheka Jackson's grandmother, Ruth Conner. R. 3696, l. 18 - 3697, l. 10. Conner was questioned in proper question-answer fashion by the solicitor. R. 3696, l. 4 - 3696, l. 7.

The state next called Jackson's mother, Bernice Jackson. R. 3701, l. 15 - 3702, l. 1. The examination of Jackson was in the form of question and answer until the solicitor asked Jackson the impact of the killing on her family's life. R. 3703, l. 8 - 3710, l. 9. When Jackson's answer continued for a page and a half of transcript, defense counsel Tinsley objected to the narrative form. He objected to "continuing without questions." R. 3710, l. 6 - 3712, l. 1. The judge overruled appellant's objection. R. 3712, l. 2.

Jackson then described how her daughter liked to talk to everyone, how she was always was friendly to everyone, and always smiled. R. 3712, l. 20 - 3713, l. 2. Jackson testified appellant had killed her daughter, but could not kill her memory. R. 3713, l. 22 - 3714, l. 4. The narrative answer of Bernice Jackson continued for four pages of transcript following appellant's objection to the narrative form was overruled. R. 3714, l. 5 - 3718, l.

Jackson testified, "John caused this on me He did this to us He tore our family up If he did not did what he did, we wouldn't be sitting here today He has interfered with everybody's life that's in here, because everybody had to come, stop what they were doing to be here today And if he had not made that move, we wouldn't be here at all " R 3717, l 20 - 3718, l 2

With the judge's approval of narrative answers secured, the solicitor continued to ask open-ended questions calling for narrative answers from the other victim impact witnesses For example, the solicitor asked Luevinia Harris' son, Marcus Harris, to "tell this jury, if you would, Marcus, what kind of loss your mother's murder had on your family "

Harris began crying during his answer, and continued crying throughout the rest of his narrative testimony R. 3728, ll 4-5 In an eight page narrative response to the solicitor's "question," Harris lectured appellant from the witness stand R 3726, l 16 - 3733, l 16

Harris said, "You know, in sitting here giving this testimony **and John, you know what I'm saying, she was in the right -- wrong place at the right -- wrong place at the wrong time in her own home That's tough to hear I couldn't do a dog like that "** R 3731, ll 4-17 (emphasis added) Harris told the jurors if their mothers were still alive, "do what your mom say to do and never miss a day, telling her you love her Tell your mother you love her " R 3731, ll 18-22

The solicitor next called George Anthony Harris, another one of Luevinia Harris' sons R. 3733, l 23 - 3734, l 12 The solicitor again asked an open-ended question "Tell them how her death has impacted your life " R 3735, ll 10-11

Harris then gave his narrative answer. Harris testified that he was tired of hearing lies, and said, "And John know its lies. Gloria knows it was. All of them know it." R 3740, ll 15-23. Harris described for the jury how he stayed with his mother's casket in the funeral home and would not even leave to eat. R 3744, ll 1-11.

The solicitor next called Luevinia Harris' husband, Mack Harris, as a witness. R 3748, ll 10-12. The solicitor again asked a "question" calling for a narrative response. He asked Harris to "Tell the jury what you loved most about her." R 3751, l 6.

Harris gave a narrative answer that covered five pages of transcript. R 3751, l 6 - 3755, l 3. Harris testified "John killed Luevinia, me, and my boys. You'd killed us all." R 3753, ll 23-25.

Harris also told the jurors, "I imagine y'all -- y'all will be getting ready for the holidays. Thanksgiving is coming up. Christmas is coming up. It means a lot to y'all. Ya'll's thought about it. Ya'll -- ya'll planning it. Ya'll thinking about that now. Me? I don't have no more holidays left." R. 3754, ll 15-20.

The solicitor asked Harris if his wife (the decedent) would forgive appellant for "what he did to her." Harris responded that his wife would not forgive appellant. R 3753, l 24 - 3756, l 1.

Discussion

The reasons against allowing narrative responses are well recognized. "The primary objection to narrative questions is that they do not allow the opposing party much chance to prevent the jury from being exposed to inadmissible material. As a result, narrative questions can be confusing to the jury, as well as prejudicial to the opposing party.

However, using narrative questions may speed up the testimony and save time. Generally, the more material the subject matter of the testimony is to the case, the more likely a narrative question will be improper." Collins, South Carolina Evidence, §4 10 at pg 72 (1995 Ed.)

In Ulatowski v. Apro, 95 Wis 2d 737, 291 N.W.2d 660 (1980), the Court noted one major problem with questions which call for a narrative response are that they afford "[t]o counsel no warning of the specific nature of the answer and no opportunity to make a specific pre-answer objection to the evidence." As seen, the solicitor here asked questions which called for a narrative response. The narrative responses were very emotional. They led to the witnesses lecturing the appellant from the witness stand. They allowed a witness to speak directly to the jury about how to treat their own mothers.

It is difficult enough to object to victim impact evidence in the presence of the jury. Here, defense counsel properly objected to the narrative responses outside the proper question-answer format. The judge overruled appellant's objection, and appellant was not obligated to continue arguing with the judge once he ruled narrative responses were proper. State v. Ross, 272 S.C. 56, 249 S.E.2d 159 (1978).

In Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), the United States Supreme Court held that victim impact evidence was admissible to allow the jury to get a "glimpse of the life" of the victim. In Payne, the United States Supreme Court held that there was no *per se* violation of the Eighth Amendment of the United States Constitution by allowing victim impact evidence.

However, Payne v. Tennessee did not authorize the state *carte blanche* to the solicitor to have his witnesses give narrative responses, and lecture the defendant from the

witness stand. The judge lost control of the victim impact witnesses by allowing narrative answers rather than mandating the proper question and answer format.

Appellant could not respond to the witnesses speaking to him from the witness stand. He could not respond to their assertions that appellant and his sister lied. Defense counsel could not anticipate the witnesses would lecture appellant, assert that he lied, and talk to the jurors about their own mothers. See State v. McDaniels, 320 S.C. 33, 462 S.E.2d 882 (1995). These are all the unexpected evils of the narrative form.

Under the unusual facts of this case, the narrative victim impact testimony, rather than the question and answer format, constituted a violation of the Eighth Amendment to the United States Constitution. This type of victim impact testimony was never envisioned by Payne v. Tennessee. See, Lucas v. Evatt, 308 S.C. 31, 416 S.E.2d 646, 648 (1992) (Finney, C.J., dissenting). Appellant should be granted a new sentencing hearing.

Whether the judge erred by instructing the jury that non-statutory mitigating circumstances were those "the defendant contends serve the same purpose [as statutory mitigating circumstances]" The instruction improperly implied that these were not circumstances the law provides the jury should consider

Relevant Facts

In his charge to the jury, the judge instructed that a statutory aggravating circumstance "is simply a fact, an incident, a detail, or an occurrence which the state legislature had declared by statute to be a circumstance which may make worse or aggravate the crime of murder when it accompanies that defense R 4054, ll 7-11

The judge defined a statutory mitigating circumstances as "a fact, an incident, a detail or an occurrence which the **state legislature** has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder " (emphasis added) R 4059, ll 5-

12

The judge defined a non-statutory mitigating circumstance thusly

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the **defendant contends** serves the same purpose That is to lessen or reduce the degree the defendant's guilt in the commission of the crime of murder

R 4060, ll 13-18 (emphasis added)

The judge also instructed the jury that they could recommend a life sentence even though they found a statutory aggravating circumstance beyond a reasonable doubt, and found no mitigating circumstances. The judge charged, "simply stated, you may recommend a sentence of life imprisonment for any reason or no reason at all **other than as an act of mercy**." R 4062, ll 8-15 (emphasis added)

Defense counsel took exception to the judge's instruction on non-statutory mitigating circumstances being those "the defendant contends" the jury should consider, rather than the law allows, and provides that the jury can consider. R 4066, l 20 - 4067, l 11

Discussion

In State v. Bell, 302 S C 18, 393 S E 2d 364, 374 (1990), this Court upheld a challenge to the judge trial's instruction on non-statutory mitigating circumstances. In Bell, the trial judge referred implicitly and explicitly to nonstatutory mitigating circumstances at least twice.

The judge in Bell further charged

As a matter of fact, you may recommend the defendant receive a life sentence irrespective of whether you find existence in the evidence of an alleged statutory mitigating circumstance or not. In fact, you may recommend a sentence of life imprisonment **for any reason you can think of or for no reason at all**.

(emphasis added)

This Court in State v. Bell also noted that the jurors could consider any mitigating circumstance otherwise authorized by law. This Court upheld that challenge to the nonstatutory mitigating circumstance instruction because the judge referred specifically to

nonstatutory mitigating circumstances, because the jury was instructed it could impose a life sentence for any reason or no reason at all, and because the jury was also instructed it could consider any mitigating circumstance authorized by law. This Court stated it had upheld this charge as sufficient to instruct a non-statutory mitigating circumstance in State v. Singleton, 284 S C 388, 326 S E 2d 153 (1985).

In this case, the judge's instruction implied the non-statutory mitigating circumstances were merely matters appellant contended the jury should consider, rather than mitigating circumstances authorized or allowed by law. See, State v. Lucas, 285 S C 37, 328 S E 2d 63, 65 (1985), State v. Copeland, 278 S C 572, 300 S E 2d 63 (1982).

Further, the judge's instruction did not allow the jury to impose a life sentence for any reason or no reason at all. The judge, as seen, told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all **other than as an act of mercy**" R 2062, ll 8-15. This confusing instruction suggested that an act of mercy would have been an invalid reason for a life vote.

At a minimum, this charge was confusing. The judge's instructions that non-statutory mitigating circumstances were matters the defendant contends the jury should consider, rather than were matters authorized by law for the jury to consider, was so confusing as a whole that a reasonable juror could have applied the law incorrectly. What the defendant contends the jury should consider, and the law authorizes it to consider are vastly different matters.

In short, a reasonable juror would have interpreted the trial judge's charge to mean that non-statutory mitigating circumstances were not on an equal par with statutory mitigating circumstances. The dismissive tone about nonstatutory mitigating circumstances

violated the Eighth and Fourteenth Amendments See Penry v Lynaugh, 109 U S 302, 109 S Ct 2934 (1989), Lockett v Ohio, 438 U S 586, 98 S Ct 2954 (1978), Eddings v Oklahoma, 455 U S 104, 102 S Ct 869 (1982)

Further, considering the charge as a whole, the jury was plainly instructed that they could not impose a life sentence as an act of mercy This made the importance of mitigating circumstances, and here specifically non-mitigating circumstances, all the more important, since the jury could not sentence appellant to life imprisonment as an act of mercy

In short, the jury was essentially instructed that some matter in mitigation had to anchor their decision to impose a life sentence This made the judge's instruction which de-emphasized the importance of non-statutory mitigating circumstances all the more prejudicial

The judge had a duty to avoid a charge that was confusing to a reasonable juror See, State v Manning, 305 S C 413, 409 S E 2d 372, 375 (1991) Appellant should be granted a new sentencing proceeding

The judge denied appellant's right to a fair sentencing hearing in violation of the Eighth and Fourteenth Amendments to the United States Constitution, by admitting state's exhibit 95. This was a horribly graphic photograph of the victim's brain matter coming through her eyes. The photograph was so inflammatory that any probative value it had was outweighed by its unduly prejudicial effect.

Relevant facts

The solicitor told the judge he wanted to have state's exhibit 95 admitted. R. 3531, 16 - 3532, 14. Defense counsel Garrett argued, "we've never contested that he shot her with a shotgun. The second thing is, your honor, this is a very, very, horribly graphic photograph. It will undoubtedly cause the prejudices of these jurors to be swayed tremendously." R. 3532, 11 6-12.

Defense counsel also argued, "This is not the condition she was in." R. 3532, 11 13-14. The judge ruled "Ninety-five's admitted over objection."¹⁰ R. 3533, 1 4-5.

DISCUSSION

State's exhibit 95 is unquestionably a horribly gruesome photograph. It is more than not pleasant to look at -- it was sickening. The photograph shows brain matter coming out of the side of the victim's eyes. Defense counsel correctly argued the unduly prejudicial effect of this horribly gruesome photograph outweighed its probative value. R. 3532, 11 6-

¹⁰ The photograph, state's exhibit 95 is on file with this Court.

12 See, State v Kornahrens, 290 S C 281, 350 S E 2d 180 (1986), State v Alexander, 303 S C 377, 401 S E 2d 146 (1991)

This gruesome photograph invited a death sentence based upon improper passion See State v Patrick, 289 S C 301, 345 S E 2d 481 (1986) It was gratuitous, and intended to inflame the passions of the jury The photograph could not have had any other effect on a reasonable juror

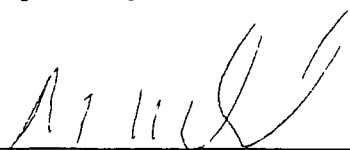
Photographs which are gruesome or inflammatory function only to deny the defendant a fair trial, and violate due process However, a sentence of death must be "based on reason rather than caprice of emotion " Gardner v Florida, 430 U S 349, 357-358, 97 S Ct 1197, 1204 (1977) The admission of this photograph violated appellant's rights under the Eighth and Fourteenth Amendments to the United States Constitution Woodson v North Carolina, 428 U S 280, 305, 96 S Ct 2978, 2991 (1976)

Because the unduly prejudicial effect of this inflammatory photograph outweighed any probative value, because it did not show the victim in the position in which she was found, and because it invited a decision of death based upon improper passion, the judge abused his discretion in admitting this photograph Appellant should be granted a new sentencing hearing

CONCLUSION

By reason arguments 1, 2 and 3, appellant's conviction should reversed, and this case remanded to the Abbeville County Court of General Sessions for a new trial By reason of arguments 4-7, appellant is entitled to a new sentencing hearing

Respectfully submitted,



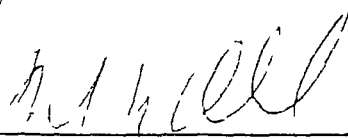
Robert M Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 1999

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR



ROBERT M DUDEK
Assistant Appellate Defender

1122 Lady Street, Suite 940
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant

June 1, 1999

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Appeal from Abbeville County

 J Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

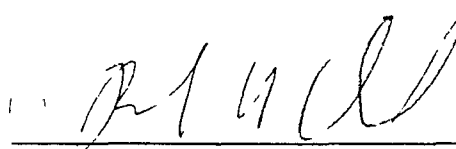
V

JOHN KENNEDY HUGHEY,

APPELLANT

 CERTIFICATE OF SERVICE

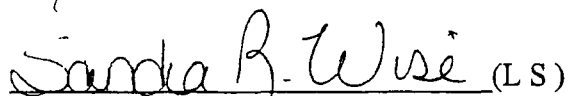
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J Zelenka, Esquire, this 1st day of June, 1999



 Robert M Dudek
 Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
 this 1st day of June, 1999

 (L S)
 Notary Public for South Carolina

My Commission Expires February 3, 2005

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Abbeville County

J. Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

V.

JOHN KENNEDY HUGHEY,

Appellant

INITIAL BRIEF OF RESPONDENT

CHARLES M. CONDON,

Attorney General

JOHN W. MCINTOSH,

Chief Deputy Attorney General

DONALD J. ZELENKA,

Assistant Deputy Attorney General

SC Office of the Attorney General

Post Office Box 11549

Columbia, South Carolina 29211

(803) 734-6305

W. TOWNES JONES, IV,

Solicitor, Eighth Judicial Circuit

Post Office Box 516

Greenwood, South Carolina 29648

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES	111
APPELLANT'S STATEMENT OF ISSUES ON APPEAL	viii
RESPONDENT'S STATEMENT OF THE FACTS	1
STATEMENT OF THE STATE'S VERSION OF FACTS	3
ARGUMENTS	
I The trial judge did not commit an error of law in concluding § 24-3-930 was an exemption that did not automatically disqualify juror Daly solely because he was an employee of the South Carolina Department of Corrections. Upon a review of the entire voir dire, the judge did not abuse his discretion in qualifying Daly when his statements reveal a person who would be fair and impartial	10
II The trial judge did not err in failing to instruct on requested specific factual examples of legal provocation similar to claims in his case when the trial judge gave a full instruction on voluntary manslaughter	20
III The trial judge did not err in the guilt phase in overruling a general relevance objection to the testimony of the victim's widower, Mack Harris, on the issue of whether he saw red colored substance on the floor of his kitchen. His complaint about the prejudice of Harris' testimony relates to unobjected matter that was cumulative to other evidence presented	27
IV The trial judge did not err in failing to charge the statutory mitigating circumstance that "the defendant's capacity to appreciate the criminality of his conduct, or his ability to conform his conduct to the requirement of the law was substantially impaired where there was no evidence to support it. Further, the trial judge instructed the jury to consider as nonstatutory mitigation, "his level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult." As well as statutory factors of "under the influence of mental or emotional disturbance and the age and mentality of the defendant."	32
V The trial judge did not abuse his discretion in allowing various victim impact witnesses to give lengthy answers in response to relevant	

	questions on how the crime had impacted on their lives under <u>Payne v. Tennessee</u>	37
VI	The trial judge did not err in his instructions related to nonstatutory mitigating circumstances where it allowed the jury to consider relevant mitigating circumstances and did not unconstitutional limit the jury's consideration of evidence	41
VII	The trial judge did not err in allowing the introduction of state exhibit 95 in the penalty phase which revealed the face of Tesheka Jackson where it was relevant and assisted the testimony of the pathologist	45
	CONCLUSION	49

TABLE OF AUTHORITIES

Cases

Boyde v California, 494 U S 370 (1990)	41, 44
Buchanan v Angelone, 522 U S 269 (1998)	41, 44
Calderon v Coleman, ___ U S ___, 119 S Ct 500 (1998)	41
Cargle v State, 909 P 2d 806, 828 (Okla Crim App 1995)	37
Earhart v State, 429 A 2d 557 (Md App 1981)	18
Eaton v Angelone, 139 F 3d 990 (4 th Cir 1998)	41
Irby v State, 436 So 2d 1047 (Fla App 1983)	17
James v Atlantic Coast R Co., 199 S C 45, 18 S E 2d 616 (1942)	37
Kent v State, 345 S E 2d 669 (Ga App 1986)	16
Lusk v State, 446 So 2d 1038 (Fla 1984)	17
Morgan v State, 415 So 2d 6 (Fla 1982)	17
Payne v Tennessee, 501 U S 808 (1991)	37
People v James, 594 N Y S 2d 499 (N Y A D 4 th Dept 1993)	16
People v Scott, 583 P 2d 939 (Colo App 1978)	18
People v Willard, 641 N Y S 2d 896 (N Y A D 3 rd Dept 1996)	18
Perigo v State, 541 N E 2d 936, 939-940 (Ind 1989)	46
Riddle v State, 443 S E 2d 557 (S C 1994)	46
Scruggs v State, 488 S E 2d 110 (Ga Ct App 1997)	16
State v Alexander, 303 S C 377, 401 S E 2d 146 (1991)	29

State v Allen, 266 S C 468, 224 S E 2d 881, 888 (1976)	31
State v Anderson, 322 S C 89, 91, 470 S E 2d 103 (1996)	31
State v Austin, 299 S C 456, 385 S E 2d 830 (1989)	25
State v Bagwell, 201 S C 387, 23 S E 2d 244 (1942)	25
State v Bailey, 298 S C 1, 377 S E 2d 581 (1989)	29
State v Barwick, 280 S C 45, 310 S E 2d 428 (1983)	21, 25
State v Bell, 305 S C 11, 21, 406 S E 2d 165, 171 (1991)	41
State v Bellamy, 293 S C 103, 359 S E 2d 63 (1987)	35
State v Benson, 700 P 2d 758 (Wash App 1985)	18
State v Brownlee, 318 S C 34, 455 S E 2d 704 (S C App 1995)	25
State v Byram, 326 S C 107, 485 S E 2d 360 (1997)	37
State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990)	34, 35
State v Davis, 309 S C 326, 422 S E 2d 133 (1992)	28-31
State v Franklin, 318 S C 47, 456 S E 2d 357 (1995)	45, 46
State v Fuller, 297 S C 440, 377 S E 2d 328 (1989)	26
State v Gallman, 79 S C 229, 240, 60 S E 682, 687 (1908)	25
State v Gardner, 332 S C 389, 505 S E 2d 338 (1998)	45
State v Gilbert, 277 S C 368, 287 S E 2d 488 (1981)	15
State v Graham, 79 S C 116, 60 S E 431 (1908)	10
State v Gullledge, 277 S C 368, 287 S E 2d 488 (1982)	15
State v Hartley, 307 S C 239, 241, 414 S E 2d 182, 183 (S C App 1992)	25
State v Henderson, 566 So 2d 1098 (La App 2d Cir 1990)	18

State v Hicks, 330 S C 207, 499 S E 2d 209 (1998)	41
State v Jacob, 574 N W 2d 117 (Neb 1998)	18
State v Johnson, 306 S C 119, 410 S E 2d 547 (1991), cert denied, 503 U S 993, 112 S Ct 1691, 118 L Ed 2d 404 (1992)	29, 37
State v Johnson, 333 S C 62, 508 S E 2d 29 (1998)	24
State v Kornahrens, 290 S C 281, 350 S E 2d 180 (1986)	45
State v Langley, ___ S C ___, ___ S E 2d ___, Op No 24924 (S C S Ct March 22, 1999)	28
State v Livingston, 327 S C 17, 488 S E 2d 313 (1997)	29, 31
State v Lyles, 79 S C 114, 60 S E 433 (1908)	11
State v Matthews, 291 S C 339, 353 S E 2d 444 (1986)	11, 15
State v Merriman, 34 S C 16, 12 S E 619 (1892)	10
State v Plemmons, 296 S C 76, 370 S E 2d 871 (1988)	35, 36
State v Rocheville, 310 S C 20, 425 S E 2d 32 (1993)	37
State v Sims, 304 S C 409, 422, 405 S E 2d 377, 384 (1991)	41
State v Smith, 304 S C 129, 403 S E 2d 162 (S C App 1991)	26
State v Smith, 466 So 2d 1343 (La App 3d Cir 1985)	18
State v Sullivan, 277 S C 35, 282 S E 2d 838 (1981)	37
State v Toland, 36 S C 515, 15 S E 599 (1892)	10
State v Tucker, 478 S E 2d 260 (1996)	37, 45, 46
State v Tyson, 283 S C 375, 323 S E 2d 770 (1984)	25
State v Walker, 324 S C 257, 478 S E 2d 280 (1996)	25
State v Wheat, 775 S W 2d 155 (Mo 1989)	18

State v Wiggins, 330 S C 538, 500 S E 2d 489 (1998)	24
State v Williams, 465 So 2d 1229 (Fla 1985)	17
State v Johnson, 123 S C 50, 115 S E 748 (1923)	10
State v Nance, 320 S C 501, 466 S E 2d 349 (1996)	45
Thompson v State, 442 S E 2d 771 (Ga 1994)	16
Welch v State, 968 P 2d 1231, 1244 (Okla Crim App 1997)	37
Williams v Commonwealth, 21 Va App 616, 466 S E 2d 754 (1996)	17

Statutes

1968 S C Op Atty Gen 275	13
1978 S C Op Atty Gen 209 1970 WL 16782 (S C A G)	13
1980 Acts and Joint Resolution No 382	13
1983 S C Op Atty Gen 80 (1983 WL 142725 (S C A G)	12
Rule 611	38
S C Code § 14-7-850	11, 12
S C Code § 16-3-20(C)(b)(6)	viii, 32
S C Code § 23-6-410 (1994)	11
S C Code § 23-6-430	11
S C Code § 24-3-930	viii, 10, 12, 13, 15
Section 14-7-850	11
§ 14-7-820	16
§ 14-7-840	12
§ 44-11-90	12, 13

§24-1-280

APPELLANT'S STATEMENT OF ISSUES ON APPEAL

1

Whether the judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S C Code § 24-3-930 provides that all guards and officers employed at a penitentiary shall be excepted from service on a jury, and also because Daly was the functional equivalent of a law enforcement officer?

2

Whether the judge erred by refusing to instruct the jury on examples of acts of legal provocation, since the jury was left without any guidance on what might constitute a legal provocation, and the judge had a duty to fashion an appropriate charge to the facts and circumstances of this case?

3

Whether the judge erred by allowing Mack Harris, the husband of the decedent Harris, to testify during the guilt phase about the blood he cleaned off the floor of his home after the shooting, since this testimony was not relevant, and was highly prejudicial?

4

Whether the judge erred by refusing to charge the statutory mitigating circumstance contained in S C Code § 16-3-20(C)(b)(6), which allows the jury to consider the capacity of the defendant to appreciate the criminality of his conduct or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired, since there was evidence supporting that mitigating circumstance?

5

Whether the judge erred by allowing the victim impact witnesses to testify in narrative form, rather than proper question-answer format, since it resulted in the victim's family personally chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v Tennessee*?

6

Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

7

Whether the judge erred by admitting State's Exhibit #95 since this photograph of the victim's face showed brain matter coming from beneath her eyes, was unduly prejudicial, was calculated to inflame the passions of the jury, and denied appellant a fair sentencing hearing?

STATEMENT OF THE FACTS

a Procedural History

The Appellant, John Kennedy Hughey, was indicted on March 11, 1996 by the Grand Jury of the Court of General Sessions for Abbeville County for (1) murder (involving the December 4, 1995 death of Tesheka Lanyra Jackson), (2) murder (involving the December 4, 1995 death of Luevinia H Harris), (3) burglary in the first degree and (4) grand larceny of a vehicle

The prosecution served notice of intent to seek the death penalty On October 13, 1997, the matter was called for a trial before the Honorable J Derham Cole The Appellant was present and represented by court-appointed counsel, Billy J Garrett, Edward McCallum, and Robert Tinsley The prosecution was represented by W Townes Jones, IV, Solicitor of the Eighth Judicial Circuit and Deputy Solicitor, Michael Coulter At the outset Hughey was ordered submitted to the William S Hall Institute on October 13, 1997 for a psychiatric evaluation Tr pp 206-209, p __ (Written Order for Evaluation) The evaluations was then completed prior to the trial

On October 17, 1998, the proceedings restarted Tr p 209 The trial began after jury selection on October 22, 1997 The Appellant testified on his own On October 27, 1997 the jury returned with guilty verdicts on all four (4) counts Tr p 3495, ll 9-17

On October 28, 1997 at 11 00 a m the sentencing proceedings began Tr p 3508, ll 1-2 After the presentation of evidence, the trial judge charged the following statutory aggravating and mitigating circumstances

On Count One, the statutory aggravating circumstances to consider were

1 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of burglary in the first degree

2 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of larceny with the use of a deadly weapon

3 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

On Count Two, the statutory aggravating circumstances to consider were

1 That the murder of Luevinia H Harris was committed while in the commission of the crime or act of burglary in the first degree

2 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

The statutory mitigating circumstances instructed on each count were as follows

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 age or mentality of the defendant at the time of the crime

You may also consider any NON-STATUTORY mitigating circumstance(s)

As to each count, the jury found beyond a reasonable doubt the existence of all the statutory aggravating circumstances Tr p 4073 The jury returned a recommendation of death for each count Tr p 4073 On October 30, 1997 Judge Cole sentenced John Kennedy Hughey to death on each count of murder He was sentenced to a life sentence on Count III of burglary in the first

degree and ten (10) years on Count IV for grand larceny

On November 7, 1997, counsel filed the notice of appeal which was served on the Eighth Circuit Solicitor's Office on November 10, 1997

STATEMENT OF THE STATE'S VERSION OF THE FACTS

“ what he did was nothing more than two brutal vicious murders Two senseless, needless, tragic, unjustified murders That's what he did And it [doesn't] matter why he did it or really how he did it He had no excuse He had no reason He had no basis for killing those two women in that home on that day None ” Tr p 3406, l 24 - p 2407, l 7 These comments in Solicitor Jones guilt phase closing argument properly sum up the case against John Kennedy Hughey involving his murder of his former girlfriend Tesheka Jackson and Luevinia Harris who was in her own home on the telephone to the police when Hughey's second shotgun blast within her home brutally ended her life

On December 4, 1995, Marcus Harris called his mother, Luevinia Harris at 11 56 a m from Oklahoma City Tr pp 2212, 2225-2229 He found that his mother's tone revealed that she was scared and asked her what was wrong and learned that John Hughey was present in his mother's house with a gun He got his cousin, Tesheka Jackson, on the telephone, who also with a “scared” tone to her voice, confirmed John had a gun, and attempted to get John on the telephone, but John refused to come to the telephone and attempts to turn on the speaker were unsuccessful Tr pp 2213-2218, 2220 Marcus then immediately called back to the house at noon and the speaker was activated Harris heard John respond and told him to leave Harris heard cussing in the background and his mother call out “just leave ” Tr pp 2218-19, 2245 Tussling was heard while his mother was on the telephone Tr pp 2245-46 Then Harris heard

his mother state "Call the police, call the police" Tr pp 2219, 2246 Harris hung up the telephone and within four seconds called 911 in Oklahoma City who patched him into the Abbeville emergency system, but he was too late Tr pp 2219-21 While on the phone, Marcus Harris learned the tragic truth of Hughey's malicious attacks "one down with gunshot wound to the head," "two down with gunshot wound to head" Tr pp 2220-21

"Don't shoot that gun in here Don't shoot that gun in here" Tr pp 2278-79 These were the final words and request to John Kennedy Hughey from Luevinia Harris while she was on the telephone with Sgt Angela Patterson, the Abbeville City Police dispatcher This was immediately after Mrs Harris requested the police to come to her home Tr pp 2278-79 Without hearing any scuffling or fighting, the dispatcher heard an initial gunshot and within six seconds heard another gunshot Tr p 2279 Although Mrs Harris voice had been described as "excited, demanding, and extremely upset," there was now silence, except for the two gunshots Tr pp 2279-80 The dispatched officer was on his way Tr p 2280

She then received a call from Oklahoma City from Marcus Harris, Mrs Harris' son, who stated police needed to go to his mother's home because John Hughey had a gun Tr pp 2281 82, 2284 She advised him the police were there and that she had just gotten off of the telephone with his mother Tr p 2282 The police then entered her home and described the injuries to the victims Hughey was not on the scene when the police arrived having left within 45 seconds of the telephone call by Luevinia Tr p 2285 The dispatcher had spoken to the victim at 12 04 and the police arrived at 12 05 Tr p 2289

Cpl Patrick Neil Henderson of the Abbeville Police Department was with the dispatcher when the fearful call from Luevinia Harris came in Tr p 2291 He was on his way when he

heard the first “pop” like a gunshot and learned that there was a second before he arrived. After hearing a baby cry upon his entry to the Harris home, he found Luevinia Harris on the floor of the hallway in a pool of blood without a pulse. Tr p 2313. He recognized Tesheka Jackson as the second person who was laying across the bed with her head down. Tr pp 2316-17. Both had head wounds.

Cpl Henderson recognized Tesheka Jackson from an incident on December 3, 1995 when she had told him that Hughey said he would kill her and Henderson advised her to stay at a safe home. Tr pp 2319-21, 2650-51.

Lt Barry New also arrived at Harris home. He noticed damage to the front door and the strike plate was on the floor. Tr pp 2253-55. He found a knife on the floor that had Tesheka’s shoe print apparently on it. Tr p 2255. He saw Ms. Harris in the hallway near a telephone. Tr pp 2357-60. He located Tesheka with a gunshot wound to her head and obviously deceased. Tr p 2361. Also, a single shot shotgun was found in the bedroom with a shell in it. Tr pp 2362-64. The gun belonged to Hughey’s deceased father. Tr p 2364. A shotgun shell box was found in the defendant’s bedroom. Tr p 2368.

The ominous planning of the tragedy was revealed in the testimony of Cpl Mitch Christopher who found a note by the Appellant on his door stating “As of this morning I will be dead. Love you all. Please take care of my kids.” Tr p 2393. The note was confirmed by Hughey in his testimony. Tr pp 3111-12, 3202.

Michael Adams, who started dating Tesheka in February 1995 revealed that on December 3, 1995, the Appellant came up and pushed Tesheka and stated that he was going to kill both of them and then ran away. Tr pp 2402-03. This incident was reported to the police. It was

reported by the decedent that Hughey told her "I'm going to kill you, I'm going to kill both of you" Tr p 2443

Upon his arrest in Georgia, Hughey advised the authorities that "I killed them, it was an accident, the gun went off" Tr p 2456 Hughey had tried to cut his wrist prior to the arrest Tr pp 2463-66

It was also learned that during his flight within thirty (30) minutes of the crime, Hughey had used the victim's ATM card while driving her car at an ATM in Anderson Tr p 2471

SLED Agent David Black described the crime scene and the various location of red substances at the home. He documented the evidence of forced entry at the door and the knife with the impression of the sole Tr pp 2485-89. He showed the location of shotgun shells and gun found as well as the blood splatter marks Tr pp 2494-2504. He located the telephone pulled from the wall and one in the bedroom Tr pp 2504-2509. He documented the injuries to the bodies Tr p 2511

The pathologist, Dr. Woodard, found the cause of death of Luevinia Harris to be from a solitary gunshot to the head which resulted in instant brain death Tr p 2532. He opined that the distance was between two and ½ and three feet for the shooting Tr pp 2538-39. Tesheka Jackson has three major injuries: 1) the fatal gunshot wound to the head above the right ear that exited her eye, 2) a large bruise on her face likely caused by the blunt end of the shotgun and 3) a stab wound in her chest possibly caused by the knife found on the floor Tr pp 2541-42. The doctor opined the shooting distance was at a maximum of two feet Tr p 2547

David Black described returning to the crime scene, after the defendant's statement, and finding another shotgun hole in the bathroom and subsequently finding the third shell in a bag

from the bedroom Tr pp 2659-66

Nancy Skraba described locating blood either consistent with the victim's or insufficient for typing in the house Tr pp 2678-91

The banks confirmed the ATM transaction and presented the video photo of Hughey at the ATM machine Tr pp 2701-20 The record revealed the stolen Mitsubishi was in the name of Tesheka and her grandparents, not Hughey Tr pp 2788-2803

Agent Dan DeFresse of SLED opined that each of the shells were consistent with being fired from the located shotgun and the bathroom firing was at a distance of 3 to 5 feet Tr pp 2814-2825

Agent Eddie Clark described the Appellant's inconsistent oral statement that he went to the Harris home and had an argument with Tesheka Initially, she threw a vase at him and later she came into the house with a shotgun she had gotten out of the car Tr pp 2856-57 He stated he pushed the gun away and it went off He tried to run through the trailer, but she followed Mrs Harris tried to get between them and grabbed the gun and it went off He said Tesheka shot Mrs Harris Tr pp 2857-58 He was scared and ran into the bedroom and Tesheka followed and he tried to get the gun away from her and it went off and he left Tr p 2858 Jerry Sloan of SLED confirmed the recited oral statement Tr pp 2876-77

The victim's mother, Bernice Jackson, confirmed that Tesheka normally stayed at her grandmother's home and denied that the Appellant and Tesheka ever lived together, were husband and wife, or otherwise She confirmed that she had met her daughter's friend, Mike Adams, before Thanksgiving Tr p 2888 She never saw her daughter with a shotgun Tr p 2890 She last spoke with her on December 3 when looking for a place to stay Tr p 2886

George Mack Harris, Luevinia's husband, confirmed that the front door and bedroom doors were not in the same condition as when he left before the murders Tr pp 2904-11 He described the telephone calls he received from Hughey that night The first one was after midnight and he declared that Sheka's not there The second call came between 4 and 5 a m after he learned she was there and told Hughey she was asleep, call back later At 6 a m, he calls again and says "Mack, I won't be here in the morning" and he then gives Sheka the telephone Tr pp 2911-13 Harris also described the fact that the red substances were not on the floor and other areas when he left on December 5, 1995 Tr pp 2916-18

The defense theory of the case sought to present a more stable relationship between the victim and the Appellant though the testimony of Chris Burton, a friend, and Gloria White Harrison, the Appellant's sister Burton, however, admitted that on December 3, 1995, Hughey called him upset and crying, but he did not see him after the call Tr pp 2955-60 He told Burton "I couldn't take it no more", crying and upset Tr p 2973, ll 6-21, p 2992 ("I can't take it no more, tell my sisters and them I love them take care of my kids for me")

His sister Gloria described her alleged presence at the December 3, 1995 incident when she drove him over to the grandmother's house to pick up the children She said she viewed the confrontation, but denied there were any threats to kill made Tr pp 3017-20 She then described the arrest at her Georgia home on December 5 and his attempt to cut his wrist Tr pp 3023-24

John Hughey testified in the guilt phase He revised his version from what he told police, in fact, denying he told them anything He claimed they "assumed" those facts Tr pp 3175-76 In this version, he arrived at the scene to take the car to be fixed, but that Tesheka slapped

him because he had caught her with Adams. He claimed Mrs. Harris then invited him in for coffee and Tesheka started attacking him first with a vase, then knives, ultimately resulting in her coming at him with a knife and he pushed her resulting in a stab. This occurred after Marcus Harris had called. He then claimed he ran out of the house and got the shotgun from the trunk of the car. Tr pp 3133-40. He said Tesheka was on the steps stating "I'm going to kill you." Tr p 3142. He stated that he told her if she put the knife down, he'd put the gun down. Tr p 3142. Walking toward her, he then spit on him and tried to slam the door in his face. He proceeded into the house. While tussling at the door, the gun went off and somehow Mrs. Harris got hit. Tr pp 3143-45. He said he was mad and was trying to shoot at Tesheka. Tr p 3146. Although the knife had dropped, he thought she had the knife and chased her. Tr pp 3146-47. He said Mrs. Harris was "just in the wrong place at the wrong time." Tr p 3151, ll 5-10.

On cross-examination, he denied having the shotgun when he entered. Tr p 3213. Further, he denied hearing Mrs. Harris tell him to not shoot gun. Importantly, he also did not recall why he had more shotgun shells with him. Tr pp 3238-39.

ARGUMENT

I The trial judge did not commit an error of law in concluding § 24-3-930 was an exemption that did not automatically disqualify juror Daly solely because he was an employee of the South Carolina Department of Corrections. Upon a review of the entire voir dire, the judge did not abuse his discretion in qualifying Daly when his statements reveal a person who would be fair and impartial.

S C Code § 24-3-930 provides “that all guards or keepers and other officers employed at the penitentiary shall be exempted from serving on juries and from military or street duty ”

(Emphasis added) The Appellant initially relies upon this statutory exception to contend that juror Brian Daly, an employee at the McCormick Correctional Institution of the South Carolina Department of Corrections, was automatically disqualified from jury duty as a result of his employment. The trial court, consistent with the prior decisions of this Court concluded that the statutory exemption was not a disqualification and rejected the claim that Daly was ineligible to serve. Tr pp 866-867, 895. Respondents submit that the trial judge did not commit an error of law in rejecting this request.

There is a distinction between “exemptions” from jury service and statutory disqualifications. In State v. Graham, 79 S C 116, 60 S E 431 (1908), this Court stated that “an exemption from jury duty is not a disqualification to act as a jury, but is a mere personal privilege, which the juror may claim or waive, and if he does not claim his privilege the parties have no right to object to him on this account ” 79 S C at 119, citing State v. Toland, 36 S C 515, 15 S E 599 (1892), State v. Merriman, 34 S C 16, 12 S E 619 (1892). Contrasting exemptions are statutes that discuss eligibility, qualification, or ineligibility to serve. In State v. Johnson, 123 S C 50, 115 S E 748 (1923), the Court interpreted language that “eligible” means

capable of serving, legally qualified to serve and that a statute that stated a certain county officer was “ineligible” as a juror disqualified that person from service as a matter of law. Accord, State v. Lyles, 79 S C 114, 60 S E 433 (1908)(same as Graham)

More recently, in State v. Matthews, 291 S C 339, 353 S E 2d 444 (1986), the Court again recognized that “an exemption [under S C Code § 14-7-850] is a privilege and not a qualification” for an officer of the United States. Relying upon Graham, the Court stated “the parties may not object to a prospective juror due to his employment status under Section 14-7-850 if the prospective juror himself does not claim his privilege of exemption.” Matthews, 291 S C at 343, 353 S E 2d at 447

a How the issue was raised at trial

At the outset of the jury selection process, inquiry was made by the trial judge on whether, among other things, any potential jurors were a “state constable, a sheriff or deputy sheriff, [or] a highway patrolman.” Tr pp 227-228. Juror Brian Daly, No 55, announced that he was employed by the South Carolina Department of Corrections. Tr p 229, ll 3-23. Daly declared that he did not attend the South Carolina Criminal Justice Academy and that he had not been certified by the Academy. Tr p 229, ll 17-23.¹ The trial judge then declared “that would not disqualify you.” Tr p 229, ll 22-23.

Prior to the individual voir dire of juror Daly, the trial court stated his interpretation of S C Code § 24-3-930 as an exemption that lies with the juror. Tr p 867, ll 3-4.

¹ See S C Code § 23-6-410 (1994) concerning training of officers and other personnel of the South Carolina Department of Corrections. S C Code § 23-6-430 concerns certification of law enforcement officers.

Defense counsel McCallum argued that the trial judge should look to the general exemption statute, § 14-7-840, for guidance Tr p 867² He asserted that the “shall be exempt” language in the prison guard statute makes it clear that it should be “an absolute exemption because of the close association with prisons, people who have been convicted of crimes, [and] how that may influence their thought pattern ” Tr p 868, ll 11-17 Secondly, defense counsel stated the close association with law enforcement would make that profession very difficult to be fair Tr p 868

In seeking to clarify the defense position upon the trial court’s inquiry, defense counsel McCallum declared that the prison guard statute had not been interpreted by this Court or the Attorney General Tr p 869³

² § 14-7-840 provides as follows

§ 14-7-840 Exemption from jury service, requirement of direction by court, maintenance of list of persons excused

No person is exempt from service as a juror in any court of this State except men and women sixty-five years of age or over Notaries public are not considered state officers and are not exempt under this section A person exempt under this section may be excused upon telephone confirmation of date of birth and age to the clerk of court or the chief magistrate The jury commissioners shall not excuse or disqualify a juror under this section The clerk of court shall maintain a list of persons excused by the court and the reasons the juror was determined to be excused

³ The Attorney General had issued opinions to S C Court Administration that opined that the failure to repeal § 24-3-930 (exemption for guards) and § 44-11-90 (exemption for mental health staff) or to include then in § 14-7-850 continued to provide the exemption 1979 WL 43097 (S C A G), 1979 WL 42703 (S C A G), 1979 WL 43246 (S C A G) The office, like the Court, has consistently opined that an exemption is not a qualification, but a personal privilege that may be waived 1983 S C Op Atty Gen 80 (1983 WL 142725

He contended that the language was the exemption of § 14-7-840 was different than 24-3-930 and the analogy between the two was inappropriate and different from the age sixty-five exemption. Tr p 870. Counsel McCallum stated “it’s just a question of what the legislative intent is and it seems clear that no guard should be an appropriate person to sit on the jury.” Tr p 870, ll 11-16.

The trial judge noted that “if it’s not appropriate, I would assume they (the Legislature) would say they shall be excluded from serving.” Tr p 870, ll 15-17.

The Solicitor stated the state’s position was consistent with the plain meaning of the use of the term exempt and that it is up to the individual whether the exemption is used or not. Tr pp 870-71.

Defense counsel Garratt then also noted that juror Daly included in his juror questionnaire when asked about law enforcement ties that he was with the Department of Corrections. Tr pp 871-72. Defense counsel Garratt maintained that this reveals that he is “associated with law enforcement.” Tr p 872.

During the voir dire, Daly declared his willingness to serve and not use the exemption. Tr p 873, ll 1-13. During the voir dire, defense counsel Tinsley developed that Daly had been employed at McCormick Correctional Institution for six (6) years. Tr p 882, ll 9-16. He stated that he had not worked on death row, but learned where death row was during orientation. Tr p 884, ll 1-17. The state sought to question the juror about the term “execution-style

(S C A G) 1978 S C Op Atty Gen 209 1970 WL 16782 (S C A G), 1968 S C Op Atty Gen 275. It should be noted that § 44-11-90 was repealed in 1980. 1980 Acts and Joint Resolution No 382, p 1240. § 24-3-90, however, has not been repealed or amended since the 1979 opinions.

murder” , and the defense objected Tr pp 891-893 The defense then sought to have the juror removed because of the prosecutor’s use of the term execution-style murder had “tainted” the juror regardless of the withdrawal of the question Tr p 893, ll 10-14 After the conclusion of voir dire, the following occurred

MR TINSLEY Your Honor, I think he’s a great juror and we’d love to have him, however, he is tainted beyond repair and we move that he be excluded at this point based upon the Solicitor’s question about execution-style killing

THE COURT All right So you’re sole objection to the qualification of the juror is based upon the Solicitor’s question?

MR TINSLEY And, also, re-raise the objection, also, issue, we had earlier

Tr p 895, ll 13-22 The trial court qualified the juror Tr p 895, l 24

Prior to the actual drawing of the jurors, counsel renewed his motion to remove juror Daly because he “was contaminated by the solicitor on the ‘execution-style killing’” Tr p 2007, l 2 See also, Tr p 2039, ll 12-13 Juror Daly sat on the panel after the defense had used six (6) strikes Tr p 2100 The defense used all of ten of its challenges Tr pp 2097-2103

After the jury selection, the defense restated that he objected to juror Draft (59), juror Battle (10), and juror 95 that he used strikes on Tr pp 2108-09⁴

b Law/Analysis

1 § 24-3-930 does not require disqualification

⁴ Prior to jury selection, the defense initially stated jurors 59, 95, 10, 53, 305, 322, and 317 should be disqualified Tr p 2039, ll 1-3 He then referred to juror 55 as Daly apparently in lieu of 53 who he did not specify Tr p 2039, ll 12-13

Juror Brian Daly was properly qualified for jury duty, even though he was an employee of the McCormick Correctional Institution.⁵ § 24-3-930 provided a exemption for him from jury service that he chose not to request. Tr. p. 873, ll. 1-13. Since an exemption is a privilege and not a disqualification, the Appellant has no standing to object to the failure of the juror to claim the exemption. Matthews, supra. His argument to the contrary is without support.

2 The mere fact that Daly indicated or responded that he was law enforcement officer does not mandate a disqualification for an employee of the South Carolina Department of Corrections

At trial and in his brief, Hughey asserts that because Daly considered himself a law enforcement officer that he should have been disqualified for cause for that reason. The trial judge must assure himself that each juror is unbiased, fair, and impartial. State v. Matthews, supra, State v. Gullledge, 277 S.C. 368, 287 S.E.2d 488 (1982). The qualification of a juror is addressed to the sound discretion of the trial judge, whose decision will not be disturbed unless wholly unsupported by the evidence. State v. Gilbert, 277 S.C. 368, 287 S.E.2d 488 (1981).

This Court has found that a former SLED agent, a special deputy sheriff, and a member of a criminal investigation division of the Navy who was previously with a county sheriff's department were not automatically disqualified merely because of their "law enforcement" ties. State v. Hess, 279 S.C. 14, 301 S.E.2d 547 (1983) (former SLED Agent), State v. Matthews, supra.

The Appellant contends that his disqualification is mandated because Daly orally

⁵ The Attorney General had earlier opined that all employees of the South Carolina Department of Corrections are exempt from service on juries, rather than those only employed at the penitentiary. 1979 WL 43097 (S.C.A.G.).

responded to the inquiry by the trial court and the written questionnaire about law enforcement officer by indicating that he was an employee of the South Carolina Department of Corrections Tr pp 229, 871-72 The trial judge did not commit an error of law in rejecting Hughey's new rule of "automatic disqualification" ⁶

Although not specifically addressed by this Court, other courts have held that correctional employees are not automatically disqualified from jury service in a criminal case In People v James, 594 N Y S 2d 499 (N Y A D 4th Dept 1993), the court upheld the trial judge's discretion in seating a correctional officer The court specifically rejected the notion that the fact that a potential juror is a correctional officer does not lead inexorably to an inference that he is inherently biased against criminal defendants In that case, the juror testified that his ability to render a fair and impartial verdict would not be affected by his employment Under those circumstances the court determined the juror had no predisposition against the defendant In Georgia, the court found that a correctional officer with certification as a peace officer was not required to be disqualified Thompson v State, 442 S E 2d 771 (Ga 1994), Kent v State, 345 S E 2d 669 (Ga App 1986) In each of those cases, the Georgia court found that a correctional officer's limited police power do not necessitate the imputation of bias as in the instance of full-time police officers In Scruggs v State, 488 S E 2d 110 (Ga Ct App 1997), the court reaffirmed its rule that its rule of excusal for full-time law enforcement officers was not

⁶ Hughey made no assertion in the trial court or in the Initial Brief of Appellant that Daly's employment status with SCDC satisfies the terms of § 14-7-820 A correctional employee, however, does not have broad authority and power to arrest similar to a deputy sheriff or a highway patrolman See §24-1-280 (Peace officer power limited to transport, custody, or recapture of inmate)

applicable to correction officers ⁷

In Williams v Commonwealth, 21 Va App 616, 466 S E 2d 754 (1996)(en banc), the Court of Appeals of Virginia concluded that the fact that a venire person was a correctional officer and the defendant was charged with an assault on a correctional officer did not, without more, require that bias be imputed to the venire person and therefore did not disqualify him per se from serving on the jury. In State v Williams, 465 So 2d 1229 (Fla 1985), the court held the trial judge did not abuse its discretion in refusing to excuse for cause correctional officers notwithstanding the correlation of an unusual specific employment risk for the challenged jurors and the victim of the offense charge. In that case, the crime charged was battery of a correctional officer. The Florida court upheld its earlier decisions in Lusk v State, 446 So 2d 1038 (Fla 1984) and Morgan v State, 415 So 2d 6 (Fla 1982) that rejected an argument that correctional officers should be disqualified since a law enforcement type position inherently creates a disability and concluded state prison employees are not automatically disqualified from jury service. The court applied the test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and instructions on the law. 465 So 2d at 1231. In Morgan, the Florida court specifically declined to equate all correctional officers within its statutory exclusions of “sheriffs, deputies, and

⁷ Correctional officers have been disqualified when the circumstances of the particular crime reveal a high potential for bias that does not exist here. In Irby v State, 436 So 2d 1047 (Fla App 1983), the court found a correctional officer should have been disqualified since the trial involved the assault on a correctional officer. The offense was against a person in the similar course of employment involving unusual risks identical to the potential juror. Irby, however, was specifically disapproved by the Florida Supreme Court in Williams, supra 465 So 2d at 1230 which found correctional officers qualified, even in prison cases.

municipal police officers ”

Other states have rejected similar arguments that correctional officers were per se disqualified from jury service. In State v. Jacob, 574 N.W.2d 117 (Neb. 1998), the court upheld the refusal to disqualify a juror who worked for the correctional agency. In People v. Willard, 641 N.Y.S.2d 896 (N.Y.A.D. 3rd Dept. 1996), court did not err in denying request the excuse in a noncapital case a prison corrections counselor who wore a t-shirt stating “Support your local corrections officers. Reinstate capital punishment”, where juror did not have a state of mind that would preclude him from rendering an impartial verdict. In State v. Henderson, 566 So.2d 1098 (La. App. 2d Cir. 1990), the court found the trial judge did not abuse his discretion in qualifying a field sergeant at a correctional facility. Accord, State v. Smith, 466 So.2d 1343 (La. App. 3d Cir. 1985). In State v. Wheat, 775 S.W.2d 155 (Mo. 1989), the court held that the defendant was not entitled to challenge for cause an employee of the Department of Corrections despite employee’s expressed concern that if defendant were convicted he might be confined in the same institution where the employee was assigned to work. In State v. Benson, 700 P.2d 758 (Wash. App. 1985), the Washington court upheld the qualification of a juvenile correctional officer whose voir dire revealed his ability to be impartial. In Earhart v. State, 429 A.2d 557 (Md. App. 1981), the Maryland court similarly upheld the refusal to strike for cause a juror who worked for a correctional official where the juror declared his ability to be impartial.⁸

Here, the voir dire of Brian Daly reveals no actual or potential bias. The inquiry revealed

⁸ In People v. Scott, 583 P.2d 939 (Colo. App. 1978), the court concluded that a prison counselor and baker should have been excluded under its statutory disqualification for “compensated employees of public law enforcement agency” where state penitentiary was a “law enforcement agency” within the meaning of the statute.

no exposure to the publicity and acceptance of the presumption of innocence Tr pp 874-875

He stated that he had, prior to the court's inquiry, never given much thought about whether he would be able to sentence a person to death Tr p 877, ll 22-25 Further, he stated "I can't say right now I could choose I would have to, you know, wait and see what happens I don't know what I would do right now " Tr p 879, ll 4-8 He declared "I have none", concerning an opinion on what he might do and that "I have no reason" as to whether he could not be a fair and impartial juror Tr p 880, ll 17-25 He was also unaware of the defendant, his family, or the decedents Tr p 882 He admitted to the defense that he was "open-minded on the matter " Tr p 885 He further declared to the defense he would be free to impose a life sentence Tr p 895, ll 3-5

The trial judge properly found that Daly was qualified to serve where his sworn expressions firmly reveal his impartiality in this case The Appellant's argument that his employment as a correctional employee requires that bias be imputed to him is not supported by law or in this case by fact His argument to the contrary is without support ⁹

⁹ It should be noted that even while requesting his disqualification, defense counsel referred to Daly as a "great juror and we'd love to have him " Tr p 895, ll 13-16 It is not remarkable that he did not choose to strike the juror despite available peremptory when he was seated

II The trial judge did not err in failing to instruct on requested specific factual examples of legal provocation similar to claims in his case when the trial judge gave a full instruction on voluntary manslaughter

In this case, the trial judge instructed on the possible lesser included offense of voluntary manslaughter. Tr pp 3465-67. The state's theory of the case pointed to the expressed malicious intent of John Hughey to murder his girlfriend. This is set forth in the Statement of the Case. Simply put, driven by malice towards his ex-girlfriend, after a verbal threat to kill her and notes that he intended to be dead, Hughey tracked her down in a safe house of her aunt, Luevinia Harris. He forcibly entered the home with a shotgun and confronted his ex-girlfriend. While Mrs. Harris was on the telephone begging the police to arrive, he shot her in the head, instantly killing her. He then chased Tesheka back to a bedroom. She had previously been stabbed with a knife, dropped by the front door. Like her aunt, she was also killed instantly by a shotgun blast to her face, after having received a blunt blow to her face. Hughey fled the scene instantly stealing Tesheka white Mitsubishi. He stopped at an ATM in Anderson where he used her stolen ATM card to get \$30.00.

Unlike the state's theory, Hughey initially claimed to his sister it was an accident, then told the police that Tesheka had brought the shotgun into the home and she had shot Mrs. Harris while they struggled. He contended initially that she threw a knife and vase at him and eventually chased him to the back bedroom where she was shot in a struggle over the shotgun. At trial, however, confronted with the overwhelming evidence of his possession of the shotgun, Hughey contended that he arrived on the scene without any intent to kill. He contended that after Tesheka had slapped him that Mrs. Harris invited him into her home for coffee. According to

Hughey, Tesheka then assaulted him after he was going to talk to Marcus on the telephone by throwing a vase and knife at him. She then assaulted him by coming after him with a knife. Tr pp 3134-35. He blocked her assault and pushed her back when she apparently got stabbed. Tr pp 3133-36. Hughey said he left the house and went to her car and retrieved a shotgun, rather than leaving. Tr pp 3141-42. He returned to the house where she still held the knife cussing at him and she spit on him. Tr pp 3141-42. Tussling at the door, a shot went off as he held the gun and Mrs. Harris was hit. Tr pp 3143-45. He said he was mad, trying to shoot at Tesheka and continued to chase her back to the bedroom where she was shot. Tr pp 3146-3151.

The Appellant sought to get special instructions that specifically “pulling a knife on defendant”, “pointing a gun at defendant”, “spitting in the defendant’s face”, “mutual combat” and “finding spouse in the act of adultery” were examples of “acts of provocation sufficient to negate malice.” Request to charge #10. These instructions on the facts were rejected by the court in favor of the general charge on voluntary manslaughter. Respondents submit that there can be no error in failing to give the requested instruction where the given charge was fully and fairly covered under State v. Barwick, 280 S.C. 45, 310 S.E.2d 428 (1983).

a. How the Issue Was Raised at Trial

After the guilt phase of the trial, the defense made numerous requests for instructions. Tr pp 3372-3376. At the outset, the trial judge announced “I’ll not give any instruction that’s incumbent upon the facts.” Tr p 3376, ll 2-3. After the closing arguments of counsel, the court considered the defense counsel’s Request No. 10 for voluntary manslaughter. This request included, among other matters specific examples of provocation in the request to charge

“Examples of acts of provocation that would be sufficient

to negate malice are [pulling a knife on the defendant][pointing a gun at the defendant][humiliating assault such as spitting in the defendant's face][an assault of a family member][sudden mutual combat in which one of the participants is killed by the other without a previously informed intention to do so][finding one's spouse in the act of adultery][the deceased having molested your minor child]

Defense Request to Charge #10, R p

Counsel Tinsley for the defense pointed out "on our request to charge number ten that our examples came right out of Erwin's book section 29-9 pages 224 and 25, of course, Solicitor Coulter objected to our paragraph seven ¹⁰ We further point out "they are examples right out of the book, and Solicitor Jones actually argues a couple of those " Tr p 3442, ll 1-17

The trial court, however, responded that there was nothing wrong with counsel arguing the facts I just don't feel comfortable with giving the instruction on the facts of the case If the jury comes back at some point needing some further explanation, then I'll consider giving them some type of explanation But until that time, "I have a general instruction that I provide that I think will be clear " Tr p 3442 Ll 18-24

The trial court then instructed the jury on murder and the lesser included offense of manslaughter Tr pp 3460-2468 The trial judge's entire instruction on manslaughter is set forth at Tr p 3464, l 20 - p 3468, l 2

The judge charged the jury that "voluntary manslaughter is the felonious taking of the life of another human being in sudden heat of passion provided it based upon a sufficient legal provocation " Tr 3465, ll 6-9

¹⁰ Erwin's South Carolina Request to Charge - Criminal, S C Bar (1994)

Sudden heat of passion aroused by sufficient legal provocation which may reduce a felonious killing from that of murder to that of manslaughter need not dethrone reason entirely or shut out knowledge and volition, but it refers to an unlawful killing provoked by such circumstances that would naturally disturb the sway of reason and render the mind of an ordinary, reasonable, and prudent person incapable of cool reflection And to produce what, according to human experience may be called an uncontrollable impulse to do violence

Now in order for a felonious killing to be reduced from that of murder to that of manslaughter it must have occurred in sudden heat of passion aroused by sufficient legal provocation. The killing of a human being, even in the heat of passion, is murder if there was no sufficient legal provocation. That is the slayer had no reasonable cause for his anger.

Now in connection with what I have just instructed you regarding a cool reflection, that is whether or not a reasonable time for cooling off had elapsed, you should consider the whole circumstances surrounding the event. You should consider the nature of the provocation, should you find some to exist, the defendant's mental and physical constitution as well as the circumstances and relationships between the parties, the time in which an ordinary person under like circumstances would have called – cooled off is considered to be the reasonable time.

Even when a person's passion were sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, then the killing would be murder and not manslaughter.

In determining whether an act was entailed by a heat of passion or by malice, all of the circumstances and conditions accompanying the event should be considered, including any previous relations or difficulties existing between the parties

Tr p 3465, l 17 - p 3467, l 11 (Emphasis added) At the conclusion of the jury instructions, defense counsel reviewed his general request for charge number ten and specifically the examples from paragraph seven Tr p 3475, ll 20-21 The trial judge denied the request stating he felt the instructions as given were a correct statement of the law and sufficiently covered the appropriate law Tr p 3478, ll 4-13

The jury subsequently requested re-instruction on the definitions of murder and voluntary manslaughter Tr pp 3482-3489, l 15 The court also instructed the jury on a definition of common law marriage Tr pp 3489-90 Defense counsel Tinsley requested the trial judge to include paragraph seven of defense request number ten (on voluntary manslaughter) Tr p 3491, ll 3-7

b Law/Analysis

Voluntary manslaughter has been defined by this Court as the intentional killing of a human being in the sudden heat of passion upon sufficient legal provocation State v Wiggins, 330 S C 538, 500 S E 2d 489 (1998) “Sudden heat of passion upon sufficient legal provocation that mitigates a felonious killing to manslaughter must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what may be called an uncontrollable impulse to do violence ” State v Johnson, 333 S C 62, 508 S E 2d 29 (1998), State v Wiggins, supra

Here, the trial judge properly charged the law of voluntary manslaughter Tr pp 3465-67 The court instructed the jury to consider “whether there was reasonable cause for his anger” (Tr P 3466, ll 9-10), and to consider the whole circumstances surrounding the event including the nature of the provocation, the defendant’s mental and physical constitution, as well as the

relationship and difficulties between the parties Tr pp 3466-67

In State v Barwick, supra, this Court held that where a requested charge is fully and fairly covered by a trial judge's general charge, refusal to give the requested instructions was not error Accord, State v Austin, 299 S C 456, 385 S E 2d 830 (1989), State v Brownlee, 318 S C 34, 455 S E 2d 704 (S C App 1995) The cautious trial judge, upon review of the requested specifications of provocation, chose to avoid a potential charge on the facts in favor of the general language that encompassed the possibilities within the Appellant's versions Accord, State v Hartley, 307 S C 239, 241, 414 S E 2d 182, 183 (S C App 1992)("judges shall not charge juries in respect to matters of fact, but shall declare the law") In State v Bagwell, 201 S C 387, 23 S E 2d 244 (1942), the court declared that "a judge cannot express any opinion as to the weight or the sufficiency of testimony without violating the prohibition of the Constitution as to charging the facts

Here, under the discrete facts presented in the Appellant's version, the requested instruction came dangerously close to a direct charge on the facts where it expressed malice would be negated if the victim pulled a knife on the defendant, spit in the defendant's face or had sudden mutual combat Further, the request may in fact not have been a correct statement of the law because a mutual struggle is not always "legal provocation", State v Tyson, 283 S C 375, 323 S E 2d 770 (1984), State v Walker, 324 S C 257, 478 S E 2d 280 (1996) The mere fact that a knife may be used by a victim does not mandate legal provocation when it may be used to protect oneself While spitting on a person has been under discrete circumstances been found to support manslaughter, State v Gallman, 79 S C 229, 240, 60 S E 682, 687 (1908), the act itself alone would not automatically be provocation to support manslaughter

The Appellant erroneously relies upon State v. Fuller, 297 S C 440, 377 S E 2d 328 (1989) and State v. Smith, 304 S C 129, 403 S E 2d 162 (S C App 1991) to support his argument. In Fuller, the court was of the opinion that the general charge on self-defense was inadequate because it did not include other elements of self-defense including the right to act on appearances and on his duty to retreat. Unlike Fuller, the manslaughter charge here was adequate, it merely did not include the specific case based factual examples of provocation. Fuller does not require reconsideration.

Similarly, in Smith, the Court of Appeals noted that the trial judge failed to adequately respond to a specific jury question that "to have legal provocation, does a person need to be struck himself, or is it enough to see someone else being assaulted for there to be enough cause to act?" The trial court was found to have erred in restating his original instruction and only giving an example of a provocation upon the defendant and not someone else. The court found this response, upon that question to be misleading because provocation need not arise only from an assault on the defendant. As the court stated "This is not the law."

Here, the court properly gave the jury appropriate law. Unlike Smith, there was no request for specific information from the jury. Further, the law given was correct, not misleading. Simply put, he is not entitled to a new trial based upon the failure to give specific factual examples of provocation.

III The trial judge did not err in the guilt phase in overruling a general relevance objection to the testimony of the victim's widower, Mack Harris, on the issue of whether he saw red colored substance on the floor of his kitchen His complaint about the prejudice of Harris' testimony relates to unobjected matter that was cumulative to other evidence presented

In his argument before this Court, the Appellant contends that the portion of the testimony of Luevinia Harris' husband, George Mack Harris, concerning his clean-up of his home was highly prejudicial and required a new trial For the numerous reasons set forth below, we disagree

a How the Issue Was Presented in the Trial Court

As revealed in the Statement of Facts, the last witness to testify in the guilt phase was George Mack Harris He described leaving to go to the Post Office on December 4, 1995 at prior to 11 a m without noticing the bicycle that belonged to the Appellant's brother He described various damage to the doors and locks of his home that occurred after he left suggesting forced entry Tr pp 2907-10 Further, he described the three telephone calls from Hughey the evening prior to the murders Tr pp 2910-14 Additionally, he described returning the day of the incident and not being allowed into his home Tr p 2904, ll 15-24, p 2917, ll 8-12 He then described returning Thursday to get clothes for the funeral and noticing the hole in the wall that was not there prior to leaving Tr pp 2917-18 Further, the following colloquy occurred

Q When you got back in that house, did you notice any **red colored substance** on the floor of your kitchen?

MR GARRETT Objection, Your Honor, **relevance?**

THE COURT Overruled ~

THE WITNESS When I got back in my house I cleaned that blood up, I (witness is crying) me and another friend I removed all that blood There was blood on the floor, blood down the hall in that door into that back bedroom, there was blood and fragments of bone on that floor The police officers that told me —

MR. GARRETT Objection, Your Honor As to what the police officers said

MR. JONES Don't tell me what they told you, just tell me —

THE COURT The questions is simply if you saw that on the floor or if it was there before you left?

EXAMINATION CONTINUED BY MR. JONES

Q Was it on the floor before you left at 10 50?

A No, sir

Q Was it there when you came back?

A Yes, it was

MR. JONES Answer any questions for the defense

MR. GARRETT I have no questions /

Tr p 2918, l 23 - p 2920, l 1 (emphasis added)

Law/Analysis

A trial judge is accorded broad discretion in ruling on the admissibility of the testimony State v. Langley, ___ S C ___, ___ S E 2d ___, Op No 24924 (S C S Ct March 22, 1999) State v. Davis, 309 S C 326, 422 S E 2d 133 (1992)(holding the admissibility of evidence with little probative value was harmless where it did not affect the outcome of the trial), cert denied, 508 U S 915, 113 S Ct 2355, 124 L Ed 2d 263 (1993) All relevant evidence is admissible

Rule 402, SCRE Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy Rule 401, SCRE, State v Alexander, 303 S C 377, 401 S E 2d 146 (1991) Although evidence is relevant, it may be excluded if the danger of unfair prejudice substantially outweighs its probative value Rule 403, SCRE, State v Alexander, supra Further, a photograph should be excluded if it is calculated to arouse the sympathy or prejudice of the jury or is irrelevant or unnecessary to substantiate facts State v Livingston, 327 S C 17, 488 S E 2d 313 (1997) Even if the evidence was not relevant and thus wrongly admitted by the trial judge, its admission may constitute harmless error if the irrelevant evidence did not affect the outcome of the trial State v Davis, supra, State v Johnson, 306 S C 119, 410 S E 2d 547 (1991), cert denied, 503 U S 993, 112 S Ct 1691, 118 L Ed 2d 404 (1992)

In this appeal, counsel argues that evidence about the cleaning up of the blood was not relevant and highly prejudicial Initially, we note the problem with this argument is that this was not the question or reason for the trial objection, which was a hearsay objection to what the police told them

A reasonable review of the record suggests that the Solicitor's inquiry was "relevant" on whether the red substance on the floor was present when Harris left on December 4, 1995 because it revealed the timing of the assaults No argument was presented, at all, at trial that it was "prejudicial" when the objection was made An issue is not preserved for appeal where one ground was raised below and another ground raised on appeal State v Bailey, 298 S C 1, 377 S E 2d 581 (1989) Whether the red substance was present at 11 00 is probative and makes more probable the events in questioned

The problem with Appellant's argument is that it addresses the unresponsive comments that Harris made about cleaning up the blood that he did not object to as either being unresponsive to the question or prejudicial. In fact, counsel was silent until potential hearsay was presented. Tr. p. 2919. Then a hearsay objection was presented and redirection to relevant matter was caused. Again, the hearsay objection is not at issue before this Court. Bailey

Although not presented below, Hughey maintains the unobjected portion of Harris testimony was error. Again, the question did not appropriately elicit the response about cleaning up the blood. Nevertheless, the fact that there was blood and evidence of brutality was well known by the jury. Testimony had been presented throughout about the blood on the floor when the forensic teams arrived at the scene. Tr. pp. 2313-16. Photographs were introduced revealing the pooling of the blood on the floor. State Exhibit 44, 84, 52, 5, 85. Tr. pp. 2315-2318. Descriptive evidence of the wounds to the victim's were presented in the guilt phase by the police who arrived upon the scene and the pathologist. Tr. pp. 2360-61, 2511, 2532-50. One described the sucking sounds and brain matter coming out from the front of the victim's face at the scene. Tr. p. 2511. See also, Tr. pp. 2493-94. Nancy Skraba of SLED described her collection of the pool at the crime scene. Tr. pp. 2678-2691. Simply put, the evidence of the blood was cumulative to other evidence presented at trial. If error to present it also through Mr. Harris, it was cumulative to unobjected evidence previously presented.

Similarly, he implicitly complains about the emotion of this evidence in the guilt phase. He ignores the fact that his son had already testified about the trauma of hearing his mother seek aid because of the Appellant's preserve with the gun. There can be no rule of law that excludes family members from guilt phase testimony. Accord, State v. Davis, supra. While the evidence

from Mr. Harris may have been of slight probative value, any alleged error was harmless where it did not affect the outcome of the trial. Davis, supra. The strong forensic evidence and direct evidence of the witnesses to the telephone calls pointed directly at Hughey's malice and intent to locate and kill Tesheka. Additionally, evidence about the crime scene, although emotional, was not unlike the rest of the case. There was no error that undermines confidence in the jury's outcome. See State v. Anderson, 322 S. C. 89, 91, 470 S. E. 2d 103 (1996) (witness emotional outburst did not require mistrial).¹¹ The exception is without merit.

¹¹ Contrary to the assertions of Appellant, Harris' testimony is not similar to the victim impact testimony in a guilt phase in State v. Livingston, supra and State v. Allen, 266 S. C. 468, 224 S. E. 2d 881, 888 (1976). In those matters, references about the victim's family's suffering were presented or photographs of happier times were introduced. Such evidence does not equate to evidence about the crime scene. In Allen, however, no error was found by a prosecutor's argument that referenced the victim's suffering.

IV The trial judge did not err in failing to charge the statutory mitigating circumstance that “the defendant’s capacity to appreciate the criminality of his conduct, or his ability to conform his conduct to the requirement of the law was substantially impaired where there was no evidence to support it Further, the trial judge instructed the jury to consider as nonstatutory mitigation, “his level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult ” As well as statutory factors of “under the influence of mental or emotional disturbance and the age and mentality of the defendant ”

In his fourth argument, Hughey contends that he was entitled to a requested instruction on the statutory mitigating circumstance set forth in § 16-3-20(C)(b)(6) This section provides “The capacity of the defendant to appreciate the criminality of his conduct to the requirements of the law was substantially impaired ” Rejecting his argument that this was required, the trial judge instructed, among others, the statutory mitigating factors “the murder was committed while the defendant was under the influence of mental or emotional disturbance” and “age or mentality of the victim at the time of the crime ” Tr pp 4059-60 Additionally, the trial judge specified as a nonstatutory mitigator “ the defendant’s level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult ” Tr p 4060, ll 21-24 Respondents submit that there was no error in failing to instruct on the requested factor where no evidence to support it existed

The Appellant claims that he is entitled to this special mitigating circumstance instruction because (1) his father allegedly beat him as a child Tr p 3771, (2) he fell out of a car when he was four years old and had surgery for a scalp injury and stayed in the hospital for about six days, (3) he was once hit in the head with a golf club Tr pp 3779-80, (4) he had a car accident

and hit his head on the windshield Tr pp 3779-80, (5) when sniffing gasoline at age 6 he fell off some farm equipment, (7) he came withdrawn after his mother died and his personality changed Tr pp 3871-73, 3904, 3912 Dr James Evans, a neuropsychologist, testified that he had evaluated Hughey and opined that he suffered from an organic brain dysfunction possibly as a result of head trauma Tr p 3975, ll 11-13 He opined that it could lower his ability to deal with stress, but he did not find depression Tr p 3976, l 15 - p 3977, l 10 The Appellant relies upon the following inquiry with Dr Evans to support his request

Q You're offering them as explanations for his individual characteristics?

A [H]e's different from the average person in many ways And those are the ways we've talked about now And those certainly there is question whether they were factors – **it needs to be asked are those factors in the crime And they may well have been**

Q **In your opinion, they could definitely have impacted him on December 4, '95?**

A **They could have been factors, yes**

Q And, doctor, in your medical opinion as neuropsychologist, if an individual who suffers from organic brain dysfunction is exposed to violence at an early age, abused, and then suffers a serious of head traumas, in your opinion as an expert, would those factors affect that person's ability to cope and deal with stress and life itself?

A Yes

Q And, doctor, in your evaluation and study of John Kennedy Hughey, **have you found organic brain dysfunction?**

A **I found a lot of converging evidence for organic brain dysfunction to the point that I would say, yes, it exists**

Tr p 3988, l 18 - p 3989, l 20 (emphasis added)

No evidence was presented that Hughey's capacity to appreciate the criminality of his conduct or ability to conform was substantially impaired. In fact, on cross-examination, Dr Evans denied that he could opine that Hughey suffered from post-traumatic stress disorder. Tr p 3990, ll 20-25. Further, the MRI results revealed no structural abnormalities in the brain. Tr p 3991, ll 9-15. Further, Dr Evans clarified that there was no test data on Hughey that supported his general comment that if (any) "person has brain dysfunction or brain damage and a history of abuse, would they be more likely to be susceptible abuse, would they have a lower tolerance for stress, might they decompensate more rapidly under stress." Tr p 3999.

After the conclusion of the penalty phase testimony, the Appellant requested instructions on statutory mitigating factors 2 (mental or emotional disturbance), 6 (substantial impairment of capacity to appreciate criminality or to conform to requirements of law) and 7 (age and mentality at time of crime). Tr pp 4013-15. Deputy Solicitor Coulter stated

"As I understand the law that if any type of testimony is shown regarding mental disturbances, **the defendant is entitled to charges on two, six and seven. So we would have no objection to those three, as I understand it, or as I understood from the case law, it's automatic, although I disagree with number, I believe it's number six.**" Tr p 4015, ll 13-21 (emphasis added)

After the Solicitor disagreed, the trial judge stated "I don't believe six is automatic, maybe in the case you read it might have been automatic, but not in every case." Tr p 4016. The trial judge agreed to instruct as "appropriate on the facts of this case" on one, two and seven and decline six (and ten). Tr p 4016, ll 6-11.

In State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990), the court held under because

evidence showed Caldwell was suffering under either an antisocial personality disorder or psychopathic personality who was not constrained by societal norms for behavior and unlikely to obey rules and if given the opportunity he would kill again, he was entitled to the instruction on "substantial impairment" of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court has consistently stated that a trial judge must reviewed all statutory mitigating circumstances and instruct any supported by the evidence. State v. Caldwell, supra, State v. Bellamy, 293 S C 103, 359 S E 2d 63 (1987)

Here, unlike Caldwell, there is no evidence that his capacity to understand the criminality of his conduct was "substantially impaired." To the contrary, the only evidence was that he fully understood the criminality of the conduct by his flight and attempt to avoid capture. No assertion has been presented otherwise.

Similarly, there is no evidence that his ability to conform his conduct to the requirements of law was substantially impaired when the crime occurred. Dr. Evans only asserted that possible brain dysfunction as a result of possible head trauma could have been a factor and affect his ability to cope and deal with stress, but no testimony concerned substantial impairment of his ability to conform his conduct to the requirements of law, as in Caldwell. Here, there was no error.

Further, the use of the evidence was alternatively directed to be considered by the court in the nonstatutory factor. Therefore, if error, the error was harmless where a specific charge was given to consider his level of intellectual functioning as a result of the physical and/or emotional trauma. Tr. p. 4060, ll. 21-25. This is analogous to State v. Plemmons, 296 S C 76, 370 S E 2d 871 (1988), where the court found no error in the failure to instruct 2, 6, 7 where there

was a specific instruction on voluntary intoxication. As in Plemmons, the issue of the effect of Hughey's functioning as a result of abuse and head trauma was clearly presented to the jury for consideration as mitigation. Nothing more is required.

V The trial judge did not abuse his discretion in allowing various victim impact witnesses to give lengthy answers in response to relevant questions on how the crime had impacted on their lives under Payne v Tennessee

In Payne v Tennessee, 501 U S 808 (1991), the U S Supreme Court authorized the admission of evidence of a victim's characteristics and the emotional impact of the murder on the victim's family in a capital sentencing hearing. This Court adopted Payne in State v Johnson, 306 S C 119, 410 S E 2d 547 (1991). The court has approved the use of parents testimony about their reliance on their sons and their dreams and aspirations, as well as testimony by friends and neighbors of the impact the loss had upon them. State v Byram, 326 S C 107, 485 S E 2d 360 (1997), State v Rocheville, 310 S C 20, 425 S E 2d 32 (1993). Photographs of the victim in life situations are also admissible to show their uniqueness. State v Tucker, 478 S E 2d 260 (1996).

This Court has not addressed the manner this information is presented to the jury through testimony. In Welch v State, 968 P 2d 1231, 1244 (Okla Crim App 1997), the court reaffirmed that victim impact evidence was admissible and could be presented either in a narrative format or question and answer. Accord, Cargle v State, 909 P 2d 806, 828 (Okla Crim App 1995). The manner of the presentation of evidence has always been left to the discretion of the trial judge. James v Atlantic Coast R Co, 199 S C 45, 18 S E 2d 616 (1942), State v Sullivan, 277 S C 35, 282 S E 2d 838 (1981). S C Rule of Evidence, Rule 611(a) ("reasonable control over the mode and order of interrogation.")

In his appeal, he asks this Court to remove the discretion from a trial court to control the courtroom when victim impact witnesses are testifying and require more precise questions and

“shorter” responses on how the crime had impacted upon their lives Rule 611, however, protects the parties and, as the Appellant acknowledges “narrative questions may speed up testimony and save time ” Brief of Appellant, pp 36-37

A review of the record reveals the trial judge did not abuse its discretion under Rule 611 in failing to interrupt and require more questioning of a victim on how a crime had impact their lives

The record reveals Tesheka’s grandmother, Ruth Connor, testified about the personal impact the death of Tesheka had upon her in a question and answer format Tr pp 3696-99

Tesheka’s mother, Bernice Jackson, testified about her daughter’s hopes, desires, and aspirations about her family, her car, and desires for marriage Tr pp 3702-04 Family photographs and videos were introduced The prosecution inquired about the “impact of that the murder of her daughter has had on [her] life and her family’s life ” Tr p 3710, ll 6-9 She described, in lengthy fashion the loss of two family members and friends and the grief that she felt for both of them, her need to raise Sheka’s children, the children’s response to seeing police cars and their shutting down Tr p 3711, ll 22-23 Counsel Tinsley objected to “continuing without questions”, but the Court properly overruled Tr p 3712, l 2

She then described the fact of raising children at her age, her daughter’s desire to talk and be friendly with everyone, and her husband’s difficulty to cope with the loss Tr p 3713 She expressed her recognition, at that stage that Hughey correctly was to blame for the problems and expressed the concern as a mother that she should have done something that could have prevented the death Tr pp 3714-15

Luevinia’s son, Marcus Harris, testified about his relationship with his family Tr pp

3721-24 He described the loss like a sister as well as a mother Tr p 3726 He described returning home from the Navy and the emotion Tr pp 3727-28 He described the type of injury she had as tearing him up Tr p 3729 He described missing her cooking when he comes home and missing her when he leaves Tr p 3730 Paraphrasing John Hughey's guilt phase testimony that Luevinia was in the wrong place at the wrong time (Tr P 3151, ll 5-10), he declared that she " was the wrong place at the wrong time in her own home That's tough to hear She was in her own home Knowing she was in her own home getting gunned down at where she was " Tr p 3731, ll 12-15 He then described the loss of his mother was "tremendously tough " Tr p 3733

George Anthony Harris, another son, described "how her death has impacted his life " Tr p 3735, ll 10-11 He described missing her everyday knowing that John knew she wouldn't hurt anyone He described his reaction when he heard about the shooting, and just thought about all the things they did together Tr pp 3737-38 He said he strived to please his parents and the emotional time they had Tr p 3739 He described, upon inquiry, her laughing and the aid she gave to Hughey after his mother's death Tr pp 3740-41 He described missing his mother's cooking and calling home the most Tr p 3741 He described his inability to leave his mother's casket at the funeral home Tr p 3744

Mack Harris testified about his long relationship with his wife Tr pp 3749-51 He stated that she was always there for him, that she loved life, she did not have enemies, and did not think anyone would do anything to hurt her Tr p 3752 He described her love of everybody and her children Tr p 3753

He was asked about the impact of the crime on his family's life Tr p 3753, l 22 He

stated that Hughey had "killed us all", that he doesn't want to go home, he had no one to cook for him, and his family would soon be leaving and he would be alone Tr p 3754

This testimony is precisely the type of testimony that is admissible under Payne, Johnson, and Rocheville. The manner of the presentation revealed appropriate responses to the impact of the crime on the family. The fact is that these deaths, in their own way, had an extraordinary impact on a number of people. This impact was foreseeable to Hughey who had benefitted from the love of both victims. Revealing their uniqueness in this matter was correct.

VI The trial judge did not err in his instructions related to nonstatutory mitigating circumstances where it allowed the jury to consider relevant mitigating circumstances and did not unconstitutional limit the jury's consideration of evidence

In Boyde v California, 494 U S 370 (1990), the court held that the Eighth Amendment is satisfied where there is not a reasonable likelihood that the penalty phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner. Accord, Calderon v Coleman, ___ U S ___, 119 S Ct 500 (1998), Buchanan v Angelone, 522 U S 269 (1998). In Buchanan, the court held that the Eighth Amendment did not require that the jury be instructed on either the concept of mitigating evidence or on particular statutory mitigating factors. The instructions given there was constitutionally adequate because it did not preclude consideration of relevant mitigating evidence. In the instant case, Judge Cole's instructions surpassed any constitutional requirement by directing the jury to consider nonstatutory mitigation and specified such mitigation to consider including "any other evidence relating to a mitigating circumstance which you find to be appropriate." Tr p 4060, l 24 - p 4061, l 3. Accord, State v Sims, 304 S C 409, 422, 405 S E 2d 377, 384 (1991) (implausible that jury would have interpreted mitigation instruction to preclude consideration of mitigation evidence of Sims background and character), State v Bell, 305 S C 11, 21, 406 S E 2d 165, 171 (1991), Eaton v Angelone, 139 F 3d 990 (4th Cir 1998). Recently, in State v Hicks, 330 S C 207, 499 S E 2d 209 (1998), the court upheld a death sentence challenge to a mitigation instruction, even though the jury was not specifically advised it could impose a life sentence for any reason or no reason at all. The court therein found that considering the instructions, as a whole, a reasonable juror would not have understood to preclude consideration of mitigation or preclude a life sentence.

even if no mitigation was found

Here, Judge Cole satisfied state and federal law in the instruction on mitigating circumstances

In arriving at your decision as to what the appropriate sentence would be in this case, you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the State Legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, [anesthesia] you should consider, any non-statutory mitigating circumstances which have been shown to exist.

by the evidence in the case

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder

Those that the defense contends should be considered are Any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt And you may recommend a sentence of life imprisonment and whether or not you find the existence of a statutory or non-statutory mitigating circumstance

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision

Tr p 4058, l 25 - p 4061, l 18 Further, the trial court charged

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy

Tr p 4062, ll 8-15

It is unclear what the Appellant's complaint to the instructions on mitigation, despite the timely objection Tr pp 4066-4068 His concern there appeared to be related to asserting "the defendant contends" dilutes the impact of the request Tr p 4066, ll 2024 As Boyde and Buchanan recognize the issue is not how much the various mitigation should be considered (or weighed) - the Eighth Amendment only requires that it must be considered Here, the jury was directed specifically that they should consider both statutory and nonstatutory mitigating circumstances in the oral and written instructions in determining the verdict Tr p 4061, ll 13-18, p 4063, ll 12-24

Contrary to the conclusion in the brief, these instructions were not confusing He ignores the view of the instructions as a whole in making the determination As recognized in Buchanan, he ignores the setting where the jury had just completed a day of testimony from the Appellant's family members, a social worker, and a psychologist presenting evidence to support both types of mitigating circumstances He misreads the entirety of the instructions to suggest otherwise The argument is without merit The jury would have considered the evidence appropriate Boyde, Buchanan

VII The trial judge did not err in allowing the introduction of state exhibit 95 in the penalty phase which revealed the face of Tesheka Jackson where it was relevant and assisted the testimony of the pathologist

In his argument before this Court, the Appellant complains about the penalty phase introduction of the photograph of Tesheka Jackson, State Exhibit 95. He claims that it is a gory and gruesome photograph and therefore unduly prejudicial. Respondents submit that this photograph was not unduly prejudicial considering its accuracy and probative value in the penalty phase of his trial.

In State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998), this Court re-addressed the penalty phase admission of photographs. In Gardner, a close-up color photograph accurately depicted the victim's condition after Appellant had left her having shot her in the lower part of the face five (5) times. The court found no abuse of discretion in the admission of that evidence similar to the evidence in the present case.

Photographs of a victim's body are admissible in a sentencing phase of a capital trial to show the circumstances of the crime and the character of the defendant. State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986). While the trial judge is required to balance the prejudicial effect of a photo against its probative value, the scope of probative value is much broader in the sentencing phase of a capital trial than in other proceedings. Gardner, supra. Accord, State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995) (numerous photos of damage to face). State v. Tucker, 478 S.E.2d 260 (S.C. 1996) (photo of victim's head shot at close range revealing blood victim coughed up).

Similarly, the court upheld admission of photographs in State v. Nance, 320 S.C. 501,

466 S E 2d 349 (1996), showing cleaned-up stab wounds to the victim's hands, abdomen, right shoulder, and face. The court found the photographs corroborated the testimony of the pathologist and relevant to the issue of malice on the assault charge. Also, in State v Franklin, 318 S C 47, 456 S E 2d 357 (1995), the court found the admission of seventeen (17) crime scene photographs and ten (10) autopsy slides were admissible and rejected the assertion that photographs were inadmissible merely because they "graphically depict a gruesome scene" and the autopsy photographs are not per se inadmissible unless they are calculated to inflame. Accord Riddle v State, 443 S E 2d 557 (S C 1994) (crime scene photographs admissible where it was the "least graphic" of the available photographs and in black and white and supported testimony of the witnesses).

In Franklin, the court held to constitute "unfair prejudice" sufficient to preclude admission of photographic evidence, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. Accord State v Tucker, 478 S E 2d 260, 266 (S C 1996).

In Perigo v State, 541 N E 2d 936, 939-940 (Ind 1989), the Indiana court held that "gruesome" photographs of the victim and fetus at the crime scene were admissible in a guilt phase stating

These photographs are indeed revolting, but the purpose of relevant evidence is to prove, however slightly, the material issues. This cannot be done sometimes without presenting disagreeable evidence. Revolting crimes generate revolting evidence.

541 N E 2d at 939-40. The Indiana court also rejected the assertion that the prosecution was

required to accept a stipulation and prohibited the use of photographs

A trial court and the jury may learn through reviewing an exhibit what they might have learned through listening to testimony describing it [cite omitted] Certainly, some exhibits are inadmissible because of their prejudicial nature or lack of relevance, but an adversary's offer to stipulate does not bear on admissibility Each adversary must be permitted to offer and admit evidence solely on admissibility standards

541 N E 2d at 940

In the testimony of the pathologist, Dr Woodard, he used various photographs to explain the injuries to each of the victims Tr pp 3623-59 Particularly, he identified photographs of Luevinia Harris from the crime scene and close-ups to describe her facial injuries Tr pp 3624-27 He described the holes in her face and how he determine the distance from the shooting to the wound of approximately five feet Tr pp 3627-29

He also described the multiple injuries to Sheka Jackson using photographs to reveal the stab wound to the chest, Tr p 3629 (Exhibit 102), and the clothing she had on He used this evidence to reveal his opinion of the moderate to severe pain the stab wound caused Tr pp 3630-31 Further, an exhibit was used to describe injuries to her arm and the brain material in her sleeve Exhibit 106 and 105 were used to show the entrance wound to Sheka's head and the bruise from the blunt object on her right cheek This injury would also have resulted in pain Tr pp 3634-37

The challenged Exhibit 95 was introduced, over objection, which showed the front part of Sheka's face Dr Woodard stated that this photograph revealed the exit wound of the shotgun blast that pushed out her left eye Tr pp 3639-40 Dr Woodard used these photographs to

assist him in showing the victim's location on the bed at the time of her shooting by the location of the high velocity blood debris Tr pp 3641-42 Using this information, he opined her location in the room and that she was one and one half to two feet from the barrel of the shotgun Tr pp 3642-47

This information accurately revealed to the jury the location and distance of the shooting. Clearly, this is relevant and probative of the crime and character of the defendant. As the Perigo court stated "revolting crimes generate revolting evidence." Exhibit 95 revealed unique information about the crime. Its admission was not an abuse of discretion in light of the entire record.

CONCLUSION

For all the foregoing reasons, the appeal must be dismissed

Respectfully submitted,

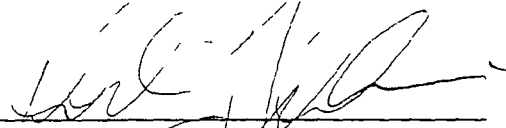
CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By



Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone (803) 734-6305

March 22, 1999

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Abbeville County
J Derham Cole, Circuit Court Judge

THE STATE,

Respondent,

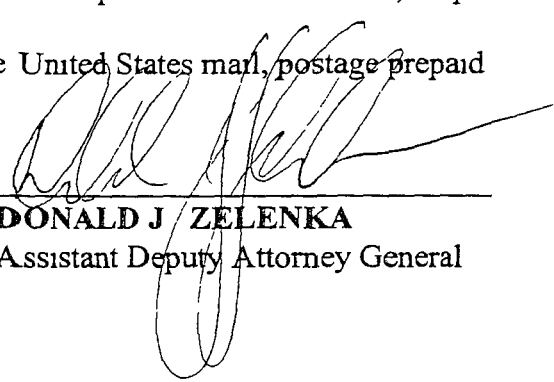
v

JOHN KENNEDY HUGHEY,

Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Initial Brief of Respondent* in the above-referenced case has been served upon Robert M Dudek, Esquire this 22nd day of March, 1999 by depositing copies in the United States mail, postage prepaid



DONALD J. ZELENKA
Assistant Deputy Attorney General

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

J Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V

JOHN KENNEDY HUGHEY,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

ROBERT M DUDEK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S C 29201
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES	3
ARGUMENTS IN REPLY	

1

South Carolina has a specific statute exempting prison guards from jury service. The legislature recognized this exemption from jury duty was necessary so that prison guards would be at work protecting the public. Brian Daly was employed at McCormick Correctional Institution, and S. C. Code §24-3-930 states that guards at a penitentiary shall be exempted from service on a jury. Further, Daly was the functional equivalent of a law enforcement officer, and should have been excluded on that basis also.

5

2

The state does not, and cannot, argue that the request to charge from Ervin, **South Carolina Request to Charge – Criminal §29-9** constituted a charge on the facts. Further, examples often aid a jury in understanding legal concepts. Here the jury sought specific guidance in understanding the difference between murder and voluntary manslaughter. The judge failed to craft an instruction to the facts of this case.

10

3

The solicitor asked the victim's husband, George Mack Harris, "When you got back in that house did you notice any red colored substance on the floor of your kitchen?" The state's argument on appeal that the solicitor was **not** attempting to elicit a response from Harris that he found blood on the floor stretches the limits of credulity.

13

1

Dr Evans testified that appellant's mental disorders may have been factors in his committing the crime on December 4, 1995. There was also testimony about appellant's inability to handle stressful situations, and his making poor judgments because of his psychological problems. The state's attempt to distinguish the facts present case from **State v Caldwell**, 300 S C 494, 388 S E 2d 816 (1990), where this Court held the trial judge committed reversible error by refusing to instruct the jury on the mitigating circumstances contained in South Carolina Code §16-3-20(C)(b)(2), (6) and (7) does not comport with the facts of **Caldwell**

15

[6]

The trial judge's charge that non-statutory mitigating circumstances were those "the defendant contends serve the same purpose as statutory mitigating circumstances implied these were not circumstances the law provides the jury should consider. The judge's penalty stage charge as a whole was improper, and unfair to appellant

18

CONCLUSION

20

TABLE OF AUTHORITIES

Cases

<u>Commonwealth v Delaney</u> , 34 Mass App Ct 732, 616 N E 2d 111, (1994)	10
<u>Hutcheson v State</u> , 246 Ga 13, 268 S E 2d 643 (1980)	5, 6
<u>Kent v State</u> , 179 Ga App 131, 345 S E 2d 669 (Ct App 1986)	6
<u>Lockett v Ohio</u> , 438 U S 104 98 S Ct 2954 (1978)	18
<u>People in the interest of R A D</u> , 196 Colo 430, 586 P 2d 46 (1978)	5
<u>People v Maes</u> , 43 Colo App 365, 609 P 2d 1105 (1990)	5
<u>People v Manners</u> , 708 P 2d 1391 (Colo Ct App 1995)	5
<u>People v Scott</u> , 583 Pa 2d 939 (Colo App 1978)	4
<u>State v Bell</u> , 302 S C 18, 393 S E 2d 364 (1990)	17
<u>State v Blassingame</u> , 271 S C 44, 244 S E 2d 528 (1978)	10
<u>State v Caldwell</u> , 300 S C 494, 388 S E 2d 816 (1990)	14, 15, 16
<u>State v Cooper</u> , 291 S C 332, 353 S E 2d 441 (1986)	8
<u>State v Cummings</u> , 326 N C 298, 389 S E 2d 66 (1990)	10
<u>State v Davis</u> , 309 S C 326, 422 S E 2d 133 (1992)	9
<u>State v English</u> , 115 S C 535, 106 S E 2d 781 (1921)	9
<u>State v Fuller</u> , 297 S C 440, 377 S E 2d 328 (1989)	10
<u>State v Jacob</u> , 574 N W 2d 177 (Neb 1998)	4, 8
<u>State v James Neil Tucker</u> , 1999 WL 32906 (January 25, 1999)	15
<u>State v Langley</u> , Op No 24924, Shearouse's Adv Sh No 12 (filed March 22, 1999)	13
<u>State v Lewisohn</u> , 379 A 2d 1192, 1206 (Me 1977)	10
<u>State v Manning</u> , 305 S C 413, 409 S E 2d 372 (1991)	18

<u>State v Pierce</u> , 289 S C 430, 346 S E 2d 707 (1986)	15, 16
<u>State v Pilgrim</u> , 320 S C 409, 465 S E 2d 108 (Ct App 1995)	9
<u>State v Stevenson</u> , 327 N C 259, 393 S E 2d 527 (1990)	9, 10
 Other Authorities	
1979WL 42703 (S C A G) (September 11, 1979)	7
S C Code §24-3-910	6
S C Code §24-3-920	6
S C Code §24-3-930	4, 6, 7, 8
<u>S C Code §16-3-20(C)(b)(2), (6) and (7)</u>	14, 15, 16
<u>S C Code §16-3-20(C)(b)(7)</u>	14, 15
<u>South Carolina Request to Charge – Criminal §29-9</u>	9

I

South Carolina has a specific statute exempting prison guards from jury service. The legislature recognized this exemption from jury duty was necessary so that prison guards would be at work protecting the public. Brian Daly was employed at McCormick Correctional Institution, and S. C. Code §24-3-930 states that guards at a penitentiary shall be exempted from service on a jury. Further, Daly was the functional equivalent of a law enforcement officer, and should have been excluded on that basis also.

In its brief, the state wrote, "although not specifically addressed by this Court, other courts have held that correctional employees are not automatically disqualified from jury service in a criminal case." Respondent's brief at 16. The state then cites several cases from other jurisdictions which held the trial judge did not abuse his discretion by refusing to disqualify department of corrections' employees with general duties. Even given that fact, the state also acknowledged in its brief that there are other state court opinions holding just the opposite. Respondent's brief at 16-18. Regardless, this is a case about a statute specifically excluding prison guards on the "front line" in charge of supervising inmates.

The state cites State v. Jacob, 574 N.W.2d 177 (Neb. 1998), in which the court upheld the refusal to disqualify a juror who worked for a correctional agency. In Jacob, however, the juror worked in the mailroom and did not have any personal contact with inmates. Juror Daly was a prison guard, and had personal contact with inmates.

The state acknowledged in its brief that other jurisdictions have held that even corrections employees not on "the front line" are also exempt from jury duty. The state cited People v. Scott, 583 Pa.2d 939 (Colo. App. 1978), where the court held that a prison

counselor and baker were both excluded under the statutory definition of "compensated employees of public law enforcement agencies " Respondent's brief at 18

Further, in People v Manners, 708 P 2d 1391 (Colo Ct App 1995), the Court held that a part-time employee at a state penitentiary's medical clinic, who was only paid on a fee-basis, and did not rely on fees from the penitentiary for his livelihood, was nonetheless subject to challenge for cause as a compensated employee of a law enforcement agency In a holding of exclusion much broader than the facts of the present case dictate, the court in Manners held that "all penitentiary employees, including counselors and bakers, are 'considered compensated employees of a public law enforcement agency under the statute, the actual function of an employee of a law enforcement agency is irrelevant " The Court also held that was no need for a showing of actual bias on the part of the employee in order to sustain a challenge for cause Citing, People in the interest of R A D, 196 Colo 430, 586 P 2d 46 (1978) "' People v Manners, 708 P 2d at 1391

Similarly, in People v Maes, 43 Colo App 365, 609 P 2d 1105 (1990), the court held that the trial judge improperly denied the defendant's challenge for cause of a juror who is working as a mechanic in a police garage

The Georgia cases cited by the state involve a different statutory system than the specific penitentiary guards "shall be exempted" statute at issue in this case In Hutcheson v State, 246 Ga 13, 268 S E 2d 643, 644 (1980), the court explained that full-time police officers in Georgia are normally not included on jury lists However, these officers are eligible to be jurors by making it known in writing that they want to be included on the jury list However, the Court held that if these eligible officers are challenged for cause the challenge must be granted

In Kent v State, 179 Ga App 131, 345 S E 2d 669, 670 (Ct App 1986) the Court observed that it is inherent in the nature of police duties that questions concerning the officer's possible bias, fairness, prejudice or impermissible influence upon jury deliberations will inevitably arise. The court then held that correctional officers do not have the same bias as full-time police officers.

Here, appellant challenged juror Daley for cause under a statute that specifically exempted penitentiary guards. Appellant was not, as were the Georgia cases cited by the state, attempting to argue that a correctional officer should be exempt under the broader statute exempting police officers.

As to the broader issue of Daly being a member of law enforcement, appellant only argued that in addition to this correctional guard being exempt under S C Code §24-3-930 that Daly also **personally** wrote on his questionnaire that he worked for law enforcement. Since juror Daley was challenged for cause, he should have been excluded from jury service in the same manner as the juror in State v Hutcheson, supra.

In this case, S C Code §24-3-930 provides that "all guards, keepers, employees and other officers employed at the penitentiary shall be exempted from serving on juries and from military or street duty." The succession of the statutes in Title 24 shows a clear recognition by the legislature that protection of the public from prison inmates was a paramount concern.

S C Code §24-3-910 provides that it is unlawful for any person "employed in keeping, taking care of, or guarding a correctional facility or its prisoners to contrive, procure, connive at, or otherwise voluntarily suffer or permit the escape of a prisoner," and sets the punishment for that crime. Similarly, S C Code §24-3-920 provides "the

director of the department of corrections shall offer a reward of one hundred dollars for the capture of each escaped convict " The next statute, the one at issue here, S C Code §24-3-930, provides that **all prison guards, keepers, employees and other officers employed at the penitentiary shall be exempt from jury service**

An attorney general's opinion, 1979 WL 42703 (S C A G), issued September 11, 1979, supports appellant's contention that the legislature was concerned with the daily operation of correctional institutions when it exempted prison guards from jury duty The Attorney General opined "that only those persons employed at the penitentiary are exempted from service by the statutory provision cited (§24-3-930)¹ The Attorney General reasoned that the legislature could have exempted all employees of the Department of Corrections However, "it did not, however, choose to do so **Apparently, the legislature felt that those persons who were actually serving in the daily operations of the prisons themselves were more critically needed in that capacity than other members of the Department of Corrections whose physical presence on any particular day would be of less critical importance** " (emphasis added)

Prison guards "owe a duty to the public to protect society from the people they are charged with guarding " Appellant's brief at 7 The state also has a substantial interest in seeing that prison guards are working in the penitentiary, and are not causing a disruption to the correctional facility by being out of work on jury duty

¹ The attorney general opinion contains an error inasmuch as it cites S C Code §29-3-930 This typographical error is apparent from the subsequent attorney general's opinion dated October 4, 1979, that was cited by the state Respondent's brief at 15, n 5 The

Further, Daly was working at McCormick Correctional Institution at the time of appellant's trial. Daly properly considered himself a law enforcement officer, and had to know given the large number of transfers within the South Carolina Department of Corrections, that appellant could become an inmate at a facility where Daly was employed in the future if given a life sentence.²

Juror Daly should have been disqualified for cause pursuant to S C Code §24-3-930. Unlike the mail room juror in State v. Jacob, *supra*, Daly had direct contact with inmates and custodial responsibilities. The Nebraska court in State v. Jacob simply found that the challenged juror did not qualify as "a jailer" under the Nebraska statute. State v. Jacob, 574 N W 2d at 131.

Further, this Court has taken a functional rather than rigid formalistic approach in interpreting other exemption statutes pertaining to law enforcement officers. See State v. Cooper, 291 S C 332, 353 S E 2d 441, 442 (1986). Appellant's challenge for cause of Daly should have been granted by the trial judge. The interest of the public, the state, and a defendant's right to a fair trial all justified Daly being disqualified for cause given the facts of this case.

Attorney General subsequently amended its opinion to state that all department of corrections employees were exempt.

² Daly had been to death row and knew these prisoners were segregated from others in the general population.

II

The state does not, and cannot, argue that the request to charge from Ervin, South Carolina Request to Charge – Criminal §29-9 constituted a charge on the facts. Further, examples often aid a jury in understanding legal concepts. Here the jury sought specific guidance in understanding the difference between murder and voluntary manslaughter. The judge failed to craft an instruction to the facts of this case.

The state argued that, "under these discrete facts presented in appellant's version, the requested instruction came dangerously close to a direct charge on the facts." Respondent's brief at p. 25. However, as appellant wrote in his brief, examples are often given to the jury on what can constitute a deadly weapon for purposes of an inference of malice. Court's similarly given examples of circumstances of aggravation in an ABHAN case. See State v. Davis, 309 S. C. 326, 422 S. E. 2d 133, 144 (1992), State v. Pilgrim, 320 S. C. 409, 465 S. E. 2d 108, 110 (Ct. App. 1995), *aff'd as modified*, State v. Pilgrim, 326 S. C. 24, 482 S. E. 2d 562 (1997).

Such examples often aid the jury in understanding legal concepts, and have been held not to be misleading or comments on the facts. For example, in State v. English, 115 S. C. 535, 106 S. E. 2d 781 (1921), this Court held that the trial judge did not commit error by giving the jury an example of a legal provocation that could satisfy that element of voluntary manslaughter.

In State v. Stevenson, 327 N. C. 259, 393 S. E. 2d 527, 529 (1990), the court also held that it was not error for the trial judge to give examples of provocation. The Court recognized "the trial court's mere recital of such examples cannot be construed as an

expression of an opinion that any of them have been proven " State v Stevenson, 393 S E 2d at 529 citing State v Cummings, 326 N C 298, 315, 389 S E 2d 66, 76 (1990)

Other courts have similarly found examples of what might constitute an adequate provocation in a trial judge's instructions did not constitute error In State v Lewisohn, 379 A 2d 1192, 1206 (Me 1977), the court held the trial judge's elaborate examples differentiating murder from involuntary manslaughter constituted helpful guidance to the jury, and were not confusing See, also, Commonwealth v Delaney, 34 Mass App Ct 732, 739, 616 N E 2d 111, 116 (1994)³

The judge in this case told defense counsel that he would not charge the jury with the examples of manslaughter, but would consider "some type of explanation" if the jury came back wanting a further explanation R p 3442, lines 18-25 However, when the jury returned wanting further instructions on the difference between murder and voluntary manslaughter, the trial judge only repeated his general instruction without the requested examples The judge here failed in his duty to craft an instruction to meet the facts of this case State v Fuller, 297 S C 440, 377 S E 2d 328 (1989)

At the point the jury returned for further guidance, it had obviously focused its critical attention on the difference between murder and manslaughter State v Blassingame, 271 S C 44, 244 S E 2d 528, 529 (1978) Without further guidance, each juror was left to imagine on his own what might constitute a circumstance that would render "the mind of an ordinary, reasonable, and prudent person incapable of cool reflection " R 3465, l 17 - 3466, l 10

³ Aff'd 418 Mass 658, 639 N E 2d 710 (1994)

The examples in the requested charge were examples that have withstood the test of time. The judge's refusal to charge the requested instruction giving examples of acts of provocation constituted reversible error under the facts of this case.

ARGUMENT III

The solicitor asked the victim's husband, George Mack Harris, "When you got back in that house did you notice any red colored substance on the floor of your kitchen?" The state's argument on appeal that the solicitor was **not** attempting to elicit a response from Harris that he found blood on the floor stretches the limits of credulity

SLED agent David Black had earlier described the crime scene to the jury in detail. It was professional testimony that included the fact that blood was found throughout the house. R 2487, l 11 - 2511, l 18. Thus, the jury was well aware the crime scene contained blood and other unpleasant material after the shooting.

The police would not allow Harris to go back into his home **until three days after the shooting**. Then Mr. Harris was entering his home for the first time to retrieve some clothes for his wife's burial. That was the emotional backdrop against which the solicitor's question to Harris about the red colored substance on the floor was asked. The trial record discloses witness Harris' answer was directly responsive to the solicitor's question about any red colored substance he found on the floor. The defense interposed an objection on the grounds of relevance (The fact that Harris found blood on the floor was not relevant, and the testimony of the victim's spouse, unlike a professional law enforcement officer was going to be emotional). After defense counsel's relevance objection was overruled, Harris answered:

When I got back in my house I cleaned that blood up, I [witness is crying] me and another friend I removed all that blood. There was blood on the floor.

R p 2918, line 23 – p 2920, line 1

It is readily apparent that the solicitor meant to have Mr Harris testify about finding blood on the floor. It was easily foreseeable Mr Harris' answer about finding his wife's blood all over the floor would be emotional.

Defense counsel correctly objected to this testimony during the guilt stage because it was not relevant. The fact Mr Harris found blood on the floor of his home three days after his wife's death was not relevant.

The testimony that Mr Harris was not allowed to enter his own home for three days while the police worked on the crime scene was naturally emotional. His viewing of the blood in his house, and his being overwhelmed by the emotion of that moment was not relevant to the issue of appellant's guilt to the crimes of murder or voluntary manslaughter. While such emotional testimony from a family member about discovering blood three days after the shooting may have been proper during the penalty stage as victim impact evidence, such testimony was not relevant to the issues the jury had to decide during the guilt stage. See State v Langley, Op No 24924, Shearouse's Adv Sh No 12 (filed March 22, 1999) at 13-18.

The solicitor was asking for emotional blood evidence from the victim's husband during the guilt stage of the trial, and he received emotional blood evidence in response to his question to George Mack Harris. The state's focus in its brief on the subsequent hearsay objection ignores the obvious issue on appeal.

ARGUMENTIV

Dr Evans testified that appellant's mental disorders may have been factors in his committing the crime on December 4, 1995. There was also testimony about appellant's inability to handle stressful situations, and his making poor judgments because of his psychological problems. The state's attempt to distinguish the facts present case from State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990), where this Court held the trial judge committed reversible error by refusing to instruct the jury on the mitigating circumstances contained in South Carolina Code §16-3-20(C)(b)(2), (6) and (7) does not comport with the facts of Caldwell.

The state claimed that unlike Caldwell there was no evidence appellant lacked the capacity to appreciate the criminality of this conduct or that his ability to conform his conduct to the requirements of law was substantially impaired. Respondent's brief at 33-35. However, as appellant argued in his initial brief, Dr Evans testified that appellant's head injuries, and other problems could have been factors in what "impacted him on December 4, 1995." R p 3988, lines 4-6. Jeff Youngman testified that appellant's head injuries were not offered as excuses for the crime, but rather as an explanation for why appellant acted as he did. R 3931, l 18 - 3933, l 16.

Unlike the present appellant, Caldwell had a psychopathic personality. Here, matters beyond appellant's control, and not a psychopathic personality caused appellant's lack of ability to cope on December 4, 1995.

The state also seeks to distinguish Caldwell because "the only evidence was that he [appellant Hughey] fully understood the criminality of the conduct *by his flight and attempt to avoid capture*." Respondent's brief at p 35 (emphasis added). Even if that quoted

statement were true, it does not distinguish the present case from Caldwell. Caldwell fled the crime scene, and also destroyed evidence. While appellant drove to his sister's house in Georgia after the shooting, there was evidence he had the right to use the automobile, and that the ATM he accessed was a joint account belonging to appellant and the victim. In short, appellant's right to have this statutory mitigating circumstance charged was stronger than the one Caldwell successfully claimed.

The state's argument in its brief is simply a weighing of the evidence involving the statutory mitigating circumstance contained in S C Code §16-3-20(C)(b)(6). However, this Court has held that in determining the submission of a mitigating or aggravating circumstance, the Court is concerned only with the existence (any direct or circumstantial evidence), and not its weight. State v. Pierce, 289 S C 430, 346 S E 2d 707, 711 (1986), State v. James Neil Tucker, 1999 WL 32906 (January 25, 1999). As in Caldwell, this Court in Pierce also held the defendant was entitled to jury instructions on the mitigating circumstances contained in S C Code §16-3-20(C)(b)(2), (6) & (7).

Finally, the state's apparent argument that because appellant received an instruction pursuant to S C Code §16-3-20(C)(b)(2) & (7), and general non-statutory mitigating instructions that he cannot complain of the failure to charge S C Code §16-3-20(C)(b)(6), it simply ignores the defective charge on non-statutory mitigating circumstances, and the relevant case law. If there was **any** evidence that appellant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, and there was such evidence in the testimony of Dr. Evans and social worker Jeff Youngman, then appellant was entitled to an instruction under S C Code §16-3-20(C)(b)(6) irrespective of the

other statutory mitigating circumstances the jury was allowed to consider State v Caldwell, State v Pierce, supra

The state's argument also does not take into account that the trial judge's dismissive tone that statutory non-mitigating circumstances were something the defendant contended the jury should consider, rather than the law authorizes it to consider See Appellant's brief at p 40-43, and the argument *infra* Appellant was entitled to a jury instruction under S C Code §16-3-20(C)(b)(6) He should now be granted a new sentencing hearing

ARGUMENT VI (In Appellant's Brief)

The trial judge's charge that non-statutory mitigating circumstances were those "the defendant contends serve the same purpose as statutory mitigating circumstances implied these were not circumstances the law provides the jury should consider. The judge's penalty stage charge as a whole was improper, and unfair to appellant

The state contends the judge's charge as a whole was not confusing, and a correct charge on the law. Respondent's brief at p. 44. However, that charge as a whole was dismissive of non-statutory mitigating circumstances, and told the jury that mercy was an improper factor for it to consider. The charge in this case differed substantially from the one challenged in State v. Bell, 302 S.C. 18, 393 S.E.2d 364, 374 (1990).

In State v. Bell this Court upheld a challenge to the trial judge's instruction on non-statutory mitigating circumstances because the judge referred implicitly or explicitly to non-statutory mitigating circumstances at least twice. The judge also charged the jury that it could recommend a sentence of life imprisonment **for any reason or no reason at all**.

Here, the trial judge charged that the **defendant contended** non-statutory mitigating circumstances served the same purpose as statutory circumstances [declared by the state legislature] as a circumstance which lessened the severity of the crime. R. 4059, ll. 5-12, 4060, ll. 13-18. The judge also instructed the jury that it may "recommend a sentence of life imprisonment for any reason or no reason at all **other than as an act of mercy**." R. 4042, ll. 8-15 (emphasis added).

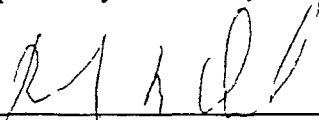
The judge's charge that the "defendant contends" the jury should consider non-statutory mitigating circumstances was dismissive of those mitigating circumstances when compared to statutory mitigating circumstances. The instruction informed the jury that a life

sentence as an act of mercy **was invalid**, rather than a permissible reason to give a life sentence. The instruction in this case violated the Eighth and Fourteenth Amendments, and was confusing. Lockett v. Ohio, 438 U.S. 104, 98 S.Ct. 2954 (1978), State v. Manning, 305 S.C. 413, 409 S.E.2d 372, 375 (1991). Appellant is entitled to a new sentencing hearing.

CONCLUSION

By reason of the foregoing arguments, as well as those previously argued, appellant's conviction should be reversed, and this case remanded to the Abbeville County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing hearing.

Respectfully submitted,



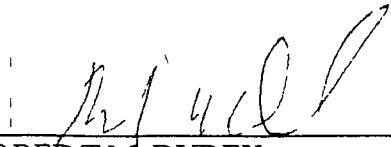
Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of June, 1999

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR



ROBERT M DUDEK
Assistant Appellate Defender

1122 Lady Street, Suite 940
Columbia, SC 29201
(803) 734-1330

Attorney for Appellant

June 1, 1999

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Abbeville County

J Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

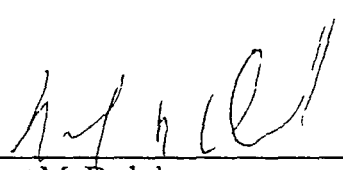
V

JOHN KENNEDY HUGHEY,

APPELLANT

CERTIFICATE OF SERVICE

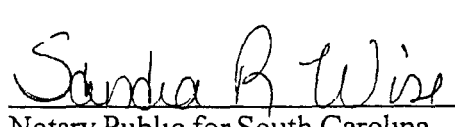
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon Donald J Zelenka, Esquire, this 1st day of June, 1999



Robert M Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 1st day of June, 1999

 (L S)

Notary Public for South Carolina

My Commission Expires February 3, 2005

Copr © West 2000 No Claim to Orig U S Govt Works

529 S E 2d 721

(Cite as 339 S C 439, 529 S E 2d 721)

Supreme Court of South Carolina

The STATE, Respondent,
v
John Kennedy HUGHEY, Appellant

No 25096

Heard Oct 20, 1999

Decided March 27, 2000

Rehearing Denied May 11, 2000

Defendant was convicted in the Circuit Court, Abbeville County, J Derham Cole, J, of murder, and was sentenced to death. Defendant appealed. The Supreme Court, Toal, J, held that (1) correctional officer was not disqualified from serving on jury, (2) when instructing jury on involuntary manslaughter, court was not required to provide specific factual examples of legal provocation, (3) defendant was not entitled to jury instruction on statutory mitigating circumstance of his capacity to appreciate criminality of his conduct, or his ability to conform his conduct to requirements of law, (4) victim impact testimony was properly admitted, (5) jury instruction on non-statutory mitigating circumstances was correct statement of law, and (6) graphic photograph of victim's face after she was shot in back of head with twenty gauge shotgun was admissible.

Affirmed

West Headnotes

[1] Jury k55

230k55

[1] Jury k83(3)

230k83(3)

Although correctional officer was statutorily exempted from jury duty, he was not thereby disqualified from serving on jury. Code 1976, § 24-3-930

[2] Jury k55

230k55

An exemption from jury duty is not a disqualification.

[3] Jury k83(3)

230k83(3)

A juror's belief that he is the member of law enforcement is not enough to disqualify him. Code 1976, § 14-7-820

[4] Jury k83(3)

230k83(3)

Correctional officer was not "law enforcement officer" within meaning of statute that disqualifies such officers from jury duty, even though correctional officer's questionnaire indicated that he considered himself member of law enforcement. Code 1976, §§ 14-7-820, 24-3-930

[5] Homicide k309(1)

203k309(1)

In instructing jury on involuntary manslaughter in capital murder prosecution, court was not required to provide specific factual examples of legal provocation; court's instruction adequately expressed current law of voluntary manslaughter; defendant's requested instruction elevated specific facts of case to acceptable act of

legal provocation, and requested instruction was fully and fairly covered by trial judge's general charge

[6] Criminal Law k769

110k769

The trial judge is required to instruct the jury only on the current and correct law

[7] Criminal Law k805(3)

110k805(3)

The substance of the law must be charged to the jury, not particular verbiage

[8] Criminal Law k822(1)

110k822(1)

A jury instruction is correct if when it is read as a whole, it contains the correct definition and adequately covers the law

[9] Criminal Law k1173 2(1)

110k1173 2(1)

To warrant reversal, a trial judge's refusal to give a requested jury instruction must be both erroneous and prejudicial

[10] Homicide k33

203k33

Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation

[11] Homicide k33

203k33

Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter

[12] Homicide k39

203k39

[12] Homicide k42

203k42

Sudden heat of passion aroused by sufficient legal provocation which may reduce a felonious killing from that of murder to that of manslaughter need not dethrone reason entirely or shut out knowledge and volition, rather, it refers to an unlawful killing provoked by such circumstances that would naturally disturb the sway of reason and render the mind of an ordinary, reasonable, and prudent person incapable of cool reflection

[13] Homicide k39

203k39

[13] Homicide k42

203k42

In order for a felonious killing to be reduced from that of murder to that of manslaughter it must have occurred in sudden heat of passion aroused by sufficient legal provocation

[14] Homicide k42

203k42

The killing of a human being, even in the heat of passion, is murder, rather than manslaughter, if there was no sufficient legal provocation, i.e., if the slayer had no reasonable cause for his anger

[15] Homicide k40

203k40

In determining whether a reasonable time for cooling off had elapsed, such that a killing is murder rather than manslaughter, the jury should consider the nature of the provocation (if it finds some to exist), the defendant's mental and physical constitution, and the circumstances and relationships between the parties

[16] Homicide k40
203k40

Even when a person's passion was sufficiently aroused by a legally adequate provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing is murder and not manslaughter

[17] Criminal Law k829(1)
110k829(1)

A trial judge's refusal to provide specific jury instructions is not reversible error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved

[18] Criminal Law k829(1)
110k829(1)

The failure to provide specific jury instructions is not error when the given instructions use the proper test for determining the issues before the jury

[19] Criminal Law k338(2)
110k338(2)

Even if testimony by murder victim's husband as to his finding of blood and bone fragments in their home were irrelevant and inadmissible, any error in its admission into evidence was harmless, as it did not contain any evidence that was not described, rather graphically, by law enforcement officers and pathologist

[20] Criminal Law k661
110k661

The trial judge has considerable discretion in ruling on the admissibility of testimonial and non-testimonial evidence

[21] Criminal Law k1153(1)
110k1153(1)

The trial judge's determination of admissibility of evidence will not be disturbed absent abuse of discretion resulting in prejudice to the complaining party

[22] Criminal Law k338(1)
110k338(1)

Evidence is relevant if it tends to establish or makes more or less probable some matter in issue upon which it directly or indirectly bears

[23] Criminal Law k796
110k796

The trial judge in a capital sentencing proceeding has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by the evidence and not merely those requested by the defendant

[24] Sentencing and Punishment k1780(3)
350Hk1780(3)
(Formerly 110k1208 1(6))

In deciding which statutory mitigating circumstances may be supported in a capital sentencing proceeding, the trial judge is concerned only with the existence of the evidence, not its weight

[25] Criminal Law k796
110k796

Neuropsychologist's testimony during capital sentencing proceeding that defendant's organic brain dysfunction would affect his ability "to cope and deal with stress and life itself" did not warrant jury instruction on statutory mitigating circumstance of defendant's capacity to appreciate criminality of his conduct, or his ability to conform his

conduct to requirements of law, such testimony implied that defendant could not deal with stress, not that he would be unable to appreciate criminality of his conduct or to conform his conduct to law Code 1976, § 16-3-20(C)(b)(6)

[26] Homicide k311
203k311

Capital murder defendant's abuse as child, several head traumas, car accident, and death of his mother did not warrant sentencing phase jury instruction on statutory mitigating circumstance of defendant's capacity to appreciate criminality of his conduct, or his ability to conform his conduct to requirements of law, trial judge adequately submitted issue of defendant's mental well-being by instructing jury to consider as non-statutory mitigation, "his level of intellectual function whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult " Code 1976, § 16-3-20(C)(b)(6)

[27] Sentencing and Punishment k1782
350Hk1782
(Formerly 203k358(1))

State's victim impact testimony in sentencing phase of capital murder prosecution was not objectionable on ground that it was given in narrative form rather than question-answer format, testimony was routine victim impact testimony that did not evoke any prejudicial comments

[28] Sentencing and Punishment k310
350Hk310
(Formerly 110k986 6(3))

Victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant

[29] Criminal Law k822(1)
110k822(1)

A jury instruction must be viewed in the context of the overall charge

[30] Criminal Law k769
110k769

The test for the sufficiency of a jury instruction is what a reasonable juror would have understood the charge to mean

[31] Homicide k311
203k311

Jury instruction on non-statutory mitigating circumstances was correct statement of law in capital murder sentencing proceeding, even though it defined non-statutory circumstances as those "the defendant contends" jury should consider, not what law authorized jury to consider, instruction repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming recommendation, jury was instructed that they could recommend life imprisonment for "any reason or no reason at all," and trial judge provided specific factual examples of non-statutory mitigating circumstances, such as defendant's prior good acts and level of intellectual functioning

[32] Criminal Law k1172 1(2)
110k1172 1(2)

An instruction that the jury in a capital sentencing proceeding should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error

[33] Criminal Law k438(6)
110k438(6)

[33] Criminal Law k438(7)
110k438(7)

Graphic photograph of murder victim's face after she was shot in back of head with twenty gauge shotgun was admissible in capital sentencing proceeding, as it demonstrated that shot was intentional rather than accidental, defense argued in guilt phase that gun accidentally fired when defendant and victim were struggling over it, but photograph demonstrated that victim was shot deliberately from behind, in manner in which she was least able to defend herself, and not as result of struggle over gun

[34] Criminal Law k438(1)
110k438(1)

[34] Criminal Law k1153(1)
110k1153(1)

The relevancy, materiality, and admissibility of photographs are matters left to the sound discretion of the trial judge and those rulings will not be disturbed absent a showing of an abuse of discretion

[35] Criminal Law k438(7)
110k438(7)

The trial judge must balance the prejudicial effect of graphic photographs against their probative value, to constitute unfair prejudice, the photographs must create a tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one

[36] Criminal Law k438(7)
110k438(7)

Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions

[37] Sentencing and Punishment k1750

350Hk1750
(Formerly 110k1208 1(6))

In the sentencing phase of a capital trial, the scope of the probative value of evidence is much broader

[38] Sentencing and Punishment k1778
350Hk1778
(Formerly 110k1208 1(6))

The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase

[39] Sentencing and Punishment k1756
350Hk1756
(Formerly 110k1208 1(6))

During the sentencing phase in a capital case, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence

[40] Sentencing and Punishment k1767
350Hk1767
(Formerly 203k358(1))

Photographs of the victim's body are admissible in the sentencing phase of a capital murder trial to demonstrate (1) the circumstances of the crime, and (2) the character of the defendant

****725 *446** Assistant Appellate Defender Robert M Dudek, of South Carolina Office of Appellate Defense, of Columbia, for appellant

Attorney General Charles M Condon, Chief Deputy Attorney General John W McIntosh, Assistant Deputy Attorney General Donald J Zelenka, of Columbia, Solicitor W Townes Jones, IV, of Greenwood, all for respondent

TOAL, Justice

John Kennedy Hughey ("Hughey") seeks a reversal of his conviction and death sentence for the murders of Tesheka Lanyra Jackson ("Jackson") and Luevinia H Harris ("Harris") We affirm

FACTUAL/PROCEDURAL BACKGROUND

On December 4, 1995, Hughey forcibly entered Harris's house and had an altercation with his former girlfriend, Jackson While Hughey and Jackson were arguing, Harris was on the phone with her son, Marcus Harris, from Oklahoma City Harris told her son to call the police because Hughey had a gun, so he immediately called 911 Harris also called the Abbeville City Police Department to request help While Harris was on the phone with the dispatcher, Hughey shot both Harris and Jackson with a shotgun Harris died from a solitary gunshot wound to the head Jackson had three major injuries (1) a gunshot wound to the back of her head, from a maximum shooting distance of two feet, (2) a large bruise on her face, likely caused by the blunt end of the shotgun, and (3) a stab wound in her chest

Within thirty minutes of the shooting, Hughey stole Jackson's car and used her ATM card in Anderson Hughey was arrested in Georgia and told the authorities "I killed them, it was an accident, the gun went off" Prior to the incident, Hughey left a note on his door that stated "As of this morning I will be dead Love you all Please take care of my kids John K "

*447 After his arrest, Hughey gave an oral statement to Agent Eddie Clark Hughey claimed he and Jackson had an altercation at Harris's house According to Hughey, Jackson threw a vase at him and went outside to get a shotgun from her car Harris

tried to get between Hughey and Jackson, grabbed the gun, and the gun accidentally fired According to Hughey, Jackson chased him into the bedroom, they struggled for the gun, and he accidentally shot her

Hughey gave an inconsistent statement during the guilt phase of the trial He denied making the statement to the police after his arrest At trial, Hughey claimed Harris invited him in for coffee and Jackson attacked him with a vase and a knife According to Hughey, Jackson charged him with a knife and he pushed her resulting in a stab Hughey then ran out of the house to get the shotgun from the car He claims that Jackson stood on the steps and threatened to kill him As he approached her, Jackson spit on him and attempted to slam the door While they struggled at the door, the gun went off and Harris was shot Hughey admitted that he was angry and attempted to shoot at Jackson He chased Jackson into the bedroom where he shot her in the back of the head with a twenty gauge shotgun

On March 11, 1996, Hughey was indicted in Abbeville County for (1) the murder of Jackson, (2) the murder of Harris, (3) burglary in the first degree, and (4) grand larceny of a vehicle On October 27, 1997, the jury found Hughey guilty on all four counts The jury found beyond a reasonable doubt the existence of all statutory aggravating circumstances and returned a recommendation of death for each count of murder On October 30, 1997, the trial judge sentenced Hughey to (1) death for each count of murder, (2) a life sentence for burglary in the first degree, and (3) ten years imprisonment for grand larceny

Hughey appeals his death sentence for both murders, raising the following issues

(1) Whether the trial judge erred by refusing to disqualify juror # 55, Brian Daly ("Daly"), since he was employed at

the **726 McCormick Correctional Institution, and S C Code Ann § 24-3-930 (1989) provides that "[a]ll guards and officers employed at the Penitentiary shall *448 be exempted from serving on a jury", and whether Daly was the functional equivalent of a law enforcement officer?

(2) Whether the trial judge erred by refusing to provide specific examples of legal provocation in the jury charge of voluntary manslaughter?

(3) Whether the trial judge should have excluded the testimony of Mack Harris, the husband of Luevinia Harris, during the guilt phase concerning the blood he cleaned off the floor of his home after the murders?

(4) Whether the trial judge erred by refusing to charge the statutory mitigating circumstances contained in S C Code Ann § 16-3- 20(C)(b)(6) (Supp 1998), which allows the jury to consider (1) the capacity of the defendant to appreciate the criminality of his conduct, or (2) the defendant's ability to conform his conduct to the requirements of the law?

(5) Whether the trial judge erred by allowing the victim impact witnesses to testify in narrative form, rather than question-answer format, and whether this format was beyond the permissible scope of *Payne v Tennessee*, 501 U S 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991)?

(6) Whether the trial judge erred by instructing the jury that a non- statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance?

(7) Whether the trial judge erred in admitting State's Exhibit 95, a graphic color photograph of the victim's head wound?

[1] Hughey argues section 24-3 930 disqualifies a correctional officer from serving on a jury We disagree

[2] South Carolina recognizes a difference between "exemptions" and "disqualifications" from jury duty An exemption *449 from jury duty is not a disqualification to act as a juror, but is a personal privilege that the juror may claim or waive 50A C J S Juries § 304 (1955), see also 15A Words and Phrases Exempt, Exemption (1950) ("A person exempted from jury services is not thereby disqualified to serve on a jury ") This Court has held an exemption from jury duty is not a disqualification See *State v Matthews*, 291 S C 339, 343, 353 S E 2d 444, 447 (1986) ("An exemption under [S C Code Ann § 14-7-850] is a privilege and not a disqualification"), *State v Toland*, 36 S C 515, 521, 15 S E 599, 600 (1892) ("exemption was a personal privilege which [jurors] might or might not claim, but it did not disqualify them as jurors ")

S C Code Ann § 24-3-930 (1976) provides "that all guards or keepers and other officers employed at the Penitentiary shall be exempted from serving on juries and from military or street duty " (emphasis added) In drafting this section, the South Carolina legislature chose the term "exempted " However, in other code sections relating to juror qualification, the legislature chose to use the term "disqualifications " See, e g , S C Code Ann § 14-7-430 (1976) ("Persons drawn shall serve unless dead, disqualified, or removed from county"), S C Code Ann § 14-7-820 (1976) ("Disqualification of county officers and court employees") The use of these separate terms in different sections of the Code demonstrates the legislature's intent to draw a distinction between an exemption and a disqualification Therefore, the trial judge did not err in ruling that section 24-3-930 did not disqualify juror Daly

LAW/ANALYSIS

I JUROR DISQUALIFICATION

A Exemption versus Disqualification

B Disqualification under S C Code § 14-7-820 (1976)

Hughey argues section 14-7-820 disqualifies a juror who considers himself to be a member of law enforcement We disagree

[3] Section 14-7-820 provides "No clerk or deputy clerk of the court, constable, sheriff, **727 probate judge, county commissioner, magistrate or other county officer or any person employed within the walls of any courthouse shall be eligible as a juror in any civil or criminal case " "This court has adopted a functional rather than a rigid formalistic approach in interpreting and applying the provisions of this statute " *450 State v Cooper, 291 S C 332, 334, 353 S E 2d 441, 442 (1986) A juror's belief that he is the member of law enforcement is not enough to disqualify him under this statute

[4] This Court held in State v Johnson, 123 S C 50, 115 S E 748 (1923) that a juror would be disqualified under section 14-7-820 when he or she was vested with like powers and duties of a law enforcement officer In Bryant v State, 264 S C 157, 213 S E 2d 451 (1975), we held that a special deputy sheriff who did not perform the duties of a law enforcement officer was not disqualified under the statute Daly is a corrections officer whose duties do not involve enforcing the criminal laws of this State Hughey offers no evidence that Daly "was vested with like powers and duties of a sheriff," Cooper, 291 S C at 334-335, 353 S E 2d at 442 Hughey only argues that Daly's questionnaire indicates he considered himself a member of law enforcement In light of the fact that the voir dire of Daly reveals no bias, Mr Daly's subjective view of his employment does not disqualify him under section 14-7-820 Furthermore, section 24-3-930, discussed supra, speaks to

the eligibility of an officer or guard employed by the penitentiary for jury duty Therefore, section 24-3-930, not section 14-7-820, governs the eligibility of a corrections officer for jury duty

II LEGAL PROVOCATION

[5] Hughey argues the trial judge erred by refusing to provide specific factual examples of legal provocation in the voluntary manslaughter charge We disagree

[6][7][8][9] The trial judge is required to charge only the current and correct law of South Carolina Cohens v Atkins, 333 S C 345, 509 S E 2d 286 (Ct App 1998) The substance of the law must be charged to the jury, not particular verbiage Keaton v Greenville Hosp Sys, 334 S C 488, 514 S E 2d 570 (1999) A jury charge is correct if when the charge is read as a whole, it contains the correct definition and adequately covers the law Id at 495-96, 514 S E 2d at 574 To warrant reversal, a trial judge's refusal to give a requested jury charge must be both erroneous and prejudicial Ellison v Parts Distributors, Inc, 302 S C 299, 395 S E 2d 740 (Ct App 1990)

[10][11][12][13][14][15][16] *451 The trial judge's jury charge in the instant case is not reversible error because it adequately expressed the current South Carolina law of voluntary manslaughter "Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation " State v Johnson, 333 S C 62, 508 S E 2d 29 (1998)

Both heat of passion and sufficient legal provocation must be present at the time of the killing to constitute voluntary manslaughter State v Walker, 324 S C 257, 478 S E 2d 280 (1996) (citations omitted) The jury charge used in this case adequately expressed the current law of voluntary

manslaughter by incorporating the exact language used by this Court in *State v. Walker* to define "sudden heat of passion." See *Walker*, 324 S C at 257, 478 S E 2d at 281. The trial judge gave the instruction as follows:

Sudden heat of passion aroused by sufficient legal provocation which may reduce a felonious killing from that of murder to that of manslaughter need not dethrone reason entirely or shut out knowledge and volition, but it refers to an unlawful killing provoked by such circumstances that would naturally disturb the sway of reason and render the mind of an ordinary, reasonable, and prudent person incapable of cool reflection. And to produce what, according to human experience may be called an uncontrollable impulse to do violence.

Now in order for a felonious killing to be reduced from that of murder to that of manslaughter it must have occurred in sudden heat of passion aroused by sufficient legal provocation. The killing of a human being, even in the heat of passion, is murder if there was no sufficient legal ****728** provocation. That is the slayer had no reasonable cause for his anger.

Now in connection with what I have just instructed you regarding a cool reflection, that is whether or not a reasonable time for cooling off had elapsed, you should consider the whole circumstances surrounding the event. You should consider the nature of the provocation, should you find some to exist, the defendant's mental and physical constitution as well as the circumstances and relationships between the parties, the time in which an ordinary person under like ***452** circumstances would have called--cooled off is considered to be the reasonable time.

Even when a person's passion were sufficiently aroused by a legally adequate

provocation, if at the time of the killing those passions had cooled or a sufficiently reasonable time had elapsed so that the passions of the ordinary reasonable person would have cooled, the killing would be murder and not manslaughter.

[17][18] The trial judge's refusal to include the specific instructions requested by Hughey does not constitute reversible error. A trial judge's refusal to provide specific jury instructions is not reversible error if the general instructions are sufficiently broad to enable the jury to understand the law and the issues involved. *Cohens*, 333 S C at 345, 509 S E 2d at 289. The failure to provide specific jury instructions is not error when the given instructions use the proper test for determining the issues before the jury. *Miller v. City of West Columbia*, 322 S C 224, 471 S E 2d 683 (1996).

Hughey requested that specific examples of legal provocation be provided to the jury. Specifically, Hughey requested the following examples of legal provocation: pulling a knife on a defendant, pointing a gun at a defendant, spitting in a defendant's face, assault of a family member, sudden mutual combat where one of the participants is killed by the other without a previously informed intention to do so, finding one's spouse in the act of adultery, or the deceased having molested a defendant's minor child. The requested examples constitute a direct charge on the facts because Hughey alleges that a knife was pulled on him, Jackson spit in his face, and there was sudden mutual combat. The requested jury charge elevates the specific facts of the case, such as spitting in a person's face, to an acceptable act of legal provocation. Because the requested charge is an instruction on the facts, and the requested charge is fully and fairly covered by the trial judge's general charge, refusal of the requested instruction is not reversible error. See *State v. Barwick*, 280 S C 45,

310 S E 2d 428 (1983)

III PREJUDICIAL TESTIMONY

[19] Hughey argues the trial judge erred in overruling their objection to a portion of George Harris's testimony. We disagree.

*453 At trial, defense counsel objected to the following testimony by George Mack Harris, husband of one of the victims:

Question: When you got back in that house, did you notice any red colored substance on the floor of your kitchen?

Mr. Garrett: Objection, Your Honor, relevance?

The Court: Overruled.

The Witness: When I got back in my house I cleaned that blood up, I (witness is crying) me and another friend. I removed all that blood. There was blood on the floor, blood down the hall in that door into that back bedroom, there was blood and fragments of bone on that floor. The police officers told me--

Mr. Garrett: Objection, Your Honor. As to what the police officers said.

Mr. Jones: Don't tell me what they told you, just tell me--

The Court: The question is simply if you saw that on the floor or if it was there before you left?

Question: Was it on the floor before you left at 10:50?

Answer: No sir.

Question: Was it there when you came back?

Answer: Yes, it was.

[20][21] Defense counsel objected to Mr. Harris's testimony on the grounds of relevance. The trial judge has considerable discretion. **729 in ruling on the admissibility of testimonial and non-testimonial evidence. See *State v. Davis*, 309 S C 326, 422 S E 2d 133 (1992), overruled on other grounds, *Brightman v*

State, 336 S C 348, 520 S E 2d 614 (1999), *State v. Sims*, 304 S C 409, 405 S E 2d 377 (1991). The trial judge's determination of admissibility will not be disturbed absent abuse of discretion resulting in prejudice to the complaining party. See, e.g., *State v. Babb*, 299 S C 451, 385 S E 2d 827 (1989).

[22] "Evidence is relevant if it tends to establish or makes more or less probable some matter in issue upon which it directly or indirectly bears." *State v. Alexander*, 303 S C 377, 401 S E 2d 146, 148 (1991). The State argues the testimony is relevant to the timing of the murder because it establishes that the murder occurred during the period of time Mr. Harris was absent from his home. Even if we find the testimony was irrelevant, and the trial judge abused his discretion by admitting *454 the testimony, the statements by Mr. Harris did not result in unfair prejudice, and therefore, any error by the trial judge was harmless. *State v. Johnson*, 306 S C 119, 410 S E 2d 547 (1991) (wife's testimony was not relevant, but admission was a harmless error).

Although Mr. Harris's testimony may have been of little probative value, in light of the evidence already presented by the State, its admission did not result in prejudice to the Appellant. In *State v. Davis*, *supra*, this Court upheld the admission of testimony by the victim's mother where the testimony was of little probative value but concerned facts already known to the jury. The testimony by Mr. Harris in the instant case did not contain any evidence that was not described, rather graphically, by the police, the pathologist, and a SLED agent. This Court concluded in *Davis* that although the testimony by the victim's mother was of little probative value, the testimony did not prejudice the defendant to the extent of affecting the outcome of the trial. *Davis*, 309 S C at 340, 422 S E 2d at 142.

Therefore, even if the testimony of Mr Harris was irrelevant and inadmissible, because the questionable testimony was brief and no new evidence was presented, the admission constituted a harmless error

IV STATUTORY MITIGATING CIRCUMSTANCES

Hughey argues the trial judge erred by refusing to instruct the jury on the statutory mitigating circumstance contained in S C Code Ann § 16-3- 20(C)(b)(6) (Supp 1998), which would allow the jury to consider Hughey's capacity to appreciate the criminality of his conduct, or his ability to conform his conduct to the requirements of the law We disagree

[23][24] Section 16-3-20(C)(b)(6) authorizes the trial judge to instruct the jury on certain statutory mitigating circumstances that may be supported by evidence Specifically, section 16-30-20(C)(b)(6) states that the jury may consider "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired " The trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by *455 the evidence and not merely those requested by the defendant State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990) (citing State v Bellamy, 293 S C 103, 359 S E 2d 63 (1987)) In deciding which statutory mitigating circumstances may be supported, the trial judge is concerned only with the existence of the evidence, not its weight Id

[25] Hughey argues the trial judge should have instructed the jury to consider the statutory mitigating circumstances contained in section 16-3- 20(C)(b)(6) based on the following testimony provided by Dr James Evans, a specialist in neuropsychology

Question You're offering them as explanations for his individual characteristics

Answer Yes, in a way I'm offering them as fact the [sic] would appear to modify or mitigate or whatever the crime--it would--it wasn't--it might be something that- He's different from the average person in many ways And those are the ways we've talked about now And those certainly there is question whether **730 they were factors--it needs to be asked are those factors in the crime And they may well have been

Question In your opinion, they could definitely have impacted him on December 4, 1995?

Answer They could have been factors, yes

Question And, Doctor, in your medical opinion as neuropsychologist, if an individual who suffers from organic brain dysfunction is exposed to violence at an early age, abused, and then suffers a series of head traumas, in your opinion as an expert, would those factors affect that person's ability to cope and deal with stress and life itself?

Answer Yes

Question And, Doctor, in your evaluation and study of John Kennedy Hughey, have you found organic brain dysfunction?

Answer I found a lot of converging evidence for organic brain dysfunction to the point I would say, yes, it exists

Dr Evan's testimony implies that Hughey could not deal with stress, not that Hughey would be unable to appreciate the *456 criminality of his conduct or to conform his conduct to the law In fact, no witness testified that Hughey could not appreciate the criminality of his conduct

In State v Caldwell, this Court held the trial judge erred by failing to charge the statutory mitigating circumstances contained in section 16-3- 20(C)(b)(6) where the defendant suffered from a psychopathic

personality Caldwell, 300 S C at 506, 388 S E 2d at 823 This condition is "one in which the individual is not constrained by societal norms for behavior and therefore is unlikely to obey rules on his own " Id The trial judge in Caldwell should have charged section 16-3-20(C)(b)(6) because the defendant's disorder caused him to be unable to appreciate the criminality of his behavior or abide by the law Unlike Caldwell, there is no evidence in the instant case that Hughey's disorder caused him to be unable to understand the criminality of his conduct, only that he was more susceptible to stress

[26] Hughey argues that he was entitled to an instruction on the mitigating circumstances in section 16-3-20(C)(b)(6) because of his abuse as a child, several head traumas, a car accident, and the death of his mother The trial judge adequately submitted the issue of Hughey's mental well-being to the jury by instructing the jury to consider as non-statutory mitigation, "his level of intellectual function whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult " See State v Plemmons, 296 S C 76, 370 S E 2d 871 (1988) (trial judge was not required to charge section 16-3-20(C)(b)(6) because of the effects of alcohol on the defendant where the non-statutory mitigating circumstances charge specifically permitted the jury to consider the effects of intoxication)

The trial judge in the present case did not err by refusing to charge the statutory mitigating circumstances contained in section 16-3-20(C)(b)(6) because no evidence introduced supported it and the jury was advised to consider Hughey's mental state through the judge's non-statutory mitigating circumstances charge

*457 V VICTIM IMPACT TESTIMONY

[27] Hughey argues the trial judge improperly allowed the State's victim impact witnesses to testify in narrative form rather than question-answer format in violation of *Payne v Tennessee*, 501 U S 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991) [FN1] We disagree

FN1 Defense counsel adequately preserved this issue for appeal by objecting to the family members "continuing without questions "

[28] Victim impact evidence is admissible in the sentencing phase to demonstrate the "uniqueness" of the victim and the specific harm committed by the defendant *State v Rocheville*, 310 S C 20, 27, 425 S E 2d 32, 36 (1993) In *Payne v Tennessee*, 501 U S 808, 111 S Ct 2597, 115 L Ed 2d 720 (1991), the United States Supreme Court held that victim impact evidence is relevant for a jury to **731 meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair See also *State v Johnson*, 306 S C 119, 410 S E 2d 547 (1991) The State called four members of Harris's family to describe their personal relationship with Harris and the unique impact her death had on their lives The solicitor asked each family member one open-ended question that elicited a long, narrative response describing their relationship with the victim Although given in narrative form, the testimony was routine victim impact testimony that did not evoke any prejudicial comments [FN2] The witnesses' testimony was relevant and proper because it portrayed Harris as an unique individual and it demonstrated the specific harm caused by Hughey's actions [FN3]

FN2 The family members testified that Harris was a good mother, they missed her company, they missed her

cooking, and that the holidays were going to be painful without her

FN3 The family members' testimony in this case is similar to other victim impact testimony permitted by this Court. See *State v Ivey*, 325 S C 137, 481 S E 2d 125 (1997) (admitting testimony from victim's mother concerning the impact of her son's death), *Riddle v State*, 314 S C 1, 443 S E 2d 557 (1994) (admitting testimony of victim's stepdaughter concerning the victim's standing in the community, the victim's grandchildren, and the impact the crime had on her), *State v Rocheville*, 310 S C 20, 425 S E 2d 32 (1993) (admitting testimony of victim's parents who testified about their families' reliance on their son's dreams and aspirations)

***458 VI NON-STATUTORY MITIGATING CIRCUMSTANCES**

Hughey argues the trial judge's instruction on non-statutory mitigating circumstances constituted reversible error. We disagree.

[29][30][31] A jury instruction must be viewed in the context of the overall charge. See *State v Hicks*, 330 S C 207, 499 S E 2d 209 (1998) (citing *Cupp v Naughten*, 414 U S 141, 94 S Ct 396, 38 L Ed 2d 368). The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. *Id.* at 218, 499 S E 2d at 215. Hughey argues the jury charge was confusing to a reasonable juror because it implies that non-statutory mitigating circumstances are not circumstances the law requires a jury to consider. The trial judge gave the following instruction on non-statutory mitigating circumstances:

Now you are also permitted under the law to consider you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in this case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of a circumstance or circumstances beyond a reasonable doubt. And you may recommend *459 a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy (emphasis added).

****732** Considering the jury charge as whole, a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment. Hughey contends the trial judge's instruction was erroneous because the charge defined non-statutory circumstances as those "the defendant contends" the jury should consider, not what the law authorizes the jury to consider. The jury charge adequately apprised the jury of the function of non-statutory mitigating circumstances because it repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming a recommendation. In fact, the judge instructed the jury that they could recommend life imprisonment for "any reason or no reason at all." See *State v Atkins*, 303 S C 214, 399 S E 2d 760 (1990) (upholding a jury charge where the judge stressed the jury could recommend a life sentence "for any reason or no reason")

Moreover, the jury charge in the present case is similar to other charges of non-statutory mitigating circumstances upheld by this Court. The jury charge authorized the jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. Similar jury instructions have been found adequate by this Court. See *State v Hicks*, 330 S C 207, 499 S E 2d 209 (1998) (upholding a jury charge which permitted a jury to impose a life sentence even if they did not find mitigating circumstances), *State v Sims*, 304 S C 409, 405 S E 2d 377 (1991) (jury charge was found proper where it authorized jury to consider any mitigating evidence presented), *State v Singleton*, 284 S C 388, 326 S E 2d 153 (1985)***460** (instruction proper where judge states the jury may consider "any mitigating circumstances which are supported by evidence"). Furthermore, the trial judge went beyond the basic jury charge on non-statutory mitigating circumstances by

providing specific factual examples of non-statutory mitigating circumstances, such as the defendant's prior good acts and level of intellectual functioning

[32] Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy" (emphasis added). This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. See *Singleton*, 284 S C at 393, 326 S E 2d at 156, *State v Chaffee*, 285 S C 21, 328 S E 2d 464 (1984)

The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law

VII PHOTOGRAPH

[33] Hughey argues the trial judge erred in admitting State's Exhibit 95, a graphic color photograph of Jackson's head wound, because the photograph was so inflammatory that it denied his right to a fair sentencing hearing. We disagree.

[34][35][36] The relevancy, materiality, and admissibility of photographs are matters left to the sound discretion of the trial judge and those rulings will not be disturbed absent a showing of an abuse of discretion. *State v Nance*, 320 S C 501, 466 S E 2d 349 (1996), *State v Kornahrens*, 290 S C 281, 350 S E 2d 180 (1986). The trial judge must balance the prejudicial effect of graphic

photographs against their probative value. To constitute unfair prejudice, the photographs must create a "tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." *461 *State v Franklin*, 318 S C 47, 55, 456 S E 2d 357, 361 (1995). Photographs which are calculated to arouse the sympathies or prejudices of the jury should be excluded from the guilt phase of a capital case if they are irrelevant or not substantially necessary to show material facts or conditions. *Kornahrens*, 290 S C at 288, 350 S E 2d at 185.

[37][38][39][40] In the sentencing phase, the scope of the probative value of evidence is **733 much broader. *State v Rosemond*, 335 S C 593, 518 S E 2d 588 (1999). "The purpose of the bifurcated proceeding in a capital case is to permit the introduction of evidence in the sentencing proceeding which ordinarily would be inadmissible in the guilt phase." *Id.* During the sentencing phase, the trial judge may permit the introduction of additional evidence of aggravation in order to aid the jury in determining whether to recommend a death sentence. *Id.* Photographs of a victim's body in the sentencing phase are admissible to demonstrate (1) the circumstances of the crime, and (2) the character of the defendant. *State v Tucker*, 324 S C 155, 168, 478 S E 2d 260, 267 (1996).

During the sentencing phase the State introduced a graphic photograph of the victim's face after she was shot in the back of the head with a twenty gauge shotgun. Although the photograph is gruesome, it depicts the condition in which Hughey left the victim and the circumstances of the crime. The photograph is probative of the circumstances of the crime because it demonstrates the shot was intentional rather than accidental. The defense argued in the guilt phase that the gun accidentally fired

when Hughey and Jackson were struggling over the gun. The photograph demonstrates that Jackson was shot deliberately from behind, in a manner in which she was least able to defend herself, and not as a result of a struggle over the gun. The photograph also demonstrates that Hughey shot Jackson at a very close range. See *Rosemond*, 335 S C 593, 518 S E 2d 588 (admitting a photograph of a victim who was shot twice in the head in order to demonstrate the wounds were inflicted at close range), *State v Nichols*, 325 S C 111, 481 S E 2d 118 (1997) (admitting photograph of victim's face because it demonstrated the angle and distance from which the victim was shot), *Tucker*, 324 S C at 155, 478 S E 2d at 267 (admitting photographs of victim's head to demonstrate the shots were fired at close range). Moreover, *462 this Court has not found an abuse of discretion in the admission of graphic photographs similar to the photographs in the present case. See *State v Gardner*, 332 S C 389, 505 S E 2d 338 (1998) (admitting a close-up color photograph of the victim's face in the sentencing phase of the trial where she had been shot in the face five times).

CONCLUSION

After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury's finding of statutory aggravating circumstances is supported by the evidence. See S C Code Ann § 16-3-25 (1985). Further, the death penalty is neither excessive nor disproportionate to that imposed in similar cases. See *State v Powers*, 331 S C 37, 501 S E 2d 116 (1998), cert denied, 525 U S 1043, 119 S Ct 597, 142 L Ed 2d 539 (1998), *State v Byram*, 326 S C 107, 485 S E 2d 360 (1997), *State v Tucker*, 324 S C 155, 478 S E 2d 260 (1996), cert denied, 520 U S 1200, 117 S Ct 1561, 137

L Ed 2d 708 (1997), State v Green, 301 S C 347, 392 S E 2d 157 (1990), cert denied, 498 U S 881, 111 S Ct 229, 112 L Ed 2d 183 (1990), State v Lucas, 285 S C 37, 328 S E 2d 63 (1985), cert denied, 472 U S 1012, 105 S Ct 2714, 86 L Ed 2d 729 (1985) Based on the foregoing, the convictions and sentences are AFFIRMED

MOORE, WALLER, and BURNETT, JJ ,
concur

FINNEY, C J , dissenting in a separate
opinion

FINNEY, Chief Justice

I respectfully dissent In my opinion, the testimony from the neuropsychologist coupled with the evidence of appellant's head traumas and his car accident constitute some evidence warranting a charge on the statutory mitigating circumstance of capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990) Accordingly, I would reverse and remand for resentencing

END OF DOCUMENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

J Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

v

JOHN KENNEDY HUGHEY,

PETITIONER

PETITION FOR REHEARING

Petitioner requests rehearing because this Court (1) May have misapprehended the prejudice from victim impact evidence that included the victim's family lecturing petitioner from the witness stand, calling him a liar, and personally challenging him when he could not respond, (2) May have overlooked the prejudice from George Harris' irrelevant and weeping guilt stage testimony about cleaning his wife's blood off the floor of their home days after the homicide, and, (3) May have overlooked the fact the trial judge's charge that a life sentence as "act of mercy" was improper violated the noblest traditions of South Carolina capital jurisprudence

Victim Impact testimony

This Court held that although the victim impact testimony was in narrative form, it was "[r]outine victim impact testimony that did not evoke any prejudicial comments " State v John

Kennedy Hughey, Op No 25096, Shearouse's Adv Sh #12 at page 36 However, a close examination of the record shows the victim impact testimony was not routine

During the penalty stage, the state called decedent Jackson's mother, Bernice Jackson, as a witness R 3701, 1 15 - 3702, 1 1 The examination of Jackson was in the form of question and answer until the solicitor asked Jackson the impact of the killing on her family's life R 3703, 1 8 - 3710, 1 9 When Jackson's answer continued for a page and a half of transcript, defense counsel Tinsley objected to the narrative form He objected to "continuing without questions " R 3710, 1 6 - 3712, 1 1 The judge overruled appellant's objection R 3712, 1 2

Jackson then described how her daughter liked to talk to everyone, how she was always was friendly to everyone, and always smiled R 3712, 1 20 - 3713, 1 2 Jackson testified appellant had killed her daughter, but could not kill her memory R 3713, 1 22 - 3714, 1 4 The narrative answer of Bernice Jackson continued for four pages of transcript following appellant's objection to the narrative form was overruled R 3714, 1 5 - 3718, 1 2

Jackson testified, "John caused this on me He did this to us He tore our family up If he did not did what he did, we wouldn't be sitting here today He has interfered with everybody's life that's in here, because everybody had to come, stop what they were doing to be here today And if he had not made that move, we wouldn't be here at all " R 3717, 1 20 - 3718, 1 2

With the judge's approval of narrative answers secured, the solicitor continued to ask open-ended questions calling for narrative answers The solicitor asked Luevinia Harris' son, Marcus Harris, to "tell this jury, if you would, Marcus, what kind of loss your mother's murder had on your family "

Harris began crying during his answer, and continued crying throughout the rest of his narrative testimony R 3728, ll 4-5 In an eight page narrative response to the solicitor's "question," Harris lectured appellant from the witness stand R 3726, l 16 - 3733, l 16

Harris said, "You know, in sitting here giving this testimony **and John, you know what I'm saying, she was in the right -- wrong place at the right -- wrong place at the wrong time in her own home That's tough to hear I couldn't do a dog like that "** R 3731, ll 4 17 (emphasis added) R 3731, ll 18-22

The solicitor next called George Anthony Harris, another one of Luevinia Harris' sons R 3733, l 23 - 3734, l 12 The solicitor again asked an open-ended question "Tell them how her death has impacted your life " R 3735, ll 10-11

Harris then gave his narrative answer Harris testified that he was tired of hearing lies, and said, "**And John know its lies Gloria [Petitioner's sister] knows it was All of them know it "** R 3740, ll 15-23 (emphasis added) Harris described for the jury how he stayed with his mother's casket in the funeral home and would not even leave to eat R 3744, ll 1-11

The solicitor next called Luevinia Harris' husband, Mack Harris, as a witness R 3748, ll 10-12 The solicitor again asked a "question" calling for a narrative response He asked Harris to "Tell the jury what you loved most about her " R 3751, l 6

Harris gave a narrative answer that covered five pages of transcript R 3751, l 6 - 3755, l 3 Harris testified "John killed Luevinia, me, and my boys **You'd killed us all "** R 3753, ll 23-25 (emphasis added)

Harris also told the jurors, "I imagine y'all -- y'all will be getting ready for the holidays Thanksgiving is coming up Christmas is coming up It means a lot to y'all Ya'll's thought

about it Ya'll -- ya'll planning it Ya'll thinking about that now Me? I don't have no more holidays left " R 3754, ll 15-20

The solicitor asked Harris if his wife (the decedent) would forgive appellant for "what he did to her " Harris responded that his wife would not forgive appellant R 3753, l 24 - 3756, l 1

Petitioner respectfully submits that lecturing him from the witness stand, and calling the defense testimony lies was not "routine victim impact evidence " It was fundamentally unfair because petitioner could not respond to the victim's family addressing him, and the pitting of the witnesses was improper

"The primary objection to narrative questions is that they do not allow the opposing party much chance to prevent the jury from being exposed to inadmissible material As a result, narrative questions can be confusing to the jury, as well as prejudicial to the opposing party However, using narrative questions may speed up the testimony and save time Generally, the more material the subject matter of the testimony is to the case, the more likely a narrative question will be improper " Collins, South Carolina Evidence, §4 10 at pg 72 (1995 Ed)

The narrative responses in this case were very emotional, and contained improper testimony It is difficult enough to object to victim impact evidence in the presence of the jury

In Payne v Tennessee, 501 U S 808, 111 S Ct 2597 (1991), the United States Supreme Court held that victim impact evidence was admissible to allow the jury to get a "glimpse of the life" of the victim In Payne, the United States Supreme Court held that there was no *per se* violation of the Eighth Amendment of the United States Constitution by allowing victim impact evidence

However, Payne v Tennessee did not authorize the state *carte blanche* to the solicitor to have his witnesses give narrative responses, and lecture the defendant from the witness stand. The judge lost control of the victim impact witnesses by allowing narrative answers rather than mandating the proper question and answer format.

Appellant could not respond to the witnesses speaking to him from the witness stand. He could not respond to their assertions that appellant and his sister lied. Defense counsel could not anticipate the witnesses would lecture appellant, assert that he lied, and talk to the jurors about their own mothers. See State v McDaniel, 320 S C 33, 462 S E 2d 882 (1995). These are all the unexpected evils of the narrative form.

Under the unusual facts of this case the narrative victim impact testimony constituted a violation of the Eighth Amendment to the United States Constitution. This type of victim impact testimony was never envisioned by Payne v Tennessee. See, Lucas v Evatt, 308 S C 31, 416 S E 2d 646, 648 (1992) (Finney, C J, dissenting).

Guilt stage victim impact testimony

This Court may also have overlooked the fact that the victim's widower, George Harris', crying testimony where he described cleaning his wife's blood off the floor was very prejudicial, and not relevant to any matter at issue during the guilt stage of the trial. The only evidence was that Mr. Harris was not present when the shooting occurred, and that he was allowed to return to his home later by the police.

Q When you got back in that house, did you notice any **red colored substance** on the floor of your kitchen?

MR. GARRETT: Objection, Your Honor, **relevance?**

THE COURT: Overruled.

THE WITNESS When I got back in my house I **cleaned that blood up, I (witness is crying) me and another friend I removed all that blood** There was blood on the floor, blood down the hall in that door into that back bedroom, **there was blood and fragments of bone on that floor** The police officers that told me ---

MR. GARRETT Objection, Your Honor As to what the police officers said

MR. JONES Don't tell me what they told you, just tell me---

THE COURT The questions is simply if you saw that on the floor or if it was there before you left?

EXAMINATION CONTINUED

BY MR. JONES

Q Was it on the floor before you left at 10 50?

A No, sir

Q Was it there when you came back?

A Yes, it was

MR. JONES Answer any questions for the defense

MR. GARRETT I have no questions

R 2918, 1 23 - 2920, 1 1 (emphasis added)

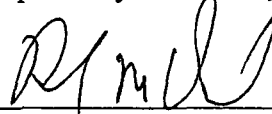
The only effect of this testimony was to interject an arbitrary and impermissible factor into this case -- a death sentence based upon sympathy for the victims Given that this was a domestic case involving petitioner and his common law wife, the impermissible testimony above should not be dismissed as insufficiently prejudicial to petitioner

The confusing and conflicting penalty stage instruction on acceptable reasons for giving a life sentence

Finally, the Court's approval of the trial judge's instruction that a verdict of life imprisonment could not be given as an "act of mercy" conflicts with the tradition of a jury being allowed to give a recommendation of mercy to the sentencing judge. An act of mercy is not synonymous with a verdict guided by "sympathy, prejudice, passion, or public opinion." State v. John Kennedy Hughey, Op No 25096, Shearouse's Adv Sh #12 at page 38. However, that a life sentence can be recommended for "**any reason or no reason at all**" does conflict with a charge that an "act of mercy" was an improper basis for a life recommendation.

Petitioner respectfully submits the "other than as an act of mercy" instruction is internally confusing, and conflicts with tradition in capital cases. For all of these reasons, petitioner asks that this Court reconsider its opinion in State v. John Kennedy Hughey, Op No 25096, Shearouse's Adv Sh #12 at pages 25-42, and grant rehearing.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

S C Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201
(803) 734-1330

April 11, 2000

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Abbeville County

J Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

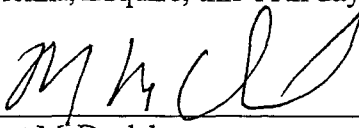
V

JOHN KENNEDY HUGHEY,

PETITIONER

CERTIFICATE OF SERVICE

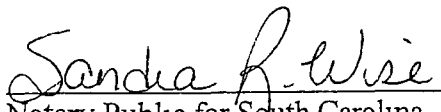
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above referenced case has been served upon Donald J Zelenka, Esquire, this 11th day of April, 2000

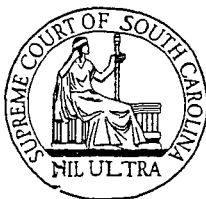


Robert M Dudek
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 11th day of April, 2000

 (L S)
Notary Public for South Carolina
My Commission Expires February 3, 2005



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734 1080
FAX (803) 734 1499

May 11, 2000

Assistant Appellate Defender Robert M. Dudek
Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201

Re The State v. Hughey, John Kennedy

Dear Counsel

The Court has issued the following order on your Petition for Rehearing in the above matter

"Petition for Rehearing is denied

s/ Jean H. Toal C J

s/ John H. Waller, Jr. J

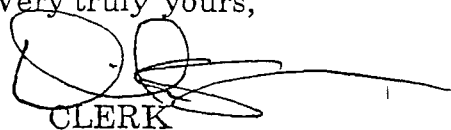
s/ E. C. Burnett, III J

Justice James E. Moore,
not participating

May 11, 2000 "

The remittitur in this matter is today being forwarded to the Clerk of Court for Abbeville County

Very truly yours,


CLERK

Assistant Appellate Defender Robert M Dudek

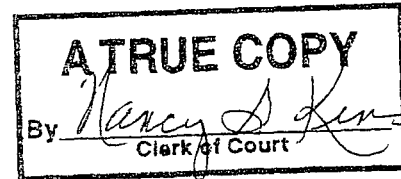
Page Two

May 11, 2000

cc Assistant Deputy Attorney General Donald J Zelenka
The Honorable William Townes Jones, IV

STATE OF SOUTH CAROLINA)
)
 County of Abbeville)
)
John Kennedy Hughey, #5055)
)
 Full Name and p umber f any f ppl ant)
)
 V)
)
State of South Carolina)
)
 Nam f R pondent)
)
)

In the Court of Common Pleas



APPLICATION FOR

POST-CONVICTION RELIEF

2000-CP-01-212

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court it shall be in writing (legibly handwritten or typewritten) signed by the applicant and verified (notarized) and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should therefore exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

- 1 Place of detention Lieber Correctional Institution
- 2 Name and location of Court which imposed sentence Abbeville County Court
of General Sessions, Abbeville, South Carolina
- 3 The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed
 - (a) 96-GS-01-220 - murder (two counts), burglary in the first degree,
 - (b) grand larceny of a vehicle
 - (c) _____
- 4 The date upon which sentence was imposed and the terms of the sentence
 - (a) October 30, 1997 - two sentences of death, life imprisonment for
 - (b) burglary, ten years imprisonment for grand larceny
 - (c) of a vehicle

STATE OF SOUTH CAROLINA

Oct 25 1999
 2:26 PM
 Nancy S. King

5 Check whether a finding of guilty was made

(a) after a plea of guilty _____

(b) after a plea of not guilty X _____

(c) after a plea of nolo contendere _____

6 Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

7 If you answered "yes" to (6) list

(a) the name of each Court to which you appealed

1 South Carolina Supreme Court

11 United States Supreme Court

111 _____

(b) the result in each such Court to which you appealed

1 Affirmed (SC Supreme Court)

11 Certiorari denied (US Supreme Court)

111 _____

(c) the date of each such result

1 March 27, 2000

11 October 16, 2000

111 _____

(d) if known citations of any written opinion or orders entered pursuant to such results

1 339 S C 439, 529 S E 2d 721

11 2000 WL 1204885

111 _____

8 If you answered "no" to (6) state your reasons for not so appealing

(a) _____

(b) _____

(c) _____

9 State concisely the grounds on which you base your allegation that you are being held in custody unlawfully

(a) Ineffective Assistance of Counsel

(b) _____

(c) _____

10 State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) The failure to specifically object to the "no mercy" instruction on federal constitutional grounds,

(b) Requesting a "plain and ordinary meaning" instruction during the penalty phase rather than an instruction that life imprisonment means life without parole pursuant to State v Simmons and the SC statute,

(c) The failure to secure petitioner's presence during all critical stages of the trial. SEE ATTACHMENT "A"

11 Prior to this application have you filed with respect to this conviction

(a) any petitions in a State Court under South Carolina Law?

No

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief? No

(c) any petitions in the United States Supreme Court for certiorari other than petitions if any already specified in (7)? No

(d) any other petitions motions or applications in this or any other Court?

No

12 If you answered "yes" to any part of (11) list with respect to each petition motion or application

(a) the specific nature thereof

1 _____

11 _____

111 _____

1V _____

(b) the name and location of the Court in which each was filed

1 _____

11 _____

111 _____

1V _____

(c) the disposition thereof

1 _____

11 _____

111 _____

1V _____

(d) the date of each such disposition

1 _____
 11 _____
 111 _____
 1V _____

(e) if known citations of any written opinions or orders entered pursuant to each such disposition

1 _____
 11 _____
 111 _____
 1V _____

13 Has any ground set forth in (9) been previously presented to this or any other Court State or Federal in any petition motion or application which you have filed? No

14 If you answered "yes" to (13) identify

(a) which grounds have been presented

1 _____
 11 _____
 111 _____

(b) the proceedings in which each ground was raised

1 _____
 11 _____
 111 _____

15 If any ground set forth in (9) has not previously been presented to any Court State or Federal set forth the ground and state concisely the reasons why such ground has not previously been presented

(a) All ineffectiveness claims above were not ripe until direct appeal was over
 (b) _____
 (c) _____

16 Were you represented by an attorney at any time during the course of

(a) your arraignment and plea? Yes
 (b) your trial if any? Yes
 (c) your sentencing? Yes

(d) your appeal if any from the judgment of conviction or the imposition of sentence? Yes

(e) preparation presentation or consideration of any petitions motions or applications with respect to this conviction which you filed? N/A

17 If you answered "yes" to one or more parts of (16) list

(a) the name and address of each attorney who represented you

- 1 Robert Tinsley, 222 Autumn Trace, Greenwood, SC 29649
- 11 Edward McCallum, III and Billy Garrett, 109 Oak Ave , Greenwood, SC
29646-2624
- 111 Robert M Dudek, 1122 Lady Street, Suite 940
Columbia, SC 29201

(b) the proceedings at which each such attorney represented you

- 1 Trial Attorneys - Robert Tinsley, Edward McCallum, III and
Billy Garrett
- 11 Appeal Attorney - Robert M. Dudek
- 111 _____

18 State clearly the relief you seek in filing this application

A New Trial

19 Are you now under sentence from any other court that you have not challenged?

No

ATTACHMENT "A"

- (d) The failure to object to evidence petitioner attempted suicide following the victim's death since this evidence should have been excluded pursuant to Rule 403, SCRE,
- (e) The failure to properly investigate and prepare witness testimony,
- (f) Eliciting prejudicial guilt phase testimony that petitioner had been expelled from school since this evidence was irrelevant,
- (g) The failure to properly investigate and present available mitigating evidence

STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

VERIFICATION

I JOHN KENNEDY HUGHEY, being duly sworn upon my oath depose and say that I have subscribed to the foregoing application that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application and that the matters and allegations therein set forth are true

John Kennedy Hughey
JOHN KENNEDY HUGHEY

Sworn to and subscribed before me

This 20 day of October 2000

Edward W. Whitaker
Notary Public for South Carolina

My Commission Expires December 12, 2001

Oct 25
2:26
Mary & King

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, JOHN KENNEDY HUGHEY hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true

(1) I am the applicant in this action and I believe I am entitled to redress

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor

John Kennedy Hughey
Applicant

Sworn to and subscribed before me

This 20 day of October 2000.

Walter J. Jones
Notary Public for South Carolina

My Commission Expires Sept 22, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

VERIFICATION

I JOHN KENNEDY HUGHEY, being duly sworn upon my oath depose and say that I have subscribed to the foregoing application that I know the contents thereof that it includes every ground known to me for vacating setting aside or correcting the conviction and sentence attacked in this application and that the matters and allegations therein set forth are true

X

JOHN KENNEDY HUGHEY

Sworn to and subscribed before me

This ____ day of ____ 19__

____ L S
Notary Public for South Carolina

My Commission Expires ____

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I JOHN KENNEDY HUGHEY hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor In support of my application I declare under penalty of perjury that the following facts are true

(1) I am the applicant in this action and I believe I am entitled to redress

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor

John Kennedy Hughey
Applicant

Sworn to and subscribed before me

This 20 day of October 2000

Walter J. [Signature] L S
Notary Public for South Carolina

My Commission Expires Sept 22, 2008

STATE OF SOUTH CAROLINA
Clerk of Court
Oct 25
2:26
Harvey L. King
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

VERIFICATION

I, JOHN KENNEDY HUGHEY, being duly sworn upon my oath depose and say that I have subscribed to the foregoing application that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application and that the matters and allegations therein set forth are true

John Kennedy Hughey
JOHN KENNEDY HUGHEY

Sworn to and subscribed before me

This 20 day of October, 2000.

Edward Whitaker
Notary Public for South Carolina

My Commission Expires December 2, 2001

APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

I, JOHN KENNEDY HUGHEY, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of proceeding or give security therefor.

John Kennedy Hughey
Applicant

Sworn to and subscribed before me

This 20 day of October, 2000.

Walter J. Jones
Notary Public for South Carolina

My Commission Expires Sept 22, 2008

The Supreme Court of South Carolina

The State,

Respondent,

v

John Kennedy Hughey,

Petitioner

O R D E R

This Court affirmed petitioner's conviction and death sentence in State v Hughey, 339 S C 439, 529 S E 2d 721 (2000). His petition for rehearing was denied on May 11, 2000. Petitioner subsequently filed a petition for a writ of certiorari in the United States Supreme Court which was denied October 16, 2000. Petitioner now seeks a stay of execution in order to pursue state post-conviction relief.

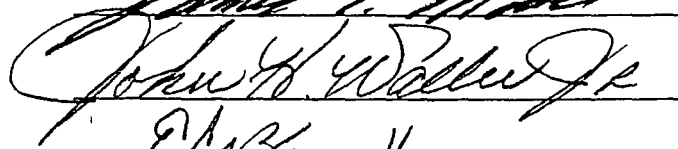
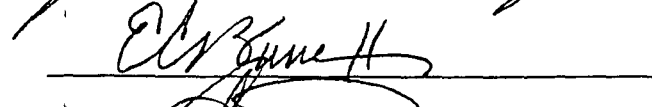
Petitioner's request for a stay is granted. The stay shall remain in effect to the extent provided by this Court in In re Stays of Execution in Capital Cases, 321 S C 544, 471 S E 2d 140 (1996).

The Honorable Wyatt T Saunders, Jr, is hereby assigned to the post-conviction relief action that petitioner proposes to file. The judge shall retain jurisdiction over this case regardless of where he may be assigned to

ATTORNEY GENERAL'S OFFICE
RECEIVED 11-2-00

hold court, and he may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled. The judge shall conduct a hearing on petitioner's desires regarding counsel within thirty (30) days of the date of this order.

IT IS SO ORDERED

 CJ
 J
 J
 J
 J

Columbia, South Carolina

November 2, 2000

STATE OF SOUTH CAROLINA)
) THE COURT OF COMMON PLEAS
 COUNTY OF ABBEVILLE)

JOHN KENNEDY HUGHEY,)
)
 APPLICANT,) TRANSCRIPT OF RECORD
)
 -VS-) NO 00-CP-01-0212
)
 WILLIAM D CATOE,) APPOINTMENT OF COUNSEL
 DIRECTOR, SOUTH CAROLINA) FOR POST-CONVICTION
 DEPARTMENT OF CORRECTIONS,) RELIEF APPLICATION
)
 RESPONDENT)

NOVEMBER 13, 2000
 NEWBERRY SOUTH CAROLINA

B E F O R E

THE HONORABLE WYATT T SAUNDERS, JUDGE

A P P E A R A N C E S

TERESA L NORRIS, ESQUIRE
 THE CENTER FOR CAPITAL LITIGATION
 POST OFFICE BOX 11311
 COLUMBIA, SOUTH CAROLINA 29211
 E CHARLES GROSE JR ESQUIRE
 SUITE 208 PARK PLAZA, BOX P-133
 600 MONUMENT STREET
 GREENWOOD, SOUTH CAROLINA 29646
 ATTORNEYS FOR THE APPLICANT

DONALD J ZELENKA, DEPUTY ATTORNEY GENERAL
 OFFICE OF THE ATTORNEY GENERAL
 POST OFFICE BOX 11549
 COLUMBIA SOUTH CAROLINA 29211-1549
 ATTORNEY FOR THE RESPONDENT

MARGARET F BRIGGS
 CIRCUIT COURT REPORTER
 211 LAKESHORE DRIVE
 GREENWOOD, SOUTH CAROLINA 29649

1 (PROCEEDINGS COMMENCED AT 9 55 A M)

2 (THE APPLICANT WAS PRESENT WITH

3 COUNSEL)

4 THE COURT WE'LL COME INTO SESSION, PLEASE
5 IN THE MATTER OF JOHN KENNEDY HUGHEY, INMATE NO 5055,
6 AS APPLICANT, VERSUS WILLIAM D CATOE, AS DIRECTOR OF
7 THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AS
8 RESPONDENT, IN CIVIL ACTION NO 2000-CP-01-0212 THIS
9 IS AN APPLICATION FOR POST-CONVICTION RELIEF BROUGHT
10 BY MR HUGHEY SUBJECT TO HIS CONVICTION FOR MURDER IN
11 ABBEVILLE COUNTY THE MATTER IS BEING HELD IN
12 NEWBERRY COUNTY PURSUANT TO THE ORDER OF THE SUPREME
13 COURT THAT THE MATTER BE EXPEDITIOUSLY DEALT WITH IN
14 ORDER THAT MR HUGHEY'S WISHES CONCERNING COUNSEL BE
15 DETERMINED

16 MR HUGHEY, ARE YOU FAMILIAR WITH THE
17 ORDER OF THE SUPREME COURT SIR?

18 MR HUGHEY YES, I AM SIR

19 THE COURT ALL RIGHT NOW, THE ORDER
20 DIRECTS THIS JUDGE TO DETERMINE FROM YOU WHAT YOUR
21 WISHES ARE CONCERNING WHETHER OR NOT YOU WANT COUNSEL
22 DO YOU WANT AN ATTORNEY TO REPRESENT YOU IN REGARD TO
23 YOUR POST-CONVICTION RELIEF APPLICATION?

24 MR HUGHEY YES, SIR

25 THE COURT AND HAVE YOU TALKED WITH ANY

1 PARTICULAR ATTORNEY?

2 MR HUGHEY THE ONES I HAVE PRESENTLY, SIR

3 THE COURT ALL RIGHT YOU'VE TALKED BOTH

4 WITH MR GROSE -- THAT'S E CHARLES GROSE, ESQUIRE,

5 OF THE GREENWOOD BAR -- AND WITH TERESA L NORRIS,

6 ESQUIRE, OF THE RICHLAND BAR

7 MR HUGHEY THAT'S CORRECT

8 THE COURT NOW, DO YOU WISH FOR THEM TO BE

9 APPOINTED TO REPRESENT YOU IN THIS POST-CONVICTION

10 RELIEF APPLICATION?

11 MR HUGHEY YES

12 THE COURT HAS ANYBODY FORCED YOU, MADE

13 YOU, THREATENED YOU, OR COERCED YOU TO GET YOU TO

14 DESIRE THEM TO REPRESENT YOU?

15 MR HUGHEY NO, SIR

16 THE COURT HAVE YOU HAD SUFFICIENT TIME TO

17 TALK WITH EITHER OR BOTH OF THEM TO BE SATISFIED THAT

18 THEY ARE COMPETENT TO REPRESENT YOU IN THIS MATTER?

19 MR HUGHEY YES

20 THE COURT IN YOUR VIEW?

21 MR HUGHEY YES

22 THE COURT NOW, THERE ARE CERTAIN STATUTORY

23 REQUIREMENTS THAT WILL APPLY TO EITHER OR BOTH OF

24 THEM

25 I BELIEVE, MISS NORRIS, IT APPLIES TO

1 ONE OF THE TWO ATTORNEYS

2 MS NORRIS YES, SIR

3 THE COURT WILL YOU SPEAK TO THE RECORD
4 CONCERNING YOUR QUALIFICATIONS TO REPRESENT A PERSON
5 WHO IS UNDER PENALTY OF DEATH IN A POST-CONVICTION
6 RELIEF APPLICATION

7 MS NORRIS YES, YOUR HONOR UNDER THE
8 STATUTE THERE ARE BASICALLY TWO DIFFERENT MECHANISMS
9 TO QUALIFY ONE OF THOSE IS THAT YOU HAVE ACTUALLY
10 REPRESENTED A DEATH-SENTENCE INMATE IN A STATE POST-
11 CONVICTION OR FEDERAL HABEAS I HAVE REPRESENTED AT
12 LEAST SIX DEATH-SENTENCE INMATES IN STATE COURT AND A
13 NUMBER OF OTHERS IN FEDERAL COURT AS WELL, SO I DO
14 MEET THAT QUALIFICATION

15 THE COURT ALL RIGHT YOU UNDERSTAND THEN
16 MR HUGHEY, THAT MISS NORRIS DOES MEET THE STATUTORY
17 QUALIFICATION?

18 MR HUGHEY YES SIR

19 THE COURT AND MR GROSE, YOU WILL BE
20 ASSISTING?

21 MR GROSE THAT IS CORRECT, YOUR HONOR

22 THE COURT ALL RIGHT IS THERE ANY OTHER
23 MATTER THAT WE NEED TO ATTEND TO TODAY IN ORDER TO
24 PROTECT MR HUGHEY'S RIGHTS, MISS NORRIS?

25 MS NORRIS NOT THAT I AM AWARE OF YOUR

1 HONOR

2 THE COURT MR HUGHEY APPEARS IN A GREEN
3 PRISON SUIT

4 MR HUGHEY, ARE YOU NOW UNDER THE
5 INFLUENCE OF ANY DRUG OR ALCOHOL THAT IN ANY WAY WOULD
6 AFFECT YOUR THINKING AND YOUR UNDERSTANDING OF WHAT
7 YOU'RE DOING?

8 MR HUGHEY NO, SIR

9 THE COURT YOU APPEAR IN A CLEAR-MINDED
10 STATE YOUR RESPONSES TO THE COURT'S QUESTIONS HAVE
11 BEEN PROMPT AND ACCURATE YOU ARE RESTRAINED AT YOUR
12 WRISTS AND YOUR ANKLES, BUT YOU CERTAINLY APPEAR TO BE
13 CLEAR-MINDED AND TO BE AWARE AND COGNIZANT OF THE
14 PROCEEDINGS AND THE MEANING OF THESE PROCEEDINGS DO
15 YOU HAVE ANY QUESTIONS, SIR?

16 MR HUGHEY NO SIR

17 THE COURT VERY WELL THE COURT BY ORDER
18 WILL APPOINT MR GROSE AND MISS NORRIS TO REPRESENT
19 YOU THANK YOU VERY MUCH

20 (PROCEEDINGS CONCLUDED AT 10 00 A M)

21 - - -END OF TRANSCRIPT OF RECORD- - -

22

23

24

25

CERTIFICATE

I, THE UNDERSIGNED MARGARET F BRIGGS
OFFICIAL COURT REPORTER FOR THE STATE OF SOUTH
CAROLINA DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD
OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED
IN THE CAPTIONED CASE IN THE COURT OF COMMON PLEAS
FOR ABBEVILLE COUNTY SOUTH CAROLINA, ON THE 13TH DAY
OF NOVEMBER, 2000

I DO FURTHER CERTIFY THAT I AM NEITHER OF
KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO

DECEMBER 29, 2000

Margaret F Briggs
MARGARET F BRIGGS

November 13, 2000 after consultation with various parties to resolve this issue and appoint state postconviction relief counsel, if appropriate

The Petitioner, John Kennedy Hughey, was indicted on March 11, 1996 by the Grand Jury of the Court of General Sessions for Abbeville County for (1) murder (involving the December 4, 1995 death of Tesheka Lanyra Jackson), (2) murder (involving the December 4, 1995 death of Luevinia H Harris), (3) burglary in the first degree and (4) grand larceny of a vehicle

The prosecution served notice of intent to seek the death penalty On October 13, 1997, the matter was called for a trial before the Honorable J Derham Cole The Petitioner was present and represented by court-appointed counsel, Billy J Garrett, Edward McCallum, and Robert-Tinsley- The prosecution was represented by W Townes Jones, IV, Solicitor of the Eighth Judicial Circuit and Deputy Solicitor, Michael Coulter At the outset Hughey was ordered submitted to the William S Hall Institute on October 13, 1997 for a psychiatric evaluation ROA pp 206-209, p ___ (Written Order for Evaluation) The evaluations was then completed prior to the trial

On October 17, 1998, the proceedings re-started ROA p 209 The trial began after jury selection on October 22, 1997 The Petitioner testified on his own behalf On October 27, 1997 the jury returned with guilty verdicts on all four (4) counts ROA p 3495, ll 9-17

On October 28, 1997 at 11 00 a m the sentencing proceedings began. ROA p 3508, ll 1-2 After the presentation of evidence, the trial judge charged the following statutory aggravating and mitigating circumstances

On Count One, the statutory aggravating circumstances to consider were

1 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of burglary in the first degree

2 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of larceny with the use of a deadly weapon

3 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

On Count Two, the statutory aggravating circumstances to consider were

1 That the murder of Luevinia H Harris was committed while in the commission of the crime or act of burglary in the first degree

2 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

The statutory mitigating circumstances instructed on each count were as follows

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 age or mentality of the defendant at the time of the crime

You may also consider any NON-STATUTORY mitigating circumstance(s)

As to each count, the jury found beyond a reasonable doubt the existence of all the statutory aggravating circumstances ROA p 4073 The jury returned a recommendation of death for each count ROA p 4073 On October 30, 1997 Judge Cole sentenced John Kennedy Hughey

to death on each count of murder. He was sentenced to a life sentence on Count III of burglary in the first degree and ten (10) years on Count IV for grand larceny.

On November 7, 1997, counsel filed the notice of appeal which was served on the Eighth Circuit Solicitor's Office on November 10, 1997. In his appeal to the South Carolina Supreme Court he was represented by his current counsel, Robert M. Dudek of the South Carolina Office of Appellate Defense. In the direct appeal, he briefed the following questions presented:

1

Whether the judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S.C. Code § 24-3-930 provides that all guards and officers employed at a penitentiary shall be excepted from service on a jury, and also because Daly was the functional equivalent of a law enforcement officer?

2

Whether the judge erred by refusing to instruct the jury on examples of acts of legal provocation, since the jury was left without any guidance on what might constitute a legal provocation, and the judge had a duty to fashion an appropriate charge to the facts and circumstances of this case?

3

Whether the judge erred by allowing Mack Harris, the husband of the decedent Harris, to testify during the guilt phase about the blood he cleaned off the floor of his home after the shooting, since this testimony was not relevant, and was highly prejudicial?

4

Whether the judge erred by refusing to charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(6), which allows the jury to consider the capacity of the defendant to appreciate the criminality of his conduct or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired, since there was evidence supporting that mitigating circumstance?

5

Whether the judge erred by allowing the victim impact witnesses to testify in narrative form, rather than proper question-answer format, since it resulted in the victim's family personally chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v. Tennessee*?

6

Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

7

4

Whether the judge erred by admitting State's Exhibit #95 since this photograph of the victim's face showed brain matter coming from beneath her eyes, was unduly prejudicial, was calculated to inflame the passions of the jury, and denied appellant a fair sentencing hearing?

The South Carolina Supreme Court denied the appeal on March 27, 2000 State v Hughey, supra A timely petition for rehearing was filed on April 11, 2000 Rehearing was denied on May 11, 2000

Certiorari was taken to the United States Supreme Court On October 16, 2000, the Court entered an order denying certiorari *Hughey v South Carolina*, U S , 120 S Ct , 2000 Westlaw 1204885 (U S S C October 16, 2000) (NO 00-5635)

On October 19, 2000, Hughey, through appointed appellate counsel, Robert M Dudek of the South Carolina Office of Appellate Defense, filed a petition for a stay of execution asserting a desire to pursue state post-conviction relief proceedings contending that his appointed trial counsel did not adequately represent him at trial The stay request was granted November 2, 2000

I

On November 13, 2000, this Court convened a hearing in Newberry, South Carolina at the Newberry County Courthouse pursuant to the Order of the Supreme Court to determine the desires of John Kennedy Hughey regarding counsel Mr Hughey was present at the hearing The Respondents were represented by Donald J Zelenka, Assistant Deputy Attorney General of the South Carolina Attorney Generals Office This Court made inquiry of Mr Hughey and finds that he desires to have counsel appointed to represent him in the state post-conviction relief action Present at the hearing, at this Court's request was Teresa L Norris of the Center for Capital Litigation and Charles Grose

A Appointment of Qualified Counsel

Section 17-27-160 provides

If the applicant is indigent and desires representation by counsel, two counsel shall be immediately appointed to represent the petitioner in this action. **At least one of the attorneys appointed to represent the applicant must have previously represented a death-sentenced inmate in state or federal post-conviction relief proceedings or (1) must meet the minimum qualifications set forth in Section 16-3-26(B) and Section 16-3-26(F) and (2) have successfully completed, within the previous two years, not less than twelve hours of South Carolina Bar approved continuing legal education or professional training primarily involving advocacy in the field of capital appellate and/or post-conviction defense.** The Supreme Court may promulgate additional standards for qualifications of counsel in capital post-conviction proceedings. The court may not appoint an attorney as counsel under this section if the attorney represented the applicant at trial or in a direct appeal unless the applicant and the attorney request appointment on the record or the court finds good cause to make the appointment.

This Court has considered the qualifications of Ms. Teresa Norris. Ms. Norris has been a member of the South Carolina bar since 1990. She has represented in state postconviction relief cases South Carolina death row inmates Ernest Riddle, Larry Hall, Robert Nance, James N. Tucker, Herman Von Dohlen, and Donny Council. She was also recently appointed to represent Mr. Tucker in a second state PCR action involving a separate death sentence. She also has experience in federal capital habeas corpus litigation involving South Carolina and other capital defendants. This Court finds that Ms. Norris meets the minimum qualifications of the prior experience pursuant to §17-27-160(B), to qualify as experienced counsel. Additionally, she has maintained continuing legal education dedicated to representation of capital inmates in similar actions. This Court finds it appropriate to appoint Ms. Norris as a qualified counsel in this matter.

This Court was also presented with the qualifications of E Charles Grose Mr Groves has been a member of the South Carolina Bar since 1993 This Court finds that Mr Grose has been involved in representing indigent clients in criminal matters in his part-time role as Public Defender Mr Grose does not meet the qualifications for lead counsel in this matter at the present time, but such statutory qualifications are not necessary for his appointment as second counsel This Court finds it appropriate to appoint Mr Grose as second counsel for Mr Hughey in this matter

Therefore, it is ordered that the following be appointed to represent Mr Hughey in the potential state post-conviction relief matter

1- Teresa L Norris, Esq.
The Center for Capital Litigation
P O Box 11311
Columbia, South Carolina 29211
(803-765-0650)
(803-765-0705)(FAX)

2 E Charles Grose Jr
600 Monument St , Suite 208 Park Plaza, Box P-133
Greenwood, South Carolina 29646
(864) 229-9505
(864) 227-1104

B Scheduling Order

This Court further reminds newly appointed state post-conviction relief counsel of its obligation, pursuant to In Re Stays, 471 S E 2d 140 (S C 1996), to provide to the Clerk of the South Carolina Supreme Court, with a copy to this Court and opposing counsel, Donald J Zelenka of the South Carolina Attorney General's Office, a status letter every sixty (60) days to ensure the pending stay of execution is continued during these proceedings The Court further

establishes the following *projected* schedule consistent with In Re Stays and Section 17-27-160 based on the date of the Court's order of appointment on November 13, 2000

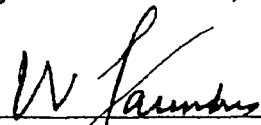
1	Jan 12, 2001	State PCR Application due to be filed and first status letter due (60 days after appointment)
2	Feb 11, 2001	Respondent's Return due to be filed (30 days after PCR)
3	March 13, 2001	Status Hearing to schedule evidentiary hearing within 180 days must be held prior to this date §17-27-160(C) (within 30 days after return filed) (September 9, 2001)
4	March 13, 2001	Second Status Letter
5	May 12, 2001	Third Status Letter
6	July 11, 2001	Fourth Status Letter
7	September 9, 2001	Projected 180 day date for Evidentiary Hearing to be Completed §17-27-160(C)
8	November 8, 2001	Fifth Status Letter
9	(Each 60 days thereafter until a final order has been entered)	

WHEREAS, this Court has conducted the initial hearing of appointment as mandated by the

Order of the Supreme Court and appointed the above-named counsel This Court, consistent with

the statutory law, has set forth a projected scheduling order in this matter

IT IS SO ORDERED this 13th day of November 13, 2001 *at* Adler 16


 Honorable Wyatt T. Sanders **SAUNDERS**
 Presiding Judge
 Newberry, South Carolina

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

John Kennedy HUGHEY, #5055)
)
)
)
 Applicant,)

C/A No 00-CP-01 - 212

vs)

R Dodge Frederick, Interim)
 Director, South Carolina)
 Department of Corrections,)
 and State of South Carolina)
)
 Respondent)

RETURN TO APPLICATION FOR
 POST-CONVICTION RELIEF AND REQUEST
 AND REQUEST FOR A MORE DEFINITE
 STATEMENT AND REQUEST TO SET
 AN EVIDENTIARY HEARING

M
h

The Respondents, above -named, hereby make a Return to the application for post-conviction relief dated October 20, 2000 and filed October 25, 2000. On November 2, 2000, the Supreme Court of South Carolina entered an Order staying the order of execution of Abbeville County death row inmate John Kennedy Hughey to allow him to pursue potential state post-conviction relief. The Order assigned the Honorable Wyatt T. Saunders with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. A hearing was held on Mr. Hughey's desires for appointment of counsel on November 13, 2000 and the Court appointed Teresa L. Norris of the Center for Capital Litigation, Columbia, South Carolina and E. Charles Grose of Greenwood, South Carolina. The application was filed prior to the appointment of present counsel. The Respondents would respectfully show this Court the following

I Prior Proceedings

The Petitioner, John Kennedy Hughey, was indicted on March 11, 1996 by the Grand Jury of the Court of General Sessions for Abbeville County for (1) murder (involving the December 4, 1995 death of Tesheka Lanyra Jackson) (2) murder (involving the December 4, 1995 death of Luevinia H Harris), (3) burglary in the first degree and (4) grand larceny of a vehicle

The prosecution served notice of intent to seek the death penalty On October 13, 1997, the matter was called for a trial before the Honorable J Derham Cole The Petitioner was present and represented by court-appointed counsel, Billy J Garrett, Edward McCallum, and Robert Tinsley The prosecution was represented by W Townes Jones, IV, Solicitor of the Eighth Judicial Circuit and Deputy Solicitor, Michael Coulter At the outset Hughey was ordered submitted to the William S Hall Institute on October 13, 1997 for a psychiatric evaluation ROA pp 206-209, p __ (Written Order for Evaluation) The evaluations was then completed prior to the trial

On October 17, 1998, the proceedings re-started ROA p 209 The trial began after jury selection on October 22, 1997 The Petitioner testified on his own behalf On October 27, 1997 the jury returned with guilty verdicts on all four (4) counts ROA p 3495, ll 9-17

On October 28, 1997 at 11 00 a m the sentencing proceedings began ROA p 3508, ll 1-2 After the presentation of evidence, the trial judge charged the following statutory aggravating and mitigating circumstances

On Count One, the statutory aggravating circumstances to consider were

1 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of burglary in the first degree

2 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of larceny with the use of a deadly weapon

3 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

On Count Two, the statutory aggravating circumstances to consider were

1 That the murder of Luevinia H Harris was committed while in the commission of the crime or act of burglary in the first degree

2 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

The statutory mitigating circumstances instructed on each count were as follows

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 age or mentality of the defendant at the time of the crime

You may also consider any NON-STATUTORY mitigating circumstance(s)

As to each count, the jury found beyond a reasonable doubt the existence of all the statutory aggravating circumstances ROA p 4073 The jury returned a recommendation of death for each count ROA p 4073 On October 30, 1997 Judge Cole sentenced John Kennedy Hughey to death on each count of murder He was sentenced to a life sentence on Count III of burglary in the first degree and ten (10) years on Count IV for grand larceny

On November 7, 1997, counsel filed the notice of appeal which was served on the Eighth Circuit Solicitor's Office on November 10, 1997. In his appeal to the South Carolina Supreme Court he was represented by his current counsel, Robert M. Dudek of the South Carolina Office of Appellate Defense. In the direct appeal, he briefed the following questions presented:

1

Whether the judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S.C. Code § 24-3-930 provides that all guards and officers employed at a penitentiary shall be excepted from service on a jury, and also because Daly was the functional equivalent of a law enforcement officer?

2

Whether the judge erred by refusing to instruct the jury on examples of acts of legal provocation, since the jury was left without any guidance on what might constitute a legal provocation, and the judge had a duty to fashion an appropriate charge to the facts and circumstances of this case?

3

Whether the judge erred by allowing Mack Harris, the husband of the decedent Harris, to testify during the guilt phase about the blood he cleaned off the floor of his home after the shooting, since this testimony was not relevant, and was highly prejudicial?

4

Whether the judge erred by refusing to charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(6), which allows the jury to consider the capacity of the defendant to appreciate the criminality of his conduct or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired, since there was evidence supporting that mitigating circumstance?

5

Whether the judge erred by allowing the victim impact witnesses to testify in narrative form, rather than proper question-answer format, since it resulted in the victim's family personally chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v. Tennessee*?

6

Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

7

Whether the judge erred by admitting State's Exhibit #95 since this photograph of the victim's face showed brain matter coming from beneath her eyes, was unduly prejudicial, was calculated to inflame the passions of the jury, and denied appellant a fair sentencing hearing?

The South Carolina Supreme Court denied the appeal on March 27, 2000 *State v Hughey*, 339 S C 439, 529 S E 2d 721 (2000) A timely petition for rehearing was filed on April 11, 2000 Rehearing was denied on May 11, 2000

Certiorari was taken to the United States Supreme Court On certiorari, the following question was raised

Did an unambiguous jury instruction that mercy was not an appropriate reason to sentence petitioner to life imprisonment violate the Eighth Amendment and Fourteenth Amendments since it precluded jury consideration of petitioner's severely disadvantaged background as mitigating character evidence, as well as the domestic nature of the homicide as a circumstance of the crime?

On October 16, 2000, the Court entered an order denying certiorari *Hughey v South Carolina*, __ U S __, 121 S Ct 345 (U S S C October 16, 2000) (NO 00-5635)

On October 19, 2000, Hughey, through appointed appellate counsel, Robert M Dudek of the South Carolina Office of Appellate Defense, filed a petition for a stay of execution asserting a desire to pursue state post-conviction relief proceedings contending that his appointed trial counsel did not adequately represent him at trial The stay request was granted November 2, 2000 and counsel was appointed on November 13, 2000 in Newberry County

A STATEMENT OF THE STATE'S VERSION OF THE FACTS

" what he did was nothing more than two brutal vicious murders Two senseless, needless, tragic unjustified murders That's what he did And it [doesn't] matter why he did it or really how he did it He had no excuse He had no reason He had no basis for killing those

two women in that home on that day None " ROA p 3406, l 24 - p 2407, l 7 These comments in Solicitor Jones guilt phase closing argument properly sum up the case against John Kennedy Hughey involving his murder of his former girlfriend Tesheka Jackson and Luevinia Harris who was in her own home on the telephone to the police when Hughey's second shotgun blast within her home brutally ended her life

On December 4, 1995, Marcus Harris called his mother, Luevinia Harris at 11 56 a m from Oklahoma City ROA pp 2212, 2225-2229 He found that his mother's tone revealed that she was scared and asked her what was wrong and learned that John Hughey was present in his mother's house with a gun He got his cousin, Tesheka Jackson, on the telephone, who also with a "scared" tone to her voice, confirmed John had a gun, and attempted to get John on the telephone, but John refused to come to the telephone and attempts to turn on the speaker were unsuccessful ROA pp 2213-2218, 2220 Marcus then immediately called back to the house at noon and the speaker was activated Harris heard John respond and told him to leave Harris heard cussing in the background and his mother call out "just leave " ROA pp 2218-19, 2245 Tussling was heard while his mother was on the telephone ROA pp 2245-46 Then Harris heard his mother state "Call the police, call the police " ROA pp 2219, 2246 Harris hung up the telephone and within four seconds called 911 in Oklahoma City who patched him into the Abbeville emergency system, but he was too late ROA pp 2219-21 While on the phone, Marcus Harris learned the tragic truth of Hughey's malicious attacks ' one down with gunshot wound to the head," "two down with gunshot wound to head " ROA pp 2220-21

"Don't shoot that gun in here Don't shoot that gun in here " ROA pp 2278-79 These were the final words and request to John Kennedy Hughey from Luevinia Harris while she was

on the telephone with Sgt Angela Patterson, the Abbeville City Police dispatcher. This was immediately after Mrs Harris requested the police to come to her home. ROA pp 2278-79. Without hearing any scuffling or fighting, the dispatcher heard an initial gunshot and within six seconds heard another gunshot. ROA p 2279. Although Mrs Harris voice had been described as "excited, demanding, and extremely upset," there was now silence, except for the two gunshots. ROA pp 2279-80. The dispatched officer was on his way. ROA p 2280.

She then received a call from Oklahoma City from Marcus Harris, Mrs Harris' son, who stated police needed to go to his mother's home because John Hughey had a gun. ROA pp 2281-82, 2284. She advised him the police were there and that she had just gotten off of the telephone with his mother. ROA p 2282. The police then entered her home and described the injuries to the victims. Hughey was not on the scene when the police arrived having left within 45 seconds of the telephone call by Luevinia. ROA p 2285. The dispatcher had spoken to the victim at 12 04 and the police arrived at 12 05. ROA p 2289.

Cpl Patrick Neil Henderson of the Abbeville Police Department was with the dispatcher when the fearful call from Luevinia Harris came in. ROA p 2291. He was on his way when he heard the first "pop" like a gunshot and learned that there was a second before he arrived. After hearing a baby cry upon his entry to the Harris home, he found Luevinia Harris on the floor of the hallway in a pool of blood without a pulse. ROA p 2313. He recognized Tesheka Jackson as the second person who was laying across the bed with her head down. ROA pp 2316-17. Both had head wounds.

Cpl Henderson recognized Tesheka Jackson from an incident on December 3, 1995 when she had told him that Hughey said he would kill her and Henderson advised her to stay at a safe home ROA pp 2319-21, 2650-51

Lt Barry New also arrived at Harris home He noticed damage to the front door and the strike plate was on the floor ROA pp 2253-55 He found a knife on the floor that had Tesheka's shoe print apparently on it ROA p 2255 He saw Ms Harris in the hallway near a telephone ROA pp 2357-60 He located Tesheka with a gunshot wound to her head and obviously deceased ROA p 2361 Also, a single shot shotgun was found in the bedroom with a shell in it ROA pp 2362-64 The gun belonged to Hughey's deceased father ROA p 2364 A shotgun shell box was found in the defendant's bedroom ROA p 2368

The ominous planning of the tragedy was revealed in the testimony of Cpl Mitch Christopher who found a note by the Petitioner on his door stating "As of this morning I will be dead Love you all Please take care of my kids" ROA p 2393 The note was confirmed by Hughey in his testimony ROA pp 3111-12, 3202

Michael Adams, who started dating Tesheka in February 1995 revealed that on December 3, 1995, the Petitioner came up and pushed Tesheka and stated that he was going to kill both of them and then ran away ROA pp 2402-03 This incident was reported to the police It was reported by the decedent that Hughey told her "I'm going to kill you, I'm going to kill both of you" ROA p 2443

Upon his arrest in Georgia, Hughey advised the authorities that "I killed them, it was an accident, the gun went off" ROA p 2456 Hughey had tried to cut his wrist prior to the arrest ROA pp 2463-66

It was also learned that during his flight within thirty (30) minutes of the crime, Hughey had used the victim's ATM card while driving her car at an ATM in Anderson ROA p 2471

SLED Agent David Black described the crime scene and the various location of red substances at the home He documented the evidence of forced entry at the door and the knife with the impression of the sole ROA pp 2485-89 He showed the location of shotgun shells and gun found as well as the blood splatter marks ROA pp 2494-2504 He located the telephone pulled from the wall and one in the bedroom ROA pp 2504-2509 He documented the injuries to the bodies ROA p 2511

 The pathologist, Dr Woodard, found the cause of death of Luevinia Harris to be from a solitary gunshot to the head which resulted in instant brain death ROA p 2532 He opined that the distance was between two and ½ and three feet for the shooting ROA pp 2538-39 Tesheka Jackson has three major injuries 1) the fatal gunshot wound to the head above the right ear that exited her eye, 2) a large bruise on her face likely caused by the blunt end of the shotgun and 3) a stab wound in her chest possibly caused by the knife found on the floor ROA pp 2541-42 The doctor opined the shooting distance was at a maximum of two feet ROA p 2547

David Black described returning to the crime scene, after the defendant's statement, and finding another shotgun hole in the bathroom and subsequently finding the third shell in a bag from the bedroom ROA pp 2659-66

Nancy Skraba described locating blood either consistent with the victim's or insufficient for typing in the house ROA pp 2678-91

The banks confirmed the ATM transaction and presented the video photo of Hughey at the ATM machine ROA pp 2701-20 The record revealed the stolen Mitsubishi was in the name of Tesheka and her grandparents, not Hughey ROA pp 2788-2803

Agent Dan DeFresse of SLED opined that each of the shells were consistent with being fired from the located shotgun and the bathroom firing was at a distance of 3 to 5 feet ROA pp 2814-2825


 Agent Eddie Clark described the Petitioner's inconsistent oral statement that he went to the Harris home and had an argument with Tesheka Initially, she threw a vase at him and later she came into the house with a shotgun she had gotten out of the car ROA pp 2856-57 He stated he pushed the gun away and it went off He tried to run through the trailer, but she followed Mrs Harris tried to get between them and grabbed the gun and it went off He said Tesheka shot Mrs Harris ROA pp 2857-58 He was scared and ran into the bedroom and Tesheka followed and he tried to get the gun away from her and it went off and he left ROA p 2858 Jerry Sloan of SLED confirmed the recited oral statement ROA pp 2876-77

The victim's mother, Bernice Jackson, confirmed that Tesheka normally stayed at her grandmother's home and denied that the Petitioner and Tesheka ever lived together, were husband and wife, or otherwise She confirmed that she had met her daughter's friend Mike Adams, before Thanksgiving ROA p 2888 She never saw her daughter with a shotgun ROA p 2890 She last spoke with her on December 3 when looking for a place to stay ROA p 2886

George Mack Harris, Luevinia's husband, confirmed that the front door and bedroom doors were not in the same condition as when he left before the murders ROA pp 2904-11

He described the telephone calls he received from Hughey that night. The first one was after midnight and he declared that Sheka's not there. The second call came between 4 and 5 a.m. after he learned she was there and told Hughey she was asleep, call back later. At 6 a.m., he calls again and says "Mack, I won't be here in the morning" and he then gives Sheka the telephone. ROA pp. 2911-13. Harris also described the fact that the red substances were not on the floor and other areas when he left on December 5, 1995. ROA pp. 2916-18.

The defense theory of the case sought to present a more stable relationship between the victim and the Petitioner through the testimony of Chris Burton, a friend, and Gloria White Harrison, the Petitioner's sister. Burton, however, admitted that on December 3, 1995, Hughey called him upset and crying, but he did not see him after the call. ROA pp. 2955-60. He told Burton "I couldn't take it no more", crying and upset. ROA p. 2973, ll. 6-21, p. 2992 ("I can't take it no more, tell my sisters and them I love them take care of my kids for me").

His sister Gloria described her alleged presence at the December 3, 1995 incident when she drove him over to the grandmother's house to pick up the children. She said she viewed the confrontation, but denied there were any threats to kill made. ROA pp. 3017-20. She then described the arrest at her Georgia home on December 5 and his attempt to cut his wrist. ROA pp. 3023-24.

John Hughey testified in the guilt phase. He revised his version from what he told police, in fact, denying he told them anything. He claimed they "assumed" those facts. ROA pp. 3175-76. In this version, he arrived at the scene to take the car to be fixed, but that Tesheka slapped him because he had caught her with Adams. He claimed Mrs. Harris then invited him in for coffee and Tesheka started attacking him first with a vase, then knives, ultimately resulting in her

coming at him with a knife and he pushed her, resulting in a stab. This occurred after Marcus Harris had called. He then claimed he ran out of the house and got the shotgun from the trunk of the car. ROA pp 3133-40. He said Tesheka was on the steps stating "I'm going to kill you." ROA p 3142. He stated that he told her if she put the knife down, he'd put the gun down. ROA p 3142. Walking toward her, he then spit on him and tried to slam the door in his face. He proceeded into the house. While tussling at the door, the gun went off and somehow Mrs. Harris got hit. ROA pp 3143-45. He said he was mad and was trying to shoot at Tesheka. ROA p 3146. Although the knife had dropped, he thought she had the knife and chased her. ROA pp 3146-47. He said Mrs. Harris was "just in the wrong place at the wrong time." ROA p 3151, II 5-10.

On cross-examination, he denied having the shotgun when he entered. ROA p 3213. Further, he denied hearing Mrs. Harris tell him to not shoot gun. Importantly, he also did not recall why he had more shotgun shells with him. ROA pp 3238-39.

II ATTACHMENTS TO RETURN

The Respondents attach and incorporate herein by reference the following materials to this return:

- A Final Brief of Appellant
- B Final Brief Of Respondent
- C Final Reply Brief Of Appellant
- D *State v Hughey*, 339 S C 439, 529 S E 2d 721 (2000) opinion

III Allegations in Initial Application

In his initial application for post-conviction relief filed on October 25, 2000, the Applicant makes the following allegations:

I 9(a) - Ineffective Assistance of Counsel

- A The failure to specifically object to the “no mercy” instruction on federal constitutional grounds
- B Requesting a “plain and ordinary meaning” instruction during the penalty phase rather than an instruction that life imprisonment means life without parole pursuant to State v. Simmons [Simmons v S C] and the South Carolina statute,
- C The failure to secure petitioner’s presence during all critical stages of the trial,
- D The failure to object to evidence petitioner attempted suicide following the victim’s death since this evidence should have been excluded pursuant to Rule 403, SCRE,
- E The failure to properly investigate and prepare witness testimony,
- F Eliciting prejudicial guilt phase testimony that petitioner had been expelled from school since this evidence was irrelevant,
- G The failure to properly investigate and present available mitigating evidence

The Respondents submit that these allegations do not support the granting of state post-conviction relief

IV Responses to Allegations

A General Law on Ineffective Assistance Of Counsel

In Strickland v Washington, 466 U S 668, 104 S Ct 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial 466 U S at 687 Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was the Applicant prejudiced

in any way by their performance. To the contrary, the Record from each proceeding demonstrates that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance. State v. Pendergrass, 270 S C 1, 239 S E 2d 750 (1977), Marzullo v. Maryland, *supra*, Butler v. State, 286 S C 441, 34 S E 2d 813 (1985), Hill v. Lockhart, 474 U S 52, 106 S Ct 366 (1985).

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U S 668, 689, 104 S Ct 2052, 2065, 80 L Ed 2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." *Id.* Rather, the court must place itself in the shoes of Hughey's attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Hughey bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U S 668, 688, 694, 104 S Ct 2052, 2064-64 2068, 80 L Ed 2d 674 (1984). In assessing counsel's performance, courts bear in mind that the review is "highly deferential." *Id.*

at 689, 104 S Ct at 2065 Indeed, it affords a strong presumption that counsel's performance was within the extremely wide range of professionally competent assistance Id And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct " Id at 690, 104 S Ct at 2066 Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding See Id at 691-92, 104 S Ct at 2066-67 Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability - i e , one adequate to undermine our confidence in the result-- that "the result of the proceeding would have been different " See id at 694, 104 S Ct at 2068

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary " Id at 691, 104 S Ct at 2066, see Satcher v Pruett, 126 F 3d 561, at 572 (4th Cir 1997)(explaining that " '[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments' " (quoting Strickland, 466 U S at 691, 104 S Ct at 2066))

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation Savino v Murray, 82 F 3d 593, 598 (4th Cir 1996) The Court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of

hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial ” Mazzell v Evatt, 88 F 3d 263, 269 (4th Cir 1996)

As the Supreme Court made clear in Strickland

the reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information. [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U S at 691 Barnes v Thompson, 58 F 3d 971, 978 (4th Cir 1995), Matthews v Evatt, 105 F 3d 907, 919-920 (4th Cir 1997). The mere fact that trial counsel’s strategy was unsuccessful does not render counsel’s assistance unconstitutionally ineffective. Strickland, 466 U S at 689 Bell v Evatt, 72 F 3d 421, 429 (4th Cir 1995).

In addition to a burden of showing “deficient” performance, counsel must also prove “prejudice” under the Sixth Amendment. Recently in Jones v State, 332 S C 329, 504 S E 2d-822 (1998), the South Carolina Supreme Court restated the “prejudice” prong in a capital sentencing proceeding as being established when “there is a reasonable probability that, absent [counsel’s] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing Strickland. “A reasonable probability is a probability sufficient to undermine confidence in the outcome ” Jones, 504 S E 2d at 823-824.

Accord, Plath v Moore, 130 F 3d 595 (4th Cir 1997) ('given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed' Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor ") Respondents submit that he will be unable to satisfy this burden The Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record Norman v State 276 S C 278, 277 S E 2d 707 (1981)

B MERITS

A The failure to specifically object to the "no mercy" instruction on federal constitutional grounds,

In his first allegation, Hughey contends that his trial counsel were ineffective in failing to specifically object to a portion of the penalty phase instruction on federal constitutional grounds Respondents submit that trial counsel was not deficient nor prejudicial under the Sixth Amendment in failing to object as the petitioner now contends that he should have As set forth below, prejudice cannot be proven where the court found that the instructions as given were not confusing nor reversible error He has failed in his burden under Strickland

During the penalty phase portion of the trial, Judge Cole gave the following instruction on mitigating circumstances

In arriving at your decision as to what the appropriate sentence would be in this case, you are instructed that you must also consider any statutory mitigating circumstances Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the State Legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder

A mitigating circumstance is neither a justification nor an excuse for the crime of murder It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances The following statutory mitigating circumstances are set forth on your statutory instruction form They are the same as to each of the counts of the indictment

Those statutory mitigating circumstances are The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense

Now you are also permitted under the law to consider, [anesthesia] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder

Those that the defense contends should be considered are Any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural

consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and whether or not you find the existence of a statutory or non-statutory mitigating circumstance

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision

ROA p 4058, l 25 - p 4061, l 18 Further, the trial court charged

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist. Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy

ROA p 4062, ll 8-15

The defense counsel took exception to the judge's instruction on mitigating circumstances solely on the use of the phrase "the defense contends" ROA pp 4066-67. He asserted that the language "the defendant contends" should be "the law allows" ROA pp 4066. The trial judge responded that the defense misunderstood his comment because it related to those"specifically that the defendant contends are non-statutory mitigating circumstances those

that are not set forth in the statute and so those non-statutory mitigating circumstances that I referred to in that part of the instruction are those that the defendant contends should be considered as non-statutory mitigating circumstances" ROA p 4067 The defense then generally repeated his request to charge eleven through eighteen ROA p 4068 Defense request to charge 16 was a request to charge "you may consider whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all This is what has been traditionally referred to as a sentence of mercy " ROA p 4126

In the direct appeal to the South Carolina Supreme Court, Hughey raised the following pertinent "question presented"

6 Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose ' as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?"

In addressing this question, the South Carolina Supreme Court held

VI NON-STATUTORY MITIGATING CIRCUMSTANCES

Hughey argues the trial judge's instruction on non-statutory mitigating circumstances constituted reversible error We disagree

A jury instruction must be viewed in the context of the overall charge See State v Hicks, 330 S C 207 499 S E 2d 209 (1998) (citing Cupp v Naughtner, 414 US 141 94 S Ct 396 38 L Ed 2d 368) The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean Id at 218 499 S E 2d at 215 Hughey argues the jury charge was confusing to a reasonable juror because it implies that non-statutory mitigating circumstances are not circumstances the law requires a jury to consider The trial judge gave the following instruction on non-statutory mitigating circumstances

Now you are also permitted under the law to consider you should consider any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case

A non-statutory mitigating circumstance is one which is not provided for by statute but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in this case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy (emphasis added).

Considering the jury charge as whole, a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment. Hughey contends the trial judge's instruction was erroneous because the charge defined non-statutory circumstances as those "the defendant contends" the jury should consider, not what the law authorizes the jury to consider. The jury charge adequately apprised the jury of the function of non-statutory mitigating circumstances because it repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming a recommendation. In fact, the judge instructed the jury that they could recommend life imprisonment for "any reason or no reason at all." See State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990) (upholding a jury charge where the judge stressed the jury could recommend a life sentence "for any reason or no reason").

Moreover, the jury charge in the present case is similar to other charges of non-statutory mitigating circumstances upheld by this Court. The jury charge authorized the jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. Similar jury instructions have been found adequate by this Court. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (upholding a jury charge which permitted a jury to impose a life sentence even if

they did not find mitigating circumstances) State v Sims, 304 S C 409, 405 S E 2d 377 (1991) (jury charge was found proper where it authorized jury to consider any mitigating evidence presented) State v Singleton, 284 S C 388, 326 S E 2d 284 (1985) (instruction proper where judge states the jury may consider "any mitigating circumstances which are supported by evidence") Furthermore the trial judge went beyond the basic jury charge on non-statutory mitigating circumstances by providing specific factual examples of non-statutory mitigating circumstances such as the defendant's prior good acts and level of intellectual functioning

M #22
Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy" (emphasis added). This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. See Singleton, 284 S C at 393, 326 S E 2d at 156, State v Chaffee, 285 S C 21, 328 S E 2d 464 (1984).

The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law.

State v Hughey, supra

In Boyde v California, 494 U S 370 (1990), the Supreme Court held that the Eighth Amendment is satisfied where there is not a reasonable likelihood that the penalty phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner. Accord, Calderon v Coleman, 525 U S 141, 119 S Ct 500 (1998), Buchanan v Angelone, 522 U S 269 (1998). In Buchanan, the court held that the Eighth Amendment did not require that the jury be instructed on either the concept of mitigating evidence or on particular statutory mitigating factors. The instructions given there was constitutionally adequate because it did not preclude consideration of relevant mitigating evidence. In the instant case, Judge Cole's

instructions surpassed any constitutional requirement by directing the jury to consider nonstatutory mitigation and specified such mitigation to consider including “any other evidence relating to a mitigating circumstance which you find to be appropriate” ROA p 4060, l 24 - p 4061, l 3 Accord, State v Sims, 304 S C 409, 422, 405 S E 2d 377, 384 (1991)(implausible that jury would have interpreted mitigation instruction to preclude consideration of mitigation evidence of Sims background and character), State v Bell, 305 S C 11, 21, 406 S E 2d 165, 171 (1991), Eaton v Angelone, 139 F 3d 990 (4th Cir 1998) Recently, in State v Hicks, 330 S C 207, 499 S E 2d 209 (1998), the state court upheld a death sentence challenge to a mitigation instruction, even though the jury was not specifically advised it could impose a life sentence for any reason or no reason at all The court therein found that considering the instructions, as a whole, a reasonable juror would not have understood to preclude consideration of mitigation or preclude a life sentence even if no mitigation was found

Here, Judge Cole satisfied state and federal law in the instruction on mitigating circumstances

In arriving at your decision as to what the appropriate sentence would be in this case, you are instructed that you must also consider any statutory mitigating circumstances Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the State Legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder

A mitigating circumstance is neither a justification nor an excuse for the crime of murder It is simply something

which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, [anesthesia] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder

Those that the defense contends should be considered are: Any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or

circumstances beyond a reasonable doubt And you may recommend a sentence of life imprisonment and whether or not you find the existence of a statutory or non-statutory mitigating circumstance

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision

ROA p 4058, l 25 - p 4061, l 18 Further, the trial court charged

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy

ROA p 4062, ll 8-15

It was unclear what is the nature of Petitioner's current complaint that his counsel's objections to the instructions on mitigation were constitutional inadequate, despite the timely objection ROA pp 4066-4068 His stated concern at the trial appeared to be related to asserting "the defendant contends" dilutes the impact of the request ROA p 4066, ll 20-24 As Boyde and Buchanan recognize the issue is not how much the various mitigation should be considered (or weighed) - the Eighth Amendment only requires that the evidence must be considered Here, the jury was directed specifically that they should consider both statutory and non-statutory mitigating circumstances in the oral and written instructions in determining the verdict ROA p 4061, ll 13-18, p 4063, ll 12-24

Contrary to the conclusion in the earlier petition for writ of certiorari, these mitigating circumstances instructions were not confusing. He ignores the view of the instructions as a whole in making the determination. As recognized in Buchanan, he ignores the setting where the jury had just completed a day of testimony from the Petitioner's family members, a social worker, and a psychologist presenting evidence to support both types of mitigating circumstances. He misreads the entirety of the instructions to suggest otherwise. The argument is without merit. The jury would have considered the evidence appropriate. Boyde, Buchanan

M 26
The Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), refined the requirements related to the consideration of mitigating evidence by a capital sentencer. Unlike the mandatory schemes struck down in previously by the Supreme Court in schemes in which all mitigating evidence was excluded, the Ohio system at issue in Lockett permitted a limited range of mitigating circumstances to be considered by the sentencer. The plurality nonetheless found this system to be unconstitutional, holding that "the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S., at 604, 98 S.Ct., at 2965. A majority of the Court adopted the Lockett rule in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), accord, Hitchcock v. Dugger, 481 U.S. 393, 398-399, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987), Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1670, 90 L.Ed.2d 1 (1986), and this Court has not altered the rule's central requirement. "Lockett and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial

instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all " McKoy v North Carolina, 494 U S 433, 456, 110 S Ct 1227, 1240, 108 L Ed 2d 369 (1990) (KENNEDY, J, concurring in judgment), see Saffle v Parks, 494 U S 484, 490-491, 110 S Ct 1257, 1261, 108 L Ed 2d 415 (1990)

The Petitioner's earlier reliance on Saffle v Parks, supra is misplaced. The Supreme Court has three times declined to disapprove of instructions directing jurors not to be influenced by sympathy, *mercy*, or passion in deciding on the appropriate sentence for the capital defendant. See Johnson v Texas, 509 U S 350, 113 S Ct 2658, 125 L Ed 2d 290 (1993), Saffle v Parks, 494 U S 484, 110 S Ct 1257, 108 L Ed 2d 415 (1990), California v Brown, 479 U S 538, 539, 107 S Ct 837, 93 L Ed 2d 934 (1987), see also Austin v Bell, 927 F Supp 1058, 1064-65 (M D Tenn 1996), Jamison v Collins, 100 F Supp 2d 647 (S D Ohio 2000). The Court has not construed the Lockett line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant. Indeed, the Court has stated that "[i]t would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." Saffle v Parks, 494 U S, at 493, 110 S Ct, at 1263, see also California v Brown, 479 U S 538, 542-543, 107 S Ct 837, 840, 93 L Ed 2d 934 (1987) (permitting an instruction that the jury could not base its sentencing decision on sympathy). See Lesko v Lehman, 925 F 2d 1527 (3rd 1991).

The recent decisions of other courts enumerate that a mercy instruction is not required at trial. In Ladner v State, 584 So 2d 743, 761 (Miss 1991) the Mississippi court held that a

defendant "has no right to a mercy instruction " Ladner, 584 So 2d at 761 See also Doss v State, 709 So 2d 369, 394 (Miss 1997), Walker v State, 671 So 2d 581, 613 (Miss 1996)

The basis of these holdings is the understanding that "[t]he State must not cut off full and fair consideration of mitigating evidence, but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice " Holland v State, 705 So 2d 307, 352 (Miss 1997)

Similarly, in State v Young, 853 P 2d 327 (Utah 1993), the Utah court rejected a claim that under this Court's precedent in Defendant bases his claim on Penry v Lynaugh, 492 U S 302, 109 S Ct 2934, 106 L Ed 2d 256 (1989), Lockett v Ohio, 438 U S 586, 98 S Ct 2954, 57 L Ed 2d 973 (1978) and Eddings v Oklahoma, 455 U S 104, 102 S Ct 869, 71 L Ed 2d 1 (1982), all of which vacated the death penalty sentences of the respective defendants because the sentencing procedures used did not allow the sentencing bodies to hear and fully consider the mitigating evidence offered Defendant argued that these cases require a jury to consider sympathy for the defendant during the penalty phase and to consider any mercy or sympathy arising from the mitigating evidence in reaching their verdict The Utah court found that the defendant's reliance on these cases was misplaced It concluded that this Court had specifically rejected the argument that these cases require a jury to consider sympathy in reaching its verdict in Saffle The Court further rejected petitioner Park's reasoning that an antisympathy instruction violated his rights because it barred the jurors from considering his mitigating evidence It distinguished between allowing a jury to consider mitigating evidence and guiding jurors as to how they should consider the evidence The Court upheld an antisympathy instruction because reliable, accurate, and nonarbitrary sentencing necessarily requires a "moral inquiry into the

culpability of the defendant, and not an emotional response to the mitigating evidence ' " The Utah court declared that it would follow the reasoning and holding of Saffle and hold that the federal constitution does not prohibit an antisympathy instruction, ' *nor does it require an instruction that the jurors may be guided by mercy or sympathy* ' Id , at 363

The clear majority of courts addressing the issue have agreed that a no-sympathy instruction is not unconstitutional in the penalty phase of a capital case See Saffle, 110 S Ct at 1261, 1263, 108 L Ed 2d at 426, 428 (citing Byrne v Butler, 847 F 2d 1135, 1138-40 (5th Cir 1988), People v Emerson, 122 Ill 2d 411 442- 43, 119 Ill Dec 250, 263, 522 N E 2d 1109, 1122 (1987), cert denied, 488 U S 900, 109 S Ct 246, 102 L Ed 2d 235 (1988), State v Ramseur, 106 N J 123, 295-99, 524 A 2d 188, 275-77 (1987), State v Landrum , 559 N E 2d 710, 728 (Ohio 1990), State v Steffen, 31 Ohio St 3d 111, 125, 509 N E 2d 383, 396 (1987), cert denied, 485 U S 916, 108 S Ct 1089, 99 L Ed 2d 250 (1988), State v Owens, 293 S C 161, 169, 359 S E 2d 275, 279, cert denied, 484 U S 982, 108 S Ct 496, 98 L Ed 2d 495 (1987), State v Porterfield, 746 S W 2d 441, 450-51 (Tenn), cert denied, 486 U S 1017, 108 S Ct 1756, 100 L Ed 2d 218 (1988))

In addition to Illinois, New Jersey, Ohio South Carolina, and Tennessee, other state courts have held that giving a no-sympathy instruction in the penalty phase of a capital trial is not unconstitutional E g ,In re Rupe, 115 Wash 2d 379, 798 P 2d 780 (Wash 1990), State v Moen, 309 Or 45, 786 P 2d 111 (1990), Fox v State, 779 P 2d 562 (Okla Crim App 1989), cert denied, 494 U S 1060 110 S Ct 1538, 108 L Ed 2d 777 (1990) Woods v State, 547 N E 2d 772 (Ind 1989), State v Copeland, 530 So 2d 526 (La 1988), cf State v Clemmons, 753 S W 2d 901 (prosecutor reminded jury of nonexistent oath that it would make its decision

without sympathy, prejudice, hatred, or fear, court said statement was incorrect (jury took no such oath), but also said sympathy is not a proper factor for the jury to consider in reaching its decision as to punishment), cert denied, 488 U S 948, 109 S Ct 380, 102 L Ed 2d 369 (Mo 1988)

In Commonwealth v King, 554 Pa 331, 721 A 2d 763 (1998), the Pennsylvania court found that capital murder defendants were not entitled to an instruction advising jurors that they were permitted to consider feelings of sympathy and *mercy* for defendants in connection with the return of sentences, even though jurors were asked, during voir dire, about their ability to eschew sympathy and render a decision based on the evidence. The court, similarly to the instant case found that since trial court clearly instructed jurors that they were required to consider any evidence of mitigation concerning the character and record of the defendants and the circumstances of their offense

Defendant implicitly states that his counsel should have asserted that the failure of the instructions to inform the jury of its ability to impose a life sentence out of mercy is a violation of the Constitution. There is no Eighth Amendment requirement that the jury should be so informed. Our capital punishment doctrine is rooted in the principle that the Eighth and Fourteenth Amendment cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and freakishly imposed. See Lewis v Jeffers, 497 U S 764, 774- 76 110 S Ct 3092, 3099, 111 L Ed 2d 606 (1990). Accordingly, where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. Lewis, supra, 497 U S at p 774

110 S Ct at p 3099, citing Gregg v Georgia, 428 U S 153, 189, 96 S Ct 2909, 2932, 49 L Ed 2d 859 In State v Melson, 638 S W 2d 342 at p 366, (Tenn 1982), the Tennessee court said, "[T]he idea that 'mercy,' could be extended to a defendant is incorporated in the instructions on mitigating factors, and the admonition against being ruled by passion or prejudice runs throughout " Thus, the instructions guide the jury in the exercise of its appropriate discretion and enables them to dispense a life sentence on the basis of the evidence they have heard and the instructions they have received

31
Here, the South Carolina Supreme Court found that the "trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy " (emphasis added) This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error See Singleton, 284 S C at 393, 326 S E 2d at 156, State v Chaffee, 285 S C 21, 328 S E 2d 464 (1984) " Id Applying the Court's precedent in Lockett and its progeny, the South Carolina Supreme Court found that the jury charge, reviewed in its entirety, was not confusing because it advised the jurors to consider all mitigating circumstance in making their recommendation The non-statutory circumstances were repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law The evidence that the Petitioner had previously emphasized in his appellate brief "that justified mercy" was adequately considered by the jury based upon the instructions that required the jury to consider the evidence as a whole and in mitigation in making the decision on whether a life sentence was appropriate The Constitution does not and should not require more His counsel was not at constitutional

deficiency in failing to object to the instructions in the manner collateral counsel now asserts. He has failed to show Strickland prejudice. The initial allegation is without merit.

B Requesting a “plain and ordinary meaning” instruction during the penalty phase rather than an instruction that life imprisonment means life without parole pursuant to State v Simmons [Simmons v S C] and the South Carolina statute,

In his second allegation, he contends that trial counsel erred in requesting a “plain and ordinary meaning” instruction and instead should have requested a life without parole instruction. The record reveals that counsel made a request to have the trial court instruct on the so-called “plain and ordinary meaning” charge. ROA 4017-18. See also Request Number 13, ROA 4120-21. The trial judge stated that he would give the charge if there was some confusion by the jurors about what the terms meant. ROA 4017, ll 14-15. The records reveal the instruction was not given at trial. ROA p 4049- 4066. The Applicant now contends that the jury should have been instructed that life imprisonment means life without parole. The problem with the suggestion is that since the Applicant’s crime occurred on December 4, 1995, if Hughey would have been sentenced to a life sentence, he would have been eligible for parole consideration after either twenty or thirty years depending on whether an aggravating factor was found under Section 16-3-20. At the time of the crime, the statute set forth as follows:

(A) A person who is convicted of or pleads guilty to murder must be punished by death or by imprisonment for life and is not eligible for parole until the service of twenty years, provided, however, that when the State seeks the death penalty and an aggravating circumstance is specifically found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the court must impose a sentence of life imprisonment without eligibility for parole until the service of thirty years.

Since Hughey did not, like Simmons, have a prior violent crime conviction under Section 16-1-60, he would have been parole-eligible under a life sentence. See ROA 3156-57 (Hughey testimony about prior convictions for petit larceny, grand larceny, malicious injury to property, failure to stop, and driving under suspension). See Section 24-21-640, -645.¹ Therefore, unlike Simmons, he was not entitled to a parole ineligibility instruction under either state or federal law.

To be entitled to a Simmons charge, two prongs must be met. First, the State must put the defendant's future dangerousness in issue. Second, the only available alternative sentence to

¹ § 24-21-640 Circumstances warranting parole, criteria, reports of parolees, records subject to Freedom of Information Act

h 33. The board must carefully consider the record of the prisoner before, during and after imprisonment, and no such prisoner may be paroled until it appears to the satisfaction of the board that the prisoner has shown a disposition to reform, that, in the future he will probably obey the law and lead a correct life, that by his conduct he has merited a lessening of the rigors of his imprisonment, that the interest of society will not be impaired thereby, and, that suitable employment has been secured for him. The board must establish written, specific criteria for the granting of parole and provisional parole. This criteria must reflect all of the aspects of this section and include a review of a prisoner's disciplinary and other records. The criteria must be made available to all prisoners at the time of their incarceration and the general public. The paroled prisoner must, as often as may be required, render a written report to the board giving that information as may be required by the board which must be confirmed by the person in whose employment the prisoner may be at the time. **The board must not grant parole nor is parole authorized to any prisoner serving a sentence for a second or subsequent conviction, following a separate sentencing for a prior conviction, for violent crimes as defined in Section 16-1-60.** Provided that where more than one included offense shall be committed within a one-day period or pursuant to one continuous course of conduct, such multiple offenses must be treated for purposes of this section as one offense.

death is life imprisonment without possibility of parole Simmons v South Carolina, 512 U S 154, 178, 114 S Ct 2187, 2201, 129 L Ed 2d 133, 151 (1994) (O'Connor, J, concurring), see also State v McWee, 322 472 S E 2d 235, 238 (1996), cert denied, 519 U S 1061, 117 S Ct 695, 136 L Ed 2d 618 (1997) (due process requires parole ineligibility charge "only if appellant's future dangerousness was an issue and only if appellant would have been ineligible for parole upon the imposition of a life sentence") Hughey has not met either prong of the Simmons test Defense counsel cannot be deemed ineffective by failing to request what he was not entitled to as a matter of state or federal law This assertion must be denied

C The failure to secure petitioner's presence during all critical stages of the trial,

In his third specification, Hughey contends that counsel failed to secure his presence at all critical stages of the trial The Applicant has failed to state with any specificity at what time during the proceedings was the Applicant not present Respondent's counsel has reviewed the record and cannot readily locate the any portion of a critical stage of the trial that Applicant now claims that he was not present This third assertion in ground 10(b) lacks sufficient specificity to respond to because it fails to set forth any "facts" to support the claim This matter must be dismissed pursuant to S C Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion Alternatively, this allegation is subject to dismissal pursuant to S C Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action")

D The failure to object to evidence petitioner attempted suicide following the victim's death since this evidence should have been excluded pursuant to Rule 403, SCRE,

In his fourth specification, Hughey contends that counsel should have objected to evidence presented that he had attempted suicide following the victim's death. The record reveals in the state's case, without objection, Captain Ken Grogan of the Hall County, Georgia Sheriff's Office testified that upon his arrest in Georgia, Hughey advised the authorities that "I killed them, it was an accident, the gun went off" ROA p 2456. He stated that when he was arrested that he noticed a lot of blood on Hughey's arms and he felt that he needed treatment although he did not know if he was transported him to a hospital ROA p 2457. On cross-examination, Capt Grogan stated again that when he was first talking to Hughey, he did not remember seeing if his wrists were cut, but when he came out he remembered seeing a lot of blood. Dr John Lewallen testified that he examined Hughey after he was brought in as an attempted suicide and was asked to evaluate cuts to his left wrist. He stated Hughey had reported it as a self-inflicted wound and determined that it was consistent with a self-inflicted wound ROA pp 2463-66. Hughey had apparently also had initially indicated that he had ingested something, but then changed his story saying that there was no ingestion removing a need to pump his stomach ROA p 2465-66.

In his defense in the guilt phase, his sister Gloria described the arrest at her Georgia home on December 5 and his attempt to cut his wrist ROA pp 3023-24. Hughey also testified that he before he came out of the house, during the arrest, he felt like killing himself because he had lost everything and cut his wrists ROA p 3154-55. Defense counsel Garrett had him show the jury his wrist and stated that he had never done anything like that before and he did not really want to die ROA p 3155. On cross-examination, Hughey also testified that he did not

remember being taken to the hospital and denied telling them that he had taken poison ROA p 3167 He only recalled having his wrist stitched up ROA p 3168

The Applicant apparently now contends that this evidence should have been excluded under SCRE 403 as being prejudicial Rule 403 states “ [A]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence ” By his allegation, the Applicant concedes that the evidence was relevant, just prejudicial under the Rule

h #36 Any guilty act, conduct, or statements on the part of the accused are generally admissible as some evidence of consciousness of guilt It was held in Town of Hartsville v Munger, 93 S C 527, 77 S E 219, that 'false and conflicting statements and attempts to run away have always been regarded as some evidence of guilty knowledge and intent ' State v McDowell, 266 S C 508, 224 S E 2d 889 (1976) See State v Thompson, 278 S C 1, 292 S E 2d 581, cert denied, 456 U S 938, 102 S Ct 1996, 72 L Ed 2d 458 (1982), (evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid *165 apprehension), State v Byers, 277 S C 176, 284 S E 2d 360 (1981) (evidence that defendant stole truck to flee scene of prior robbery admissible in robbery trial because it shows his flight to avoid capture), State v Tucker, 324 S C 155, 478 S E 2d 260 (1996)

As a general matter, evidence of conduct of the accused subsequent to the charged criminal offense is admissible if probative of culpability See 29 Am Jur 2d, Evidence § 278 Evidence has been admitted which tends to show the accused resisted arrest, Bird v United States, 187 U S 118, 23 S Ct 42, 47 L Ed 100 (1902), took to flight or concealment prior to

arrest, Allen v United States, 164 U S 492, 17 S Ct 154, 41 L Ed 528 (1896), suppressed or destroyed evidence, Hickory v United States, 160 U S 408, 16 S Ct 327, 40 L Ed 474 (1896), escaped or attempted to escape from custody, Hunt v State, 312 Md 494, 540 A 2d 1125 (1988), concealed his identity, Wright v State, 312 Md 648, 541 A 2d 988 (1988), **attempted suicide**, State v Campbell, 146 Mont 251, 405 P 2d 978 (1965), possessed weapons, People v Northcott, 209 Cal 639, 289 P 634 (1930), possessed stolen property, State v Barnes, 47 Or 592, 85 P 998 (1906), or engaged in similar conduct See Wigmore, Evidence, § 276 (3d ed 1940)

437. As a general rule, "[e]vidence that the accused attempted to commit suicide is relevant as a circumstance tending to show consciousness of guilt," 1 Wharton's Criminal Evidence § 159 (14th ed 1985), or as showing "an attempt to flee and escape forever from the temporal consequences of one's misdeed[s]" 2 Wigmore on Evidence § 276, p 131 (Chadbourn rev 1979) See also 22 ALR3d 840 When faced with the question, the courts of other states in almost every instance have allowed evidence of attempted suicide to go to the jury for whatever weight it chooses to place upon it See, e g , Commonwealth v Sheriff, 425 Mass 186, 680 N E 2d 75, 83 (1997) (instruction that attempted suicide evidence of consciousness of guilt not error), Harper v State, 930 S W 2d 625, 630 (Tex App 1996) (evidence of flight and attempted suicide properly admitted), State v Mann, 132 N J 410, 625 A 2d 1102 (1993) (evidence of attempted suicide may be admissible but pretrial evidentiary hearing and proper jury instructions required), State v Mitchell, 450 N W 2d 828, 831-832 (Iowa 1990) (admission of evidence of suicide attempt after arrest not abuse of discretion), State v Hunt, 305 N C 238, 287 S E 2d 818, 823 (1982) (flight and attempted suicide in jail "implied admissions of guilt"), Harper v

Texas, 930 S W 2d 625 (Tex Ct App 1996) (evidence of attempted suicide admissible),
Aldridge v State, 229 Ga App 544, 494 S E 2d 368, 370-71 (1997)

Those states which in recent decisions have refused to admit such evidence have done so on the basis of fact situations not applicable here See, e g , Meggison v State, 540 So 2d 258, 259 (Fla App 1989) (evidence of attempted suicide not probative of flight from pending prosecution because accused had pleaded guilty, guilty plea later withdrawn), Pettie v State, 316 Md 509, 560 A 2d 577 (1989) (evidence of suicide attempt improperly admitted because prosecution failed to prove actual suicide attempt made)

 In view of these decisions and the breadth of the existing South Carolina law allowing any guilty act, conduct, or statements on the part of the accused are generally admissible as some evidence of consciousness of guilt, Respondents contend that evidence of attempted suicide by the accused "where such person is, at the time or thereafter, charged with or suspected of crime," is relevant as possibly indicating a consciousness of guilt and admissible for whatever weight the jury chooses to assign "Whether the acts of the defendant constitute flight, and were due to a consciousness of guilt, or whether such acts have an innocent explanation, is a question for the jury [Cits]" See, Butler v State, 172 Ga App 405, 407(4), *546 323 S E 2d 628 (1984) The evidence was not unfairly prejudicial under Rule 403

Counsel cannot be deemed ineffective in failing to object to evidence showing the Applicant's state of mind after the crime in either the guilt or penalty phase Although the particular reasons why the evidence was not objected to and introduced by the defendant is not known, there is no Sixth Amendment violation when, as presented the evidence was admissible The specification and allegation must be dismissed

E The failure to properly investigate and prepare witness testimony,

First, this allegation lacks sufficient specificity to respond to because it fails to set forth any "facts" to support the claim. It does not state what witness should have been investigated and what witness if any was not prepared on their testimony. In the guilt phase the Applicant presented testimony from Gloria White Harrison, the Applicant and forensic expert Donald Girndt. ROA p. 2993-3364. The mitigation witnesses are set forth in assertion (f) below. This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action"). Alternatively, since the bare allegation is contradicted by the record, a hearing on an allegation is not required. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

F Eliciting prejudicial guilt phase testimony that petitioner had been expelled from school since this evidence was irrelevant,

In this allegation, Hughey complains that his lawyers erred in eliciting testimony that Hughey had been expelled from school. The record reveals that in his direct examination, Hughey testified that he went to the tenth grade in school. ROA p. 3066. Defense counsel Garrett asked, "you quit in the tenth grade?" and Hughey answered "I got expelled." ROA p. 3066, ll. 17-20. The Applicant now claims that this inquiry was a Sixth Amendment violation requiring a new trial. We disagree.

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct

falls within the wide range of reasonable professional assistance " Strickland v Washington, 466 U S 668, 689, 104 S Ct 2052, 2065, 80 L Ed 2d 674 (1984) Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently In the wake of a conviction and death sentence such a conclusion "is all too tempting " Id Rather, the court must place itself in the shoes of Hughey's attorneys and ask only whether their choices were objectively unreasonable Respondents submit that counsel's questioning falls outside the range of competence This is particularly true here since evidence of Hughey's schooling would be presented Jeff Youngman, a social worker in the penalty phase who testified about Hughey's family background, and his limited education, ROA P 3910 The Applicant has failed to show either deficient performance or prejudice on this record

G The failure to properly investigate and present available mitigating evidence

First, this specification also lacks sufficient specificity to respond to because it fails to set forth any "facts" to support the claim It does not state what evidence or witness should have been investigated and what witness was not presented The record reveals that mitigation testimony was presented from Ms Anthony Wilson, Anthony Scott Harrison, Jessie Christopher Brown, Nancy Leigh Ramey, Rev Wendall Cox, Gloria White Harrison, social worker Jeff Youngman, and Dr James Evans, an expert in neuro-psychology and psychology ROA p 3768-4003 In addition, the Applicant had testified in the guilt phase about his background ROA p 3064-3253

This matter must be dismissed pursuant to S C Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion Alternatively, this allegation is subject to

dismissal pursuant to S C Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action") Alternatively, since the bare allegation is contradicted by the record, a hearing on an allegation is not required Norman v State, 276 S C 278, 277 S E 2d 707 (1981)

IV Conclusion

WHEREFORE, Respondent makes the Return and submits that the motion to make more definite and certain be granted or the grounds specified above in the Application for Post-Conviction Relief be dismissed Pursuant to Section 17-27-160, Respondents respectfully request this Court to set a scheduling hearing with the parties within thirty (30) days to set the evidentiary hearing within one-hundred and eighty (180) days from that date

Respectfully submitted,

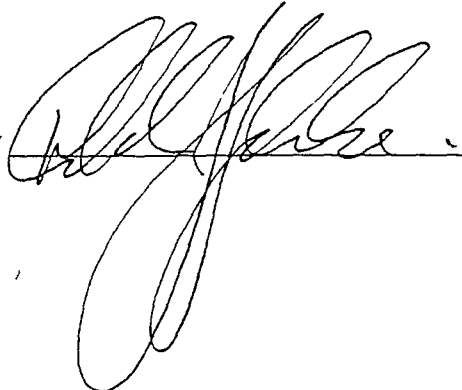
CHARLES M CONDON
Attorney General

JOHN W McINTOSH
Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By



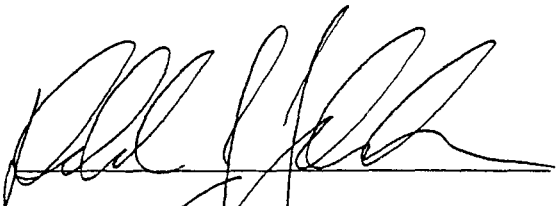
January 19, 2001

CERTIFICATE OF SERVICE

I, Donald J Zelenka, certify that I have served Respondents' *Return and Motion to Make More Definite and Certain the Application for Post-Conviction Relief* in the foregoing action by depositing in the United States mail, postage prepaid to the following

- 1 Teresa L Norris, Esq
The Center for Capital Litigation
P O Box 11311
Columbia, South Carolina 29211
(803-765-0650)
(803-765-0705)(FAX)
- 2 E Charles Grose Jr
600 Monument St , Suite 208 Park Plaza, Box P-133
Greenwood, South Carolina 29646
(864) 229-9505
(864) 227-1104

This 19th day of January, 2001



DONALD J ZELENSKA

STATE OF SOUTH CAROLINA)
) THE COURT OF COMMON PLEAS
 COUNTY OF ABBEVILLE)

JOHN KENNEDY HUGHEY,)
)
 APPLICANT,) TRANSCRIPT OF RECORD
)
 -VS-) NO 00-CP-01-0212
)
 GARY MAYNARD, COMMISSIONER,) HEARING ON MOTION
 SOUTH CAROLINA DEPARTMENT)
 OF CORRECTIONS, AND)
 CONDON, SOUTH CAROLINA)
 ATTORNEY GENERAL,)
)
 RESPONDENTS)

APRIL 29, 2002
 GREENWOOD, SOUTH CAROLINA

B E F O R E

THE HONORABLE WYATT T SAUNDERS, JR , JUDGE

A P P E A R A N C E S

TERESA L NORRIS, ESQUIRE
 CENTER FOR CAPITAL LITIGATION
 POST OFFICE BOX 11311
 COLUMBIA, SOUTH CAROLINA 29211

E CHARLES GROSE, JR , PUBLIC DEFENDER, COUNTY
 OF ABBEVILLE
 600 MONUMENT STREET, BOX P-133
 GREENWOOD, SOUTH CAROLINA 29646
 ATTORNEYS FOR THE APPLICANT

DONALD J ZELENKA, DEPUTY ATTORNEY GENERAL
 POST OFFICE BOX 11549
 COLUMBIA, SOUTH CAROLINA 29211-1549
 ATTORNEY FOR THE RESPONDENT

MARGARET F BRIGGS
 CIRCUIT COURT REPORTER
 211 LAKESHORE DRIVE
 GREENWOOD, SOUTH CAROLINA 29649

1 (PROCEEDINGS COMMENCED AT 2 55 P M)
2 THE COURT WE'LL OPEN THE RECORD AND
3 COME INTO SESSION, PLEASE, IN THE MATTER OF JOHN
4 KENNEDY HUGHEY, AS APPLICANT, VERSUS GARY MAYNARD,
5 COMMISSIONER OF THE SOUTH CAROLINA DEPARTMENT OF
6 CORRECTIONS, AND CHARLES CONDON, SOUTH CAROLINA
7 ATTORNEY GENERAL, RESPONDENTS, IN CIVIL ACTION
8 NO 2000-01-0212

9 THIS IS A MOTION TO CONDUCT
10 ALL PROCEEDINGS WITH RESPECT TO APPLICANT'S REQUEST
11 FOR AUTHORIZATION OF EXPERT, INVESTIGATORY, AND OTHER
12 SERVICES EX PARTE AS REQUIRED, ACCORDING TO THE STYLE
13 OF THE MOTION, BY CODE SECTION 17-27-160 AND 16-3-26

14 THIS TECHNICALLY IS AN ABBEVILLE
15 COUNTY CASE THAT IS BEING HEARD IN GREENWOOD
16 COUNTY BY THIS JUDGE, WHO'S BEEN ASSIGNED THE POST-
17 CONVICTION RELIEF APPLICATION OF MR HUGHEY, WHO IS
18 UNDER SENTENCE OF DEATH

19 THE COURT WOULD FIRST INQUIRE
20 WHETHER THERE'S A WAIVER OF THE HEARING TO BE HELD
21 IN ABBEVILLE COUNTY BY THE APPLICANT?

22 MS NORRIS YES, SIR

23 THE COURT IS THERE A WAIVER BY THE STATE?

24 MR ZELENKA YES, SIR

25 THE COURT VERY WELL THE COURT WILL

1 CONDUCT THE PROCEEDINGS HERE

2 THE FIRST ISSUE IS THE MOTION ITSELF,
3 AND WE WILL BIFURCATE THE ARGUMENT, IF YOU WILL AND
4 THE RECORD WILL SHOW THAT WE HAD A BRIEF MEETING IN
5 CHAMBERS OUTSIDE MR HUGHEY'S PRESENCE I WANT
6 MR HUGHEY TO KNOW WHAT WAS DISCUSSED WHAT WAS
7 DISCUSSED ESSENTIALLY WAS THE FIRST THING THAT WE'VE
8 COVERED, AND THAT IS THAT THIS IS AN ABBEVILLE COUNTY
9 CASE AND THAT THERE'S NO COURT TO BE HELD BY THIS
10 JUDGE IN ABBEVILLE COUNTY WITHIN THE FORESEEABLE
11 FUTURE I THINK JUNE SOMETHING WE MAY HAVE A TERM,
12 BUT WE DECIDED THE FIRST ORDER OF BUSINESS WOULD BE
13 TO BE CERTAIN THAT ON THE RECORD WE AGREE TO HAVE THE
14 HEARING IN GREENWOOD COUNTY TODAY

15 WE ALSO DISCUSSED THAT THE APPLICANT
16 WOULD GO FORWARD WITH HIS MOTION ONLY AS IT REGARDS
17 HIS REQUEST FOR AN EX PARTE HEARING OF HIS RELIEF AND
18 WITHOUT TOUCHING UPON EXACTLY WHAT RELIEF HE SEEKS,
19 THE ISSUE BEING FIRST WHETHER EX PARTE RELIEF IS
20 IN ORDER IN THIS PROCEEDING, AND AT THAT TIME THE
21 APPLICANT WILL YIELD TO THE STATE AND THE STATE WOULD
22 RESPOND TO THAT POSITION, AND DEPENDING UPON THE
23 COURT'S RULING ON THAT DISPUTE, AS IT WERE, OR
24 DIFFERENCE OF OPINION, THEN WE WILL EITHER DISPENSE
25 WITH THE PROCEEDINGS AND GO FORWARD OR WE'LL HAVE

1 FURTHER ARGUMENT AS TO WHAT EXPERT, INVESTIGATIVE, OR
2 OTHER SERVICES MAY BE NEEDED, DEPENDING UPON THE
3 OUTCOME OF THE HEARING, THE OUTCOME OF THE FIRST PART
4 OF THE HEARINGS

5 NOW, WHO WILL SPEAK FOR MR HUGHEY?

6 MS NORRIS I WILL, YOUR HONOR

7 THE COURT MS NORRIS, YOU'RE RECOGNIZED

8 MS NORRIS THANK YOU, YOUR HONOR

9 BASICALLY I'LL JUST TOUCH ON THE HIGHLIGHTS I THINK
10 YOU HAVE OUR WRITTEN MOTION

11 THE COURT AND THANK YOU FOR IT

12 MS NORRIS BUT IT IS OUR POSITION THAT
13 17-27-160 SPECIFICALLY ALLOWS CAPITAL P C R 'S AND
14 REQUESTS FOR EXPERT AND INVESTIGATIVE SERVICES TO BE
15 DETERMINED IN A MANNER CONSISTENT WITH 16-3-26, WHICH
16 IS THE TRIAL STATUTE THE STATE HAS CITED THE CASE
17 OF THAMES, T-H-A-M-E-S, VERSUS STATE IT IS OUR
18 POSITION THAT THAT DOESN'T CONTROL THIS ISSUE
19 FIRST, IT WAS NOT A CAPITAL CASE IT WAS ARGUED AND
20 DECIDED BEFORE THE P C R CAPITAL STATUTE WAS PASSED
21 AND I BELIEF I HAD ALSO SUBMITTED A BRIEFING FROM
22 THAMES THE ISSUE WASN'T EVEN ADDRESSED THERE
23 IT IS OUR POSITION THAT THE STATUTE, THE CAPITAL
24 STATUTE, CONTROLS VERSUS THAT CASE

25 WE SUBMIT THAT IN ORDER TO COME TO YOU

1 AND EXPLAIN WHY WE NEED EXPERTS AND INVESTIGATORS,
2 THAT TO SOME EXTENT THAT REQUIRES US TO GET INTO WORK
3 PRODUCT AND ATTORNEY-CLIENT PRIVILEGE, AND WE SUBMIT
4 THAT IT VIOLATES DUE PROCESS AND EQUAL PROTECTION FOR
5 MR HUGHEY AND HIS COUNSEL TO HAVE TO BASICALLY LAY
6 OPEN BEFORE THE GOVERNMENT TRIAL PREPARATION AND
7 PLANNING FOR INSTANCE, MR ZELENKA'S CONCERN IS
8 THAT WE'RE DISCUSSING THE SUBSTANCE OF THE CASE
9 WITH YOU AND MR ZELENKA MIGHT BE LEFT OUT OF THAT
10 ANOTHER PROVISION OF THE CAPITAL P C R IS FULL
11 CIVIL DISCOVERY, SO CERTAINLY IF MR ZELENKA FILED
12 DISCOVERY, THEY'RE ULTIMATELY ENTITLED TO FIND OUT
13 WHAT EXPERTS WE INTEND TO PUT ON THE WITNESS STAND
14 BUT THE DIFFERENCE IS THERE MAY BE EXPERTS THAT WE
15 WILL CONSULT WITH OR THAT WE WOULD ASK THE COURT FOR
16 TESTING, AND TESTING DOESN'T AMOUNT TO SOMETHING WE
17 ARE GOING TO PUT ON THE WITNESS STAND MR ZELENKA
18 IS NOT ENTITLED TO KNOW THAT

19 MR ZELENKA'S RESPONSE, HE CITES
20 ETHICS CANONS FOR BOTH THE JUDGE AND ATTORNEYS, AND
21 IT CERTAINLY DOES SAY NO EX PARTE, BUT IT SAYS THAT
22 YOU ARE NOT REQUIRED TO HEAR FROM SOMEBODY WHO
23 DOESN'T HAVE A LEGAL INTEREST IN A PROCEEDING WE
24 SUBMIT THAT THE STATE HAS NO LEGAL INTEREST IN
25 FINDING OUT ABOUT COMMUNICATIONS WITH EXPERTS,

1 INVESTIGATORS, AND THE TRIAL PREPARATION THAT WE'RE
2 DOING

3 MR ZELENSKA ALSO CITES IN HIS RESPONSE
4 THAT IN A CIVIL CASE YOU AS THE JUDGE AND CERTAINLY A
5 CIVIL LITIGANT COULDN'T COME TALK TO YOU ABOUT THE
6 TYPES OF EXPERTS AND INVESTIGATORS WE NEED WELL,
7 THE DIFFERENCE IS A CIVIL LITIGANT DOESN'T HAVE TO
8 COME TO YOU MR HUGHEY, WHO IS INDIGENT, DOES SO
9 WE SUBMIT THAT WE ARE DIFFERENT THAN CIVIL CASES IN
10 GENERAL AND THERE'S A RECENT SUPREME COURT CASE,
11 WADE VERSUS STATE, 559 S E 2D 843, DECIDED FEBRUARY
12 11TH, 2002, THAT MAKES IT CLEAR THAT ALTHOUGH -- AND
13 I DO HAVE A COPY OF THAT CASE, JUDGE, IF YOU'D LIKE

14 THE COURT YES, MA'AM, IF YOU DO HAVE IT
15 MS NORRIS YES, SIR AND I'LL ALSO GIVE
16 ONE TO MR ZELENKA

17 (MS NORRIS PRESENTED DOCUMENTS
18 TO THE COURT AND TO MR ZELENKA)

19 MS NORRIS BUT IN ESSENCE THAT PARTICULAR
20 CASE TALKS ABOUT THAT THE PRISON NEGATION ACT DOESN'T
21 APPLY, BECAUSE THERE IS LANGUAGE IN THERE THAT SAYS
22 THAT ALTHOUGH P C R 'S ARE CONSIDERED CIVIL
23 LITIGATION AND P C R COUNSEL IS APPOINTED, APPELLATE
24 COUNSEL HAS DIFFERENT REQUIREMENTS, SO WE CAN'T BE
25 COMPARED WITH A CIVIL CASE IN THAT ASPECT

1 MR ZELENSKA SAYS THAT THE STATE WANTS
2 TO KNOW WHAT THE FACT FINDER WILL KNOW BEFORE A
3 DECISION IS MADE AGAIN, THERE ARE DISCOVERY RULES
4 AVAILABLE AND OBVIOUSLY BEFORE A DECISION IS MADE,
5 WE'LL HAVE AN EVIDENTIARY HEARING, SO THE STATE WILL
6 BE ENTITLED TO THAT INFORMATION

7 AND THE OTHER ASPECT, JUDGE, ALTHOUGH
8 THIS IS SORT OF AN AWKWARD SITUATION, IT CUTS BOTH
9 WAYS EITHER MR ZELENSKA DOESN'T KNOW WHAT
10 INFORMATION WE HAVE TO PROVIDE IN ORDER TO SHOW,
11 AS THE STATUTES REQUIRE, THAT OUR EXPERTS OR
12 INVESTIGATORS ARE REASONABLE AND NECESSARY, SO
13 OBVIOUSLY THERE HAS TO BE SOME DISCUSSION ABOUT
14 THE FACTS BUT ON THE FLIP SIDE OF THAT, IF, FOR
15 INSTANCE, WE DO TESTING THAT DOESN'T HELP MR HUGHEY,
16 YOU, AS THE FACT FINDER, ARE GOING TO KNOW THAT AS
17 WELL, BUT THAT'S A DIFFERENT ISSUE THAN WHETHER WE
18 ARE PREPARING EVIDENCE FOR THE STATE MR HUGHEY
19 DIDN'T MAKE THE SYSTEM, THE LEGISLATURE DID, BUT WE
20 SUBMIT THAT BEING FORCED TO GO FORWARD WITH THE STATE
21 PRESENT WOULD VIOLATE BOTH DUE PROCESS AND EQUAL
22 PROTECTION

23 THE ONLY JUDGE IN A CAPITAL
24 P C R THAT I AM AWARE OF THAT HAS DEALT WITH THIS
25 PARTICULAR ISSUE IS JUDGE KITTREDGE IN THE CASE OF

9 THE COURT THAT MOTION WAS FILED WHAT?

18 THE COURT WELL, THAT'S ESSENTIALLY WHERE
19 WE ARE NOW THE STATE HAS BEEN NOTIFIED AND HAS
20 RESPONDED TO A PENDING EX PARTE MOTION IT'S NOT
21 UNDER SEAL, BUT ESSENTIALLY YOU HAVE NOT REVEALED
22 ANYTHING THAT MR HUGHEY MAY BE ATTEMPTING TO HAVE
23 FUNDED

24 MS NORRIS THAT'S CORRECT

25 THE COURT THAT'S ESSENTIALLY WHERE WE ARE

1 NOW, ISN'T IT?

2 MS NORRIS WELL, JUDGE, ONCE WE GET PAST
3 THIS INITIAL STEP AND START TALKING ABOUT ACTUAL
4 EXPERTS AND INVESTIGATORS THAT WE NEED, THAT'S A
5 DIFFERENT STORY JUDGE KITTREDGE EXCLUDED THE STATE
6 FROM THAT OTHER THAN NOTICE THAT HE WAS DISCUSSING
7 FUNDING ISSUES WITH THE APPLICANT'S COUNSEL -- AND
8 INDEED, JUDGE, NO OTHER JUDGE IN THE STATE HAS
9 REQUIRED IN A CAPITAL P C R , THAT I KNOW OF -- AND
10 CERTAINLY MR ZELENKA CAN CORRECT ME IF I'M WRONG --
11 NO JUDGE HAS REQUIRED THAT A CAPITAL DEFENDANT IN A
12 P C R CASE TO COME IN AND TALK ABOUT THE MONEY THEY
13 NEED FOR THEIR EXPERT SPENDING IN THE STATE'S
14 PRESENCE

15 NOW, ULTIMATELY, WHEN WE GET TO
16 COURT, OBVIOUSLY IF MR ZELENKA FILED DISCOVERY, HE'S
17 ENTITLED TO KNOW WHAT EXPERTS I INTEND TO PUT ON THE
18 WITNESS STAND HE'S NOT ENTITLED TO KNOW WHO MY
19 INVESTIGATORS ARE, EXPERTS WE CONSULT WITH FOR
20 TESTING, UNLESS WE'RE GOING TO PUT IT INTO EVIDENCE

21 THE COURT ALL RIGHT THANK YOU,
22 MS NORRIS

23 MR ZELENKA, HAVE YOU HAD TIME TO
24 DIGEST THE CASE HANDED UP, WADE V STATE AND THE
25 ORDER OF JUDGE KITTREDGE IN RAY V MOORE AND

1 DIRECTOR? HAVE YOU HAD TIME TO READ THOSE? THE
2 COURT HAS NOT

3 MR ZELENKA: I'M GENERALLY FAMILIAR WITH
4 THE STACY WADE CASE I'M NOT AS FAMILIAR WITH ALL
5 THE CIRCUMSTANCES DEALING WITH "BABE" RAY A
6 DIFFERENT MEMBER OF OUR OFFICE HANDLED THAT
7 PARTICULAR CASE, BUT I AM GENERALLY AWARE OF THE
8 DETERMINATION THAT JUDGE KITTREDGE MADE SO I
9 BELIEVE I'M READY TO GO FORWARD

10 MAY IT PLEASE THE COURT, IT'S OUR
11 POSITION THAT WE'RE BASICALLY LOOKING AT TWO
12 DIFFERENT ISSUES BEFORE THE COURT WITH RESPECT TO
13 WHETHER THERE SHOULD BE EX PARTE PROCEEDINGS FROM
14 ONE EXTENT IT'S WHETHER THE STATUTE WHICH ALLOWS THE
15 APPOINTMENT OF COUNSEL IN THIS CASE AS WELL AS THE
16 AVAILABILITY OF TWENTY-FIVE THOUSAND DOLLARS OF STATE
17 FUNDS FOR INVESTIGATIVE AND EXPERT WITNESSES, WHETHER
18 THAT SOMEHOW ALLOWS OR DOESN'T ALLOW IN A CIVIL
19 PROCEEDING THE STATE TO HAVE KNOWLEDGE OF WHY THE
20 REQUEST IS BEING MADE WE BELIEVE THAT THERE IS
21 NOTHING IN THE STATUTE, SECTION 16-3-26, THAT
22 PRECLUDES THE STATE FROM GAINING THAT INFORMATION
23 AS IT'S PRESENTED TO THE COURT WE NOTE THAT THE
24 STATUTE THAT CREATED THE EFFECTIVE DEATH PENALTY ACT
25 AND THE SPECIAL PROCEEDINGS FOR POST-CONVICTION

1 RELIEF IN DEATH PENALTY CASES, SECTION 17-27-160, AT
2 THE SAME TIME THAT WAS PASSED, IT CREATED A STATUTE
3 THAT ALLOWED FOR DISCOVERY, GENERAL DISCOVERY OF A
4 CIVIL NATURE, IN DEATH PENALTY POST-CONVICTION RELIEF
5 CASES, BUT EXCLUDED DISCOVERY IN NON-DEATH-PENALTY
6 POST-CONVICTION RELIEF CASES UNLESS GOOD CAUSE WAS
7 SHOWN TO THE TRIAL JUDGE

8 THE CASE THAT WE'RE RELYING
9 UPON, GENERALLY THAT THERE SHOULD BE NO EX PARTE
10 PROCEEDINGS WITH RESPECT TO REQUESTS MADE IN THIS
11 CIVIL SETTING FOR EXPERT WITNESSES OR INVESTIGATIVE
12 EXPENSES -- AND AGAIN, THIS IS DIFFERENT FROM COUNSEL
13 FEES -- WE DON'T SEEK OR ASSERT THAT WE HAVE ANY
14 ENTITLEMENT OR ANY DISCUSSION VALUE AS TO WHETHER
15 COUNSEL SHOULD BE GIVEN CERTAIN FEES, BUT MAINLY THE
16 INVESTIGATIVE FEES -- IS THAMES VERSUS STATE, A SOUTH
17 CAROLINA SUPREME COURT DECISION WHICH WAS ENACTED AND
18 DECIDED BEFORE THE EFFECTIVE DEATH PENALTY ACT BUT
19 IN THAT CASE, IN A STATE POST-CONVICTION RELIEF
20 SETTING, THEY'RE ASSERTING EQUAL PROTECTION AND DUE
21 PROCESS THE COURT, WE THINK, WAS FAIRLY CLEAR WHEN
22 IT STATED THAT, "ACCORDINGLY, A POST-CONVICTION
23 RELIEF JUDGE IN THIS CASE PROPERLY CONDUCTED A
24 HEARING ON THE MOTION IN WHICH COUNSEL FOR THE STATE
25 WAS ALLOWED TO FULLY PARTICIPATE " IT SPEAKS VOLUMES

1 AS TO WHETHER IN A CIVIL SETTING, WHEN A REQUEST IS
2 MADE IN A POST-CONVICTION CASE FOR FEES, THAT THE
3 STATE SHOULD HAVE THE OPPORTUNITY TO BE THERE

4 AND I THINK IN A CAPITAL P C R CASE
5 IT'S EVEN MORE IMPORTANT, AND TO THAT EXTENT I WOULD
6 BRING TO THE COURT'S ATTENTION THE CANONS OF ETHICS,
7 BOTH WITH RESPECT TO THE JUDICIAL CANONS AND THE
8 LAWYERS' CANONS OF ETHICS, WHICH ASSERT THAT IT IS
9 IMPROPER FOR THE PARTIES BETWEEN ONE SIDE AND THE
10 JUDGE TO ENGAGE IN EX PARTE PROCEEDINGS UNLESS
11 OTHERWISE AUTHORIZED BY LAW I'VE CITED RULE 501
12 OF THE SOUTH CAROLINA RULES OF APPELLATE PROCEDURE,
13 CANON 3, SUBPART 7(A) FOR THAT, AS WELL AS THE
14 ATTORNEYS' CANONS OF ETHICS, RULE 407, 3 5, INVOLVING
15 EX PARTE COMMUNICATIONS

16 WHY IS THAT SO IMPORTANT IN A CAPITAL
17 CASE? IN A CAPITAL CASE, AS YOUR HONOR IS AWARE, THE
18 JUDGE IS SITTING AS THE EVENTUAL FACT FINDER, AND AS
19 I UNDERSTAND FROM THE MOTION -- BECAUSE AGAIN, WE
20 PREVIOUSLY HAVE FREQUENTLY NOT BEEN AWARE OF SUCH
21 COMMUNICATIONS OR THE EXTENT THAT THOSE
22 COMMUNICATIONS GO ON -- IN THE MOTION THEY NOTED
23 THAT WHAT WOULD OCCUR IN THIS EX PARTE COMMUNICATION
24 WITH THE JUDGE IS THE REVEALING OF THE PRODUCT OF
25 INTERVIEWS WITH POTENTIAL WITNESSES, INTERPRETATION

1 OF RECORDS THAT ONE SIDE MAY HAVE GATHERED, AND A
2 DISCLOSURE OF PRIVILEGED COMMUNICATIONS WITH TRIAL
3 COUNSEL, AND THEY ASSERT THAT THAT INFORMATION SHOULD
4 BE EXCLUDED FROM US BECAUSE IT WOULD, QUOTE,
5 "TELEGRAPH TO THE PROSECUTION THE DEFENDANT'S DEFENSE
6 STRATEGY " NOW, WE BELIEVE THAT IN ANY OTHER CIVIL
7 SETTING, THAT'S THE DEFINITION OF EX PARTE
8 COMMUNICATIONS, THE REVEALING OF THE DEFENSE
9 STRATEGY, THE REVEALING OF INFORMATION WHICH MIGHT
10 NOT OTHERWISE BE DISCLOSED ON THE RECORD

11 I'M NOT ASSERTING THAT THE DEFENSE
12 COUNSEL INTENDS TO DO ANYTHING IMPROPER, BUT THE
13 EFFECT OF THAT COMMUNICATION IS THAT IT CAN DEVELOP
14 INFORMATION OR A BIAS IN ANY FACT FINDER, WHICH WE
15 BELIEVE THE OTHER SIDE, IN THIS SITUATION THE STATE,
16 SHOULD BE AWARE OF WE ARE SEEKING WHAT THE DEFENSE
17 IS SEEKING, TO ENTER A COURTROOM WITH AN UNBIASED
18 JUDGE, AND WE'RE ALSO SEEKING THAT THAT JUDGE HAS THE
19 SAME INFORMATION AVAILABLE TO IT TO MAKE ITS DECISION
20 WHICH THE SOUTH CAROLINA SUPREME COURT MAY ULTIMATELY
21 HAVE

22 THERE MAY BE INFORMATION WHICH ACTS
23 FAVORABLY OR UNFAVORABLY IN A SITUATION ONE EXAMPLE
24 THAT I COULD SUGGEST WHICH MAY OCCUR IS THAT THERE
25 MAY BE A DISCUSSION ABOUT THE QUALIFICATIONS OF

1 CERTAIN EXPERT WITNESSES WHO MAY BE AVAILABLE OR MAY
2 NOT BE AVAILABLE THERE MAY BE A DISCUSSION AS TO
3 WHY A CERTAIN EXPERT WITNESS IS NOT A DESIRABLE
4 WITNESS TO THE DEFENSE IN THAT SITUATION GOING ON IN
5 THIS EX PARTE COMMUNICATION THE JUDGE MAY AGREE
6 THAT THAT WOULD NOT BE YOUR BEST WITNESS AND MAY
7 SUGGEST THERE WOULD BE A DIFFERENT WITNESS CALLED
8 WITHOUT THAT INFORMATION, WITHOUT THE KNOWLEDGE THAT
9 THERE HAS BEEN THAT SORT OF COMMUNICATION WITH THE
10 JUDGE, TWO THINGS MAY OCCUR THAT THE STATE WOULD BE
11 BLINDED TO IN MAKING ITS PRESENTATION THE FIRST
12 SITUATION IS THE JUDGE WOULD HAVE MADE A PRIMA FACIE
13 DETERMINATION THAT THIS PARTICULAR EXPERT WITNESS IS
14 QUALIFIED TO RENDER AN OPINION THAT TAKES AWAY THE
15 FIRST ARGUMENT THAT A STATE MAY HAVE ON VOIR DIRE,
16 AS TO WHETHER IN FACT THAT PERSON POSSESSES THE
17 APPROPRIATE CREDENTIALS AND WHETHER THEY ARE IN FACT
18 AN APPROPRIATE WITNESS IF WE ALREADY KNOW THAT THAT
19 DETERMINATION HAS BEEN MADE, THAT IS A FACTOR THAT
20 MAY BIAS THEM

21 THE OTHER INFORMATION WOULD BE THE
22 STATE MAY THEN SEEK TO PRESENT THE WITNESS THAT THE
23 DEFENSE COUNSEL IN A DISCUSSION WAS CHOOSING NOT TO
24 PRESENT THAT MAY BE A WITNESS THAT WE'RE RELYING
25 UPON WE MAY NOT BE AWARE THAT THERE'S ALREADY BEEN

1 SOME COMMUNICATION THAT WENT ON WHICH BIASED THE
2 POTENTIAL WITNESS THAT THE STATE MAY HAVE UTILIZED
3 IN THAT PARTICULAR SITUATION I THINK THE STATE IS
4 ENTITLED TO BE AWARE OF THAT TYPE OF INFORMATION AND
5 COMMUNICATION I THINK THAT'S WHY THE STATE'S INPUT
6 IN THIS CIVIL SETTING IS IMPORTANT

7 AND AGAIN, THEY POINT OUT THAT THE
8 CIVIL RULES OF DISCOVERY ARE AVAILABLE AND THAT WE
9 MAY BECOME AWARE OF CERTAIN INFORMATION WHICH THEY
10 HAVE, BUT I THINK THEY'RE ALSO BEING VERY CANDID IN
11 THEIR MOTION THAT THERE'S A LOT OF INFORMATION THAT
12 MAY POSSIBLY BE GIVEN TO THE COURT THAT THE STATE
13 WOULD NOT BE AWARE OF, AND THAT'S THEIR CONCERN ABOUT
14 TELEGRAPHING THE DEFENSE STRATEGY BUT WE AGREE THAT
15 IF THERE IS A DEFENSE STRATEGY THAT'S BEING
16 TELEGRAPHED TO THE JUDGE IN ADVANCE OF THE HEARING,
17 IN ADVANCE OF THE APPLICATION FOR POST-CONVICTION
18 RELIEF BEING AMENDED OR THOSE ISSUES BEING RAISED, WE
19 THINK THAT FUNDAMENTAL FAIRNESS DEMANDS THAT WE HAVE
20 KNOWLEDGE OF THAT SAME INFORMATION

21 NOW, THE INFORMATION, AS I NOTED IN
22 OUR PLEADINGS, THAT WE'RE TRULY TRYING TO SEEK IS --
23 AND IT'S IN FOOTNOTE 1 OF PAGE 2 OF OUR LETTER THAT
24 WE WROTE, OUR FORMAL PLEADINGS -- THE MATTERS RELATED
25 TO THE SUBSTANTIVE ISSUES OR ISSUES ON THE MERITS

1 THAT'S ALL WE'RE CONCERNED ABOUT BEING MADE PRIVY TO
2 WE RECOGNIZE WE CAN UTILIZE THE DISCOVERY PROCESS AND
3 GAIN INFORMATION

4 WITH RESPECT TO WHERE THEY'RE TALKING
5 ABOUT PRIVILEGED COMMUNICATIONS WITH TRIAL COUNSEL,
6 CANDIDLY, YOUR HONOR, I DON'T KNOW WHAT THAT MEANS,
7 BECAUSE THEY HAVE MADE AN APPLICATION FOR POST-
8 CONVICTION RELIEF, WHICH WAIVES THE ATTORNEY-CLIENT
9 PRIVILEGE, AND IN THIS SETTING THE PRIOR TRIAL
10 COUNSEL IS A WITNESS, HE'S NOT REPRESENTING THE
11 INDIVIDUAL, SO ANY DISCUSSIONS THEY WOULD HAVE WITH
12 TRIAL COUNSEL WE SUBMIT WOULD NOT BE PRIVILEGED
13 INFORMATION THEY WOULD BE DISCUSSIONS WITH A THIRD
14 PARTY THAT THAT TRIAL COUNSEL IS FREE TO REVEAL TO
15 US, AND WE SHOULD -- TO THE EXTENT THAT THEY'RE
16 PRESENTED TO THE COURT, THAT'S NOT A SECRET, AND IT
17 SHOULDN'T BE A SECRET, AND THE PARTIES RECOGNIZING
18 THAT THE STATUTE WHICH PROVIDES FOR THE WAIVER OF THE
19 ATTORNEY-CLIENT PRIVILEGE, PARTICULARLY SECTION
20 17-27-130, RECOGNIZES THAT THAT BREAK HAS BEEN MADE
21 AS A MATTER OF LAW SO THERE'S NOTHING THERE THAT
22 WOULD BE PREVENTED FROM COMING TO US, BECAUSE THE LAW
23 ALLOWS FOR THAT COMMUNICATION TO BE GIVEN WE WOULD
24 JUST HAVE TO ASK FOR IT

25 BUT IN SUM, WE THINK THAT THAMES

1 VERSUS STATE IS A REASONABLE INTERPRETATION AS
2 TO WHAT SHOULD OCCUR IN A POST-CONVICTION RELIEF
3 SETTING, THAT THEIR RELIANCE UPON THE FUNDING AND
4 THE APPOINTMENT POWERS SET FORTH IN SECTION 17-27-160
5 DO NOT CREATE AN ABILITY TO, WHETHER INTENDED TO OR
6 CAUSED BY UNINTENDED CONSEQUENCES, CREATE A JUDGE AND
7 PROVIDE A JUDGE WITH INFORMATION THAT ONE SIDE IS
8 BLINDED TO WE DO NOT THINK IT'S IN THE INTEREST OF
9 JUSTICE OR THE INTEREST OF THE CANONS THAT THAT
10 SITUATION SHOULD OCCUR

11 WITH RESPECT TO THE COMMENT THAT WE
12 DON'T -- THAT -- WELL, LET ME JUST PUT IT THIS WAY
13 THE STATE DOESN'T KNOW WHAT DOESN'T GO ON OR WHAT
14 GOES ON IN MATTERS THAT IT'S NOT APPRISED OF WE
15 CAN'T SAY WE'VE BEEN EXCLUDED FROM OTHER MATTERS,
16 EXCEPT FROM THE FACT OF THE JOHN "BABE" RAY CASE,
17 FROM WHAT GOES ON IN THE DISCUSSIONS WITH THE TRIAL
18 JUDGE, BECAUSE WE'VE BEEN GENERALLY UNAWARE THAT THEY
19 HAVE OCCURRED, WHAT'S BEEN DISCUSSED, AND THE
20 DETERMINATIONS THAT HAVE BEEN MADE BY THE TRIAL
21 COURT WE HAVE ACTED ON THE ASSUMPTION THAT THE
22 LAWYERS ARE ACTING UNDER THE CANONS OF ETHICS AND
23 THAT IF MATTERS OF SUBSTANCE HAVE BEEN DISCUSSED WITH
24 THE JUDGE, THE LAW WOULD WORK ITSELF OUT AND WE WOULD
25 BE MADE PRIVY TO THAT CANDIDLY, IT WASN'T UNTIL

1 THIS RESPONSIVE MOTION WAS MADE BY THE APPLICANT'S
2 COUNSEL THAT WE WERE GENERALLY AWARE AS TO WHAT WENT
3 ON IN THESE DISCUSSIONS HAD WE KNOWN THAT THERE WAS
4 GOING TO BE A DISCUSSION ABOUT INTERVIEWS OF WITNESS
5 WITH A SITTING POST-CONVICTION-RELIEF JUDGE, HAD WE
6 KNOWN THAT THE JUDGE WAS GOING TO BE PROVIDED EX
7 PARTE WITH INTERPRETATION OF MEDICAL RECORDS AND
8 MENTAL HEALTH RECORDS OR OTHER RECORDS, HAD WE KNOWN
9 THAT PRIVILEGED COMMUNICATIONS WERE GOING TO BE
10 DISCLOSED TO A JUDGE WITH AN UNDERSTANDING THAT
11 THOSE COMMUNICATIONS WOULD NEVER BE DISCLOSED TO
12 THE PROSECUTION, I CAN ASSURE YOU WE WOULD HAVE
13 TAKEN STEPS TO TRY TO MAKE AN UNDERSTANDING AT LEAST
14 WITH THE COURT THAT WE THOUGHT THAT THAT WAS NOT THE
15 APPROPRIATE MANNER FOR THESE THINGS TO BE HANDLED

16 IS IT A WINDFALL THAT THEN COMES TO
17 THE STATE, AS HAS BEEN ASSERTED? I DO NOT THINK SO,
18 BECAUSE IT'S CONSISTENT WITH THE LAW THAT THAT
19 INFORMATION BE REVEALED I DO NOT BELIEVE THAT
20 THAT IS A WINDFALL AGAIN, WE ARE NOT SITTING IN
21 THE TRIAL SITUATION WE'RE NOT SITTING WITH THE
22 STATE AND THE DEFENDANT OR PROTECTED BY CERTAIN
23 SIXTH AMENDMENT RIGHTS, WHICH DO NOT EXIST IN STATE
24 POST-CONVICTION RELIEF HE DOES NOT HAVE A SIXTH
25 AMENDMENT RIGHT TO COUNSEL HE HAS A STATUTORY RIGHT

1 TO COUNSEL, WHICH IS PROVIDED FOR UNDER BOTH
2 THE UNIFORM POST-CONVICTION RELIEF ACT AND AS
3 ADDITIONALLY PROVIDED FOR IN SECTION 17-27-160 AS IT
4 RELATES TO DEATH PENALTY SITUATIONS HE'S PROVIDED
5 EXTENDED AMOUNTS OF MONEY IN THE CAPITAL SETTING, AND
6 WE BELIEVE IT'S CONSISTENT WITH DUE PROCESS THAT THE
7 INFORMATION BE REVEALED IN A MANNER CONSISTENT, WE
8 THINK, BOTH WITH THE CANONS AND WITH AN UNDERSTANDING
9 THAT IN FACT THE HEARING BE HELD WITH A JUDGE AND
10 WITH THE PARTIES FULLY AWARE OF WHAT THE JUDGE KNOWS
11 AT THE TIME HE'S MAKING THOSE DECISIONS

12 WITH RESPECT TO THE "BABE" RAY CASE,
13 I THINK YOUR HONOR IS WELL AWARE -- OR IT'S MY
14 UNDERSTANDING THAT DISCOVERY DETERMINATIONS ARE NOT
15 APPEALABLE WE DID NOT APPEAL THAT, IN ALL CANDOR
16 WITH THE COURT ONCE THE "BABE" RAY DECISION CAME
17 OUT, WE SOUGHT TO COMPLY WITH OUR UNDERSTANDING OF
18 IT, AND WE HOPE THE OTHER SIDE AND THE COURT WAS
19 CONSISTENT WITH THEIR APPLICATION OF THAT IN THAT
20 PARTICULAR SETTING

21 UNLESS THE COURT HAS FURTHER
22 INFORMATION OR REQUESTS, I'LL REST AT THIS TIME

23 THE COURT THANK YOU, COUNSEL

24 RESPONSE, MS NORRIS

25 MS NORRIS JUST BRIEFLY, JUDGE THANK

1 YOU LET ME SAY TO START WITH -- AND I DON'T MEAN TO
2 OFFEND MR ZELENSKA PERSONALLY, BUT I'VE BEEN DOING
3 THESE THINGS FOR EIGHT YEARS, WITH MR ZELENSKA PRETTY
4 MUCH BEING THE PERSON ALWAYS ON THE OTHER SIDE OF THE
5 COURTROOM, AND TO SAY THAT THE STATE DOESN'T KNOW
6 WHAT'S GOING ON, I THINK FRANKLY IS KIND OF
7 LAUGHABLE, BECAUSE EVERY SINGLE ONE OF THE CAPITAL
8 P C R DEFENDANTS THAT I KNOW OF ARE INDIGENT, AND
9 WHEN EXPERTS SHOW UP ON THE WITNESS STAND, IT'S CLEAR
10 WHERE THE MONEY IS COMING FROM, AND IT'S NOT JUST
11 DEFENSE COUNSEL, QUOTE, "GOING BUYING " THERE ARE
12 JUDGES IN THOSE DISCUSSIONS

13 AND WHILE MR ZELENSKA TALKED ABOUT
14 THAMES BEING REASONABLE, IT MAY WELL BE, BUT THAT'S
15 AN ARGUMENT TO BE MADE TO THE LEGISLATURE HERE WE
16 HAVE A SPECIFIC CAPITAL P C R STATUTE I'M NOT
17 ADDRESSING P C R IN GENERAL BUT A SPECIFIC CAPITAL
18 P C R STATUTE THAT ALLOWS APPLICATION OF 16-3-26
19 NOW, MR ZELENSKA TALKS ABOUT TELEGRAPHING STRATEGIES
20 TO YOU, AND I'LL ALSO POINT OUT THAT 16-3-26, WHICH
21 IS THE TRIAL DEATH PENALTY STATUTE, IT IS POSSIBLE
22 FOR DEFENDANTS TO BE SENTENCED BY A JUDGE ALONE SO
23 IT'S A SIMILAR SITUATION, AND ALTHOUGH IT DOESN'T
24 HAPPEN MOST OF THE TIME, THERE HAVE BEEN AT LEAST
25 THREE, MAYBE FOUR, THAT I CAN THINK OF, CAPITAL

1 CASES, SEVERAL RECENTLY -- THERE WAS ONE A YEAR OR SO
2 AGO IN ANDERSON COUNTY WHERE THE DEFENDANT DID PLEAD
3 GUILTY, SO IT WAS A JUDGE ALONE SENTENCING AND AT
4 THE TRIAL LEVEL, THE DEFENSE COUNSEL STILL HAD TO GO
5 TO THE JUDGE

6 SO IT MAY NOT BE THE BEST SYSTEM THERE
7 IS, BUT MR HUGHEY DIDN'T CREATE IT THE LEGISLATURE
8 DID IT'S THE SYSTEM WE'VE GOT AND IN RESPECT TO
9 THAT, CLEARLY EX PARTE LEXINGTON COUNTY ADDRESSES THAT
10 THE STATE AND EVERYONE ELSE IS EXCLUDED FROM
11 DISCUSSIONS ABOUT INVESTIGATORS AND EXPERTS

12 MR ZELENKA TALKS ABOUT, YOU KNOW,
13 WE'RE TELLING YOU OUR STRATEGIES IT MAY BE, JUDGE,
14 THAT SOME LAWYERS MAY WALK INTO A CASE FROM THE
15 BEGINNING AND KNOW WHAT THEY'RE GOING TO DO A YEAR
16 OR SO DOWN THE LINE, BUT I'M NOT THAT LAWYER AND
17 MR GROSE CAN SPEAK FOR HIMSELF, BUT RIGHT NOW, UNTIL
18 I HAVE SOME EXPERTS AND SOME INVESTIGATORS AND SOME
19 INFORMATION, I DON'T KNOW WHAT I'M GOING TO DO FOR
20 MR HUGHEY OR WHAT MY STRATEGY WILL BE THAT'S THE
21 WHOLE POINT OF GETTING EXPERT AND INVESTIGATORS IT
22 MAY CHANGE AND IT MAY CHANGE BASED ON INFORMATION
23 THEY'RE NOT ENTITLED TO KNOW THEY'RE ENTITLED TO
24 KNOW WHAT EVIDENCE WE PUT ON THE WITNESS STAND

25 FINALLY, WITH RESPECT TO THE ATTORNEY-

1 CLIENT PRIVILEGE, MR ZELENSKA CITED 17-27-130 THE
2 PART HE LEFT OUT WAS THE LANGUAGE THAT SAYS THE
3 ATTORNEY-CLIENT PRIVILEGE WITH THE TRIAL ATTORNEY
4 IS WAIVED ONLY TO THE EXTENT NECESSARY TO RESPOND TO
5 INEFFECTIVE ASSISTANCE CLAIMS NOW, IT MAY BE THAT
6 IT WOULDN'T BE NECESSARY TO GET INTO A TRIAL
7 ATTORNEY'S PRIVILEGE, BUT IT CERTAINLY WOULD BE
8 NECESSARY TO GET INTO OUR PRIVILEGE AND EVEN
9 EVENTUALLY STATEMENTS FROM MR HUGHEY THAT CONCERN
10 INVESTIGATION OR EXPERTS THAT WE MAY NEED AND
11 AGAIN, IT'S NOT THE BEST SYSTEM, BUT WE SUBMIT IT
12 VIOLATES EQUAL PROTECTION, AND TO SAY THAT WE HAVE
13 TO AND MR HUGHEY HAS TO DISCUSS OUR EXPERTS AND
14 INVESTIGATORS IN FRONT OF THE STATE, YOU KNOW, I WANT
15 TO KNOW IF THE ATTORNEY GENERAL'S GOING TO COME LET
16 ME IN ON IF HE TALK ABOUT GETTING AN INVESTIGATOR AND
17 EXPERT IT JUST SIMPLY IS UNFAIR, AND AT THE BOTTOM,
18 DUE PROCESS, EQUAL PROTECTION, FUNDAMENTAL
19 UNFAIRNESS AND I THINK THAT'S PRETTY MUCH OUR CASE
20 ON THAT

21 THE COURT: THANK YOU, MS NORRIS
22 SENTENCING IN A CAPITAL CASE HAS
23 OCCURRED BY THE COURT ALONE, BUT ONLY WHEN THE
24 DEFENDANT WAIVED A SENTENCING PROCEEDING BEFORE A
25 JURY

1 MS NORRIS IF THE DEFENDANT PLEADS
2 GUILTY, IT'S AUTOMATICALLY JUDGE ALONE THE
3 DEFENDANT DOESN'T HAVE A CHOICE AT THAT POINT

4 THE COURT THAT IS HIS CHOICE

5 MS NORRIS TO PLEAD GUILTY, YES, SIR

6 THE COURT AND SO THAT'S A WAIVER BY THE
7 DEFENDANT OF A SENTENCING PROCEEDING BY A JURY NOW,
8 IF THIS WERE NOT A BENCH TRIAL, WE WOULDN'T HAVE THE
9 PROBLEM THAT WE HAVE HERE, BECAUSE ANYTHING THAT WERE
10 INVOLVED IN A DISPUTE, A MOTION TO SUPPRESS THAT
11 INFORMATION, ALLEGING IT WOULD BE PRIVILEGED, WHETHER
12 A WORK PRODUCT OR UNDULY PREJUDICIAL OR ON ANY OTHER
13 BASIS, WOULD LIE, AND THE COURT WOULD NOT KNOW
14 ANYTHING ABOUT IT UNTIL SUCH MOTION WERE MADE BUT
15 HERE WE DON'T HAVE THAT WE ESSENTIALLY HAVE A
16 FUNDAMENTAL ETHICAL CONSIDERATION, AND THE ARGUMENT
17 BY THE STATE IS WELL TAKEN AND THOUGHT TO BE
18 CONTROLLING IN THIS MATTER WE'RE STILL NOT AT THE
19 POINT OF WHAT YOU'RE GOING TO ASK FOR BUT THE COURT
20 IS CONCERNED THAT THE JUDGE, AS AN UNBIASED FACT
21 FINDER, COULD IN THIS CASE AND IN ANY CASE PROBABLY
22 WOULD BE COMPROMISED BY PRIOR KNOWLEDGE OF THE
23 DEFENDANT'S EFFORTS, WISHES, AND WANTS AND THAT
24 COULD BE ATTACKED BY SOME OTHER PROCEEDING SO THE
25 MOTION TO HAVE THESE EX PARTE AUTHORIZATIONS FOR

1 EXPERT INVESTIGATORY AND OTHER SERVICES IS DENIED

2 BUT NOW WE MOVE TO THE NEXT PRONG, AND
3 THAT IS, WHAT ARE WE ASKING FOR? ARE WE READY TO
4 TALK ABOUT THAT, OR DO YOU WANT TO DISCUSS THAT IN
5 VIEW OF THE STRATEGIC STEPS THAT MAY BE IN ORDER
6 HERE?

7 MS NORRIS FRANKLY, JUDGE, I THINK
8 PROBABLY WHAT WE'LL DO -- AND MR GROSE AND I NEED TO
9 DISCUSS IT AND LOOK AT IT -- I THINK PROBABLY WHAT
10 WE'LL DO IS TO TAKE A WRIT TO THE SUPREME COURT,
11 BECAUSE THIS IS A ONE OF A KIND YOU ARE THE FIRST
12 JUDGE TO SAY THIS HAS TO BE OUT IN THE OPEN

13 THE COURT THIS JUDGE DOES NOT TAKE ISSUE
14 WITH YOU ON THAT

15 MS NORRIS THAT'S ALL IT IS THIS
16 IS A ONE OF A KIND, AND BEFORE I START LAYING OUT
17 MR HUGHEY'S TRIAL STRATEGIES IN FRONT OF MR ZELENKA
18 AND THE MEDIA AND EVERYBODY ELSE, I WANT THE STATE
19 SUPREME COURT TO ADDRESS IT

20 THE COURT IT MAYBE ONE OF A KIND, BUT
21 IT'S ONLY THE FIRST OF ITS KIND

22 MS NORRIS YES, SIR

23 THE COURT IT'S CERTAINLY NOT THE LAST OF
24 ITS KIND

25 MS NORRIS ABSOLUTELY, JUDGE I AGREE

1 WITH YOU

2 THE COURT IF THERE EVER WERE A TIME TO
3 HAVE A QUESTION ANSWERED, THIS IS JUST AS GOOD A TIME
4 AS ANY TO HAVE THIS QUESTION ANSWERED, AND IT IS AT
5 BOTTOM AN ETHICAL QUESTION AS TO WHETHER PRIOR
6 KNOWLEDGE WOULD BE SO POLLUTING OF THE FACT FINDER'S
7 MISSION AS TO DESTROY THE CIVIL ACTION

8 THE COURT WOULD MAKE THIS OBSERVATION
9 FOR THE RECORD IN PASSING, THAT IT'S FUNDAMENTAL THAT
10 THIS IS A CIVIL ACTION AND THE MATTER IS NOT BEFORE
11 THE COURT WITH THE CONSTITUTIONAL GUARANTEES OF A
12 CRIMINAL TRIAL

13 MS NORRIS JUDGE, IF I COULD JUST MAKE
14 ONE OTHER POINT THE CONCERNS ABOUT YOU AS A FACT
15 FINDER HAVING PRIOR KNOWLEDGE, YOU'RE GOING TO HAVE
16 THE SAME KNOWLEDGE WHETHER MR ZELENSKA'S THERE OR
17 NOT WE HAVE NO CHOICE MR HUGHEY HAS NO MECHANISM
18 TO GET MONEY FOR HIS DEFENSE WITHOUT COMING TO YOU
19 SO YOU'RE STILL GOING TO HEAR THE SAME THING FROM ME
20 REGARDLESS OF WHETHER MR ZELENSKA'S THERE OR NOT

21 THE COURT WELL TAKEN, BUT THE RESPONDENT
22 WOULD HAVE AN OPPORTUNITY TO REMARK AS TO WHETHER
23 THOSE PUBLIC FUNDS ARE NECESSARY IN VIEW OF WHAT
24 MAY ALREADY EXIST SO FAR AS INFORMATION AVAILABLE TO
25 MR HUGHEY NOW, IT'S NOT RECOLLECTED EXACTLY HOW

1 MR ZELENSKA STATED THIS AND/OR ALLUDED TO IT, BUT
2 IT WAS CERTAINLY ALLUDED TO THAT THERE MAY BE
3 INFORMATION ALREADY AVAILABLE TO MR HUGHEY THAT
4 WE DON'T HAVE TO DOUBLE SPEND MONEY FOR, SO TO SPEAK

5 DID I MISUNDERSTAND YOU, COUNSEL?

6 MR ZELENSKA THAT IS A POTENTIAL SITUATION
7 THAT COULD HAPPEN

8 THE COURT SIR?

9 MR ZELENSKA THAT'S A POTENTIAL SITUATION
10 THAT COULD HAPPEN DEPENDING ON WHAT THEY'RE ASKING
11 FOR, THERE MAY ALREADY BE INFORMATION OUT THERE THAT
12 COULD BE PROVIDED TO THEM SOME SOCIAL HISTORY
13 INFORMATION OR OTHERWISE

14 THE COURT WELL, IF YOU DID NOT EXACTLY
15 SAY IT THAT WAY, THE COURT INFERRED THAT WAS PART OF
16 YOUR ARGUMENT

17 ANYTHING FURTHER FOR THE RECORD AT
18 THIS JUNCTURE?

19 MS NORRIS NO, YOUR HONOR

20 THE COURT THANK YOU BOTH FOR EXCELLENT
21 PRESENTATION THE MATTER IS CONCLUDED

22 (PROCEEDINGS CONCLUDED AT 3 35 P M)

23 - - -END OF TRANSCRIPT OF RECORD- - -

24

25

CERTIFICATE

I, THE UNDERSIGNED MARGARET F BRIGGS,
OFFICIAL COURT REPORTER FOR THE STATE OF SOUTH
CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD
OF ALL THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED
IN THE CAPTIONED CASE IN THE COURT OF COMMON PLEAS
FOR ABBEVILLE COUNTY, SOUTH CAROLINA, ON THE 29TH
DAY OF APRIL, 2002

I DO FURTHER CERTIFY THAT I AM NEITHER OF
KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO

MAY 8, 2002

Margaret F Briggs
MARGARET F BRIGGS

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

John Kennedy HUGHEY, #5055)

C/A No 00-CP-01 - 212

Applicant,)

ORDER DENYING REQUESTS TO CONDUCT
ALL PROCEEDINGS WITH RESPECT TO
APPLICANT'S REQUESTS FOR EXPERT,
INVESTIGATIVE OR OTHER SERVICES EX
PARTE

vs)

GARY MAYNARD,)
Director, South Carolina)
Department of Corrections,)
and State of South Carolina)

Respondent)

This matter comes before this Court by a "Motion to Conduct All Proceedings With Respect to Applicant's Requests for Authorization for Expert, Investigative, and Other Services *Ex Parte* as required by S C § Code 17-27-160 and S C Code § 16-3-26 " The Respondents made a letter response on April 11, 2002 On April 29, 2002, this Court convened a hearing in Greenwood County on this matter The Applicant was present and represented by his counsel, Teresa L Norris and E Charles Grose The Respondents were represented by Donald J Zelenka of the Attorney General's Office Argument was heard by counsel for both parties At the hearing This Court orally denied the Applicant's motion This written Order follows

An *ex parte* request was made by appointed counsel for Mr Hughey Upon the request, the Court advised counsel of its intent to approve the request, but advised counsel that it would give notice of the order to the Respondents Applicant's counsel objected and the matter was

2199

held in abeyance pending a motion by Applicant's counsel

On March 15, 2002, counsel for Mr. Hughey made a motion asserting that in a state post-conviction relief action, he was entitled to submit all funding requests to the Circuit Court ex parte without notice to the Respondents' counsel. He contends that (1) § 17-27-160 provides for ex parte consideration for funding, (2) Thames v. State, 325 S.C. 9, 478 S.E.2d 682 (1996), does not support a finding otherwise, (3) that refusal to allow an ex parte showing would require disclosure of work product and violate the attorney-client privilege, and (4) requiring opposing counsel to be notified violates Due Process and Equal Protection of both the United States and South Carolina Constitution. The Respondents' counsel responded by letter on April 11, 2002. Argument was heard by both counsel.

This Court finds that the motion to have *ex parte* authorization for expert witness and other services must be denied. This Court notes that this is a civil, not criminal proceeding. As such, the civil rules of discovery and ethics are the relevant guide to how these proceedings must be handled. The opposing party has a right, under these standards, to have notice and opportunity to be heard about the use of public funds, as well as notice what this Court, as a fact-finder, is being made aware of from one party.

This Court agrees with Respondents' position that these matters are governed by the SCACR Rule 501, Code of Judicial Conduct and particularly Canon 3 (7)(A) involving the propriety of *ex parte* communications "that do not deal with substantive matters or issues on the merits." Similarly, SCACR, Rule 407, Rule 3.5 controls lawyers *ex parte* communications with a court.

The Applicant's counsel has asserted an entitlement to such proceedings concerning

P
299
4

compensation for *experts* that §17-3-50 applies in this matter and authorizes *ex parte* proceedings. In Thames v State, 325 S C 9, 478 S E 2d 682 (1996) the Supreme Court found expressly that such *ex parte* funding proceedings are not authorized in normal post-conviction relief cases and noted that §17-3-50 and §16-3-26(C), and the mandates of Ex parte Lexington County, 314 S C 220, 442 S E 2d 589 (1994) are inapplicable in post-conviction relief proceedings. Particularly, it held in these matters that it was proper to contest matters related to requests for expert witnesses funding at a hearing “which counsel for the State was allowed to fully participate”¹

The importance of both parties knowledge and participation in such matters is desirous, particularly in capital post-conviction relief matters where the assigned judge is not only the administrative judge over the case, but this Court will be the finder of fact and law in the matter. It is important, therefore, that each side is aware of whatever factual basis is being presented to the judge in the particular matter. In their Memorandum, and before the Court in argument, the Applicant’s implicitly conceded the same and suggested that matters related to the merits of the case will likely be revealed where he stated that the ex parte communications with the Court to request services “may have to reveal the product of interviews with potential witnesses, provide interpretation of records that he may have gathered, and disclose “privileged conversations with trial counsel”² Motion p 4. In support of his motion, Hughey also contends that matters

¹ Respondents further contended that they do not seek any entitlement to participate in proceedings for the compensation of individual counsel unless the proceedings reveal “matters related to substantive issues or issues on the merits,” which occur prior to a decision on the merits of the case by the same judge.

² Respondents noted that under Section 17-27-130, there is a waiver of attorney-client privilege by allegation of ineffective assistance of counsel to the extent necessary to respond to

P
399
h

brought up in these *ex parte* proceedings would “telegraph to the prosecution the defendant’s defense strategy” This is precisely the Court’s concern about *ex parte* proceedings because it would also telegraph to the fact-finder the Applicant’s post-conviction strategy in an *ex parte* setting This may well be in violation of the spirit of the ethical rules cited above

The Applicant’s counsel seems to equate these civil post-conviction relief proceedings with a General Sessions trial This Court finds that to be unavailing here, as it was in Thames The Applicant’s citation to such cases in the memorandum is simply not applicable to this current setting where South Carolina civil rules allow for the full discovery Such matters could be done *ex parte* under the rules and precedent in a criminal trial setting But those criminal matters do not extend to these independent civil proceedings where the Court is the fact-finder It seems almost fundamental that a party in civil litigation cannot “telegraph its trial strategy”, “reveal its interviews with potential witnesses, and provide interpretation of records” or disclose “privileged conversations” to the Judge in an *ex parte* setting outside of the presence of the opposing party when the judge will necessarily act as the finder of fact Thames, supra plainly stands for the reasonable recognition that post-conviction relief proceedings are not that same as the trial The assertion in the Thames opinion may well be *dicta* but it is unquestionably a guide to the bench and bar as to how these matters should be handled

Contrary to the Applicant’s assertion, the Court must find that Respondents will not reap

the allegation The present allegations before this Court include counsel’s failure to properly investigate and present available mitigating evidence and the failure to properly present and prepare witness testimony The Respondents are currently able to delve into privileged communications between trial counsel and the Applicant on these matters as well as other matters related to ineffective assistance pursuant to state law

P
289

a "windfall of 'confidential' communications and 'attorney work-product'" if they participate in these proceedings since the Court opines that it is inappropriate for confidential communication or "attorney work product related to the case" to be disclosed to the trial judge in an *ex parte* fashion under the ethical rules

The judicial problem the Applicant fails to recognize in his motion is the concern with the Court receiving information that could bias the fact-finder without the Respondents being aware of the nature of the communications. As Thames noted

When a defendant requests expert services for a criminal trial, the request is determined by the judge in *ex parte* proceedings § S C Code Ann. 16-3-26(C) and § 17-3-50(B) (Supp 1995), Ex parte Lexington County, 314 S C 220, 442 S E 2d 589 (1994). These statutory provisions are, however, inapplicable to post-conviction relief proceedings

Section 16-3-26(C), which is limited to capital cases, applies to "the representation of the defendant whether in connection with issues relating to guilt or sentence." Therefore, this provision applies only to the capital trial itself and not to post-conviction relief proceedings. While § 17-3-50(A) mentions that the same hourly rates for appointed counsel shall apply to post-conviction proceedings, the use of the word "defendant" throughout § 17-3-50(B) indicates that it applies only to the criminal trial itself and not to post-conviction relief actions. Accordingly, the post-conviction relief judge in this case properly conducted a hearing on the motion at which counsel for the State was allowed to fully participate

(Emphasis added)

Recognizing it to potentially fall into this ethical area, whether Respondents' counsel were of the opinion that such *ex parte* proceedings were appropriate or not would not bind the Court (or protect the parties) if in fact it was later determined to be a violation of the Rules of Ethics. This Court finds, however, that the Thames decision is well reasoned and applicable to all state post-conviction relief settings, capital or non-capital, unless and until revised by rule or decision. Contrary to the assertions of the Applicant's counsel, this Court does not believe that the

P529

incorporation of the enhanced level of funding in capital post-conviction relief cases set forth in §17-27-160 necessary allowed the appointed civil PCR counsel to communicate *ex parte* with the hearing judge prior to a decision on the merits of the action with the defense strategy or “confidential communications” or “work product on the merits of a case” without the other side being present. Respondents are not seeking to learn any of these matters inappropriately, ^{but - NS -} we are merely requesting to know what the fact-finder knows when he makes his decision on the merits and when the proceedings are held.

In conclusion, this Court finds that § 17-27-160 does not provide for *ex parte* communication with the hearing judge where allegedly privileged communications and “work-product” is revealed to the hearing judge without notice to opposing counsel. § 17-27-160 established the level of funding and qualifications for counsel in capital cases. It did not create an ability to communicate with the hearing judge in a manner not set out in § 17-27-160. The provision merely stated “counsel appointed in these cases shall be compensated from the funding provided in § 16-3-26 in the same manner and rate as appointed trial counsel.” Although § 16-3-26 provides for pre-trial “ex parte proceedings to determine that investigative, expert, or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentence”, § 17-27-160 does not mandate ex parte proceedings, it mandates the manner and rate of compensation and provisions for payment to appointed PCR counsel. His assertion to the contrary is without merit.

Second, he contends that Thames is not controlling. Thames was a non-capital case that interpreted § 17-3-50(B) which allowed *ex parte* proceedings in a criminal trial setting to be inapplicable in a civil PCR action brought pursuant to § 17-27-10, et seq. The Applicant is

P
699
L

correct that Thames is not controlling. However, it is persuasive that the fact that § 17-27-60 does not mandate *ex parte* proceedings would not allow for it in capital cases.

The Applicant's contention that the right to participate of the Respondents in an investigative or expert service funding request would violate "work-product and the attorney-client privilege", because it must make a showing that the services are "reasonably necessary" under § 16-3-26(C). Assuming the "reasonably necessary" standard applies, there is no provision that allows, as stated above, the fact-finder to receive "*ex parte*" "the product of interviews with potential witnesses, provided interpretation of records that he may have gathered, and disclose privileged conversations with trial counsel." Motion, p. 4. Contrary to the criminal setting, the hearing judge is the fact-finder and must base his showing upon the evidence presented at the hearing. The rules governing limited *ex parte* proceedings attempt to prevent the telegraphing of one side's version of the case where the judge may inadvertently develop a bias. This same concern does not present itself in the criminal trial setting where the jury, not the judge, is the fact-finder. This difference is significant.

Second, in the capital PCR setting, there is no difference than in a non-capital post-conviction relief proceeding on the requirements to obtain funding, it is only that the funding pool is more limited. His concern about revealing either "work-product" or "attorney-client" privileged material is premature. First, there is no requirement that compels the disclosure of either "work product" or "attorney-client" privileged communications for purposes of obtaining expert funding. Such concerns are purely speculative at this stage. Further, this Court, alternatively questions whether the disclosure of these alleged materials to the court in this civil setting for the purpose of obtaining additional funding or the selection of new expert may waive

B3
h3

his claim of “work product” or attorney-client privilege” due to the disclosure when made to the court, as a fact-finder. First, the names of any court-appointed expert may be subject to disclosure under SCRCP, Rule 33(b)(1), (6), (7) and SCRCP Rule 26(b)(1), (3), (4)(A). The Applicant’s speculation otherwise does not mandate these proceedings be completely done *ex parte* at this time.

The Applicant relies upon an Order by Circuit Court Judge John W. Kittredge in John Babe Ray v. Michael Moore, in the Court of Common Pleas in Spartanburg County that revised its earlier order that has disallowed *ex parte* funding requests. In that Order, the Court established a procedure consistent with State v. Row, 955 P.2d 1082 (Idaho 1998). This Court respectfully does not find the Order persuasive.

The Applicant relies upon State of Idaho v. Row, 955 P.2d 1082 (Idaho 1998). In Row, however, the Court held that the defendant was not prejudiced by the court’s refusal to implement *ex parte* proceedings for the approval of expert assistance where the applicant was allowed to submit the motion under seal which did not tip her hand to the state and the state was ignorant of the details of the request. However, the request was denied. Row does not stand for the proposition that *ex parte* proceedings are not allowed. Similarly, Wade v. State, 348 S.C. 255, 559 S.E.2d 843 (2002) does not provide support for the Applicant’s position. It merely applied a “plain meaning” interpretation to a statute to give effect to the legislative intent. The reliance upon Wade does not suggest the propriety of any *ex parte* proceedings. Similarly, courts are split on the priority of *ex parte* proceedings for experts in post-conviction cases. Owens v. State, 908 S.W.2d 923 (Tenn. 1995) (ex parte proceedings required), but see Davis v. State, 912 S.W.2d 689 (Tenn. Crim. App. 1995) (state not required to provide experts to indigent non-capital post-

P
8
2
9
5

conviction petitioners), Haight v. Commonwealth, 41 S W 3d 436, 445 (Ky 2001)(court properly denied request for ex parte funding hearing), Sanborn v. Commonwealth, 957 S W 2d 905, 909 (Ky 1998)(no support to have *ex parte* funding in post-conviction case, Ake v. Oklahoma, 470 U S 68 (1985) distinguished), Coe v. State, 17 S W 3d 193 (Tenn 2000)(no right in competency to be executed proceedings to seek *ex parte* funding or hearing)

This Court further rejects the claim that the Applicant's right to due process and equal protection is violated by not allowing *ex parte* proceedings. The Applicant relies upon Ake v. Oklahoma, *supra*. He claims that allowing the state access to "privileged" information only because of his indigency status when he seeks funding whereas it could not if the Applicant was not indigent is unconstitutional. This Court finds that the issue is not that the state would have access to "privileged" information only because of indigency. In this setting, as stated above, the state would have access to the information through use of discovery generally about expert witnesses. His reliance upon the pre-trial issue of Ake and Bailey v. State, 309 S C 455, 424 S E 2d 503 (1992) are simply not applicable to this post-conviction setting.

Therefore, this Court denies the request to conduct "all proceedings with respect to applicant's request for authorization for expert, investigative, and other services *ex parte*."

AND IT IS SO ORDERED this 26th day of July, 2002


 WYATT T SAUNDERS
 Presiding Judge

at Greenwood, South Carolina

PS
 8/9
 23

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF ABBEVILLE)

John Kennedy Hughey, #5055,) 00-CP-01-21
)
 Applicant,)
)
 v) CERTIFICATE OF SERVICE
)
 State of South Carolina,)
)
 Respondent)
 _____)

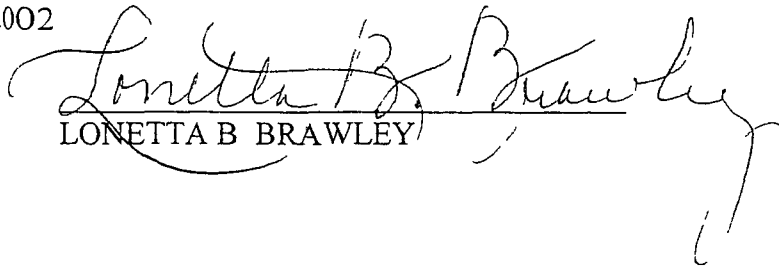
I, Lonetta B Brawley, do hereby certify

- 1 That I am an employee of the Office of the Attorney General
- 2 That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail
- 3 That I have this day served a copy of the Order in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid

Teresa L Norris, Esquire
 Center for Capital Litigation
 Post Office Box 11311
 Columbia, South Carolina 29211

E Charles Grose, Esquire
 Office of the Public Defender
 600 Monument Street, Box P-133
 Suite 208, Park Plaza
 Greenwood, South Carolina 29646

DATED this 1st day of August, 2002


 LONETTA B BRAWLEY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ABBEVILLE)

IN THE COURT OF COMMON PLEAS

John Kennedy HUGHEY, #5055)

C/A No 00-CP-01 - 212

Applicant,)

ORDER GRANTING MOTION TO
 RECONSIDER ORDER DENYING REQUESTS
 TO CONDUCT ALL PROCEEDINGS
 WITH RESPECT TO
 APPLICANT' S REQUESTS FOR EXPERT,
 INVESTIGATIVE OR OTHER SERVICES EX
 PARTE

vs)

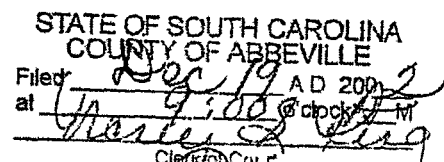
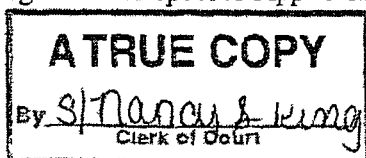
GARY MAYNARD,
 Director, South Carolina
 Department of Corrections,
 and State of South Carolina)

Respondent)

This matter comes before this Court by a "Motion to Reconsider Denial of Ex Parte Proceedings In Order To Seek Expert, Investigative, and other services and motion to assign another trial court to hear those matters" dated August 12, 2002 The motion has been supplemented by numerous affidavits This Court held a conference telephone call on December 17, 2002 with counsel Charles Grose, Teresa Norris and Assistant Deputy Attorney General Donald J Zelenka At the conclusion of the telephone call, this Court entered an oral order granting reconsideration of its earlier order This Order follows

I

This Court entered an Order dated July 26, 2002, denying an earlier Motion to Conduct All Proceedings With Respect to Applicant's Requests for Authorization for Expert,



Investigative, and Other Services *Ex Parte* as required by S C § Code 17-27-160 and S C Code § 16-3-26," dated March 15, 2002. An *ex parte* request had been made by appointed counsel for Mr. Hughey prior to March 15, 2002. Upon the request, the Court advised counsel of its intent to approve the request, but advised counsel that it would give notice of the order to the Respondents. Applicant's counsel objected and the matter was held in abeyance pending a motion by Applicant's counsel.

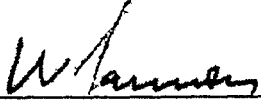
On March 15, 2002, counsel for Mr. Hughey made a motion asserting that in a state post-conviction relief action, he was entitled to submit all funding requests to the Circuit Court ex parte without notice to the Respondents' counsel. The Respondents' counsel responded by letter on April 11, 2002. On April 29, 2002, this Court convened a hearing in Greenwood County on this matter. The Applicant was present and represented by his counsel, Teresa L. Norris and E. Charles Grose. The Respondents were represented by Donald J. Zelenka of the Attorney General's Office. Argument was heard by counsel for both parties. On July 26, 2002, this Court entered a written order denying the motion.

II

The Applicant, through counsel made a motion to reconsider. In the telephone conference call on December 17, 2002, this Court advised counsel that it had decided to reconsider its earlier order. This Court requests counsel for the Applicant to seek to submit requests for funding in a generic manner that would not disclose substantive issues or specific factual matters, such as the product of interviews with potential witnesses, interpretation of records and other privileged matters which should not be disclosed to a fact-finder in an *ex parte* setting. If counsel is unable to make the generic request for funding in a manner to show its reasonableness, this Court may

request a modification by the Supreme Court of its exclusive assignment in this matter to allow for another judge to address these particular funding issues

AND IT IS SO ORDERED this 18th day of December, 2002



WYATT T SAUNDERS
Presiding Judge

at Greenwood, South Carolina

7
393
L

- (b) The result in each court to which Applicant appealed
 - (i) Convictions and sentences affirmed
 - (ii) Petition for Writ of Certiorari denied
- (c) The date of each result
 - (i) Convictions and sentences affirmed on March 27, 2000 Rehearing was denied on May 11, 2000
 - (ii) Petition for Writ of Certiorari denied on October 16, 2000
- (d) Citations of any written opinion or orders entered pursuant to such results
 - (i) *State v Hughey* 339 S C 439, 529 S E 2d 721 (2000)
 - (ii) *Hughey v South Carolina*, 531 U S 946 (2000)

9 Not applicable

10 & 11 **GROUND FOR RELIEF WITH SUPPORTING FACTS**

10(a) *Applicant was denied the effective assistance of counsel during both the trial and sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution*

11(a) During both the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel in numerous ways, including, but not limited to, the following

(i) Despite substantial irrefutable evidence to support convictions for murder, counsel advised the applicant and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument, based, in part, on counsels' misunderstanding of the law, that Applicant was guilty only of voluntary manslaughter, which was contradicted even by the Applicant's and the defense expert's testimony

(11) Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Applicant's adaptability to confinement and evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

(111) Counsel failed to adequately object to the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*" This instruction is contrary to state law, which never requires a sentence of death, S C Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy See *State v Johnson* 338 S C 114, 525 S E 2d 519 (2000), *State v Torrence*, 305 S C 45, 406 S E 2d 315 (1991) This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or that otherwise weighs in favor of a sentence to life imprisonment rather than the death penalty

Counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in sentencing *Strickland v Washington*, 466 U S 668 (1984), *Wiggins v Smith*, 539 U S 510 (2003), *Florida v Nixon*, 543 U S 175 (2004)

10(b) *Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution*

11(b) Appellate counsel failed to properly brief the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*" This instruction is contrary to state law, which never requires a sentence of

death, S C Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See *State v Johnson* 338 S C 114, 525 S E 2d 519 (2000), *State v Torrence*, 305 S C 45, 406 S E 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or that otherwise weighs in favor of a sentence to life imprisonment rather than the death penalty. Counsel's conduct was both unreasonable and prejudicial in sentencing. *Strickland v Washington*, 466 U S 668 (1984), *Smith v Robbins*, 528 U S 259 (2000).

12 & 13 Applicant filed the original application for post-conviction relief on October 25, 2000 in the Court of Common Pleas for Abbeville County. This application is an amendment of the original application, which is still pending. Applicant has not otherwise previously filed a petition for a writ of habeas corpus or post-conviction relief in state or federal court from these convictions and sentences. Other than the petitions, motions, or applications addressed here and already specified in paragraph 8, Applicant has not filed any other actions related to his convictions and sentences.

14 & 15 None of the grounds set forth in paragraphs 10 & 11 have been previously presented to this or any other court, state or federal, except in the original application filed in 2000, which is still pending and is hereby amended. While the South Carolina Supreme Court addressed the "no mercy" instruction in dicta, *Hughey* 339 S C at 460, 529 S E 2d at 732, the specific state law and constitutional grounds asserted herein were not previously claimed by trial or appellate counsel.

16 The grounds set forth in paragraphs 10 & 11 have not previously been presented to any court, state or federal, because these grounds rely on additional facts outside the record which was before the previous courts and, under state law, Applicant could not assert the claims of ineffective

assistance of counsel on direct appeal *See State v Kornahens* 290 S C 281, 287 350 S E 2d 180, 184 (1986)

17 & 18 Applicant was represented during his trial and sentencing by Robert J Tinsley, 311 Lodge Drive, Greenwood, SC 29646 and Billy J Garrett, Jr, The Garrett Law Firm, PC, 109 Oak Ave, Greenwood, SC, 29646 During the direct appeal and petition for writ of certiorari, Applicant was represented by Robert M Dudek, S C Commission on Indigent Defense, 1330 Lady Street, Suite 401, Columbia, S C 29201

19 Applicant seeks the vacation of his convictions and/or sentences

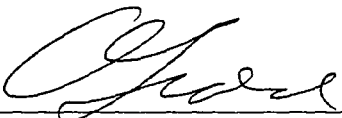
20 Applicant is not under sentence from any other court

Respectfully submitted,

E CHARLES GROSE
TARA M SCHULTZ
Office of the Public Defender
600 Monument St, Box P-133
Greenwood, SC 29646
(864) 229-9505

TERESA L NORRIS
Blume Weyble & Norris, LLC
P O Box 11744
Columbia, SC 29211
(803) 765-1044

By


COUNSEL FOR APPLICANT

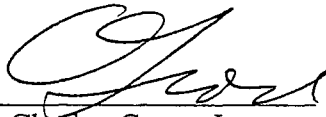
December 15, 2006

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	FOR THE EIGHTH JUDICIAL CIRCUIT
John Kennedy Hughey, #5055,	)	
Applicant	)	Case No 00-CP-01-0212
v	)	
	)	
	)	Certificate of Service
Gary Maynard, Commissioner,	)	
South Carolina Department of	)	
Corrections and State of South	)	
Carolina,	)	
Respondent	)	

I certify that I served by United States mail, postage prepaid, a copy of the affidavit of the amended application for post-conviction relief by mailing a copy addressed as follows

Donald J Zelenka, Esquire
 SC Attorney General's Office
 P O Box 11549
 Columbia, South Carolina 29211

Respectfully Submitted,


 E Charles Grose, Jr
 Suite 208, Park Plaza
 600 Monument Street, Box P-133
 Greenwood, South Carolina 29646
 (864) 229-9505

December 15, 2006
 Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ABBEVILLE	)	
 John Kennedy HUGHEY, #5055	)	C/A No 00-CP-01 - 212
	)	
	)	
	)	
Applicant,	)	
	)	RETURN TO AMENDED APPLICATION FOR
vs	)	POST-CONVICTION RELIEF
	)	
State of South Carolina	)	
	)	
Respondent	)	
_____	)	


 The Respondents, above -named, hereby make a Return to the amended application for post-conviction relief dated December 15, 2007. The initial application was filed on October 25, 2000. The Respondents initial Return was filed on January 19, 2001. This Return to the Amended Application follows.

I Prior Proceedings

The Petitioner, John Kennedy Hughey, was indicted on March 11, 1996 by the Grand Jury of the Court of General Sessions for Abbeville County for (1) murder (involving the December 4, 1995 death of Tesheka Lanyra Jackson), (2) murder (involving the December 4, 1995 death of Luevinia H Harris), (3) burglary in the first degree and (4) grand larceny of a vehicle.

The prosecution served notice of intent to seek the death penalty. On October 13, 1997, the matter was called for a trial before the Honorable J Derham Cole. The Petitioner was present and represented by court-appointed counsel, Billy J Garrett, Edward McCallum, and

Robert Tinsley The prosecution was represented by W Townes Jones, IV, Solicitor of the Eighth Judicial Circuit and Deputy Solicitor Michael Coulter At the outset Hughey was ordered submitted to the William S Hall Institute on October 13, 1997 for a psychiatric evaluation ROA pp 206-209, p __ (Written Order for Evaluation) The evaluations was then completed prior to the trial

On October 17, 1998, the proceedings re-started ROA p 209 The trial began after jury selection on October 22, 1997 The Petitioner testified on his own behalf On October 27, 1997 the jury returned with guilty verdicts on all four (4) counts ROA p 3495, ll 9-17

On October 28, 1997 at 11 00 a m the sentencing proceedings began ROA p 3508, ll 1-2 After the presentation of evidence, the trial judge charged the following statutory aggravating and mitigating circumstances

On Count One, the statutory aggravating circumstances to consider were

- 1 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of burglary in the first degree
- 2 That the murder of Tesheka L Jackson was committed while in the commission of the crime or act of larceny with the use of a deadly weapon
- 3 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

On Count Two, the statutory aggravating circumstances to consider were

- 1 That the murder of Luevinia H Harris was committed while in the commission of the crime or act of burglary in the first degree
- 2 Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct

The statutory mitigating circumstances instructed on each count were as follows

- 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 age or mentality of the defendant at the time of the crime

You may also consider any NON-STATUTORY mitigating circumstance(s)

As to each count, the jury found beyond a reasonable doubt the existence of all the statutory aggravating circumstances ROA p 4073 The jury returned a recommendation of death for each count ROA p 4073 On October 30, 1997 Judge Cole sentenced John Kennedy Hughey to death on each count of murder He was sentenced to a life sentence on Count III of burglary in the first degree and ten (10) years on Count IV for grand larceny

On November 7, 1997, counsel filed the notice of appeal which was served on the Eighth Circuit Solicitor's Office on November 10, 1997 In his appeal to the South Carolina Supreme Court he was represented by his current counsel, Robert M Dudek of the South Carolina Office of Appellate Defense In the direct appeal, he briefed the following questions presented

1

Whether the judge erred by refusing to disqualify juror #55, Brian Daly, since he was employed at McCormick Correctional Institution, and S C Code § 24-3-930 provides that all guards and officers employed at a penitentiary shall be excepted from service on a jury, and also because Daly was the functional equivalent of a law enforcement officer?

2

Whether the judge erred by refusing to instruct the jury on examples of acts of legal provocation, since the jury was left without any guidance on what might constitute a legal provocation, and the judge had a duty to fashion an appropriate charge to the facts and circumstances of this case?

3

3

Whether the judge erred by allowing Mack Harris, the husband of the decedent Harris, to testify during the guilt phase about the blood he cleaned off the floor of his home after the shooting, since this testimony was not relevant, and was highly prejudicial?

4

Whether the judge erred by refusing to charge the statutory mitigating circumstance contained in S C Code § 16-3-20(C)(b)(6), which allows the jury to consider the capacity of the defendant to appreciate the criminality of his conduct or to consider that his ability to conform his conduct to the requirements of the law was substantially impaired, since there was evidence supporting that mitigating circumstance?

5

Whether the judge erred by allowing the victim impact witnesses to testify in narrative form, rather than proper question-answer format, since it resulted in the victim's family personally chastising appellant from the witness stand, and this was far beyond the permissible scope of *Payne v Tennessee*?

6

Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

7

Whether the judge erred by admitting State's Exhibit #95 since this photograph of the victim's face showed brain matter coming from beneath her eyes, was unduly prejudicial, was calculated to inflame the passions of the jury, and denied appellant a fair sentencing hearing?

The South Carolina Supreme Court denied the appeal on March 27, 2000 *State v Hughey*, 339

S C 439, 529 S E 2d 721 (2000) A timely petition for rehearing was filed on April 11, 2000

Rehearing was denied on May 11, 2000

Certiorari was taken to the United States Supreme Court On certiorari, the following question was raised

Did an unambiguous jury instruction that mercy was not an appropriate reason to sentence petitioner to life imprisonment violate the Eighth Amendment and Fourteenth Amendments since it precluded jury consideration of petitioner's severely disadvantaged background as mitigating character evidence, as well as the domestic nature of the homicide as a circumstance of the crime?

On October 16, 2000, the Court entered an order denying certiorari *Hughey v South Carolina*, __ U S __, 121 S Ct 345 (U S S C October 16, 2000) (NO 00-5635)

On October 19, 2000, Hughey, through appointed appellate counsel, Robert M Dudek of the South Carolina Office of Appellate Defense, filed a petition for a stay of execution asserting a desire to pursue state post-conviction relief proceedings contending that his appointed trial counsel did not adequately represent him at trial. The stay request was granted November 2, 2000 and counsel was appointed on November 13, 2000 in Newberry County.

A STATEMENT OF THE STATE'S VERSION OF THE FACTS

“ what he did was nothing more than two brutal vicious murders. Two senseless, needless, tragic, unjustified murders. That’s what he did. And it [doesn’t] matter why he did it or really how he did it. He had no excuse. He had no reason. He had no basis for killing those two women in that home on that day. None.” ROA p 3406, l 24 - p 2407, l 7. These comments in Solicitor Jones’ guilt phase closing argument properly sum up the case against John Kennedy Hughey involving his murder of his former girlfriend Tesheka Jackson and Luevinia Harris who was in her own home on the telephone to the police when Hughey’s second shotgun blast within her home brutally ended her life.

On December 4, 1995, Marcus Harris called his mother, Luevinia Harris at 11 56 a m from Oklahoma City. ROA pp 2212, 2225-2229. He found that his mother’s tone revealed that she was scared and asked her what was wrong and learned that John Hughey was present in his mother’s house with a gun. He got his cousin, Tesheka Jackson, on the telephone, who also with a ‘scared’ tone to her voice, confirmed John had a gun, and attempted to get John on the

telephone, but John refused to come to the telephone and attempts to turn on the speaker were unsuccessful ROA pp 2213-2218, 2220 Marcus then immediately called back to the house at noon and the speaker was activated Harris heard John respond and told him to leave Harris heard cussing in the background and his mother call out "just leave " ROA pp 2218-19, 2245 Tussling was heard while his mother was on the telephone ROA pp 2245-46 Then Harris heard his mother state "Call the police, call the police " ROA pp 2219, 2246 Harris hung up the telephone and within four seconds called 911 in Oklahoma City who patched him into the Abbeville emergency system, but he was too late ROA pp 2219-21 While on the phone, Marcus Harris learned the tragic truth of Hughey's malicious attacks "one down with gunshot wound to the head," "two down with gunshot wound to head " ROA pp 2220-21

*M
H
H* "Don't shoot that gun in here Don't shoot that gun in here " ROA pp 2278-79 These were the final words and request to John Kennedy Hughey from Luevinia Harris while she was on the telephone with Sgt Angela Patterson, the Abbeville City Police dispatcher This was immediately after Mrs Harris requested the police to come to her home ROA pp 2278-79 Without hearing any scuffling or fighting, the dispatcher heard an initial gunshot and within six seconds heard another gunshot ROA p 2279 Although Mrs Harris voice had been described as "excited, demanding, and extremely upset," there was now silence, except for the two gunshots ROA pp 2279-80 The dispatched officer was on his way ROA p 2280

She then received a call from Oklahoma City from Marcus Harris, Mrs Harris' son, who stated police needed to go to his mother's home because John Hughey had a gun ROA pp 2281-82, 2284 She advised him the police were there and that she had just gotten off of the telephone with his mother ROA p 2282 The police then entered her home and described the

injuries to the victims. Hughey was not on the scene when the police arrived having left within 45 seconds of the telephone call by Luevinia. ROA p. 2285. The dispatcher had spoken to the victim at 12:04 and the police arrived at 12:05. ROA p. 2289.

Cpl. Patrick Neil Henderson of the Abbeville Police Department was with the dispatcher when the fearful call from Luevinia Harris came in. ROA p. 2291. He was on his way when he heard the first "pop" like a gunshot and learned that there was a second before he arrived. After hearing a baby cry upon his entry to the Harris home, he found Luevinia Harris on the floor of the hallway in a pool of blood without a pulse. ROA p. 2313. He recognized Tesheka Jackson as the second person who was laying across the bed with her head down. ROA pp. 2316-17. Both had head wounds.

Cpl. Henderson recognized Tesheka Jackson from an incident on December 3, 1995 when she had told him that Hughey said he would kill her and Henderson advised her to stay at a safe home. ROA pp. 2319-21, 2650-51.

Lt. Barry New also arrived at Harris home. He noticed damage to the front door and the strike plate was on the floor. ROA pp. 2253-55. He found a knife on the floor that had Tesheka's shoe print apparently on it. ROA p. 2255. He saw Ms. Harris in the hallway near a telephone. ROA pp. 2357-60. He located Tesheka with a gunshot wound to her head and obviously deceased. ROA p. 2361. Also, a single shot shotgun was found in the bedroom with a shell in it. ROA pp. 2362-64. The gun belonged to Hughey's deceased father. ROA p. 2364. A shotgun shell box was found in the defendant's bedroom. ROA p. 2368.

The ominous planning of the tragedy was revealed in the testimony of Cpl. Mitch Christopher who found a note by the Petitioner on his door stating "As of this morning I will be

dead Love you all Please take care of my kids ” ROA p 2393 The noted was confirmed by Hughey in his testimony ROA pp 3111-12, 3202

Michael Adams, who started dating Tesheka in February 1995 revealed that on December 3, 1995, the Petitioner came up and pushed Tesheka and stated that he was going to kill both of them and then ran away ROA pp 2402-03 This incident was reported to the police It was reported by the decedent that Hughey told her “I’m going to kill you, I’m going to kill both of you” ROA p 2443

Upon his arrest in Georgia, Hughey advised the authorities that “I killed them, it was an accident, the gun went off” ROA p 2456 Hughey had tried to cut his wrist prior to the arrest ROA pp 2463-66

It was also learned that during his flight within thirty (30) minutes of the crime, Hughey had used the victim’s ATM card while driving her car at an ATM in Anderson ROA p 2471

SLED Agent David Black described the crime scene and the various location of red substances at the home He documented the evidence of forced entry at the door and the knife with the impression of the sole ROA pp 2485-89 He showed the location of shotgun shells and gun found as well as the blood splatter marks ROA pp 2494-2504 He located the telephone pulled from the wall and one in the bedroom ROA pp 2504-2509 He documented the injuries to the bodies ROA p 2511

The pathologist, Dr Woodard, found the cause of death of Luevinia Harris to be from a solitary gunshot to the head which resulted in instant brain death ROA p 2532 He opined that the distance was between two and ½ and three feet for the shooting ROA pp 2538-39 Tesheka Jackson has three major injuries 1) the fatal gunshot wound to the head above the right

ear that exited her eye, 2) a large bruise on her face likely caused by the blunt end of the shotgun and 3) a stab wound in her chest possibly caused by the knife found on the floor ROA pp 2541-42 The doctor opined the shooting distance was at a maximum of two feet ROA p 2547

David Black described returning to the crime scene, after the defendant's statement, and finding another shotgun hole in the bathroom and subsequently finding the third shell in a bag from the bedroom ROA pp 2659-66

Nancy Skraba described locating blood either consistent with the victim's or insufficient for typing in the house ROA pp 2678-91

The banks confirmed the ATM transaction and presented the video photo of Hughey at the ATM machine ROA pp 2701-20 The record revealed the stolen Mitsubishi was in the name of Tesheka and her grandparents, not Hughey ROA pp 2788-2803

Agent Dan DeFresse of SLED opined that each of the shells were consistent with being fired from the located shotgun and the bathroom firing was at a distance of 3 to 5 feet ROA pp 2814-2825

Agent Eddie Clark described the Petitioner's inconsistent oral statement that he went to the Harris home and had an argument with Tesheka Initially, she threw a vase at him and later she came into the house with a shotgun she had gotten out of the car ROA pp 2856-57 He stated he pushed the gun away and it went off He tried to run through the trailer, but she followed Mrs Harris tried to get between them and grabbed the gun and it went off He said Tesheka shot Mrs Harris ROA pp 2857-58 He was scared and ran into the bedroom and

Tesheka followed and he tried to get the gun away from her and it went off and he left ROA p 2858 Jerry Sloan of SLED confirmed the recited oral statement ROA pp 2876-77

The victim's mother, Bernice Jackson confirmed that Tesheka normally stayed at her grandmother's home and denied that the Petitioner and Tesheka ever lived together, were husband and wife, or otherwise She confirmed that she had met her daughter's friend, Mike Adams, before Thanksgiving ROA p 2888 She never saw her daughter with a shotgun ROA p 2890 She last spoke with her on December 3 when looking for a place to stay ROA p 2886

George Mack Harris, Luevinia's husband, confirmed that the front door and bedroom doors were not in the same condition as when he left before the murders ROA pp 2904-11 He described the telephone calls he received from Hughey that night The first one was after midnight and he declared that Sheka's not there The second call came between 4 and 5 a m after he learned she was there and told Hughey she was asleep, call back later At 6 a m, he calls again and says "Mack, I won't be here in the morning" and he then gives Sheka the telephone ROA pp 2911-13 Harris also described the fact that the red substances were not on the floor and other areas when he left on December 5, 1995 ROA pp 2916-18

The defense theory of the case sought to present a more stable relationship between the victim and the Petitioner though the testimony of Chris Burton, a friend, and Gloria White Harrison, the Petitioner's sister Burton, however, admitted that on December 3, 1995, Hughey called him upset and crying, but he did not see him after the call ROA pp 2955-60 He told Burton 'I couldn't take it no more' crying and upset ROA p 2973, ll 6-21, p 2992 ("I can't take it no more tell my sisters and them I love them take care of my kids for me")

His sister Gloria described her alleged presence at the December 3, 1995 incident when she drove him over to the grandmother's house to pick up the children. She said she viewed the confrontation, but denied there were any threats to kill made. ROA pp 3017-20. She then described the arrest at her Georgia home on December 5 and his attempt to cut his wrist. ROA pp 3023-24.

John Hughey testified in the guilt phase. He revised his version from what he told police, in fact, denying he told them anything. He claimed they "assumed" those facts. ROA pp 3175-76. In this version, he arrived at the scene to take the car to be fixed, but that Tesheka slapped him because he had caught her with Adams. He claimed Mrs. Harris then invited him in for coffee and Tesheka started attacking him first with a vase, then knives, ultimately resulting in her coming at him with a knife and he pushed her resulting in a stab. This occurred after Marcus Harris had called. He then claimed he ran out of the house and got the shotgun from the trunk of the car. ROA pp 3133-40. He said Tesheka was on the steps stating "I'm going to kill you." ROA p 3142. He stated that he told her if she put the knife down, he'd put the gun down. ROA p 3142. Walking toward her, he then spit on him and tried to slam the door in his face. He proceeded into the house. While tussling at the door, the gun went off and somehow Mrs. Harris got hit. ROA pp 3143-45. He said he was mad and was trying to shoot at Tesheka. ROA p 3146. Although the knife had dropped, he thought she had the knife and chased her. ROA pp 3146-47. He said Mrs. Harris was "just in the wrong place at the wrong time." ROA p 3151, ll 5-10.

On cross-examination, he denied having the shotgun when he entered ROA p 3213
 Further he denied hearing Mrs Harris tell him to not shoot gun. Importantly, he also did not
 recall why he had more shotgun shells with him ROA pp 3238-39

II ATTACHMENTS TO INITIAL RETURN

The Respondents attached and incorporated by reference the following materials to this
 return

- A Final Brief of Appellant
- B Final Brief Of Respondent
- C Final Reply Brief Of Appellant
- D *State v Hughey*, 339 S C 439, 529 S E 2d 721 (2000) opinion

III Allegations in Initial Application

In his initial application for post-conviction relief filed on October 25, 2000, the
 Applicant makes the following allegations

I 9(a) - Ineffective Assistance of Counsel

- A The failure to specifically object to the "no mercy" instruction on federal constitutional grounds,
- B Requesting a "plain and ordinary meaning" instruction during the penalty phase rather than an instruction that life imprisonment means life without parole pursuant to State v Simmons [Simmons v S C] and the South Carolina statute,
- C The failure to secure petitioner's presence during all critical stages of the trial,
- D The failure to object to evidence petitioner attempted suicide following the victim's death since this evidence should have been excluded pursuant to Rule 403, SCORE,
- E The failure to properly investigate and prepare witness testimony,
- F Eliciting prejudicial guilt phase testimony that petitioner had been expelled from school since this evidence was irrelevant,

G The failure to properly investigate and present available mitigating evidence

The Respondent made a Return to these matters on January 21, 2001

IV AMENDED ALLEGATIONS FROM DECEMBER 15, 2006

In his Amended application, Hughey, thorough counsel, makes the following allegations

10(a) *Applicant was denied the effective assistance of counsel during both the trial and sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution*

11(a) During both the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel in numerous ways, including, but not limited to, the following

- 43.
- I) Despite substantial irrefutable evidence to support convictions for murder, counsel advised the applicant and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument, based in part, on counsel's misunderstanding of the law, that Applicant was guilty only of voluntary manslaughter, which was contradicted even by the Applicant's and the defense expert's testimony
 - ii) Counsel failed to adequately investigate, develop, or present mitigation evidence, including, but not limited to, evidence of Applicant's adaptability to confinement and evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired
 - iii) Counsel failed to adequately object to the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*" This instruction is contrary to state law, which never requires a sentence of death, S C Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy See, State v Johnson, 338 S C 114, 525 S E 2d 519 (2000), State v Torrence, 305 S C 45, 406 S E 2d 315 (1991) This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty

Counsel's conduct in each instance separately and cumulatively was both unreasonable and prejudicial in sentencing Strickland v. Washington, 466 U.S. 668 (1984), Wiggins v. Smith, 539 U.S. 510 (2003), Florida v. Nixon, 543 U.S. 175 (2004)

10(b) *Applicant was denied the effective assistance of appellate counsel in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution*

11(b) Appellate counsel failed to properly brief the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*" This instruction is contrary to state law, which never requires a sentence of death S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy See, State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000), State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or otherwise weighs in favor of a sentence of life imprisonment rather than the death penalty Counsel's conduct was both unreasonable and prejudicial in sentencing Strickland v. Washington, 466 U.S. 668 (1984), Smith v. Robbins, 528 U.S. 259 (2000)

V Responses to Amended Allegations

A General Law on Ineffective Assistance Of Counsel.

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), the United States Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show (1) that counsel's performance was deficient, and (2) that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial 466 U.S. at 687 Respondent submits that the Record on Appeal from the Applicant's trial and sentencing hearing conclusively demonstrate that appointed counsel were not deficient in their performance nor was the Applicant prejudiced in any way by their performance To the contrary, the Record from each proceeding demonstrates

that the Applicant's attorneys were diligent in their representation of the Applicant, performed well within the range of competence demanded of attorneys in criminal matters and performed within the wide range of reasonable professional assistance State v Pendergrass, 270 S C 1, 239 S E 2d 750 (1977), Marzullo v Maryland, supra, Butler v State, 286 S C 441, 34 S E 2d 813 (1985), Hill v Lockhart, 474 U S 52, 106 S Ct 366 (1985)

At this stage, the review of counsel's performance is quite deferential. The Supreme Court has instructed reviewing courts to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v Washington, 466 U S 668, 689, 104 S Ct 2052, 2065, 80 L Ed 2d 674 (1984). Thus we ask not whether, with the benefit of hindsight, counsel would have conducted the defense differently. In the wake of a conviction and death sentence such a conclusion "is all too tempting." Id. Rather, the court must place itself in the shoes of Hughey's attorneys and ask only whether their choices were objectively unreasonable. We cannot say that counsel's efforts in this case failed to satisfy Strickland's standard.

The Applicant contends he was deprived of constitutionally required effective assistance of counsel during the guilt and sentencing phases of his trial. To prevail on this claim, Hughey bears the burden of demonstrating that their attorney's "representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v Washington, 466 U S 668, 688, 694, 104 S Ct 2052, 2064-64 2068, 80 L Ed 2d 674 (1984). In assessing counsel's performance, courts bear in mind that the review is "highly deferential." Id at 689, 104 S Ct at 2065. Indeed, it affords a strong presumption that counsel's performance was

within the extremely wide range of professionally competent assistance. Id. And, to eliminate the deceptive effects of hindsight on its consideration, the court looks to "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690, 104 S. Ct. at 2066. Moreover, even those instances in which counsel's conduct fell below an objective standard of reasonableness generally will not justify setting aside a conviction unless the error affected the outcome of the proceeding. See Id. at 691-92, 104 S. Ct. at 2066-67. Therefore, deficiencies in the Applicant's attorney's conduct would warrant the grant of habeas relief only if Petitioners convince the court that in the absence of unprofessional errors by their attorney there is a reasonable probability--i.e., one adequate to undermine our confidence in the result--that "the result of the proceeding would have been different." See id. at 694, 104 S. Ct. at 2068.

2
11
[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691, 104 S. Ct. at 2066, see Satcher v Pruett, 126 F.3d 561, at 572 (4th Cir. 1997) (explaining that "[i]n any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments" (quoting Strickland, 466 U.S. at 691, 104 S. Ct. at 2066)).

Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v Murray, 82 F.3d 593, 598 (4th Cir. 1996). The Court should decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of

hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial ” Mazzell v. Evatt, 88 F 3d 263, 269 (4th Cir 1996)

As the Supreme Court made clear in Strickland

the reasonableness of counsel’s actions may be determined or substantially influenced by the defendants own statements or actions. Counsel’s actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigations are reasonable depends upon such information. [W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U S at 691. Barnes v. Thompson, 58 F 3d 971, 978 (4th Cir 1995), Matthews v. Evatt, 105 F 3d 907, 919-920 (4th Cir 1997). The mere fact that trial counsel’s strategy was unsuccessful does not render counsel’s assistance unconstitutionally ineffective. Strickland, 466 U S at 689. Bell v. Evatt, 72 F 3d 421, 429 (4th Cir 1995).

In addition to a burden of showing “deficient” performance, counsel must also prove “prejudice” under the Sixth Amendment. Recently in Jones v. State, 332 S C 329, 504 S E 2d 822 (1998), the South Carolina Supreme Court restated the “prejudice” prong in a capital sentencing proceeding as being established when “there is a reasonable probability that, absent [counsel’s] errors the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing Strickland. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 504 S E 2d at 823-824. Accord, Plath v. Moore, 130 F 3d 595 (4th Cir 1997) (“given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the

conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed. Thus, in weighing the omitted evidence against that actually used to convict and sentence Plath, the mitigating evidence seems insufficient to shift the balance in Plath's favor.") Respondents submit that he will be unable to satisfy this burden. The Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

B MERITS

A Applicant and Sister's Guilt Phase Testimony

7
§ 18. In his initial specification, he contends counsel erred in advising his sister and the Applicant to testify in the guilt phase of the trial where "evidence was irrefutable to support convictions for murder." Respondent submits that this issue is a red herring because it assumes in the allegation that he would be convicted on murder. The Applicant has failed to show either that there is a reasonable probability under Strickland that the result of the proceeding would have resulted in a different verdict assuming that counsel did advise the Applicant and his sister to testify. Nevertheless, the right to testify belongs to the Applicant. The trial court made full inquiry of whether the Applicant wanted to testify and was advised of his right to testify or not. R. 3060-3064. The Applicant stated that he wanted to testify and did. R. 3064.

Respondents submit that he will be unable to satisfy this burden. The Supreme Court of South Carolina has held that a hearing on an allegation is only required when factual allegations that lead to a Sixth Amendment deprivation are not conclusively refuted by the record. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

B The failure to properly investigate and present available mitigating evidence

In his second specification of ineffective assistance of counsel, he claims that his counsel failed to investigate or present adequate mitigation evidence. He specifies adaptability to confinement as the capacity to appreciate the criminality of his conduct as two examples of this error. First, other than those two specifics, this claim lacks sufficient specificity to respond to because it fails to set forth any "facts" to support the claim. It does not state what evidence or witness should have been investigated and what witness was not presented.

13
14
The record reveals that mitigation testimony was presented from Ms. Anthony Wilson, Anthony Scott Harrison, Jessie Christopher Brown, Nancy Leigh Ramey, Rev. Wendall Cox, Gloria White Harrison, social worker Jeff Yungman, and Dr. James Evans, an expert in neuropsychology and psychology. ROA p. 3768-4003. In addition, the Applicant had testified in the guilt phase about his background. ROA p. 3064-3253.

This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action"). Alternatively, since the bare allegation is contradicted by the record, a hearing on an allegation is not required. Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981).

CASE IN MITIGATION

1 Anthony "Tony" Wilson - The Applicant's Sister

Counsel Tinsley called Anthony Wilson to testify. R. 3768. Wilson testified that her mother was Dolly Mary Hughey and father was Alan Carlyle. Although her father was not John

Henry Hughey Smith, she said the Applicant was her brother, albeit half-brother R 3770 She said that their childhood was "fat", with seven (7) children The Applicant was the youngest son and 6th of 7

She said she did not know his father well because her father was White and did not live in the home R 3771 Her father had fathered three (3) of the children She said her father was now dead Id 3771-72

She said Mr Hughey came into the picture when she was young and he moved in with her mother They had four (4) children, including the Applicant

Wilson described her stepfather as black and that he hated Wilson because she was not his child R 3773 She described being beaten, deprived of food and being run out of the house R 3773

Wilson said her stepfather worked construction She recalled that he would come home drunk every Friday when he returned from a week of work R 3774-75 Wilson said her stepfather would be drunk, out of money, and he would fuss and fight with her mother resulting from her requests for money to buy groceries R 3775

Wilson described that they lived in a lot of places

Wilson said the Applicant's father did not treat the younger four as badly as the older because they were his and he was a better father to them R 3775-76 However, Wilson declared that he wasn't a good father to anybody Id Wilson described that her stepfather would hit Wilson with a stick or anything he would pick up She also said her stepfather hit the Applicant also Id She said he left home as soon as he was able to leave She felt John Henry was an alcoholic who drank all the time R 3777

Wilson recalled in the early 1970's that the Applicant got his head cut open. She described the parents fussing with her stepfather drinking and the Applicant ran to get into the car with them, but the car went into reverse and the Applicant fell out and cut his head open on the bottom part of the door. Wilson described seeing the "white stuff" inside his cut open head. He went to the hospital and had surgery and remained there for awhile before he came home. R 3779

Wilson stated the Applicant had two more head injuries. Once he was hit in the head with a golf club and a second time he hit his head on the windshield in a car wreck and scarred up his face. R 3779

Wilson also described her brother being in an accident when he drove the pulp wood truck when he was a child. R 3780-81

Wilson described that her mother was hit by her stepfather until she died September 19, 1992 because of a drunk driver who hit her in her sister's yard. R 3782

Wilson described seeing the Applicant and Sheka together before and after his mother's death. R 3784. He said John's relationship with his mother was good, that he was her baby boy. Wilson said the stepfather lost his mind and drank more after Dolly May's death.

She said the Applicant complained of headaches after his accident. She felt the Applicant was ashamed of his head and would wear caps and grow his hair out. She said the Applicant treated his mother good and they would move furniture together. She said John Henry died a year after his wife. R 3786-87

She described the Applicant's changes after his mother died. The Applicant did not seem to care for himself anymore and did not care how he dressed, stopped lifting weights, and

isolated himself from his family R 3787 She said the Applicant would write things on mirrors about his mother like the date she was born and died The Applicant described hearing talking in the house to him, but did equate it with his mother

Wilson said John and Sheka had two sons She said they would come over to her house R 3789

Wilson described a gun, Exhibit 48, that the Applicant's father gave to the Applicant She said her stepfather would shoot it all the time, including one time at her R 3789 The basis for it was when Wilson caught him with another woman and told her mother R 3790 Her stepfather told her Wilson was lying R 3790-91

Wilson said her stepfather would also call them names, such as half-white and other things She said the Applicant was exposed to this repeatedly R 3791

Wilson said she loved her brother She opined that Hughey had a hard life, saw terrible things that his father did, and did not have a positive male role model in his father R 3792 She felt the Applicant had suffered an abusive childhood from the violence he saw toward his mother and the shooting of weapon inside the home R 3793

On cross-examination, though, she admitted that when she went over to the Applicant's she saw Sheka with him R 3800-01

2 Anthony Scott Harrison

Harrison testified he met Hughey in 1984 and that he was introduced to Hughey's sister Gloria He said he had been married to her for 14 years and that they had four children R 3803-04 He observed Hughey before his mother's death as treating him like a big brother and that Hughey respected him and his wife R 3804 After the death, the Applicant changed a little and

would not talk much and was distant to the family R 3805 He felt the death affected the Applicant deeply because of the close relationship R 3806

Harrison described the Applicant's help around his house where he helped out cutting grass, cleaning gutters, and putting a new roof on his mother's home R 3806 He also helped build his sister Ruth's house R 3807-08 He did roofing Id

Harrison felt John Henry Smith was a "good father", but drank a little too much R 3807 However, he did not observe how he treated Ms Dolly or the older children Id

On cross-examination, Harrison stated he was married to Gloria, the sister When he visited the family, he said nothing troubled him about the Applicant R 3810-11 After the death, he said he saw the Applicant, but found "he was still acting the same" and "wasn't no strange behavior " R 3811 He found him to have a normal life R 3812

Harrison further stated that the day after Applicant murdered Tesheka Jackson, Hughey told them he was in Georgia because he took someone to the hospital because they had AIDS R 3815 After Harrison had learned Sheka had been killed, he would not talk to them After he attempted suicide, he admitted the killing R 3816

3 Jessie Christopher Burton

Burton, a friend and cousin of the Applicant and victim, described Hughey helping on jobs at his house, including roofing, cutting grass, and helping around the house after Burton had broken his arm R 3818-19

He described a birthday party in September 1991 for Burton's son which revealed Hughey's interaction with children He introduced a videotape of the family gathering and

described Hughey treating the children "like his own" R 3824 He described another event on December 4, 1995 R 3825-26

Burton felt that Hughey changed after his mother's death and it was the first time he saw Hughey cry R 3837-38

On cross-examination, it was developed that Hughey did not bring his older son to the birthday party because the mother's family would not allow him around that son R 3832 Burton opined that everything was fine with Hughey prior to 1991 He said after 1991 he was concerned about Hughey's driving because his license was suspended R 3834-35

4 Nancy Ramey

ly 8 7/1 - Ramey, half-sister of the Applicant's mother, testified about her relationship with John Henry Smith She described him as "a good person, and then he would drink and he was a violent person" R 3838-39 She said she saw him hit her sister when he was drinking on more than once occasion

Ramey testified that Smith did not treat his stepchildren like he did his own and was mean to them R 3839

She described in the 1970's when Smith was drinking, got in his car and the three year old Applicant fell out of the car and was run over when Smith was drinking R 3840, 3845 She said that they took him to the hospital and was bleeding and he had a head wound and it was touch and go for a few days Id

She described an April 1991 birthday party for Justin at her home and saw the Applicant playing with the children at the party She also saw Hughey with Sheka and their children playing at her work R 3841

She felt that Hughey treated her with respect as his aunt R 3842 She described him helping her every year haul wood to get ready for winter and help "in other ways" R 3842

She felt Hughey was affected in September 1991 by her sister's death when she was mowing the grass and was killed by a drunk driver Id She said he was living with his mother and father at that time She concluded that he was helpful and respectful to her R 3844

On cross-examination, she stated she only knew of the two children the Applicant had with Sheka R 3846

She felt after 1991 that Hughey was just different and not the same after his mother's death, but she could not be more specific R 3846 She noted that the two children he had with Sheka were born after 1991 in 1992 and 1994 and the oldest would have been three when Sheka was killed R 3847

5 Reverend Wendell Cox

Reverend Cox of the New Friendship Missionary Baptist Church testified he knew the Applicant from church and his mother's home He recalled Hughey's mother being killed by a drunk driver and visited the home He felt the mother played the important role in the family decisions and moral support He saw Hughey at church before and after his mother's death through the years with his mother and later with Sheka and the children R 3841

6 Gloria White Harrison

Gloria Harrison testified again in the mitigation phase R 3853 She stated her parents were John and Dolly Hughey and that they moved frequently She said she had two older sisters and one older brother and two younger sisters and one younger brother R 3854 She stated her mother was the sole support for all seven

She said her mother was initially married to Alan Carlyle who parented the first three, but did not live in the home or provide any financial support. Subsequently, her mother married John Henry Hughey Smith who was Gloria's father. R 3856 She said her father always drank. She described seeing him violent when he drank. She said he had a good job and made good money, but his downfall was women and his drinking habit. She described his return on the weekends and her mother asking for money and he'd always get angry and take it out on everybody, including the Applicant. R 3858 She felt he was rougher on the stepchildren. R 3859 At one time, her father started shooting up the ceiling with his rifle, her parents fought and then they called the police. R 3859

h
#26
She also described the car incident in the 1970's when the Applicant was thrown from the car when his father was driving drunk. R 3860 She said the open door struck Hughey and cut his head open. R 3860 She said Hughey was in the hospital a long time. She described another event when Hughey fell off a tractor and he hit his head. On another event Hughey was "sniffing gasoline", fell asleep and fell off the truck when he was six. R 3861 She also recalled another accident when they were in a car accident near Anderson. R 3862

She said that Hughey always complained about having headaches and had several blackouts after the trauma. R 3863

Harrison stated that there was a blessed mother-son relationship between Hughey and his mother where they would do things together. She said he took care of his mother, particularly after his father had a work-site accident and had to have a plate put in his head. R 3865

In September 1991, she learned her mother was killed while cutting grass at her sister Ruby's home when a drunk driver lost control. She said her sisters Ruby and Anthony (Tony) witnessed it. They had to get counseling and her death destroyed the family. R 3867

Gloria similarly described how her father treated the family members different by not buying things for the step-family. Gloria noted the difference in the family after her mother's death from the shared large family gatherings on Sundays and holidays. R 3868-69

She described her own relationship with John as initially being full of life until his mother died and then he became distant, not coming by to see her. She said he did not receive counseling. R 3870. She said he appeared to be distant and running from the truth of his mother's death after it. R 3871. She said he drank more after her death. R 3872

27
- 27
* 27
She said her father died one year after his mother's death. Her father would be withdrawn and sit in the chair crying and saying she would be home. Ultimately, he ran out of money and started begging for change for a drink. R 3873. The Applicant was calm, but was looking for someone to be his mother. Id. However, she denied that he was ever talking to his (dead) mother, but his dad did. R p 3873, ll 20-25

She said her brother had always been there for her and that they share a bond together. R 3875-76

She described the Applicant helping around the house with yard work, changing curtains, taking out the ashes. The family would also call upon John to do manual labor for them. R 3876-77. She recalled the Applicant helping an elderly lady at Wal-Mart take bags to her car which created a new position there. She said he was always willing to help others. He helped her when he took and buried her puppy after it had been hit. R 3878

She again described him before 1991 as a “more good person” and after he became withdrawn Gloria stated that she was saddened by Sheka’s loss and went to her funeral and recalled Mrs Harris walking with her boys and they’d play together

She said when she saw her brother on December , 1994, something was wrong and when she got back he was crying She said she loved her brother and wanted to keep him R 3880-81

On cross-examination, she said he told her on December 4 that killing Mrs Harris was an accident R 3881 She said she could not believe that Sheka was gone She denied knowing a Tiara Sade DeVette, Lachina Ophny, and Aquata Ophny R 3884-85

She recalled a blackout by the Applicant at her home, but could not remember when it was, but did not take him to a hospital R 3885-86 She recalled a second blackout in Abbeville after her mother died, but did not take him to a hospital then She did not think he had any medical attention R 38887 She was not contending he was in a blackout on December 4 R 3887

She admitted he did not have any relationship with his daughter Kiara over the past few years, but had gotten money before through a court order She did not know about any support he gave for Tiara.

She did not think he appeared distant when he was with the children at his home R 3890

7 Jeff Yungman

Forensic Social Worker Jeff Yungman testified as an expert in social work R 3899-3904 He testified that he wanted to determine if Hughey was maltreated as a child and the effect on his decision making powers, whether he had head trauma and if it made a difference on his

decision making and the impact of the death of his mother R 3904 He said he reviewed school records medical records from Northeast Georgia Medical Center, Anderson Hospital and Abbeville County Memorial Hospital He also reviewed a "notebook" found at his residence and interviewed Anthony, Donny Ray, Ruby, Glona and Barbara

He stated that he located five (5) separate occasions where Hughey suffered head trauma and taken to the hospital including a 1973 car incident, a 1976 fall off a tractor, a 1981 hit in the head with a shovel, a 1994 auto accident, a 1995 auto accident, and a 1995 hit in the head with golf club R 3906

He noted there were two distinct families He learned that his father was an alcoholic and took rage out on his children and beat his wife with children intervening He noted he would shoot his shotgun in the house Further, the family lived in five (5) different locations in his childhood He also beat his children with belts, straps, tree limbs, etc He described the different reactions from the children to even hiding in the woods to avoid the beatings R 3908

Yungman noted that the father targeted the older children, though the younger observed the beatings Hughey at age 6 to 8 started huffing gasoline fumes as a way to deal with the beatings or his mother's treatment R 3909 Yungman stated that studies have shown the huffing causes "severe cognitive impairment" if done over a long period, and Hughey did it for one to two years R 3909

According to school records, Hughey had an 80 IQ which is on the bottom and of the low average range He did not receive any special education and dropped out of school at age 16 when he was in the tenth grade R 3910

He opined the lack of school success can bring about low self-esteem and can be the result of being abused as a child R 3911

His relationship with his mother was close and special and that he did everything for her and was with her at all times R 3911 He described her as his emotional support R 3911 He described her death by a drunk driver He said everything changed for the Applicant after his mother passed away He was withdrawn, had auditory hallucinations feeling his mother was in the house, not listen or take advice from others, and started drinking heavily R 3912 He also refused to go to his sister's house where the death occurred

Yungman stated these symptoms were consistent with what he had seen in disturbed children who suffer from post-traumatic stress disorder (PTSD) He opined the traumatic event was the described the first head injury where he was hospitalized for 6 days when his scalp was peeled back R 3914 He noted this was caused by his father when he was intoxicated R 3915

He described the "poor home life" as unique in the abuse caused by shooting the weapon He noted the father being struck by the backhoe caused seizure disorders R 3916 He noted family on his father's side had been committed to a mental hospital and two others committed suicide R 3916

He described the father's drinking episodes on payday and beating the family, including when his wife was pregnant with the Applicant R 3917

He noted as the children got older the level of violence and drinking increased R 3919

Yungman stated, that depending on the school district, someone with an 80 IQ would have some special education Further, after his mother's death, it would have been appropriate for him to have counseling R 3920

He felt, after her death, that he lost everything and all emotional support R 3920 He was withdrawn and had suicide ideation because he felt hopeless R 3921 'He thought he heard his mother speaking to him and he would answer her by writing on the mirrors of his room " R 3921

Yungman opined this affected his relationship with others and ability to make decisions When stressed, he reverted to the violent behavior he learned as a child R 3922-23 After her death, he started drinking heavily R 3923

Yungman noted that Hughey was exposed to violence in his home, he received abuse himself He was affected when a caretaker father through neglect caused his initial head injury R 3925 His third area of 6 head traumas in 22 years had an affect on his decision making power R 3925 His fourth area was his ability to cope while his mother was alive and then unable to do so after her death R 3926 This may explain why in stressful situations, as on December 4, he acted as he did, according to Yungman

He noted that in stressful situations, he would revert back to learned behavior This was supported by his employment reports where after her death he did not hold a steady job R 3928 after her death, things went progressively downhill R 3929

Yungman summarized that his opinion is not an excuse, but providing an explanation for the behavior R 3932

On cross-examination, Yungman stated that he was first contacted three weeks to one month prior to trial R p 3933, ll 23-25 He stated he had not prepared a report He said he advised counsel of his findings after the trial started R 3936

He noted that there was no medical history of blackouts R p 3938, ll 8-10 He noted the initial injury was sewn up but there was no operation on the brain or skull R 3942 As to the other injuries, he was treated in the emergency room and released Id The family described after his mother's death and lost a job due to drinking R 3948-49 Yungman initially stated Hughey had not gotten through the grieving process, but did not ask him how he felt when his children were born with Sheka R 3952-53

7 Dr James Evans

Dr James Evans, a psychologist testified as an expert in psychology and neuropsychology R 3965 He administered the major portion of the Halsted-Reitan neuropsychological test battery, Wechsler Normal Intelligence Scale and a few Rorschach tests R 3966 He spent six hours with the Applicant September 27 and July R 3967-68 He also performed malingering tests R 3967 He opined that he was not faking R 3968

Dr Evans stated he initially performed a Quantitative E E G test in July R 3968 He found "strong evidence" of brain dysfunction which he opined would lead to trouble with verbal learning R 3970

He also stated similar evidence found on the neuro-psychological tests showed dysfunction He said the head injury could have been the source of it or made it worse R 3971 These problems could make school-type learning difficult in reading, spelling, and efficient speaking R 3972 he opined it could also lead to an inability to adapt to stress R 3973 He felt he had a verbal learning disability in school and it would have made it difficult R 3973

As to his IQ level, it was within average range but on the bottom He felt he was at a seventh grade level for recognizing words and doing arithmetic R 3974

Dr Evans stated he did not find organic brain damage R 3975 However, there was no M R I scan or X ray that showed it R 3975 Dr Evans stated that he did not see signs of depression in his first two meetings, but a couple of weeks prior to trial he seemed depressed and decompensated R 3977

Dr Evans also opined that his mother's death created problems He described seeing him ten (10) days before saying "he saw his mother in the room with them " R 3979 He told him it happened regularly and he heard her talking R 3979 He said it sounded like malinger, but he felt it was not because he told him she always says the same thing which were the last words she told him about keeping the dinner warm until she got back from the store and then they would eat together R 3979-80

Dr Evans stated he does not opine it was dissociation, but evolved from PTSD R 3981-82 he stated this would make him less capable of making decisions and have a lower tolerance for stress R 3982 He confirmed that prior abuse could be a stressor and could affect memory through dissociation R 3984 Avoidance of his sister's home was another symptom of PTSD R 3985

Since he could not tell what caused the scars on Hughey's head, he did not opine they were from head trauma, but are consistent with it R 3987-88

Dr Evans opined Hughey was different than the average person and this difference may be factors in the crime R 3989 He said there was a lot of converging evidence of organic brain dysfunction R 3989

1 Adaptability to Confinement Evidence

Respondents submit that the case in mitigation did not include any evidence of adaptability to prison life. As revealed in the above summary, the mental health evidence revealed that Hughey, in times of stress will revert to his learned behavior of violence. However, the record does not reveal the reason why this type of evidence was not presented at the trial. The prior depositions of the Applicant's counsel do not reveal the breadth of investigation or basis why this was not pursued. However, it was considered. See Tinsley, Exhibit 19. Also Tinsley, p 68-70. Tinsley admitted that Lt. Allen had told him that he had not had any trouble with the Applicant in jail. He noted that Hughey was not shackled in his meetings with him. Tinsley, p 70-72. He felt that there would have been no harm in calling Lt. Allen. Id, p 77-78. Tinsley stated that it was not an oversight not to present the evidence because there were references to it in his notes. Id, p 93. But at the time of the deposition, he could not recall why it was not done and requested the opportunity to review his notes and records. Id, p 93. Therefore, a hearing is necessary on this issue. Norman, supra.

2 *Capacity to Appreciate the Criminality of His Conduct*

Hughey contends that his counsel was ineffective in failing to investigate or present evidence concerning the instruction on the statutory mitigating circumstance set forth in § 16-3-20(C)(b)(6). This section provides "The capacity of the defendant to appreciate the criminality of his conduct to the requirements of the law was substantially impaired." In the direct appeal, he claimed error in the trial court failing to instruct on this circumstance. See Final Brief of Appellant, p 28-34. Rejecting his argument that this was required, the trial judge instructed, among others, the statutory mitigating factors "the murder was committed while the defendant was under the influence of mental or emotional disturbance" and "age or mentality of the victim

at the time of the crime " Tr pp 4059-60 Additionally, the trial judge specified as a nonstatutory mitigator ' the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult " Tr p 4060, ll 21 24

Respondents submit that there was no Sixth Amendment violation by any alleged deficiency in either investigation or presentation on this issue merely because the trial court failed to instruct on the requested factor ¹

¹ In the direct appeal, appellate counsel asserted error because of the failure of the trial judge to instruct on this statutory factor In denying appellate relief, the South Carolina Supreme Court addressed the issue in the following manner

IV STATUTORY MITIGATING CIRCUMSTANCES

Hughey argues the trial judge erred by refusing to instruct the jury on the statutory mitigating circumstance contained in S C Code Ann § 16-3- 20(C)(b)(6) (Supp 1998) which would allow the jury to consider Hughey's capacity to appreciate the criminality of his conduct or his ability to conform his conduct to the requirements of the law We disagree

[23][24] Section 16-3-20(C)(b)(6) authorizes the trial judge to instruct the jury on certain statutory mitigating circumstances that may be supported by evidence Specifically section 16-3-20(C)(b)(6) states that the jury may consider "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired " The trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by the evidence and not merely those requested by the defendant State v Caldwell 300 S C 494 388 S E 2d 816 (1990) (citing State v Bellamy 293 S C 103 359 S E 2d 63 (1987)) In deciding which statutory mitigating circumstances may be supported the trial judge is concerned only with the existence of the evidence not its weight Id

[25] Hughey argues the trial judge should have instructed the jury to consider the statutory mitigating circumstances contained in section 16-3- 20(C)(b)(6) based on the following testimony provided by Dr James Evans a specialist in neuropsychology

Question You're offering them as explanations for his individual characteristics

Answer Yes in a way I'm offering them as fact the [sic] would appear to modify or mitigate or whatever the crime--it would--it wasn't--it might be something that-- He's different from the average person in many ways And those are the ways we've talked about now And those certainly there is question whether they were factors-- it needs to be asked are those factors in the crime And they may well have been

Question In your opinion they could definitely have impacted him on December 4 1995?

Answer They could have been factors yes

Question And Doctor in your medical opinion as neuropsychologist if an individual who suffers from organic brain dysfunction is exposed to violence at an early age abused and then suffers a series of head traumas in your opinion as an expert would those factors affect that person's ability to cope and deal with stress and life itself?

Answer Yes

Question And Doctor in your evaluation and study of John Kennedy Hughey have you found organic brain dysfunction?

Answer I found a lot of converging evidence for organic brain dysfunction to the point I would say yes it exists

*7 Dr Evan's testimony implies that Hughey could not deal with stress not that Hughey would be unable to appreciate the criminality of his conduct or to conform his conduct to the law In fact no witness testified that Hughey could not appreciate the criminality of his conduct

In State v Caldwell this Court held the trial judge erred by failing to charge the statutory mitigating circumstances contained in section 16-3-20(C)(b)(6) where the defendant suffered from a psychopathic personality Caldwell 300 S C at 506 388 S E 2d at 823 This condition is "one in which the individual is not constrained by societal norms for behavior and therefore is unlikely to obey rules on his own " Id The trial judge in Caldwell should have charged section 16-3-20(C)(b)(6) because the defendant's disorder caused him to be unable to appreciate the criminality of his behavior or abide by the law Unlike Caldwell there is no evidence in the instant case that Hughey's disorder caused him to be unable to understand the criminality of his conduct only that he was more susceptible to stress

[26] Hughey argues that he was entitled to an instruction on the mitigating circumstances in section 16-3-20(C)(b)(6) because of his abuse as a child several head traumas a car accident and the death of his mother The trial judge adequately submitted the issue of Hughey's mental well-being to the jury by instructing the jury to consider as non-statutory mitigation "his level of intellectual function whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult " See State v Plemmons 296 S C 76 370 S E 2d 871 (1988) (trial judge was not required to charge section 16-3-20(C)(b)(6) because

The Appellant claims that he is entitled to this special mitigating circumstance instruction because (1) his father allegedly beat him as a child Tr p 3771 (2) he fell out of a car when he was four years old and had surgery for a scalp injury and stayed in the hospital for about six days, (3) he was once hit in the head with a golf club Tr pp 3779-80, (4) he had a car accident and hit his head on the windshield Tr pp 3779-80, (5) when sniffing gasoline at age 6 he fell off some farm equipment, (7) he came withdrawn after his mother died and his personality changed Tr pp 3871-73, 3904, 3912 Dr James Evans, a neuropsychologist, testified that he had evaluated Hughey and opined that he suffered from an organic brain dysfunction possibly as a result of head trauma Tr p 3975, ll 11-13 He opined that it could lower his ability to deal with stress, but he did not find depression Tr p 3976, l 15 - p 3977, l 10 The Appellant relies upon the following inquiry with Dr Evans to support his request

Q You're offering them as explanations for his individual characteristics?

A [H]e's different from the average person in many ways And those are the ways we've talked about now And those certainly there is question whether they were factors – **it needs**

of the effects of alcohol on the defendant where the non-statutory mitigating circumstances charge specifically permitted the jury to consider the effects of intoxication)

The trial judge in the present case did not err by refusing to charge the statutory mitigating circumstances contained in section 16-3-20(C)(b)(6) because no evidence introduced supported it and the jury was advised to consider Hughey's mental state through the judge's non-statutory mitigating circumstances charge

State v Hughey, supra

to be asked are those factors **in the crime** And they may well have been

Q In your opinion, they could definitely have impacted him on December 4, '95?

A They could have been factors, yes

Q And, doctor, in your medical opinion as neuropsychologist, if an individual who suffers from organic brain dysfunction is exposed to violence at an early age, abused, and then suffers a serious of head traumas, in your opinion as an expert, would those factors affect that person's ability to cope and deal with stress and life itself?

A Yes

Q And, doctor, in your evaluation and study of John Kennedy Hughey, **have you found organic brain dysfunction?**

A **I found a lot of converging evidence for organic brain dysfunction to the point that I would say, yes, it exists**

Tr p 3988, l 18 - p 3989, l 20 (emphasis added)

No evidence was presented that Hughey's capacity to appreciate the criminality of his conduct or ability to conform was substantially impaired In fact, on cross-examination, Dr Evans denied that he could opine that Hughey suffered from post-traumatic stress disorder Tr p 3990, ll 20-25 Further, the MRI results revealed no structural abnormalities in the brain Tr p 3991, ll 9-15 Further, Dr Evans clarified that there was no test data on Hughey that supported his general comment that if (any) "person has brain dysfunction or brain damage and a history of abuse, would they be more likely to be susceptible abuse, would they have a lower tolerance for stress might they decompensate more rapidly under stress" Tr p 3999

After the conclusion of the penalty phase testimony, the Appellant requested instructions on statutory mitigating factors 2 (mental or emotional disturbance), 6 (substantial impairment of capacity to appreciate criminality or to conform to requirements of law) and 7 (age and mentality at time of crime) Tr pp 4013-15 Deputy Solicitor Coulter stated

“As I understand the law that if any type of testimony is shown regarding mental disturbances, **the defendant is entitled to charges on two, six and seven** So we would have no objection to those three, as I understand it, or as I understood from the case law, it’s automatic, although I disagree with number, I believe it’s number six” Tr p 4015, ll 13-21 (emphasis added)

2739
X After the Solicitor disagreed, the trial judge stated “I don’t believe six is automatic, maybe in the case you read it might have been automatic, but not in every case Tr p 4016 The trial judge agreed to instruct as “appropriate on the facts of this case” on one, two and seven and decline six (and ten) Tr p 4016, ll 6-11

In State v Caldwell, 300 S C 494, 388 S E 2d 816 (1990), the court held under because evidence showed Caldwell was suffering under either an antisocial personality disorder or psychopathic personality who was not constrained by societal norms for behavior and unlikely to obey rules and if given the opportunity he would kill again, he was entitled to the instruction on “substantial impairment” of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law The court has consistently stated that a trial judge must reviewed all statutory mitigating circumstances and instruct any supported by the evidence State v Caldwell, supra, State v Bellamy, 293 S C 103, 359 S E 2d 63 (1987)

Here, unlike Caldwell, there is no evidence that his capacity to understand the criminality of his conduct was “substantially impaired” To the contrary the only evidence was that he fully

understood the criminality of the conduct by his flight and attempt to avoid capture. No assertion has been presented otherwise.

Similarly, there is no evidence that his ability to conform his conduct to the requirements of law was substantially impaired when the crime occurred. Dr. Evans only asserted that possible brain dysfunction as a result of possible head trauma could have been a factor and affect his ability to cope and deal with stress, but no testimony concerned substantial impairment of his ability to conform his conduct to the requirements of law, as in Caldwell. Here, there was no error.

Further, the use of the evidence was alternatively directed to be considered by the court in the nonstatutory factor. Therefore, if error, the error was harmless where a specific charge was given to consider his level of intellectual functioning as a result of the physical and/or emotional trauma. Tr. p. 4060, ll. 21-25. This is analogous to State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (1988), where the court found no error in the failure to instruct 2, 6, 7 where there was a specific instruction on voluntary intoxication. As in Plemmons, the issue of the effect of Hughey's functioning as a result of abuse and head trauma was clearly presented to the jury for consideration as mitigation. Nothing more is required.

C The failure to specifically object to the "no mercy" instruction on federal constitutional grounds

In his third specification of ineffective sentencing counsel, Hughey contends that his trial counsel were ineffective in failing to specifically object to a portion of the penalty phase instruction on federal constitutional grounds. Respondents submit that trial counsel was not deficient nor prejudicial under the Sixth Amendment in failing to object as the petitioner now

contends that he should have. As set forth below, prejudice cannot be proven where the South Carolina Supreme Court found in the direct appeal that the instructions as given were not confusing nor reversible error. He has failed in his burden under Strickland.

During the penalty phase portion of the trial, Judge Cole gave the following instruction on mitigating circumstances:

In arriving at your decision as to what the appropriate sentence would be in this case, you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the State Legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder. It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder.

A mitigating circumstance is neither a justification nor an excuse for the crime of murder. It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable.

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. The following statutory mitigating circumstances are set forth on your statutory instruction form. They are the same as to each of the counts of the indictment.

Those statutory mitigating circumstances are: The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense.

Now you are also permitted under the law to consider, [anesthesia] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder

Those that the defense contends should be considered are Any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt And you may recommend a sentence of life imprisonment and whether or not you find the existence of a statutory or non-statutory mitigating circumstance

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision

ROA p 4058, l 25 - p 4061 l 18 Further, the trial court charged

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist ***Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy***

ROA p 4062 ll 8-15

The defense counsel took exception to the judge's instruction on mitigating circumstances solely on the use of the phrase "the defense contends" ROA pp 4066-67 He asserted that the language "the defendant contends" should be "the law allows" ROA pp 4066 The trial judge responded that the defense misunderstood his comment because it related to those specifically that the defendant contends are non-statutory mitigating circumstances those that are not set forth in the statute and so those non-statutory mitigating circumstances that I referred to in that part of the instruction are those that the defendant contends should be considered as non-statutory mitigating circumstances" ROA p 4067 The defense counsel then generally repeated his request to charge eleven through eighteen ROA p 4068 The defense's request to charge 16 was a request to charge "you may consider whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all This is what has been traditionally referred to as a sentence of mercy" ROA p 4126

In the direct appeal to the South Carolina Supreme Court, Hughey, through appellate counsel Robert Dudek of the South Carolina Office of Appellate Defense, raised the following pertinent "question presented"

- 6 Whether the judge erred by instructing the jury that a non-statutory circumstance was "one which the defendant contends serves the same purpose" as a statutory mitigating circumstance, since this was an improper charge, and it did not inform the jury as a matter of law that they could consider these non-statutory mitigating circumstances?

In addressing this particular question, the South Carolina Supreme Court held

VI NON-STATUTORY MITIGATING CIRCUMSTANCES

Hughey argues the trial judge's instruction on non-statutory mitigating circumstances constituted reversible error. We disagree.

A jury instruction must be viewed in the context of the overall charge. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (citing Cupp v. Naughten, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368). The test for the sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean. Id. at 218, 499 S.E.2d at 215. Hughey argues the jury charge was confusing to a reasonable juror because it implies that non-statutory mitigating circumstances are not circumstances the law requires a jury to consider. The trial judge gave the following instruction on non-statutory mitigating circumstances:

Now you are also permitted under the law to consider — you should consider any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case.

A non-statutory mitigating circumstance is one which is not provided for by statute but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Those that the defense contends should be considered are any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in this case.

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision.

Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy (emphasis added).

Considering the jury charge as whole, a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment. Hughey contends the trial judge's instruction was erroneous because the charge defined non-statutory circumstances as those "the defendant contends" the jury should consider, not what the law authorizes the jury to consider. The jury charge adequately apprised the jury of the function of non-statutory mitigating circumstances because it

3
#44

repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming a recommendation. In fact the judge instructed the jury that they could recommend life imprisonment for "any reason or no reason at all." See State v. Atkins, 303 S C 214 399 S E 2d 760 (1990) (upholding a jury charge where the judge stressed the jury could recommend a life sentence "for any reason or no reason")

Moreover the jury charge in the present case is similar to other charges of non-statutory mitigating circumstances upheld by this Court. The jury charge authorized the jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. Similar jury instructions have been found adequate by this Court. See State v. Hicks, 330 S C 207 499 S E 2d 209 (1998) (upholding a jury charge which permitted a jury to impose a life sentence even if they did not find mitigating circumstances) State v. Sims, 304 S C 409 405 S E 2d 377 (1991) (jury charge was found proper where it authorized jury to consider any mitigating evidence presented) State v. Singleton, 284 S C 388 326 S E 2d 284 (1985) (instruction proper where judge states the jury may consider "any mitigating circumstances which are supported by evidence") Furthermore the trial judge went beyond the basic jury charge on non-statutory mitigating circumstances by providing specific factual examples of non-statutory mitigating circumstances such as the defendant's prior good acts and level of intellectual functioning

Hughey contends the jury instruction was confusing because it suggested that an act of mercy would have been an invalid reason for a life vote. The trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy" (emphasis added). This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error. See Singleton, 284 S C at 393, 326 S E 2d at 156, State v. Chaffee, 285 S C 21, 328 S E 2d 464 (1984)

The jury charge, reviewed in its entirety, is not confusing because it advises the jurors to consider all mitigating circumstance in making their recommendation. The non-statutory circumstances are repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law

State v. Hughey, supra

In Boyde v. California, 494 U S 370 (1990), the Supreme Court held that the Eighth

Amendment is satisfied where there is not a reasonable likelihood that the penalty phase

instructions would preclude consideration of relevant mitigating evidence offered by the petitioner. Accord, Calderon v. Coleman, 525 U.S. 141, 119 S.Ct. 500 (1998), Buchanan v. Angelone, 522 U.S. 269 (1998). In Buchanan the court held that the Eighth Amendment did not require that the jury be instructed on either the concept of mitigating evidence or on particular statutory mitigating factors. The instructions given there were constitutionally adequate because they did not preclude consideration of relevant mitigating evidence. In the instant case, Judge Cole's instructions surpassed any constitutional requirement by directing the jury to consider nonstatutory mitigation and specified such mitigation to consider including "any other evidence relating to a mitigating circumstance which you find to be appropriate." ROA p. 4060, l. 24 - p. 4061, l. 3. Accord, State v. Sims, 304 S.Ct. 409, 422, 405 S.E.2d 377, 384 (1991) (implausible that jury would have interpreted mitigation instruction to preclude consideration of mitigation evidence of Sims' background and character), State v. Bell, 305 S.Ct. 11, 21, 406 S.E.2d 165, 171 (1991), Eaton v. Angelone, 139 F.3d 990 (4th Cir. 1998). Recently, in State v. Hicks, 330 S.Ct. 207, 499 S.E.2d 209 (1998), the state court upheld a death sentence challenge to a mitigation instruction, even though the jury was not specifically advised it could impose a life sentence for any reason or no reason at all. The court therein found that considering the instructions, as a whole, a reasonable juror would not have understood to preclude consideration of mitigation or preclude a life sentence even if no mitigation was found.

Here, Judge Cole satisfied state and federal law in the instruction on mitigating circumstances.

In arriving at your decision as to what the appropriate sentence would be in this case, you are instructed that you must also consider any statutory mitigating circumstances. Therefore, what is a statutory mitigating circumstance?

It is a fact, an incident, a detail, or an occurrence which the State Legislature has declared by statute to be a circumstance which may make less or reduce the severity of the crime of murder It is a circumstance which may be considered as mitigating or extenuating the degree of moral culpability for the commission of the offense of murder

A mitigating circumstance is neither a justification nor an excuse for the crime of murder It is simply something which may lessen the degree of the defendant's guilt or make the defendant less blameworthy or less culpable

In making your determination as to whether or not to recommend a sentence of death or a sentence of life imprisonment, you should consider the following statutory mitigating circumstances The following statutory mitigating circumstances are set forth on your statutory instruction form They are the same as to each of the counts of the indictment

Those statutory mitigating circumstances are The defendant has no significant history of prior criminal conviction involving the use of violence against another person, two, the murder was committed while the defendant was under the influence of a mental or an emotional disturbance, and three, the age or mentality of the defendant at the time of the offense

Now you are also permitted under the law to consider, [anesthesia] you should consider, any non-statutory mitigating circumstances which have been shown to exist by the evidence in the case

A non statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder

Those that the defense contends should be considered are Any prior good acts of the defendant, the defendant's level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or

emotional trauma suffered as a child or as an adult, and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case

Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence of such of a circumstance or circumstances beyond a reasonable doubt. And you may recommend a sentence of life imprisonment and whether or not you find the existence of a statutory or non-statutory mitigating circumstance

In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and any non-statutory mitigating circumstances in arriving at your decision

ROA p 4058, l 25 - p 4061, l 18 Further, the trial court charged

Conversely, you may also recommend a sentence of life imprisonment even though you find at least one statutory aggravating circumstance beyond a reasonable doubt, and find no mitigating circumstances do exist. Simply stated, you may recommend a sentence of life imprisonment for any reason or for no reason at all other than as an act of mercy

ROA p 4062, ll 8 15

It was unclear what is the nature of Petitioner's current complaint that his counsel's objections to the instructions on mitigation were constitutional inadequate, despite the timely objection. ROA pp 4066-4068 His stated concern at the trial appeared to be related to asserting "the defendant contends" dilutes the impact of the request. ROA p 4066, ll 2024 As Boyde and Buchanan recognize the issue is not how much the various mitigation should be considered (or weighed) - the Eighth Amendment only requires that the evidence must be

considered. Here, the jury was directed specifically that they should consider both statutory and non statutory mitigating circumstances in the oral and written instructions in determining the verdict. ROA p 4061, ll 13-18, p 4063, ll 12-24

Contrary to the conclusion in the earlier petition for writ of certiorari and application, these mitigating circumstance instructions were not confusing. He ignores the view of the instructions as a whole in making the determination. As recognized in Buchanan, he ignores the setting where the jury had just completed a day of testimony from the Petitioner's family members, a social worker, and a psychologist presenting evidence to support both types of mitigating circumstances. He misreads the entirety of the instructions to suggest otherwise. The argument is without merit. The jury would have considered the evidence appropriate. Boyde, Buchanan

The Supreme Court in Lockett v Ohio, 438 U S 586, 98 S Ct 2954, 57 L Ed 2d 973 (1978), refined the requirements related to the consideration of mitigating evidence by a capital sentencer. Unlike the mandatory schemes struck down in previously by the Supreme Court in schemes in which all mitigating evidence was excluded, the Ohio system at issue in Lockett permitted a limited range of mitigating circumstances to be considered by the sentencer. The plurality nonetheless found this system to be unconstitutional, holding that "the Eighth and Fourteenth Amendments require that the sentencer not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U S , at 604, 98 S Ct , at 2965. A majority of the Court adopted the Lockett rule in Eddings v Oklahoma, 455 U S 104, 102 S Ct 869, 71 L Ed 2d 1 (1982), accord, Hitchcock v Dugger, 481

U S 393, 398-399, 107 S Ct 1821, 1824, 95 L Ed 2d 347 (1987), Skipper v South Carolina, 476 U S 1, 4 106 S Ct 1669, 1670, 90 L Ed 2d 1 (1986), and this Court has not altered the rule's central requirement "Lockett and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all " McKoy v North Carolina, 494 U S 433, 456, 110 S Ct 1227, 1240, 108 L Ed 2d 369 (1990) (KENNEDY, J , concurring in judgment), see Saffle v Parks, 494 U S 484, 490-491, 110 S Ct 1257, 1261, 108 L Ed 2d 415 (1990)

250
X
The Petitioner's earlier reliance on Saffle v Parks, *supra* is also misplaced The Supreme Court has three times declined to disapprove of instructions directing jurors not to be influenced by sympathy, *mercy*, or passion in deciding on the appropriate sentence for the capital defendant See Johnson v Texas, 509 U S 350, 113 S Ct 2658, 125 L Ed 2d 290 (1993), Saffle v Parks, 494 U S 484, 110 S Ct 1257, 108 L Ed 2d 415 (1990), California v Brown, 479 U S 538, 539, 107 S Ct 837, 93 L Ed 2d 934 (1987), see also Austin v Bell, 927 F Supp 1058, 1064-65 (M D Tenn 1996), Jamison v Collins, 100 F Supp 2d 647 (S D Ohio 2000) The Court has not construed the Lockett line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant Indeed, the Court has stated that "[i]t would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary " Saffle v Parks, 494 U S at 493, 110 S Ct , at 1263, see also California v Brown, 479 U S 538, 542 543, 107 S Ct 837,

840, 93 L Ed 2d 934 (1987) (permitting an instruction that the jury could not base its sentencing decision on sympathy) See Lesko v Lehman, 925 F 2d 1527 (3rd 1991)

The recent decisions of other courts enumerate that a 'mercy' instruction is not required at trial In Ladner v State, 584 So 2d 743, 761 (Miss 1991), the Mississippi court held that a defendant "has no right to a mercy instruction " Ladner, 584 So 2d at 761 See also Doss v State, 709 So 2d 369, 394 (Miss 1997), Walker v State, 671 So 2d 581, 613 (Miss 1996) The basis of these holdings is the understanding that "[t]he State must not cut off full and fair consideration of mitigating evidence, but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice " Holland v State, 705 So 2d 307, 352 (Miss 1997)

Similarly, in State v Young, 853 P 2d 327 (Utah 1993), the Utah court rejected a claim that under this Court's precedent in Defendant bases his claim on Penry v Lynaugh, 492 U S 302, 109 S Ct 2934, 106 L Ed 2d 256 (1989), Lockett v Ohio, 438 U S 586, 98 S Ct 2954, 57 L Ed 2d 973 (1978) and Eddings v Oklahoma, 455 U S 104, 102 S Ct 869, 71 L Ed 2d 1 (1982), all of which vacated the death penalty sentences of the respective defendants because the sentencing procedures used did not allow the sentencing bodies to hear and fully consider the mitigating evidence offered Defendant argued that these cases require a jury to consider sympathy for the defendant during the penalty phase and to consider any mercy or sympathy arising from the mitigating evidence in reaching their verdict The Utah court found that the defendant's reliance on these cases was misplaced It concluded that this Court had specifically rejected the argument that these cases require a jury to consider sympathy in reaching its verdict in Saffie The Court further rejected petitioner Park's reasoning that an antisympathy instruction

violated his rights because it barred the jurors from considering his mitigating evidence. It distinguished between allowing a jury to consider mitigating evidence and guiding jurors as to how they should consider the evidence. The Court upheld an antisympathy instruction because reliable, accurate, and nonarbitrary sentencing necessarily requires a "moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." The Utah court declared that it would follow the reasoning and holding of Saffle and hold that the federal constitution does not prohibit an antisympathy instruction, "*nor does it require an instruction that the jurors may be guided by mercy or sympathy*" *Id.*, at 363.

3-2
\$32

The clear majority of courts addressing the issue have agreed that a no-sympathy instruction is not unconstitutional in the penalty phase of a capital case. See Saffle, 110 S Ct at 1261, 1263, 108 L Ed 2d at 426, 428 (citing Byrne v Butler, 847 F 2d 1135, 1138-40 (5th Cir 1988), People v Emerson, 122 Ill 2d 411, 442-43, 119 Ill Dec 250, 263, 522 N E 2d 1109, 1122 (1987), cert denied, 488 U S 900, 109 S Ct 246, 102 L Ed 2d 235 (1988), State v Ramseur, 106 N J 123, 295-99, 524 A 2d 188, 275-77 (1987), State v Landrum, 559 N E 2d 710, 728 (Ohio 1990), State v Steffen, 31 Ohio St 3d 111, 125, 509 N E 2d 383, 396 (1987), cert denied, 485 U S 916, 108 S Ct 1089, 99 L Ed 2d 250 (1988), State v Owens, 293 S C 161, 169, 359 S E 2d 275, 279, cert denied, 484 U S 982, 108 S Ct 496, 98 L Ed 2d 495 (1987), State v Porterfield, 746 S W 2d 441, 450-51 (Tenn), cert denied, 486 U S 1017, 108 S Ct 1756, 100 L Ed 2d 218 (1988)).

In addition to Illinois, New Jersey, Ohio, South Carolina, and Tennessee, other state courts have held that giving a no-sympathy instruction in the penalty phase of a capital trial is not unconstitutional. E.g., In re Rupe, 115 Wash 2d 379, 798 P 2d 780 (Wash 1990), State v

Moen, 309 Or 45 786 P 2d 111 (1990), Fox v State, 779 P 2d 562 (Okla Crim App 1989), cert denied, 494 U S 1060, 110 S Ct 1538, 108 L Ed 2d 777 (1990), Woods v State, 547 N E 2d 772 (Ind 1989), State v Copeland, 530 So 2d 526 (La 1988), cf State v Clemmons, 753 S W 2d 901 (prosecutor reminded jury of nonexistent oath that it would make its decision without sympathy, prejudice, hatred, or fear, court said statement was incorrect (jury took no such oath), but also said sympathy is not a proper factor for the jury to consider in reaching its decision as to punishment), cert denied, 488 U S 948, 109 S Ct 380, 102 L Ed 2d 369 (Mo 1988)

 In Commonwealth v King, 554 Pa 331, 721 A 2d 763 (1998), the Pennsylvania court found that capital murder defendants were not entitled to an instruction advising jurors that they were permitted to consider feelings of sympathy and *mercy* for defendants in connection with the return of sentences, even though jurors were asked, during voir dire, about their ability to eschew sympathy and render a decision based on the evidence. The court, similarly to the instant case found that since trial court clearly instructed jurors that they were required to consider any evidence of mitigation concerning the character and record of the defendants and the circumstances of their offense

Defendant implicitly states that his counsel should have asserted that the failure of the instructions to inform the jury of its ability to impose a life sentence out of mercy is a violation of the Constitution. There is no Eighth Amendment requirement that the jury should be so informed. Our capital punishment doctrine is rooted in the principle that the Eighth and Fourteenth Amendment cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and freakishly imposed. See Lewis v Jeffers, 497

U S 764, 774 76, 110 S Ct 3092 3099, 111 L Ed 2d 606 (1990) Accordingly, where discretion is afforded a sentencing body on a matter so grave as the determination whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action Lewis, supra, 497 U S at p 774, 110 S Ct at p 3099, citing Gregg v Georgia, 428 U S 153, 189, 96 S Ct 2909, 2932, 49 L Ed 2d 859 In State v Melson, 638 S W 2d 342 at p 366, (Tenn 1982), the Tennessee court said, "[T]he idea that 'mercy,' could be extended to a defendant is incorporated in the instructions on mitigating factors, and the admonition against being ruled by passion or prejudice runs throughout " Thus, the instructions guide the jury in the exercise of its appropriate discretion and enables them to dispense a life sentence on the basis of the evidence they have heard and the instructions they have received

Here, the South Carolina Supreme Court found that the "trial judge told the jurors "you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy " (emphasis added) This argument is without merit because a judge's charge that the jury should not be guided by sympathy, prejudice, passion, or public opinion is not reversible error See Singleton, 284 S C at 393, 326 S E 2d at 156, State v Chaffee, 285 S C 21, 328 S E 2d 464 (1984) " Id Applying the Court's precedent in Lockett and its progeny, the South Carolina Supreme Court found that the jury charge, reviewed in its entirety, was not confusing because it advised the jurors to consider all mitigating circumstance in making their recommendation The non-statutory circumstances were repeatedly emphasized by the trial judge and are adequately defined according to current South Carolina case law The evidence that the Petitioner had previously emphasized in his appellate brief "that justified mercy" was adequately

considered by the jury based upon the instructions that required the jury to consider the evidence as a whole and in mitigation in making the decision on whether a life sentence was appropriate. The Constitution does not and should not require more. His counsel was not at constitutional deficiency in failing to object to the instructions in the manner collateral counsel now asserts. He has failed to show Strickland prejudice. The third specification is without merit.²

This matter must be dismissed pursuant to S.C. Code § 17-27-70(b) (1976) by the failure to allege facts to support his legal conclusion. Alternatively, this allegation is subject to dismissal pursuant to S.C. Rules of Civil Procedure, Rule 12(b)(6) ("failure to state facts to constitute a cause of action"). Alternatively, since the bare allegation is contradicted by the

² The Applicant, through counsel in his December 2006 "Amended Application" deleted a series of allegations set out in the initial application. Respondents submit that these claims have been abandoned by the Applicant by this amendment. These claims are as follows:

- B Requesting a "plain and ordinary meaning" instruction during the penalty phase rather than an instruction that life imprisonment means life without parole pursuant to State v. Simmons [Simmons v. S.C.] and the South Carolina statute,
- C The failure to secure petitioner's presence during all critical stages of the trial,
- D The failure to object to evidence petitioner attempted suicide following the victim's death since this evidence should have been excluded pursuant to Rule 403, SCRE,
- E The failure to properly investigate and prepare witness testimony,
- F Eliciting prejudicial guilt phase testimony that petitioner had been expelled from school since this evidence was irrelevant,

Respondents submit that each of these allegations, as set out in the initial application, must be dismissed for a failure to prosecute these allegations. As to the merits, Respondents would refer to its initial Return.

record, a hearing on an allegation is not required Norman v. State, 276 S C 278, 277 S E 2d 707 (1981)

VI Conclusion

WHEREFORE, Respondent makes the Return to the Amended Application for Post Conviction Relief

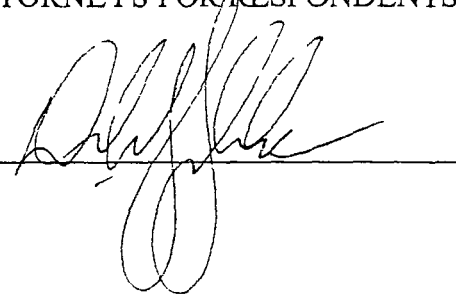
Respectfully submitted,

HENRY D McMASTER
Attorney General

JOHN W McINTOSH
Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By 

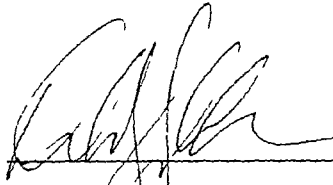
January 7, 2008

CERTIFICATE OF SERVICE

I, Donald J Zelenka, certify that I have served Respondents' *Return to Amended Application for Post-Conviction Relief* in the foregoing action by depositing in the United States mail, postage prepaid to the following

- 1 Teresa L Norris, Esq
 Blume, Weyble and Norris, LLC
 P O Box 11744
 Columbia, South Carolina 29211
 803-765-1044
- 2 E Charles Grose Jr
 600 Monument St , Suite 208 Park Plaza, Box P-133
 Greenwood, South Carolina 29646
 (864) 229-9505
 (864) 227-1104

This 7th day of January, 2008



DONALD J ZELENSKA

RECEIVED _____

ADMINISTRATIVE INSTRUCTIONS

782147

FILE _____

and HAVE _____

PO BOX _____

COPY _____

OTHER _____

OTHER _____

Petitioner, EN F-20-33

~~Respondent~~

~~Respondent~~

2000-CP-01-0212

IT IS SO ORDERED

Jean Hoefler Toal
Chief Justice

August 17, 2007
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)
John Kennedy Hughey)
v)
The State of South Carolina)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case Number 2000-CP-01-0212

Order



EMILY Y MCRAHAM
CLERK OF COURT

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2008 JUN 6 AM 11 38

This matter came before the Court on May 22, 2008 on the motion of the Applicant, John Kennedy Hughey, for approval of funding for an MRI and to continue the Post-conviction Relief (PCR) hearing beyond June 23, 2008 Mr Hughey waived his presence at the hearing Mr Hughey was represented by Teresa L Norris E Charles Grose, Jr, and Tara M Schultz The State was represented by Donald L Zelenka I make the following findings of fact and conclusions of law

Findings of Fact

Mr Hughey moved for approval of funding for an MRI and to continue the PCR hearing beyond June 23, 2008 The motions to continue also involved requests that Mr Hughey receive anti-depressants for two months prior to undergoing additional psychological testing In addition to argument of counsel, the Court considered the affidavits of Dr David Bachman, Dr Donna Schwartz-Watts, and Dr Tora Brawley Because of the parties' pre-trial brief, the Court was aware of the issues that the parties anticipate presenting at the PCR hearing

The Court will consider each request separately in this order

164

Treatment with anti-depressants

In support of the motion, Dr Brawley averred in her affidavit that Mr Hughey's IQ test scores decreased from 80 in 1997 to 69 in 2005. Dr Schwartz-Watts averred in her affidavit that it was her opinion that Mr Hughey had dementia, post-traumatic stress disorder (PTSD), and a low IQ at the time of the offenses in 1995. Dr Schwartz-Watts further averred that it was her opinion that he currently suffers from depression and is seeking that Dr Brawley re-test Mr Hughey's IQ after Mr Hughey has been on an anti-depressant for at least two months to make certain that Mr Hughey's low IQ testing scores are not influenced by depression.

The State, although noting that it did not stipulate to mental health opinions reflected in the proffered affidavits, did not oppose Mr Hughey's desire to conduct additional IQ testing after Mr Hughey has been medicated for two months with an anti-depressant.

I find that Dr Brawley's and Dr Schwartz-Watts' desire to conduct additional IQ testing after he has been treated for two months with an anti-depressant is reasonable and necessary in this case. I further find that in order to facilitate Mr Hughey's treatment with an anti-depressant, the Court should order Dr Schwartz-Watts to treat Mr Hughey for this purpose.

Request for MRI funding

Dr Bachman averred that he conducted a physical and neurological examination of Mr Hughey based upon assertions that Mr Hughey suffered multiple head traumas prior to the incident in 1995. In the affidavit, Dr Bachman averred that his examination



found elevated blood pressure and neurological deficits. He recommends an additional MRI to look for evidence of brain injury resulting from head trauma and evidence of strokes. Dr. Schwartz-Watts averred that an MRI is necessary to complete her evaluation.

Although it did not stipulate to the opinions, the State did not oppose the request for an MRI.

The cost of the examination is estimated to be \$2,439.00. The Court finds that this request is reasonable and necessary and should be paid by the Office of Indigent Defense pursuant to S.C. Code Section 17-27-160, even if the amount exceeds the statutory cap. The Court finds that up to \$3,000.00 should be approved for this purpose.

New Hearing Date

Mr. Hughey requested that the PCR hearing be continued beyond June 23, 2008. Based on the Court approving of the additional IQ testing to be conducted after Mr. Hughey is treated for two months with an anti-depressant, the June 23rd hearing is not possible. After consulting the parties and the court schedule for Abbeville County, the Court finds that the PCR hearing should be set to begin on October 13, 2008.

Order of Protection

The Court previously ordered that Mr. Grose and Ms. Schultz be protected beginning on Monday, May 26, 2008. Based on the PCR hearing being continued, it is no longer necessary for the protection to begin on this date. I find that Mr. Grose and Ms. Schultz should be protected beginning Monday, September 15, 2008 through the end of the capital PCR hearing in this case.



Conclusion

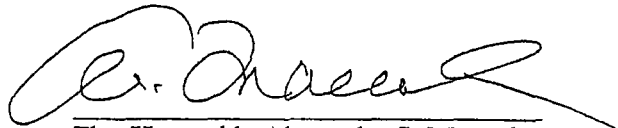
In order to facilitate Mr Hughey being treated with and anti-depressant for two months prior to additional IQ testing by Dr Brawley, the Court IT IS ORDERED that Dr Schwartz-Watts treat Mr Hughey for this purpose in keeping with the terms set out in this order

IT IS FURTHER ORDERED that up to \$3000 00 is approved for an MRI which shall be paid by the Office of Indigent Defense pursuant to S C Code Section 17-27-160 even if the amount exceeds the statutory cap

IT IS FURTHER ORDERED that the PCR hearing shall begin on Monday, October 13, 2008 at the Abbeville County Courthouse

IT IS FURTHER ORDERED that Mr Grose and Ms Schultz shall be protected beginning on Monday, September 15, 2008 through the end of the capital PCR hearing in this case

IT IS SO ORDERED



The Honorable Alexander S Macaulay
Presiding Judge, Eighth Judicial Circuit

June 4, 2008
Anderson, South Carolina

WORK COPY
~~STATE OF SOUTH CAROLINA~~
 7-1-08

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF ABBEVILLE	)	Case Number 2000-CP-01-212
	)	
JOHN KENNEDY HUGHEY (#5055),	)	
Applicant,	)	
	)	Applicant's Trial Brief
vs	)	
	)	
STATE OF SOUTH CAROLINA,	)	
Respondent	)	

To The Honorable Alexander S Macaulay, Presiding Judge, Eighth Judicial Circuit

I Introduction

The applicant, John Kennedy Hughey, files this trial brief to apprise the Court of the facts and legal principles relevant to four grounds for relief raised in the amended application for post-conviction relief. These grounds are

- A Despite substantial irrefutable evidence to support convictions for murder, counsel advised the applicant and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument that Applicant was guilty only of voluntary manslaughter, which was contradicted even by the Applicant's and the defense expert's testimony
- B Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Applicant's adaptability to confinement and evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired
- C Counsel failed to object to the trial court's improper instruction that the jury could "recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy." This instruction is contradictory to state law, which never requires a sentence of death, S C Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. *See State v Johnson*, 338 S C 114, 525 S E 2d 519 (2000), *State v Torrence* 305 S C 45, 406 S E 2d 315 (1991). This instruction is also contrary to the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or that otherwise weighs in favor of a sentence to life imprisonment rather than the death penalty.

- D Appellate counsel failed to properly brief the trial court's improper instruction that the jury could recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy. This instruction is contradictory to state law, which never requires a sentence of death, S.C. Code § 16-3-20, and specifically allows admission and consideration of mitigation requests for mercy. See *State v. Johnson*, 338 S.C. 114, 525 S.E.2d 519 (2000), *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). This instruction is also contrary to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, which require that the jury be allowed to consider any sentencing factor permitted by state law or that otherwise weighs in favor of a sentence to life imprisonment rather than the death penalty.

II Discussion

A Despite substantial irrefutable evidence to support convictions for murder, counsel advised the applicant and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument that Applicant was guilty only of voluntary manslaughter, which was contradicted even by the Applicant's and the defense expert's testimony

A claim of ineffective assistance of counsel must be examined under the standard established in *Strickland v. Washington*, 466 U.S. 688 (1984). The *Strickland* standard is satisfied if a petitioner establishes both that his attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694. See also *Williams v. Taylor*, 529 U.S. 362 (2000), *Pauling v. State*, 331 S.C. 606, 609, 503 S.E.2d 468, 470 (1998). With respect to capital sentencing, the petitioner must show only that "there is a reasonable probability that at least one juror would have struck a difference balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

At trial, counsel attempted to present evidence of voluntary manslaughter. Counsel made this attempt despite substantial irrefutable evidence to support the convictions for each count of murder. Counsel's decision was influenced by two misunderstandings of the law. The voluntary manslaughter defense angered the jurors

and tainted the sentencing phase of the trial by alienating the jurors with the incredible arguments during the trial and sentencing

1 Relevant facts contained in the trial record

a) Factual evidence presented by the state at trial

The state presented evidence that Hughey shot and killed Tesheka Jackson, the twenty-two year old mother of his two sons and partner of six years, as well as her Aunt Luevima Harris, a forty-eight year old female

The state alleged that on the day prior to the killings, December 3, 1995, Hughey discovered Jackson with another man, Michael Adams, in a car outside Jackson's grandmother's house. An argument ensued, Hughey pushed Jackson, Adams got out of the car and Hughey ran away while threatening to kill both of them. Jackson and her children spent the night with Harris. Trial Tr pp 2254-57, 2319-21, 2400-05, 2439, 2441, 2444-5, and 2651

The state argued that on the following morning Hughey was still enraged over Jackson's relationship with Adams. At approximately eleven o'clock, Hughey kicked in the front door of Harris's home while brandishing a shotgun. Trial Tr pp 2354-5, 2484, and 2487. Hughey had ridden a bicycle over that morning and waited in the woods outside the house for Harris's husband to leave. Trial Tr pp 2326, 2335, and 2905. He hid the shotgun there the night before. Hughey held the women at gunpoint for about an hour, at which time Harris received a call from her son, Marcus. She told him of the situation. He asked to talk to Hughey who refused to come to the phone. Marcus called back and, while on speaker phone, told Hughey to leave his mother alone. Receiving no response, he told his mother to hang up and he proceeded to call the police. Trial Tr

2212-19

The police were quickly dispatched. While *en route*, Harris managed to get dispatch officers on the phone. During that call, the dispatcher heard two gunshots. Trial Tr pp 2219-20, 2276-82, and 2348. The state contends it was at this point Hughey shot Harris in the forehead from a range of twelve inches, then reloaded the single-shot firearm and shot Jackson – who had also suffered a non-fatal stab-wound to the chest and bruising to the face consistent with being struck by a shotgun barrel. He shot Jackson in the head at point-blank range as she knelt on the bed in the bedroom. Prior to Harris's call, two shots had already been fired as Hughey pursued Jackson through the house. Trial Tr pp 2362-4, 2374, 2507-11, 2531-50, 2663 and 2816.

Hughey then left, leaving behind his one and three year old sons. He took Jackson's car and credit card, drove to Anderson, withdrew thirty dollars from Jackson's account, and drove to his sister's house in Gainesville, Georgia. Trial Tr pp 2322-25, 2372, 2454-7, 2469-71, 2516-7, 2701-6, 2710-12, 2799-2803, and 2888.

b) Factual evidence presented by counsel at trial

In contrast to the state's presentation, the defense conceded that Hughey had discovered Jackson and Adams outside her grandmother's house on that Sunday but contended Hughey neither pushed Jackson nor made any threats. Trial Tr pp 2626-8, and 3105-7. He left distraught and, by his own account, suicidal. Trial Tr pp 3112-3. He called Chris Burton crying because of the way Jackson had treated him. Trial Tr pp 2955-7 and 3107. Hughey later testified that this was only the second time he had ever cried, the first being when his mother was killed by a drunk driver. Trial Tr pp 3107-8. After he returned home later that day, Jackson paid him a visit. He refused to let her in

but told her he would call later which he did. The pair were somewhat reconciled and they agreed to meet at Harris's house the following morning so they could take their car to be repaired because the roof was leaking. Trial Tr 3115-20

Jackson agreed to pick up Hughey at 9:30 a.m. but because he overslept, he ended up cycling over, unarmed and without violent intent, later than planned. Trial Tr pp 3120-3. Outside the Harris residence, casual conversation between Hughey and Jackson turned into an argument over Adams. Jackson slapped Hughey while he was holding his youngest boy because it appeared as though he might reveal news of Jackson's recent infidelity to Harris. Harris told the couple to come inside in an attempt to mediate. Trial Tr pp 3125-28. At approximately midday, Marcus called and spoke with his mother for a number of minutes. Hughey wanted to talk to Marcus and tell him about Jackson and Adams. At this point, Jackson became violently angry at the prospect that her infidelities would be revealed to both Harris and Marcus. Trial Tr pp 3130-7. Jackson threw a vase and a knife at Hughey before attacking him with a butcher's knife. A struggle ensued. As a result of their altercation, Jackson and Hughey both suffered lacerations. Hughey ran out of the house with Jackson after him. The car jointly owned by Hughey and Jackson was parked outside the Harris home. Hughey retrieved a shotgun that had been kept in the car for months. Jackson spat in Hughey's face and ran into the house. Hughey followed. They struggled over the gun and a number of shots were fired. Marcus was on the phone at this time and heard the fight. Marcus called back to talk to all parties on the speaker phone and he suggested Hughey leave. Marcus then hung up to call the police after advising Harris to do the same. Harris called Abbeville dispatch. Hughey, provoked beyond reason by Jackson's actions, then aimed the gun at Jackson.

and in doing so, accidentally shot and killed Harris before shooting Jackson. Hughey testified at trial he was mad and did not know what he was doing. Trial Tr pp 3140-7

2 Factual evidence that will be presented in the PCR hearing

Hughey will show that trial counsel were ineffective because they based the guilt phase "defense" on voluntary manslaughter, due to their misunderstanding of the relevant legal principles. Specifically (1) A victim exercise of a legal right cannot be sufficient legal provocation for voluntary manslaughter, and (2) South Carolina requires that the sufficient provocation for voluntary manslaughter come from an act of the victim and not an act of a third person.

Robert Tinsley and Billy Garrett divided responsibility between the guilt phase and sentencing phase of the trial. Garrett was responsible for the guilt phase, Tinsley for the sentencing phase. According to Tinsley, Garrett was primarily responsible for developing the defense theory in the guilt phase. Tinsley dep p 41-42. According to Garrett, "[Garrett] was more the lead in the [guilt phase] of the case and [Tinsley] was more the lead in the [sentencing phase] of the case." Garrett dep p 24 and pp 8-9.

According to Garrett

[Tinsley] was focusing on what happens if [Hughey] gets convicted and [Garrett's] focus was on trying to keep him from being convicted or at least making non-capital, maybe manslaughter, you know, maybe no burglary, sudden heat of passion type of argument as opposed to an intentional going over there and killing aunt and wife with intent.

Garrett dep pp 9. Garrett was hoping to avoid the penalty phase, and testified, "[I]n my mind it was not a death penalty case if the jury believed what he said happened. It was more of a voluntary manslaughter accident kind of situation that probably ripened into murder with the wife but may very well have been manslaughter on the aunt." Garrett

dep pp 16-18 Garrett, therefore, decided that the guilt phase strategy was manslaughter

'at least to the aunt' Garrett dep p 9 Garrett said

It looked to me that you could argue, at least as to the aunt that he was shooting at her but with a transferred intent of not murder, malice aforethought, but instead an intent of sudden heat of passion, that you know, his wife had just cut him or gotten cut and she was hitting him and fighting and the children were there and, you know, he stupidly brought a gun up and shot

Garrett dep pp 10-11 Garrett continued, "[Hughey] shot the aunt accidentally I don't think he got involuntary manslaughter I think the transferred intent would have put it at a manslaughter, voluntary manslaughter, level" He added, 'And the reason not for her so much, after the aunt was shot, he had to reload - it was a single shot as I recall He had to load the gun and so we were concerned that there was sufficient malice aforethought by that time' Garrett dep pp 11-12

Garrett's theory was not supported by Tinsley's recollection of Hughey's account of the events Hughey had told Tinsley that he brought the shotgun to the crime scene Tinsley dep pp 34-35 When asked if Hughey ever told him why he brought the gun to the crime scene, Tinsley testified

He claimed he didn't bring it to kill her but I think to just maybe intimidate her, that sort of thing He thought maybe she was dating someone else or neglecting him, that sort of thing

Tinsley dep p 25 Tinsley testified that Hughey was concerned about "where the relationship was going" and that he was upset and angry Tinsley dep p 35 Despite knowing this, Tinsley not only joined the theory that Hughey accidentally killed Harris, but he also recalled the guilt phase "defense" was voluntary manslaughter as to both victims This defense involved "transferred intent" According to Tinsley, "The killing of Ms Harris, while not so much in the heat of passion with her it was with Ms

Jackson Tinsley dep pp 85-86

3 The ineffectiveness of trial counsel

“In failing to adequately research and understand the defenses available to [the] client, defense counsel rendered assistance that fell below the minimum standard set forth in *Strickland*’ *Benham v State*, 591 S E 2d 824 (Ga 2004) *See also Compton v State*, 202 S W 3d 416 (Tex Ct App 2006) (“Without a firm command of the law governing the case, a lawyer cannot render effective assistance to the defendant”) Counsel’s conduct was deficient because trial counsel “failed to achieve a rudimentary understanding of the well-settled law,” which “is a classic example of deficiency of counsel ” *Smith v Dietke*, 417 F 3d 438, 442 (5th Cir 2005)

Here, trial counsels’ defense ignored the fact that neither Jackson’s nor Harris’s actions could give rise to provocation as a matter of law Hughey was a trespasser in Harris’ home Jackson was a guest in Harris’s home Jackson’s and Harris’s conduct did not constitute provocation because they had the right to tell Hughey to leave, eject him by force, and defend themselves with deadly force if Hughey opposed them with deadly force *State v Brooks*, 252 S C 504, 167 S E 2d 307 (1969) “The exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence ” *State v Ivey*, 325 S C 137, 481 S E 2d 125 (1997) (lawful arrest by police officer does not constitute sufficient legal provocation) This legal principle is well settled *Eg State v Norris*, 253 S C 31, 168 S E 2d 564 (1969) (deceased defending his daughter from attack of accused is not sufficient legal provocation) *See also State v Wood*, 362 S C 135, 607 S E 2d 57 (2004) (lawful arrest by police officer does not constitute sufficient legal provocation), *Sheppard v State*, 357

S C 646, 594 S E 2d 462 (2004) (officer can use whatever force necessary to arrest fleeing felon without constituting legal provocation) Furthermore, trial counsels' belief that the killing of Harris could be voluntary manslaughter, based on the concept of transferred intent, is also an error of law "The provocation must come from some act of or related to the victim in order to constitute sufficient legal provocation" *State v Tucker* 324 S C 155, 171, 478 S E 2d 260, 269 (1996) The provocation cannot come from a third person *Harris v State*, 354 S C 382, 581 S E 2d 154 (2003) and *State v Locklaw*, 341 S C 352, 535 S E 2d 420 (2000)

Counsel's conduct, in addition to being legally erroneous, was not otherwise explained by reasonable strategy Because counsel's entire strategy for the pursuit of a voluntary manslaughter verdict was based on "an erroneous view of the law," counsel's strategy was not reasonable *State v Thiel*, 665 N W 2d 305 (Wis 2003) In short, when counsel's conduct is based on an erroneous understanding of the law "counsel made no tactical choice, unless a failure to become informed of the law affecting his client can be so considered" *Luchenburg v Smith*, 79 F 3d 388, 392-93 (4th Cir 1996)

Counsel was even aware that their defense strategy was doomed from the beginning and would likely alienate the jury Garrett testified, "Well, as far as my participation, I was wasted We knew that going in, that if we didn't get that theory through that we were in trouble as far as my participation out front" By "wasted," Garrett meant "loss of credibility" Garrett knew he couldn't participate in the penalty phase "Couldn't be me [be]cause I d lost credibility and the last thing we want to do is have a jury listening to me in mitigation and still being mad at me for lying to them about what happened Garrett dep pp 21-22 Tinsley was aware that the voluntary

manslaughter defense ‘was a stretch’ and could alienate the jury early on’ Tinsley dep pp 85 86 Both counsel were also aware that Don Girdnt, the defense expert called during trial, had problems with the voluntary manslaughter theory Hughey was prejudiced by counsel’s deficient conduct because counsel alienated the jurors during the trial with the unsupported argument of voluntary manslaughter As the United States Supreme Court described it in *Florida v Nixon*, 543 U S 175 (2004)

the gravity of the potential sentence in a capital trial and the proceeding s two-phase structure vitally affect counsel s strategic calculus Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant s guilt is often clear Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous In such cases, ‘avoiding execution [may be] the best and only realistic result possible’ ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10 9 1, Commentary (rev ed 2003), reprinted in 31 Hofstra L Rev 913, 1040 (2003)

In circumstances where guilt is clear, counsel must “strive at the guilt phase to avoid a counterproductive course,” *id* , such as presenting logically inconsistent strategies in the trial and sentencing *Id* (citing, *inter alia*, Lyon, *Defending the Death Penalty Case What Makes Death Different?*, 42 Mercer L Rev 695, 708 (1991) (“It is not good to put on a ‘he didn’t do it’ defense and a ‘he is sorry he did it’ mitigation This just does not work The jury will give the death penalty to the client and, in essence, the attorney”)) Thus, “[c]ounsel may reasonably decide to focus on the trial’s penalty phase,” *id* , and “counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in ‘a useless charade ’ See also *Ross v Kemp*, 393 S E 2d 244 (Ga 1990) (finding counsel ineffective for presentation of conflicting theories of the case)

Here counsel clearly engaged in ‘a useless charade that neither expected to succeed and both knew would alienate the jury in sentencing. Counsel’s opening statement in the trial asserted a voluntary manslaughter defense and asserted “facts” which were contradicted completely by the state’s evidence, by John Hughey himself in some instances, and even the defense expert. In closing statements during the trial, the solicitor argued correctly that, even if the jury believed Hughey, and even if it was “transferred intent” with respect to Harris, Hughey was still guilty of murder. The solicitor mocked the defense argument, especially the argument that Harris was essentially “in the wrong place at the wrong time” when she was in her own home. This mockery of the defense case continued in the state’s sentencing phase closing arguments where the solicitor repeated the notion that Jackson was “at the wrong place at the wrong time in her own home.”

Where, as here, the very matter as to which defense counsel has been ineffective becomes one of the linchpins of the prosecutor’s closing”), prejudice is established. See *Commonwealth v. Alvarez*, 740 N.E.2d 610, 618 (Mass. 2000).

B. Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Applicant’s adaptability to confinement and evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

1. Relevant facts contained in the trial record

a) Evidence of Hughey’s adaptability to confinement

Trial counsel did not present any evidence of Hughey’s adaptability to incarceration.

b) Evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

In the sentencing phase, the defense called several family members, some friends and two retained experts

Anthony Wilson

Hughey's sister Anthony Wilson testified that Hughey was the next to youngest in a family of seven children by two different fathers, Alan Carlyle and John Henry Hughey (a.k.a. Bozo). Anthony was the daughter of Carlyle, a white man. Bozo hated her and her two mixed race siblings because they weren't his children. He often beat them, called them half-white, deprived them of food and forced them out of the house at gunpoint. Trial Tr pp 3069-73. On one occasion Anthony caught Bozo with another woman and told their mother, Dollie Mae. Bozo threatened to kill her and chased her around the house firing a gun. Hughey witnessed this violence and, tragically, it was Bozo's gun that would bring about the deaths of Jackson and Harris. Trial Tr pp 3789-90.

Bozo, absent most of the work week, would come home drunk every Friday and be violent toward his wife. Having spent all his money, he would fight Dollie Mae all weekend about the fact that they could not afford groceries. Trial Tr pp 3774-5. As Anthony got older she left on the weekends to avoid Bozo, who she said was crazy. Trial Tr p 3791.

Although Bozo did not treat his own children as harshly as Carlyle's progeny, he was still not a good father and would often beat them, Hughey included, with whatever came to hand. Anthony testified that Bozo was an alcoholic and that sometime in the

early 1970s he got in a drunken fight with Dollie Mae. Bozo ran to his car and Hughey tried to get in with him. Bozo suddenly slammed the car into reverse and Hughey fell out, partially tearing the scalp off his skull. Hughey, who was only four or five years old at the time, had emergency surgery followed by a significant stay in the hospital. Hughey has a big scar on his head as a result of this accident. Trial Tr pp 3776-80

Too drunk to drive himself, Bozo would, on occasion, have Hughey drive his big pulpwood truck. Hughey was only a little boy at the time and too short to even reach the pedals. Inevitably, this practice led to a wreck. Trial Tr p 3780. In subsequent years Hughey suffered two more head injuries: one from a golf club to the face and another when he hit his head on the windshield in a car wreck. Trial Tr pp 3779-80

Hughey suffered a lot of headaches. According to Anthony, Hughey loved Dollie Mae. She was his emotional support and he was still living at home when she died. When Dollie Mae passed away, Hughey took to drinking and wandering the streets having "lost his mind." He did not care about himself anymore. He isolated himself from his family except on holidays, stopped dressing well and ceased working out which resulted in him losing a lot of weight. Anthony went to counseling after Dollie Mae's death. Hughey did not. Instead he would write on mirrors in her house, where he continued to live and also claimed to hear voices, about the day she was born, how she died and how he loved her. Trial Tr pp 3784-8

Scott Harrison

Scott Harrison, Hughey's brother-in-law testified that after Dollie Mae's death Hughey became distant and isolated from his family. In contrast to Anthony's recollection he called Bozo a good father, though he acknowledged that he drank too

much sometimes Trial Tr pp 3805-7 Scott also recalled that when Hughey arrived at Scott's and Gloria's house on the day of the killings Hughey had told them that he was in Georgia taking Jackson to visit a friend of hers who was in the hospital with AIDS Even when they received a phone call informing them of Jackson's death, Hughey wouldn't tell them what had happened He attempted suicide Only after this attempt, Hughey finally told them what happened that morning Trial Tr 3815-6

Chris Burton

Chris Burton, Hughey's childhood friend and Jackson's cousin, testified Hughey was always there for him Specifically, when his wife broke her arm, Hughey helped out around the house and cut their grass Trial Tr pp 3817-8 The only time he ever saw Hughey cry was after his mother's death, and it was around this time he started getting in trouble Trial Tr p 3827 On cross-examination by the State, Chris revealed Hughey had a daughter by another woman in 1991 and the child's family prevented Hughey from seeing her Trial Tr pp 3831-2

Nancy Ramey

Hughey's maternal aunt, Nancy Ramey, testified that Bozo was basically a good person though he did drink, was violent, and mistreated his step-children She recalled more than one occasion on which he'd struck Dollie Mae, and she was present when he drunkenly ran over Hughey It was questionable whether Hughey would survive this injury Finally, she stated that when Dollie Mae was run over and killed by a drunk driver it changed Hughey Trial Tr pp 3838-43

Reverend Wendell Cox

The defense also called Reverend Wendell Cox, pastor of the church Hughey

attended with Jackson and their children. Other members of the Hughey family also attended that church. According to the Reverend, Dollie Mae's death had an enormous impact on the family. Trial Tr pp 3850-1

Gloria Harrison

After Reverend Cox, Hughey's sister Gloria Harrison testified. She described how Dollie Mae was the family's sole support. Trial Tr p 3854. In contrast, Bozo, though always having good jobs and money, would spend everything he had on women and alcohol yet get angry when Dollie Mae asked him for anything. Bozo took out his anger on whomever was around but was hardest on his step-children. On one occasion he shot a hole in the roof of the trailer and the police were called. Trial Tr pp 3858-9

Gloria recalled the incident when Hughey was hit by the car-door and was in the hospital for an extended period. She also remembered him falling off a tractor and hitting his head, being in a car-wreck, and toppling off a pulpwood truck, having fallen asleep after sniffing gasoline at the age of six. According to Gloria, Hughey always complained of migraines and even suffered blackouts on several occasions. Trial Tr pp 3860-63

She recounted how Hughey was close to his mother and how he took care of her after Bozo got hit in the head with a back hoe and began to suffer constant seizures. After Dollie Mae died, Hughey did not receive counseling and became distant, drinking more and seemingly turning into his father. Hughey said he could hear his mother in the house. Gloria finished by telling the Court how much she loved her brother. Trial Tr pp 3864-74 and 3880

Jeff Yungman

Following Gloria was Jeff Yungman, an expert in social work. Trial Tr p 3902

He reviewed Hughey family records and interviewed Hughey's siblings. He related six occasions on which Hughey suffered head trauma: (1) in 1973, he fell out of a car; (2) in 1976, he fell off a tractor; (3) in 1981, he was hit in the head with a shovel; (4) in 1994, he was in a car accident; (5) in 1995 he was in another car accident, and (6) in 1995 he was hit in the head with a golf club. Trial Tr pp 3905-6. Yungman also testified to the following:

- 1) Hughey's older siblings would hide in the woods on weekends in fear of Bozo (Trial Tr p 3908),
- 2) Hughey started huffing gas at approximately six years of age and continued to do so for a period of one to two years (Trial Tr p 3909),
- 3) Hughey had an IQ of 80 (Trial Tr p 3909),
- 4) Hughey received no special education and dropped out of school at the age of sixteen (Trial Tr p 3910),
- 5) After his mother's death Hughey withdrew, suffered auditory hallucinations of her in the house, was easily provoked, drank heavily and would not go to his sister's house, where the death occurred (Trial Tr p 3912),
- 6) These conditions were consistent with Post Traumatic Stress Disorder (PTSD) (Trial Tr p 3913) although he would not actually make that diagnosis (Trial Tr pp 3955-6),
- 7) Hughey was hospitalized for six days at age four and had to have his scalp surgically reattached (Trial Tr p 3914),
- 8) It was rare to see this level of abuse and neglect in a household (Trial Tr p 3916),

- 9) Two of Hughey's paternal uncles were committed to a mental hospital (Trial Tr p 3916),
- 10) Hughey had two uncles who committed suicide (Trial Tr p 3916),
- 11) Bozo beat Dollie Mae while she was pregnant with Hughey (Trial Tr p 3917),
- 12) Bozo was hospitalized twice for seizures and alcohol abuse (Trial Tr p 3919),
- 13) Dollie Mae provided Hughey's entire emotional support (Trial Tr p 3920),
- 14) Hughey displayed suicidal ideation at least twice (Trial Tr p 3921),
- 15) After his mother's death, Hughey would hear her speaking to him and in turn write responses on the mirrors in her house (Trial Tr p 3921),
- 16) After Dollie Mae's death, Hughey reverted to violent behaviors learned as a child (Trial Tr p 3923),
- 17) Bozo's recklessness with Hughey, as evidenced by a number of "accidents," was no different than abuse (Trial Tr p 3925),
- 18) Hughey held down steady employment before his mother's death but not after (Trial Tr p 3928),
- 19) Hughey lost a job because of his drinking (Trial Tr 3949),
- 20) Hughey never went through the grieving process (Trial Tr p 3951), and
- 21) Hughey's PTSD affected his decision-making process in stressful situations and this explained his behavior on the day of the shootings (Trial Tr p 3926)

Dr James Evans

Finally, defense counsel presented Dr James Evans, an expert in psychology and

neuropsychology, who tested Hughey prior to trial. Dr. Evans testified that the examination lasted approximately six hours and that further tests demonstrated Hughey was not malingering. Trial Tr. pp. 3965-68. On first seeing Hughey, Dr. Evans noted there were only minor signs of rejection and depression. However, two weeks prior to trial he witnessed evidence of depression and decompensation. Dr. Evans related that Hughey hears his mother talking, but denies being crazy, and by all accounts she is repeating what she said to Hughey the last time they were together, that she is “keeping his dinner warm until he gets home.” Trial Tr. p. 3977. Dr. Evans’s opinion was that Hughey suffered from a dysfunction focused on the left side of his brain, possibly resulting from head trauma, affecting verbal learning and making him more susceptible to stress. Indeed, Dr. Evans testified Hughey functioned on a seventh grade level and his non-verbal IQ was in the average range whereas his verbal IQ was in the borderline range. Trial Tr. pp. 3970-74. In addition, Dr. Evans opined that Hughey possibly suffered from PTSD as well as a history of severe abuse, both of which can result in dissociation. Lastly, he suggested a possible diagnosis might be “depression with psychotic features” and that all of these characteristics may have been factors that influenced Hughey’s behavior on the day of the killings. Trial Tr. pp. 3981-89. His final words were that Hughey did not seem like a cold-blooded killer. Trial Tr. p. 4002.

The trial judge declined the defense request to charge the statutory mitigating factor. “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.” Trial Tr. pp. 4013-16 and 4118-9.

2 The ineffectiveness of trial counsel

Hughey will show that trial counsel was ineffective for two reasons (1) for failing to present evidence, known to them at the time of the trial of Hughey's adaptability to confinement, and (2) for failing to investigate and present evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

a) Evidence of Hughey's adaptability to confinement

Once a jury has convicted a person of murder, one of the jury's primary concerns in sentencing is whether a person will continue to be a danger if placed in confinement rather than executed *Simmons v South Carolina* 512 U S 154, 162 (1994) ("a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system"), *See also* Stephen P Garvey, *Aggravation and Mitigation in Capital Cases What Do Jurors Think*, 98 Col L Rev 1538, 1560-61 (1998) (jurors who actually sat in capital cases in South Carolina revealed in interviews that, among all the factors considered by capital sentencing juries, "the defendant's prior history of violent crime and future dangerousness" were considered to be the most aggravating) Thus, the United States Supreme Court has specifically recognized that adaptability to confinement is proper mitigating evidence *Skappeler v South Carolina*, 476 U S 1 (1986)

It was not long after Tinsley was appointed to represent him that Hughey was transferred from the Abbeville County Detention Center to the Greenwood County Detention Center According to Tinsley, Detention Center officials transferred Hughey as a safety precaution because of "potential conflicts [with] relatives of the deceased

coming in. Additionally, Greenwood had a more modern facility at that time that was better staffed, was better run, was more comfortable for a long pre-trial detention, and had better attorney-client meeting rooms. Tinsley dep , pp 16-19

Tinsley recalled that Hughey was a model inmate in the Greenwood County Detention Center. Tinsley confirmed this with Major Eidson and Lt. Allen, the director and the deputy director of the jail. Allen, who is now deceased, is a Vietnam Veteran and someone who would have made a good appearance as a witness. Hughey was allowed to move around the jail for attorney visits, had not tried to escape and had not committed any acts of violence against jail guards or other inmates. Tinsley dep p 69. Likewise, Garrett thought Hughey was a model inmate at the Greenwood County Detention Center, got along with the guards, and did not get into trouble at the jail. Garrett dep pp 55-56

Garrett knew adaptability was not presented in Hughey's case but could not recall why. Garrett dep pp 56. Tinsley, who was responsible for the sentencing phase strategy, did not present the evidence based on his misunderstanding of the law. He thought the law required the State to present future dangerousness before Hughey could present adaptability to incarceration. Tinsley's handwritten notes reflect this erroneous belief.

On or about September 8, 1997, the State served Tinsley with notice of the evidence they intended to present in aggravation. Tinsley dep pp 62-63 and ex 1 (a copy of ex 1 is attached). The state's notice included Hughey's alleged "propensity for violence, disregard for peace and good order and to commit such acts in the future." Tinsley underlined "commit such acts in the future." Next to this text, Tinsley wrote, "(i.e. future dangerousness) Lt. Allen adapt prison." Tinsley dep p 68-69 and ex 1, p

4 Tinsley's notes from the time of the trial further confirm this belief. In a note captioned "Possible mitigation order," Tinsley wrote Other Possible Mit Wit. Lt Allen J L Eidson Gwd Jail if st argues future dangerousness. Tinsley dep pp 72-75 and ex 18 (a copy of ex 18 is attached). Another one of Tinsley's handwritten notes regarding the sentencing phase themes captioned "Hughey," listed "favorable jailor" as a potential witness and, as a mitigation theme noted, "Adaptability (if future Dang)." Tinsley dep pp 78-79 and ex 19 (a copy of ex 19 is attached). Yet another note lists, "Adaptability (Maj Eidson, Lt Allen/Future Dang)." Tinsley dep p 79 and ex 20 (a copy of ex 20 is attached).

Tinsley acknowledged this evidence of adaptability to incarceration was available at the time of trial, is the type of evidence jurors consider as a reason for giving a life sentence, and "might have" affected the outcome of the sentencing phase of the trial. Not only was this evidence not presented, Tinsley failed to include Eidson and Allen on the witness list. Tinsley dep p 79-80 and ex 21. Tinsley cannot justify his failure to present this evidence. In discussing *Skapper v South Carolina*, 476 U.S. 1 (1986), Tinsley acknowledged that the law "did not require that the State present future dangerousness evidence in order to present adaptability." Tinsley dep pp 92-93.

In addition to Major Eidson and Lt Allen, there is substantial evidence that Hughey had good relationships with police officers and correctional officers and that he is, in turn, extremely adaptable to confinement.

Hughey spent nearly two years confined in the Greenwood County Detention Center waiting for his case to be tried. Hughey was an ideal inmate. During that time, he interacted with a number of guards. He never caused any problems, was cooperative and

respectful was peaceable and polite, and would assist the jailers in their jobs. The guards could count on Hughey to help calm other inmates and help prevent fights among inmates. On one occasion, Hughey calmed a fight by saying, 'It's not worth arguing.'

Hughey was the eyes and ears for the guards in his unit. If another inmate was involved in a fight or had contraband, Hughey would inform the guards in a quiet way. If something wasn't right on the unit, Hughey would slip the guards a note.

Records from the Greenwood County Detention Center confirm Hughey was a good inmate. Officials never cited Hughey for fighting or attacking guards. Hughey received only a few write ups for minor incidents such as arguing with other inmates, possessing contraband, excessive noise during a card game, using abusive language, and smoking.

Neil Henderson, who is now the Chief of the Abbeville Police Department, knew Hughey prior to his confinement. According to Henderson, Hughey often acted as an informant for both Henderson and the department. He never paid Hughey for information but knew he could go to him if he needed to know what was going on around town. Henderson used to pay Hughey for washing both his car and the department's vehicles.

Hughey was prejudiced because evidence of adaptability to confinement and lack of dangerousness in prison is powerful evidence, particularly when presented through credible witnesses such as confinement officers. See *Williams v. Taylor*, 529 U.S. 362 (2000); *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006).

b) Evidence supporting the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired

Under *Strickland*, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Strickland*, 466 U S at 690-91. “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing,” *Wiggins*, 539 U S at 533. See also *Rompilla*, 125 S Ct at 2463 (there is no requirement that defense counsel “scour the globe on the off chance something will turn up”), *Hall v Washington*, 106 F 3d 742, 749-50 (7th Cir 1997) (counsel need not have “a scorch-the-earth strategy”). Nonetheless, a decision not to investigate “must be directly assessed for reasonableness in all the circumstances,” *Wiggins*, 539 U S at 533 (quoting *Strickland*, 466 U S at 691), and “an attorney must look into readily available sources of evidence,” *Hall*, 106 F 3d at 749-50.

In *Wiggins*, the Supreme Court held that the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (1989) reflect “well-defined norms” for capital defense counsel’s performance. 539 U S at 524. The well-defined norms in capital cases require that defense counsel must start by collecting all available records for the defendant and his family. *Wiggins*, 539 U S at 524 (quoting 1989 ABA Guideline 11.4.1(C)) (“[I]nvestigations into mitigating evidence ‘should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor’”). See also 1989 ABA Guideline 11.4.1 (Counsel’s investigation for sentencing ‘should begin immediately upon

counsel's entry into the case and should include numerous topics)¹ 1989 ABA Guideline 11.8.6 ("Counsel should present to the sentencing entity or entities all reasonably available evidence in mitigation unless there are strong strategic reasons to forego some portion of such evidence")²

Because the scope of mitigation evidence which may be considered by the jury in sentencing is much broader than the range of relevant information which may be considered in determining guilt or innocence, counsel is under a greater obligation to discover and evaluate potential evidence of mitigation.' *United States ex rel. Emerson v Gramley*, 883 F. Supp. 225, 243 (N.D. Ill. 1995), *aff'd*, 91 F.3d 898 (7th Cir. 1996)

The responsibility of the lawyer is to walk a mile in the shoes of the client, to see who he is, to get to know his family and the people who care about him, and then to present that information to the jury in a way that can be taken into account in deciding whether the client is so beyond redemption that he should be eliminated from the human community

Battenfield v Gibson, 236 F.3d 1215, 1229 (10th Cir. 2001) (quoting Stephen B. Bright, *Advocate in Residence: The Death Penalty As the Answer to Crime: Costly, Counterproductive and Corrupting*, 36 Santa Clara L. Rev. 1069, 1085-86 (1996))

In assessing whether counsels' conduct was reasonable in both *Williams* and *Wiggins*, the Court held that when counsel fails to adequately investigate or to make a

¹ Collect information relevant to the sentencing phase of trial including but not limited to: medical history (mental and physical illness or injury of alcohol and drug use, birth trauma and developmental delays); educational history (achievement, performance and behavior); special educational needs including cognitive limitations and learning disabilities; military history (type and length of service, conduct, special training); employment and training history (including skills and performance and barriers to employability); family and social history (including physical, sexual or emotional abuse); prior adult and juvenile record; prior correctional experience (including conduct or supervision and in the institution/education or training/clinical services); and religious and cultural influences. 1989 ABA Guideline 11.4.1(D)(2)(C)

The topics listed for consideration include: medical history; employment and training history; family and social history; information on rehabilitative potential; and expert testimony concerning the information and the resulting impact on the client relating to the offense and to the client's potential at the time of sentencing. 1989 ABA Guideline 11.8.6(B)

reasonable decision after investigation counsel's performance is deficient because counsel cannot have a valid 'strategy' not to pursue evidence that is unknown to counsel due to a failure to adequately investigate. See *Williams*, 529 U.S. at 396 ("the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams favor was not justified by a tactical decision to focus on Williams' voluntary confession" because "trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background"), *Wiggins*, 539 U.S. at 527-28 ("counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible").

Like counsel in *Williams* and *Wiggins*, Hughey's trial defense counsel's conduct was deficient because the evidence reveals that counsel failed to adequately investigate and the "failure to investigate thoroughly resulted from inattention, not reasoned strategic judgment." *Wiggins*, 539 U.S. at 526. In essence, counsel failed to investigate background evidence or mental health issues for sentencing until shortly before trial because (1) counsel believed the case would be resolved by a negotiated plea, and (2) counsel believed erroneously, based only on their own interactions, that Hughey did not have low intelligence or mental health issues.

Tinsley knew Hughey prior to the murders through representing him on "a couple of minor things like a DUS and that sort of thing." Tinsley dep. p. 13. These cases ended in guilty pleas. During this previous representation, Tinsley did not learn anything about Hughey's background "that stood out." Tinsley probably had met Hughey's sister, Dorothy Hughey, who is the family member Tinsley has "known the longest and the best." Tinsley dep. p. 15-16. Rather than investigate Hughey's background and develop

mitigation evidence, Tinsley was convinced that the case would end with a negotiated guilty plea

After Tinsley was appointed to represent Hughey, Chief Deputy Solicitor Mike Coulter 'pretty quick[ly]' started talking about seeking the death penalty Tinsley dep pp 20-21 According to Tinsley, the prosecution considered it a capital case because of "the burglary" and "the killing of more than one person" Tinsley dep p 23 Tinsley, however, never "thought it was a capital case" Tinsley "felt that it wasn't a capital case because of the domestic nature of the dispute between Mr Hughey and his girlfriend" Tinsley dep p 21 Tinsley testified

I've just seen so many – I've handled worse premeditation, malice with forethought type cases that weren't treated as death penalty cases or some that were A number that were that I was able to plea – work out a plea on, light sentence type plea

Tinsley dep p 22 In an effort to prevent the state from seeking the death penalty, Tinsley "offered three consecutive life sentences under burglary, murder and murder" Tinsley dep p 39 He said that plea negotiations were "ongoing" including "during the trial" Tinsley dep p 41 In plea negotiations, Tinsley approached both Solicitor Townes Jones, who Tinsley believed "was pretty flexible in the matter," and Coulter, who Tinsley felt was "pushing it" as a capital case Tinsley dep p 39 According to Tinsley, "They considered [Hughey's offer to plead guilty] and took it to the victims" on more than one occasion, but Jackson's mother, "was adamant in not wanting anything short of a capital sentence" Tinsley dep pp 40-41 As discussed above, Garrett was hoping to avoid the penalty phase with the voluntary manslaughter defense" Garrett dep pp 16-17

Whether counsel expected a negotiated plea or a manslaughter verdict counsel s

conduct was deficient in failing to prepare for sentencing from the beginning of the case. See e.g. Cave v Singletary, 971 F.2d 1513 (11th Cir. 1992) (counsel ineffective for presenting trial defense that was based on a misunderstanding of the the felony murder rule and failing to prepare for sentencing because she was under the ‘grandiose, perhaps even delusional belief’ that the defendant would be acquitted). *See also Hamblin v Mitchell*, 354 F.3d 482 (6th Cir. 2003), *Blake v Kemp*, 758 F.2d 523 (11th Cir. 1985).

In a late effort to develop strategy for the sentencing phase, Tinsley retained Paige Tarr, a mitigation specialist, Jeff Yungman, a social worker, and Dr. Jim Evans, a psychologist. Tinsley waited until mere months before Hughey’s capital trial to involve these professionals.

Tarr assisted Tinsley by “going through a lot of the family history, mitigation, relationships, [and] criminal records.” Tinsley saw Tarr as the sentencing phase “coordinator” and as someone who would recommend “other experts.” By the time Tinsley involved Tarr, it was too late for Tarr to provide much assistance. Tarr’s first time sheet entry is May 14, 1997. On June 17, 1997, Hughey signed a release for Tarr to have access to his medical records. Tarr’s affidavit to be used to support defense funding requests was not obtained until August 15, 1997. Tinsley dep. pp. 42-46 and ex. Numbers 8 (Tarr’s affidavit), 9 (release for Tarr to get records), and 10 (Tarr’s time sheets).

Tarr put Tinsley in touch with Yungman. The letter of engagement retaining Yungman is dated September 10, 1997. Tinsley dep. pp. 46-47 and ex. 12. Tinsley recalls that Yungman “spent time with [Hughey], interviewed him, and testified.” Tinsley dep. p. 43. Yungman’s role was “to explore the limitations of John Hughey and

his inability to cope with stress with pressure and ways he might react to stress, pressure' Tinsley dep p 46 Yungman sent Tinsley a draft of Hughey's social history on October 8 1997 Tinsley dep p 47, ll 12-25 and ex 13 According to his time sheet, all of Yungman's work in the case was done during October 1997, the month of Hughey's trial Tinsley dep pp 48-49 and ex 14

Dr Evans was also retained on the eve of trial Although the trial court authorized funding for the defense to retain a psychologist on May 5, 1997, Dr Evans's first psychological assessment was not completed until September 27, 1997 Tinsley dep pp 49-51 and ex 5 and 6

While a psychiatrist did not testify at trial, the defense applied for and received funding for such an expert Tinsley dep p 49-50 Both Tinsley and Garrett failed to recognize the need for a psychiatrist until it was too late to help the case Tinsley acknowledged that a psychiatrist was retained "later than it should have been" Tinsley "got a little too close to [Hughey]" and made some "assumptions that could have been inaccurate in terms of need for a psychiatrist" Tinsley dep p 51 For example, Tinsley was surprised when Dr Evans determined that Hughey had a borderline IQ Tinsley dep pp 52 Tinsley eventually retained Dr Don Morgan, a forensic psychiatrist, but did not get him involved in the case until the week of the trial

In the months prior to trial, Garrett did not see the need to spend money on a psychiatrist Garrett dep p 43 While Tinsley saw Hughey as "simple but competent," Garrett, on the eve of trial, 'had some questions about his competency' and involved Dr Katrina Wright, a clinical psychologist Tinsley dep p 56-58 Garrett testified, 'looking at the late hour of this I wasn't real happy with what our level of knowledge was on this,