

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

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had been cut and location of castoff blood in the front bathroom and her location in the bedroom R 3280 Each of these were consistent with Hughey's testimony

He opined that this was a domestic homicide R 3282 He further opined that the episode as described by Hughey could have been accomplished between 12 02 and 12 04

On cross-examination, he confirmed that in his opinion it did not appear on this incident that there was a burglary R 3300 02 He stated that there was an alternate explanation for how the wood split at the door, which was the struggle with Ms Jackson R 3303 He stated that he knew that it was not true that Hughey kicked in the door and considered the state's theory as "fantasying" R 3305, 3311 Girndt stated that there were alternate theories to the state's theory about the case R 3308 09 Girndt further opined that the hallway was narrow and that it would be difficult for two people to pass through it together R 3315-16 Girndt also re affirmed his opinion that the gun that killed Ms Harris was a distance four feet R 3226 27 Girndt also stated that there were various possibilities of how Ms Jackson was located when she was shot R 3331 33 Girndt opined that he could not state where Hughey was standing when Jackson was shot in the bedroom R 3347-48 Also, R 3352

On re direct examination, Girndt confirmed his opinion that the shooting and cutting occurred after the first phone call, supported by Hughey's explanation that there was a discussion about a gun in his pocket and that she did not say it was a

shotgun R 3355 He further opined that it was logical based upon the evidence that Ms Jackson initially ran into the bathroom and then into the bedroom R 3358 59

He further rejected that prosecutor's claim that anyone was shot in the back of the head or execution style R 3361 Particularly, he noted that the assertion, though presented by the pathologist testimony, was inconsistent with the written autopsy report R 3362-64 He noted that the evidence was not inconsistent with at the time Ms Harris was shot , with someone passing her on the other side down the hall to the bedroom area and that they could have been lined up at the time of the shooting R 3364-65 This was consistent with the defense theory

ANALYSIS

There are certain salient facts which defeat the Applicant's claim of either deficient performance or prejudice

- 1 The trial judge gave a charge on manslaughter R 3465-67, 3488 89
- 2 The trial judge gave a charge on transferred intent as it related to manslaughter R 3467-68
- 3 The Applicant's expert witness, Donald Girndt, agreed that the circumstances leading to the death of Ms Harris from Hughey were consistent with his conclusions, particular based upon the location of the body, the nature of the physical are and the fact that the blood of Ms Jackson being outside of the door meaning that they were fighting while the door was open - consistent with Hughey's testimony R
- 4 Counsel did a reasonable investigation of the facts

- 5 Counsel did a reasonable investigation of the law of manslaughter and transferred intent
- 6 The Applicant concurred in counsel's theory and was adamant that he did not commit burglary or larceny of the house and did not intend to hurt Ms Harris
- 7 Had counsel been successful in limiting the Harris killing to manslaughter and received an acquittal in burglary and larceny - no statutory aggravating circumstances would have remained to authorize a death penalty, even if Hughey was convicted of murder involving Ms Jackson
- 8 The defense argued that that at the time of the killing of Ms Harris, Hughey's intent was to shoot Ms Jackson after she had thrown a vase, a knife and came at him with a knife and then after he retrieved a gun continued to taunt him with the knife, spit at him and then a fight began "in sudden heat of passion " ROA 3430 31 The was argued on a theory of transferred intent ROA 3432
- 9 The Applicant testified that he was guilty of manslaughter and the defense requested that he be convicted of manslaughter ROA 3434
- 10 Appellate counsel Dudek referred to the instant case is a classic case of voluntary manslaughter in his pleadings in the direct appeal wherein the Supreme Court found the manslaughter charge given was adequate and did not conclude manslaughter was not appropriately instructed based upon the facts

In his current memorandum, Hughey contends that the defense was defective concerning any assertion of voluntary manslaughter because there was an absence of sufficient legal provocation because a victim's exercise of a legal right cannot be sufficient legal provocation. He focuses upon counsel Garrett's testimony that 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.

Respondent admit that there was evidence by which the jury could and did find the existence of malice murder beyond a reasonable doubt and that therefore these actions do not support voluntary manslaughter. However, that conclusion does not undermine defense counsel performance's in making a reasonable investigation of the facts and law and to present the best defense available. Contrary to the underlying premise of the Applicant, the presentation of a factual defense in the guilt phase of a capital case cannot be thwarted merely because there may be a penalty phase. Here, the defense team was faced with a struggle to present the Applicant's version in the best possible light against a conflicting theory presented by the state. As stated before, counsel decision was not and admitted struggle to come up with some defense to the charges (where none ultimately was determined to exist by the jury) was not based upon ignorance or neglect. It was based upon a search for the facts in their investigation, guided by Hugheys own comments and recollection of the events, the assistance of a forensic crime scene analyst who found support in Hughey's version and a rejection of a portion of the state's version. In addition it was based upon a reasoned search for the applicability of the law which the trial judge ultimately concurred in. Counsel cannot be faulted for the failure of the result where his actions were zealously in pursuit of his client's interests in avoiding a death sentence.

“Voluntary manslaughter is the unlawful killing of a human being in sudden heat of passion upon sufficient legal provocation ” *State v Cole* 338 S C 97, 101, 525 S E 2d 511, 513 (2000) Heat of passion alone will not suffice to reduce murder to voluntary manslaughter Both heat of passion and sufficient legal provocation must be present at the time of the killing *Cole*, 338 S C at 101, 525 S E 2d at 513

“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, and produce what, according to human experience, may be called an uncontrollable impulse to do violence ” *Id* at 101-02, 525 S E 2d at 513 (quoting *State v Byrd* 323 S C 319, 474 S E 2d 430 (1996))

“[M]ere words, no matter how opprobrious, are insufficient to constitute adequate legal provocation when death is caused by the use of a deadly weapon ” *State v Rogers* 320 S C 520, 525, 466 S E 2d 360, 362 (1996) Further, merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation *See State v Johnson* 324 S C 38, 40-41, 476 S E 2d 681, 682 (1996) (holding that the trial judge properly refused to charge voluntary manslaughter despite testimony that individuals approached the defendant as they were “trash talking” and that one of the individuals removed his hat and “stepped out a little bit,” demonstrating a willingness to fight, because there was no evidence that anyone made an overt threatening act toward the defendant) When “death is caused by use of a deadly weapon, the offending words must be accompanied by an overt,

threatening act ” *Id* at 525, 466 S E 2d at 362-63 (quoting *State v Lowry* 315 S C 396, 399, 434 S E 2d 272, 274 (1993) (internal quotations omitted))

Moreover, “[t]he 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, 142, 481 S E 2d 125, 127 (1997) “A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter ” *State v Shuler* 344 S C 604, 632, 545 S E 2d 805, 819 (2001), *State v Tyson* 283 S C 375, 379, 323 S E 2d 770, 772 (1984) (holding that the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted an armed robbery showed that the victim was defending himself) See also, *State v Holland*, 2009 WL 2591257, 3 (S C App) (S C App ,2009) ¹³

The South Carolina Supreme Court recently considered the propriety of manslaughter instructions in *State v Wharton*, 381 S C 209, 214-215, 672 S E 2d 786, 788 (S C ,2009) In *Wharton*, the Court concluded that there was no evidence in the record of sufficient legal provocation Testimony showed that Wharton was in a rage after his argument with Suber and that several people were trying to calm him After attempts to calm him failed, Wharton deliberately instructed someone to bring him a gun, *despite there being no threat of another person with a weapon* There was no evidence showing Victim provoked Wharton, and although there was evidence that Wharton and Shaw argued and exchanged words, there was no evidence

¹³In *Holland*, the Court recently concluded that “the requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore the overwhelming, clear evidence of Holland's mission of violence against Koehler-a state of mind that began before Koehler even stepped out of Caruthers' vehicle ”

Shaw posed a threat to Wharton either by possessing a weapon or through hostile acts *See State v Byrd* 323 S C 319, 322, 474 S E 2d 430, 432 (1996) (holding that where death is caused by the use of a deadly weapon, words alone, however opprobrious, are not sufficient to constitute a legal provocation, but words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter) The Court concluded that while Wharton may have been in a rage and acting under a sudden heat of passion, there is no evidence of sufficient legal provocation *See State v Pittman* 373 S C at 573, 647 S E 2d at 168 (recognizing that both heat of passion and sufficient legal provocation must be present at the time of the killing)

Three critical cases are frequently considered in whether a manslaughter instruction should be given *State v Knoten* 347 S C 296, 555 S E 2d 391 (2001), *State v Lowry* 315 S C 396, 434 S E 2d 272 (1993), *Carter v State* 301 S C 396, 392 S E 2d 184 (1990), *overruled on other grounds by Brightman v State* 336 S C 348, 520 S E 2d 614 (1999), and *State v Gilliam* 296 S C 395, 373 S E 2d 596 (1988)

In *Knoten* our Supreme Court held that a jury charge on voluntary manslaughter was required when the evidence included a confession that showed sufficient legal provocation despite other evidence showing that the defendant later recanted the confession *Id* at 308-09, 555 S E 2d at 397-98 See, *State v Commander* 2009 WL 1676014, 4 (S C App) (S C App ,2009) One of Knoten's given to police indicated that the victim cut the defendant with a knife and chased him out of her apartment into the frigid weather while he was naked and that he reached into his trunk to obtain a metal pipe, presumably to defend himself as he went back into the apartment to retrieve his clothes 347 S C at 303-04, 555 S E 2d at 395 As he

entered the apartment, the victim cut him with a knife a second time, and the defendant then hit the victim on the head with the metal pipe 347 S C at 304-05, 555 S E 2d at 395-96

Unlike the evidence of the victim's second assault of the defendant in *Knoten* recently in *State v Holland*, the court determined that there is simply no evidence that any action of Koehler after he retreated from the bar precipitated a new provocation rising to the level of "legal provocation," sufficiently distinct from any provocation Holland had already experienced inside the bar In the instant case, Hughey stated that there was a renewed struggle after he returned to the house after both Jackson and Hughey had gone outside after the initial assault and Jackson continued brandishing the knife, before the struggle again began resulting in the first gunshot and Ms Harris's death

In *Lowry* there was testimony that the victim moved toward the defendant in a menacing fashion with his arms and hands outstretched toward the defendant as if to grab him 315 S C at 398, 434 S E 2d at 273 The Lowry Court stated that this testimony tended to show that the victim was about to **initiate** a physical encounter when the shooting occurred 315 S C at 399, 434 S E 2d at 274 Contrasting that was no testimony in *State v Holland* that could be similarly characterized In the instant case, Ms Jackson was still brandishing the knife

In *Carter* the defendant's heat of passion was provoked by the victim's striking the defendant and forcefully ejecting him from the victim's house 301 S C at 397, 392 S E 2d at 185 And in *Gilliam* the defendant's heat of passion was provoked by the victim's firing a gun at the defendant 296 S C at 397, 373 S E 2d at 597 But in *State v Holland*, the Court of Appeals found that Holland's rage was provoked by a mere verbal argument inside a bar, which does not rise to the level of legal provocation Again, there is no **reasonable** inference of a specific,

identifiable hostile act of victim Koehler that posed a genuine threat to Holland. However, in the instant case, Hughey he was initially provoked by the vase and knife assault and it continued as he returned with Jackson into the house and the struggle continued when Mss Jackson refused to put the knife down.

A trial judge may not exclude the offense of voluntary manslaughter if the defendant and victim were in a heated argument, and the decedent was about to initiate a physical encounter when the shooting occurred. *State v Johnson*, 333 S C 62, 508 S E 2d 29, 31 (1998), see *State v Wiggins*, 330 S C 538, 500 S E 2d 489 (1998)[holding the evidence tended to show the defendant acted in sudden heat of passion where the defendant was in a heated argument with the victim and feared for his life because the victim threatened him], *Lowry*, 434 S E 2d 272 [holding a voluntary manslaughter charge was necessary where the defendant and the victim were in a heated argument and the victim was about to initiate a physical encounter when shooting occurred], *State v Davis*, 278 S C 544, 298 S E 2d 778 (1983)[holding a voluntary manslaughter charge was proper where a witness testified that defendant and victim had been fighting], see also *State v Franklin*, 310 S C 122, 125, 425 S E 2d 758, 760 (Ct App 1992)[mind can be rendered incapable of cool reflection by “exasperation, rage, anger, sudden resentment, or terror”]

The Applicant takes issue with the defense team’s analysis of the existence of the defense of manslaughter as a baseless offense. What counsel conceded was that it was a factually close defense that there were successful in having the trial court instruct the jury to consider. It was not influenced by an error of law but it was a recognition that it was a close call.

Cooling Off Period

The Applicant contends that counsel should have recognized that there was a sufficient cooling off period to remove the possibility of manslaughter. He contends that there was a break when Hughey left the front steps and returned with the shotgun and asserted that he was trying to get Jackson to drop the knife. The question in this period was whether there was incontestable of “cool reflection” after the initial assault or was Hughey acting either under a continuous heat of passion or a renewed heat of passion due to his wife’s wielding of the knife accompanied by the verbal threats that she would get him leading to the confrontation at the door. As ultimately proven beyond a reasonable doubt by the state, there was a sufficient cooling off period. Yet defense counsel’s assertion was that heat of passion was continuing throughout the period as the victim continued wielding the knife and making threats throughout as they fought and struggled over the weapons. Counsel was not deficient in seeking this charge.

The Applicant relies upon opinions of the Court that occurred subsequent to Hughey’s trial to suggest it was deficiency. In *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (200), the Court found that a period of three to five minutes constituted a sufficient cooling off period. In *Cole*, a fight occurred between the victim and the defendant at the victim’s home. *Id.* Focusing on the actions of the defendant in the intervening time between the provocation and killing (as distinguished from the quantity of time that passed), the Court found that the actions taken by the defendant to go out to his car, get a knife and return to fatally stab the victim indicated “cool reflection.” *Id.* The facts in *Cole* demonstrated cooling off as a matter of law, especially since the defendant himself admitted that “he had enough time to get his head together.”

Unlike Cole, while Hughey was at the car, Jackson continued in her assault by wielding the knife that was a part of her attack accompanied by the verbal threats. Although there may

be evidence within the defense theory of deliberation by hoping that she would drop the knife with the showing of the gun, he similarly noted his fear by the continuing threats within his testimony

The Applicant contends that the short time frame was enough to remove manslaughter. However, there is no bright-timeline as he may suggest. In *State v Pittman*, 373 S C 527, 575, 647 S E 2d 144, 169 (S C ,2007), the Court held that the law has not defined a bright-line rule for what constitutes a sufficient time for cooling off, the Court indicated that whether the defendant's actions during the intervening time between the provocation and the killing indicates the absence of sudden heat of passion is an appropriate question for the court as a matter of law. See *State v Walker* 324 S C 257, 261, 478 S E 2d 280, 281-82 (1996) (finding that the defendant demonstrated cool reflection through his actions between the alleged provocation and the killing), and *State v Byrd* 323 S C 319, 322-23, 474 S E 2d 430, 432 (1996) (holding that the defendant's actions between the alleged provocation and killing did not support a finding of sudden heat of passion). See also, *State v Smith*, 609 S E 2d 528 (S C S Ct 2008) (cert pending) (defendant hears allegations of victim molesting child in morning, goes to work and other activities, and then does not violently confront victim till evening “Sufficiently reasonable time” had passed to allow passions to cool)

However, the dissent recognized that the Court in *State v Goodson* 140 S C 357, 138 S E 816 (1927) surveyed the law related to “cooling off” in reversing a murder conviction because the trial court refused to charge voluntary manslaughter. In *Goodson* the defendant's passion was incited on Tuesday afternoon and the victim shot and killed the next afternoon. The *Goodson* court cited these passages from prior decisions, with approval

In 13 R C L , 790, we find

“What constitutes ‘cooling time,’ as it ordinarily is termed, depends on the nature of man and the laws of the human mind, as well as on the nature and circumstances of the provocation, the extent to which the passions have been aroused, and the nature of the act causing the provocation, and therefore no precise time can be laid down by the Court as a rule of law, within which the passions must be held to have subsided and reason to have resumed its control. The question is one of reasonable time, depending on all the circumstances of the particular case, and the law has not defined, and cannot, without gross injustice, define the precise time which shall be deemed reasonable,*581 as it has with respect to notice of the dishonor of commercial paper. What constitutes reasonable time in a particular case is ordinarily a question of fact for the jury, and the court cannot take it from the jury by assuming to decide it as a question of law.”

In *State v McCants* 1 Speers, 390, the Court, in speaking of what is reasonable time for cooling, said

“The standard of what is reasonable, is ordinary human nature, to be applied by the Court, if all the facts and circumstances be found by a special verdict, or to be applied by the jury in giving a general verdict. As to the reasonable time in which cooling should ensue after provocation, no precise rule can be given.”

In the same case, at page 391, we find

“In all cases where the time of cooling may be considered, whether the time be regarded as evidence of the fact of cooling, or as constituting, of itself, when reasonable, legal deliberation, the whole circumstances are to be taken into the estimate in determining whether the time be reasonable. The nature of the provocation, the prisoner's physical and mental constitution, his condition in life and peculiar situation at the time of the affair, his education and habits (not of themselves voluntary preparations for crime), his conduct, manner and conversation throughout the transaction, in a word, all pertinent circumstances may be considered, and the time in which an ordinary man, in like circumstances, would have cooled, is a reasonable time.”

State v Goodson 140 S C at 361-2, 138 S E at 817-8 [cited in *State v Pittman* 373 S C 527, 580-581, 647 S E 2d 144, 172 (S C ,2007)

In *State v Walker*, the Court in 1996 did note that cool reflection suggested by asking the victim to cool down removed the possibility of manslaughter. However, unlike Walker, here the victim was still wielding a weapon and making threats against his life when the assault

continued at the door. There was some evidence to suggest renewed and continued heat of passion. In *State v. Byrd*, the case clearly was not evidence of any manslaughter. Here, unlike Byrd, the victim was shown as wielding a knife and continuing the actual threats against Hughey in her version. In *Byrd*, after the initial threat was made, there was no evidence of it continuing prior to the shooting that resulted in Ms. Harris' death.

Counsel was not deficient in 1997 in manslaughter in light of the factual issue concerning the cooling off period.

Transferred Intent and Manslaughter

The Applicant further contends that counsel erred in its legal investigation concerning the applicability of transferred intent, particularly as it related to manslaughter and Ms. Harris' death. Counsel stated he knew, again that this was a close question. He consulted with various legal experts and was of the opinion in 1997 that the possibility of its use was not foreclosed in a manslaughter situation. Under his theory, Ms. Harris was always an unintended victim. If the Applicant was acting in sudden heat of passion and with sufficient legal provocation in shooting at Ms. Jackson and missed and struck Ms. Harris killing her, he would have been guilty of manslaughter for her death. Counsel admitted that the death of Ms. Jackson was more problematic under the manslaughter theory when she was shot in the bedroom. However, as evident from the limited defense presentation of Hughey's testimony on direct at trial - the focus of the manslaughter was toward the charge involving Ms. Harris, whom he claimed that he had no intent to harm. In addition to Hughey's testimony, this was supported by Girndt expert opinions which concluded the version of Ms. Harris' death was consistent with scene evidence and injuries. Since the finding of manslaughter would have favorably impacted on the non-

existence of an aggravating factor concerning two murders, counsel was not deficient in seeking that, albeit limited and rejected assertion

Respondent submit that it cannot be ignored that the trial judge accepted the legal theory presented by the defense of transferred intent and manslaughter in his instructions. This advocacy on the part of the defense was supported by decisions of the South Carolina Supreme Court going back to 1938. Although the Court now claims the issue is “unsettled” in 2009, viewing it in 1997, there was not caselaw that precluded its possibility in a manslaughter setting. Counsel was not deficient in attempting to such mitigation to get a manslaughter verdict as to Ms. Harris’s death.

The Applicant’s focus is upon. In *State v. Wharton*, 381 S.C. 209, 215, 672 S.E.2d 786, 788 - 789 (S.C., 2009), the Court declined to address the issue of whether the court of appeals erred in holding that the doctrine of transferred intent was inapplicable to voluntary manslaughter. The Supreme Court recognized that in *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), the plurality held that the doctrine of transferred intent was not applicable to voluntary manslaughter cases because the overt act that produces the sudden heat of passion must come from the victim. However, the *Childers* dissent would have held that if a defendant kills an unintentional victim upon sufficient legal provocation committed by a third party, the doctrine of transferred intent applies, entitling the defendant to a voluntary manslaughter charge. The Supreme Court found that *Childers* was not a majority opinion, and the applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party ***remains an unsettled question in South Carolina***.

Since it remains an unsettled question of the law in 2009, plainly defense counsel approach in 1995 through the trial in 1997 could not be deemed deficient. A review of the existing precedent may assist. See *State v Kennedy*, 85 S C 146, 67 S E 152 (1910), *Annotation Homicide By Unlawful Act Aimed At Another*, 21 A L R 917 ¹⁴

¹⁴ Cases from other jurisdictions support the common law application of transferred intent to manslaughter

If the circumstances of the killing are such that it would have been manslaughter had the blow fallen on and killed the intended victim, it will also result in manslaughter if a third person is killed. *Hill v State* (1914) 74 Tex Crim Rep 481, 168 S W 864, *Whiten v State* (1913) 71 Tex Crim Rep 555, 160 S W 462, *Clark v State* (1885) 19 Tex App 495

Where a woman threw a poker at her child for correction under circumstances which, if it had killed him, would have made her guilty of manslaughter, she is equally guilty if the poker accidentally hits and kills another child. *Rex v Conner* (1836) 7 Car & P (Eng) 438

If one, in shooting at persons in a sudden affray or sudden heat of passion, kill an innocent bystander, he is guilty of manslaughter. *Shelton v Com* (1911) 145 Ky 543, 140 S W 670

The slaying of one by a blow intended for another, inflicted in sudden heat and passion, is manslaughter just as it would have been had it reached its intended mark. *Trabue v Com* (1902) 23 Ky L Rep 2135, 66 S W 718

In *Com v Flanigan* (1869) 8 Phila (Pa) 430, where the killing was caused by the accidental discharge of a weapon in a quarrel between two persons, the court says: Can it be doubted, in such a state of evidence, that, if the shot had killed the other person to the quarrel instead of the bystander, the offense would have been voluntary manslaughter? What matters it, then, if the shot took effect at the body of the bystander?

Where one killed a person with a shot fired at another, who at the time was fleeing from him, he could not complain that he was convicted of manslaughter under an instruction that, if he tried in sudden heat and passion to kill his intended victim, and accidentally killed accused, he was guilty only of manslaughter. *Sims v Com* (1890) 12 Ky L Rep 215, 13 S W 1079. Where one shoots at another, intending to kill him, under such circumstances that the killing, if accomplished, would be voluntary manslaughter, but the shot misses him and accidentally kills an innocent third person, the homicide will be voluntary manslaughter. *Coker v State*, 209 Ga App 142, 433 S E 2d 637 (1993)

In *State v Williams*, 189 S C 19, 199 S E 906 (1938), the Court upheld a directed verdict challenge to a “voluntary manslaughter” conviction. In *Williams*, the Court stated that

It may also be regarded as a well settled principle of law that a man will be held guilty of murder or manslaughter who in the attempt to kill one person by mistake kills a third person, although there is no intention or design to kill such third person. The three defendants participated in a felonious assault, and if, while engaged in the effort to kill Moseley, either one had fired the shot which killed the deceased, all would have been guilty of the crime, although they had no design or intention to injure or kill the deceased.

State v Williams, 199 S E 906, 908 (S C 1938). In upholding this conviction for **manslaughter**, the Court necessarily relied upon this “well-settled principle” of transferred intent and its expressed application in 1938.¹⁵ Under Applicant’s current construction, the direct verdict motion would have to have been granted. Necessarily, applying transferred intent it was not

Evidence that defendant fired a gun at another and struck a third party causing his death justified conviction of manslaughter in the first degree and punishment at 50 years in the penitentiary. *Carr v State*, 81 Okla. Crim. 261, 163 P.2d 241 (1945).

Where accused shoots at one party and unintentionally kills a second party, he is guilty of murder in the second degree, if killing of first party would have constituted murder, or he is guilty of manslaughter if killing of first party would have constituted manslaughter. Pen Code 1925, art. 42. *Covert v State*, 134 Tex. Crim. 12, 113 S.W.2d 556 (1938).

If defendant fired shot that killed murder victim in the heat of passion without any cooling off period, after altercation with third party standing near the victim, she was guilty of manslaughter only. *State v Green*, 157 W. Va. 1031, 206 S.E.2d 923 (1974).

18 A L R 917

¹⁵Inexplicably, in *State v Fennell*, 340 S C 266, 531 S E 2d 512 (200) it referred to *Williams* as a murder conviction. The clerical error in *Fennell* obviously cannot distort the defined existence of transferred intent and its applicability to manslaughter since 1938.

The Applicant asserts that the doctrine of transferred intent was not before the Court in *Williams*. See Applicant's Memorandum, p. 58-59. He claims that this was actually a case of accomplice liability, not transferred intent. *Id.* However, he ignores that the issue of transferred intent was fully present in the state's theory of the case for the death of McMillan underlying the motion for a directed verdict.

Under these facts and circumstances, it is urged on behalf of Williams that he could not be held for the murder of McMillan by Babb. In our opinion, there was ample testimony to go to the jury. **The jury was fully warranted in taking the view that the two Babbs and Williams were attempting to kill Moseley, and in so doing killed McMillan by mistake, in which case each of the three would be guilty in the same degree.**

State v. Williams, 199 S.E. 906, 908 (S.C. 1938). Since the convictions were plainly of voluntary manslaughter, his claim must be denied.

Subsequent to *Williams*, the issue of transferred intent was addressed before the Hughey trial in *State v. Gandy*, 283 S.C. 571, 324 S.E.2d 65 (1984). In *Gandy*, the Court affirmed a murder conviction (where murder and manslaughter was instructed), where defendant claimed that he intended to kill one man through a closed door, and killed an unintended victim. The Supreme Court held

“where a defendant intends to kill or seriously injure one person, but kills another, a defendant may be found guilty of murder or manslaughter. If malice is found at the time of the killing, even if a third party is killed rather than the intended victim, the defendant is guilty of murder. *State v. Hayward*, 197 S.C. 371, 15 S.E.2d 669 (1941). **This concept, known as “transferred intent”,** was most recently discussed in *State v. Horne*, 319 S.E.2d 703 (1984), where we noted

This result is sometimes described as the function of the doctrine of “transferred intent” whereby the actor's intent to kill his intended victim is said to be transferred to his actual victim. *All that is required of murder is the mental state of malice* provided by the

intent to kill a human being coupled with an act which caused the death of a human being (emphasis added)

State v Gandy, 283 S C 571, 574, 324 S E 2d 65, 67 (S C ,1984) (emphasis added) Therefore in 1984, this Court had not establish precedent which precluded the use of transferred intent in a manslaughter situation. To the contrary, it common law proclamations supported its use

Next, the Court addressed the general concept of transferred intent in *State v Fennell*, 340 S C 266, 531 S E 2d 512 (2000) In *Fennell*, the defendant was convicted of murder of the intended victim and the assault and battery with intent to kill (ABI) of an unintended victim. The defendant argued with the intended victim (Thraikill). A few weeks later the defendant approached him at a restaurant to talk about the incident. Thraikill refused to talk about it and made a disparaging remark which angered the defendant. The defendant retrieved a gun from his car. He returned to the restaurant and emptied his gun, striking Thraikill with five shots, killing him. A stray bullet struck and seriously injured Armstrong, a bystander. The defendant told a psychiatrist that he did not intend to injure Armstrong. The defendant moved for a directed verdict on the ABI charge, because the State failed to prove he intended to kill Armstrong and he argued the doctrine of transferred intent did not apply. This Court disagreed, holding “[a] person who, acting with malice, unleashes a deadly force in an attempt to kill or injure an intended victim should anticipate that the law will require him to answer fully for his deeds when that force kills or injures an unintended victim.” *Id* , 531 S E 2d at 516. However, the Court again stated the common law premise about the possibility of the application of transferred intent to a manslaughter case.

This Court in several cases has held that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of

transferred intent In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i.e., his mental state of malice) is transferred to the unintended victim "If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake" *State v Hayward* 197 S C 371, 377, 15 S E 2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer) See also *State v Gandy* 283 S C 571, 324 S E 2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot through a closed door, killing unintended victim instead), *overruled on other grounds by State v Lowry* 315 S C 396, 434 S E 2d 272 (1993), *State v Horne* 282 S C 444, 447, 319 S E 2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim), *State v Williams* 189 S C 19, 24, 199 S E 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him), LaFave & Scott, *Substantive Criminal Law* § 3 12(d) (1986) (discussing transferred intent), McAninch & Faurey, at 17-19 (same)

State v Fennell, 340 S C 266, 272-273, 531 S E 2d 512, 515 - 516 (S C ,2000) Therefore, in 2000, subsequent to the trial, the Supreme Court of South Carolina was confirming its common law statement about manslaughter and transferred intent

The Applicant argues that a different concept prevents the applicability of transferred intent to manslaughter because of case law that "sufficient provocation necessary to justify a voluntary manslaughter charge must come from the victim" In *State v Childers*, 358 S C 614, 595 S E 2d 872 (Ct App 2004), the testimony showed the victim was Childers' estranged ex-girlfriend The defendant testified he saw the victim at a turkey shoot and they tried to reconcile After the turkey shoot, the defendant drove to the home of the victim's mother and wanted to talk with the victim He brought a loaded gun with him in case he encountered stray dogs during his

walk. The defendant testified that when he arrived at the house, he saw the victim, her sister, and her sister's ex-husband in the yard. The defendant said that as he approached, the ex-husband shot at him. The defendant testified he immediately fired back and ran away, and the victim was shot and killed. The trial judge refused the defendant's request for an instruction on voluntary manslaughter and the defendant was convicted of murder. The Court of Appeals reversed, finding the defendant was provoked. The Court of Appeals held the act of Childers pointing and firing of the gun under the circumstances warranted a voluntary manslaughter instruction. It further held, "[a]lthough it was the victim's brother-in-law, and not the victim herself, who allegedly shot at and thereby provoked Childers, the doctrine of transferred intent justifies a voluntary manslaughter charge as to the killing of the victim." *Id.*, 595 S.E.2d at 875.

Subsequently, in *State v. Childers*, 373 S.C. 367, 645 S.E.2d 233 (2007), the Supreme Court reversed the Court of Appeals decision regarding the refusal to charge voluntary manslaughter. Justices Waller and Burnett found Childers was not entitled to a voluntary manslaughter instruction, since he only testified he was provoked by the victim's brother-in-law and he fired the gun in response to first being shot at by the brother-in-law. They noted Childers' testimony did not support sudden heat of passion upon sufficient legal provocation, because the overt act that produces the sudden heat of passion must be made by the victim. *Id.*, 645 S.E.2d at 236 [citations omitted]. Chief Justice Toal concurred in the result only, finding there was no evidence to warrant a charge on voluntary manslaughter and, therefore, the concept of transferred intent had no relevance to the outcome of the case. *Id.*, 645 S.E.2d at 237.

However, in *Childers*, in dissent Justice Pleicones, joined by Justice Moore, however, believed "this case represents a classic claim of transferred intent." *Id.* They held the critical

question was Childers' mental state at the time he shot and, if there was evidence he fired in sudden heat of passion upon sufficient legal provocation, "it matters not that his aim was poor" Id The dissent found that since Childers testified his sudden heat of passion was aroused when the victim's brother-in-law shot at him and that in returning fire, he mistakenly shot the victim, the doctrine of transferred intent applied to the submission of a voluntary manslaughter instruction, stating that the majority misapplies the doctrine of transferred intent, citing *Fennell State v Gandy*, and *State v McElveen* 280 S C 325, 313 S E 2d 298 (1984) The dissent further asserted that there was error in the majority decision where it relied on a case where the legal provocation of "A" was used by the defendant to justify his intentional shooting of "B," *State v Locklair* 341 S C 352, 535 S E 2d 420 (2000), and one where there was simply no legal provocation *State v Tucker* 324 S C 155, 478 S E 2d 260 (1996)

In *Harris v State*, 354 S C 382, 581 S E 2d 154, 155 (2003) ¹⁶, the Court held a "provocation" from the intended victim cannot be transferred to an unintended victim In other words, a defendant cannot assert an intended victim's provocation to claim voluntary manslaughter for the intentional shooting of the unintended victim Harris does not, however, hold a defendant's intent cannot be transferred from the intended victim to the unintended victim

State v Locklair, 341 S C 352, 535 S E 2d 420 (2000) also supports this conclusion In Locklair, the defendant argued he was entitled to a charge on voluntary manslaughter, because (1) there was evidence of a domestic dispute between him and the victim, and (2) the victim's

¹⁶Harris arose from a review of the granting of post-conviction relief based on the failure of trial counsel to object to the trial judge's failure to charge voluntary manslaughter The Court noted the PCR court mistakenly associated the term "voluntary manslaughter" with the law of involuntary manslaughter in relation to the issue presented to it, and the issue was ultimately decided on that basis Harris, 581 S E 2d at 157

mother threw a cigarette lighter at him immediately before he shot the victim. This Court held the victim's words alone, absent any overt physical actions, was insufficient provocation to reduce the crime to manslaughter. This Court further explained that any alleged provocation of the victim's mother was insufficient to reduce the crime to manslaughter for the *defendant's intentional shooting of the victim*.

Harris and *Locklair* are distinguishable from the circumstances in the present case. Hughey was allegedly provoked by Jackson's initial assault upon him with the vase and knives and continuing threat to kill him. Although the state was able to disprove its existence, the defense was not constitutionally deficient in seeking to present a defense arguable available under any evidence standard. See *State v. Cottrell*, *supra*.

The issue was not the transfer of provocation from Ms. Jackson to Ms. Harris as the Applicant continues to suggest. Rather, it was *Hughey's intent* to shoot Jackson as a result of Jackson's own provocation, which could be transferred the intent to shoot Ms. Jackson to Ms. Harris when Hughey missed Jackson and killed Ms. Harris instead. Under the misinterpretation of transferred intent by the current counsel for the Applicant, there could be no criminal culpability whatsoever under circumstances where an individual misses the intended target and injures or kills a bystander when only acting under sudden heat of passion upon sufficient legal provocation. However, if the defense was able to prove that the shooting at the doorway was the result of sudden heat of passion upon sufficient legal provocation by Ms. Jackson, manslaughter for Ms. Harris' unintended death would have been appropriate. Counsel cannot be deemed deficient by their unsuccessful attempt at a manslaughter verdict.

Further, the second prong of *Strickland* cannot be satisfied. It is the Applicant's current theory that guilt on each of murders should have been conceded. *Strickland* prejudice can not be shown as to guilt. Further his speculation about its impact on the penalty phase is inadequate speculation and not sufficient to show but for requiring the state to prove guilt beyond a reasonable doubt in the guilt phase, that there is a reasonable probability that the result of proceeding would have been life rather than death. The Applicant ignores that the same presentation of evidence would have been made in the penalty phase to attempt to remove the existence of the aggravating factors of burglary and larceny. Further, since there is no evidence that Hughey has changed his version of the incident, a version that he was adamant about at trial, how can it be said that the mere presentation in the guilt phase of a defense which still admitted the killings, created *Strickland* prejudice. His claim must be denied.

B The failure to properly investigate and present available mitigating evidence

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
Applicant's Memorandum p 62-98

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 and the capacity to appreciate the criminality of his conduct as two examples of this error. Claiming that the defense focused unnecessarily on their unsuccessful manslaughter defense, he claims that little effort was devoted to a mitigation investigation. Concerning their investigation, he now claims that mitigation investigator Paige Tarr was hired only 5 months before trial which he contends was an inadequate time, that a social worker Jeff Yungman did not receive requested data and his trial presentation was limited by the lack of requested material, that Dr. Morgan, a psychiatrist was consulted immediately prior to the trial but was not used and counsel failed to present evidence of adaptability to prison life although they had reason to believe he was a good prisoner. Further, he claims that the defense erred in failing to present a forensic psychiatrist, similar to Dr. Donna Schwartz Watts, to testify in support of a statutory mitigating factor and diagnosed Hughey with Dementia Due to Multiple Etiologies, Chronic PTSD and Major Depression, Single Episode. He also claims that Dr. Watts could have testified about Hughey alcohol intake prior to the incident and diagnosis for Alcohol Abuse.

Respondent submits that counsel reasonably investigated the background of the Applicant, both mental and family background, and presented an appropriate case in mitigation. Although the Applicant has presented a fancier case in mitigation, Respondent submits that in light of what evidence, much of it similar, that the jury heard, the Applicant has failed in his burden of proof to show a reasonable probability that the result of the proceeding would have been different. His allegation must be dismissed.

What The Jury Heard At The Trial

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 neuro psychology and psychology. ROA p. 3768-4003. In addition, the Applicant had already testified in the guilt phase about his general background. ROA p. 3064-3253.

Importantly, the jury instructions given at the conclusion of the case focused the jury on potential mitigation suggested by the evidence. In particular, they were presented

- 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.

ROA 4060. The trial judge did not charge the statutory mitigating factor 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 ” R 4059 In addition, Judge Cole instructed

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

ROA 4060, 1 13-4061, 1 2

CASE IN MITIGATION

1 Anthony “Tony” Wilson - The Applicant’s Sister

Counsel Tinsley called Anthony Wilson to testify to testify about the Applicant and his family background 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 biological father was now dead Id 3771-72

She said Mr Hughey (John Henry Hughey Smith) 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 own child R 3773 She described being beaten, deprived of food and being run out of the house by her step-father 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 the family lived in a different places throughout her childhood

Wilson said the Applicant's father did not treat the younger four as badly as the older because they were his own children 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 the fact that her stepfather would hit Wilson with a stick or anything he would pick up She also said her stepfather hit the Applicant Id She said the Applicant 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 getting his head cut open She described the parents fussing with her stepfather engaged in drinking She recalled that the Applicant ran to get into the car with them to leave However, when the car unexpectedly 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 has taken 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 another car wreck which scarred up his face. R 3779. Wilson also described her brother being in another accident when he drove the pulp wood truck when he was a child. R 3780-81

Wilson described that her mother was physically hit by her stepfather throughout their relationship until she died September 19, 1992. She said her mother died because of a drunk driver who hit her in her sister's yard. R 3782

Wilson described seeing the Applicant and Sheka living 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 a 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

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 concerning the family background. R. 3853. She stated her parents were John Hughey Smith and Dolly Hughey. She confirmed that the family 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

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 the Applicant as initially being full of life until his mother died. At that time, he became distant, not coming by to see her. She said he did not receive counseling. R. 3870. She said he appeared to remain 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

She said her own 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

She described after the death that 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. She stated that she recalled the other victim, Mrs. Harris, walking with her boys and they’d all play together.

She said when she saw her brother on December, 1994, something was wrong and when she got back he was crying. In an apparent plea for the jury to save her brother, she said she loved her brother and wanted to keep him. R 3880–81

On cross-examination, she said Hughey 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 testified about Hughey suffering from blackouts. 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 also recalled a second blackout in Abbeville after her mother died, but did not take him to a hospital then either. She did not think he had any medical attention. R 3887. She was not contending he was in a blackout on December 4 when the crime occurred. R 3887

She admitted Hughey 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, Gloria 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). R. 3913. 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 Rorshach 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

What The Applicant Now Contends They Should Have Heard

ADAPTABILITY TO CONFINEMENT MITIGATION EVIDENCE

Respondents submit that the case in mitigation did not include any evidence of adaptability to prison life based upon his present confinement history 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 The testimony of the Applicant's counsel reveal it was considered by counsel Tinsley with the assistance of counsel Garrett negative experience in the earlier Elmore trial Although counsel was aware that Hughey had not been in any serious trouble in jail, he chose not to present the evidence even though he had the jail guards on his witness list Respondent submit that this was a strategic decision made by the defense team in the trial The Applicant has failed to show the decision was based on neglect or ignorance

WHAT COUNSEL TINSLEY TESTIFIED

Counsel Tinsley stated that he and Garrett were both aware that evidence of adaptability to prison was appropriate evidence in a capital proceeding He was aware that jail and prison records was appropriate information to gather in defense PCR 28-29 More particularly, he testified that he specifically considered it in Hughey's case as a good penalty phase issue as good adjustment to custody and adaptability to prison PCR 29 Exhibit 3 ¹⁷

¹⁷Counsel Tinsley stated that he considered a number of themes in his preparation for the penalty phase These were including *adaptability*, head injuries, sniffing of gasoline, disassociation, dysfunctional family, domestic nature of the crime, his mother's death, the killer's punishment from

Counsel Tinsley noted on the notice of evidence in aggravation document that he received on September 7, 1997, Lt Allen's name for adaptability in prison PCR 88, Exhibit 17 He stated that Lt Allen was a jailer in Greenwood from 1995 to 1997 while Hughey was in custody Id However, he was deceased at the time of the PCR hearing Tinsley stated that he felt that Lt Allen would have been a favorable jailer and would deflect issues of future dangerousness if

her death, resulting PTSD, bereavement, the killing of ms Harris while trying to kill the common law wife, because of the children don't execute the remaining parent, young age of 26 at the time of the crime, mental functioning at 13 year old level, no significant prior violent crime history, mental duress at the time, capacity substantially impaired, some provocation, borderline intellectual functioning, abused by father and prior good acts PCR 484

In addition, Tinsley listed in Exhibit 20, addition themes of adaptability, the Hughey family, blackouts, the children, relationship with the parties, his environment, his hereditary, his father's violence, the defendant's scarring on his head from previous injuries, humanize the defendant, the defendant's small size and requirement to fend for himself, organic brain damage, sever brain damage, mental, organic and psychological, had many problems versus an abuse excuse, never got help, no medication, no counseling, no positive role model, behavioral problems, diminished culpability due to a diminished degree of responsibility, limited education, seventh grade level of functioning, his mother was abused when pregnant with the Applicant, family violence, history of guns and knives, family alcohol history and defendant's hallucinations, avoidance about mother's death and going to his sister's house where the death happened and not going to the grave site, suicidal, family history related to the difficult family history of John Henry Hughey, results of organic brain damage, damage to reduce capacity to deal with stress, left lobe syndrome, borderline mentality, learning disability, delusional - relating to visions of his mother, decompensation

Tinsley noted that following stressors his mother's death, his father's behavior/mental illness, his inability to face negative situations, the abuse, physical and emotional and psychological, the multi-generational problems, his inability to recall events of the crime, possibly false detail, recalling statement PCR 495-486 He also noted as something to look into "not an intoxication mitigation," more a result of his dad's abuse coupled with gasoline sniffing as a child and heavy drinking following his mom's death He also noted a question mark the testimony of Michael Bowie, the person who drive the car that resulted in killing his mother PCR 487 Counsel stated that he felt that the jury would not take a voluntary drinking intoxication mitigation in a positive manner compared to the other types of mitigation they could present PCR 487

Counsel stated that he further noted to consider individual characteristics of Hughey including short, slight, physically scarred all over head, 28 years old, 26 then, mental IQ of 80, seventh grade level, 10 th grade actual, borderline mental retardation, PTSD, depressed, learning disabilities, not malingering, impossible disassociation

presented PCR 90 He had also made reference in his records in preparation for the penalty phase in mitigation Hughey's juvenile record and prison record PCR 91, Exhibit 19

In addition to Lt Allen, counsel noted J L Edson, the head jailer in the Greenwood jail as a potential witness on prison adaptability PCR 92 He noted their use "if the state argues future dangerousness " PCR 92, 93 Counsel stated that if the state had argued future dangerousness, the defense would have had to present adaptability evidence to offset it PCR 92 However, the state did not present such specific evidence Counsel further stated that he had a memorandum of law on future adaptability to prison, citing *Skapper v South Carolina*, on admissibility of adaptability evidence Exhibit 22 PCR 95

In hindsight, counsel Tinsley stated that if he had to do it over again, he would have called Lt Allen despite co-counsel's objection based upon the Elmore experience However, he would not have called Major Edson PCR 95-97 He confirmed that it would not have prevented him from calling other jailers or presenting prison records Id He recalled that he felt that Lt Allen would have been more favorable than Major Edson and was aware that Mr Garrett did not want him to call Edson

On cross-examination by the state, Tinsley confirmed that he did not call either Lt Allen or Major Edson He stated that prior to the trial he specifically had discussions with both Lt Allen and Major Edson about the potential testimony He stated that Major Edson was more or less non-committal, but that Lt Allen was favorable toward Hughey

Tinsley stated that although in hindsight he should have, he stated that the discussion that he had with Garret about adaptability and it had backfired on him He said this sent up a red flag

and that they were employees of the state and were working for them at the time PCR 489, 1 15-18

Counsel stated that he was aware when his case had concluded that he had not called the witnesses

Billy Garrett

Counsel Garrett testified that he thought that Hughey had been a good inmate and was generally quiet and reserved. He felt he could along with the guards, noting that one of his clients, Ms. Stewart, always made Hughey available to him and seemed to get along with him. PCR 217. He stated that Tinsley made the call on whether to put in adaptability evidence. PCR 220. He stated that when Tinsley asked him about it, he referred to his own experience in the Elmore case when he put in adaptability evidence and it backfired on them. PCR 217-218. While the officers in Elmore had given glowing reports, it did not play as well in front of the jury. He told Tinsley to be cautious in presenting the testimony. PCR 218. He noted that they were concerned about Major Edson. He noted that while the individuals were still employed at the detention center, unlike the present witness in the PCR hearing, the testimony may have been tempered and not be as helpful, due to Edson's relationship with the Solicitor. PCR 218. Garrett admitted that he had no idea who Lt. Allen was and had never talked to him. PCR 219.

Although it was Tinsley's decision on whether to present adaptability evidence, Garrett stated that he would have taken Garrett's counsel seriously in making the decision. PCR 220-221. He stated that the guards in Elmore did not do near the job that they had hoped they would do. PCR 220.

Counsel Garrett stated that he was of the opinion that everyone like Hughey in jail and that Hughey always had a smile on his face PCR 263 He felt that Tinsley knew about jail incidents He said that he would have been very concerned about an allegation with a razor, even if it were an electric razor just because of the facts of this case PCR 264-65 Garrett stated that after Skipper, he was aware that adaptability evidence was information that could be presented at trial Although it appeared that Hughey had a normal existence in the jail, he told Tinsley specifically about the negative experience he had in the Elmore case He noted that Elmore, like Hughey, did not have a history of violence and that basically that he was a normal inmate who followed directions which was expected of every inmate PCR 266 Garrett felt the guards from CCI who testified in the Elmore case ended up sounding like he was merely normal, nothing special He felt their testimony softened the presentation on adaptability

Garrett stated that they had discussion with Tinsley in detail about the benefits and risks of the testimony He advised him to be cautious and careful and make sure the witnesses stayed firm PCR 268

What Evidence The Applicant Asserts Should Have Been Presented On Adaptability

During the PCR hearing, the presented testimony from two former employees at the Greenwood Detention Center, Julia Perlotte and Martha Ann Stewart Neither of these witnesses were on counsel Tinsley projected witness list

Ms Perlotte testified that she was employed at the Greenwood Detention Center throughout Hughey's incarceration He found Hughey to be quiet and reserved and never gave any officers on her shift any problems PCR 153-155, 161-62 Upon review of the records, she found he was at the detention center from December 8, 1995 until October 30, 1997 She opined

that he did not have any incident that she considered major, although she did find that there was an incident with contraband which involved not returning a razor and hiding it under his bed PCR 157-158 She noted that the razor was never used as a weapon before it was confiscated PCR 159 She opined that she felt that Hughey was adaptable to confinement

She confirmed that he had about six incidents according to her records while incarcerated there She stated that normally during that length of incarceration there would be more incidents than that PCR 168

On cross-examination, she confirmed that the razor was found under his mattress PCR 162 She stated that she had no idea from her review of the reports why Hughey was possessing it and Hughey gave no reason for it in the report She admitted that Hughey had disciplinarys for arguing with another inmate, although it did not result in violence, and cursing at a correctional officer She thought that Hughey had a cell by himself at the time of the razor incident [She noted that Hughey was on a five day lockdown after the razor incident PCR 169]

She stated that he was supposed to return the razor and was supposed to not argue with other inmates and not supposed to curse at the jailers She stated that normally when someone is charged with murder, they would try to house them by themselves and with another person also charged with murder PCR 166-67

Martha Stewart testified about the same period of his incarceration in Greenwood Although retired in 2007, she was a shift supervisor while Hughey was there PCR 171-172 Like Perlotte, she did not see any problems with Hughey and he would talk to them in polite manner PCR 172 She noted that there were some defendants other than Hughey who would cause greater problems Hughey was very calm and would comply with them

She described the incident reports that he had as very small in size compared to some other inmates PCR 174 She opined that he would be adaptable to confinement PCR 175 She had no records of him getting into fights

On cross-examination, she recalled having discussions with Hughey and thought at some point he was depressed PCR 176 However, she never found anything disturbing, irrational or confusing in her discussions with him

Dr Donna Schwartz Watts also testified about her review of the juvenile records of Hughey, which he claims counsel never obtained prior to the 1997 trial She opined that Hughey had adjusted well at the Department of Juvenile Justice which suggested he adapted in a well-structured environment PCR 399 Similarly, she opined that the Greenwood records gave her the same impression of a good adjustment to structure and routine She suggested that adaptability to prison should have been considered PCR Exhibit 48 She opined that although he suffered from PTSD, Depression, Borderline Intellectual Functioning and Alcohol Abuse, the prognosis should have been presented to demonstrate the likelihood of Hughey's adaptability PCR Exhibit 48 Dr Watts recalled that Tinsley contacted her in 1997 about Hughey PCR 440 However, she was unavailable to interview him at that time PCR 440 She recommended Dr Donald Morgan to Tinsley due to her work conflict PCR 440-41

On cross-examination, Dr Watts testified that Hughey explosive behavior that happened when he was not incarcerated did not show up in either his DJJ or Greenwood records PCR 457-58 Dr Watts conceded that his criminal history suggested that he did not avoid possession of weapons, including shooting leisure with his girlfriend, a possession of a knife on school

grounds, a series of assaults and batteries against other individuals, disobedience with corrections officers, using profane language including such that might provoke violence PCR 444-445

She admitted that the report that was done by the Department of Youth Services suggested that he suffered from “periodic explosive disorders ” PCR 449 She noted that he would suppress his feelings until they literally burst out PCR 450 The report noted that it took little to provoke Hughey and that he had general mistrust of others PCR 450 Despite that conclusion, Dr Watts disagreed that it would impact on adaptability She stated that he would not have drugs or alcohol and it would be a structured environment and he was removed from his chaotic family PCR 450 She confirmed that he was diagnosed at DYS with a conduct disorder, but found that Dr Lewis later did not diagnose him pre-trial for anti-social personality disorder PCR 451

She found that he did well in a structure but had the outburst when he was drinking However, she confirmed the following charges had been made

- assault and battery at 19
- assault and battery at 22
- assault and battery with intent to kill two months after his mother died
- attempted escape
- threatening another inmate at SCDC

PCR 451-452

In the brief before this court, the Petitioner seeks to parse various comment from the juvenile records to suggest that while he may make poor decisions and fail to consider the

consequences of his behavior, PCR 412, Exhibit 40, he was also seen to show good judgment and exercise control PCR 420-421

Respondent submits that counsel was not deficient in failing to present evidence of adaptability to prison. Counsel did a reasonable investigation in his adaptability. He was presented with a defendant who was incarcerated nearly two years at the detention center and failed to act violently. In addition the write ups that he had were limited. Counsel Tinsley and Garrett were each aware of the general good behavior that Hughey had while at Greenwood and properly considered presenting such evidence. However, as revealed at the hearing, the presentation possess some risks. Counsel Tinsley relied upon counsel Garrett's experience in weighing how and if he would present such evidence. He concluded to avoid the risk of adaptability to prison life evidence backfiring as it had to Garrett in his earlier case, unless the state presented evidence of future dangerousness. Such a strategic decision, grounded after counsel Tinsley had meet with the detention officers and learned their testimony and its value was not deficient, but a sound strategic decision.

Respondents would further submit that *Strickland* prejudice has not been shown by the omission of this evidence. As counsel recognized it was a two edge sword. Although the general opinion that Hughey was adaptable to prison would have been presented, it would have given the state a renewed ability, within the defense case to bring out acts of violence and disobedience, including an unknown, but potentially dangerous act by Hughey of the possession of the razor, his arguing with inmates and cursing officers, his earlier diagnosis of "periodic explosive disorders, his history of assaults and battery and weapon possession and threats independent of the instant crime. In addition, it would be revealed that there was a need for a well structured

environment to having his adaptability and the question history of adaptability shown while he was living in his own cell rather than the less structured general prison population. Respondents submit that the Applicant cannot show that there is a reasonable probability that Hughey would have been sentenced to life had counsel chosen to have presented adaptability evidence.

MENTAL HEALTH MITIGATION AND PRESENTATION

In his second specification, Hughey contends that the mitigation investigation for the penalty phase was incomplete and presentation inadequate. The Applicant based this primarily upon the testimony of Paige Tarr and Jeff Yungman. In addition, he seeks relief upon the testimony of Dr. Donna Schwartz Watts. A review of the evidence presentation at trial and in the PCR action reveals that Hughey has failed in his burden of proof of either deficiency or prejudice under *Strickland*.

Paige Tarr Haas Mitigation Investigator

Paige Tarr (Haas) was retained as a mitigation investigator around May 1997. PCR 44. Tarr described the role of the mitigation investigator to put together a life history for the defendant going back generations and then focusing upon birth til the incident occurs. PCR 331. In June 1997, she acquired releases from counsel and Hughey for records. She delivered the releases to doctors, schools, the hospital, the health department and D S S in June. Subsequently, she attempted to subpoena records of Hughey's father, John Henry Smith, in August from Harris Psychiatric Hospital. However, the hospital objected to the record production without a court order in a letter dated August 21, 1997. PCR 49, Exhibit 9 [Counsel Tinsley stated he never received the records. PCR 518]. However, Tarr did not recall if the

records on John Smith were obtained PCR 340 However, Yungman's report shows that he was not provided them PCR 341

Tarr testified that she felt that 12 months (one year) was a minimum for a mitigation investigator to prepare a case PCR 339

Tarr testified that she contacted and got social worker Jeff Yungman and Dr James Evans involved in the Hughey case PCR 343 Tarr stated that she had a concern that she was unable to obtain a forensic psychiatrist PCR 346

Tarr stated that her outline for mitigation included Jeff Yungman for social history, Dr Jim Evans for neuropsychological work-up, Dr Morgan for neurological and psychiatric and a guard for future dangerousness and adaptability PCR 347 For family members, she had included Gloria, John, Aunt Nancy Ramey PCR 348

On cross-examination, Tarr admitted that the affidavit use4d was a form prepared by Scharlotte Holdman to assist in getting continuances PCR 353 Further, Tarr stated that she attempted to locate a psychiatrist, including Dr Bellard from North Carolina PCR 354-55 However, she was never told not to find a psychiatrist PCR 355

Tarr recalled from her notes a telephone conversation with Dr Donald Morgan PCR 358 According to the notes of an October 22, 1997 conversation, it revealed "PTSD (?), complicated bereavement, significant brain damage, does not have capacity to stay composed under duress, seizure like episodes for temporal lobe problems and cannot assist defense as for as telling what went on at critical time and not malingering " PCR 358 364, Exhibit 51

Tarr noted that in her notes it reflects that she was seeking to acquire the juvenile records and detention records, but her notes did not include the end result PCR 360 ¹⁸

Jeff Yungman Retained Social Worker At Trial

Jeff Yungman testified that he was not employed until October 1, 1997. He stated that he had requested Hughey's juvenile records and the father's psychiatric records, but claimed he never received them, as documented in his report and testimony PCR 129-130. Yungman asserted that he needed this data to do a complete psycho-social history. He testified that the juvenile records may have been useful to him to show his functioning and educational abilities PCR 130. Concerning his father's psychiatric records, Yungman wanted those because psychiatric problems run in the family.

Yungman completed family interviews before October 5, two weeks prior to trial PCR 53, 131, Exhibits 12, 13. On October 6, 1997, he sent his written report to Tinsley PCR 53, 132. Yungman's conclusions as a social worker was that Hughey was suffering from depression and had a concern that he also suffered from post-traumatic stress disorder. Exhibit 12. He stated that behaviors described by the Hughey family was consistent with the symptoms for PTSD. [At trial, Yungman testified that Hughey "may or may not" have PTSD, but that "he is

¹⁸ The records before the Court also includes Dr. Donald Morgan's time sheet PCR 61-63, 524-26, Exhibit 15. Dr. Morgan on October 18, 1997 attended court. On October 19, 1997, he spent three (3) hours interviewing Hughey and an additional hour in record review.

Counsel Tinsley recalled that Dr. Morgan told him matters similar, but not the same, to what Ms. Tarr reported he told her PCR 493. However, he recalled Dr. Morgan told Tinsley that he did not feel that he could help Mr. Hughey with his testimony PCR 493. Tinsley recalled that Dr. Morgan mentioned that he could establish PTSD and other problems, as well as depression PCR 493-94.

consistent with it ROA 3955] He stated it was not his role as a social worker to diagnose, but he was able to recognize symptoms PCR 133

Yungman complained that he had not met with other experts and feared he did not understand the big picture He also complained that he met with counsel only twice and prepared for his testimony over lunch PCR 134-35 He also felt that a psychiatrist should have been involved to do some evaluations PCR 133, 135 He stated he spent 31 25 hours on the case PCR 135

Yungman stated that after the trial he wrote a letter complaining to Paige Tarr about his work with Tinsley PCR 136, 141 He based this upon his belief that Post-Traumatic Stress Disorder should have been stressed PCR 141 However, he did not share his complaints or concerns with Tinsley PCR 141

Yungman admitted that he is morally opposed to the death penalty PCR 142 He further stated that he was upset that the jury made the death verdict PCR 142

Yungman admitted that he had completed his written report and conclusions on October 8 He confirmed that he provided counsel then with information on how to qualify him and humanize him and to bring out the fact he was a former police officer PCR 143

Yungman admitted that on the day he sent the report that he also spoke on the telephone PCR 144

Yungman admitted that he also wrote counsel and told him that he would come up the afternoon before so that they can meet to discuss his testimony PCR 144-45

Yungman conceded that his trial testimony was consistent with his written report PCR 145-46 He did not recall any factors being missed PCR 146 Yungman, subsequent to the

verdict, wrote Tinsley and asserted that he did not think the jury was listening or wanted to listen to Yungman or Dr Evans PCR 146 Despite his current complaints, Yungman declared that he would be willing to work on other cases in Abbeville with him PCR 146, Exhibit 13

Dr Donna Schwartz Watts - Retained Psychiatrist for PCR Action

Dr Donna Schwartz Watts testified at the hearing As noted earlier, she was unavailable at the time of the trial and had recommended Dr Donald Morgan to counsel Tinsley For this hearing, Dr Watts prepared a written report based upon her evaluation and record review of Hughey Exhibit 48

She testified that she interviewed Hughey on four separate occasions PCR 377-78 She stated that due to his post traumatic stress disorder, he was not immediately forthcoming with details However, he gradually over time would provide more information PCR 379

Dr Watts stated she had reviewed Hughey's juvenile record She found he had been committed to DJJ on October 6, 1986 for carrying a concealed weapon and public disorderly conduct PCR 395 Dr Watts believed that the records were important to her evaluation PCR 396, 398 She opined that it allowed her to see what his cognitive functions looked like in 1986 Id She noted that the late Dr David Siegel had evaluated Hughey at the 1986 commitment and found Hughey approached tasks at a slow pace and was evasive In addition, he found Hughey would blame others for his trouble PCR 403 Dr Siegel also noted that his IQ was 83, with a verbal of 80 and performance of 81 PCR 404

Dr Watts also reported that Dr Siegel found that Hughey suffered from "periodic explosive tendencies" and would "suppress his feeling until they would literally burst out " Further, he found that he was easily provoked by others PCR 405 He also found that Hughey's

anger may be based upon his prior victimization. However, he exhibited a “grossly inadequate style of coping with frustration, disappointment and rejection.” PCR 405

Dr. Watts felt that Dr. Siegel’s impressions were consistent with hers. PCR 405-06. She felt his findings were consistent with her conclusions of post traumatic stress disorder, depression, and his low IQ. PCR 406. Further, she noted that the Interdisciplinary Team noted that Hughey had problems controlling his temper, which Hughey denied showing little insight. PCR 409-10. Although the team found his behavior and attitude toward authority figures was positive, the team set goals for Hughey to include controlling frustration, hostility and anger, as well as decreasing physical aggression. PCR 409-10.

Dr. Watts diagnosed Hughey with a series of illnesses. She opined that he had dementia due to multiple etiologies. PCR 380. She noted it could be caused by his reported high blood pressure, the head traumas, his earlier alcohol abuse and family history, including his father’s dementia. PCR 380-81, Exhibit 48.

She also stated that he had an alcohol abuse history. PCR 381. She opined that he had been arrested for it previously. In addition it could impact his cognitive impairment. She further stated he reported drinking the evening before and the day of the offense. PCR 381. She was also aware of the family history of the abuse.

Dr. Watts focused on her opinion that he suffered from “Post-Traumatic Stress Disorder - Chronic.” PCR 382. She found that it could be based upon various traumatic events he experienced including the death of his mother, his violent childhood, or the multiple car accidents he was involved in. PCR 382-83. She noted his experience in seeing his father beat

his mother and shoot guns at his sisters PCR 382 She also referred to the car accident that resulted in his head injury PCR 383

Dr Watts opined that the mother's death contributed to PTSD PCR 383-84 Dr Watts noted that in addition to her death, he viewed the body at the hospital which "would certainly cause PTSD " PCR 384 in her report, she described that fact that he never received grief counseling or treatment She found that Hughey had difficulty sleeping and completing tasks Exhibit 48

Dr Watts further opined that Hughey suffered from "Major Depression, Single Episode, moderate with psychotic features and partial remission" and "complicated bereavement by history " PCR 384 Dr Watts found that Hughey had deterioration in functioning following his mother's death In addition, it was reported that he currently has visions of his mother This led to the diagnosis of major depression PCR 385

In addition, Dr Watts concluded that he also had "inhalent abuse by history " PCR 386 She determined this was based upon reports that he used to sniff gasoline from age 6 to 10 PCR 386

An Axis II diagnosis he received was "borderline intellectual functioning by history " PCR 386 She found that in 1997, Dr Lewis at the Dept of Mental Health made that diagnosis which suggested his IQ was higher than mentally retarded, but less than 80 PCR 387 Dr Watts also found evidence of hypertension, headaches, legal stressors and health problems PCR 387

Dr Watts felt Hughey had declined since October 1997 which she felt was based upon his dementia PCR 389 she pointed to the difference and decline from school grades to later testing PCR 390-91

Dr Watts opined that Hughey was voluntarily intoxicated at the time of the crime PCR 391 She stated that Hughey had told her he had drunk a case of beer with Chris Burton the night before the incident up to 3 a m and had one more beer the next day before he went to the victim's home PCR 392, ll 12-16 ¹⁹ PCR 445-46

Dr Watts opined that her testimony would address certain defined statutory mitigating circumstances First, Applicant claimed her testimony would provide more support for the "mentality" mitigator Particularly, her use of the school records from the DJJ files also revealed deficits in school work and testing below grad level PCR 390-91

Concerning the mitigator "under the influence of mental or emotional disturbance", she opined that her diagnosis of PTSD and major depression, which were not fully diagnosed at trial, would support those PCR 391-92 She found that the decline in functioning and impulsivity resulted after his mother's death Further, his intellectual level and PTSD met the mitigator As noted above, she also claimed, from his self-report, that he was intoxicated that date PCR 392 Also, Exhibit 48

Dr Watts also opined that she had evidence that could be used to show "substantial impairment in his capacity to conform his conduct to the requirements of law " PCR 392-93 She found that was based upon his depression, his alleged drinking of alcohol surrounding the incident, his irritability, and his "substantial difficulty conforming his impulses " PCR 393 She

¹⁹ On cross-examination, Dr Watts stated that neither Hughey nor Burton were asked at trial about drinking PCR 445 She was not aware if he had reported the information to trial counsel However, she was not aware if anyone considered him intoxicated that day who saw him She admitted this was an excessive amount, and could cause a question as to its veracity PCR 446

stated that he had been up all night drinking and that he was depressed PCR 393, 432-33 See also Exhibit 48

She opined that the alcohol abuse and PTSD went hand in hand for the crime PCR 433 She stated it caused him to over-react, decreases his ability to cope and he will react more impulsively PCR 434 She stated that if you layer all the facts together you get

Impulsively, poor judgment, explosively, with anger

PCR 435, 1 9

On cross-examination, Dr Watts confirmed that she did not disagree with Dr Lewis' evaluation in 1997 PCR 441 She stated that her opinions were similar other than PTSD PCR 441

She confirmed that symptom of PTSD was to avoid situations which relate back to the traumatic event, including the family violence However, Dr Watts admitted that Hughey did not avoid possession and use of weapons and his criminal history included possession of concealed weapons and a number of assaults PCR 444-46

She confirmed that she never saw any report or information around the time of the incident that Hughey was intoxicated PCR 445

Dr Watts restated the version that Hughey provided to her of events that led to the deaths [These factors were generally consistent with Hughey's trial version, except for the new evidence of drinking] PCR 446-47 Hughey told her that the gun was in the trunk of the car, that he got the gun after the victim pulled the knife on him, that he did not mean to shoot the aunt, that it was caused because his girlfriend got upset because she didn't want the aunt to know about

the fact she had been unfaithful to Hughey PCR 447 She stated that Hughey included in his version information that the children had been in the car at some point when an argument began outside PCR 448 In addition, Hughey also now claimed that the aunt bumped the gun PCR 448 Similar to trial, he did not describe how he shot Ms Jackson, other than the fact that he shot her PCR 449

Dr Watts confirmed that the DYS included a suggestion he suffered from “periodic explosive disorder ” Dr Watts stated Dr Siegel was predicting his future behavior She found his assessment similar to what happened on the day of the crime little to provoke, general distrust of others, wants things to go his way in relationships PCR 450

Dr Watts testified that if Hughey was on the street today, she would expect more explosive outbursts PCR 450

Dr Watts stated that the killing of the aunt and his girlfriend could create PTSD However, she noted he does not have flashbacks about the event PCR 453-54 She stated that “he sees the death of his mother as more significant ” PCR 455, ll 9-10

Counsel Robert Tinsley

Counsel Robert Tinsley testified that Hughey did not indicate to him prior to the trial the use of the level of alcohol or a case of beer that Dr Watts stated Hughey recently asserted PCR 468 Tinsley stated that Paige Tarr was hired as a mitigation specialist Tinsley stated that they ultimately retained Dr Donald Morgan later in the preparation PCR 478 Tinsley stated that Dr James Evans, a psychologist, had already seen Hughey and did not express any need to him for either a psychologist or neurologist He found Dr Evans’ testimony was consistent with the information that he had been provided PCR 479

Tinsley stated that he was aware of the A B A Guidelines at the time of the trial PCR 491 He was aware that forensic psychiatrist were frequently used PCR 492 Tinsley explained that he did not initially retain a psychiatrist because he was already familiar with Hughey and had represented him previously PCR 492 He said he had known him and worked with him for nearly two years PCR 492

However, he ultimately retained Dr Donald Morgan, who evaluated Hughey PCR 492-93 He recalled that he learned that Hughey was suffering from depression and that Dr Morgan could establish PTSD PCR 494 However, he chose not to call him as a witness because Dr Morgan indicated that he could not help him PCR 493

Tinsley also confirmed that he spoke with the retained social worker, Jeff Yungman, on October 8 when the report was sent He stated that they spoke about his conclusions and potential testimony on that date PCR 495 He stated Yungman's testimony was consistent with the report and he did not indicate any need to meet with other experts before he testified PCR 495

Counsel further stated that he reviewed the findings of Dr Lewis from the State Hospital who found the existence of "complicated bereavement, alcohol abuse in remission, and borderline intellectual functioning " PCR 497, Exhibit 48 He stated that he chose not to call her in mitigation because she was a state employee and did not feel that she would have been particularly helpful PCR 497

Counsel Tinsley stated that he prepared a request to charge #18 including non-statutory mitigating factors on October 29 PCR 501, State Exhibit 1, 2 He asserted that those factors were

- One was prior good acts
- Two was domestic nature
- Three, the fact that the defendant's the only remaining parent of the two children
- Four, the defendant's low average intellectual functioning
- Five, the head trauma suffered by Mr Hughey
- Six, the childhood abuse suffered by Mr Hughey
- Seven, the childhood exposure to violence of Mr Hughey
- The sudden tragic death of Ms Hughey and its impact on Mr Hughey
- Nine, the individual characteristics of Mr Hughey's thirteen year old level of function
- Ten, that Mr Hughey's the child of a dysfunctional family
- Eleven, the defendant's organic brain dysfunction
- Twelve, the defendant's learning disability
- Thirteen, the impact of a death sentence upon Mr Hughey's family
- Fourteen, the inherent worth of Mr Hughey as an individual

PCR 501 State Exhibit 1, 2

ANALYSIS

The Applicant contends that the evidence of mitigation presented by Dr Watts should have been presented at the sentencing phase of the trial Respondents submit that counsel was not deficient in failing to present such testimony

There Was No Gross Intoxication Proven At the Time of the Incident

First, we submit that he had failed in his burden of proof to show the excess intoxication claim presented through Dr Watts This self-report by Hughey prior to the hearing lacks credibility Hughey never advised his counsel, nor apparently anyone else, prior to the trial that he drank a case of beer the night before and more the morning of the incident To the contrary,

there was no record of any similar suggestion until Dr Watts received this self-report. Respondents request that factual assertion must be rejected. The record revealed that numerous accounts were given to counsel prior to the trial. There is no record of any similar suggestion being presented. As a factual matter, this must be rejected.

Counsel's Mitigation Investigation Was Reasonable and Not Deficient

The record clearly reveals, albeit later than Applicant now requests, that counsel retained a mitigation investigator, a social worker, a psychologist, and ultimately a forensic psychiatrist who provided expert opinions in the case. Counsel was aware that Dr Donald Morgan could testify about depression and post traumatic stress disorder, but chose not to call him when Dr Morgan indicated his information would not help him. The record is replete with references to Dr Morgan and his potential testimony. The failure to call Dr Morgan was not based upon neglect nor ignorance, but strategy based upon his knowledge of the testimony that would have been presented.

Further, the Petitioner questions the failure to call Dr Morgan because the experts did not give a conclusive opinion on post-traumatic stress disorder. The record reveals that Social Worker Yungman declared that Hughey's behaviors were consistent with a diagnosis of post-traumatic stress disorder. ROA 3913. Particularly, he related this to the mother's death resulting in changes in behavior and instances of suicide. ROA 3921. On cross-examination, Yungman indicated that Hughey "may or may not" have PTSD, but that his actions were consistent with it. ROA 3955. At the PCR hearing, Yungman indicated the reason for this qualification was due to his belief that social workers cannot diagnose.

Additionally, Dr James Evans opined that a possible diagnosis for Hughey could be “depression with psychotic features ” ROA 3979-80 He confirmed in his written report that Hughey had “minor signs of rejections and depressions ” ROA 3977 Dr Evans testified about post-traumatic stress disorder ROA 3977-3986 He presented the series of symptoms Hughey possessed which were supportive of that diagnosis However, on cross-examination, Dr Evans declared that he was “strongly suspicious that he suffers from post-traumatic stress disorder ” He further opined that although he could not give an express opinion “to the degree of certainty,” but found that there was converging evidence that would support that diagnosis ROA 3990

The issue that the jury had to decide was not whether any particular mental illness existed Instead it was whether the incident of the Applicant’s life supported a life sentence The jury heard from the family members historical evidence of the trauma within Hughey’s life Additionally, it was supported by the lengthy testimony of social worker and Dr Evans Dr Evans placed the impact of trauma on one’s ability to make decisions and judgement directly into the hands of the jury for its assessment The mere fact that he stated he could not reach the certainty of an actual diagnosis of PTSD did not undermine the power of his testimony concerning the trauma and its effects, as well as his other conclusions on depression

Trial counsel’s assessment of Dr Morgan and his decision to not present him has not been shown to be deficient Counsel Tinsley’s statement that Dr Morgan opined to him that he would not be helpful is uncontradicted Although he would have testified about depression and PTSD, those factors alone, in light of the similar testimony presentation through Dr Evans and Yungman, does not make the decision not to call Dr Morgan an error of constitutional dimension Similar testimony was presented

Respondent does not dispute that Dr. Watts presented testimony that would have been admissible at trial. However, she admitted that she was not available in 1997 to do an evaluation when she was contacted by counsel Tinsley. However, Tinsley, as noted previously, was able to retain another psychiatrist to complete an evaluation. Counsel is entitled to and can rely on the reports of experts who are consulted. *Murtishaw v. Woodford*, 255 F.3d 926, 947 (9th Cir. 2001) (entitled to rely on expert consulted), *Moran v. Godinez*, 57 F.3d 690, 699-700 (9th Cir. 1994), *Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990). And counsel need not continue looking for an expert - shop for experts - just because an unfavorable opinion has been received. *Smith v. Cockrell*, 311 F.3d 661, 676 (5th Cir. 2003). His assertion otherwise is without merit.

Here, the defense team did not abandon Hughey, but put into evidence a thoughtful and thorough case in mitigation considering various themes and presentations. Accord, *Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003) (concluding that counsel's performance "far surpassed the inadequate performance described in *Wiggins*" in that counsel, inter alia, "presented an expert psychologist who gave the jury a full picture of Tucker's disturbing social history"), *Byram v. Ozmint*, 339 F.3d 203, at 210 (4th Cir. 2003) (rejecting ineffective assistance claim where, "[u]nlike in *Wiggins* counsel here spent considerable time developing a picture of Byram's life"), and *Bacon v. Lee*, 225 F.3d 470, 481 (4th Cir. 2000) (observing that "Bacon's counsel could reasonably have concluded that the evidence they had developed would give the jury an accurate picture of Bacon's personality and that further investigation into Bacon's background would not be fruitful").

The sentencing jury was aware of the dysfunction family experience that Hughey had, as well as a series of traumas. In addition it was presented with a favorable picture of him through

his family The picture that Dr Watts presents is essentially the same picture of Hughey that the jury was in fact presented Deficient performance has not been shown

Assuming that deficiency was somehow presented, Respondent submits that Hughey has still failed to show a Sixth Amendment violation because prejudice under *Strickland* has not been shown First, as noted it was a double murder with a shotgun Second that petitioner was shown to have a prior history of assaults and contact with the correctional system Thirdly, the defense, in fact presented the traumatic family history, the love from some of his family members, his social history, evidence of depression, symptoms of PTSD, and brain deficits

The testimony of Dr Watts presented a two edged sword While it firmed up opinions on PTSD and Depression, it opened up areas that could have likely aggravated the situation for Hughey First, it re-opened the blame the victim versions, by suggesting that Ms Harris now ‘bumped the gun’ which resulted in her death - something that the defense had chosen to avoid In addition, it revealed through the DYS report that Hughey blames others for his troubles PCR 401-404 Importantly, the testimony focused attention on the diagnosis that Hughey was given of “periodic explosive tendencies” and the fact that he is easily provoked by others PCR 404

The explosive nature of Hughey was complicated by the conclusion that he had a “grossly inadequate style of coping with frustration, disappointment and rejection” and had problems controlling his temper The theme presented through cross-examination would be that of “impulsivity, poor judgement, explosively, with anger ” The result would have been the same

Contrasted with the presentation that was made and the slight difference in the beneficial testimony of Dr Watts, the negatives with the presentation would remove any reasonable

probability that the result of the proceeding would have been different had Dr Watts testimony been presented His claim must be denied

C The failure to specifically object to the “no mercy” instruction on federal constitutional grounds

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

Applicant s Memorandum p 99-130

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 This issue has also been addressed in ground four related to ineffective assistance of appellate counsel 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

Respondent recognizes that since the hearing and briefing, the Supreme Court has entered an opinion in the postconviction relief appeal in *Rosemond v Catoe*, 680 S E 2d 5 (S C 2009) that explicitly overruled the earlier holding in *State v Hughey* concerning this instruction However, we submit that neither deficient performance or prejudice can be shown Within argument four, we more fully discuss our position the ruling in *Rosemond* does not mandate a

new sentencing proceeding in this case. Since we assert that viewing the particular instructions given in this case as a whole, no reasonable juror would have misinterpreted the instruction to preclude its consideration of mercy evidence in the sentencing phase, the claim must be denied.

The Instruction As Given Did not Preclude Consideration of Mercy or An Act of Mercy

First, the fundamental flaw in the Applicant's logic on this issue, as with ground three, is the claim that the "other than as an act of mercy" instruction was intended to preclude a consideration of mercy whereas according to Judge Cole that the instruction covered the defense counsel's request to authorize a sentence of mercy ROA 4018-19. Particularly, Respondents submit that the Applicant has overlooked the following points that

- 1 Viewing the penalty phase instructions as a whole, it is clear that the trial judge, as well as counsel at the time of the trial, was aware that consideration of mercy was proper for the jury in its sentencing consideration - *but also that the jury was not limited to mercy in its life sentence consideration*
- 2 Judge Cole had previously declared that "my general instruction covers that" ROA 4018 19. The Applicant is now suggesting that Judge Cole's own instruction was contrary his own expressed understanding and interpretation of the law that mercy was a valid consideration and a sentence of mercy could be given
- 3 Viewing the instructions as a whole and not this challenged sentence in isolation, a reasonable juror would have known it had the ability to consider mercy in determining the sentence. See Boyde v California, 494 U S 370 (1990) (Eighth Amendment satisfied where there is not a reasonable likelihood that the penalty

phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner)

- 4 The Respondents agree [and have always agreed] that state law authorized consideration of mercy by a capital sentencer, although the federal constitution did not require it
- 5 Since the Applicant is now apparently interpreting the challenged sentence in isolation, the Court cannot overlooked the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence the Petitioner to a life sentence as an act of mercy **First, it is reasonable that the trial judge intended that the instruction tells the jury, “you may recommend a sentence of life imprisonment for no reason at all other than as an act of mercy ” The phrase “other than as an act of mercy” modifies the phrase “for no reason at all,” not the phrase “for any reason ”**
- 6 The problem with the Applicant’s assertion is that he fails to recognize that Judge Cole was using the term “other than” as an *adverb*, not as an *adjective* As an adverb, the phrase means “besides” and defined as “in addition to” or “as well” See *Roget’s 21st Century Thesaurus Third Edition (2009)* Also “other than” can be a preposition for “besides” and defined as in addition to with synonyms of “added to, along with, as well as , beside, beyond, together with Id Instead, the Applicant is limiting the phrase “other than” as an adjective meaning barring and defines as “except for ” Id

The Respondents agree with Judge Cole and the Court that “if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it” as a matter of state law Rosemond v Catoe, 680 S E 2d 5 (S C 2009) Beyond that, we would affirmatively assert as a matter of state law that even if no plea from witnesses for mercy is given the jury can consider a life sentence as an act of mercy The problem with the Supreme Court’s intervening new opinion in Rosemond v Catoe, albeit in *obiter dicta*, and Applicant’s reliance upon it, is that it ignores that the jury in Rosemond’s sentencing, as well as the jury in State v Hughey, 339 S C 439, 459, 529 S E 2d 721, 731 (2000), would have properly considered “mercy” evidence and that neither instructions “precluded a capital jury’s consideration of mercy evidence in the sentencing phase,” because any reasonable jury would have read the term as an adverb and not as an adjective as Applicant’s isolated parsing suggests

Since it is unquestionably apparent that Judge Cole was aware and agreed that a sentencing jury could consider mercy in its sentencing decision, it is important that the instructions be viewed as a whole and not taken out of context Simply put, if the author of the language (Judge Cole) intended the language to be similar to the request for a sentence of mercy and the trial counsel who had sought such a charge did not see a contradiction when listening to the penalty charge in its entirety at trial, a reasonable juror would likely have reached the same conclusion rather than the contrary conclusion assumed by the Applicant The fact that in hindsight a different and alternate interpretation to the parsed language suggests a different result must fail in light of the directions to both consider the evidence presented, the expressed mitigating circumstance instructions and the simple fact that all at the time of the trial did not treat this sentence with the construction now suggested

Second, defense counsel cannot be deemed ineffective for failing to object to the instruction based upon the new interpretation because Judge Cole plainly was of the opinion that it was similar to their requested “mercy” instruction and would have likely denied the request. Further, he cannot be deemed deficient for not preserving the claim for an appeal because the precise merits were raised and ruled upon in the direct appeal. He cannot factually suggest otherwise. To suggest sanctuary in the recent Rosemond opinion is misplaced because the result in the direct appeal in Hughey would have been the same whether there was an objection or not because it was addressed and not asserted to be procedurally barred. To suggest otherwise is either revisionist history or total speculation in the face of the Court’s 2000 decision.

How The Issue Was Presented At Trial

In the Applicant’s Brief, they refer to Defendant’s Request to Charge 16, ROA, p. 4126-27. In its pertinent part, the request stated:

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 no reason at all. This is what has been traditionally referred to as a “sentence of mercy.” 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.

ROA 4126-4127. During the charge conference, Judge Cole stated that “my general instruction covers that.” ROA 4018-19. After the instructions were given, counsel Tinsley made no specific objection to the “mercy” language set out in ROA, p. 4062, ll. 8-15, but made a general request that “beyond that I would just merely refer the Court to our request to charge 11 through 18, renew all prior motions at this time in the case, and sit down.” ROA p. 4068, ll. 5-8.

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 Naughtner, 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 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

Trial Counsel's PCR Testimony

Counsel Robert Tinsley testified that he made penalty phase instruction request 16 to try to get a life sentence “for no reason at all ” PCR 114, ll 19-24 He admitted that this was to have the jury be allowed to consider mercy and have a life sentence as an act of mercy PCR 115, l 7-18 Counsel acknowledged that when the request was discussed at the charge conference, Judge Cole declared “my general instruction covers that ” PCT 115-116, l 3 However, at the hearing, counsel Tinsley opined that the “other than as an act of mercy” language in the instruction was contrary to the charge he requested PCR 116, l 6-17 , citing ROA 4062 Counsel Tinsley stated that there was no specific objection to the “other than as an act of mercy” language PCR 117, l 4-6 Counsel Tinsley stated that he did not catch the instruction and that he would object to it because it should have been “for no reason at all” and even as an act of mercy, not the opposite of that **“But I just did not hear it like that ”** PCR 117, l 15-19 Counsel affirmed that the instruction could be construed as a comment on testimony if the defense puts in evidence requesting mercy PCR 118

Counsel Billy Garrett testified that he missed the instruction concerning mercy He stated that in addition to counsel Tinsley, Ed McCallum was at counsel table with them whose job it was to listen to the instructions PCR 222-223 Counsel Garrett stated that they were asking in their requests for jurors to consider a sentence based upon mercy PCR 223 He stated from the “cold transcript” it makes the matter glaring At the trial, Garrett claimed that he just did not see it and did not know how they missed it PCR 276

ANALYSIS

Respondent submits that the problem with trial counsel new retrospective assessment is that it was presented to him that the instruction precluded consideration of an act of mercy -

treating the “other than” phrase as an adjective rather than an adverb. The admission that he did not hear that way, is an admission that a reasonable juror listening to the instructions would not hear it that way either. The problem with this new assessment by counsel is that a reasonable juror would have rejected that interpretation because it ignores the penalty phase instructions as a whole. Simply put, under Applicant’s new concrete and parsed interpretation, the charge would have precluded a life sentence as an “act of mercy.” This flies in the face of the other ameliorating instructions, as well as Judge Cole’s expressed intent with his general instruction and the arguments. It is evident why defense counsel missed it - they read the instruction as Judge Cole and any reasonable juror would have considered it - as an adverb [in addition to, as well, besides] rather than as an adjective [barring, except for] - in light of the closing argument by counsel requesting “mercy” [ROA 4038, 4045 - “should you decide to recommend a sentence of mercy,” “spare my client’s life”]

There Was No Federal Constitutional Violation

Respondents concede and acknowledge as a matter of state law that a jury in South Carolina has a right to sentence a convicted murderer to a life sentence as an act of mercy Rosemond supra. However we disagree with any assertion that factors either require a sentence of death or require an act of mercy when statutory aggravating factors exist. In fact the federal constitution does not require mercy.

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 " 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)

In *State v Simmons*, 360 S C 33, 45 n 6, 599 S E 2d 448, 453 n 6 (S C ,2004), the South Carolina Supreme Court interpreted *State v Hughey* to stand for the proposition that "jury may recommend life imprisonment for any reason or no reason at all " However, it should also be noted that in *State v Hicks*, 330 S C 207, 218-219, 499 S E 2d 209, 215 (S C ,1998), the Court held that "the trial judge is not required to instruct the jury it could impose a life sentence "for any reason or no reason at all" where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found " *State v Green*, 301 S C 347, 359, 392 S E 2d 157, 163 (S C ,1990)(same), *State v Jones* 298 S C 118, 378 S E 2d 594 (1989) (same)

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

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 in the United States Supreme Court and this briefing, 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. "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 U.S. Supreme 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)

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. However, this instruction reasonably read did not do that. But, 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 in the direct appeal 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

Simply put the instruction did not preclude evidence of mercy being considered nor was it intended to do so by Judge Cole He intended it to suggest that a life sentence could be given for any reason or no reason at all *in addition to an act of mercy* To suggest it precluded a sentence as an act of mercy would suggest an absurd result Such interpretation was not the intent of the trial judge, not the impression of the defense counsel at the moment the instructions were given as a whole The defense team was particularly cognizant of the issue because they had requested an instruction on the issue A counsel conceded, had they heard it in the offensive manner now suggested they would have been on their feet objecting They did not which speaks volumes about how a jury would have considered it Similarly, Judge Cole similarly construed the language to authorize the instruction Finally, the South Carolina Supreme Court, in the first instance found the instruction appropriate , despite appellate counsel consistent protestations otherwise

In conclusion, Respondent submit that the Applicant has failed in his burden of proof in showing counsel was constitutionally deficient in failing to object specifically to the instruction in 1997 Further, in light of the rejection of the same claim in the direct appeal and the trial

judge's expresses statement that his instruction covered their request, prejudice under *Strickland* has not been shown. 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.

D Ineffective Assistance of Appellate Counsel - “other than as an act of mercy”

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, 446 U S 668(1984), Smith v Robbins, 528 U S 259(2000)

Applicant s Memorandum p 131-134

In his final claim, he asserts counsel Dudek inadequately briefed the “other than as an act of mercy ” issue in the direct appeal In the application, he contends that it should have been raised as an independent issue that it was contrary to state law and was 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 This underlying issue has been essentially covered under specification three which is incorporated herein by reference

Respondent submits that this claim must be dismissed As set forth more fully below, appellate counsel cannot be deemed constitutionally deficient and ineffective under the Sixth Amendment when he in fact raised the same issue to the Supreme Court within his initial merit brief and reply brief, the Supreme Court addressed and rejected the merits of this claim specifically in the direct appeal order, and that appellate counsel additionally argued it more

specifically in his petition for rehearing the same assertions raised herein. More importantly, it is evident from a reasonable reading of the trial record, that the jury would have considered the challenged language to have allowed, not precluded an “act of mercy.” See PCR 552. It is also evident that it was Judge Cole’s own assessment that the charge he gave concerning “any reason or no reason at all other than an act of mercy” was similar to the particular instruction requested by the defense for a “sentence of mercy.” [Judge Cole stated that “my general instruction covers that.” ROA 4018-19.]

Respondents submit this claim lacks merit.

The Instruction As Given Did not Preclude Consideration of Mercy or An Act of Mercy

First, the fundamental flaw in the Applicant’s logic on this issue, as with ground three, is the claim that the “other than as an act of mercy” instruction was intended to preclude a consideration of mercy whereas according to Judge Cole that the instruction covered the defense counsel’s request to authorize a sentence of mercy. ROA 4018-19. Particularly, Respondents submit that the Applicant has overlooked the following points that

- 1 Viewing the penalty phase instructions as a whole, it is clear that the trial judge, as well as counsel at the time of the trial, was aware that consideration of mercy was proper for the jury in its sentencing consideration - *but also that the jury was not limited to mercy in its life sentence consideration*
- 2 Judge Cole had previously declared that “my general instruction covers that.” ROA 4018-19. The Applicant is now suggesting that Judge Cole’s own

- instruction was contrary his own expressed understanding and interpretation of the law that mercy was a valid consideration and a sentence of mercy could be given
- 3 Viewing the instructions as a whole and not this sentence in isolation, a reasonable juror would have known it had the ability to consider mercy in determining the sentence See Boyde v California, 494 U S 370 (1990) (Eighth Amendment satisfied where there is not a reasonable likelihood that the penalty phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner)
- 4 The Respondents agree [and have always agreed] that state law authorized consideration of mercy by a capital sentencer, although the federal constitution did not require it
- 5 Since the Applicant is apparently interpreting the challenged sentence in isolation, the Court cannot overlooked the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence the Petitioner to a life sentence as an act of mercy **First, it is reasonable that the trial judge intended that the instruction tells the jury, “you may recommend a sentence of life imprisonment for no reason at all other than as an act of mercy ”** **The phrase “other than as an act of mercy” modifies the phrase “for no reason at all,” not the phrase “for any reason ”**
- 6 The problem with the Applicant’s assertion is that he fails to recognize that Judge Cole was using the term “other than” as an *adverb*, not as an *adjective* As an adverb, the phrase means “besides” and defined as “in addition to” or “as well”

See *Roget's 21st Century Thesaurus Third Edition* (2009) Also “other than” can be a preposition for “besides” and defined as in addition to with synonyms of “added to, along with, as well as , beside, beyond, together with Id Instead, the Applicant is limiting the phrase “other than” as an adjective meaning barring and defines as “except for ” Id

The Respondents agree with Judge Cole and the Court that “if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it” as a matter of state law Rosemond v Catoe, 680 S E 2d 5 (S C 2009) Beyond that, we would affirmatively assert as a matter of state law that even if no plea from witnesses for mercy is given the jury can consider a life sentence as an act of mercy The problem with the Supreme Court’s intervening new opinion in *Rosemond v Catoe*, albeit in *obiter dicta*, and Applicant’s reliance upon it, is that it ignores that the jury in Rosemond’s sentencing, as well as the jury in State v Hughey, 339 S C 439, 459, 529 S E 2d 721, 731 (2000), would have properly considered “mercy” evidence and that neither instructions “precluded a capital jury’s consideration of mercy evidence in the sentencing phase,” because any reasonable jury would have read the term as an adverb and not as an adjective as Applicant’s isolated parsing suggests

Since it is unquestionably apparent that Judge Cole was aware and agreed that a sentencing jury could consider mercy in its sentencing decision, it is important that the instructions be viewed as a whole and not taken out of context ²⁰ Simply put, if the author of the

²⁰In 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

language intended the language to be similar to the request for a sentence of mercy and the trial counsel who had sought such a charge did not see a contradiction when listening to the penalty charge in its entirety at trial, a reasonable juror would likely have reached the same conclusion rather than the contrary conclusion assumed by the Applicant

It is the improper parsing of the instruction that has led to the Applicant's tortuous interpretation which is inconsistent with this Court's standard of review for viewing jury instructions as a whole and matters on appeal from state post-conviction relief decisions. In order to prove counsel was ineffective, a PCR applicant must show that appellate counsel's performance was deficient and that he suffered resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In determining whether a defendant was prejudiced by allegedly improper jury instructions, the court must find that, ***viewing the charge in its entirety and not in isolation***, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution.²¹ *Todd v. State*, 355 S.C. 396, 399,

received

²¹The Court should not misinterpreted the emphasis in the Trial Brief of Respondent that the federal constitution did not require "mercy" in capital sentencing as an assertion that this instruction did not authorize an act of mercy. This earlier emphasis was naturally based upon implicit claims made in this case and other cases that the federal constitution required mercy consideration. See Trial Brief of Respondent. However, it was not to suggest that mercy was an improper consideration *as a matter of state law* or that this particular instruction [or Hughey] precluded consideration of mercy. To the contrary, as the Brief of Respondent declared "[t]he evidence that the Petitioner had previously emphasized in his PCR trial 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 implicit suggestion otherwise is a misapprehension by the Court of the State's position or the instruction itself.

585 S E 2d 305, 306 (2003), *Battle v State*, 382 S C 197, 203, 675 S E 2d 736, 739 (S C ,2009)

The Petitioner failed in his burden of proof

The Underlying Issue Was Presented And Decided In The Direct Appeal.

The issue raised in ground four asserts that appellate counsel was constitutionally deficient because he failed to assert his claim as a separate ground rather than within the section challenging the statutory mitigating circumstance instructions. While better appellate practice may suggest that properly preserved claims should be raised in a separate issue presented, appellate counsel Dudek was faced with a unique situation because there was no specific objection to the charge as given setting out any state law or federal constitutional claim. Since appellate counsel reasonably perceived that the State would oppose the first time challenge based upon a procedural defect, appellate counsel sought to blend the unpreserved issue into a properly preserved claim. This was done with the hopes that the Supreme Court would either address the claim or conclude that the claim was not properly before the court and should be presented in a state postconviction relief action - setting up the claim. However, the State chose to not assert the procedural bar and the merit of the state law instructional claim was addressed. The issue then becomes one of *style - not deficiency* under the Sixth Amendment. His claim must be denied.

First, appellate counsel cannot be deemed deficient because as noted in ground three, trial counsel did not object to the penalty phase instruction, as given, on this same issue. Simply put at no time did trial counsel make any specific objection that the “other than as an act of mercy” instruction violated state law because it precluded consideration of the evidence of a request for mercy or precluded a life sentence as an act of mercy. To the contrary, when his request was made for instruction request 16, Judge Cole declared that his own general instruction covered the

same defense request - the request for a sentence of mercy [As noted within, when the given charge is read with "other than" as an adverb or preposition, it does exactly as Judge Cole suggested and defense counsel requested - it authorizes a sentence of life as an act of mercy]

The inquiry then becomes whether an appellate counsel be constitutionally deficient for raising an unpreserved claim, but not as a separate ground. The simple answer is that counsel cannot be deemed concerning the raising of an unpreserved claim. First, South Carolina preservation rules are clear. The failure to object to language in an instruction bars appellate review. State v. Hudgins, 319 S C 233, 460 S E 2d 388 (1996). See also State v. Bailey, 298 S C 1, 5, 377 S E 2d 581, 584 (1989) (holding making "standard motions" at trial does not preserve an issue for appellate review and stating, "A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal "), State v. Jordan, 255 S C 86, 93, 177 S E 2d 464, 468 (1970) ("This court has, in numerous cases, held that it will not consider a question on appeal which was not presented in the court below "), State v. Williams, 303 S C 410, 401 S E 2d 168 (1991) (an issue must be raised to and ruled on by the trial judge to preserve for appellate review), State v. Hoffman, 312 S C 386, 440 S E 2d 869 (1994) (an issue which is not properly preserved cannot be raised for the first time on appeal), State v. Crowley, 226 S C 472, 85 S E 2d 714 (1955) (objection must be on specific ground), State v. Nichols, 325 S C 111, 120-121, 481 S E 2d 118, 123 (1997) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review ") The record is devoid of any showing that the issue was preserved at trial on the same grounds asserted. Contrary to the claim, at no time did Judge Cole state that the request 16 was rejected - it was instead that his instruction covered the request. Simply put, Judge Cole believed his language

was similar to the request for a sentence of mercy instruction, not that mercy was an invalid factor

How Appellate Counsel Dudek Presented The Issue In The Direct Appeal

In the Final Brief of Appellant before the South Carolina Supreme Court, the Appellant raised the following 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?

Final Brief of Appellant, p 40-43 Within the brief, appellate counsel Robert Dudek noted that in State v Bell, 302 S C 18, 393 S E 2d 364, 374 (1990) that the judge had charged an instruction the a life sentence could be given for any reason or no reason at all *Final Brief of Respondent*, p 41 However, in challenging the instruction at issue in this portion, counsel Dudek argued

“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 [**emphasis in original brief**] 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 mitigation 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 it 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 as an act of mercy [Emphasis added]

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.

Final Brief of Appellant, p. 43-43

In the *Final Brief of Respondent* on this issue, Respondent did not assert any procedural bar. The State asserted essentially, citing Boyde v. California, 494 U. S. 370 (1990) and Buchanan v. Angelone, 522 U. S. 269 (1998), 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), that the instructions given there was constitutionally adequate because it did not preclude consideration of relevant mitigating evidence, Eaton v. Angelone, 139 F. 3d 990 (4th Cir. 1998). Further noting that 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, that 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. Respondent contended that Judge Cole satisfied state and federal law in the instruction on mitigating circumstances, emphasizing the following

portions of the instructions including 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 *Final Brief of Respondent*, p 41-44 Respondents argued that it was unclear what the Appellant's complaint to the instructions on mitigation, despite the timely objection ROA 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

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

Final Brief of Respondent, p 44

In the *Final Reply Brief of Appellant*, counsel Dudek replied, again citing State v Bell and urging that

"[T]he 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 proceeding

Final Reply Brief of Appellant, p 18-19 (emphasis added)

In deciding this issue, the Supreme Court of South Carolina went to the heart of the current complaint on the instruction of "any reason or no reason at all other than as an act of mercy" and interpreting this claim as adequately presented and preserved

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

Counsel Dudek made a "petition for rehearing" on April 11, 2000. Within the petition, he made the following argument:

The confusing and conflicting penalty phase 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 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 these reasons, petitioner asks that this Court reconsider its opinion in State v. John Kennedy Hughey, Op. No. 25096, Shearouse Adv. Sh. #12 at pages 25-42, and grant rehearing.

State v. Hughey, Petition for Rehearing, April 11, 2000, p. 6-7. The petition for rehearing was denied by the Court on May 11, 2000.

Appellate counsel Dudek, however, did not stop with the South Carolina Supreme Court with his presentation of the claim. He raised it to the United States Supreme Court as his sole claim on certiorari in the direct appeal. In the Petition for Writ of Certiorari, counsel Dudek directed the Court to the instruction in his Question Presented stating

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).

***The Procedural Impact of Rosemond v. Catoe*, 680 S. E. 2d 5 (S. C. 2009)**

As noted in claim three, this issue faces a confusing procedural posture for three separate reasons. First, as noted in argument three, the same issue was not presented to the trial judge and therefore was not technically preserved for a direct appeal. Second, while there was no contemporaneous objection to the particular instruction as given, counsel Robert Dudek did raise a challenge to the "any reason or no reason" in the direct appeal.²² Since the State in its *Initial*

²²In the Applicant's Brief, they refer to Defendant's Request to Charge 16, ROA, p. 4126-27. In its pertinent part, the request stated

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 no reason at all. This is what has been traditionally referred to as a "sentence of mercy." 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.

ROA 4126-4127. During the charge conference, Judge Cole stated that "my general instruction covers that." ROA 4018-19. After the instructions were given, counsel Tinsley made no specific objection to the "mercy" language set out in ROA, p. 4062, ll. 8-15, but made a general request

Brief of Respondent did not assert a procedural bar due the lack of the objection, the appellate court was free to address the merits of the claim. Importantly, the Supreme Court specifically rejected the claim on merit grounds in the direct appeal. Thirdly, while this briefing was pending the Supreme Court took an extraordinary step and partially overruled *State v. Hughey* in *Rosemond v. Catoe et al*, Op. No. 26679, __ S.C. __, 680 S.E.2d 5 (S.C. June 29, 2009)²³

In the *Rosemond* decision, the Court concluded

that “beyond that I would just merely refer the Court to our request to charge 11 through 18, renew all prior motions at this time in the case, and sit down.” ROA p. 4068, ll. 5-8

²³An attorney is not required to anticipate or discover changes in the law or facts, which did not exist, at the time of trial, to render effective assistance of counsel. *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994), *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993). But, a finding by the Supreme Court that an attorney was ineffective for failing to request an instruction on well established law is not a “change in the law” which would protect other attorneys who failed to do so prior to the Court’s opinion. *Chalk v. State*, 313 S.C. 25, 437 S.E.2d 19 (1993).

A counsel is not ineffective in failing to forecast changes or advances in the law. *Larrea v. Bennett*, 368 F.3d 179 (2d Cir. 2004) (failure to anticipate change in state law not ineffective, rejecting at 184 n. 2 that an attorney should be familiar with cases from other jurisdictions, *Sherrill v. Hargett*, 184 F.3d 1172 (10th Cir. 1999), *Lilly v. Gilmore*, 988 F.2d 783, 786 (7th Cir. 1993), *Moore v. Deputy Commissioners Sci-Huntington*, 946 F.2d 236, 245, fn. 6 (3rd Cir. 1991), *Johnson v. Armontrout*, 923 F.2d 107, 108 (8th Cir. 1991), *Sistrunk v. Vaughn*, 96 F.3d 666, 672 (3rd Cir. 1996) (not ineffectiveness to fail to anticipate “*Batson*”). The Ninth Circuit says counsel cannot be required to anticipate later decisions. *Lowry v. Lewis*, 21 F.3d 344, 346 (9th Cir. 1994). See also *Murtishaw v. Woodford*, 255 F.3d 926, 949-950 (9th Cir. 2001) (not ineffective to fail to request imperfect self-defense instruction before Supreme Court adopted it), *U.S. v. Chambers*, 918 F.2d 1455, 1461 (9th Cir. 1990) (view counsel's conduct at the time counsel is required to act). The same is true for counsel who fails to preserve an issue after U.S.S.C. has granted certiorari but U.S.S.C. has not yet decided the case. *U.S. v. McNamara*, 74 F.3d 514 (4th Cir. 1996), *U.S. v. Smith*, 915 F.Supp. 1378 (W.D. Pa. 1995). Failure to seek a continuance in anticipation of a possible change in federal sentencing law was not ineffectiveness in *U.S. v. Gonzalez-Lerma*, 71 F.3d 1537, 1542 (10th Cir. 1995). Counsel was not ineffective in *U.S. v. Goode*, 143 F.Supp.2d 817, 826-827 (E.D. Mich. 2001) for failure to raise a proof beyond a reasonable doubt sentencing claim before the decision in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

During the sentencing phase, the testimony of two family friends was properly admitted and these witnesses asked the jury for mercy. In contrast, the trial court then instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy. Notably, the trial court's jury instruction mirrored the instruction found proper subsequent to Rosemond's trial in *State v. Hughey*, 339 S.C. 439, 459, 529 S.E.2d 721, 731 (2000). **We overrule *Hughey* to the extent it approved and sanctioned the charge given here.**

Rosemond v. Catoe, supra. Importantly, while the Court removed its apparent sanction of the instruction in *Hughey*'s case, it did not grant the sentencing hearing based upon the *Hughey* conclusion. See PCR 555. To the contrary, the Court's conclusory mandate was

Due to the overwhelming evidence of guilt and want of prejudice, we affirm the PCR court's denial of relief regarding the assignment of errors related to the guilt phase of Rosemond's trial. We reverse the PCR court and hold Rosemond established his entitlement to a new sentencing hearing as a result of trial counsel's failure to present any mental health mitigation evidence in the sentencing phase. We remand the case for a new sentencing hearing. **We overrule *State v. Hughey* to the extent it approved the instruction that precluded a capital jury's consideration of mercy evidence in the sentencing phase.**

Rosemond, supra. Thus, the mandate is clear of two matters - first, trial judges should not use the similar language in the future. However, it did not conclude that new sentencing proceedings were required when a similar instruction is given. To the extent that *Hughey* may claim that relief is automatic after *Rosemond*, a closer reading of *Rosemond* requires that the assertion must be rejected.

The Law of the Case Doctrine Precludes Reconsideration of the Holding in Hughey for Hughey

South Carolina applies the "law of the case" doctrine to its decisions. In *Greenwood County v. Watkins*, 196 S.C. 51, 12 S.E.2d 545 (1940), the Court stated that it was well settled in S.C. that the rulings in a case, even though admittedly wrong become the law of the case. The

doctrine of “the law of the case” prohibits issues which have been decided in a prior appeal from being relitigated in the trial court in the same case 5 Am Jur 2d *Appellate Review* § 605 (1995)

The law of the case applies both to those issues explicitly decided and to those issues which were necessarily decided in the former case *Nelson v Charleston & Western Carolina Railway Co* 231 S C 351, 357, 98 S E 2d 798, 800 (1957) (where Court granted a new trial in first appeal for errors in the charge, it logically determined trial court had not erred in refusing defendant's motion for a directed verdict “for if there had been error in this respect it would have been unnecessary to consider any other questions”), see also *Warren v Raymond* 17 S C 163 (1882) (all points decided by the Court on appeal, or necessarily involved in what was decided, are res judicata and cannot be considered again in the cause) ²⁴ *Ross v Medical University of South Carolina* 328 S C 51, 62, 492 S E 2d 62, 68 (S C ,1997) Also, *Johnson v Board of Com'rs of Police Ins & Annuity Fund of State*, 68 S E 2d 629, 633 (S C 1952) (“[T]he rulings in a case even though admittedly wrong become the law of the case and res judicata between the parties), *Jenkins v Southern R Co* 145 S C 161, 143 S E 13 (1927)(application for an injunction was refused on the ground that the initial decision in the first appeal was “not only res adjudicata as between the parties, but is the law of the case,’ right or wrong,” even though earlier decision was overruled)

²⁴ 21 C J S *Courts* § 143 (1990) (“ [a]n adjudication on any point within the issues presented by the case cannot be considered a dictum and this rule applies as to all pertinent questions although only incidentally involved, which are presented and decided in the regular course of the consideration of the case, and lead up to the final conclusion and to any statement in the opinion as to a matter on which the decision is predicated ”) (Emphasis added) *Ross v Medical University of South Carolina* 328 S C 51, 62, 492 S E 2d 62, 68 (S C ,1997)

Further, retroactive application to collateral cases is not required. In *McCray v State*, 287 S C 160, 337 S E 2d 218 (1985), the Court relied upon *Shea v Louisiana*, 470 U S 51, 105 S Ct 1065, 84 L Ed 2d 38 (1985) and *Solem v Stumes*, 465 U S 638, 104 S Ct 1338, 79 L Ed 2d 579 (1984) to conclude that a state court decision did not have retroactive application. Although the later interpretation of the decision as being grounded in the federal constitution and subject to retroactive treatment, the *McCray* decision stood for the general proposition concerning non-retroactivity as a matter of state procedure.

Subsequently, the Court in *Talley v State*, 371 S C 535, 541, 640 S E 2d 878, 880 - 881 (S C ,2007), addressed the inapplicability of retroactivity of decisions. The Court looked to both *Teague v Lane* 489 U S 288, 109 S Ct 1060, 103 L Ed 2d 334 (1989), and *State v Jones* 312 S C 100, 439 S E 2d 282 (1994), to determine whether new decision in the U S Supreme Court should be applied retroactively on collateral review in state court. The Court concluded that in determining whether Respondent was deprived of his federal constitutional right to counsel, it was required to follow the United States Supreme Court's decisions on retroactivity. *Am Trucking Ass'ns Inc v Smith* 496 U S 167, 178, 110 S Ct 2323, 2330, 110 L Ed 2d 148, 159 (1990) ("In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions"), *see also, e g State v Means* 367 S C 374, 626 S E 2d 348 (2006) (applying *Jones* in determining *State v Gentry* 363 S C 93, 610 S E 2d 494 (2005), should be applied retroactively), *State v Hill* 361 S C 297, 604 S E 2d 696 (2004) (applying *Jones* in determining *State v Sutton* 340 S C 393, 532 S E 2d 283 (2000), should be applied retroactively), *Gibson v State* 355 S C 429, 586 S E 2d 119

(2003) (applying *Teague* to determine whether *Sandstrom v Montana* 442 U S 510, 99 S Ct 2450, 61 L Ed 2d 39 (1979), should be applied retroactively on collateral review)

The Talley court determined that the question of whether a decision announcing a new rule should be given prospective or retroactive effect should be addressed at the time of the decision *Teague* 489 U S at 300, 109 S Ct at 1070, 103 L Ed 2d at 349 “[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final ” *Id* at 301, 109 S Ct at 1070, 103 L Ed 2d at 349 (internal citations omitted) (emphasis in original) *Talley v State*, 371 S C 535, 541, 640 S E 2d 878, 880 - 881 (S C ,2007)

Here, reconsideration of the merits within the direct appeal in light of *Rosemond* is not required and need not be given retroactive effect Plainly, the *Hughey* direct appeal became final for retroactivity purposes when the remittitur was entered (or when certiorari was denied for federal habeas corpus purposes) The change represented by *Rosemond* was plainly not dictated by the precedent at the time of *Hughey*’s case because *Hughey* expressly decided otherwise As such we respectfully submit that the intervening decision in *Rosemond* has no impact on the present issues in *Hughey*’s case with respect to issue three and four

Further, it must be noted that in overruling *Hughey*, the Supreme Court did not conclude that postconviction relief should be granted based upon the claim that counsel was ineffective for failing to object to a similar sentence in the penalty phase instruction The Court expressly declined to address the actual issue To the contrary, it merely chose to address the prior precedent in *Hughey* Thus, postconviction relief is not mandated by this intervening decision

To hold otherwise would undermine finality in criminal procedures unnecessarily²⁵ See *Anderson v Leeke*, 271 S C 435, 441-442, 248 S E 2d 120, 123 (S C ,1978) Further, it would eviscerate a series of precedents concerning ineffective assistance of counsel claims concerning

²⁵ In *Anderson v Leeke*, 271 S C 435, 441-442, 248 S E 2d 120, 123 (S C ,1978), the Court stated

Most of what Mr Justice Harlan said in his separate opinion in Mackey v United States, 401 U S 667, 91 S Ct 1160, 1179, 28 L Ed 2d 404 (1971), with respect to collateral relief from a criminal conviction, is applicable here

“Finality in the criminal law is an end which must always be kept in plain view

At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final (citation omitted). This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.”

Anderson v Leeke, 271 S C 435, 441-442, 248 S E 2d 120, 123 (S C ,1978)

the fact that there was no 6th Amendment constitutional requirement to anticipate changes in the law, thereby holding trial counsel effective *See Gilmore v State*, 314 S C 453, 445 S E 2d 454 (1994), *Thornes v State*, 310 S C 306, 426 S E 2d 764 (1993) (an attorney is not required to anticipate or discover changes in the law or facts, which did not exist, at the time of trial, to render effective assistance of counsel)

Legal Standard

A PCR applicant has the burden of proving appellate counsel's performance was deficient *Anderson v State*, 354 S C 431, 581 S E 2d 834 (2003), *Southerland v State*, 337 S C 610, 524 S E 2d 833 (1999) A defendant is constitutionally entitled to the effective assistance of appellate counsel *Evitts v Lucey*, 469 U S 387, 105 S Ct 830, 83 L Ed 2d 821 (1985), *Thrift v State*, 302 S C 535, 397 S E 2d 523 (1990), *Tisdale v State*, 357 S C 474, 475, 594 S E 2d 166, 167 (2004) , *Southerland v State*, 337 S C 610, 615, 524 S E 2d 833, 836 (1999)

The proper standard for assessing a claim of ineffectiveness of appellate counsel is that set forth in *Strickland v Washington*, 466 U S 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984) *Smith v Robbins*, 528 U S 259, 285, 120 S Ct 746, 145 L Ed 2d 756 (2000)(following *Smith v Murray*, 477 U S 527, 535-36, 106 S Ct 2661, 91 L Ed 2d 434 (1986)) The petitioner must show both (1) constitutionally deficient performance, by demonstrating that his counsel's conduct was objectively unreasonable, and (2) resulting prejudice, by demonstrating a reasonable probability that, but for counsel's unprofessional error(s), the result of the proceeding--in this case the appeal--would have been different Id at 285 (applying *Strickland*.)

Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record " Thrift v State, 302 S C 535, 539, 397 S E 2d 523, 526 (1990) citing Jones v Barnes, 463 U S 745, 103 S Ct 3308, 77 L Ed 2d 987 (1983) (emphasis supplied) "For judges to second-guess reasonable professional judgments and impose on counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy " Jones, 463 U S at 754, 103 S Ct 3308 "Furthermore, to render effective assistance, an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal Holladay v State, 629 So 2d 673 (Ala Cr App 1992), McCoy v Lynaugh, 874 F 2d 954, 965-66 (5th Cir 1989) Rather, counsel must be given some discretion in determining which claims possibly have merit, and thus a better chance of success, and which claims do not have merit, and thus have little chance of success Smith v Murray, 477 U S 527, 106 S Ct 2661, 91 L Ed 2d 434 (1986), Engle v Isaac, 456 U S 107, 102 S Ct 1558, 71 L Ed 2d 783 (1982) " Davis v State, 720 So 2d 1006, 1014 (Ala Crim App 1998)

" '[E]xperienced advocates have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed ' "

Jones v Barnes, 463 U S 745, 746, 103 S Ct 3308, 77 L Ed 2d 987 (1983) ²⁶

²⁶ The purpose of ineffectiveness review is not to grade counsel's performance. See Strickland, 104 S Ct at 2065, see also White v Singletary, 972 F 2d 1218, 1221 (11th Cir 1992) ('We are not interested in grading lawyers' performances, we are interested in whether the adversarial process at trial, in fact, worked adequately ') Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another Strickland, 104 S Ct at 2067. Different lawyers have different gifts, this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious

In applying the [Strickland] test to claims of ineffective assistance of counsel on appeal, reviewing courts must accord appellate counsel the "presumption that he decided which issues were most likely to afford relief on appeal." Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993). See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir. 1989). Indeed, "[w]innowing out weaker arguments on appeal and focusing on those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (quoting Jones, 463 U.S. at 751), see also Smith, 882 F.2d at 899 (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims"). Although recognizing that "[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." Id. (quoting Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986)). Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir. 2000) (en banc).

Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002). Gilchrist v. State, 612 S.E.2d 702, 705 (S.C. 2004) (appellate counsel not ineffective where trial counsel's

the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances ") See State v Hicks, 330 S C 207, 499 S E 2d 209, cert denied, 525 U S 1022, 119 S Ct 552, 142 L Ed 2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review), State v Dickman, 341 S C 293, 534 S E 2d 268 (2000) (party may not argue one ground at trial and an alternate ground on appeal) ²⁷

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal Strickland, supra, Johnson v State,

²⁷Federal courts analyze this issue of ineffective assistance of appellate counsel similarly If an issue has not been preserved for review by timely objection, appellate counsel is not ineffective for failure to raise it *Lee v Davis*, 328 F 3d 896, 901-2 (7th Cir 2003), *Aparicio v Artuz*, 269 F 3d 78, 96 (2d Cir 2001), see *US v Davis*, 406 F 3d 505, 510-11 (8th Cir 2005)(appellate counsel not ineffective for failure to challenge trial counsel because appellate counsel would have had no viable record for such a challenge) *Howard v Gramley*, 225 F 3d 784, 791-792 (7th Cir 2000) See *Burton v Renico* 391 F 3d 764, 777 (6th Cir 2004) noting the absence of an objection to alleged misconduct, which bars the issue on appeal and removed a claim of ineffective appellate counsel, *Albrecht v Horn*, 485 F 3d 103, 138 (3rd Cir 2007) noting trial counsel made no objection to preserve issue Where the matters argued against appellate counsel were not preserved for review on appeal, appellate counsel was procedurally barred from raising them and, therefore, could not be deficient in failing to pursue them *Jackson v Dugger*, 931 F 2d 712 (11th Cir 1991), *Kitt v Clarke*, 931 F 2d 1246 (8th Cir 1991)

It is not ineffectiveness of counsel on appeal to fail to raise a "developing claim " *Deutscher v Whitley*, 884 F 2d 1152, 1158 (9th Cir 1989), vacated and remanded on other grounds, *Angelone v Deutscher*, 500 U S 901 (1991) The classic example is *Jameson v Coughlin*, 22 F 3d 427 (2d Cir 1994) where counsel's failure to raise an appellate issue was found reasonable at the time even though the same issue was raised by a codefendant who prevailed But see *Walter v US*, 969 F 2d 814, 816 (9th Cir 1992) which chafes at the resulting inequity That alleged inequity, however, was spurned in *Hartey v Vaughn*, 186 F 3d 367, 370-71 (3rd Cir 1999) on the ground that the court was not free to disregard habeas issues c f *Hanson v Mahoney*, 433 F 3d 1107, 1113-14 (9th Cir 2006) (no ineffectiveness in failing to object to unaccepted issue and defaulted on appeal even though state court later accepted the argument) A challenge to the effectiveness of appellate counsel for failure to challenge a ruling allowing admission of jail correspondence failed in *Busby v Dretke*, 359 F 3d 708 (5th Cir 2004) where the state court had recently ruled against the claim and the federal court ultimately found no prejudice

325 S C 182, 480 S E 2d 733 (1997) That is, the Applicant must prove prejudice by showing he would have prevailed on appeal had a writ been filed by counsel and granted by this Court See, Simpkins v State, 303 S C 364, 401 S E 2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal) ²⁸

²⁸When evaluating the issue of ineffective assistance of appellate counsel, courts review the appellate proceedings to determine whether prejudice is shown *Mapes v Tate* 388 F 3d 187, 194 (6th Cir 2004) (noting that prejudice is shown if “there is ‘a reasonable probability that, but for his counsel’s [failings] , [the defendant] would have prevailed on his appeal’ ”) (alterations in original) (quoting *Smith v Robbins* 528 U S 259, 285, 120 S Ct 746, 145 L Ed 2d 756 (2000)) “A reasonable probability is a probability sufficient to undermine confidence in the outcome ” *Burton* 391 F 3d at 773 (internal quotation marks omitted), *Maples*, 340 F 3d at 437

In *Lockhart v Fretwell* 506 U S 364, 113 S Ct 838, 122 L Ed 2d 180 (1993), the Supreme Court was confronted with an Arkansas state defendant whose trial counsel failed to make an objection to the aggravating factor upon which his death sentence was based At the time of sentencing, the Eighth Circuit Court of Appeals had held, in *Collins v Lockhart* 754 F 2d 258 (8th Cir 1985), that the use of the aggravating factor in question was unconstitutional On state collateral review, the defendant raised the claim of ineffective assistance of trial counsel for failing to make a *Collins* objection, which the state court denied Defendant then filed a 28 U S C § 2254 petition, “argu[ing] that his trial counsel did not perform effectively because he failed to raise the *Collins* objection ” *Fretwell* 506 U S at 367, 113 S Ct 838 The district court granted the habeas petition and the Eighth Circuit Court of Appeals affirmed, even though it had overruled *Collins* while defendant’s habeas petition was pending The Court of Appeals reasoned that the Arkansas trial court was bound under the Supremacy Clause to obey the Eighth Circuit’s interpretation of the Federal Constitution [in *Collins*] Based on this belief, it reasoned that had counsel made the objection, the trial court would have sustained the objection and the jury would not have sentenced respondent to death It held that since respondent was entitled to the benefit of *Collins* at the time of his original sentencing proceeding, it would only perpetuate the prejudice caused by the original sixth amendment violation to resentence him under current law

Fretwell 506 U S at 368, 113 S Ct 838 (internal quotation marks omitted)

The Supreme Court reversed, holding “that the court making the prejudice determination may not consider the effect of an objection it knows to be wholly meritless under current governing law, even if the objection might have been considered meritorious at the time of its omission ” *Id* at 374, 113 S Ct 838 (O’Connor, J, concurring), *id* at 371-72, 113 S Ct 838 The Court noted that “the Sixth Amendment right to counsel exists ‘in order to protect the fundamental right to a fair trial ’ ” *Id* at 368, 113 S Ct 838 (quoting *Strickland* 466 U S at 684, 104 S Ct 2052) Moreover, the Court reasoned that, when evaluating the prejudice prong of *Strickland* an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective To set aside a conviction or sentence solely because the outcome would have been different but for counsel’s error may grant the defendant a windfall to which the

ANALYSIS

Respondent still submits that the Petitioner has failed to show, in light of the South Carolina Supreme Court's prior treatment of the instruction in Hughey's appeal and appellate counsel's Initial and Final Brief of Appellant that to have argued his emphasis differently on the "other than as an act of mercy" the appeal would have been reversed and that the Court would have vacated the death sentence. Absent this showing, complaints about technique and emphasis do not satisfy the burden of proof.

Appellate Counsel Dudek's Testimony

Counsel Robert Dudek, a nineteen year counsel with the South Carolina Division of Appellate Defense, testified that he handled the Hughey appeal PCR 307. He stated that at the time of the trial, South Carolina did not have a plain error rule and that he had to rely upon contemporaneous and specific objections for appellate issues PCR 308. Counsel Dudek referred to R 4018 where the trial judge indicated that his general instruction would cover defense counsel's Request 16 PCR 310-311.

law does not entitle him *Id.* at 369-70, 104 S Ct 2052 (footnote omitted)

Although the holding of *Fretwell* is very narrow, *Northrop v Trippett* 265 F 3d 372, 385 (6th Cir 2001), the circumstances of the instant appeal are strikingly similar to *Fretwell*. At the time of Hughey's direct appeal, his claim was arguably meritorious. However, this alone is not enough to show prejudice, because the Supreme Court rejected the claim in Hughey's direct appeal. Thus, according to *Fretwell*, Hughey cannot show the necessary prejudice for his claim of ineffective assistance of appellate counsel based on the failure to raise a now-meritless claim, because Hughey cannot show that his appellate proceeding was "fundamentally unfair or unreasonable." *Fretwell* 506 U S at 369, 113 S Ct 838. A holding to the contrary would give Hughey "a windfall to which the law does not entitle him." *Fretwell* 506 U S at 370, 113 S Ct 838. Therefore, Respondent submits that Hughey's ineffective-assistance-of-appellate-counsel claim must fail after the Supreme Court's decision in *State v Hughey*.

He was next referred to R 4126-27 which included the defense request to charge, which included the reference to “a sentence of mercy” and “ you may sentence him to life imprisonment for no reason at all, that is an act of mercy ” PCR 311 Appellate counsel maintained that the trial judge’s initial indication at R 4018 suggested the request for a mercy instruction would be covered PCR 312 Counsel Dudek was next referred to R p 4062, ll 8-15 which include the phrase “ you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy ” PCR p 313, ll 6-12 Counsel Dudek declared that the charge as given was not consistent with the request He claimed it “turned the charge on its head” and that it was telling the jurors that a life sentence based upon mercy would be improper PCR p 313, ll 19-23 Counsel Dudek next considered R p 4068, ll 11-18 and opined that charge 16 would have been included in that exception PCR 314

Counsel Dudek stated that the argument in his appellate brief concerned a broader issue of non-statutory mitigating factors He stated that he felt the “mercy” charge was an important issue because he recalled it was the first time he had seen an instruction that you cannot sentence a defendant to life as an act of mercy He stated it jumped out to him as an issue He said, in retrospect, where there was not a specific objection, he tried to blend it in with the other issue Although you rarely get away with it PCR 315-16

Counsel Dudek stated that he was trying to set up the mercy instruction issue to be procedurally barred because it was not preserved for appellate review He said this would have set it up for post-conviction relief However, the Supreme Court “kind of reached out and grabbed the issue ” PCR 316

In hindsight, Dudek said if he did it again, he should have raised it as a stand-alone issue with a separate topic heading that the mercy instruction was improper and prejudicial, rather than blending it. PCR 316. He stated his argument would be that a jury had the right to sentence the defendant for any reason or no reason at all and as an act of mercy. He stated that mercy was a different concept than passion. He stated that he would argue that Hughey was a human being and as an act of mercy to sentence life rather than death. PCR 317.

On cross-examination, counsel Dudek admitted that he raised within issue 6 the present issue on the charge of you can give a life sentence for any reason or no reason at all other than as an act of mercy at pages 40-43. PCR p. 317, ll. 20-22. He further notes that within the brief, page 41, he emphasized the “other than as an act of mercy” in bold print. PCR p. 318, ll. 9-15. He further admitted that he argued in his brief that instruction did not allow for the jury to impose life for any reason or no reason at all, and that the instruction was confusing and suggested that an act of mercy was an invalid reason for a life sentence. PCR 319.

Upon review of the State’s brief, counsel Dudek conceded that the State did not assert a procedural bar to the challenge to the mercy instruction in its brief. PCR 319-20. Rather, the State asserted the instruction was not confusing. PCR 320.

Counsel Dudek conceded that while he attempted to set up the issue for post-conviction relief that the Supreme Court addressed the issue. PCR p. 320, l. 21. However, he stated the argument was not whether the sentence would be based upon passion or prejudice, but whether it could be based upon an act of mercy. PCR 321.

Counsel stated the Supreme Court did not ignore his argument, conceding that they paraphrased it in the order. He stated that the Court grabbed the issue and he did not expect them

to do so and it was his error in thinking he was only “squarely presenting the issue for post-conviction relief” PCR 323

Counsel Dudek further conceded that he argued the issue in his brief in the direct appeal as forcefully as he argued it in his PCR testimony PCR p 323, ll 9-12 He admitted he made a petition for rehearing which was denied PCR 324, 327

On re-direct, counsel Dudek stated that it would be inconsistent to have a family member testify and ask for mercy and then have the judge state that they could give a life sentence for any reason or no reason at all other than as an act of mercy PCR 328 In Dudek’s opinion, it would essentially say disregard the testimony PCR p 328, ll 5-11

CONCLUSION

Respondent submits that this claim must be dismissed Appellate counsel Dudek was successful in raising the claim in Hughey and having it addressed on the merits He cannot be deemed constitutionally deficient and ineffective under the Sixth Amendment when he in fact raised the same issue to the Supreme Court within his initial merit brief and reply brief, the Supreme Court addressed and rejected the merits of this claim specifically in the direct appeal order,²⁹ and that appellate counsel additionally argued it more specifically in his petition for rehearing the same assertions raised, but rejected

More importantly, despite the recent action in *Rosemond*, it is evident from a reasonable reading of the trial record and the jury instructions, that the jury would have considered the challenged language to have allowed, not precluded an “act of mercy” - the giving of a life

²⁹This was a likely reaction to the oral argument in the direct appeal where the “no mercy” claim was argued

sentence See PCR 552 Simply put there is no showing in the record of any mandate for a death sentence It is also evident that it was Judge Cole's own assessment that the charge he gave concerning "any reason or no reason at all other than an act of mercy" was similar to the particular instruction requested by the defense for a "sentence of mercy " [Judge Cole stated that "my general instruction covers that " ROA 4018-19]

The assertion must be dismissed

V CUMULATIVE PREJUDICE ISSUE

Applicant's Memorandum p 135-138

To prove ineffective assistance of counsel, a petitioner must satisfy the two-pronged test set forth in Strickland v Washington, 466 U S 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984). If a petitioner has not satisfied one prong of the Strickland test, the court does not need to inquire whether he has satisfied the other prong. Strickland, 466 U S at 697. Furthermore, "an attorney's acts or omissions that are not unconstitutional individually cannot be added together to create a constitutional violation." Fisher v Angelone, 163 F 3d 835, 852-53 (4th Cir 1998).

In his final arguments in his posthearing memorandum, Hughey asserts that a cumulative prejudice analysis is required under Kyles v Whitley, 514 U S 419, 434 (1995). For the reasons set forth in the earlier specifications, Respondent submits that the Applicant has failed to show any Sixth Amendment violation on the claims. In this portion, Hughey merely re-argues his prior claims which lacked a showing of either deficient performance or both deficient performance and prejudice as set out above. His claims are without merit.

The South Carolina Supreme Court has never specifically addressed matters under a cumulative prejudice analysis. See Green v State, 351 S C 184, 569 S E 2d 318 (2002), Fisher v Angelone, 163 F 3d 835, 852 (4th Cir 1998).³⁰ In *Fisher*, the Court held that it is not appropriate to consider the cumulative effect of attorney error when the individual claims of ineffective assistance do not violate the defendant's constitutional rights. *Id.* at 852-53. The

³⁰ See also Lorenzen v State, 376 S C 521, 657 S E 2d 771 (2008) (stating it is an unsettled question in South Carolina whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief).

individual claims in *Fisher* were reviewed on the merits and determined not to amount to error. Thus, cumulatively, the Court held they could not amount to error.³¹ *Id.*, see *Moore v Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998) (stating that cumulative error analysis applies where there are two or more actual errors, it does not apply to the cumulative effect of non-errors). There is federal precedent that such is not required under *Strickland*. See *Middleton v Roper*, 435 F.3d 858 (8th Cir. 2006). Also *e.g.* *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed.”)

Notwithstanding the deficiencies of each ineffective assistance of counsel claim, Hughey argues the court would err by analyzing individually the prejudice resulting from his multiple claims and by concluding each claim must rise or fall on its own merits. Citing *Strickland* and its progeny, including *Wiggins v Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), and *Williams v Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), Hughey contends the PCR court should consider the cumulative effect of trial counsel's errors in determining *Strickland* prejudice.

We reject Hughey's argument for two basic reasons. First, Hughey advances an erroneous interpretation of Supreme Court precedent. Neither *Wiggins* nor *Williams* stand for the

³¹ See also *Jones v Stotts*, 59 F.3d 143, 147 (10th Cir. 1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors), *United States v Stewart*, 20 F.3d 911, 917-18 (8th Cir. 1994) (same), *United States v Gutierrez*, 995 F.2d 169, 173 (9th Cir. 1993) (same). But see *Williams v Washington*, 59 F.3d 673, 682 (7th Cir. 1995) (stating that “a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]”), *Rodriguez v Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) (noting that a “claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions”).

proposition courts should accumulate the prejudice from separate ineffective assistance claims in determining whether to grant habeas relief. Rather, both decisions involved only a *single claim* of ineffective assistance of counsel—namely, trial counsel's failure to investigate and present mitigating evidence during the trial's penalty phase. See *Wiggins*, 539 U.S. at 514, 123 S.Ct. 2527, *Williams*, 529 U.S. at 390, 120 S.Ct. 1495.

Second, Hughey's argument contradicts other reasoned opinions. The Eighth Circuit precedent has repeatedly recognized "a habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test." *Hall v. Luebbbers*, 296 F.3d 685, 692 (8th Cir. 2002) (citation omitted), see e.g. *United States v. Robinson*, 301 F.3d 923, 925 n. 3 (8th Cir. 2002) (recognizing "the numerosity of the alleged deficiencies does not demonstrate by itself the necessity for habeas relief," and noting the Eighth Circuit's rejection of cumulative error doctrine), *Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation" (citation omitted)), *Scott v. Jones*, 915 F.2d 1188, 1191 (8th Cir. 1990) (holding "cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own" (citation omitted)). Therefore, we have no hesitancy in rejecting Hughey's argument. Accord, *Middleton v. Roper*, 455 F.3d 838, 851 (C.A.8 (Mo.), 2006).

Alternately, the relief need not be granted even if the *Strickland* test requires that prejudice be evaluated in light of the cumulative effect of all constitutionally infirm actions by counsel. See e.g. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 (requiring consideration of counsel's actions "in light of all of the circumstances"), *id.* at 695, 104 S.Ct. 2052 (noting that the

question to be answered in cases such as this is whether, “absent the *errors* the factfinder would have had a reasonable doubt respecting guilt” (emphasis added))

Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors

Id at 696, 104 S Ct 2052, *cf* Kyles v Whitley, 514 U S 419, 434, 436, 115 S Ct 1555, 131 L Ed 2d 490 (1995) (considering cumulative effect of errors in another context in which the *Strickland* standard for prejudice (though not the *Strickland* test for ineffective assistance) had been applied) ³²

Moreover, because none of petitioner's assertions of ineffective assistance satisfy the prejudice prong of *Strickland* calculating the “cumulative” effect of petitioner's ineffective assistance claims herein amounts to finding the sum of a series of zeros and does not warrant federal habeas relief *See* Coble v Quarterman 496 F 3d at 440 (holding federal habeas relief is only available for cumulative errors that are of a constitutional dimension and, because none of the petitioner's ineffective assistance claims satisfied both prongs of *Strickland* the petitioner had not presented any errors of constitutional dimension), Leal v Dretke, 428 F 3d 543, 552-53 (5th Cir 2005)(holding the cumulative errors of trial counsel did not warrant a certificate of

³² In United States v Rivera, 900 F 2d 1462, 1471 (10th Cir 1990) (en banc), the 10th Circuit stated that “a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors ” *Rivera* considered both the performance and prejudice prongs of each individual act of alleged ineffective assistance of counsel under *Strickland* in order to determine whether there was error that could be cumulated. The consideration of the prejudice prong prior to cumulation of the effects of all the counsel's inadequate performance was dicta, however, since the Court concluded that there was no deficient performance. *See id* at 1474. In fact, *Strickland* as quoted above, makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong.

appealability where none of the errors satisfied the prejudice prong of *Strickland*), *cert denied* 547 U S 1073, 126 S Ct 1771, 164 L Ed 2d 522 (2006), Livingston v Johnson, 107 F 3d 297, 309 (5th Cir 1997)(cumulative error analysis is only appropriate where errors are of a constitutional dimension), *cert denied* 522 U S 880, 118 S Ct 204, 139 L Ed 2d 141 (1997), Derden v McNeel, 978 F 2d 1453, 1454 (5th Cir 1992), *cert denied* 508 U S 960, 113 S Ct 2928, 124 L Ed 2d 679 (1993)(holding the same), Cordova v Johnson, 993 F Supp 473, 543 (W D Tex 1998)(“a petitioner who attempts to cumulate trial court errors that do not rise to the federal constitutional dimension has presented nothing to cumulate ”), *certificate of appealability denied* 157 F 3d 380 (5th Cir 1998), *cert denied* 525 U S 1131, 119 S Ct 922, 142 L Ed 2d 971 (1999), Moore v Quarterman, 526 F Supp 2d 654, 711 -712 (W D Tex ,2007)

This analysis has been included and considered within the allegations set out above. For those reasons he failed in his burden of proof.³³

³³The 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.

V Conclusion

WHEREFORE, Respondent request that the application for postconviction relief, as amended , be denied

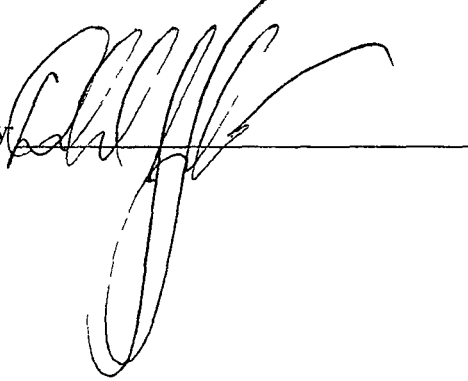
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ATTORNEYS FOR RESPONDENTS

By  _____

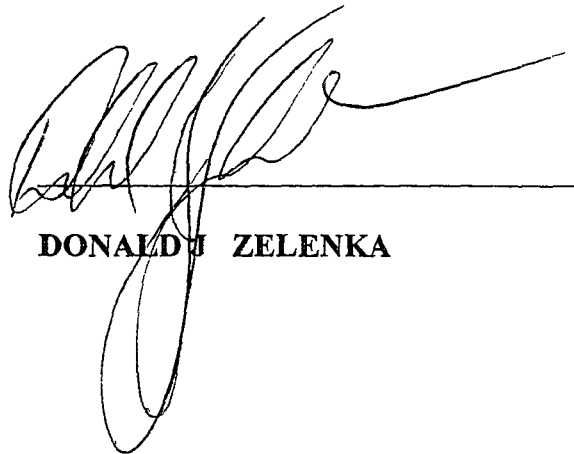
August 31, 2009

CERTIFICATE OF SERVICE

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This 31st day of August, 2009



DONALD J ZELENA

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)
John Kennedy Hughey, #5055,)
Applicant)
v)
State of South Carolina,)
Respondent)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case No 2000-CP-01-0212

Applicant's Post-hearing Brief

ATTORNEY

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Brief Statement of Facts

On December 4, 1995, Hughey shot and killed his ex-girlfriend, Tesheka Jackson, and her cousin, Leuvinia Harris, with a single-shot shotgun. Jackson was also cut early in the attack. She bled as she retreated through the house. Tr 2501. Hughey shot at her in the bathroom and missed. Tr 2656. While Hughey reloaded the shotgun, Jackson retreated to the master bedroom at the rear of the house. Tr 2362. Hughey pursued Jackson down the narrow hallway. Harris was on the phone with the police dispatcher. Tr 2278. Hughey shot Harris in the face. Tr 2532. Harris died instantly. Hughey reloaded the shotgun, went into the bedroom, and four to six seconds after he shot Harris, he shot Jackson in the side of the face. Tr 2279. Jackson died instantly. Hughey dropped the gun, Tr 2362, and fled in Jackson's car. He left his two young sons, who were in the house during all of these events. Tr 2297.

The trial record establishes the following chronology, which became significant during the guilt phase of Hughey's capital trial.

- Hughey and Jackson dated off and on for seven years and had two sons (ages two and four) together. Tr 2887.
- On December 3, 1995, Hughey caught Jackson with Michael Adams, whom she had been dating for nine to ten months. Tr 2400. Hughey did not know about Adams until that day. Tr 3105. Hughey became angry, threatened to kill both, and stormed away. Tr 2403, 2651. Jackson reported the threats to the Abbeville Police Department. Tr 2651. Officers wanted Jackson to go to a safe house. Jackson, instead, decided to stay with Harris.
- Later that night, Hughey tried to locate Jackson. When Jackson was not where she normally stays, at her grandmother's, Tr 3116, Hughey called Harris' home and talked to her husband Mack. Mack told Hughey Jackson was not there. Tr 2912-13.
- Hughey then went by Jackson's workplace looking for her. Tr 3663.
- Continuing his search for Jackson, early on the morning of December 4, 1995, Hughey again called and talked to Mack Harris. Harris allowed Hughey to talk to

Jackson Tr 2912-13 Around 10 55 a m , Mack went to the post office, leaving his wife, Jackson, and the two young children in the small trailer

- At 11 56 a m , Harris' son Marcus called Hughey was in the house with the gun Harris wanted to talk to Hughey and tell him to leave This call lasted three minutes Tr 2213
- At 12 00 noon, Marcus Harris called back so he could be on the speaker phone to talk to Hughey Marcus could hear "cussing going on" and Harris told him to call the police This call lasted two minutes Tr 2219
- Leuvinia Harris called the Abbeville Police Department herself after the first shot During the call, the dispatcher heard the shot that killed Harris, followed by a four to six second pause, and then the shot that killed Jackson Tr 2278-79
- At 12 05 a m , Abbeville Police Officers arrived at the crime scene Hughey was already gone, and Jackson's car was missing Tr 2285
- At 12 35 p m , Hughey used Jackson's ATM card to withdraw money from Jackson's bank account Tr 2325
- Later that afternoon, Georgia authorities arrested Hughey at his sister's house in Gainesville, Georgia
- On December 5, 1995, Hughey confessed to killing Jackson and Harris

Not long after the incident, Robert Tinsley became Hughey's attorney Tinsley was the Public Defender for Greenwood and Abbeville Counties He had an overwhelming caseload and a hectic court schedule PCR 12 Tinsley was aware the prosecutors considered the case capital from the start When the case was noticed capital, Garrett was appointed as co-counsel PCR 181 The lawyers divided responsibility for the trial Garrett was responsible for the guilt phase, and Tinsley was responsible for the sentencing phase PCR 12, 182 A combination of the trial record and the PCR record reveals the following chronology concerning trial counsel's investigation of the case

- On January 6, 1997, Garrett began work on Hughey's case Applicant's Ex 24¹
- On February 13, 1997, there was "a disclosure meeting where [the prosecutors laid] out all the evidence they intended to present in the trial" Applicant's Ex 52, PCR 476, 511
- On March 6, 1997, Garrett and Tinsley met with members of Hughey's family By the time of this meeting, without even having retained a crime scene expert, Garrett had already decided to present a voluntary manslaughter defense Applicant's Ex 24 and 27
- In April 1997, trial counsel retained Don Girndt, a retired State Law Enforcement Division (SLED) agent, as the crime scene expert Tr 3294
- On May 5, 1997, the trial judge signed an *ex parte* funding order The order authorized up to \$3,500 00 for "a licensed psychologist for the purpose of conducting a neuropsychological evaluation of the defendant" The order further authorized \$5000 00 for "a licensed psychiatrist, for the purpose of conducting a psychological examination of the defendant" Applicant's Ex 5
- In May 1997, trial counsel retained Paige Tarr as the mitigation investigator The first entry on her bill was May 14, 1997, when she "drove to Greenwood and met with Robert Tinsley, Billy Garrett, [and] Don Girndt, went to jail to meet client, [and] began to review case file" Applicant's Ex 8
- Trial Counsel retained Dr James Evans as a psychologist Evans saw Hughey the first time on July 9, 1997 Tr 3966 He met with Hughey again on September 27, 1997 Tr 3968, Applicant's Ex 10
- On September 10, 1997, Tinsley retained Jeff Yungman, a social worker His first time entry was October 1, 1997 The draft of his report is dated October 8, 1997 Applicant's Ex 12, 13, and 14
- The week before his trial, Hughey mentally decompensated Garrett retained Dr Katina Wright, Ph D , whose experience is primarily in counseling and child custody matters in family court, Tr 19, to advise him about Hughey's competency Dr Wright worked on the case on October 8, 10, 11 and 12, 1997 Applicant's Ex 14
- Hughey's trial was scheduled to start on October 13, 1997 Rather than starting the trial, Garrett and Tinsley moved for a competency evaluation Dr Evans and Dr

¹ Garrett's first entry is actually January 7 1996 It appears this entry should actually be January 7, 1997 Regardless of whether this entry is really 1996 or 1997 Garrett did not work on Hughey's case again until March 6 1997

Wright testified at the hearing. Judge Cole ordered a Department of Mental Health competency evaluation. Applicant's Ex. 8, 24

- On October 15 and 16, 1997, Dr. Katherine Lewis evaluated Hughey for competency to stand trial. Based on this evaluation, the trial judge found Hughey competent to stand trial.
- On October 17, 1997, jury selection began.
- After jury selection began, trial counsel retained Dr. Donald Morgan, a forensic psychiatrist, who worked on the case on October 18 and 19, 1997, for just seven hours. Applicant's Ex. 15.
- Opening statements occurred on October 22, 1997. The jurors found Hughey guilty of two counts of murder, burglary first degree, and grand larceny of a vehicle, on October 27, 1997.
- The penalty phase began on October 28, 1997. On October 30, 1997, Hughey was sentenced to death for each murder, to life imprisonment for burglary first degree, and to 10 years for grand larceny of a vehicle.

Hughey seeks a new sentencing hearing on four grounds, each involving allegations of ineffective assistance of counsel, which will be addressed in detail below, following a brief discussion of the legal standards applicable to each of these claims.

Applicable Legal Standards

As the South Carolina Supreme Court recognized long ago, “capital trials today, as never before, present a myriad of complexities heretofore unknown” *Bailey v State* 309 S C 455, 457, 424 S E 2d 503, 505 (1992)

The attorney must be conversant with constantly *new* interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State. Moreover, in preparation for trial, he must investigate the facts and circumstances of the alleged crime with no less vigor and thoroughness than the publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement. Dramatic technological advances, such as the science of DNA (deoxyribonucleic acid) analysis, are employed by prosecutors, requiring defense attorneys to acquire special knowledge and retain expert witnesses.

While the greater demands now made upon defense attorneys in the guilt phase are severe, it is in the sentencing phase that new and different issues, heretofore unknown, are introduced as a result of recent decisions of the United States Supreme Court. For example, in today's capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence the attorney must employ investigators in the course of thoroughly researching the defendant's entire life.

309 S C at 460-61, 424 S E 2d at 506-07. *See also State v Haight*, 649 N E 2d 294, 309 (Ohio Ct App 1994) (“Because death is unique as a penalty, more is and should be expected of attorneys who undertake the responsibility to represent individuals who face the prospect of being executed”)

In determining whether trial defense counsel provided ineffective assistance of counsel, pursuant to the Sixth and Fourteenth Amendments, this Court must apply the standards set forth

in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, the defendant “must show that counsel’s representation fell below an objective standard of reasonableness,” which must be judged under “prevailing professional norms.” *Id.* at 688.

Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) (“The Defense Function”), are guides to determining what is reasonable, but they are only guides.

Id. at 688-89. In assessing the investigation in *Strickland*, the Court stated that “strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation.” Any decision to halt investigation must be assessed for reasonableness. *Id.* at 690-91.

The prevailing professional norms set forth as the standard for effectiveness have been shaped through case law on both the federal and state level. The standards were explained more fully in *Wiggins v. Smith*, 539 U.S. 510 (2003), which was tried in Maryland in October 1989. In *Wiggins*, in reviewing the assertion of ineffective assistance of counsel for failing to prepare and present mitigation evidence, the Court defined the preliminary issue as a determination of “whether the investigation supporting counsel’s decision not to introduce mitigating evidence of Wiggins’ background *was itself reasonable*.” 539 U.S. at 523 (emphasis in original). In terms of the “prevailing professional norms” for the scope of a reasonable investigation, the Court considered “the professional standards that prevailed in Maryland in 1989,” and “the standards for capital defense work articulated by the American Bar Association (ABA)” that provide that investigations into mitigating evidence “should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” *Id.* (quoting American Bar Association Guidelines for the

Appointment and Performance of Counsel in Death Penalty Cases Guideline 11.4 I (C) (1989)) (emphasis added). The Court referred to the ABA Guidelines not just as “guides” but as “well-defined norms” for counsel’s performance. *Id.* (citing the Guidelines again).

The “well-defined norms” did not change between 1989 and the decision in *Wiggins* in 2003 because the Court made clear in *Wiggins* that it “made no new law” and was simply applying the *Strickland* standard in holding that “counsel’s failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision,” because counsel had not “fulfill[ed] their obligation to conduct a thorough investigation of the defendant’s background.” *Id.* at 522 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)).

In addition, the trial in *Rompilla v. Beard*, 545 U.S. 374 (2005), in which the Court also found ineffective assistance in capital sentencing, was conducted in Pennsylvania in 1988. Nonetheless, the Court cited and quoted the 1989 Guidelines, which “applied the clear requirements for investigation set forth in the earlier Standards to death penalty cases.” *Id.* at 387 n.7. The Court also cited and quoted the 2003 Guidelines as an “even more explicit” statement, but applying the same standards. *Id.* Thus, it is clear that the Court found that the 1989 Guidelines, as well as the 2003 Guidelines, describe the “well-defined” norms for counsel in capital cases tried before or after their publication in 1989 and revision in 2003. *See also Council v. State*, 380 S.Ct. 159, 173 n.5, 670 S.E.2d 356, 363 n.5 (2008) (“We note that these guidelines were revised in 2003. However, we cite to the 1989 guidelines given they were in effect at the time of Council’s trial.”) *Hamblin v. Mitchell*, 354 F.3d 482 (6th Cir. 2003) (relying on both the 1989 and 2003 guidelines, the court found ineffective assistance of counsel in

sentencing in 1983) The Guidelines address each step in a death penalty case including investigation, preparation, trial, appeal, and post-conviction relief

Counsel should begin preparing any death eligible case as though it will ultimately become capital, regardless of whether the state has served notice that the death penalty will be sought 1989 Guideline 11.3 See also 1989 Guideline 11.4.1 Commentary (any resources counsel will need to complete a proper investigation should be sought early in the case) Early investigation “should not be put off on some possibility that the death penalty will not be requested, or that the request will be dropped at a later point” 1989 Guideline 11.3 Commentary Counsel should begin two independent investigations, one for the guilt/innocence phase and one for the penalty phase, immediately upon becoming involved in a case 1989 Guideline 11.4.1A, *Council*, 380 S.C. at 173, 670 S.E.2d at 363 (citing Guideline 11.4) The investigation relating to the guilt/innocence phase should be completed regardless of any statements or admissions by the client See e.g. *Aid v. Catoe*, 372 S.C. 318, 332 n.14, 642 S.E.2d 590, 597 n.14 (2007) (finding trial counsel ineffective in failing to further investigate gunshot residue evidence in capital murder case) The investigation into mitigation evidence should likewise be conducted regardless of whether the client believes such evidence should be presented 1989 Guideline 11.4.1(A)-(C)

A proper mitigation investigation “should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor” *Wiggins*, 539 U.S. at 524 (citing 1989 ABA Guideline 11.4.1(C)) “This duty is intensified (as are many duties) by the unique nature of the death penalty” Guideline 11.4.1 Commentary A complete investigation is required because,

“[w]ithout investigation, counsel’s evaluation and advice amount to little more than a guess”

Guideline 11.4.1 Commentary

When assessing the reasonableness of an investigation, it is necessary to consider not only the evidence already known to counsel, but also whether this evidence would lead a reasonable attorney to conduct further investigation. *Wiggins*, 539 U.S. at 527. See also *Council*, 380 S.Ct. at 173, 670 S.E.2d at 363 (“Even the limited information obtained should have put counsel on notice that Respondents’ background, with additional investigation, could potentially yield powerful mitigating evidence”). Counsel need not investigate every possible line of mitigating evidence regardless of how likely that evidence would be to strengthen a mitigation case, however, a limited investigation must be supported by “reasonable professional judgments.” *Wiggins*, 539 U.S. at 533.

In a broad sense, courts have recognized, consistent with the Guidelines, that “[t]he imperative to cast a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing.” *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006). In other words, “[b]ecause 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)) See also *Bailey* 309 S C at 461-63, 424 S E 2d at 507-08 (quoting extensively from the expert testimony of Stephen Bright)

An investigation should begin with an interview of the client to gather information about the offense, his or her mental state and sources of information to be used in the sentencing phase of trial, 1989 Guideline 11 4 1(D)(2)(b), including

medical history (mental and physical illness or injury, 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 Guideline 11 4 1(D)(2)(c) See also *Council*, 380 S C at 173, 670 S E 2d at 363 (citing Guideline 11 4) Counsel with the assistance of the client, should identify people or other sources to corroborate this information 1989 Guideline 11 4 1(D)(2)(e)

Experts may be necessary to prepare the defense or rebut any portion of either phase of trial or present mitigation evidence 1989 Guidelines 11 4 1(D)(7)(a)-(d) Experts who can testify as to “medical, psychological, sociological or other explanations for the offense(s)” as well as to offer an opinion on the client’s potential future rehabilitation are essential 1989 Guideline 11 8 3(F)(2) “The assistance of one or more experts (e g social worker, psychologist, psychiatrist, investigator etc) may be determinative as to outcome ” 1989 Guideline 11 8 6 Commentary

However, it is not sufficient to merely employ one or more experts to assist with the case. Counsel must “seek records, interview family members and friends, and obtain appropriate mental evaluations *well in advance of trial*” *Poindexter v Mitchell*, 454 F.3d 564, 579 (6th Cir. 2006). Trial counsel is ineffective if they fail to provide an expert with medical records and other crucial information needed to render a reliable opinion or accurate diagnosis. *Von Dolen v State*, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004) (Counsel ineffective “in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder”). *See also Council*, 380 S.C. at 173, 670 S.E.2d at 363 (Counsel ineffective in sentencing, among other reasons, because counsel failed “to provide his only expert witness, Dr. Kuglar, with sufficient records and only directed him to evaluate Respondent’s competency to stand trial and criminal responsibility. Additionally, Dr. Kuglar, at the direction of counsel, only met with Respondent on two occasions, the first being shortly before trial”).

Once the investigation is complete, counsel must “formulate a defense theory” that is consistent and “will be effective through both phases” of trial. 1989 Guideline 11.7.1

[T]he 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. 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).

Florida v. Nixon, 543 U.S. 175, 190–91 (2004). *See also Council*, 380 S.C. at 172, 670 S.E.2d at 363 (“counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life

sentence”) In circumstances where guilt is clear, counsel must “strive at the guilt phase to avoid a counterproductive course,” such as presenting logically inconsistent strategies in the trial and sentencing *Nixon*, 543 U.S. at 191. Thus, “[c]ounsel may reasonably decide to focus on the trial’s penalty phase,” *id.* at 191, and “counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in ‘a useless charade,’” *id.* at 192.

With respect to sentencing, counsel should ensure that “all reasonably available mitigating and favorable information consistent with the defense sentencing theory” is presented in the most effective way possible, 1989 Guideline 11.8.2(D), to allow for “the particularized consideration of relevant aspects of the character and record” of the individual defendant, *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Relevant mitigating evidence includes any evidence that would be “mitigating” in the sense that it “might serve ‘as a basis for a sentence less than death.’” *Skupper v. South Carolina*, 476 U.S. 1, 5 (1986) (quoting *Lockett v. Ohio*, 438 U.S. 586, 604 (1978)). At bottom, the sentencer must be allowed to consider any “compassionate or mitigating factors stemming from the diverse frailties of humankind” *Woodson*, 428 U.S. at 304.

To the extent possible, the mitigation evidence should provide some “explanation for petitioner’s criminal propensities and some basis for the exercise of mercy,” *In re Lucas*, 94 P.3d 477, 481 (Cal. 2004), because “[t]he jury [is] called upon to determine whether a man they [do] not know [will] live or die,” *Collier v. Turpin*, 177 F.3d 1184, 1204 (11th Cir. 1999). Without mitigation evidence, the defendant is “a mere skeleton—a young killer with a prior criminal record, nothing more and nothing less.” *Pursell v. Horn*, 187 F. Supp. 2d 260, 386

(W D Pa 2002) Mitigation, however, completes the skeleton to add “flesh, bones, a mind, and a heart” to the defendant, allowing the jury to see “the man” and “have the opportunity to feel sympathy or pity ” *Id*

Even after family members and others have testified about events in the defendant’s life, expert evidence is generally required to explain “how these events had affected [the defendant] psychologically ” *Ross v State*, 954 So 2d 968, 1006 (Miss 2007) This is because “the average juror is not able, without expert assistance, to understand the effect [the defendant’s] troubled youth, emotional instability, and mental problems might have had on his culpability for the murder ” *Turpin v Lipham*, 510 S E 2d 32, 42 (Ga 1998)

All mitigating evidence should be presented unless “there are strong strategic reasons to forgo some portion of such evidence ” 1989 Guideline 11 8 6(A) Likewise, the Supreme Court held in *Strickland* that “a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance, that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy ’” 466 U S at 689 (citation omitted) Before counsel can make a valid strategic decision, however, counsel must fulfill the “duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary ” *Strickland*, 466 U S at 691 Counsel’s conduct, in failing to present mitigating evidence, can “not be justified as a tactical decision” if counsel has not “‘fulfill[ed] their obligation to conduct a thorough investigation of the defendant’s background ’” *Wiggins*, 539 U S at 522 (quoting *Williams*, 529 U S at 396) “In other words, the presumption of sound trial strategy founders on the rocks of ignorance ” *White v Roper*, 416 F 3d 728, 732 (8th Cir 2005) See also *Bond v Beard*, 539

F 3d 256, 289 (31d Cir 2008) (“Strategy is the result of planning informed by investigation, not guesswork”)

Once the defendant asserting ineffective assistance of counsel has established counsel’s failure to comply with the prevailing professional norms, he must affirmatively prove that this deficiency has prejudiced him. Specifically

The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U S at 694. The totality of the evidence must be considered in deciding whether the defendant was prejudiced by counsel’s errors. All mitigating evidence that would have been presented, but for counsel’s errors, should be weighed against the aggravating evidence presented at trial to determine whether the sentencer would have concluded a death sentence was not warranted. *Jones v State*, 332 S C 329, 504 S E 2d 822 (1998). However, the test is not whether the sentencer could have heard all available mitigating evidence and still decided on a death sentence. In other words, “[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.” *Strickland*, 466 U S at 694. Thus, “a defendant need *not* show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693 (emphasis added).

In determining prejudice, the Court must determine whether the undiscovered “mitigating evidence, taken as a whole, might well have influenced the jury’s appraisal” of the defendant’s culpability. *Rompilla*, 545 U S at 376 (quoting *Wiggins*, 539 U S at 538). “Mitigating evidence unrelated to dangerousness may alter the jury’s selection of penalty, even if it does not

undermine or rebut the prosecution's death-eligibility case" *Williams*, 529 U S at 398. See e.g. *Council*, 380 S C at 176, 670 S E 2d at 365 (finding prejudice despite "overwhelming evidence" of guilt and six statutory aggravating factors because "there was very strong mitigating evidence to be weighed against the aggravating circumstances" that "may well have influenced the jury's assessment of culpability"). Prejudice is established if "there is a reasonable probability that *at least one juror* would have struck a different balance" but for counsel's errors. *Wiggins*, 539 U S at 537 (emphasis added).

I

Despite substantial irrefutable evidence to support convictions for murder, counsel advised Hughey and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument that Hughey was guilty only of voluntary manslaughter, a defense contradicted by law and by Hughey's and the defense expert's testimony

As the Supreme Court made explicit in *Florida v. Nixon*, 543 U.S. 175 (2004) "[A]voiding execution [may be] the best and only realistic result possible" *Id.* at 191 (quoting 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)). Thus, in circumstances where guilt is clear, counsel must "strive at the guilt phase to avoid a counterproductive course," *id.* at 191, and "to impress the jury with his candor and his unwillingness to engage in 'a useless charade,'" *id.* at 192. See also *Council v. State*, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008) (Where the state's evidence of guilt was overwhelming, "counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence")

In this case, however, despite Hughey's willingness to plead guilty to two counts of murder and one count of burglary for three consecutive life sentences, PCR 21, 280-81, 471, trial counsel chose to engage in a useless charade by blindly adopting a voluntary manslaughter defense, contrary to precedent and the facts of the case. This defense only served to alienate the jury, discredit the lawyers, and all but assure a sentence of death for Hughey.

A The State's case at trial

From the opening statement, counsel, Billy Garrett, chose basically a blame the victim type theme by arguing that Jackson started "the fight" that resulted in her death and Harris' death. Tr. 2199. He argued the "fight" broke out at 12:02 p.m. and was over by 12:04 p.m.

when police arrived to find two bodies Tr 2203-05 From the very first witness, however, it was clear that Hughey had been in the house at least since 11 56 a m with a gun Thus, it took only one witness for counsel to lose credibility From there it only became increasingly clear that Hughey was guilty The state's evidence was strong but the real clincher was the defense crime scene expert, who essentially agreed with the state's theory

The evidence established that around noon on Saturday, December 3, 1995, Hughey went to Jackson's grandmother's house, where Jackson lived Jackson and Michael Adams were sitting in Adams' Mustang Hughey asked Adams if he and Jackson were dating Adams told Hughey "that's not any of his business" Hughey pushed Jackson When Adams got out of his car "to protect her," Hughey ran saying "he was going to kill" both of them Tr 2401-05

Abbeville Police Officers Neil Henderson and Barry New responded to Jackson's call at 12 30 p m Jackson reported Hughey threatened to kill her, and Henderson recommended she go to a safe house Instead of going to the safe house, Jackson told Henderson "she had a place in Greenwood to stay and that she would feel more comfortable going over there and staying" Tr 2319, 2338-39, 2347, 2650-52 She went to the home of Mack and Leuvinia Harris

Hughey called Jackson's grandmother looking for her Tr 3116 Around midnight, he called Mack Harris looking for Jackson Tr 2910-13 About 6 00 a m on December 4th, Hughey called again and again talked to Mack, who did call Jackson to the phone to talk to Hughey Tr 2910-13

Mack left the home around 10 55 a m Tr 2906 His son, Marcus Harris, called the home at 11 56 a m Tr 2225 Leuvinia told Marcus that Hughey had a gun Tr 2212-24 Jackson also got on the phone and confirmed he had a gun Marcus wanted to talk to Hughey,

but he would not come to the phone and Jackson could not get the speaker phone on. Marcus instructed her to "hang [up] the phone and I'll call back." Marcus testified that both his mother and Jackson sounded scared. When Marcus called back at 12 00 p m , Tr 2228, Jackson activated the speaker phone. Marcus heard "some cussing going on." He heard his mother say, "John, just leave." Then she said, "Just leave. Call the police. Call the police!" Tr 2214-20

Leuvina Harris called the Abbeville Police Department at 12 04 p m and spoke to Angela Patterson, a dispatcher and supervisor of communications. She asked for immediate assistance. Patterson recalled, "She was extremely agitated, you could tell she was upset, a lot of emotion in her voice." Tr 2273-76. Patterson testified

I heard something like [she] had laid the phone down or it was distant and away from her mouth and I heard [the caller] say, don't shoot that gun in here. And I heard something else in the background, some other voice, but I couldn't make it out and then she repeated, don't shoot that gun in here.

Harris was "excited, demanding, extremely upset." Patterson continued, "After she said that the second time, there was a small lull and then I heard a gunshot. Probably four to five, six seconds [later], I heard another gunshot." Between the two gunshots, Patterson heard "absolutely nothing." She didn't hear any "voices," "scuffling," or "fighting." Patterson had already dispatched officers to the crime scene. Tr 2278-80

While the line was still open at the crime scene, Patterson received a call from Marcus, who was "very excited, upset, to say the least." He said his mother had just called him and that there was someone there with a gun. Shortly thereafter, at 12 05 p m , Tr 2285, Lieutenant New and Corporal Henderson arrived at the scene. Tr 2281-84

New was the first to enter the home. He saw "obvious pry marks on the door." "The strike plate from the door frame was on the floor, along with a knife laying in the foyer area or

just inside the door. As soon as he entered the home, New also saw Jackson's (and Hughey's) two children. The older child, when asked where his mother was, pointed "to the rear of the trailer." When New proceeded in that direction, he discovered "Harris' body lying in [a] doorway in front of the washer-dryer area." New recalled, "The telephone was strung down the hall and near Mrs. Harris' body." He "stepped over Mrs. Harris' body and entered the bedroom," where he found Jackson's body. Tr 2294-98, 2312-17, 2353-62. New found a twenty-gauge "single shot shotgun laying long ways between the couch and bed." Tr 2362-64. The single-shot shotgun belonged to Hughey's father, John Henry Smith. Tr 2364-65.

Abbeville Police Corporal Mitch Christopher, who knew Hughey, was instructed to find him. Tr 2388-90. He went to Hughey's house where he found a note on the door. On the backside of the note, Hughey had written, "As of this morning, I will be dead. Love you all. Please take care of my kids. John K." Tr 2390-93.

Jackson's car was located in Georgia later that afternoon by officers of the Hall County Sheriff's Office. Captain Ken Grogan, who was aware Hughey was "wanted in a double homicide," got Hughey on the phone. Hughey admitted, "I killed them, it was an accident, the gun went off." After several minutes, Grogan convinced Hughey to come out of the house. Tr 2453-57. He was treated for a self-inflicted wound to his left wrist, but was "stable, alert." Tr 2461-67.

SLED Agents David Black, John Black (no relation), and Nancy Skraba arrived to process the crime scene on December 4, 1995, at 2:00 p.m. Tr 2475-82. David Black testified that there was blood near the door handle of the front door. The strike plate for the door "was actually on the floor inside the threshold of the doorway." The frame of the door was bent

indicating forced entry T1 2482-88 Just inside the door, Black found a knife There appeared to be blood on the knife Tr 2488-90, 2494 96

“The door frame to the bedroom at the end of the trailer was also broken ” T1 2488 It was also cracked “The strike plate was hanging on and was separated from – somewhat from the frame and only remained attached by one nail ” According to Black, “[F]orce was used to push this door open ” The bedroom had two entrances, one through the broken door frame and another through the bathroom, Tr 2490-93, where the first shot was fired, Tr 2658

Black observed the living room and kitchen area On the floor of the living room near the bathroom, Black found a washcloth with blood spatter on it Also on the floor, there was a broken vase Going into the kitchen area, there were black marbles from the vase scattered on the floor A plant had been knocked off the kitchen table Chairs had been knocked down around the kitchen table Blood spatter was on the floor of the kitchen The blood dropped straight down indicating someone was walking from the kitchen into the hallway towards the master bedroom A telephone receiver had been yanked from the kitchen wall The exposed wires were in the hallway leading to the master bedroom Tr 2496-2505

Harris’ body was in the hallway leading from the kitchen to the master bedroom near where the phone had been yanked from the wall The lower portion of her body was laying in the hallway, and her head was “in the threshold of the hall leading into the master bedroom ” Between Harris’ body and the foot of the bed, Black found a fired twenty-gauge shotgun shell He found the single-shot shotgun at the foot of the bed Inside the shotgun, Black found a fired shotgun shell Inside the bedroom, Black found a second phone The receiver was off the phone and on the floor Jackson was partially laying on the bed Tr 2505-10 On cross-examination,

Gariett attempted to establish that there was no forcible entry of the front door Tr 2586-89, 2592-95

On December 5, 1995, SLED Agent Eddie Clark interviewed Hughey at the Abbeville Police Department after advising him of his rights. SLED Agent Jerry Sloan and Chief Rucker were also present. Tr 2842-45. Hughey said, "No, I don't want to give you a written statement, but I want to tell you my side of it." Sloan listened but did not take any notes at the time. Tr 2869-76. Sloan later summarized what he remembered of the statement:

The morning of -- I believe it was Monday, he got up, he rode his bicycle over to this trailer on this side of town, wherever it is. He got there and Ms. Jackson, Ms. Harris were there and he was invited in by Ms. Harris. He said when he got inside that he and Ms. Jackson [-] she started fussing and he said she threw something, a vase or a knife or something. And he went to the back room to put a kid down, I don't know if it's his son or his daughter or what, but put the kid down and she came back through there with a gun. I'm sorry, he went to the bathroom and he was in there, she came in with a gun and when he pushed it away it went off and shot a hole in the bathroom wall.

Then he supposedly ran down the hall to the bedroom at the other end of the trailer, by the back door of the trailer and in the meantime Ms. Harris was in between then and Ms. Harris pushed the gun and it shot her, I assume. I don't know who shot her.

The Solicitor asked Sloan, "Who had the gun when Ms. Harris got shot?" Sloan responded, "Hughey said Ms. Jackson." Sloan continued, "Then he ran into the bedroom, he said Ms. Jackson came in there with a gun. He grabbed it and then it shot her and he left." Tr 2876-78.

SLED Agent John Black returned to the crime scene on December 6, 1995. He focused on the bathroom because they had previously missed the gunshot in that room and were not aware of it until after Hughey's statement. Black found a hole in the shower curtain and a corresponding hole in the wall that went to the outside of the trailer. A third shotgun shell was found inside a white paper bag in the master bedroom. Tr 2653-61.

On cross-examination, Garrett asked about the sequence of shots and highlighted that Hughey had to reload the single-shot shotgun once before he killed Harris and a second time before he killed Jackson. Even after Black tried to say he could not tell the sequence of shots, Garrett pushed Black "to use some common sense for a minute." Black then theorized the first shot was in the bathroom, the second shot killed Harris, and the third shot killed Jackson. Tr 2261-72

Brett H. Woodard, M.D., an expert in forensic pathology, Tr 2527-30, testified about Harris' autopsy. He found a sole shotgun wound on the left side of her face, which instantly rendered her "brain dead." There was a small amount of stippling. Tr 2530-34. Woodard compared photographs of Harris' stippling pattern with patterns produced by SLED at distances of six, twelve, and twenty-four inches. Based on this examination, Woodard concluded the shotgun barrel was between two and one-half and three feet from Harris' head when she was shot. Tr 2534-39

Woodard also testified about the autopsy of Jackson.

Ms. Jackson had three major injuries to her body. A fatal gunshot wound that entered the right side of the head above and slightly behind the right ear that passed through the contents of the brain and exited near the inner corner of the left eye producing removal of the left eye and soft tissues in the frontal area of the head between the bridge of the nose and the edge of the left eye.

She also had a large bruise on the right boney [sic] prominent beneath the right eye. We refer to this as the orbital ridge, the lower orbital ridge. She had a large bruise here and had two distinct shapes to it and then she had a stab wound in her anterior chest that went down to the breast plate and adjacent rib structure below that didn't enter any vital organs, didn't hit the heart or lungs, any of the deeper organs.

Tr 2540-41. The cause of Jackson's death was "the gunshot wound to her head and the resulting damage to the brain." Tr p. 2550. Woodard concluded the end of the shotgun barrel was

consistent with causing the bruising on Jackson's face "Two separate forces" and "a significant amount of force" would have been necessary to produce the bruise "It had a deep and a large amount of bleeding into the soft tissue " The bruise was caused before Jackson died because "in order to get the bleeding into the soft tissue that occurred, the heart had to be actively" beating The blows causing the bruising would have been "within an hour of her death " Tr 2542-44

"There was extensive stippling around the entrance wound on the right side of the head " The barrel of the gun was "a maximum of two feet" from Jackson's head at the time of the shot Tr 2546-49 Woodard testified the knife in evidence was consistent with making the stab wound Tr 2550

B Hughey's Case In Chief

Trial counsel presented a voluntary manslaughter defense even though Hughey's testimony alone gave the jurors enough information to rule out manslaughter as a viable defense and crime scene expert, Don Girndt, confirmed the murders could have occurred in the manner the state alleged

Chris Burton, a friend of Hughey's, testified that Hughey called him on the afternoon of December 3 He "was crying and was upset about something " Burton went looking for Hughey but could not find him Tr 2955-62 On re direct, Garrett was allowed to ask Burton more about the call he received from Hughey Burton testified

I got on the phone and said, "Hello "

He said, "I can't take it no more " I said, "What's wrong with you?"

He just said, "I can't take it " He said, "Tell my sisters and them I love them "

He said, "Take care of my kids for me " And that was it

Garrett followed up, 'And he sounded distraught?' Burton responded, "Yeah, he was crying " T1 2992-93 The only other time Burton saw or heard Hughey cry was "when his momma got killed " T1 2990

Hughey's sister, Gloria White Harrison, testified that she had driven Hughey to Jackson's grandmother's house to pick up his children on December 3 When she got there, she saw Jackson and a man in the car She pulled into the driveway "Jackson got out and she met John and they were talking " Harrison denied Hughey hit or pushed Jackson Harrison heard Hughey say, "Never mind " Hughey "got back in the Jeep and he said, 'Come on, Gloria, let's go '" Harrison took him home and she returned to Gainesville, Georgia Tr 3018-21 On December 4, Harrison saw Hughey again at her house in Gainesville Hughey was "real, real shaken " When Harrison asked if something was wrong, Hughey "said that something had happened" but did not explain Shortly afterward, Harrison's sister called and said Jackson and Harris "weren't living no more " Tr 3018-22 The police came and surrounded the house before Hughey surrendered and was arrested Tr 3022-24

Hughey then testified He admitted there was violence in his relationship with Jackson He "would still hand her," and they slapped each other Hughey claimed Jackson cut him in 1995 prior to the murders, but he did not get medical treatment or call the police because he "didn't want her to go to jail " Tr 3076-85

Hughey was not aware Jackson had been seeing Adams since February 1995 The first time Hughey saw Adams was Sunday, December 3, 1995, when Hughey had asked his sister to take him to Jackson's grandmother's to get his kids Hughey found Jackson and Adams sitting inside a Mustang Hughey asked Jackson, "Who is that?" When Jackson didn't respond,

Hughey asked, "Who is that, yo nigger?" Hughey testified, "I ain't with that." Garrett asked Hughey if his feelings were hurt. Hughey responded

Yeah, at that time. She had my boys with her. Come to find out they had spent the night together and had the kids with them. She did that so many times. I'd had enough of it.

Tr 3105-08

On cross-examination, Hughey initially denied talking to Jackson about Adams later that night or the next morning, but he ultimately admitted Jackson had told him she and the kids spent the night with Adams. Hughey claimed he could not remember when or where this conversation took place. Tr 3177-78

Hughey testified on direct examination that he was upset about Jackson seeing Adams, but denied pushing her or threatening to kill her. He claimed he walked away and got into his sister's Jeep. After he got back to his house, he walked to a phone and called Burton. Hughey testified, "I was upset." He cried for only the second time in his life, the first being when his mother was killed. Tr 3105-08. He wrote the suicide note left on his door because he planned on killing himself after the encounter with Jackson. However, he was feeling better and went to Greenwood for the Christmas parade later that day.

On cross-examination, the solicitor questioned Hughey about the note and, in particular, the "take care of my kids" part. Hughey said he wrote the suicide portion of the note on Sunday afternoon after he and Jackson had argued. Hughey testified he wrote the note "because if I'm gone, who's going to take care of" the kids? The solicitor suggested the note was really a murder-suicide note, "If she's gone and you're gone, you're really going to need somebody then,

aren't you?" Hughey acknowledged, "I would imagine somebody's going to take care of them "

Tr 3193-3203

Hughey testified that he got home between 9 30 p m and 10 00 p m and Jackson came to his house She told Hughey they needed to take her car to Anderson the next day to get a leaky sunroof repaired Then Jackson left Around 11 00 p m , Hughey called Jackson's grandmother looking for her He then called the Harris home Tr 3110-20

On cross-examination, he denied driving around looking for Jackson (which, of course, the jury learned during the sentencing hearing testimony, was not true, Tr 3660-67) He did admit, however, that he wanted to find out where she was staying that night after he learned she was not at her grandmother's Tr 3193-3203

On December 4, Hughey again called the Harris home between 6 40 a m and 7 00 a m Jackson told Hughey to call back around 8 00 a m when she got out of bed Hughey claimed he went back to his house and overslept When he woke up, he went to the Harris home on his brother's bicycle His route took him past the police department He was not carrying the shotgun He denied going there to kill Jackson and maintained the true purpose of the trip was "to take the car to Anderson " Tr 3120-23

As they were preparing to leave for Anderson, Hughey was "laughing" about what had happened the day before and asking Harris if Jackson had told her Jackson did not want Hughey telling Harris their "business," but Harris wanted to know and invited the two inside, offering Hughey some coffee Tr 3123-35 Thus, the car trip was abandoned

Hughey testified there was not any fighting outside until Jackson slapped him "for fixing to tell [Harris] what was going on " They went inside and had some coffee, but Jackson "started

getting mad ” She wanted to know what was in Hughey’s pocket because she thought he had his 9mm pistol Instead of telling Jackson he did not have the pistol, Hughey told her, “Think what you want to ” Hughey testified Jackson was arguing, but he was not, when Marcus Harris called

Hughey testified he was going to tell Marcus about Jackson’s affair, but when he started to the phone, “[S]he just pushed me again and I pushed her, I said, ‘Move out the way ’” “And me and her just got to fighting ” Jackson “threw the vase and [Hughey] blocked it with a chair ” Jackson threw a knife Hughey heard some dishes rattle Hughey “looked up and she had the other knife ” He pushed her back but she came at him again with the knife Hughey did not realize either one of them was cut Jackson was thirty pounds larger than Hughey and taller Hughey claimed he was scared He testified, Jackson “was hollering she was going to get me ” Hughey thought Harris was down the hall and guessed she “was calling the police ” Jackson “still had a knife [Hughey] ran out the house ” Tr 3125-40

On cross-examination, Hughey testified that he did not recall Harris telling Marcus that he was there with a gun He did not recall Marcus wanting to talk to Jackson He did remember Jackson going into the kitchen He did not recall Harris hanging up the phone or the phone ringing a second time He reiterated, however, that he was going to talk to Marcus He testified

I headed towards the phone and she got mad and somehow we started struggling and she threw a vase at me and I blocked it and she threw a knife and I ducked and she came at me with another knife

Hughey grabbed her and twisted her around Hughey did not see blood and did not know Jackson was cut Next, Hughey “pushed her back ” Jackson came at Hughey again Hughey went outside, but Jackson followed him hollering and cussing

On direct, Garrett asked Hughey, "Why didn't you keep running, John?" Hughey replied, "I was mad. She had a knife running after me, trying to kill me with a knife, and I ran out to the car and got the gun." Hughey "popped the trunk of the car" and got the gun. Jackson was standing "at the top of the steps with the knife and she stood there hollering and cussing [Hughey] out." There was a shell already in the gun. Hughey addressed Jackson, "If you want to talk, let's talk. You put the knife down, I'll put the gun down." Hughey walked towards her. Continuing to cuss, Jackson spit at Hughey and tried to shut the door. Hughey testified, "She tried to slam the door and I did not like that," thereby establishing malice in his own testimony. They fought "sort of like tussling" inside the front entrance. "That's when the [first] shot went off." Tr 3040-47

On cross-examination, Hughey testified again that, when he ran out of the house, "She had a knife. She was going to kill me. Something had to give." After he got the gun out of the trunk, showing cool reflection, he told Jackson, "You put the knife down. I'll put the gun down. Let's talk." Jackson spit on Hughey. Hughey walked towards Jackson, and she spit on him a second time. When the solicitor asked why he did not walk away, Hughey testified, "I was mad." Jackson tried to close the front door in Hughey's face, but he went inside. Hughey claimed he did not know why he fired the first shot and claimed, "I wasn't trying to shoot at her. I wasn't trying to kill her or nothing." Tr 3208-34

Back inside the house, on direct examination, Hughey testified

I just remember coming back up toward like through the kitchen and everything then, you know, coming through the kitchen I remember stumbling over the chair that was, you know, knocked over from where we had gotten to fighting earlier and when I looked up and pulled again, that's when Miss Luevinia was coming out the door and, you know, the hallway's kind of narrow. All I remember Sheka

when she was running down the hallway and somehow Miss Luevinia got hit and she fell I was still coming down the hall

When I got in the back bedroom, me and Sheka was tussling for a minute, and the next thing I know, she was going one way and I shot again

Hughey claimed he was not trying to shoot Harris, but he admitted he intended to shoot Jackson. Again establishing malice, Hughey admitted, "At the time, I was mad and I didn't know what I was doing." Hughey denied breaking either door or holding anyone hostage. Tr 3040-47. Hughey testified, "I made a mistake when I shot Luevinia she was just in the wrong place at the wrong time." Tr 3151. On direct, Hughey never testified about reloading the single-shot shotgun before he killed Harris or reloading the weapon a second time before he killed Jackson.

The solicitor decimated Hughey on cross-examination about these events. When asked about his prior inconsistent statements to three police officers on December 5, 1995, Hughey denied the officers asked him about the deaths of Harris and Jackson. Rather, they wanted to talk about "whatever they assumed happened." Tr 3163-66. Hughey "told them [he] wasn't going to answer no questions or give no kind of written statement." Hughey admitted he told the officers, "Me and her had got into it." Hughey testified the officers only assumed the shotgun went off in the bathroom and caused a hole in the wall. Tr 3169-77.

Hughey's testimony on cross-examination about the actual shootings was pathetic. He testified he did not remember too much after the first shot. He testified, "I tripped over the chair and kind of got focused. I just remember shooting and Miss Luevinia getting hit." Hughey did not know whether he shot at "her face or back." He denied hearing Harris say, "Don't you shoot that gun in this house." He did not remember stepping over Harris to get to Jackson in the bedroom. He and Jackson "were tussling over the gun" in the bedroom. He said it happened so

fast he did not remember breaking down the shotgun to put another shell in it, even though he would have had to do so in order to reload it. In fact, he claimed he could not recall how the other two shotgun shells came into his possession or how they got into the shotgun. Tr 3234-44. On redirect, further establishing deliberation, Garrett reinforced that Hughey had to pick up the shells with the shotgun. Tr 3244-45.

Don Girndt was the defense's final witness. The trial court qualified him as an expert in the areas of blood stains, firearms analysis, and crime scene analysis. Tr 3253-60. Based on the gunshot patterns, the autopsy report, and the absence of blood on the barrel of the shotgun, Girndt believed the shots were from four feet or more, Tr 3260-64, which, of course, negated any possibility that the shot to Jackson occurred during a struggle, although Girndt did believe the evidence was consistent with there being a struggle at the front door between Hughey and Jackson rather than a break in. Tr 3265-74.

Garrett asked Girndt about the hallway, which was rather narrow. Based on the blood spatter, Girndt was able to determine Harris was standing in the hall in front of the washer and dryer when Hughey shot her. Tr 3274-79. Girndt testified it would be "difficult for two people to navigate through that area that's in front of the washer and dryer." Girndt thought it would be a logical assumption that Jackson had to pass Harris to get to the bedroom. Tr 3281-82.

On cross-examination, the solicitor turned Girndt into an expert for the state's theory of how Hughey committed the murders. As the basis of his opinion that no burglary took place, Girndt relied on the three phone calls. Hughey was already in the house, and there was no mention of a break in. Girndt acknowledged Harris said Hughey had a gun in the house. He

believed, however, that it would have taken some force to break the frame of the front door. Girndt testified, "There was an alternate explanation, there was a struggle at the door. I don't know what happened." Girndt told Jones, "**I am not arguing with your theory**. I'm just saying there is an alternate theory" (emphasis added). Girndt acknowledged the time frame of the phone calls established Hughey was in the home at 11:56 with the shotgun. Girndt acknowledged the displaced strike plate in the bedroom door indicated someone had forced the door open at some point. Tr. 3298-3312.

When questioned about the sequence of shots, Girndt testified the first shot had probably been fired before Harris called the police department. Based on the blood spatter, Girndt thought Harris dropped the phone to defend herself. Girndt testified Hughey had to walk towards Harris. Hughey was about four feet from Harris, maybe a little less, when he shot her. After Hughey shot Harris, he would have had to reload and cock the shotgun before he killed Jackson. According to Girndt, that matched the dispatcher hearing five seconds of silence before another shot. Based on the blood spatter, Girndt acknowledged Jackson was likely lying on the bed face down when Hughey shot her in the side of the head. Hughey would have been to Jackson's right. Her head would have been near the bedspread. He again estimated the gun was four feet from her head. Tr. 3313-48.

C Evidence presented during the PCR Hearing

During the PCR hearing, defense counsel admitted the hopelessness of their voluntary manslaughter theory. Neither lawyer was entirely clear as to which victim the defense would actually apply. They testified during the PCR hearing that the decision to go with a manslaughter defense was made before any real work was done on the case and before their

expert examined the crime scene to determine the credibility of Hughey's recollection of the events. Counsel recognized the high probability of alienating the jury with their decision to go with the voluntary manslaughter defense, yet pursued it anyway, to Hughey's detriment.

Garrett testified that he focused on the facts of the crime, after allegedly researching the law on voluntary manslaughter and transferred intent. Garrett claimed Hughey "was adamant he wasn't guilty of burglary." At most, Garrett believed Hughey was guilty of one murder. PCR 197-99. Blood on the outside of the front door was evidence Hughey came back outside to get the shotgun after Jackson was cut and while she was standing at the front door. Garrett thought there was evidence Hughey and Jackson "were fighting physically throughout the trailer." He testified

The problem that we had in the case is it appears that he, in the process of either the gun going off or him shooting at her, that the moment he tried to shoot at [Jackson] there were – two of them were lined up in the hall, and unfortunately the bullet [hits] Ms. Harris, the Aunt, who had nothing to do with this.

Garrett knew "[t]hat was an awful set of facts and circumstances." His theory was that when Hughey "was intending to commit a manslaughter against Ms. Jackson, that intent transferred to Ms. Harris." PCR 209-12.

Tinsley testified that Hughey had "gone over there and his girlfriend/common-law wife and had gotten into an argument that escalated into this tragedy." Tinsley testified Hughey had "some variations at times in his recollection." PCR 464-65. Hughey initially "was pretty fairly intent on defending the – the killing of Ms. Harris as being unintentional." Tinsley testified the defense for killing Ms. Jackson was "along the lines of voluntary manslaughter" and "even went to the point of self defense in the early – early meetings." PCR 465-66. Tinsley testified that the decision to present a manslaughter defense was made early and never changed.

Tinsley thought the decision to present this defense was made by the time of the March 6, 1997, meeting with Hughey's relatives, PCR 512-14

Tinsley explained the guilt/innocence phase defense. The defense "would reduce the number of aggravating circumstances." PCR 481. According to Tinsley, "[F]irst of all, there wasn't a burglary." Under their theory, Hughey "was an invitee." Tinsley described the defense of the murders.

The killing of Ms. Harris – Ms. Harris was either accident/involuntary manslaughter, that sort of homicide and the killing of Ms. Jackson was either – it was either voluntary manslaughter or murder.

When asked if the manslaughter defense applied to Jackson, Tinsley responded, "Primarily Primarily. But if you approach it from a transferred intent type of theory, it would extend also to Ms. Harris." PCR 75. *See also* PCR 9-19.

Tinsley reluctantly acknowledged Hughey claimed he brought the shotgun to Harris' house to intimidate Jackson. When confronted with his deposition testimony, Tinsley acknowledged, "John [Hughey] brought it over there." Tinsley was asked in his deposition, "Did [Hughey] ever tell you why he brought the gun over there?" Tinsley acknowledged his response was

Yeah, 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.

PCR 75

Trial counsel adopted the manslaughter defense before counsel even retained Don Girndt to be the crime scene expert and Paige Tarr to be the mitigation investigator. PCR 296 and 298. Garrett met with Girndt just the week before trial and realized Girndt's opinion differed from

Hughey's account of the facts PCR 298-99 Girndt "disagreed with both of the versions of the case" Regarding Hughey's account of killing Jackson, Girndt's "position was it wasn't probable" PCR 302-04 Tinsley went to the trailer with Girndt and was also aware "there were some differences" between what Hughey said about the crime and Girndt's opinion of what happened According to Tinsley, Girndt "did not think that the killing of Ms Jackson appeared to be accidental" More specifically, Tinsley recalled

The defendant had a theory of arguing with [Jackson] and accident – and that sort of thing Don [Girndt] on the other hand has a more – at least as far as – as far as [Jackson] is concerned more of an intentional

According to Tinsley, Girndt's opinion was based on "the wounds, the autopsy, the pictures, the trial and his theories" PCR 71-74

Going into the trial with this knowledge of the facts, Garrett knew the voluntary manslaughter defense was unlikely to succeed "It would be a long shot" PCR 197, 208, 247, 299 He considered it "a dangerous strategy" PCR 251 He summarized

Well, I mean, you had two dead people, you had a shotgun, a breach loaded shotgun that had to be reloaded again, you got two babies crawling over the brain matter of their mother, you've got a fellow who attempted to kill himself after that I mean, the facts are just horrific It was a horrific fact pattern to try to deal with

Garrett recognized reloading the shotgun could be considered malice aforethought Garrett recognized Harris did not do anything to provoke Hughey Hughey "was very clear that he had never intended whatsoever to harm in any way Ms Harris" Garrett knew Harris had told her son Hughey was "in the house with a gun" Garrett acknowledged Hughey going outside to get the shotgun was a sufficient cooling off period Garrett believed Hughey had formed malice

aforethought by the time he reloaded the shotgun, chased Jackson into the master bedroom, and killed her. PCR 208-16, 234

Garrett also knew the voluntary manslaughter defense would likely alienate the jurors. He testified

I told Robert that the good likelihood if that happened that my participation really at that point didn't need to be out front. It needed to be more behind the scenes at that point in time because the jury had rejected my – my presentation of evidence for John.

Garrett recognized he would lose credibility with the jurors if they rejected the manslaughter defense. PCR 216. “One person would probably be burned if the jury verdict came back negative.” PCR 227. At the same time, Garrett recognized the jurors would associate him with Tinsley because the two were trying the case together and sitting at the same table with Hughey. PCR 299-301. And, of course, the jurors would associate both with Hughey's incredible testimony given based on their advice and in support of their “useless charade” in the trial. *Nixon*, 543 U.S. at 192.

Tinsley, likewise, had some concerns about presenting the voluntary manslaughter defense. “You've got to be careful in a case like this not to alienate your basically sentencing jury in phase one.” When asked about the strength of the defense, Tinsley knew “it was a stretch.” He was fully aware if the manslaughter defense did not work, then the risk was alienating the jurors. Tinsley “could have seen taking a different approach.” He explained, “I guess the word you use is punt. It's a football expression. It's to more or less punt on the defense of the – of the murder charge.” PCR 79.

Nonetheless, even though Girndt disagreed with Hughey's account of the events and counsel knew Hughey had an “inability to recall events of [the] crime,” supplied “false details”

about the crime, and was intoxicated at the time of the crimes, Applicant's Ex 20 and PCR 514-18, counsel chose to present this incredible defense

D Trial Counsel was ineffective by presenting a baseless voluntary manslaughter defense considering the facts and South Carolina precedent establishing the defense was untenable in this case

While conceding voluntary manslaughter was not an issue in this case, the state, nonetheless, tries to rationalize defense counsel's decision to present a defense which ignored facts and precedent by arguing

Respondent admits that [Hughey's] actions do not support voluntary manslaughter, but counsel's admitted struggle to come up with some defense to the charges where none existed is a daily battle for defense counsel. It was not based on ignorance or neglect, but an apparent and searching hope to have the luck of a lawless decision-maker who would give a charge

State's Pre-hearing Brief, 17-18. The state, therefore, asks this Court to approve of jury nullification and condone lawless and unprincipled decision making, which has long been rejected as appropriate in any case, let alone in capital cases. *See e.g. Roberts v Louisiana* 428 U.S. 325, 335 (1976). *See also State v Owens*, 362 S.C. 175, 607 S.E.2d 78 (2004) (It is inappropriate for a court to sanction juror misconduct)

Trial counsel's conduct is also not a result of an uncooperative client, who insisted on presenting this defense over counsel's objections. As noted previously, both counsel agreed that Hughey offered to plead guilty in exchange for a life sentence. By the same token, it is clear that Hughey would have followed counsel's advice—had it been given—not to present an incredible defense and harmful testimony during the trial.

In essence

Any experienced defense attorney knows that guilty defendants often insist on their innocence to their counsel. Furthermore, even an innocent defendant is

entitled to an assessment that does not mislead him as to the current strength of his case and the threat of conviction

Pitcher v United States, 371 F Supp 2d 246, 262 (E D N Y 2005) (Counsel ineffective in drug conspiracy case by misinforming the defendant about the benefits of cooperation and the risks of trial, which resulted in the defendant rejecting the prosecution's plea offer) Thus, even though a defendant might not initially tell his counsel the truth

[T]here is no basis for assuming he would have stuck to this story if [counsel] had provided reasonable advice [Counsel], by unreasonably telling petitioner that his story was a good one , and that the government's case was weak, gave petitioner precious little incentive to say anything else

Id at 263 See also *Carmichael v People*, 206 P 3d 800, 809, 2009 (Colo 2009) ("A large number of defendants will enter into the criminal justice system maintaining their innocence, only to later admit to the criminal acts they have committed In addition, a defense attorney's accurate presentation of available outcomes may encourage a defendant to admit his actions and face the applicable consequences)

What is important is that trial counsel's decision to rely on the voluntary manslaughter defense was influenced by two errors of law and "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) See also *United States v Mooney*, 497 F 3d 397, 404 (4th Cir 2007) ("Counsel's erroneous legal advice resulted from a failure to conduct the necessary legal investigation Counsel in criminal cases are charged with the responsibility of conducting 'appropriate investigations both factual and legal,' to determine if matters of defense can be developed"), *Padgett v State*, 324 S C 22, 484 S E 2d 101 (1997) (counsel ineffective for failing to object to first-degree burglary indictment which alleged burglary of

dwelling, but the evidence revealed that the only building on the property was a barn, not valid strategy where “it appears counsel did not recognize a distinction between Richardson's barn and a dwelling for first degree burglary purposes”)

First, Hughey's killing of Jackson could not be voluntary manslaughter because of the cooling off period and because Jackson was exercising a legal right to defend herself. Second, Hughey's killing of Harris could not be voluntary manslaughter because South Carolina requires the provocation to come from an act of the victim and not an innocent third person. Instead, counsel believed Hughey's intent could be transferred from one victim to the other victim even though this concept has never been recognized by the South Carolina Supreme Court. *State v Wharton*, 381 S C 209, 672 S E 2d 786 (2009)

1 Hughey's killing of Jackson could not be voluntary manslaughter because of the cooling off period and because Jackson was exercising her legal right to defend herself

Hughey could not have been committing voluntary manslaughter in the killing of Jackson because, even according to his testimony, there was a sufficient cooling off period. Furthermore, Jackson was exercising her legal right to defend herself.

a There was a sufficient cooling off period

South Carolina has two requirements for voluntary manslaughter. The act must be committed in a “sudden heat of passion upon sufficient legal provocation.” *Wharton*, 381 S C at 214, 672 S E 2d at 788. If a sufficient cooling off period has passed after the provocation, then the defendant cannot establish a sudden heat of passion.

A time period as short as three to five minutes can constitute a cooling off period that eliminates the possibility of voluntary manslaughter as a charge as a matter of law. *State v Cole*,

338 S C 97, 525 S E 2d 511 (2000) In *Cole*, the victim, who had previously attacked the defendant, *in the defendant's home*, left only to be followed by the defendant three to five minutes later and shot to death Those few minutes were enough for a cooling off period

Ten minutes has also been found to be a sufficient cooling off period to eliminate voluntary manslaughter *State v Pittman*, 373 S C 527, 576, 647 S E 2d 144, 176 (2007) In *Pittman*, the defendant was twelve years old and killed his grandparents after one of them had paddled him and then both victims went to bed That ensuing ten minute period, where the defendant obtained his shotgun and entered the victims' bedroom, was the requisite cooling off period in which defendant lost his right to a voluntary manslaughter charge

In both *Cole* and *Pittman*, the Court found that these seemingly short time spans are enough to dispel voluntary manslaughter as a matter of law If there has been any time for cool reflection, then there can be no "sudden heat of passion," even if there was initially sufficient legal provocation

An attempt to defuse a situation has also been deemed by the Court to be a period of cool reflection *State v Walker* 324 S C 257, 261, 478 S E 2d 280, 282 (1996) In *Walker*, the defendant asked the victim to calm down and attempted to deescalate the situation The Court held this was clearly a situation where a charge of voluntary manslaughter was not warranted

In this case, there clearly was a cooling off period As Garrett stated in his opening "[t]he time line is very crucial " He contended "[i]t's not murder but instead it's manslaughter [that] occurred within thirty seconds in the heat of passion and after legal provocation " Tr 2199, 2205 Through Marcus Harris (the very first witness), however, it was clear that Hughey was in

the home with a gun at 11 56 a m The first shot apparently happened, just before 12 04 p m when Harris called 911

Girndt, *the defense expert*, also described the deliberate nature of the killings He agreed there was a likely scuffle at the front door where the knife was found He agreed Hughey pursued Jackson, who was already bleeding from the stab wound, into the bathroom, where the first shot was fired (but missed) While Hughey was reloading the shotgun, Jackson retreated to the master bedroom As Garrett and Girndt pointed out, the hallway is narrow, meaning it would have been difficult for not just Jackson but also for Hughey to pass Harris in pursuit Harris was on the phone with dispatch but dropped the phone While trial counsel argued that Harris was shot accidentally as Jackson passed her, according to blood spatter evidence, it is clear that Harris dropped the phone prior to being shot in order to defend herself from the advancing Hughey The objective evidence, therefore, supports more a finding that Hughey shot Harris so he could pursue Jackson into the master bedroom rather than the incredible arguments the defense made The dispatcher heard five seconds of silence which coincided with Hughey reloading the shotgun, rather than struggling with Jackson When Hughey got to the bedroom, Jackson was cowering in fear on or near the bed Hughey shot her through the side of her face

Aside from this objective evidence, Hughey's own testimony was that Jackson assaulted him and he exited the house to get the gun After he had the gun, he told her "If you want to talk, let's talk You put the knife down, I'll put the gun down" This statement represents cool reflection and deliberation, as it indicates an attempt by the defendant to calm down the victim and deescalate the situation, just as in *Walker*, 324 S C at 261, 478 S E 2d at 282 When Jackson tried to retreat, Hughey admitted, "She tried to slam the door and I did not like that"

Thus, he re-entered with the gun after he had time to reflect and Jackson had discontinued any possible provocation

Hughey also clearly had the ability to leave at that point. His bicycle was there. Jackson was not pursuing him and she did not have a gun. When a means of escaping a hostile situation is available and the defendant chooses to kill the victim instead of escaping, there is nothing to warrant a finding of voluntary manslaughter. *State v. Byrd*, 323 S.C. 319, 323, 474 S.E.2d 430, 433 (1996)

b Provocation cannot come from a victim exercising her legal right to defend herself

Even if a defendant is acting in a sudden heat of passion, for voluntary manslaughter to be warranted, the killing must be done upon sufficient legal provocation. "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. Norris*, 253 S.C. 31, 39, 168 S.E.2d 564, 567 (1969). In *Norris*, the appellant unjustifiably attacked his live-in girlfriend. When her father intervened to defend his daughter, Norris shot and killed him. Because the father was exercising a legal right, defense of others, the trial court properly did not charge voluntary manslaughter. See also *State v. Ivey*, 325 S.C. 137, 481 S.E.2d 125 (1997), *State v. Franklin*, 310 S.C. 122, 425 S.E.2d 758 (Ct. App. 1992), *overruled on other ground by Brightman v. State*, 336 S.C. 348, 352, 520 S.E.2d 614, 616 (1999).

A fight alone is not enough to constitute sufficient legal provocation. *Cole, supra*. In *Cole*, the victim assaulted the defendant's friend and then fought twice with the defendant himself. The defendant was pulled off the victim, who then left the defendant's home. At that point, the defendant got his gun, followed the victim outside the house, and shot him dead. The

South Carolina Supreme Court held “these facts [do not] constitute sufficient legal provocation for voluntary manslaughter” *Id* at 102, 525 S E 2d at 513

As discussed above, even according to his testimony, Hughey wanted Jackson to think he had his 9mm pistol in his pocket. Allowing Jackson to think this way had only one purpose: to frighten her with the potential of his committing a violent act. In addition, Tinsley admitted Hughey told him he brought the gun to Harris’ home as a way to intimidate Jackson in retaliation for her relationship with another man. Either way, from Jackson’s point of view, Hughey was angry with her over the other man, he had threatened to kill her the day before, he had a gun with him, and her two young children were present in the house. Any actions taken by Jackson to protect herself in light of these facts were justified as defense of herself and defense of others.

Even assuming that she was not justified in defending herself and that she was instead the initial aggressor, the facts taken in the light most favorable to Hughey are still not favorable to him, as addressed above.

2 Trial Counsel failed to recognize that South Carolina law requires the provocation to come from an act of the victim and not an innocent third party

The South Carolina Supreme Court has recognized the doctrine of transferred intent when the issue is transferring malice from the intended victim to the unintended victim. South Carolina, however, has never applied that doctrine to voluntary manslaughter cases. *Wharton supra*. Hughey’s counsel failed to organize their defense theory around this fact, instead pursuing this transferred intent in voluntary manslaughter as if it was a matter of law in South Carolina. There is no evidence in the record of any provocation on the part of Harris to warrant a voluntary manslaughter charge in her killing. Nonetheless, defense counsel went headlong into arguing that any provocation on the part of Jackson to possibly merit a reduction of the charge.

transferred into provocation on the part of Harris. This “transferred provocation” is not viable under South Carolina law.

a Cases where the South Carolina Supreme Court held that a defendant’s malice transferred from the intended victim to the unintended victim

The doctrine of transferred intent has sustained convictions for the murder of an unintended victim. *State v. Gandy*, 283 S.C. 571, 324 S.E.2d 65 (1984) (affirming murder conviction where defendant, intending to kill one man, shot through a closed door, and instead killed an unintended victim instead), *overruled on other grounds by State v. Lowry*, 315 S.C. 396, 434 S.E.2d 272 (1993), *State v. Horne*, 282 S.C. 444, 319 S.E.2d 703 (1984) (expanding the common law to allow murder prosecution when person attacks a pregnant woman with malice and kills a viable fetus by mistake), *State v. Heyward*, 197 S.C. 371, 15 S.E.2d 669 (1941) (affirming conviction of murder for mistakenly killing a police officer who appellant believed to be another person who had threatened appellant), *State v. Kennedy*, 85 S.C. 146, 67 S.E.2d 152 (1910) (affirming conviction of accessory before the fact of murder when unintended victim killed by mistake), *State v. Smith*, 33 S.C.L. 77, 1847 WL 2220 (1847) (affirming murder conviction for shooting at man riding a horse (with the intent the horse throw the rider) but killing another unintended victim instead). Also, the Supreme Court has applied the doctrine of transferred intent to sustain a conviction for assault and battery with intent to kill in a case where the appellant shot and injured an unintended victim in the process of shooting and killing the intended victim. *State v. Fennell*, 340 S.C. 266, 531 S.E.2d 512 (2000).

The question then becomes whether the doctrine of transferred intent can be applied in a manslaughter case.

b The applicability of the doctrine of transferred intent in voluntary manslaughter cases is an unsettled issue in South Carolina

Just this year, in *Wharton*, the South Carolina Supreme Court noted that “[t]he applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled issue in South Carolina ” 381 S C at 215, 672 S E 2d at 789 The Court declined to address the issue because there was not any evidence of legal provocation from any party

While noting the doctrine of transferred intent remains unsettled in this state, the *Wharton* Court was aware of the plurality opinion in *State v Childers*, 373 S C 367, 645 S E 2d 233 (2007) In *Childers*, Justice Burnett announced the decision of the court and wrote, “The overt act that produces the sudden heat of passion must be made by the victim ” 373 S C at 373, 645 S E 2d at 236 Chief Justice Toal, concurring in result only, noted, “The concept of transferred intent has little relevance to the outcome of the instant case ” 373 S C at 374, 645 S E 2d at 237 Justice Pleicones, joined by Justice Moore, believed *Childers* “represents a classic claim of transferred intent ” 373 S C at 377, 645 S E 2d at 238

If the doctrine of transferred intent is so unsettled in *Childers* in 2007 and *Wharton* in 2009, it was even more unsettled at the time of Hughey’s trial in 1997 A review of the status of the case law discussing the doctrine of transferred intent is useful

- c The South Carolina Supreme Court requires the provocation come from the actual victim

State v Franklin, 310 S C 122, 425 S E 2d 758 (Ct App 1992), *overruled on other ground by Brightman v State*, 520 S E 2d 614, 616, 336 S C 348, 352 (1999), like Hughey's case, involved two murders. The court framed the issue on appeal

The sole issue on appeal was whether Franklin was guilty of murder or manslaughter in the slaying of his father and stepmother. The [trial] court charged the jury on murder and manslaughter as to the death of Franklin's father. The trial court charged only murder as to the stepmother's death.

Franklin, 310 S C at 123, 425 S E 2d at 759. Franklin argued the trial judge should have charged voluntary manslaughter related to the killing of his stepmother. The stepmother was down the hallway, in the kitchen, when Franklin shot his father. She did not pose any threat to Franklin. The Court held "there was no evidence of legal provocation" by the stepmother. *Id.* 310 S C at 126, 425 S E 2d at 761. The Supreme Court would rely on *Franklin* in *State v Tucker*, 324 S C 155, 478 S E 2d 260 (1996), and *State v Locklaw*, 341 S C 352, 535 S E 2d 420 (2000). Justice Burnett relied on *Tucker* and *Locklaw* in *Childers*.

Tucker, a case decided while Hughey was awaiting trial, is also instructive. Tucker had approached the female victim while she was in her yard, made sure she was alone, and forced her into her house at gunpoint. Inside the house Tucker robbed the victim and shot her twice. Tucker claimed "he shot [the victim] the first time when she tried to grab the gun." 324 S C at 161, 478 S E 2d at 263. The Court held this conduct insufficient to be legal provocation because "[i]f Victim did try to grab the gun, she was only trying to defend herself." 324 S C at 171, 478 S E 2d at 269. Tucker additionally claimed "he was under severe stress from financial pressure."

Id The Supreme Court held that “[t]he provocation [for voluntary manslaughter] must come from some act of or related to the victim in order to constitute sufficient legal provocation ” *Id*

In *Locklaur*, the Supreme Court relied on *Tucker* and held that “[p]rovocation necessary to support a voluntary manslaughter charge must come from some act of or related to the victim in order to constitute sufficient legal provocation ” *Locklaur*, 341 S C at 362, 535 S E 2d at 425. Locklaur had claimed the jurors could find sufficient legal provocation because the victim’s mother threw a cigarette case at Locklaur moments before the fatal shooting. The Court held that “this overt act was made by a third party, not the deceased, and **South Carolina has not recognized sufficient legal provocation from a third party that can be transferred to the victim** ” *Id* (emphasis added). It should also be noted that, contrary to the state’s position in Hughey’s case, the state argued in *Locklaur* that “[t]his state has not recognized sufficient legal provocation from a third party that can be transferred to the victim ” Brief of Respondent in *Locklaur* (Appendix 1) at 15. Prosecutors have an obligation to be “ministers of justice and not mere advocates,” *State v Jones*, 343 S C 562, 578, 541 S E 2d 813, 822 (2001), and the courts in this state should view with disfavor prosecutors who change their legal theory as a matter of convenience to match their desired outcome.

Although involving only one murder, *Harris v State*, 354 S C 382, 581 S E 2d 154 (2003), rejected the strategy advanced by trial counsel in Hughey’s case. Harris claimed he arrived at his sister’s house, which is also where his girlfriend was at the time. Harris asked his girlfriend to go to dinner, but she refused and they struggled. When the struggle was over, the girlfriend ran in the direction of her ex-husband, who was there to get a refrigerator. Harris testified the ex-husband “was holding a refrigerator grate as if to threaten” him. 354 S C at 387,

581 S E 2d at 156 According to Harris, “he then fired three ‘wild shots’ in the direction of [the ex-husband] to keep [the ex-husband] from advancing with the refrigerator gate, and [Harris’s girlfriend] ran in between the two men and was hit by one of the bullets ” *Id* Relying on *Tucker* and *Locklan*, a majority of the Supreme Court² reiterated “Sufficient provocation necessary to justify a voluntary manslaughter charge *must come from the victim and not be transferred from a third-party to the victim* ” *Id* (emphasis original) Accordingly, “since [Harris] put forth no evidence that [the deceased] provoked him, he cannot prove his entitlement to a charge on voluntary manslaughter ” *Id*

In *State v Pittman*, 373 S C 527, 647 S E 2d 144 (2007), a four-to-one majority of the Supreme Court affirmed convictions for murder when a juvenile killed his grandparents The majority of the Court concluded there was not sufficient evidence of sufficient legal provocation or sudden heat of passion to justify charging voluntary manslaughter for the twelve-year-old defendant, who had allegedly been paddled and punished by his grandfather prior to shooting both grandparents In their analysis, the majority observed, “Even assuming that Appellant is entitled to a finding of sufficient legal provocation as related to the death of Appellant’s grandfather, Appellant has not shown any sufficient legal provocation which would entitle him to the voluntary manslaughter charge as applied to the death of his grandmother ” 373 S C at 573-74, 647 S E 2d at 168 The Court found a sufficient cooling off period as a matter of law

d Cases relied on by the State previously

During final arguments at the PCR hearing, the Court asked the State, “Do we have authority for transferred intent in a manslaughter case?” The State responded, “There’s one case

² Chief Justice Toal delivered the opinion of the Court Justices Burnett and Waller concurred Justice Pleicones concurred in result only Justice Moore did not participate

in the South Carolina Supreme Court that talks about the authority of transferred intent to exist ” PCR 545 By email dated October 17, 2008, see Appendix 2, the state provided these three cases *State v Williams*, 189 S C 19, 199 S E 906 (1938), *State v Gandy*, 283 S C 571, 324 S E 2d 65 (1984), *overruled on other grounds by State v Lowry* 315 S C 396, 434 S E 2d 272 (1993), and *State v Fennell*, 340 S C 266, 531 S E 2d 512 (2000)

These cases do not control As previously discussed, neither *Fennell* nor *Gandy* addressed transferred intent in a voluntary manslaughter situation Both affirmed the transfer of “malice” (supporting a murder conviction) from the intended victim to the unintended victim *Williams*, while confusing, actually addressed the concept of accomplice liability instead of transferred intent Because the state relies on these cases, it is appropriate to discuss them in more detail

In *Fennell*, the jurors found the defendant guilty but mentally ill of murder and assault and battery with intent to kill On appeal, Fennell complained the “trial judge err[ed] in refusing to direct a verdict on the [assault and battery with intent to kill] charge because the doctrine of transferred intent is inapplicable when the intended victim is killed and a stray bullet injures--but does not kill--an unintended victim ” *Fennell*, 340 S C at 270, 531 S E 2d at 514 Fennell, therefore, did not appeal his conviction for murder Fennell advanced two arguments First, “[t]he doctrine of transferred intent does not apply because any intent was ‘fully satisfied’ by the death of Thrailkill (the intended victim), therefore, nothing was left to transfer to Armstrong (the unintended victim)” *Fennell*, 340 S C at 270-1, 531 S E 2d at 514 Second, “[t]he doctrine is inapplicable because the harm appellant intended to inflict on Thrailkill (death) was not identical

to the harm inflicted on Armstrong (injury) ” *Fennell*, 340 S C at 271, 531 S E 2d at 514 The Supreme Court rejected both these arguments

The Court swiftly dismissed Fennell’s first argument The Court held criminal intent “is not extinguished at the moment a bullet strikes and kills the intended victim, such that there is no mental state left upon which to convict an unintended victim who also is injured or killed ” *Fennell*, 340 S C at 271, 531 S E 2d at 515 A criminal defendant, therefore, can be convicted for causing harm to both an intended victim and an unintended victim This is the classic transferred intent doctrine as applied to malice

The Court found the second argument more challenging The Court observed that “[s]ome courts decline to resort to the doctrine of transferred intent when they are convinced this legal fiction is not needed to hold the defendant criminally liable for his acts ” *Fennell*, 340 S C at 273, 531 S E 2d at 516 The Court, however, “conclude[d] that our criminal laws, unlike those of some other jurisdictions, make it necessary to impose the doctrine of transferred intent in this case ” 340 S C at 274, 531 S E 2d at 516 In actuality, the Court was concerned with the three levels of assault and battery simple assault and battery (a thirty day misdemeanor), assault and battery of a high and aggravated nature (a ten year misdemeanor), and assault and battery with intent to kill (a twenty year felony) The Court noted “malice” can be present but need not be present to support a conviction for assault and battery of a high and aggravated nature³ The Court “conclude[d] it would not be appropriate to limit the penalty and punishment to that

³ See *State v Pilgrim* 320 S C 409 465 S E 2d 108 (Ct App 1995) (discouraging practice of comparing ABHAN to manslaughter injury charge because when malice is the key issue it is confusing to jurors and prejudicial to defendant to import the heat of passion and sufficient legal provocation elements of voluntary manslaughter into ABHAN charge), *aff’d as modified in State v Pilgrim* 326 S C 24 482 S E 2d 562 (1997) *overruled on other grounds by State v Foust* 325 S C 12 479 S E 2d 50 (1996)

provided for [assault and battery of a high and aggravated nature] under these circumstances ”
 340 S C at 276, 531 S E 2d at 517 The doctrine of transferred intent, therefore, was applied to
 sustain a conviction for a crime of “malice” against an unintended victim when the defendant, in
 fact, did not have any “malice” towards that victim

Gandy involved a conviction for murder The Supreme Court framed the facts and issues
 on appeal as follows

This case arose out of an argument between the deceased and a friend of the
 appellant at the deceased's place of business As the argument grew more heated,
 another customer attempted to intercede, but appellant attacked him with a pool
 cue Appellant then approached the deceased and her son, Ray, with the pool cue
 The deceased pulled a pistol from her purse When Gandy failed to heed Ray's
 warning to stay away, Ray grabbed the gun and shot appellant in the shoulder,
 dazing him momentarily

Appellant then went outside He said he was going to get his gun and shoot Ray
 The deceased went over and locked the door Appellant returned, found the door
 locked, and shot through the door, killing the deceased Re-entering the building,
 he found Ray crouched behind the counter, and shot him in the leg and chest
 Appellant left the building saying he had “killed the sons of bitches ”

Gandy denied he intended to kill the deceased He testified that he shot through
 the door to gain entry to the building Based on this, he argues the trial judge erred
 when he declined to charge the jury on the law of involuntary manslaughter

Gandy, 283 S C at 572-73, 324 S E 2d at 66 The Court rejected the argument that involuntary
 manslaughter should have been charged in that case *Gandy* discussed the concept of transferred
 intent

This result is sometimes described as the function of the doctrine of “transferred
 intent” whereby the actor's intent to kill his intended victim is said to be
 transferred to his actual victim *All that is required of murder is the mental state
 of malice* provided by the intent to kill a human being coupled with an act which
 caused the death of a human being

283 S C at 574, 324 S E 2d at 67 (emphasis original) *Gandy*, therefore, merely holds that when a defendant attempts to murder one person and kills another person, then he is guilty of murder. To the extent that a voluntary manslaughter charge was appropriate, albeit rejected by the jurors, in *Gandy*, there was evidence of provocation from both the deceased, who pulled out the gun, and the son, who shot Gandy.

Williams is admittedly confusing. In *Fennell*, the Supreme Court described *Williams* as “affirming [a] murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him.” *Fennell*, 340 S C at 273, 531 S E 2d at 516. At one point, the *Williams* court described this issue on appeal in terms of murder: “But it is said by the appellant that there is no evidence of common design or concerted action or conspiracy to commit murder.” *Williams*, 189 S C at ___, 199 S E at 908. In reviewing *Williams*, it appears Williams and two co-defendants were charged with murder. It further appears the trial court submitted murder, voluntary manslaughter, and self defense to the jurors. The jurors convicted the three defendants of voluntary manslaughter. The Court did state, “It may also be regarded as a well settled principle of law that a man will be held guilty of murder or manslaughter who in the attempt to kill one person by mistake kills a third person, although there is no intention or design to kill such third person.” *Id*.

The issue of transferred intent, however, was not before the court. Rather, Williams argued on appeal “that there is no evidence of common design or concerted action or conspiracy to commit murder.” *Id*. The Court actually held, “When two or more persons aid, encourage, and abet each other in the commission of a crime, all being present, all are principals and equally

guilty ” *Id Williams*, therefore, actually involved the issue of accomplice liability and not transferred intent

Therefore the state’s reliance on *Fennell*, *Gandy*, and *Williams* is misplaced

E Trial Counsel’s ineffectiveness

Trial counsel clearly provided ineffective assistance to John Hughey and failed him miserably by ignoring A B A standards for capital lawyers and presenting alienating and misinformed theories to the jury *See Council supra*

Trial counsel in capital cases are required to conduct an immediate and expeditious investigation of the state’s guilt phase evidence 1989 Guideline 11 4 1(A) That did not happen in Hughey’s case Counsel settled on the voluntary manslaughter defense without having visited the crime scene and without even consulting with the defense expert, who was hired only after this decision was made Garrett did not even meet with Girndt until October 6 – 10, 1997, the week before trial Applicant’s Ex 24, PCR 301-02 *See e g Richey v Bradshaw*, 498 F 3d 344, 362 (6th Cir 2007) (“[T]he mere hiring of an expert is meaningless if counsel does not consult with that expert to make an informed decision about whether a particular defense is viable”) Even after Girndt disputed the defense theory, counsel refused to alter the defense and proceeded to trial with a defense they knew would not succeed and was indeed demolished by the defendant and the defense expert *See Ingle v State*, 348 S C 467, 560 S E 2d 401 (2002) (counsel ineffective in criminal sexual conduct case for calling the mother of the alleged victim to testify without interviewing her, even though her damaging testimony was also presented in rebuttal by the state, the prejudice of this testimony was heightened because “it came as part of what was supposed to be petitioner’s defense”), *Awkal v Mitchell*, 559 F 3d 456, 467 (6th Cir

2009) (“The jury could not seriously consider or accept [the defendant’s] assertion that he was not guilty by reason of insanity after [his] own attorneys had given them a witness who unequivocally stated that this defense was not applicable to [him]”), *Johnson v Bagley*, 544 F 3d 592, 605 (6th Cir 2008) (“[I]t is unreasonable, after an incomplete investigation, to put an expert on the stand who will ‘directly contradict [] the sole defense theory’”)

Trial counsel has a duty to “seek a theory that will be effective through both phases” of trial 1989 Guideline 11.7.1. In addition to knowing the voluntary manslaughter defense was not likely to work, trial counsel was aware such a defense might alienate the jurors. Nonetheless, they proceeded with the defense, described aptly by the state in PCR, as relying on “searching hope to have the luck of a lawless decision-maker,” State’s Prehearing Brief at 17-18, and succeeded only in alienating the jurors. See e.g. *Daniels v Woodford*, 428 F 3d 1181, 1210 (9th Cir 2005) (Counsel ineffective in capital sentencing, in part, for presenting an implausible trial phase defense, with the result that the defendant, in sentencing, “faced a jury that could only be profoundly annoyed by this ludicrous defense in the face of overwhelming evidence of culpability”)

At trial, however, the state, in its arguments to the jury pointed out that the defense was essentially blaming Jackson. “[T]hey continue to attack her today.” Tr. 3391. See e.g. *State v Hoffman*, 768 So. 2d 542, 576 (La. 2000) (blaming the murder victim in a capital case is “an offensive argument to the jury”). The state also mocked the defense argument that Harris was in the wrong place at the wrong time when she was in her own home when she was shot. Id. The state also pointed out that, even if the jury believed Hughey’s testimony, he was still guilty of murder. Tr. 3394. At bottom, the state criticized the “audacious” defense argument asking for

manslaughter convictions based on the evidence in this case. *See Turpin v Christensen*, 497 S.E.2d 216, 227 (Ga. 1998) (prejudice found in capital sentencing where the prosecutor “reminded the jury that [the] main trial defense had been a vicious, wholly unsupported attack on the dead victim’s character”), *Commonwealth v Alvarez*, 740 N.E.2d 610, 618 (Mass. 2000) (holding that prejudice is clearly established “[w]here, as here, the very matter as to which defense counsel has been ineffective becomes one of the linchpins of the prosecutor’s closing”).

F Conclusion

Had trial counsel conceded guilt, the result would have been different. Trial counsel would not have alienated the jurors by presenting the voluntary manslaughter defense. Since this alienated jury was the same one used during sentencing, John Kennedy Hughey was prejudiced by his counsel’s ineffective assistance. Therefore, the Court should order a new sentencing hearing on this issue alone. In the alternative, as discussed in the concluding section, this Court should order a new sentencing hearing due to the cumulative prejudice of counsel’s deficient conduct.

II

Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Hughey'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

A Evidence from the trial record

1 State's evidence in aggravation

The state's evidence from the first phase of the trial was incorporated into the sentencing phase and the jurors were permitted to consider that evidence in determining whether the necessary aggravating factors existed. There was evidence to support and the jury found three aggravating circumstances: the murders were committed during the commission of a burglary, the murders were committed during the commission of larceny while armed with a deadly weapon, and two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

During the state's case in aggravation, the state focused on the nature of the injuries to Jackson and Harris by presenting additional photographs of the bodies and additional testimony about the painfulness of Jackson's injuries prior to being shot. Tr. 3622-58. The state then presented victim impact testimony from Jackson's grandmother and mother, who was left with Jackson's and Hughey's children. The state concluded with victim impact testimony from Harris' sons and husband.

Marcus Harris focused specifically on Hughey's testimony from the trial:

But this is truly, truly been a big devastation to my life. You know, John caused us a lot of sorrow – a lot of people sorrow, you know, that knew my mom – that knew her. A lot of people sorrow. You know, and 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 She was in her own home Know that she was in her own home getting gunned down at where she was

Tr 3728-31 Anthony Harris, Marcus' brother, added that Harris looked after Hughey when his mother died Tr 3734-41 Mack Harris, Luevenia's husband, concluded by saying that even though Luevenia was a forgiving woman, she would not forgive Hughey for what he did to her and Jackson Tr 3753-56

2 Defense evidence in mitigation

The defense presented testimony from several of Hughey's family members and friends and from Jeff Yungman and Dr Evans The family member testimony established that Hughey's mother, Dolly May, had three children with a white man named Alan Carlyle Tr 3769-71 Dolly May's second husband, John Henry Hughey, also known as Bozo, was Hughey's father Bozo was an abusive alcoholic When he drank, "he was mean, violent" Tr 3837-39 He especially hated Carlyle's children, because they were not his, and would beat them, withhold food from them, and run them out of the house with a gun Tr 3775-81

Anthony Wilson, Hughey's half-sister, identified the weapon Hughey used to kill Jackson and Harris as a gun Bozo gave Hughey when he was a boy Bozo had used that same gun to shoot at Wilson one time, after she caught him with another woman and he got angry, he threatened to kill her Hughey saw the entire incident take place Tr 3789-91

Gloria Harrison, one of Bozo's children, also recalled an incident when Hughey witnessed the violence and was part of it when all the children had to reach out to a neighbor for help

I remember when we were staying on the Old Greenville Highway we was living in a mobile home, and he got his rifle – at that time he got his rifle And he got it

and he just started shooting up in the ceiling And him and mama got in a fight and he shot again And we ran and got Ms Ashcraft to call the police for us

Tr 3858-59

Wilson characterized Hughey's childhood as abusive, and when asked to describe the things he had endured, replied

His life? He has had a hard life He – I mean, he saw a lot of terrible things that his father did, you know He came up hard, you know He didn't have a man I could say as a father, because I don't know what that was But anyway, I mean, I love him And I don't know what else to say He's just had a hard time

Tr 3792

In addition to the "hard life," Hughey experienced a number of head traumas as a child, the most serious of which happened when Hughey was four or five years old Bozo, drunk and angry, got in the car to leave and Hughey climbed in with him When Bozo threw the car in reverse, Hughey fell out and the top of his head was cut open by the bottom of the car door His skull was visible, Tr 3777-78, and it was "touch and go" for about two days, Tr 3840 After this incident, Hughey always suffered migraine headaches and blackouts Tr 3785, 3863

Hughey also suffered a head injury when he wrecked a pulpwood truck, Tr 3779-80, after he had huffed gasoline fumes, Tr 3861-62 He was also hit in the head with a golf club, hit in the head falling off a tractor, and had head injuries from motor vehicle accidents Tr 3779-80, 3861-62

Hughey's primary emotional attachment and support through all of this was his mother He loved her very much and "they would do things together" Tr 3786-87 He lived with her until she was hit and killed by a drunk driver Tr 3782 After her death, Hughey seemed to lose his mind and walked the streets He drank more Tr 3784-85 He became isolated and lost

interest in taking care of himself. He did strange things like “writ[ing] things on the mirrors at the house” about his mother, such as “[t]he day she was born, the day she died, that he love her. Stuff like that.” He would also tell his sister that he would hear things in the house. Tr 3787-88. He was not “the same John he used to be.” While his sisters, Anthony and Ruby, got counseling after Dolly May’s death, Hughey did not seek any such help. “[I]t’s like he’s running from the truth,” with the truth being Dolly May’s death. He became withdrawn. Tr 3869-72.

Jeff Yungman, the social worker, also testified. He had reviewed Hughey’s records from the Abbeville County School District, Northeast Georgia Medical Center, Anderson Hospital, Abbeville County Memorial Hospital, and Abbeville County Health Department. He also interviewed Hughey, his sisters Anthony, Ruby, Dorothy, Gloria, and Barbara, his brother Donny Ray, and his aunt Nancy. Tr 3903-05.

Yungman found that Hughey suffered at least six different head traumas between 1973 and the incident date. Tr 3906. He started huffing gas between ages six and eight and this lasted for about a year or two. Tr 3908-09, 3916. His IQ was 80, which is considered low average. Yungman noted that the combination of low IQ and his father’s abuse could have led to low self-esteem. Tr 3909-11.

Yungman told the jury, “It was fairly evident that Mr. Hughey’s temperament, demeanor, actions and decision making power, everything changes remarkably once his mother passed away or was killed, actually.” He went on:

He was withdrawn. He had some auditory hallucinations in that he felt that he could hear his mother in the 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. He started drinking heavily. He also would not go to his sister’s house where the incident occurred.

Ti 3912

Yungman explained Hughey's limited decision-making abilities

Well, everybody has sort of a menu of what decisions they can—or decisions they can make in any given matter. And John's menu, although it is all there, the only ones he could see were a limited number based on what he learned as a child and what kind of behaviors he grew up with as a child. So as a result, a lot of what, when in a stressful situation, what he reverted to was the behaviors he saw growing up as a child, what was violent behavior on the part of his father.

Tr 3923 Yungman described how Hughey's decision-making ability was impaired, especially when he was in stressful situations, such as on the incident date. Tr 3924-27

Yungman saw Hughey's behaviors after Dolly May's death as being consistent with a diagnosis of Post-Traumatic Stress Disorder ("PTSD"), Tr 3913, with changes in behavior and even two instances of suicidal ideation. Tr 3921

On cross-examination, Yungman admitted he had been contacted by the defense to perform the investigation only three weeks to a month earlier. He had not been provided the reports from Hughey's psychiatric evaluation until just before trial. Tr 3939. The solicitor also questioned Yungman about certain areas of Hughey's life that he was not aware of to show he was relying on incomplete or inaccurate information. Tr 3944-45

The final witness for the defense was Dr. Evans, an expert in psychology and neuropsychology. He conducted a neuropsychological evaluation of Hughey in July 1997. During the six hours of testing, he also administered two tests for malingering but found no evidence of it. Tr 3965-68. He described the various tests he administered and reported he found evidence of brain dysfunction, Tr 3970, which could hinder the ability to adapt to stress, Tr 3973.

Evans “didn’t pick up much depression” when he first saw Hughey, but the tests he administered were not tests for depression. In his initial report, he noted Hughey “had minor signs of rejection and depression,” however, he seemed depressed when he decompensated a few weeks before trial. Tr 3977

Evans explained PTSD and opined that the death of a loved one can cause it. Hughey described “that he saw his mother there in the room.” He reported experiencing that regularly. Evans contrasted Hughey from someone who would “occasionally remember [then] last moments with a loved one,” saying “it seems like he literally thinks she’s there.” A possible diagnosis for Hughey would be depression with psychotic features, though he did not actually make this diagnosis. Tr 3979-80

Evans opined that Hughey’s abusive past was a major stressor with continuing residual effects. Tr 3984. Hughey was “different from the average person in many ways” and individual characteristics “may well have been” factors in the crime. When asked if “[i]n your opinion, they could definitely have impacted him on December 4 ’95?” Evans responded, “They *could* have been factors, yes.” (emphasis added). Evans also confirmed that organic brain dysfunction, head traumas and exposure to violence and abuse would “affect [a] person’s ability to cope and deal with stress and life itself.” Tr 3988-89

On cross-examination, the solicitor focused on Hughey’s potential PTSD diagnosis, asking Evans, “Well, does he have it?” Evans said he was “strongly suspicious” that Hughey suffered from PTSD. When pressed further, Evans said “I’m not going to say that he has post-traumatic stress disorder.” Tr 3990-91. He also conceded that he was not hired to consider PTSD, but instead remained focused on neuropsychological issues. Tr 3995

3 Court's charge on statutory mitigating factors

Prior to arguments, the trial judge held a charge conference Tr 4011 Defense counsel asked the court to charge five of the ten statutory mitigation factors contained in S C Code Ann §16-3-20(C)(b) (Supp)

- (1) The defendant has no significant history of prior criminal convictions 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,
- (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, 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 ”

Tr 4118-19

The court agreed “to instruct as to statutory mitigating facts as one, two, and seven, and decline six and ten as requested” Tr 4014-16 Accordingly, statutory mitigator number six, “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,” was not charged Tr 4059

B Evidence from the PCR hearing

1 The mitigation investigation was incomplete, inadequate, and ineffective

As addressed in Argument I, trial counsel focused primarily on their manslaughter defense Little effort was devoted to the mitigation investigation, which was incomplete, inadequate, and ineffective What little investigation was conducted began on May 14, 1997,

when Tinsley retained Paige Tarr as the mitigation investigator. Tarr described her role as a mitigation investigator.

Usually you're just responsible for putting together a life history for the defendant, trying to find out as much, you know, information as possible about their life, actually usually going generations back. You know, you learn about their family, you know, prior to their birth and then especially from birth til the incident occurs.

PCR 331

"[M]itigation investigations routinely require between 200 and 500 hours of uninterrupted, intensive work over a period of six months to two years," PCR 43, Applicant's Ex. 6. Because Tarr was retained only "five months" prior to trial, she was only able to devote seventy-two hours to the mitigation investigation in this case. PCR 44, Applicant's Ex. 8.

Counsel did not provide her "a release" for information signed by Hughey so she could obtain "any and all records and information" until the middle of June. PCR 338-39, Applicant's Ex. 7 and 8. On June 26, 1997, Tarr "delivered releases to doctor's offices, school, hospital, health department [and] DSS." PCR 46, Applicant's Ex. 8. On July 25, 1997, she "drove to Anderson to [Patrick B.] Harris Psychiatric Hospital." She made a second trip to Patrick B. Harris on August 15, 1997, to serve a "subpoena of records for John Henry Smith," who is Hughey's father. PCR 48, Applicant's Ex. 8 and 9. By letter to counsel, dated August 21, 1997, the medical records department of Patrick B. Harris objected to producing these records without "court order or consent." PCR 49, Applicant's Ex. 9. Trial counsel never obtained these records. PCR 518.

2 Mental health experts

Aside from Tarr, counsel were authorized funding for a psychologist and a psychiatrist on May 5, 1997 PCR 36-37, 189, Applicant's Ex 5 Tarr recommended Dr James Evans as the psychologist PCR 50 Evans' involvement and findings were described in his sentencing testimony, discussed previously

Yungman, a social worker, was also recommended by Paige Tarr, with whom he was working on a Greenville capital case simultaneously with Hughey's case PCR 127 Tinsley did not retain Yungman until the eve of trial, PCR 50-51, 127-28, Applicant's Ex 11, and he began work on the case on October 1, 1997, when he "read and review[ed] records" provided by counsel He requested but never received Hughey's records from the Department of Juvenile Justice (DJJ) and his father's medical records from Patrick B Harris Psychiatric Hospital PCR 129-30, Applicant's Ex 12 Tinsley never followed up to obtain those documents PCR 518

Yungman believed these records were important

I can only do a psycho-social history, a good psycho-social history if I can have all available material I don't remember exactly, but certainly anything about his juvenile record might have had some evidence of his--his functioning as a juvenile as his mental capacity, regard to educational abilities and regarding his mental health And John Henry Smith is Mr Hughey's dad And I wanted to see what his psychiatric conditions were 'cause at time psychiatric problems run in the family And I wanted to see if there was any correlation, but I couldn't do it

PCR 130, Applicant's Ex 12

As outlined in his sentencing testimony, Yungman interviewed some of Hughey's family members He interviewed Anthony Wilson, Donnie Ray White, Ruby White and Nancy Ramey in person, but Dorothy Hughey, Gloria Harrison and Barbara Hughey were interviewed only by

phone. These interviews took place on October 2, 1997, and October 5, 1997, less than two weeks before trial. PCR 53, 131, Applicant's Ex. 12 and 13.

Yungman's report, dated October 6, 1997, was sent to Tinsley. PCR 53, 132, Applicant's Ex. 12 and 13. In his report, Yungman opined Hughey was suffering from depression. PCR 132, Applicant's Ex. 12. He also expressed his concern that Hughey suffered from PTSD. Applicant's Ex. 12. He wrote that a person can develop PTSD after a traumatic event, such as the death of a family member. "The behaviors described by Mr. Hughey and his family members are **consistent with** symptoms listed in the Diagnostic and Statistical Manual of Mental Disorders (DSM—IV) for someone suffering from Post-traumatic Stress Disorder." Applicant's Ex. 12. While Yungman was able to identify Hughey's symptoms as being "consistent with" PTSD, he was not able to make that diagnosis and testified only that Hughey "may or may not" have PTSD. "All I can say is that he is consistent with it." Tr. 3955.

Yungman did not have any information about the other defense experts or what their expected testimony would be, he did not meet with any other experts. Yungman "didn't know what the big picture was." Yungman also testified he met with trial counsel only twice prior to trial and was prepared for his testimony over lunch right before he took the stand. PCR 134-35. Yungman spent a total of thirty-one and a quarter hours on the case, including his testimony on October 29, 1997. PCR 135, Applicant's Ex. 13.⁴

⁴Following the trial, Yungman expressed his concerns in a letter to Paige Tarr. The letter contrasts the preparedness of the defense team in the Greenville case. Yungman and Tarr worked on simultaneously with Hughey, noting the number of defense team meetings, numbers of interviews conducted and time spent on the case, with the lack of preparation by the defense team in Hughey's case. PCR 136. Applicant's Ex. 31. He did not inform counsel of his concerns though. PCR 141.

Despite the inability of Yungman or Evans to adequately address PTSD or depression and the available funding, counsel did not consult a forensic psychiatrist until after Hughey's competence was questioned on the eve of trial. Even then counsel did not ask the psychiatrist to evaluate and address mitigation.

Tinsley recalled Garrett bringing in Dr. Morgan following Hughey's evaluation at DMH, PCR 63-64, and the cover letter enclosing Dr. Morgan's bill was addressed to Garrett, PCR 66, 205-06, Applicant's Ex. 15. Garrett, however, did not "recall ever being with him or discussing his findings at all."⁵ According to Garrett, working with Dr. Morgan was Tinsley's responsibility. Thus, Garrett could not provide any testimony about the extent of Dr. Morgan's involvement or his opinions. PCR 205-06, 260. *See also* PCR 288. Garrett also did not consult with Evans or Yungman at all. PCR 198.

Tarr, on the other hand, did recall having a phone conference with Dr. Morgan during the trial. At the PCR hearing, she testified, based on her notes of the October 22 conversation:

According to my notes, PTSD or post-traumatic stress disorder with a question mark, complicated bereavement, significant brain damage, does not have capacity to stay composed under duress, seizure like episodes for temporal lobe problems, cannot assist in defense as far as telling us what occurred during crucial time and not malingering.

PCR 364, Applicant's Ex. 51. Tarr did not know why Dr. Morgan evaluated Hughey or why he ultimately did not testify. PCR 557, 361, 363.

⁵According to his timesheet, Dr. Morgan attended a one hour court proceeding and spent two hours reviewing records on October 18, 1997. The next day, he spent three hours interviewing Hughey and an additional hour reviewing records. Dr. Morgan's total involvement in Hughey's case was for seven hours over these two days. PCR 61-63, 524-26, Applicant's Ex. 15.

Tinsley testified that he did not believe a psychiatrist was necessary in this case prior to Hughey's decompensation and the DMH evaluation, although he acknowledged that a psychiatrist could address Hughey's mental health "in greater detail and clarity" than a psychologist PCR 64

Initially, Tinsley blamed Tarr for Dr Morgan's late entry into the case, saying he was depending on her to suggest the necessary experts. He acknowledged, however, that his work load and responsibilities as the public defender for two counties was the reason for his inattention. He explained, "I was handling a huge, huge load of cases at that time," which consisted of all cases except the juveniles and the drug cases. Tinsley agreed that, prior to the month before trial, he was "trying to squeeze in doing the experts and work on the capital case with [his] other responsibilities." PCR 67-68

Tinsley admitted he made some "assumptions that could have been inaccurate in terms of the need for the psychiatrist." He did not understand that Dr Evans was not testing for and, therefore, could not diagnose PTSD. He believed Dr Evans *would testify* Hughey had PTSD. Tinsley was surprised by his testimony at trial saying only that Hughey had symptoms consistent with PTSD. PCR 522-24. "I think that surprised me and probably triggered and showed the need more for the—for the forensic psychiatrist than anything else." PCR 491. *See also* PCR 507-08.

Tinsley had included Dr Morgan on the witness list, Applicant's Ex. 21, and his notes of possible mitigation witnesses, PCR 109, Applicant's Ex. 18. Tinsley recalled that Morgan, "found some problems with John, but I don't recall exactly what he indicated his testimony would be." PCR 527-28. *See also* PCR 492-93. While Tinsley claimed in PCR that Dr Morgan

could not help Hughey by testifying, his limited recollection suggested otherwise. He recalled also that Dr. Morgan opined Hughey was “clearly suffering from depression, major depression. And he—he mentioned that there were some other problems too, that he could have—I think he could have established the PTSD.” Tinsley still did not call him as a witness after he was surprised by Evans’ failure to testify that Hughey suffered from PTSD. PCR 493-94.⁶

Tinsley knew at the time Hughey was sentenced to death that not having a prepared forensic psychiatrist prejudiced Hughey. Specifically, on October 30, 1997, Tinsley took notes that begin the “final charge 11 14 a.m.” These notes also recorded the “jury delib[eration] [began] 11 55 a.m.” and the “verdict = DEATH.” Tinsley agreed this note “was made contemporaneously with the last day of trial.” Just below these notes, Tinsley wrote, “PCR = Dr. Morgan/venue.” According to Tinsley, this was “[j]ust a reminder that Dr. Morgan was not called,” but Tinsley acknowledged this note linked the failure to call Dr. Morgan as a witness to post-conviction relief. PCR 109-10, PCR 503-06.

As will be discussed below, Tinsley did not consult Dr. Morgan soon enough for him to conduct a proper forensic evaluation. A forensic psychiatrist provided with enough information and given enough time to perform a proper evaluation would have provided valuable mitigation testimony.

⁶During the PCR hearing, Tinsley could not recall whether he considered calling Dr. Lewis, the court-appointed examiner, as a witness. PCR 108. Tinsley’s notes, however, indicate he at least considered presenting evidence of bereavement. PCR 483. Applicant’s Ex. 19, and Dr. Lewis had diagnosed Hughey with a “complicated bereavement disorder secondary to death of the mother, alcohol abuse and addiction [in a] controlled environment, [and] borderline intellectual functioning.” Tr. 415.

3 Trial counsel failed to present evidence of adaptability to incarceration

Both Tinsley and Garrett were aware that Hughey adapted well to confinement and was a good inmate while he was in pre-trial detention at the Greenwood County Detention Center. PCR 18. Tinsley and Garrett identified at least three jailors who had favorable opinions of Hughey: Major J.L. Eidson, Lt. Robert Allen, and Martha Ann Stewart. Tinsley did not, however, obtain Hughey's Greenwood Detention Center records⁷ or juvenile records from the Department of Youth Services, now known as the Department of Juvenile Justice.

Tinsley's notes from trial reveal he did not present this evidence because he believed the state must allege Hughey's future dangerousness before the evidence could be presented. He had this misunderstanding even though he had some legal research in his file labeled "future adaptability to prison life" and citing *Skipper v South Carolina*, 476 U.S. 1 (1986) (permitting evidence of adaptability to confinement as mitigation). PCR 94-95, Applicant's Ex. 22.

Specifically, on September 8, 1997, the state served the notice of evidence in aggravation of the punishment. The notice stated in part,

The state will further present evidence, testimony and exhibits as to the Defendant's character, statements and conduct relating to his release or parole from jails and/or prisons as an adult and opinions as to the Defendant's character, propensity for violence and unlawful conduct, disregard for peace and good order and to commit such acts in the future.

PCR 86-88, Applicant's Ex. 17. Tinsley underlined "commit such acts in the future." Next to this phrase, he wrote "(i.e., future dangerousness). Lt. Allen adapt prison." PCR 88-89, Applicant's Ex. 17. Tinsley also wrote some notes before the beginning of the sentencing phase.

⁷ Tinsley could not recall if he obtained Hughey's jail records from Greenwood. PCR 96. See also PCR 518-19 (Tinsley acknowledged he had time during the three-day hearing to review his file and locate other records, but he never came forward with these other records or jail records).

of the trial in which he listed "favorable jailor" as a potential witness. As possible mitigation, he listed Hughey's "juvenile record" and "prison record." Tinsley wrote "Adaptability (if future dangerous)" PCR 89-91, Applicant's Ex 19. During the trial, Tinsley listed "other possible mitigation witnesses," including "Lt Allen" and "J L Eidson." According to Tinsley's notes, he planned to call one of these witnesses only "if [the] state argues future dangerousness." PCR 91-93, Applicant's Ex 18. Tinsley additionally made some notes about sentencing phase themes. The first thing listed on this page states, "Adaptability (Major Eidson Lt Allen/Future Dangerousness)" PCR 93, Applicant's Ex 19.

Garrett testified he had two concerns about calling Major Eidson as a witness. First, he had a bad experience presenting adaptability evidence in the Eddie Lee Elmore re-sentencing trial. The Department of Corrections guards, who testified about Elmore's adaptability to confinement, were reserved witnesses. Second, Garrett was concerned with Eidson's relationship with Solicitor Jones. PCR 217-19. He did not have any similar concerns about the other jailors, including Ms. Stewart. PCR 289-91. According to Garrett, however, Tinsley "made the final call on" presenting adaptability evidence or not. He did not know why Tinsley did not present evidence of adaptability to incarceration. PCR 217, 219-21.

Tinsley acknowledged he should have presented evidence of Hughey's adaptability to incarceration and could have presented it without encountering a problem, such as Garrett described in Elmore. For instance, he could have called Allen, "the number two man" in the jail's administration, or another jailor, or simply relied on the jail records. PCR 95-97, 99-101. He had interviewed both Eidson and Allen and testified, "I felt Lieutenant Allen was favorable towards John." PCR 488-89.

Tinsley twice testified in PCR, "If I had to do it over again, I would have called Lieutenant Allen," whom he acknowledged was a very impressive person. He admitted he did not have a good reason for not presenting evidence of Hughey's adaptability to incarceration. He agreed the failure to present this evidence might have affected the outcome of Hughey's trial. PCR 95-97, 99-101.

C Evidence available, but not presented at trial

- 1 A forensic psychiatrist would have testified Hughey's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired**

a Dr. Schwartz-Watts' forensic evaluation

At the PCR hearing, Hughey presented testimony from Dr. Donna Schwartz-Watts, an expert in forensic psychiatry. PCR 366-67, Applicant's Ex. 47. She has been involved in a number of death penalty cases, mostly focused on evaluation and testimony concerning mitigation. PCR 370.

Dr. Schwartz-Watts' report lists the records she reviewed and relied upon including those that were obtained by trial counsel, as well as those that were not obtained but were reasonably available at the time of trial. For instance, Dr. Schwartz-Watts was provided with Hughey's DJJ records and the psychiatric hospital records for his father, the exact records Yungman requested but never saw because trial counsel failed to obtain them. PCR 129-30, 518, Applicant's Ex. 12. She also reviewed, among other things, juvenile and adult criminal and detention records for Hughey, excerpts of testimony from Hughey's trial, and mental health records of Hughey's siblings. She also consulted with other experts that had evaluated Hughey.⁸ Dr. Schwartz-Watts

⁸Dr. Schwartz-Watts consulted with Dr. Bachman, a neurologist, and Dr. Brawley, a neuropsychologist. She incorporated their findings into her report. PCR 374-76, Applicant's Ex. 48. Dr. Brawley's first evaluation of

testified that it was important for her, as a psychiatrist, to review medical and mental health records for Hughey's family members because they corroborate or add to what is known about the history of violence in the home and provide information about psychiatric conditions that run in the family PCR 371-74, Applicant's Ex 48

Dr Schwartz-Watts testified that the number of interviews necessary to complete a forensic evaluation depends upon the client, but "[i]f it's a client with a lower intellectual functioning and a mental illness, sometimes I have to see them for hours, three, four, five, up to ten times. It just depends on each individual." PCR 367-69

Hughey required four visits because of his issues. He was cooperative but quiet. "if you ask him a question, he will always answer you. But he doesn't volunteer details." She went on "You have to work. The examiner has to work to be able to get a history from him." PCR 377-78, Applicant's Ex 48. Hughey's guarded nature made it essential to have multiple interviews in order to adequately assess him.

When someone has a history of post traumatic stress disorder, if they've been abused or if they've grown up in environments where they've been exposed to violence, they don't trust people. And they're not usually very forthcoming with details. And trust builds over time. So as Mr Hughey got to know me and saw that — and became more familiar with me, he was less anxious, and he would give more details.

PCR 379

Hughey revealed a full scale IQ of 69 which placed him in the mildly mentally retarded range and the results of her additional tests qualified him for a diagnosis of dementia. He was severely impaired. She retested Hughey after a course of treatment for depression and found that some areas improved slightly while others continued to decline. Dr. Bachman was consulted in an effort to ascertain why Hughey's functioning had declined. Hughey had suffered severe hypertension capable of causing microscopic levels of brain damage and Dr. Bachman's exam was consistent with this hypertensive crisis causing cognitive decline. PCR 374-76 Applicant's Ex 48

The importance of multiple interviews was further illustrated by Hughey's changing mental state. During their second meeting, he exhibited more cognitive impairments than he had in her first visit, because he had been suffering a headache for two days. PCR 378-79, Applicant's Ex. 48.

b Dr. Schwartz-Watts reviewed records not obtained by trial counsel that proved to be valuable sources of information

Hughey's father, Bozo, who suffered from dementia, was hospitalized in 1989 at Patrick B. Harris Psychiatric Hospital. He suffered from "a closed head injury, seizure disorder and from alcoholism." During that particular hospital stay, Bozo was diagnosed with organic personality and organic brain disorder.

In October 1986, at the age of seventeen, Hughey was committed to DJJ for an indeterminate sentence not to exceed his 21st birthday. PCR 395, Applicant's Ex. 35. Dr. Schwartz-Watts found the DJJ records to be extremely important because the psychological testing performed by Dr. Siegel at Reception and Evaluation (R&E) was a "valid description of his pre-morbid functioning" and was consistent with the mental status examinations she administered. Applicant's Ex. 48. The psychological report "showed that some of the things clinically, that they had persisted over time and that they were there long before his crime." PCR 399.

Hughey's psychological evaluation at R&E was the first psychological evaluation he had. Dr. Siegel's observations were very similar to Dr. Schwartz-Watts' clinical impressions, especially when it came to Hughey's slow pace in approaching tasks and his evasiveness when interviewed. Dr. Siegel reported

[Hughey] consistently approached tasks with a fairly slow pace. John tended to be quite evasive during the interview, often claiming to fail to recall why he behaved in certain ways. He left out significant details regarding his charges and when confronted with this discrepancy between his story and the police report, continued to blame others for his trouble.

Hughey's IQ from 1986 was 83, which is similar to what it was at the time of his 1997 trial. PCR 401-04, Applicant's Ex 46.

Dr. Siegel wrote that psychological test data indicated periodic explosive tendencies and noted that Hughey would suppress his feelings until they would "literally burst out." He went on to say Hughey was likely easily provoked due to his "general distrust of others." Dr. Siegel opined, "His anger, may indeed, be based on some past experience where he was truly victimized, however, he exhibits a grossly inadequate style of coping with frustration, disappointment and rejection." Applicant's Ex 48. Dr. Siegel's observations were consistent with Dr. Schwartz-Watts' clinical impressions of Hughey and could be explained by his depression, PTSD and low IQ. PCR 405-06.

The other records from DYS (DJJ) list treatment goals for Hughey that were consistent with Dr. Siegel's impressions. These goals included controlling frustration, hostility and anger and decreasing physical aggression, PCR 407-08, Applicant's Ex 36. The Interdisciplinary Treatment Team Summary noted Hughey had little insight because he denied having any issues controlling his temper. PCR 409-10, Applicant's Ex 38.

c. Dr. Schwartz-Watts diagnosed Hughey with PTSD and major depression, among other things.

In her report, Dr. Schwartz-Watts listed and explained her diagnoses and opinions. First, she diagnosed him with Dementia due to Multiple Etiologies. She cited high blood pressure,

head traumas,⁹ alcohol use, and family history as possible causes. While his dementia is not directly related to his crimes, it will cause his functioning to continue to deteriorate. PCR 380-81, Applicant's Ex. 48

Hughey's diagnosis of Chronic PTSD can be based not only on the death of his mother, but also the violence he experienced as a child and the multiple car accidents he was involved in. Relying on the information presented at trial through lay witnesses and experts, Dr. Schwartz-Watts believed Hughey's abusive childhood laid the foundation for his PTSD. It is also possible for victims of car accidents to experience PTSD.¹⁰ PCR 382-84, Applicant's Ex. 48

Additionally, the death of a loved one can cause PTSD. Hughey reports his most significant trauma to be the death of his mother. He went to the hospital and saw her swollen, dead body after the accident that killed her. It was very traumatic for him. He was never treated by a psychiatrist or psychologist after her death though two of his sisters were and they were both diagnosed with PTSD. Dr. Schwartz-Watts noted of Hughey

"He has the numbing of general responsiveness seen in the illness. He is also very avoidant about discussing these traumas. He has difficulty sleeping and periods of irritability, difficulty completing and concentrating on tasks which are persistent symptoms of increased arousal."

In Hughey's case, his preexisting history of using drugs and alcohol led to drinking that increased exponentially after his mother's death. PCR 428-30, Applicant's Ex. 48

⁹ Hughey suffered five head traumas within a two year period after leaving DJJ and Dr. Schwartz Watts reviewed the medical records related to those incidents. Three of those incidents were motor vehicle accidents: one involved Hughey getting hit in the head with a golf club and the other was a four wheeler accident. These head injuries contributed to his current diagnosis of dementia. PCR 426-28

¹⁰ Hughey was in three car accidents between January 1993 and September 1994. Applicant's Ex. 48

Dr Schwartz Watts was aware of Hughey's past diagnosis of Complicated Bereavement¹¹ but determined a diagnosis of Major Depression, single episode, moderate with psychotic features in partial remission was more appropriate given his symptoms. Her concerns about the original diagnosis arose from the frequent visions of his mother as well as his impaired functioning. PCR 384-85, Applicant's Ex. 48. In her report, Dr. Schwartz-Watts relied on the DSM to assist her in properly diagnosing Hughey. "The presence of certain symptoms that are not characteristic of 'normal' grief reaction may be helpful in differentiating bereavement from a Major Depressive Episode." Such abnormal grief reactions included "prolonged and functional impairment" and "hallucinatory experiences other than thinking he or she hears the voice of, or transiently sees the image of the deceased person." Applicant's Ex. 48 (quoting Diagnostic and Statistical Manual of Mental Disorders, 4th Edition Text Revision, p. 741). Hughey reported having seen his mother and having conversations with her continually since the time of her death. Further, according to family members, his functioning declined after she was killed. Applicant's Ex. 48.

d. Dr. Schwartz-Watts testified about Hughey's alcohol intake immediately prior to the incident

Turning to the incident date, Hughey reported to Dr. Schwartz-Watts that he had been up drinking the night before. He drank a case of beer and got home at around 3:00 a.m.¹² PCR 432-

¹¹ Dr. Catherine Lewis, the court-appointed examiner, made this diagnosis after evaluating Hughey on the eve of trial. PCR 384-85, Applicant's Ex. 48.

¹² Dr. Schwartz-Watts agreed Hughey met the criteria for a diagnosis of Alcohol Abuse in a Controlled Environment as was previously diagnosed by Dr. Catherine Lewis. His drinking led to medical problems, legal problems, and relationship problems. Due to his alcohol use around the time of the incident coupled with his executive functioning, he has limited recall of the events surrounding the crime. PCR 381-82, Applicant's Ex. 48.

33 "He had genetic loading for substance abuse" and mental illness due to his family's history, and he used alcohol to cope with his PTSD Applicant's Ex 48 ¹³

- e Dr Schwartz-Watts' testimony would have added to the statutory mitigators actually charged by the judge and also required him to charge the jury that Hughey's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired at the time of the incident

While the judge charged the "mentality" statutory mitigating factor at trial, the evidence supporting it was incomplete Hughey's school records from his DJJ file revealed intellectual deficits He functioned below grade level in all areas except spelling PCR 422, Applicant's Exs 44 and 48 He scored below standard on all three areas of the Basic Skills Assessment Program PCR 423, Applicant's Exs 45 and 48 His limitations were important as a component of his mentality Dr Schwartz-Watts explained

And the reason mentality should be considered is if you take somebody that's limited intellectually, you put them under stress in a domestic situation, you intoxicate them with alcohol, their ability to think is not—is going to be severely impaired So I believe his mentality should have been considered at the time of his offense

PCR 390-91

Likewise, the evidence presented to support the statutory mitigating circumstance that Hughey was under the influence of a number of mental and emotional disturbances on December 4, 1995, was incomplete Dr Schwartz-Watts diagnosed him with PTSD and Major Depression, illnesses that were present but not diagnosed at the time of trial due to counsel's failure to obtain

¹³ Hughey's paternal grandfather and father were alcoholics Paternal uncles had committed suicide and were treated at the mental hospital A maternal aunt and maternal cousin each also committed suicide Two sisters also had problems with alcohol Applicant's Ex 48

all the necessary records and provide them to an expert qualified and asked to conduct a full mitigation evaluation

Dr Schwartz-Watts testified Hughey was suffering from depression following the death of his mother, and this led to a decline in functioning, irritability, and impulsivity. Further, he had post traumatic stress disorder and was intoxicated. He was experiencing all of these things in addition to his limited intellectually functioning at the time of the incident. PCR 391 92, Applicant's Ex 48. She opined

Limited testimony was presented about Mr Hughey's depression. His mental illness of PTSD, Depression, Borderline Intellectual Functioning and Alcohol Abuse were not presented together and discussed together, which would have made the statutory mitigation of being under the influence of a serious mental disorder stronger.

Applicant's Ex 48

In addressing statutory mitigating circumstance number six, Dr Schwartz-Watts stated

Mr Hughey had a substantial impairment in his capacity to conform his conduct to the requirements of the law at the time of the crimes. He had a history of Borderline Intellectual Functioning, Depression and Alcohol Abuse, which made him have poor judgment, irritability and impaired capacity at the time of the offense.

Applicant's Ex 48. In explaining her opinion, she addressed each factor affecting Hughey at the time of the incident.

First, she noted that Hughey's alcohol abuse and PTSD went hand-in-hand. "He didn't hurt his victims because he—as a result of that disorder, but the fact that he was drinking more relates it to the PTSD and he was intoxicated at the time of the crime." She also explained how someone who had been drinking alcohol, had a low IQ and suffered from PTSD would react in a stressful situation. "They'll overreact. He could become explosive as Dr Siegel had described

earlier. You use very poor judgment. When you already have a low IQ and you're drunk and you're in the middle of an argument, your chances of making good decisions are very poor." Low IQ also limited the choices Hughey could make. PCR 433-4. Voluntary intoxication should have been presented both as complication of Hughey's PTSD and as a factor in the incident. Applicant's Ex 48.

Hughey reported not sleeping much before the crime. Applicant's Ex 48. She testified that lack of sleep would also decrease his ability to cope. "When you're sleep deprived, your memory's not as good. Your cognitive functioning is not as intact as normal." PCR 434.

Dr. Schwartz-Watts testified about the importance of Hughey's previously undiagnosed Major Depression. She said, "To me, that's one of the most significant factors on that day. He was impulsive. He was clearly irritable. He was angry. And he harmed people because of that anger." PCR 435.

If someone was under the influence of all these factors simultaneously, they would react "[i]mpulsively, poor judgment, explosively, with anger." When asked directly if, "[a]t the time of the incident then on December 4th, 1995 do you believe that Mr. Hughey was substantially impaired in conforming his conduct to the requirements of the law?" she replied, "Absolutely." PCR 435. She explained that untreated depression made Hughey irritable and violent and alcohol intoxication impaired his ability to conform his behavior to the requirements of the law. Conflict with Jackson and lack of sleep also contributed. PCR 393. Based on her testimony, statutory mitigator number six should have (and would have) been charged if trial counsel had adequately developed and presented this evidence.

2 Adaptability

- a Corrections officers from the Greenwood County Detention Center would have testified Hughey was a model inmate

At the PCR hearing, Hughey presented testimony from Julia Perlotte and Martha Ann Stewart, two former employees of the Greenwood County Detention Center. Both worked there while Hughey was in pretrial detention. Neither of them testified at Hughey's trial.

Julia Perlotte was employed at the Greenwood County Detention Center from 1992-2001. Perlotte remembered Hughey as being "[v]ery quiet, reserved. Didn't hear a lot out of him." As a shift supervisor, she was responsible for overseeing the entire detention center during a specific shift. Hughey was always very respectful towards her and never gave any officers on her shift any problems. She had the opportunity to observe Hughey with other inmates and said he got along "good" with them. PCR 153-55.

Relying on Hughey's jail records, Perlotte testified he was in the Greenwood County Detention Center from December 8, 1995, until October 30, 1997. PCR 156, Applicant's Ex. 30. According to his inmate file, he was involved in a few incidents but nothing that was considered major. PCR 156-57. In Perlotte's experience, based on the length of time Hughey was in the jail and the crimes he was charged with, his file was very small and the incidents he had were minor. PCR 160-61, 168-69. She explained that if an incident involved more than one inmate, a report went in each inmate's file. Hughey's incidents involved smoking in D-block, disrespecting an officer, arguing and excessive noise. Perlotte characterized these as being non-violent violations that were minor. PCR 157-58. In another incident, Hughey and several other inmates were cited for destruction of jail property, but they never determined who actually damaged the property. PCR 160.

There was one incident where a razor was found in Hughey's possession. Razors were handed out by the officers during showers and then collected. Peilotte testified that the officer who handed out the razors should not have let the razor go unaccounted for at the end of the shift and should have been reprimanded. PCR 168-69. Though Hughey did break the rules, there was no actual violence associated with the incident. PCR 159, Applicant's Ex. 30.

Peilotte testified she had observed thousands of inmates during her time at the Greenwood County Detention Center and when asked how he compared to other inmates as far as his adaptability and behavior in confinement, she answered "He never gave my shift and myself any problems. He could talk to you on a very calm level, talk to you about anything you asked him, just general conversation. He wasn't hostile. He adapted to what he was there for. He wasn't hostile." PCR 161-62.

The second jailor to testify was Martha Ann Stewart. Stewart retired from her employment at the Greenwood County Detention Center in 2007 after almost 19 years of service. During the time Hughey was an inmate there, she was a shift supervisor. As a shift supervisor, she oversaw 5-6 officers and all the inmates in the jail. Stewart did not recall Hughey giving them any problems.

He never gave anybody that much problem. He was always polite. He always, yes, ma'am, no, ma'am. And most of the time when you'd tell him to do anything he would do it. He knew when we went back there and it was lock-down time, he knew he was to go into his room. And he never gave us a problem with it.

She compared him to other capital inmates housed at the detention center during her tenure. "He was very calm. He was always complying with the rules that we set for him back there that they—he knew that was going down. And we never had that much trouble out of him at all, if

any, while he was back there ” PCR 171-73 Stewart told a story about Hughey complying with a request to cut his dreadlocks off when he got to the jail PCR 179

After reviewing Hughey’s jail records, she characterized his file as very minor and said that other inmates who would have been in the jail as long as Hughey was may have had files two to three inches thick PCR 173-74 Applicant’s Ex 30 With some of the incident reports containing the names of multiple inmates, it is possible Hughey may not have done anything wrong She considered Hughey to be adaptable to confinement PCR 175

b A forensic psychiatrist would have testified Hughey adjusted well to DJJ and explained why he was highly adaptable to incarceration

Applicant’s forensic psychiatrist, Dr Watts, reviewed Hughey’s DJJ records and inmate file from the Greenwood County Detention Center, neither of which counsel obtained prior to Hughey’s 1997 trial She testified the DJJ records showed that Hughey adapted well to a structured environment, followed rules and conformed his behavior PCR 399 Additionally, the Greenwood County Detention Center records illustrated his good adjustment to structure and routine He did not have any major infractions while in pretrial detention She opined “Adaptability to prison should have been considered [at trial] DJJ records, and Greenwood County Detention Center records show that Mr Hughey was adaptable ” In diagnosing Hughey with PTSD, Depression, Borderline Intellectual Functioning and Alcohol Abuse, she also noted “The prognosis of these illnesses should have been presented [at trial] to demonstrate the likelihood of Mr Hughey’s adaptability to imprisonment ” Applicant’s Ex 48

In addressing the concerns about Hughey’s potential for periodic angry explosions,¹⁴ Dr Watts testified that she had reviewed Hughey’s records from SCDC, in addition to the records

¹⁴ See Applicant s Exs 46 and 48 as discussed in section II(C)(1)

from DJJ and the Greenwood Detention Center, and none of those records include any write-ups for explosive behavior. His only explosions have happened when he was not incarcerated. PCR 457-78. She explained that when Hughey does not have access to drugs or alcohol, his health problems are treated with medications, and he is away from his chaotic family, he is adaptable. PCR 450.

Upon his arrival at DJJ, the Reception and Evaluation Team Report was completed and showed he "made a satisfactory adjustment to the reception and evaluation center." He followed rules and regulations, got along well with peers, and accepted supervision well. PCR 400, Applicant's Ex. 37. Dr. Watts was asked why it is noteworthy he was adaptable to R&E.

For a number of reasons. First of all, it helps in terms of diagnosis and prognosis, that you know if he's in a structured environment, if he's removed from violence from the home, if he's removed from alcohol that his thinking improves. He's able to make better decisions on a day to day basis even given his limited intellectual—his intellectual deficits. And also it shows that he follows rules. And past behavior is a good predictor of future behavior. So one would expect him to adapt well in prison under the same set of structure. It's a very similar environment.

PCR 401.

A functional assessment completed by South Carolina Vocational Rehabilitation listed Hughey's limitations as making poor decisions and failing to consider the consequences of his behavior. PCR 412, Applicant's Ex. 40. This assessment was consistent with his educational progress reports, which are used to gauge a juvenile's attitude in school, whether they follow instructions and whether they complete their assignments, among other things. PCR 417. With few exceptions, Hughey received the highest marks possible. When he did receive lesser marks, they were in areas such as completing his assignment, working to capacity, showing good judgment, and exercising self control. PCR 417-21, Applicant's Ex. 43. Dr. Watts testified

these school reports supported Hughey being adaptable to a structured environment because of the lack of conduct disorder and his ability to follow the rules PCR 421

After being in DJJ for seven months, his attitude towards authority figures was noted as positive and he was respectful of officers PCR 411, Applicant's Ex 39 In the classroom setting, he received several handwritten comments applauding his good attitude Applicant's Ex 43 The R&E Social and Personal Adjustment Scale noted that Hughey had no overt behavioral problems but that he needed remedial instruction PCR 413, Applicant's Ex 41 His overall behavioral record was "very mild behavior for a juvenile" In addition to several write-ups to comment on positive behaviors, he was cited for a few minor, non-violent infractions¹⁵ PCR 413-16, Applicant's Ex 42

D Trial counsel's ineffectiveness

1 Trial counsel failed to conduct a mitigation investigation that was adequate under prevailing professional norms

As discussed previously, under *Strickland*, counsel must make "reasonable investigations," or "make a reasonable decision that makes particular investigations unnecessary" *Strickland v Washington*, 466 U S 668, 690 91 (1984) Counsel in this case made no reasonable decision not to investigate and also did not conduct a reasonable investigation

As set forth in *Wiggins v Smith*, 539 U S 510 (2003), investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor" *Id* at 523

¹⁵ These infractions included two noise violations failure to clean the detail properly visiting another room without permission being disrespectful to staff and inappropriate dress PCR 413 16 Applicant's Ex 42

(quoting 1989 Guideline 11.4 I(C) (1989)) (emphasis added). Additionally, as set forth in *Rompilla v Beard*, 545 U.S. 374 (2005), counsel must “make reasonable efforts to obtain and review material that counsel knows the prosecution will rely on as evidence of aggravation at the sentencing phase of the trial.” *Id.* at 377. The notion that defense counsel must obtain information that the State has and will use against the defendant is “a matter of common sense” and a matter explicitly addressed in the Guidelines. *Id.* at 387. There is simply no “situation in which defense counsel should not make some effort to learn the information in the possession of the prosecution and law enforcement authorities.” *Id.*

Furthermore, counsel must begin the sentencing investigation immediately upon becoming involved in a case. 1989 Guideline 11.4 1A, *Council*, 380 S.C. at 173, 670 S.E.2d at 363 (citing Guideline 11.4). Experts who can testify as to “medical, psychological, sociological or other explanations for the offense(s)” as well as to offer an opinion on the client’s potential future rehabilitation, 1989 Guideline 11.8 3 (F)(2), “may be determinative as to outcome,” 1989 Guideline 11.8 6 Commentary. However, it is not sufficient to merely employ one or more experts to assist with the case.

Counsel must “seek records, interview family members and friends, and obtain appropriate mental evaluations *well in advance of trial*.” *See also Poindexter v Mitchell*, 454 F.3d 564, 579 (6th Cir. 2006). Trial counsel is ineffective if they fail to provide an expert with medical records and other crucial information needed to render a reliable opinion or accurate diagnosis. *Von Dolen v State*, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004) (Counsel ineffective “in failing to adequately investigate and prepare expert testimony about his mental condition as it existed at the time of the murder”) *See also Council*, 380 S.C. at 173, 670 S.E.2d

at 363 (Counsel ineffective in sentencing because, among other reasons, counsel failed “to provide his only expert witness, Dr. Kuglar, with sufficient records and only directed him to evaluate Respondent’s competency to stand trial and criminal responsibility. Additionally, Dr. Kuglar, at the direction of counsel, only met with Respondent on two occasions, the first being shortly before trial”)

Here, despite “knowledge from the inception that the case would be a capital one and that his client faced powerful State’s evidence,” *Marshall v. Cathel*, 428 F.3d 452, 472 (3rd Cir. 2005) trial counsel put off beginning the mitigation investigation until the trial was a mere five months away. Counsel’s delay and inattention is inexplicable and inexcusable in a case, such as this, where “[t]he only real question appeared to be what punishment was appropriate.” *Marquez-Bunola v. State*, 157 P.3d 749, 767 (Okla. Crim. App. 2007). As a result, trial counsel requested Hughey’s DJJ records but did not follow up and consequently did not receive the necessary records. They never even requested the file from the Greenwood County Detention Center, despite their knowledge that the state had given notice of its intent to present evidence of Hughey’s prior adjudications and his alleged future dangerousness. *See e.g. Bond v. Beard*, 539 F.3d 256, 288 (3rd Cir. 2008) (Counsel “neither began their investigation at an appropriate time nor attempted to discover reasonably available mitigation evidence. They thus failed to meet prevailing standards of timeliness and quality”)

Counsel were also aware that Hughey was adaptable to confinement and, therefore, not a future danger. Nonetheless, counsel did not obtain the records to support this knowledge, even after Jeff Yungman (the social worker retained less than a month before trial) requested these records. “When experts request necessary information and are denied it, and when experts

are placed on the stand with virtually no preparation or foundation, a capital defendant has not received effective penalty phase assistance of counsel.” *Bean v Calderon*, 163 F 3d 1073, 1079 (9th Cir 1998) *See also Smith v Stewart*, 189 F 3d 1004, 1012 (9th Cir 1999) (“A lawyer who should have known but does not inform his expert witnesses about essential information going to the heart of the defendant’s case for mitigation does not function as ‘counsel’ under the Sixth Amendment”) He also raised concerns about PTSD but he was not qualified to make a diagnosis Because Yungman’s report was submitted to Tinsley five days prior to trial, there was not time to follow up on his findings Thus, it is clear that counsel’s investigation was limited not due to strategy, but due simply to time constraints and inattention

If counsel had obtained these records, counsel would have discovered “red flags” and “mitigation leads that no other source had opened up” *Rompilla*, 545 U S at 390 Specifically, as addressed previously, Hughey’s records from his 1986 DJJ commitment contained a wealth of information to support the presence of psychiatric issues and learning deficiencies, in addition to establishing adaptability to confinement

Counsel clearly had no strategic reason for failing to obtain these prior records In fact, counsel did request the records but simply failed to follow-up to obtain them Worse yet, counsel made no effort to obtain these records after they were specifically requested by Yungman *See Bond*, 539 U S at 288 (Counsel “failed to give their consulting expert sufficient information to evaluate [the defendant] accurately”)

Likewise, counsel failed to adequately develop and present the mental health evidence Counsel did not have Hughey evaluated until Dr Evans saw him about three months prior to trial Even assuming this evaluation was timely, it was inadequate because Dr Evans was

retained for the limited purpose of conducting a neuropsychological evaluation. Despite this fact, Dr. Evans alerted defense counsel to the possibility of depression with psychotic features in his initial report. Nonetheless, counsel did not follow-up on this in any way until competence became an issue on the eve of trial. Even then, counsel was focused solely on the question of competence.

In addition, although both Yungman and Evans alerted counsel to the possibility of PTSD, counsel did not develop this information. Rather than consult with Dr. Evans ahead of time, counsel merely assumed that Dr. Evans would make this diagnosis. When counsel learned, through his testimony, that he could not make the diagnosis because that was not the focus of his testing and he had inadequate information (specifically, he was lacking the very significant DJJ records), counsel still did nothing to remedy the situation. Instead, counsel simply noted his own ineffectiveness in his notes with “PCR = Dr. Morgan.”

Counsel’s conduct was clearly deficient in this case for many of the same reasons found in *Council*. “[N]ot only did counsel delay in investigating [the defendant’s] background, he failed to conduct an adequate investigation.” *Council*, 380 S.C. at 173, 670 S.E.2d at 363. Counsel sought only limited records, did not have a timely mental health evaluation, failed to provide the defense psychiatrist “with sufficient records and only directed him to evaluate competency to stand trial and criminal responsibility.” *Id.*

2 Trial counsel did not present evidence of Hughey’s adaptability to incarceration even though favorable evidence existed

Separate and apart from the inadequate development of mental health evidence, counsel failed to prepare and present evidence of Hughey’s adaptability to confinement, even though it is clear that, 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, 1560-1 (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 adaptability to confinement is proper mitigating evidence. *Skipper v. South Carolina*, 476 U.S. 1 (1976).

Tinsley and Garrett were well aware that Hughey was a model inmate while in pretrial detention at the Greenwood County Detention Center, but this evidence was never presented to the jury. Trial counsel expressed concerns about the relationship of the jail administrators with the solicitor but they acknowledged there would have been other ways to present the evidence, such as through other jailors or jail records.

Furthermore, Tinsley did not properly understand the law regarding the presentation of evidence of adaptability to incarceration, this was confirmed in Tinsley’s own notes. He repeatedly linked the concept of adaptability to future dangerousness. His after the fact statements that he understood *Skipper* and that adaptability evidence was independently admissible are clearly rebutted by this contemporaneous evidence.

3 Prejudice

Hughey was prejudiced by counsel's deficient performance in sentencing. Counsel had already put on a charade defense during the trial that could only have alienated the jury by blaming one victim, in part, for her death and blaming the other victim for being in the 'wrong place at the wrong time' in her own home. Counsel made matters only worse by failing to present the true picture of Hughey's mental state at the time.

Rather than being a man who was simply jealous and then angry about Jackson seeing another man, Hughey was a man suffering from depression with psychotic features and from post-traumatic stress disorder that had its origins much earlier than his mother's death. From the time he was a small child he was traumatized by the abuse he observed and lived through in his own home and he was huffing gasoline to mask the pain. Over time as the traumas continued and culminated in his mother's traumatic death, his alcohol abuse escalated. Thus, by the time of these crimes, he was living in a world of limited intellect, neurological damage, depression, and PTSD that was compounded by alcohol. In short, his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Counsel's failure to prepare and present this information prejudiced Hughey because "[e]vidence of mental disturbance can be persuasive mitigating evidence for jurors considering the death penalty, and this evidence can determine the outcome." *Gray v. Blanker*, 529 F.3d 220, 235 (4th Cir. 2008). Specifically, evidence of "psychotic episodes" under severe stressors and depression, such that the defendant suffers a "severe mental illness" is significant mitigation. *Id.* at 236.

This case is very similar to *Von Dohlen* in this regard. In *Von Dohlen*, the defense mental health expert, who had not been provided with significant and necessary information, testified in sentencing that the defendant “did not have a chronic mental illness.” The truth, however, was that Von Dohlen “suffered from ‘severe chronic depression’ a major mental illness,” 360 S.C. at 606, 602 S.E.2d at 742, with “psychotic and suicidal tendencies.” This difference in the mental health picture required reversal. See also *Tupin v. Christenson*, 497 S.E.2d 216, 241 (Ga. 1998) (“The psychiatric evidence, if properly presented, could have totally changed the evidentiary picture. Psychiatric evidence may have provided the jury with an explanation for [the defendant’s] actions”), *State v. Hamilton*, 699 So.2d 29, 34 (La. 1997) (Evidence of mental illness “had the potential to totally change the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior”).

In addition to the inherent mitigating value of the evidence of mental illness, it is significant that this evidence would have established the existence of a statutory mitigating factor that the trial court refused to charge. Failure to charge a statutory mitigating factor that is supported by the evidence is reversible error. *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990).

Finally, Hughey was prejudiced by the failure to present evidence of his adaptability to confinement. This evidence was significant because it is inevitable that a jury that has convicted the defendant of murder will be concerned about the defendant’s behavior in confinement if the death penalty is not imposed. Here, there was significant evidence that the jury was deprived of that Hughey was a “model inmate” and adapted well to confinement. Failure to present this

evidence, especially in combination with counsel's failure to offer any "insight concerning Petitioner's mental illness" was prejudicial, *see Nance supra*, and reversal is required

III

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 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.

A The Trial Record

Hughey's trial counsel submitted Defendant's Request to Charge No 16 requesting the trial judge "instruct the Jury regarding mercy or sentencing the defendant to life for no reason at all." Tr 4126-27. This request included, "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.'" The request concluded, "In other words, you may choose to sentence the defendant to life imprisonment if you find a mitigating circumstance, or you may choose to sentence him to life imprisonment for no reason at all, that is, as an act of mercy." *Id*

During the charge conference, the trial judge stated, "My general instruction covers that, Mr Tinsley." Tr 4018. Relying on the court's assurance that mercy would be covered in the charge, counsel specifically pleaded for mercy for Hughey in closing argument. He argued "this is not a death penalty case compared" to other cases. He told the jurors, "It's not a question so much of in motion [sic] as it is logic." Tr 4036-37. He then argued, "I also point out that life in prison is no picnic -- and he can be sentenced with a recommendation of life, consecutive life, consecutive life, and then whatever on the larceny **should you decide to recommend a sentence**

of mercy ” Tr 4038 (emphasis added) Counsel later argued, ‘If you don’t believe death’s appropriate in this case, don’t sign the death warrant, don’t let anybody make you sign that death warrant ” He concluded, “I ask you to spare my client’s life ” Tr 4045

Contrary to the discussion during the charge conference, the trial judge instructed the jurors not to consider mercy as a reason for a life sentence He 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 existence [sic] 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 4062 (emphasis added)

The trial judge called for any “exceptions or additions” to the jury instructions Counsel made several objections because the court chose “not to charge a couple of our requests ” The primary objection was, “The language referring to the defendant contends on the non-statutory mitigation I felt should have been characterized as the law allows and provides whatever the case may be in that language ” When the trial judge expressed confusion about the objection, Edward McCallum, Garrett’s associate, responded

Your Honor, my recollection of your statement was that a non-statutory mitigating circumstance is one which the defendant contends serves the same purpose as the statutory mitigating circumstance And I don’t think that’s an appropriate comment

I think that the law provides that a non mitigating – or mitigating non-statutory circumstances the law provides is a basis for them to reach the decision It is not something the defendant contends

Tr 4066-67

The trial judge explained what he intended to charge “Non-statutory mitigating circumstances, by definition, are those that are not set forth in the statute ” The judge added,

“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 ” McCallum responded, “I don’t believe that was what came across ” The judge agreed to note trial counsel’s exception Tr 4067-68

Counsel added, “Your honor, beyond that I would just merely refer the Court to our Request to Charge eleven through eighteen, renew all the prior motions at this time in the case, and sit down ” Tr 4068 Trial counsel never specifically objected to the trial judge incorrectly telling the jurors they could not consider mercy as a reason for a life sentence

B Evidence presented at PCR hearing

1 Robert Tinsley

During the PCR hearing, Tinsley reviewed Request to Charge Number 16, the trial judge’s instructions, and the charge conference According to Tinsley, the purpose of Request to Charge Number 16 was “trying to get a – a life [sentence] for no reason at all He testified he was requesting the jurors be allowed to consider mercy as the basis of their verdict He agreed the instruction actually given was contrary to the instruction he requested He further agreed he did not make “a specific objection to the other than an act of mercy instruction ” When asked whether he thought the charge should have been objected to, Tinsley responded

If it was – if it was charged that way I didn’t catch it like that I would have – I would object to that because it should have been for no reason at all **and even as an act of mercy, not as an opposite of that as – other than as an act of mercy**
But I just did not hear it like that

PCR 114-17

Tinsley agreed that criminal defense lawyers ask for mercy in sentencing all the time He knew capital defendants are allowed to call witnesses to ask for mercy He thought the charge in

this case was “like a comment on the testimony” and tantamount to the judge instructing the jurors to disregard a reason for deciding to impose a life sentence PCR 117-18

2 Billy Garrett

During the PCR hearing, counsel asked Garrett if he was present during the earlier testimony about the “no mercy” instruction. Garrett quickly responded, “Looking back, I know it’s there, it’s in the record. I missed it.” He explained the requests to charge were put together “by myself, Mr. [Edward] McCallum and Mr. Tinsley.” Garrett agreed the purpose of Request to Charge Number 16 was to allow the jurors to sentence based on mercy. He explained McCallum’s “sole function was to come and listen to those instructions to help us not miss anything.” Garrett admitted, “All three [lawyers] were there listening intently to that charge. And somehow we all three missed it.” PCR 222-23

On cross-examination the Attorney General wanted to know, “When you heard those instructions overall from your perspective while you were sitting there, did you think you were deprived of a right to argue mercy in that case?” Garrett reiterated his previous testimony

You know, I – I look at the – the cold transcript and it – and it’s glaring in my opinion. And it’s awful that all three of us missed it. But the truth of the matter is I missed it, you know. I just didn’t see it. I don’t know, you know, how we – I don’t know how we all three missed it, but the truth of the matter is, we did.

I, you know, did I feel like the overall charge was okay? You can see that when I saw something I didn’t like in that case, I was generally on my feet complaining. I just didn’t catch it.

PCR 276

C The appeal

During direct appeal, Bob Dudek, appellate counsel, asserted as error

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 a jury to consider

Final Brief of Appellant 40 This argument was based on trial counsel's objection Although trial counsel did not specifically base the objection on the judge's instruction that the jurors could impose a life sentence for any reason “other than as an act of mercy,” appellate counsel argued

Further, the judge's instruction did not allow the jury to impose a life sentence for any 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** This confusing instruction suggested that an act of mercy would have been an invalid reason for a life vote

Final Brief of Appellant 42 (citation to record admitted) Appellate counsel continued to argue the confusion of this instruction by stating, “A reasonable juror would have interpreted the trial judge's charge to mean that non-statutory mitigating circumstances were not on equal par with statutory mitigating circumstances ” Final Brief of Appellant 42

Appellate counsel then argued

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-[statutory] mitigating circumstances, all the more important, since the jury could not sentence appellant to life imprisonment as an act of mercy

Final Brief of Appellant 43 Appellate counsel appeared to use the “other than as an act of mercy” instruction to argue that Hughey was prejudiced by the confusing instruction on non-statutory mitigating factors

The South Carolina Supreme Court considered appellate counsel's argument on non-statutory mitigating circumstances *See State v Hughey*, 339 S C 439, 458, 529 S E 2d 721, 731 (2000) The Court reviewed the trial judge's instruction on non-statutory mitigating factors and

held, “Considering the jury charge as a whole, a reasonable juror would understand that either a statutory or a non-statutory mitigating circumstance could reduce the sentence to life imprisonment.” 339 S.C. at 458-59, 529 S.E.2d at 731. The Court rejected the argument that the phrase “the defendant contends” reduced the legal significance of non-statutory mitigating circumstances holding “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.” *Id.* The Court then stressed that “the judge instructed the jury that they could recommend life imprisonment for ‘any reason or no reason at all.’” *Id.* (emphasis added). The Court dispensed with appellate counsel’s position that the “other than as an act of mercy” portion of the instruction made the instruction on non-statutory mitigating factors confusing. The Court noted in *dicta*

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.” 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.

Id. at 460 (citations omitted)

D The ineffectiveness of trial counsel

Trial counsel made no specific objection to the court’s charge that the jury could “recommend a sentence of life imprisonment for any reason or for no reason at all **other than as an act of mercy**.” Tr. 4062 (emphasis added). To the extent the issue was not preserved, counsel’s conduct was deficient. Trial counsel offered no strategic reason for the failure. Trial counsel’s failure to object to the instruction prejudiced Hughey. *Wiggins, supra; Strickland, supra*

In determining the permissible role of mercy in capital sentencing in the country and in South Carolina, in particular, it is helpful to consider the historical context prior to the Court's decision in *Furman v Georgia*, 408 U S 238 (1972) and then afterwards

Under English common law, capital punishment was mandatory for virtually any homicide, and there was no mechanism in the legal system for dispensing mercy. *McGautha v California*, 402 U S 183, 198 (1971). The American colonies, including South Carolina, followed this tradition, *Furman*, 408 U S at 335 (Marshall, J, concurring), but from the beginning in this country, "there was rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." *McGautha*, 402 U S at 199. The practice of jury sentencing in non-capital cases also arose in this country during the colonial period as a reaction to harsh punishments imposed by judges and the "distrust of governmental power." *Id.* at n 10.

Even in capital cases, it was clear that "jurors on occasion took the law into their own hands" and would "simply refuse[] to convict of the capital offense" in order to avoid the imposition of the death penalty. "In order to meet the problem of jury nullification, legislatures

adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." *Id.* Beginning with Tennessee, around 1832, the states permitting capital punishment and the federal government changed the laws to require a sentence of death for murder unless the jury made a "recommendation of mercy." *Id.* at 200.

The ability of jurors to dispense mercy as they saw fit was jealously guarded by the courts. For example, in *Calton v Utah*, 130 U S 83 (1889), the United States Supreme Court reviewed a case prosecuted under the Utah statute requiring the death penalty for first degree

murder except “upon the recommendation of the jury,” which would then result in a life sentence. The Court found reversible error in the trial court’s failure to inform the jurors “as to their right, under the statute, to recommend imprisonment for life at hard labor in the penitentiary in place of the punishment of death.” *Id.* at 88.

South Carolina, like other jurisdictions, changed its law from a mandatory death penalty for a murder conviction in order to allow the jury discretion to dispense mercy in 1894. That statute, as amended, provided

Whoever is guilty of murder shall suffer the punishment of death. Provided, however, That in each case where the prisoner is found guilty of murder, the jury may find a special verdict recommending him or her to the mercy of the Court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.

In *Winston v. United States*, 172 U.S. 303 (1899), the United States Supreme Court reviewed three cases prosecuted under the federal statute adopted in 1897. The statute required capital punishment for murder or rape unless the jury qualified the guilty verdict “by adding thereto ‘without capital punishment,’” in which case the sentence imposed was life imprisonment. In each case, the trial court instructed the jury that it should not add “without capital punishment” to its verdict unless there were “mitigating” or “palliating” circumstances based on the facts of the case. *Id.* at 307-08. The Court found error in the limitation of the jurors’ discretion.

The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right, but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court or the jury is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just

01 wise to impose capital punishment How far considerations of age, sex, ignorance, illness, or intoxication, of human passion or weakness, of sympathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of congress to the sound discretion of the jury, and of the jury alone

Id at 215

The South Carolina Supreme Court followed suit In *State v King*, 158 S C 251, 155 S E 409 (1930), the trial court gave instructions similar to those in *Winston* that limited the jurors' recommendation of mercy to cases involving "extenuating circumstances surrounding the killing " 155 S E at 418 The court found error because, under the statute, "[it] is clear that a jury may, for any reason whatever appearing to them, refuse to have the accused put to death, but may spare his life " Thus, the trial court should "simply inform the jury that they may recommend the defendant to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for lifetime imprisonment at hard labor " *Id* at 426 Similarly, in *State v Blakely*, 158 S C 304, 155 S E 408 (1930), the trial court instructed the jury that it could recommend mercy "if you find extenuating circumstances in this case otherwise you have nothing to do with mercy, and the most merciful thing you can do is to abide by your oath and find the truth " *Id* at 408 Based on *King*, the court found reversible error in this charge

The ability of even a single juror to exercise mercy was also closely guarded For example in *Andres v United States*, 333 U S 740 (1948), the trial court instructed the jury on its "right to qualify a verdict of guilty by adding the words 'without capital punishment'" following the language of the Court's decision in *Winston* quoted above *Id* at 744 n 3 The Court found

no error in the failure to further “explain to the jury the scope of their discretion in granting mercy to a defendant,” *id* at 742, because the court properly “left the question of the punishment to be imposed – death or life imprisonment – to the discretion of the jury,” *id* at 744. *Andres* was reversed, however, because the trial court instructed the jury that a recommendation of mercy must be unanimous. In essence, the requirement of unanimity did not apply to the recommendation of mercy because “[t]his construction [of the statute] is more consonant with the general humanitarian purpose of the statute and the history of the Anglo-American jury system” than a finding that a recommendation of mercy must be unanimous. *Id* at 749.

South Carolina also continued to safeguard the power of the jury to exercise mercy. “The discretion of the jury as to recommending mercy [was] an unlimited one. [A] recommendation to mercy [did] not have to be based on evidence.” *State v. Chasteen*, 228 S.C. 88, ___, 88 S.E.2d 880, 887 (1955) (murder case). See also *State v. Worthy*, 239 S.C. 449, 123 S.E.2d 835 (1962) (rape case) (if requested, the trial judge must charge that a recommendation of mercy may be given for any reason at all). “[W]hether or not mercy was recommended upon a finding of guilt, and thereby the death penalty avoided, rest[ed] within the sole discretion of the jury. The duty of the court in that regard [was] to see that such discretion [was] left with the jury, free as reasonably possible of influences which would prevent its fair and impartial exercise.” *State v. White*, 246 S.C. 502, 506, 144 S.E.2d 481, 483 (1965) (reversing rape conviction and death sentence because the prosecutor asked the jurors to consider the case as if the victim was their daughter, wife, sister, or mother).

When *Furman* was decided, 41 states and the federal government authorized death for at least one crime, with murder, followed by kidnapping and treason being the most common. Rape

was a capital offense in 16 states and the federal system 408 U S at 341 (Marshall, J, concurring) “All jurisdictions [allowing for capital punishment] had replaced their automatic death penalty statutes with discretionary jury sentencing” *Woodson v North Carolina* 428 U S 280, 292 (1976) (Opinion of Stewart, Powell, and Stevens, JJ) Of the executions since 1930, 90% were based on murder convictions *Furman*, at 348 There were “3,859 persons executed since 1930, of whom 1,751 were white and 2,066 were Negro” *Id* at 364 “455 persons, including 48 whites and 405 Negroes, were executed for rape” *Id*

In *Furman*, the Court reviewed an Eighth Amendment challenge to the death penalty in a Georgia murder case, a Georgia rape case, and a Texas rape case Five Justices in five different concurrences concluded that “the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments” Only two of the Justices (Brennan and Marshall) concluded that the death penalty was *per se* unconstitutional Thus, the way was left open for legislatures to “fix” the problems identified in the capital punishment system as then applied The two narrowest opinions (those of Justices Stewart and White) have subsequently been viewed as the actual holdings of *Furman* *Gregg v Georgia* 428 U S 153, 170 n 15 (1976)

Justice Stewart focused only on whether the death penalty was constitutionally applied in the cases before the Court He noted that under Georgia law, the jury in a rape case could choose death, life imprisonment, or one to twenty years in confinement *Id* at 309 n 8 In a murder case, the Georgia jury could choose between death or life imprisonment *Id* at n 9 In a Texas rape case, the sentencing choices were death, life imprisonment, or not less than five years in confinement *Id* at n 8 He found that the death sentences imposed were “‘cruel’ in the sense

that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary” *Id* at 309 They were also “‘unusual’ in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare” *Id*

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed

Id at 309-10

Justice White also observed

[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not

Id at 313

Given these opinions, it was clear that there needed to be a “meaningful basis” for determining in which cases the death penalty would be authorized, but nothing in these opinions hinted that the jury should not be allowed to continue, as it had for almost 80 years in South Carolina, to exercise mercy even in those cases in which the death penalty was authorized

Subsequently, in *Gregg* this became even more clear In the controlling opinion of Justice Stewart, joined by Justice Powell, and Justice Stevens, the Court reviewed a death sentence for murder under Georgia’s statutes, which were amended in 1972 428 U S at 163 The statutes, as amended, are very similar to South Carolina’s current statute, which was drafted

largely following the Georgia provisions approved in *Gregg* *State v Shaw* 273 S C 194, 199, 255 S E 2d 799, 802 (1979)

In *Gregg*, the Court noted that, after *Furman*, 35 States and the federal government had amended statutes in an “attempt[] to address the concerns” expressed by the Court in *Furman* *Id* at 180 The Court then turned to the specific concerns of *Furman* that the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner ” *Id* at 188

Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of 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

It is certainly not a novel proposition that discretion in the area of sentencing be exercised in an informed manner We have long recognized that “(f)or the determination of sentences, justice generally requires that there be taken into account the circumstances of the offense together with the character and propensities of the offender ”

Id at 189 (citation omitted)

“[W]here discretion is afforded” to a jury, by definition, the jury has the “freedom to act or judge on one's own,” [http //www thefreedictionary com/discretion](http://www.thefreedictionary.com/discretion), which means that unless the death penalty is required by statute in some instances, the jury is authorized to make a “free decision” rejecting the death penalty for any reason, no reason, or as an exercise purely of mercy

In addition to “fair procedural rules,” the Court observed that the problem of ensuring that the relevant “information will be properly used in the imposition of punishment” is best “alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision ” *Id* at 192

While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary

Id at 193-95

In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance

Id at 195 Again, the essence was that “the sentencing authority is given adequate information and guidance,” but there was no constitutional requirement that the ability of the jury to exercise its free discretion to reject the death penalty and impose a life sentence for any reason, no reason, or even as an exercise of mercy be removed

With respect to the specific challenges to the Georgia statute before it, which again are similar to those in South Carolina, the Court reiterated that the amendments

[N]arrow[ed] the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances *The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court*, but it must find a Statutory aggravating circumstance before recommending a sentence of death

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence No longer can a Georgia jury do as *Furman's* jury did reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die Instead, the jury's attention is directed to the specific circumstances of the crime In addition, the jury's attention is focused on the characteristics of the person who committed the crime As a result, while some jury discretion still exists, “the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application”

Id at 197-98 (citations and footnotes omitted, emphasis added) As Justice White stated in concurring “The Georgia Legislature has plainly made an effort to guide the jury in the exercise of its discretion, while at the same time permitting the jury to dispense mercy on the basis of factors too intangible to write into a statute ” *Id* at 222 At bottom, “[o]n their face these procedures seem to satisfy the concerns of *Furman* ” *Id* at 198

By definition, a statute designed so that “[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court” is one that allows for the jury to reject the death penalty and impose a life sentence for any reason, no reason, or simply as an act of mercy Indeed, in *Gregg*, there was actually a *challenge* to the jury’s ability to arbitrarily grant mercy, which the Court rejected

[T]he isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice

Id at 203 At bottom, the Court held that the Georgia statutes alleviated the “basic concern” of *Furman*, which was that defendants “were being condemned to death capriciously and arbitrarily” or “in a way that could only be called freakish ” *Id* at 206

In *Woodson v North Carolina* 428 U S 280 (1976), decided the same day as *Gregg*, the Court (again in the opinion of Justices Stewart, Powell, and Stevens) reviewed North Carolina’s amended statute Following the decision in *Furman*, the North Carolina legislature “enacted a new statute that was essentially unchanged from the old one [prior to *Furman*] except that it made the death penalty mandatory” for a first degree murder conviction The petitioner challenged this statute under the Eighth Amendment

Although a number of states had reenacted mandatory death penalty statutes following *Furman*, the Court found this to “reflect attempts by the States to retain the death penalty in a form consistent with the Constitution, rather than a renewed societal acceptance of mandatory death sentencing.” *Id.* at 298. Thus, “North Carolina’s mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death and thus cannot be applied consistently with the Eighth and Fourteenth Amendments’ requirement that the State’s power to punish ‘be exercised within the limits of civilized standards.’” *Id.* at 301.

The Court also found the North Carolina statute to be unconstitutional due to “its failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.” *Id.* at 303.

A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Id. at 304.

[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference,

there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case

Id at 304-05

By definition, if the jury must be allowed to consider “compassionate or mitigating factors stemming from the diverse frailties of humankind,” the jury is allowed to consider compassion “Deep awareness of the suffering of another coupled with the wish to relieve it” <http://www.thefreedictionary.com/compassion> Thus, again, unless the statute requires the death penalty in some instances (in a manner consistent with the Eighth Amendment), the jury is free to reject the death penalty and impose life for any reason, or no reason, or simply as an act of mercy

In *Roberts v Louisiana*, 428 U S 325 (1976) also decided on the same day as *Gregg* and *Woodson*, the Court (again in the opinion of Stewart, Powell and Stevens) reviewed the amended Louisiana statutes, which also required a mandatory death sentence for first-degree murder In each case, the jury would be instructed on the lesser included offenses of second-degree murder and manslaughter, whether or not raised by the evidence or requested by the defendant If convicted of first degree murder, the death penalty was mandatory The Court found the same constitutional deficiencies identified in *Woodson* due to the mandatory nature of the death penalty, the “standardless jury discretion,” and “[t]he constitutional vice of mandatory death sentence statutes lack of focus on the circumstances of the particular offense and the character and propensities of the offender” *Id* at 333 Allowing the jury to consider lesser included offenses did not resolve the deficiencies

This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel

the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions. The Louisiana procedure neither provides standards to channel jury judgments nor permits review to check the arbitrary exercise of the capital jury's de facto sentencing discretion.

Id. at 335

South Carolina, like North Carolina and Louisiana, had also returned to a mandatory death penalty system, which was found to be unconstitutional in light of *Woodson*. *State v. Rumsey*, 267 S.C. 236, 226 S.E.2d 894 (1976). South Carolina again amended its capital statute in 1977 “patterned after the death penalty statutes of our sister state Georgia” that were approved by the Supreme Court in *Gregg*. *Shaw*, 273 S.C. at 199, 255 S.E.2d at 802.

Meanwhile, the burglary statute still required a life sentence unless the jury recommended mercy at the time of its guilty verdict. And, the court continued to recognize that “[t]he failure to allow the jury to determine whether to recommend mercy cannot be regarded as harmless error.” *State v. McGee*, 268 S.C. 618, 621, 235 S.E.2d 715, 716 (1977). *See also Watson v. State*, 287 S.C. 356, 338 S.E.2d 636 (1985) (counsel’s failure in burglary case to inform his client of his right to request the impaneling of a jury to consider the question of a recommendation of mercy constituted ineffective assistance).

The South Carolina Supreme Court found the 1977 statute, patterned after Georgia’s capital punishment scheme, to be constitutional in *Shaw*. Like Georgia’s scheme, our statute allows the jury to recommend life imprisonment even if it finds the existence of one or more statutory aggravating circumstances beyond a reasonable doubt and the jury must be informed of this power. *State v. Goolsby*, 275 S.C. 110, 268 S.E.2d 31 (1980), *State v. Tyner*, 273 S.C. 646, 258 S.E.2d 559 (1979). Indeed, “[u]nder the South Carolina statute, a jury is not required to state

its reasons for failing to recommend a sentence of death ” *State v Copeland*, 278 S C 572, 591, 300 S E 2d 63, 74 (1982) Cases where juries reject the death penalty and impose a life sentence, are cases that “represent acts of mercy which have not yet been held to offend the United States Constitution ” *Id*

In addition to having the authority to commit “acts of mercy,” capital juries in South Carolina were (and are) also routinely instructed that mitigating circumstances are those that “in fairness and *mercy*, may be considered as extenuating or reducing the degree of moral culpability or punishment ” *Coker v Georgia* 433 U S 584, 589 (1977) *See Shafer v South Carolina* 532 U S 36, 50 (2001), *State v Chaiping* 313 S C 147, 176 n 4, 437 S E 2d 88, 104 n 4(1993), *State v Bell* 305 S C 11, 21, 406 S E 2d 165, 171 (1991) This “fairness and mercy” language was also used in the most recent capital trial in South Carolina *See Appendix 3*

In *Zant v Stephens* 462 U S 862 (1983), the Court again reviewed the Georgia capital sentencing scheme to determine whether reversal of a death sentence imposed based on three aggravating factors was required when the Georgia Supreme Court held one of the aggravating factors to be invalid The Court initially observed

In Georgia, unlike some other States, the jury is not instructed to give any special weight to any aggravating circumstance, to consider multiple aggravating circumstances any more significant than a single such circumstance, or to balance aggravating against mitigating circumstances pursuant to any special standard Thus, in Georgia, the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty

Id at 873-74 “An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder ” *Id* at 877 Thereafter, however

[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances, and Georgia has not adopted such a system. Under Georgia's sentencing scheme, and under the trial judge's instructions in this case, no suggestion is made that the presence of more than one aggravating circumstance should be given special weight.

Id. at 890-91. Because the jury was entitled to consider the evidence of the defendant's prior criminal record as non-statutory aggravation evidence anyway, it was irrelevant that the evidence was presented in the context of an invalidated statutory aggravating circumstance.

While some other states imposed more limitations on the jury's discretion, the Georgia Supreme Court made it clear that it was improper to instruct the jury that it could not consider mercy or sympathy. Specifically, in *Legare v. State*, 302 S.E.2d 351, 354 (Ga. 1983), the court disapproved of instructions that the jury could not consider "sympathy."

[T]his jury was charged to consider in mitigation all circumstances which in fairness or mercy offer a basis for not imposing the death penalty, a charge the substance of which is constitutionally required. But the jury was also charged not to base their verdict on sympathy for the defendant. Since the evidence in mitigation might well evoke sympathy, we find these charges in irreconcilable conflict. Because the charge complained of might well confuse the jury and limit their constitutionally required consideration of evidence in mitigation, we hereby disapprove it.

Id.

The South Carolina Supreme Court, on the other hand, found no error in a trial court's instruction that "you must decide the issues involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by sympathy, by prejudice, by passion, or by public opinion." *State v. Chaffee*, 285 S.C. 21, 32, 328 S.E.2d 464, 470 (1984). Because the trial court first raised the issue in response to the defendant's objection during the state's closing argument that the argument was "prejudicial and inflamed the passions of the jury," the appellate court declared, without citation to any case, statute, or rule

Whether the judge was referring to sympathy for the dead woman and her family or for the defendants is not clear. In either event, we find no error.

Id. See also *State v Singleton* 284 S C 388, 393, 326 S E 2d 153, 156 (1985), *State v Elmore* 286 S C 70, 332 S E 2d 762 (1985), *rev'd in part and remanded* 476 U S 1101 (1986), *State v Plemmons* 286 S C 78, 332 S E 2d 765 (1985), *rev'd in part and remanded* 476 U S 1102 (1986).

In *California v Brown* 479 U S 538 (1987), the United States Supreme Court also considered whether an instruction informing jurors that they “must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling” during the penalty phase of a capital murder trial violates the Eighth and Fourteenth Amendments. *Id.* at 539. The Court held that it did not but did not mention, in the opinion, the fact that the California statute required death if the jury concluded that aggravating factors outweighed mitigating factors.

Unlike the Georgia and South Carolina schemes where the jury is not instructed to “weigh” aggravating circumstances against mitigating circumstances, but rather the jury is instructed to “consider” any mitigating circumstances as well as any aggravating circumstances, *State v Bellamy* 293 S C 103, 359 S E 2d 63 (1987), the California statute required that the jury “shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances” and “shall impose” a sentence of life without possibility of parole if the mitigating circumstances outweigh the aggravating circumstances. *California v Ramos* 463 U S 992, 994 n 3 (1983).

The Court in *Brown* held that the California Supreme Court, which had found constitutional error, had erred in focusing “solely on the word ‘sympathy’ to determine that the

instruction interferes with the jury's consideration of mitigating evidence," because "the question is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Id.* at 541 (quoting *Francis v. Franklin*, 471 U.S. 307, 315-316 (1985)).

To determine how a reasonable juror could interpret an instruction, we "must focus initially on the specific language challenged." *Francis v. Franklin*, 471 U.S. at 315, 105 S.Ct. at 1971. If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law. *Ibid.* In this case, we need not reach the second step of analysis because we hold that a reasonable juror would not interpret the challenged instruction in a manner that would render it unconstitutional.

Id. at 541-42. The only word of the instruction challenged was "sympathy" and the Court doubted "that a rational juror could parse the instruction in such a hypertechnical manner." *Id.* at 542. The Court also noted that the jury was instructed to avoid "mere sympathy." *Id.* "Even a juror who insisted on focusing on this one phrase in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* In reaching this conclusion, the Court noted that 13 defense witnesses had been called over three days in sentencing. "We think a reasonable juror would understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Id.*

We also think it highly unlikely that any reasonable juror would almost perversely single out the word "sympathy" from the other nouns which accompany it in the instruction: conjecture, passion, prejudice, public opinion, and public feeling. Reading the instruction as a whole, as we must, it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty.

Id. at 542-43.

An instruction prohibiting jurors from basing their sentencing decisions on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution. It serves the useful purpose of confining the jury's imposition of the death sentence by cautioning it against reliance on extraneous emotional factors, which, we think, would be far more likely to turn the jury against a capital defendant than for him.

Id. at 543

In her concurrence, Justice O'Connor noted "the tension that has long existed between the two central principles of our Eighth Amendment jurisprudence" the need to suitably direct and limit discretion and the need to allow the sentencer to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular offense. *Id.* at 544

In my view, evidence about the defendant's background and character is relevant because of 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, may be less culpable than defendants who have no such excuse. *Lockett* and *Edwards* reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime rather than mere sympathy or emotion. [H]owever, one difficulty with attempts to remove emotion from capital sentencing through instructions such as those at issue in this case is that juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored.

Id. at 545-46

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), another Georgia case, the Court summarized the two guiding principles of its prior decisions, as follows:

In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.

Id. at 304. In short, when the state statute does not “decree the death penalty, absolutely and categorically, the jury must always be given the option of extending mercy.” *Morgan v. Illinois*, 504 U.S. 719, 751 (1992) (Scalia, J., dissenting).

The Court in *McCleskey* also noted that the discretion allowed to juries generally weighs in favor of the defendant.

Discretion in the criminal justice system offers substantial benefits to the criminal defendant. Not only can a jury decline to impose the death sentence, it can decline to convict or choose to convict of a lesser offense. Whereas decisions against a defendant's interest may be reversed by the trial judge or on appeal, these discretionary exercises of leniency are final and unreviewable.

481 U.S. at 311. By definition, “leniency” is showing “mercifulness as a consequence of being lenient or tolerant.” <http://www.thefreedictionary.com/leniency>. Thus, allowing the jury to dispense mercy is not prohibited.

The South Carolina Supreme Court, however, continued its *carte blanche* rejection of challenges to instructions not to consider “sympathy,” apparently without any recognition that the California “weighing” statute involved in the *Brown* decision imposed far greater restrictions on juror discretion to impose life than South Carolina’s and Georgia’s “consider” statutes. See e.g., *State v. Owens*, 293 S.C. 161, 359 S.E.2d 275 (1987) (citing *Plemmons* and *California v. Brown*), *State v. Cain*, 297 S.C. 497, 377 S.E.2d 556 (1988) (same), *State v. Jones*, 298 S.C. 118, 378 S.E.2d 594 (1989) (citing *California v. Brown and Owens*), *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990).

Subsequently, in *Boyde v. California*, 494 U.S. 370 (1990), the Court again considered the constitutionality of the California scheme and the trial court’s instructions. The specific instruction challenged was, as follows:

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole.

Id. at 374. In reviewing this challenge, the Court noted that California no longer used this instruction and that after *Brown*, California had abandoned its instruction not to consider “sympathy.” *Id.* at 374 n.2. Boyde challenged the statute and instruction asserting that “the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances ‘outweigh’ the mitigating circumstances.” *Id.* at 377. The Court held: “But there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence ‘in an effort to achieve a more rational and equitable administration of the death penalty.’” *Id.*

In *Saffle v. Parks*, 494 U.S. 484 (1990), the Court was again presented with a claim challenging an instruction in the penalty phase “telling the jury to avoid any influence of sympathy.” *Id.* at 486. Because the case was one brought in federal habeas, however, and would require a new constitutional rule, relief was barred based on *Teague v. Lane*, 489 U.S. 288 (1989). *Saffle*, 494 U.S. at 490 (“Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence.”)

At the very least, nothing prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a ‘reasoned *moral* response,’ rather than an emotional one. The 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.

Id. at 493.

States such as South Carolina and Georgia do, of course, allow the jury to reject imposition of the death penalty even when no mitigating circumstances are found simply as an act of mercy. Indeed, the Georgia Supreme Court continued its explicit recognition that, under the Georgia statute (on which South Carolina's is patterned), mercy and sympathy are proper considerations for the jury in capital sentencing. *Isaacs v State*, 386 S E 2d 316, 334 (Ga 1989) (holding that trial court did not err by telling the jury that although it could properly consider "feelings of sympathy and mercy for the defendant," but it should not act on "whim or caprice"). Nonetheless, the South Carolina Supreme Court continued in its rejection of claims that the trial court committed error in instructing the jury not to be influenced by sympathy. *State v Johnson*, 306 S C 119, 410 S E 2d 547 (1991) (citing *Bell Cain*, *Owens*, *California v Brown*, and *Saffle v Parks*).

At the same time, however, the South Carolina Supreme Court followed the Georgia Supreme Court and explicitly held that it is proper for the defendant to present witnesses in sentencing to ask for mercy for the defendant.

[A]lthough a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf, a defendant may not present witnesses to testify merely to their religious or philosophical attitudes about the death penalty. Nor is a defendant entitled to present the opinion of a witness about what verdict the jury "ought" to reach.

State v Torrence, 305 S C 45, 51, 406 S E 2d 315, 318 (1991) (quoting *Childs v State*, 357 S E 2d 48, 60 (1987)). See also *State v Johnson*, 338 S C 114, 525 S E 2d 519 (2000).

Other states have also explicitly recognized that "[t]he law permits mercy [in capital jury sentencing], but does not require it." *State v Rhines*, 548 N W 2d 415, 456 (S D 1996). For example, the Washington Supreme Court, while rejecting sympathy as a consideration does not reject consideration of mercy. *State v Brett*, 892 P 2d 29, 58 (Wash 1995) ("mercy, as opposed

to sympathy, is a proper mitigating circumstance” because sympathy is an “emotional consideration[], while mercy is based on reason”) ¹⁶ Indeed, the court has explicitly held that “mercy is a proper circumstance which a capital case jury may consider ” *State v Gentry*, 888 P 2d 1105, 1151 (Wash 1995) Sympathy is rejected because “sympathy can be directed toward either the defendant or the victim whereas mercy can only be directed toward the defendant ” *Id* at 50 This observation, of course, echoes the observations of the South Carolina Supreme Court in *Chaffee* 285 S C at 32, 328 S E 2d at 470 (“Whether the judge was referring to sympathy for the dead woman and her family or for the defendants is not clear”)

The Georgia Supreme Court also continued its explicit holding followed by South Carolina in *Torrence* and subsequent cases, that “[i]t is reversible error to prevent a friend or relative of the defendant from taking the stand and pleading with the jury for mercy ” *Barnes v State*, 496 S E 2d 674, 688 (Ga 1998) The Georgia court also explained the reasoning behind its holding in *Childs* “mercy for the individual defendant is, by itself, a valid reason for a jury to decline to impose a death sentence a jury can withhold the death penalty for any reason or no reason at all ” *Barnes*, 496 S E 2d at 688 See also *Jenkins v State*, 498 S E 2d 502, 515 (Ga 1998) (no error in the trial court’s instructions to jurors “that they could consider mitigating evidence or any circumstances in mitigation, that they could return a life sentence for any reason or no reason at all, and that they could consider ‘feelings of sympathy and mercy that flow from the evidence’”) At bottom, the Georgia court recognizes that it is proper during a *capital trial* to charge the jurors “not be swayed in your deliberations by mere sentiment, conjecture, sympathy,

¹⁶ Mercy is compassionate treatment or to be kind and forgiving The American Heritage College Dictionary 852 (3rd ed 1993) Sympathy, on the other hand implies a relationship or an affinity between people or things in which whatever affects one correspondingly affects the relationship *Id* at 1375

passion, prejudice, public opinion, or public feeling,” but that it is “error to charge [the] jury in [the capital] penalty phase not to consider sympathy when determining sentence” *Heidler v State*, 537 S E 2d 44, 54 (Ga 2000)

As noted previously, in this case, *State v Hughey*, 339 S C 439, 459, 529 S E 2d 721, 731 (2000), however, in rejecting the challenge to the language “other than as an act of mercy,” the court simply reverted in *dicta* to its case law approving “no sympathy” instructions

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)

Hughey, 339 S C at 460, 529 S E 2d at 732. In doing so, the court apparently did not recognize the contradiction in its own holdings that a defendant is entitled to present witnesses to explicitly ask for mercy. *Torrence*, 305 S C at 51, 406 S E 2d at 318 (“a defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf”). The court has continued to follow the rule of *Torrence* even after *Hughey*. See e.g. *State v Wise*, 359 S C 14, 596 S E 2d 475 (2004), *State v Sapp*, 366 S C 283, 621 S E 2d 883 (2005). The court also continued to recognize in the context of burglary cases, where the sentence was automatically life unless the jury recommended mercy, that “[a] recommendation of mercy rests entirely in the discretion of the jury and may be exercised independently of whether the evidence warrants it.” *Chubb v State*, 303 S C 395, 397, 401 S E 2d 159, 160 (1991) (trial counsel ineffective for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held), *Patrick v State*, 349 S C 203, 562 S E 2d 609 (2002) (counsel ineffective in burglary case for failing to request mercy from jury and prejudice was presumed)

Aside from Georgia and Washington, some other states explicitly recognize that “[m]ercy is a relevant factor for consideration at a death sentencing hearing, to be considered within the context of all factors in aggravation and mitigation.” *People v Caffey*, 792 N E 2d 1163, 1209 (Ill 2001). Because mercy is a relevant consideration, “a prosecutor’s argument suggesting that the jury could not consider mercy as a mitigating factor, or that mercy differed from other mitigating factors, constitutes error.” *Id.* at 1212. See also *Jones v State*, ___ So 2d ___, 2007 WL 2459244, *25 (Ala Crim App Aug 31, 2007) (trial court in sentencing order declared “this Court recognizes that a non-statutory mitigating circumstance can include mercy for the defendant”), *State v Kleypas*, 40 P 3d 139 (Kan 2001) (“it is proper for the prosecutor to argue that the defendant is not deserving of the jury’s mercy because of the defendant’s actions, as long as the prosecutor does not improperly state the law by arguing to the jury that it is prohibited from granting mercy to the defendant”), *People v Harlan*, 109 P 3d 616 (Colo 2005) (trial court instructed the jury that it must not base its decision on passion, prejudice, or some other arbitrary response, but that it could consider mercy or sympathy), *Zink v State*, 278 S W 3d 170, 188 (Mo 2009) (“Prosecutors may discuss the concept of mercy in their closing arguments [in capital case] because mercy is a valid sentencing consideration, and in that connection may argue that the defendant should not be granted mercy”).

Where mercy is not allowed as a consideration by other states it is generally because of the structure of the state statutes. For example, in Pennsylvania, because the death penalty statute provides that if the jury finds at least one aggravating circumstance and no mitigating circumstances the verdict must be death, “a jury may consider mercy or sympathy when

weighing specific aggravating and mitigating factors, but it may not exercise its sense of mercy or sympathy in a vacuum ” *Commonwealth v Powell*, 956 A 2d 406, 426 (Pa 2008)

Even some weighing states explicitly allow for the consideration of mercy For example in *Kansas v Marsh*, 548 U S 163 (2006), the Court reviewed the constitutionality of the Kansas statute, which provides

If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the [statutory] aggravating circumstances exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death, otherwise the defendant shall be sentenced as provided by law

Id at 166 Despite the mandatory nature of this statute, under Kansas law, the jury is still explicitly allowed and instructed that it can consider mercy

A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case

The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted

Id at 176

In sum, under the Eighth Amendment, capital sentencing schemes are required to meet “twin objectives ” to be “at once consistent and principled but also humane and sensible to the uniqueness of the individual ” *Eddings v Oklahoma*, 455 U S 104, 110 (1982) The process required by the Eighth Amendment must “guide the discretion of the sentencer” while at the

same time “allow mitigating evidence to be considered,” *Johnson v Texas* 509 U S 350, 373 (1993), so the jury can reach a “reasoned *moral* response,” *California v Brown* 479 U S at 545 (1987) (O’Connor, J, concurring) (emphasis in original) These are the constitutional requirements

The United States Supreme Court has, on the other hand, never construed the Eighth Amendment to require that a jury “be able to dispense mercy on the basis of a sympathetic response to the defendant” *Johnson*, 509 U S at 371 To the contrary, the Court has declared that the states are free “to structure the consideration of mitigating evidence” *Id* at 373 The states may require imposition of a death sentence if a jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or finds that the aggravating circumstances outweigh the mitigating circumstances as long as the jury is able to consider and give effect to all relevant mitigating evidence *Blaystone v Pennsylvania*, 494 U S 299 (1990) Likewise, the states are free to give no special weight to aggravating circumstances once at least one aggravating circumstance is found to “narrow[] the class of persons convicted of murder who are eligible for the death penalty” *Zant v Stephens* 462 U S at 874 The states are free to allow the jury to freely “consider” aggravating and mitigating circumstances without any requirement that aggravating circumstances be weighed against mitigating circumstances *Id* at 273-74 At the same time, the states are free to “permit[] the jury to dispense mercy on the basis of factors too intangible to write into a statute” *Penry v Lynaugh* 492 U S 302, 327 (1989) (quoting *Griegg v Georgia* 428 U S 153, 222 (1976) (White, J, concurring)) The states are free to construct a system where “[t]he jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, but it must find a

statutory aggravating circumstance before recommending a sentence of death ” *Zant v Stephens*, 462 U S at 875 n 13

In South Carolina, like Georgia, it is proper for a defendant to present witnesses “to ask for mercy on his behalf,” *Torrence*, 305 S C at 51, 406 S E 2d at 318 (quoting *Childs v State*, 357 S E 2d 48, 60 (Ga 1987)), *Johnson* 338 S C at 126, 525 S E 2d at 525, *State v Sapp*, 366 S C at 283, 621 S E 2d at 883, proper for defense counsel to “endeavor[] to appeal to the jury’s sense of mercy,” *Dayton v Evatt* 312 S C 4, 12, 430 S E 2d 517, 522 (1993), and proper for a defendant to address the jury and ask for mercy, *State v Moore*, 357 S C 458, 593 S E 2d 608 (2004)

Given these prior decisions, it was improper for the trial court to instruct the jury that it could not impose a life sentence “as an act of mercy ” Counsel’s failure to object to the erroneous charge was both deficient and prejudicial The judge’s instruction eliminated mercy as a permissible reason to sentence Hughey to life imprisonment This limitation affected how the mitigation evidence could be considered by the jury But for counsel’s failure to object to the improper mercy instruction, there is a reasonable probability the outcome of the sentencing phase would have been different See e g *Patrick v State*, 349 S C 203, 562 S E 2d 609 (2002) (counsel ineffective in burglary case for failing to request mercy from jury and prejudice was presumed), *Chubb* 303 S C at 397, 401 S E 2d at 160 (trial counsel ineffective for failing to present mitigation evidence or argue for mercy during the guilt phase because of her erroneous expectation that a separate sentencing proceeding would be held)

IV

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 E2d 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.

A The relevant facts

The relevant facts from Issue III, are incorporated here by reference. Appellate counsel, Bob Dudek, testified at the PCR hearing. He explained he relies heavily on the objections made at trial in figuring out which issues to brief because South Carolina is a "preservation state." An issue must be properly raised to be preserved. A proper objection needs to be contemporaneous and specific, state the proper grounds and "hopefully it's accompanied by a correct argument on the law." PCR 307-08.

Dudek acknowledged there was not a specific objection to the questionable mercy instruction by trial counsel. When he was asked if he thought that charge was an important issue, he answered, "Yes, I did because frankly I think that was the first time I'd ever seen that instruction that you cannot sentence a defendant to life imprisonment as an act of mercy. And, quite frankly, it just kind of jumped out at me as a – as an issue." Since it was not specifically objected to, he attempted to "blend" this issue with the properly preserved issue concerning the "defendant contends" language in the judge's charge on non-statutory mitigating circumstances. PCR 314-15.

Dudek testified that his plan “was trying to set the issue up to be procedurally barred where the court would say, you’re arguing this as an improper mercy instruction. That was never raised on appeal. This issue is not preserved for appellate review.” This issue would then have to be addressed in post-conviction relief. He admitted he should have briefed the incorrect mercy instruction as a stand-alone issue, saying it was “improper and prejudicial.” If he has briefed it as such, he would have distinguished mercy from passion “or those type things” and described it as “you can look at John Kennedy Hughey as a human being and as an act of mercy give him a life sentence rather than a death sentence.” PCR 316-17

B Ineffectiveness of appellate counsel

Due process of law requires that a defendant receive effective assistance of counsel on direct appeal. *Evitts v Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under the same test as other ineffectiveness claims. *Smith v Robbins*, 528 U.S. 259 (2000), *Strickland v Washington*, 466 U.S. 668 (1984).

Certainly, appellate counsel has no constitutional duty to raise every nonfrivolous issue on appeal. *Jones v Barnes*, 463 U.S. 745 (1983), *Thrift v State*, 302 S.C. 535, 397 S.E.2d 523 (1990). In most cases, the reason for abandoning one issue is to enable counsel to focus on the more meritorious issues, since a “brief that raises every colorable issue runs the risk of burying good arguments.” *Jones*, 463 U.S. at 752-53. Here, appellate counsel knew the issue was a strong one and did seek to raise it. He simply did so in a deficient manner.

Trial counsel objected to the judge’s instruction by renewing their motion for Defendant’s Request to Charge No. 16, which included the language that the jury could sentence Hughey to a life sentence for any reason or no reason at all, even as an act of mercy. Whether or

not trial counsel's objection adequately preserved the issue, Dudek had a duty to raise this issue on appeal and fully brief it. Instead, he interjected it into the argument on a separate issue regarding the judge's charge on mitigating circumstances. By not raising the erroneous mercy charge as a stand-alone issue, the South Carolina Supreme Court misconstrued the argument Dudek was trying to make and rejected it in dicta. Dudek erred in not fully briefing this issue because he knew it was not legally sound. He was familiar with cases allowing the defendant to call witnesses to ask for mercy for a capital defendant. PCR 327-28

In addition, In South Carolina, the trial judge is required to charge the "current and correct" law of the state. *State v. Zeigler*, 364 S.C. 94, 106, 610 S.E.2d 859, 885 (2005). See also *State v. Buckner*, 341 S.C. 241, 534 S.E.2d 15 (Ct. App. 2000) (holding jury charge is proper if, as a whole, it is free from error and reflects the current and correct law of South Carolina). The judge need not charge particular verbiage as long as the substance of the law is correct. *Id.* (citing *State v. Bukhart*, 350 S.C. 252, 261, 565 S.E.2d 298, 303 (2002)). In order for an error in the charge to warrant reversal, the judge's refusal to charge a requested instruction must be "both erroneous and prejudicial." *Id.* Further, Dudek's failure is in violation of Guideline 11.9.2 of the 1989 ABA Guidelines, which requires appellate counsel to pursue every issue regardless of how well it is preserved and also to attack restrictive appellate rules.

Dudek testified the issue jumped out at him because it was the first time he had ever seen a judge address mercy in this way. In short, the instruction given by the trial judge, that mercy was not an appropriate reason for handing down a life sentence in Hughey's case, cuts against precedent. It essentially tells the jury to either wholly disregard certain mitigation evidence presented by the defense or limits the way that evidence can affect the jurors' decision-making.

process. The charge was both erroneous and prejudicial. Had Dudek briefed the mercy charge separately, he would have had the opportunity to fully explore the improper nature of the charge, as discussed in Issue III.

Had Dudek handled the judge's incorrect charge as a stand-alone issue, he would have had the opportunity to fully explain the error and prejudice. But for the deficiencies of appellate counsel, there is a reasonable probability the outcome of the appeal would have been different. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999) (appellate counsel provided ineffective assistance of counsel that required a new capital sentencing trial by failing to assert, as trial counsel had, that the defendant was entitled to a charge that life is to be understood in its "ordinary and plain meaning," pursuant to *State v. Norris*, 285 S.C. 86, 328 S.E.2d 339 (1985)). *See also Carter v. Bowersox*, 265 F.3d 705 (8th Cir. 2001) (appellate counsel was ineffective in failing to assert as error that the trial court failed to instruct the jury, as required by state law, that if it failed to make a unanimous finding that the death penalty was warranted by evidence in aggravation of punishment, it was required to return a life sentence), *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002) (appellate counsel ineffective for failing to assert as error the trial court's instruction that once the jurors "have unanimously found an aggravating circumstance, before they can weigh aggravating circumstances against any mitigating circumstances, they must all find the existence of at least one mitigating circumstance. This is not a correct articulation of the law").

V

Cumulative prejudice

As discussed previously, a finding of prejudice under *Strickland* requires that a petitioner “show that there is a reasonable probability that, but for counsels' unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. This test is not, however, an outcome determinative inquiry. Thus, “a defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693 (emphasis added). Likewise, the prejudice test of *Strickland* “is not a sufficiency of evidence test.” *Kyles v. Whitley*, 514 U.S. 419, 434 (1995).¹⁷ Thus, in this context, the question is not whether the jury would have given Hughey a life sentence if counsel had performed adequately. Prejudice is established if “there is a reasonable probability that *at least one juror* would have struck a different balance” but for counsel's errors. *Wiggins v. Smith*, 529 U.S. 510, 537 (2003) (emphasis added).

This Court must also apply a cumulative prejudice analysis. *Kyles*, 514 U.S. at 436 (the prejudice must be “considered collectively, not item-by-item”). The United States Supreme Court's opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered “the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally” in conducting its prejudice analysis and finding counsel

¹⁷In *Kyles* the Court reviewed a Petitioner's claim that the state did not disclose evidence favorable to the defense in violation of the rule established in *Brady v. Maryland*, 373 U.S. 83 (1963), and refined in *United States v. Bagley*, 473 U.S. 667 (1985). In *Bagley* the Court adopted the standard of *Strickland* for determining “materiality.” Thus the Court's discussion in *Kyles* is equally applicable to the analysis of prejudice in resolving claims of actual ineffectiveness of counsel under *Strickland*.

ineffective for failing to adequately prepare and present mitigation evidence “[A]s a whole” implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional *errors*, the result of the proceeding would have been different.” 466 U.S. at 694 (emphasis added). If the Court did not intend a cumulative analysis it would have discussed the prejudice analysis in terms of “individual error” or error by error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”¹⁸

The South Carolina Supreme Court has never before explicitly applied a cumulative prejudice analysis. *Green v. State*, 351 S.C. 184, 569 S.E.2d 318 (2002). The court declined to do so in *Green*, however, because Green failed to meet the threshold requirement of showing error. Specifically, the Court held that “[m]ultiple errors do not exist in this case to form any cumulative prejudicial effect.” 351 S.C. at 197, 569 S.E.2d at 325. Here, however, Hughey has shown the existence of numerous errors by trial counsel. While each individual error requires reversal, the cumulative impact leaves no doubt that the death sentence must be vacated.

¹⁸Numerous courts relying on *Strickland* have held that a cumulative prejudice analysis is appropriate. See e.g. *Pavel v. Hollins*, 261 F.3d 210 (2nd Cir. 2001), *Richards v. Quarterman*, ___ F.3d ___, 2009 WL 1111177 (5th Cir. Apr. 27, 2009), *Goodman v. Bertrand*, 467 F.3d 1022 (6th Cir. 2006), *Martin v. Grosshans*, 424 F.3d 588 (7th Cir. 2005), *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), *Cagle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003), *Steidl v. Walls*, 267 F. Supp. 2d 919 (C.D. Ill. 2003), *United States ex rel. Madej v. Schomig*, 223 F. Supp. 2d 968 (N.D. Ill. 2002), *Espinal v. Bennett*, 588 F. Supp. 2d 388 (E.D.N.Y. 2008), *Saranchak v. Beard*, 538 F. Supp. 2d 847 (M.D. Pa. 2008), *In re Gay*, 968 P.2d 476 (Cal. 1998), *McIntosh v. State*, 941 So.2d 1 (Fla. Dist. Ct. App. 2006), *People v. Briones*, 816 N.E.2d 1120 (Ill. App. Ct. 2004), *State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997), *Mata v. State*, 141 S.W.3d 858 (Tex. Ct. App. 2004), *State ex rel. Humphries v. McBride*, 647 S.E.2d 798 (W. Va. 2007), *State v. Thiel*, 665 N.W.2d 305 (Wis. 2003).

From the very beginning of trial, in opening statements, counsel distanced themselves from Hughey by informing the jury they were appointed *See, Nance supra*. Counsel then informed the jury that the time line of the crimes was significant and would establish that Hughey was guilty only of manslaughter in the face of overwhelming evidence of murder including three shots from a single shot shotgun throughout the Harris home. And, by Hughey's own admission, he entered that home with a shotgun, while the victims were not similarly armed, because he was angry. This defense was not only rejected but it reverberated throughout the state's arguments and the victim impact testimony, including the extremely damaging and prejudicial argument that Harris was in "the wrong place at the wrong time" in her own home.

From there, due to counsel's failure to adequately prepare the mitigation evidence, the jury never heard anything more than Hughey was an angry man, who had a bad background, but he killed Jackson and Harris in front of his own children in a jealous rage. If counsel had adequately prepared, the jury would have heard that Hughey had limited intelligence, major depression with psychotic episodes, and PTSD, that, in combination with alcohol, lack of sleep, and his neurological damage rendered his ability to conform his conduct to the law substantially impaired.

Despite these impairments, however, Hughey adapted well to confinement. His behavior while in DJJ and while in pretrial confinement conclusively established this fact. This past behavior plus additional testimony from a forensic psychiatrist could easily have alleviated the natural fears of the jurors that Hughey would continue to be a danger in prison.

Finally, on top of these errors, defense counsel sat by silently while the trial court instructed the jury that it could not consider mercy in sentencing when trial counsel's failure to adequately prepare for mitigation left that in the position of relying on mercy almost exclusively in pleading for Hughey's life in sentencing. The combination of all these errors was clearly prejudicial and requires reversal.

Conclusion

For the forgoing reasons, this Court should order a new sentencing hearing

Respectfully submitted,

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June 8, 2009

Appendix

- 1) Brief of Respondent, State v Jimmy Clifton Lockman
- 2) E-mail of Don Zelenka dated October 14, 2008
- 3) Statutory Instruction, State v William Oliver Dickerson

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions

Honorable J. Denham Cole, Circuit Court Judge

Case No. 88-GS-42-2521

The State

Respondent

James Clinton Lockhart

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- 1 Was the Appellant entitled to an instruction on the elements of voluntary manslaughter, where the record does not show sufficient legal provocation by the victim?
- 2 Was the order directing the Appellant to submit to an independent psychiatric evaluation a prejudicial abuse of discretion, where the State did not rely upon any evidence derived from it?
- 3 Was the Appellant entitled to a directed verdict on the "great risk of death" aggravator, where the record shows he fired the gun in the direction of the victim's stepfather and uncle?
- 4 Was the Appellant entitled to a directed verdict on the "prior murder conviction" aggravator, where the legislature set no time limits defining when the previous conviction must occur?
- 5 Should this Court reverse the death sentence if one aggravator is invalid, where the evidence supporting either circumstance was otherwise admissible in the penalty phase?

STATEMENT OF THE CASE

This is a death penalty case arising from the April 26, 1995 murder of Tammy Bridges. On May 18, 1995, the Spartanburg County Grand Jury indicted the Appellant for murder and possession of a firearm during the commission of a violent crime. The State served its notice of intent to seek the death penalty on September 3, 1996.

The State called the charges for trial on September 14, 1998. The jury found the Appellant guilty as charged on September 19, 1998.

Following the twenty-four hour waiting period, the Honorable J. Derham Cole convened the penalty phase on September 20, 1998. At the conclusion of the penalty phase, Judge Cole presented the following aggravating circumstances for the jury's consideration:

- 1 The Appellant had a previous conviction for murder.
- 2 The Appellant knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would be hazardous to the lives of more than one person.
- 3 The Appellant murdered two or more persons pursuant to one act or one scheme or course of conduct.

On September 22, 1998, the jury found the existence of the first and second aggravating circumstances beyond a reasonable doubt. The jury recommended the death penalty for murder. Accordingly, Judge Cole sentenced the Appellant to death on September 22. Judge Cole affirmatively found that the evidence warranted the sentence, and that the verdict was not the result of passion, prejudice or other arbitrary factor.

The Appellant filed a timely notice of appeal. This proceeding followed

STATEMENT OF FACTS

Allen Nichols was at work on April 26, 1995 when the Appellant's mother, Brenda Locklair, called him in tears. Nichols said Brenda was upset because she thought the Appellant might kill himself. Nichols said Brenda warned him to keep the Appellant away from guns. R. p. 1841, lines 1-10, R. p. 1870, lines 2-14.

Several minutes later, the Appellant walked up to Nichols' window. The Appellant told Nichols that Brenda was "just completely overreacting to everything." The Appellant asked Nichols if he were going to be home after work. Nichols agreed to meet the Appellant at Nichols' home after 5:00 p.m. R. p. 1841, line 11 - p. 1842, line 19.

As Nichols prepared to leave work, the Appellant's brother dropped off the Appellant at the store. The Appellant and Nichols then left in Nichols' truck. Nichols tried to talk to the Appellant about "what exactly was going on," but they began talking about their guns. R. p. 1842, line 20 - p. 1844, line 11.

The pair arrived at Nichols' house and stayed about five or ten minutes. According to Nichols, he decided to ride around with the Appellant and shoot guns in the river. Nichols loaded his .22 caliber rifle in his truck. The Appellant carried Nichols' loaded Baretta pistol and put it in the glove compartment. Nichols said the Appellant "was real happy," and "nothing really seemed wrong." R. p. 1844, line 12 - p. 1845, line 15, R. p. 1874, lines 2-7.

Nichols and the Appellant left in Nichols' truck and drove out of town. As Nichols drove past the home of Tammy Bridges' parents on Woodruff Street, the Appellant remarked that Tammy's car was gone. Robert Williams, Tammy's stepfather, testified that Tammy had moved into her parents' home the previous day. Tammy lived with the Appellant and his parents before April 26. R. p. 1781, lines 13-22. R. p. 1845, lines 17-22, R. p. 1848, line 17 - p. 1849, line 13.

Nichols drove to his cousin's outside Woodruff to shoot wild turkeys, but the flock got away. As Nichols and the Appellant returned to the truck, the Appellant reached in his wallet and pulled out Christopher Jones' death certificate. At the time, the Appellant was charged with Jones' murder, but had not gone to trial. R. p. 1846, line 21 - p. 1848, line 1. See R. p. 2019, line 25 - p. 2022, line 24, R. p. 2024 line 13 - p. 2026, line 6.

Nichols and the Appellant got into the truck and started to drive to Nichols' house. On the way, the Appellant asked Nichols to drive by Tammy's parents' house so he could return the death certificate to her. Nichols knew the Appellant and Tammy had broken up and warned him not to argue with her. Nichols and the Appellant shared a marijuana cigarette as they drove to the Williams' house. R. p. 1848, lines 2-18, R. p. 1849, lines 14-17, R. p. 1874, line 8 - p. 1875 line 7.

When Nichols arrived at the Williams' house, he saw children playing in the street and porch in front of the house. Nichols parked on the opposite side of the street facing traffic in front of the house. Nichols had to maneuver the truck to avoid the children. R. p. 1849, lines 18-22, R. p. 1850, line 1 - p. 1851, line 5, R. p. 1875 lines 10-18, R. p. 1879, lines 20-25.

Nichols said the Appellant tried to call Tammy on the cell phone but it would not work. The Appellant reached over and started honking the truck's horn. Nichols then heard a tapping on the driver's side window and saw Tammy and her mother, Betty Williams, standing by the truck. Nichols said the Appellant opened his door onto the street and began talking to Tammy. R. p. 1851, line 6 - p. 1853 line 14.

Nichols said Tammy asked "what's wrong with you Jimmy[,] " and asked why the Appellant cut up her clothes. Tammy kept her voice low and talked in a monotone. Nichols heard Betty say something, but he did not understand her. However, Nichols said Betty's comment "just spurred [him,]" and he reached over to pinch the Appellant. R. p. 1853, line

15 - p 1854, line 16

Nichols heard the Appellant tell Tammy that he was sorry and pleaded with her to talk to him, but she refused. Meanwhile, Nichols heard Betty tell the children in the street to get out of the way. Nichols then heard Tammy say "no, Jimmy, I'm not coming back to you." Nichols said he shifted gears and prepared to leave the scene. However, the Appellant reached into the dash and grabbed the pistol out of the glove compartment. R p 1854, line

17 - p 1856, line 12

Nichols said he reached across and grabbed the Appellant's shirt collar, but the Appellant pulled him out of the truck. Nichols heard Tammy and Betty screaming, then he saw them running away. As Nichols fell out of the truck, he saw the Appellant taking long steps toward Tammy with his arms extended. Nichols said he heard the Appellant pulling the trigger repeatedly, but the safety was engaged. As Nichols tried to make a running tackle, the Appellant disengaged the safety and shot Tammy in the back. R p 1856 line 13 - p 1858, line 5, R p 1859, line 1 - p 1860, line 4

Nichols said he tackled the Appellant after the first shot. According to Nichols, the Appellant fired two more times before they fell to the ground. The gun then struck the asphalt and fired an additional round before jamming. The Appellant then stood up and told Nichols, "leave me the f*** alone, I got to do this." R p 1860, line 5 - p 1861, line 6, R p 1862, line 22 - p 1863, line 9

Robert Williams and Dewey Morgan, the victim's uncle, testified that they drove to the store shortly before the shooting occurred. When Williams and Morgan returned, they saw Nichols' truck parked in front of their house. Morgan parked the car behind Tammy's car, and Williams told his wife Betty, to ask the truck driver to move. Meanwhile, the victim stood in the street at the open door on the passenger side of the truck. R p 1778, line 19 - p 1781, line 12, R p 1783, line 7 - p 1784, line 12, R p 1816, line 16 - p 1817, line

17, R p 1819, lines 11-21, R p 1820 line 15 - p 1821, line 20

Williams overheard the victim ask her mother to go inside the house. The victim then screamed "oh, my God" and tried to run toward the car. The Appellant exited the truck and approached the car with something resembling a flashlight. Williams and Morgan heard two gunshots, and the victim fell from a shot in her back. R p 1784, lines 13-16, R p 1785, line 17 p 1787, line 5, R p 1788, line 2 - p 1789, line 23, R p 1791, lines 21-25, R p 1821, lines 21-24, R p 1822, lines 2-24

The Appellant stood up after Nichols tackled him and stepped over the victim's body before walking toward the Williams' house. According to Robert Williams, the Appellant looked "like he was hunting somebody." The Appellant pointed the gun at the front door of the house and pulled the trigger. However, the gun jammed and did not fire. Some of the children had run into the house. However, Allen Nichols testified that there "were [still] plenty of people out there. [t]here were at least five or six out there." Dewey Morgan left the car and ran up to the front porch because his mother and niece, Stacy Waddell, came outside during the shooting. R p 1790, lines 8-22, R p 1791, lines 4-6, R p 1809, line 12 - p 1810, line 1, R p 1822, line 25 - p 1823, line 24, R p 1863, lines 10-18, R p 1864, line 4 - p 1865, line 7

Nichols tackled the Appellant again while he tried to fire at the house. Meanwhile, Robert Williams left the car and ran toward the Appellant and Nichols. Williams said he grabbed the gun and wrestled with the Appellant over it. Williams eventually dislodged the gun and it fell on the ground, discharging once. The Appellant tossed Nichols aside, then stood up and ran toward a neighbor's house. The Appellant went twenty or thirty feet, looked back for a second, then ran down the street. Williams tried to shoot the Appellant, but the gun jammed again and did not fire. R p 1792, line 23 - p 1796, line 5, R p 1810, line 11 - p 1812, line 1, R p 1824, lines 17-18, R p 1865, line 8 - p 1867, line 6

Robert Williams went to the victim after the Appellant ran away. Tammy appeared to understand Williams when he spoke, but then she went limp. The victim was alive still alive when Sergeant Gentry Lee arrived at the scene. However, the emergency room personnel pronounced the victim dead on arrival. Forensic pathologist David Wren later found a gunshot wound in the victim's back. The angle of entry was consistent with a shot fired while the victim was lying on the ground. Dr. Wren believed the victim bled to death from the wound, which also caused blood to accumulate and collapse her lung. R p 1749, line 21 - p 1750, line 9, R p 1772, line 15 - p 1773, line 22, R p 1775, lines 9-11, R p 1796, line 19 - p 1797, line 16, R p 1900, line 8 - p 1904, line 13

The Woodruff City police investigators recovered the gun at the scene and found a shell casing near the victim's body. The investigators also found a second shell casing approximately twenty feet from the body. R p 1743, line 1 - p 1745, line 10, R p 1746, line 24 - p 1747, line 22, R p 1749, lines 4-12, R p 1758, lines 1-16

Robert Williams told the investigators that the Appellant was the shooter. At the Woodruff Police Department's request, Lieutenant Rick Gregory issued a bulletin from the Spartanburg County Sheriff's office concerning the Appellant. The search continued until 4:00 a.m. the following day when Gregory and other deputies found the Appellant at his parents' home five miles from the scene. The Appellant changed clothes before the police arrived. R p 1746, lines 4-23, R p 1762, line 5 - p 1765, line 15

After the deputies transported the Appellant to the Woodruff Police Department, Officer Ronald Bishop advised him of his rights at 4:30 a.m. The Appellant voluntarily waived his rights and gave a tape recorded statement. R p 1828, line 3 - p 1833, line 16
See State's Ex. No. 9. The Appellant then wrote the following statement:

About three weeks ago me & Tammy had been at each others throat about little things. She left me day before yesterday & I got up out of the bed to go with my father to pick up my son at school. Instead, I had him to drope (*sic*) me off at Stacie's so I could talk to Tammy. We talked about us getting back

together. She said she wasn't coming back & I just kept asking her too (*sic*). Then a little later I went to spend the day with my brother. At six o'clock I had Randy to carry me to Allen's house. Then me & Allen went to shoot the guns at his cousin's gun range, but we didn't shoot them. On the way home I had him to stop & let me give Tammy some birth cert. We were talking at the truck with me inside. Then her mother came over to the truck & I asked Tammy could we talk alone. Then her mother said their (*sic*) comes Tammy's dad you better hurry up & leave. Then Tammy got smart with me & I'm suppose (*sic*) to be on Zolofit med but I lost my perscription (*sic*). After she got smart with me & started to walk off, I grabbed the gun. Her mom threw a cig case at me, her dad was trying to stop me & Allen also.

Tammy laid face down on the road & I shot at her right shoulder. I was to the right hand side of her. Then Allen & her dad grabbed the gun and I heard another shot.

The gun was aimed down but I don't know where the bullet went. Allen or I never thought anything like this was going to happen. When they took the gun I jumped up & ran home to see my son before I turned myself in. R pp 2490-2491. See R p 1833, line 18 - p 1836, line 3.¹

During the sentencing phase, the State showed that a Laurens County jury convicted the Appellant of murder in June 1995. Trooper Robert Fox testified that he found Christopher Jones lying face down in a church parking lot near the Spartanburg County line on November 27, 1994. The engine in the victim's car was still running. R p 2001, lines 3-22, R p 2002, line 14 - p 2003, line 8, R p 2019, line 25 - p 2022, line 24.

Jones was still alive when Fox found him, but he was later pronounced brain dead at the hospital. Dr. John Lokey found three gunshot wounds on the victim. A bullet entered Jones' chest and passed through his lung and the edge of his heart. The second bullet in the back severed the victim's spinal cord and would have caused instant paralysis. Finally, the third bullet passed through the back of Jones' head and lodged above the victim's right eye socket. R p 2005, line 19 - p 2006, line 2, R p 2011, line 25 - p 2017, line 2.

The angle of entry for the back and head wounds suggested that the shots were fired together. Forensic pathologist Brett Woodard believed that the third bullet caused Jones

¹The Appellant's recorded statement included substantially the same content. See State's Ex. No. 9.

brain death. The presence of gunpowder stippling on the third bullet wound suggested that the shot was fired at close range. R p 2013, line 18 - p 2014, line 11, R p 2135, lines 11-15, R p 2136, line 2 - p 2137, line 3, R p 2138, line 6 - p 2139, line 16, R p 2140, lines 8-23, R p 2141, lines 6-15.

The sentencing phase testimony connected the murders of Tammy Bridges and Christopher Jones. Stacy Waddell, Tammy's sister, testified that Jones was the father of Tammy's daughter, Jennifer. Tammy ended the relationship with Jones in 1994. Although the Appellant was married, Tammy began dating him one month before Jones' death. Waddell said Jones was trying to reconcile with Tammy before his murder. Jones said the Appellant "really couldn't stand" Jones' efforts at reconciliation, and started arguments with Tammy over it. Waddell denied Jones fought over Tammy on prior occasions. On cross-examination, Waddell said Tammy moved into the Appellant's home after he murdered Jones. R p 2043, line 13 - p 2044, line 20, R p 2051, lines 3-20, R p 2052, line 16 - p 2053, line 17, R p 2057, lines 4-14.

Waddell further testified that her mother called her the day before Tammy died. Waddell said her mother asked her to pick up Tammy at the Appellant's house because they had been fighting. Tammy stayed at Waddell's house that night. R p 2044, line 21 - p 2045, line 16.

The Appellant came to Waddell's house early in the morning on the following day, and asked to speak to Tammy. Waddell initially refused, but eventually allowed the Appellant inside the house. When the Appellant went back to Tammy's bedroom, Waddell's daughter said the Appellant was carrying a knife. Waddell said she went back to the bedroom and found the Appellant kneeling beside the victim's bed. Waddell demanded the weapon, and the Appellant handed her an eight inch long kitchen knife. Waddell flung the knife in the kitchen sink. R p 2045, line 17 - p 2048, line 6, R p 2061, line 23 - p 2063,

line 5

After Waddell disarmed the Appellant, he hugged Tammy's daughter and prepared to leave. The Appellant asked for his knife, but Waddell gave it to William Earl Jennings. Tammy apparently called Jennings and asked him to take the Appellant home.² Jennings testified that he gave the knife to the Appellant when they got in the truck. Jennings saw the Appellant fling the knife out of the window as they drove home. According to Jennings, the Appellant said, 'you can't do anything with this knife.' R. p. 2048, lines 10-19, R. p. 2061, line 23 - p. 2063, line 24.

Sometime after the Appellant left Stacy Waddell's house, she took Tammy to the Appellant's home to pick up Tammy's clothes and personal items. Waddell said all of Tammy's pictures and clothes had been shredded. Waddell also said some certificates and Tammy's identification were missing. Officer Gentry Lee later testified that Tammy was clutching Christopher Jones' death certificate in her hand after the shooting. R. p. 2048, line 20 - p. 2050, line 1, R. p. 2076, line 9 - p. 2077, line 7.

Tammy worked at Ascension, Incorporated. Tammy's supervisor, Kathy Johnson, spoke to the victim around 9:30 a.m. on April 26, 1995. Johnson said she was concerned for Tammy's safety after this conversation, and asked the victim to stay with her overnight. Leshe Taylor, another Ascension employee, testified that a white male called the business 30-45 minutes later. The caller asked to speak to Tammy, and told Taylor that 'if something doesn't happen, someone is going to die.' Taylor asked Johnson to speak to the caller. Johnson said she recognized the caller was the Appellant. The Appellant again asked to speak to Tammy, and said 'if I didn't let him talk to her that someone was going to be

²Tammy also called Jennings when the Appellant took her daughter into a field with a shotgun after an earlier fight. The Appellant was still mad when Jennings arrived. Jennings asked for the gun, and the Appellant handed it to him. According to Jennings, the Appellant kicked Jennifer as they walked home when she hesitated to climb through a barbed wire fence. R. p. 2064, line 3 - p. 2066, line 11.

killed ” Johnson told him that the Appellant that Tammy was not there According to Johnson, the Appellant became angry and hung up the phone R p 2031, lines 10-24, R p 2034, line 22 - p 2035, line 24, R p 2037, line 6 - p 2040, line 22, R p 2141, lines 3 10

Gertrude Langford testified that she was the Williams’ next door neighbor when the shooting occurred Langford said she was in her living room facing the street and reading by the window when she heard two gunshots Langford went to the door and heard someone yell ‘ he killed my sister ’ R p 2080, line 10 - p 2082, line 10 See State’s Ex No 8

Judge Cole previously qualified Captain Larry Gainey as an expert in firearm and tool mark identification in the guilt phase Gainey noted that the murder weapon could hold eighteen cartridges, and had fourteen when he examined it During the sentencing phase, Gainey testified that the gun could fire a bullet up to a mile away Due to the design of the ammunition the bullets could penetrate wood or metal without deforming The bullets could also penetrate solid objects and injure a person R p 1715, line 25 - p 1716, line 5, R p 1724, lines 14-23 R p 2084, line 14 p 2085 line 21

During the defense case in mitigation, social worker Mary Schultz testified that the Appellant lived ‘ a fairly quiet existence ’ Judge Cole qualified Roger Rhodes as an expert in clinical therapy Although Rhodes did not speak to the Appellant he opined that the Appellant had an obsessive compulsive relationship with Tammy which distorted normal thought processes On cross-examination, Rhodes conceded that a 1997 mental health evaluation by the Department of Corrections said that the Appellant was a malingerer Rhodes also conceded that two forensic psychologists said the Appellant had antisocial personality disorder, but disputed the diagnosis R p 2244, lines 9-21, R p 2257, line 8 p 2258, line 24, R p 2287, line 17 - p 2288, line 8, R p 2290, line 13 - p 2291, line 16, R p 2292, line 2 - p 2293, line 19, R p 2297, lines 23-25, R p 2298, line 19 - p 2299, line 8

ARGUMENT

- I The lower court properly refused to charge a voluntary manslaughter instruction because evidence of sufficient legal provocation by the victim is lacking

At the conclusion of the guilt phase, the Appellant requested an instruction on voluntary manslaughter as a lesser included offense of murder. The Appellant argued that his extreme emotional state from his domestic problems caused the victim's actions to rise to the level of adequate provocation.³ Judge Cole declined the request to charge because the evidence did not show that the victim physically assaulted the Appellant or even insulted him. R p 1922, line 6 - p 1927, line 24. The Appellant now argues that he was entitled to the charge because the victim "got smart" with him and her mother allegedly threw a cigarette case at him. The Appellant concludes that the victim and her mother "acted in concert" with each other to create sufficient legal provocation. B O A pp 14-17. These arguments have no merit.

"Voluntary manslaughter is the unlawful killing of another in sudden heat of passion upon sufficient legal provocation." State v Rogers, 320 S C 520, 525, 466 S E 2d 360, 362 (1996). A history of domestic strain is not legal provocation. State v Kornahrens, 290 S C 281, 286, 350 S E 2d 180, 184 (1986). Sufficient legal provocation requires acts by the victim "such as would naturally disturb the sway of reason and render the mind of an ordinary person incapable of cool reflection, and produce what according to human experience, may be called an uncontrollable impulse to do violence." State v Wiggins, 330 S C 538, 549, 500 S E 2d 489, 495 (1998), *quoting* State v Lowry, 315 S C 396, 434 S E 2d 272 (1993). The trial judge need not charge voluntary manslaughter when the victim's actions did not constitute sufficient legal provocation. State v Ivey, 325 S C 137,

³The Appellant asserts that the murder of Tammy Bridges revolved around a "lovers' triangle." B O A p 4. The triangle no longer existed because the Appellant murdered Christopher Jones *six months* before he killed Ms. Bridges.

142, 481 S E 2d 125, 127 (1997)

As evidence of provocation, the Appellant relies upon his written statement asserting that the victim "smarted off" to him and humiliated him in front of his friend B O A p 15⁴ However, *nothing* in the record indicates that the victim used insulting or threatening language against the Appellant To the contrary, Allen Nichols testified that the victim calmly spoke to the Appellant and never raised her voice When Nichols related the conversation between the victim and the Appellant, he did not note any insulting or threatening language The victim simply said, "no, Jimmy, I'm not coming back to you ," then walked away R p 1856, lines 5 6

The victim did not make any statements that would "render the mind of an **ordinary** person incapable of cool reflection, and produce an uncontrollable impulse to do violence " [Emphasis added] Wiggins, Id Defense counsel effectively conceded this point

She said some things to him which **he interpreted** as blowing him off, some things that **he interpreted** as smarting off to him If you take that, in view of the context of a lovers' situation with an ongoing strife, we think that that could rise to the level of adequate provocation and heat of passion [Emphasis added] R p 1924, lines 15-21

As shown above, the issue of sufficient legal provocation is an objective inquiry into how an ordinary person would react to the victim's actions Therefore, the Appellant's subjective belief that the victim insulted or threatened him did not create sufficient legal provocation Cf State v Damon, 285 S C 125, 128, 328 S E 2d 628, 630 (1985) ["The law will not classify a killing as manslaughter on the basis of a mistaken and baseless idea in the mind of the killer"]

⁴The Appellant also refers to his statements to Dr Katherine Lewis See B O A p 9 n 5, citing R pp 2536 2542 Judge Cole accepted Dr Lewis' report as a court's exhibit during a competency hearing See R p 1651, line 4 - p 1653, line 6 This report never went to the jury Accordingly, the Appellant's statements in the report are not substantive evidence that the jurors would have considered in determining whether adequate provocation existed

Furthermore, even if the victim insulted or humiliated the Appellant, it does not reduce the killing to voluntary manslaughter. When a deadly weapon is the cause of death, "words alone, however opprobrious, are not sufficient to constitute legal provocation." Lowry, 315 S C at 399, 434 S E 2d at 274. Provocation does not exist unless the victim's words were "accompanied by the appearance of an assault - by some overt, threatening act - which could have produced the heat of passion." Id

The Appellant contends that a manslaughter instruction is required by State v. Kahan, 268 S C 240, 233 S E 2d 293 (1977). See B O A p 14. In that case, the defendant's wife died of a gunshot wound at home. No one witnessed the victim's death, and the defendant claimed that she killed herself. The State charged the defendant with murder, but the jury convicted the Appellant of manslaughter. The defendant later challenged the submission of the manslaughter charge to the jury. Id, 268 S C at 244, 233 S E 2d at 293.

This Court ruled that the manslaughter instruction was proper because the witnesses testified that the defendant and his wife argued before the shooting. Since the defendant claimed that the victim's death was a suicide, the jury was required to decide whether he killed his wife. Evidence that the defendant argued with his wife before the shooting was circumstantial evidence that he killed her in sudden heat or passion. Id, 268 S C at 246-57, 233 S E 2d at 295.

As this Court later explained, Kahan concerned whether the State presented sufficient evidence that an intentional killing occurred. See State v. Mickle, 273 S C 71, 72, 254 S E 2d 295, 296 (1979). Evidence that the victim and the defendant were arguing before the killing was simply evidence that he acted in sudden heat or passion. Kahan did not address or hold that the victim's actions - "words alone" - constituted sufficient legal provocation.

Additionally, this Court has repeatedly stated that words alone will not reduce a capital murder to manslaughter where the defendant uses a deadly weapon. See, e g, State

v. Butler, 277 S C 452, 290 S E 2d 1 (1982) [Defendant's assertion that he panicked and killed victim after she said she was going to accuse him of rape after consensual sex did not show provocation], State v. Plemmons, 286 S C 78, 332 S E 2d 765 (1985) [Evidence that defendant's grandmother was shouting, cursing and pointing her finger at him did not show adequate provocation], Rogers, 320 S C at 324-25, 466 S E 2d at 362 [Racist epithets by victim and directed at defendant did not constitute adequate provocation] Therefore, since Tammy Bridges did not take any overt physical actions against the Appellant, even the most liberal construction of her words did not reduce the crime to manslaughter

The Appellant contends that Betty Williams' actions supply the necessary overt act because she sided with her daughter and acted in concert with Tammy The Appellant concludes that the jury could find voluntary manslaughter occurred because Betty threw a cigarette case at him before he shot Tammy B O A pp 15-16 This argument has no merit

Under state law, '[t]he 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) This state has not recognized sufficient legal provocation from a third party that can be transferred to the victim⁵

The Appellant also argues that third party participation may provide sufficient legal provocation under State v. Wyatt, 317 S C 370, 453 S E 2d 890 (1995) See B O A p 16 This argument has no merit

In Wyatt, the defendant got into an argument with his wife and hit her several times After the argument, the defendant sat in his car for fifteen minutes A man walked over and

⁵The Appellant argues that "provocation on the part of the deceased or a third party acting in concert with the deceased" will support a manslaughter verdict B O A p 16, quoting Sattiewhite v. State, 786 S W 2d 271, 287 (Tex Crim App 1989) Texas statutory law defines "sudden passion" in the terms suggested by the Appellant See Sattiewhite, 786 S W 2d at 287 Texas may define sufficient legal provocation in those terms, but this state does not

told the defendant, "if he wanted to hit someone, to hit him instead of a woman. The defendant scuffled with this man and eventually shot and wounded him. As the defendant tried to drive away, a hostile crowd surrounded his car. A second man reached into the car and attempted to remove the defendant's keys. The defendant shot and killed this man. Id., 317 S.C. at 372, 453 S.E.2d at 891.

The State charged Wyatt with murder and assault and battery with intent to kill. The jury convicted Wyatt of the lesser included offenses of manslaughter and assault and battery of a high and aggravated nature. On direct appeal, this Court ruled that the admission of evidence about Wyatt's past physical cruelty to his wife was harmless in light of the verdict. This Court concluded that "the jury, by rejecting murder and A.B.I.K., found appellant had not acted with malice but upon provocation." Id., 317 S.C. at 373, 453 S.E.2d at 891.

Under the facts in Wyatt, the provocation derived from the victims, not a third party, i.e. the defendant's wife. Wyatt did not hold that provocation from an uninjured third party would support a manslaughter verdict. Therefore, this Court should reject the flawed legal premise of the Appellant's argument.

Even if this Court accepts the premise of the Appellant's exception, a new guilt phase trial is unnecessary. Throwing a cigarette case, without more, would not naturally "render the mind of an ordinary person incapable of cool reflection, and produce an uncontrollable impulse to do violence" [Emphasis added] Wiggins, Id.

Additionally, the only evidence of provocation is the Appellant's statement. The statement shows that the Appellant drew the gun **after** Tammy walked away from him and **before** her mother allegedly threw the cigarette case.⁶ Any alleged "provocation" by the

⁶The Appellant's statement to Dr. Catherine Lewis asserted that he drew the gun after Tammy's mother threw the cigarette case. See R. p. 2541. As noted above, neither party introduced this report into evidence. Accordingly, the report is not substantive evidence that the jurors would have considered in determining whether adequate provocation existed.

mother was independent because it occurred after the Appellant showed his clear intent to harm the victim. Nothing in the record shows that the victim's mother "acted in concert" with her daughter at that point. Therefore, since the victim's actions standing alone did not constitute legal provocation, Judge Cole properly refused to charge the elements of manslaughter.⁷ This Court should reject this argument on appeal.

⁷At the penalty phase, Judge Cole submitted the statutory mitigating circumstance that "[t]he defendant was provoked by the victim into committing the murder." S.C. Code Ann. § 16-3-20(C)(b)(8) (Supp. 1998). The submission of the mitigator does not mean that any alleged provocation reduced the charge to manslaughter. Cf. State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) [Duress will not reduce or excuse murder, but is a mitigating circumstance in the sentencing phase].

- II Since the State did not introduce any information from the independent psychiatric evaluation, the order requiring an independent mental examination was not a prejudicial abuse of discretion

The Appellant argues that Judge Cole could not authorize an independent mental health examination because state law limits the trial court's authority to do so B O A pp 24 27 This argument does not require a new trial

At a September 20, 1996 pretrial hearing, Assistant Solicitor Mabry informed Judge Cole that the State had served its request for notice of an insanity defense. Defense counsel stated that experts were evaluating the Appellant at the Department of Corrections. Counsel promised to notify the State if insanity would be an issue. Although the Assistant Solicitor noted that defense counsel was also concerned about the Appellant's competency, Judge Cole declined to order the examination on his own motion. R p 41, lines 20-25, R p 42, line 24 - p 45, line 6

On May 29, 1998, Judge Cole heard the State's motion for an independent examination to determine the defendant's mental condition on or about the time of the alleged incident occurring. At the hearing, defense counsel said they provided a copy of their expert's report to the State. R p 46, line 3 - p 47, line 9. Defense counsel agreed with Judge Cole's summary of their expert's conclusions

THE COURT And in that report, it indicates that the defendant suffers or did suffer from some type of mental illness that would cause him to lack capacity to confirm (*sic*) his conduct to the requirements of the law at the time of the alleged offense?

MR JOHNSTON That is correct. R p 47, lines 10-15

Counsel further agreed that "the defendant intends to offer such evidence at the trial of the case either in the guilt phase or the penalty phase." R p 47, lines 16-19

Following oral argument, Judge Cole deferred ruling on the State's motion. After reviewing the parties' briefs, Judge Cole issued two orders on June 5, 1998

The first order granted the State's motion for an independent psychiatric examination of the Appellant. Judge Cole summarized the probable defense testimony on mental health as follows:

The defendant has recently been examined by psychiatric experts who were privately employed by the defendant's attorneys pursuant to this court's authorization, and the results of that examination provided to the Solicitor. Defendant's expert has stated that the defendant is presently competent to stand trial, had the capacity to distinguish right from wrong at the time of the offense and therefore not (sic) insane, but because of a mental illness, defect, or disease lacked sufficient capacity at the time of the offense to conform his conduct to the requirements of the law. R. p. 2520

Judge Cole reviewed the text of S.C. Code Ann. §§ 44-23-410 (Supp. 1998) and 44-23-420 (1985). R. p. 2521. Judge Cole held that the legislature imposed an affirmative duty to order an evaluation if the trial court suspected the defendant was incompetent to stand trial. R. p. 2522. Judge Cole concluded that "the legislature did not intend nor did they expressly limit a circuit court from ordering a psychiatric examination should the trial judge deem it appropriate considering the particular circumstances of the matter before the court." R. p. 2522.

Judge Cole recognized that "where a defendant offers psychiatric testimony regarding his capacity to conform his conduct to the law, it would be unfair to allow a defendant to refuse an independent psychiatric evaluation and then be permitted to introduce his own psychiatric evidence on an important factual issue critical to a proper and fair determination of the matter, whether it be a jury decision as to the proper verdict form or a decision as to the appropriate punishment dependant upon all of the relevant circumstances relating to the matter." R. p. 2526. Accordingly, Judge Cole held that "under the circumstances of this case, [it is] within the inherent power of this court to require an independent psychiatric evaluation of the defendant where he intends to offer such evidence in the trial of the case." R. p. 2527. Judge Cole also rejected the Appellant's argument that the examination violated the Fifth, Sixth and Fourteenth Amendments and the State constitution. R. pp. 2527-2531.

Judge Cole's second order defined the parameters of the independent examination. Judge Cole directed the examiner to determine the Appellant's criminal responsibility at the time of the crime. If the Appellant were criminally responsible, Judge Cole directed the examiner "to determine whether or not, because of mental disease or defect, the defendant lacked sufficient capacity to conform his conduct to the requirement of the law as applied in the statutory section of Guilty But Mentally Ill." R pp 2532-2533. Judge Cole also limited the State's ability to use any information from the independent examination.

[T]he State shall be prohibited from calling any physicians or hospital personnel for the purpose of testifying in Court as to any statements made to them by the defendant concerning the facts about the criminal charges except as herein provided. Any and all oral or written statements made by the defendant concerning the above charges and communicated to any physicians or hospital personnel in conjunction with this psychiatric examination shall not be admissible in evidence concerning these charges except as follows: (1) Where a competency hearing is required outside the presence of the jury, (2) Where the defendant testifies and such statements are used for impeachment purposes, (3) Where the defense has experts testify and such experts, upon questioning, make reference to such statements made by the defendant concerning the crime, (4) Where sanity and/or mental illness becomes an issue requiring expert testimony from the examining physician(s) of the state psychiatric facility, then said physician(s) may testify to their diagnosis and their reasons supporting said diagnosis, if called by the defendant or, in rebuttal to the defendant's or other evidence by the State. The Court further notes that the State has agreed that no effort will be made to use any statements of the defendant communicated to physicians or hospital personnel in any subsequent criminal trial of the defendant except as set forth above. R pp 2534-2535.

On July 13-14, 1998, Dr. Catherine F. Lewis interviewed the Appellant in his attorneys' presence. Dr. Lewis completed her report and evaluation on August 17, 1998. See R pp 2536-2542. Judge Cole accepted this report as a Court's exhibit before declaring the Appellant competent to stand trial. Defense counsel concurred in Dr. Lewis' assessment. R p 1651, line 4 - p 1653, line 6.

Neither the State nor the defense referred to Dr. Lewis' report or its contents during the guilt phase case. Defense counsel never requested instructions or verdict forms of 'not guilty by reason of insanity' or 'guilty but mentally ill.'

The Appellant now complains that the trial judge exceeded his statutory authority by ordering an independent mental evaluation. B O A pp 24-26. The Appellant concludes that the examination was prejudicial because it "produced evidence the state used to successfully urge that appellant be executed." B O A p 27. These arguments have no merit.

This exception does not require reversal because the Appellant has shown no conceivable prejudice from Dr. Lewis' evaluation. As noted above, the State did not rely upon any portion of the report during the guilt phase. None of the Appellant's statements about the crime or Dr. Lewis' opinions were before the jury. The only reference to the report occurred when Judge Cole accepted the report as evidence of the Appellant's competency. Defense counsel agreed with Dr. Lewis' opinion on that issue. Accordingly, nothing in the report affected the outcome of the guilt phase of the trial in violation of the Appellant's constitutional rights.

The Appellant asserts that the State referred to Dr. Lewis' conclusions about his family life on cross-examination of Mary Schultz. The record shows that the State did not rely upon the report as evidence in its sentencing case in chief, rebuttal or cross-examination. See B O A pp 26-27.

Schultz said she interviewed the Appellant, friends, teachers and family members herself. R p 2242, line 20 - p 2243, line 10. Shultz also reviewed the Appellant's school records and mental health records from the Gilliam Psychiatric, Perry and Kirkland Institutions. R p 2241, lines 11-18. Shultz said she reviewed "a forensic evaluation[,] Dr. Hyde's consultation[, and] the notes from Spartanburg Mental Health." R p 2243, lines 13-19. Shultz never said she reviewed or relied upon Dr. Lewis' report for her conclusion. Based upon her review of the documents and interviews, Shultz came to the following conclusion:

Mr. Locklair's life was a simple life. I think he had a fairly quiet existence. He was an average student. He didn't have any unusual childhood illnesses.

He held jobs and was consistent in his employment. It seemed to me that things rapidly began to change in his life in or around the beginning of '94 up until April of '95. But up to that point it, his life was, would not have been something that, I mean you would not have seen him in the Woodruff Paper other than little league or something like that. R p 2244, line 13 - p 2245, line 2

On cross-examination, Assistant Solicitor Mabry asked Shultz about a diagnosis from Spartanburg Mental Health in 1994, but the Appellant objected before she answered the question. Mabry then asked one more question.

MR. MABRY: It's my understanding, it's my understanding of **your testimony** that you didn't find anything unusual about Mr. Locklair's life, is that correct?

MS. SHULTZ: That's correct. [Emphasis added] R p 2245, line 23 - p 2246, line 1

If the State sought information about the Appellant's trouble-free childhood, it did not need to rely upon Dr. Lewis' report. The Appellant's own expert social worker provided an independent basis for this information. Accordingly, the State properly argued the Appellant's childhood did not excuse his crimes. See B O A pp 26-27, citing R p 2425, line 11 - p 2426, line 9.

Furthermore, the State did not introduce any portion of Dr. Lewis' report during therapist Roger Rhodes' testimony. Rhodes said he relied upon the same records Ms. Shultz reviewed for her social report. Rhodes also consulted with Shultz. R p 2277, lines 4-14. On cross-examination, the State asked Rhodes about a 1994 mental health evaluation that diagnosed the Appellant with antisocial personality disorder. The State also asked Rhodes about a 1997 psychological report describing the Appellant as a malingerer who faked mental illness to get out of "lock-up." The State then questioned Rhodes about day notes from the Department of Corrections that said the Appellant made homicidal threats. R p 2287, line 15 - p 2297, line 22. All of those materials predated Judge Cole's order and Dr. Lewis' evaluation.

'Error without prejudice does not warrant reversal' State v. McWee, 322 S C 387, 393, 472 S E 2d 235, 239 (1996) Nothing in the record shows that the State relied upon Dr Lewis' report or the jury even considered it Therefore, the Appellant is not entitled to a new guilt or sentencing trial See State v. Taylor, 333 S C 159, 172, 508 S E 2d 870, 876 (1998) [Error is harmless when it 'could not reasonably have affected the result of the trial'] Likewise, since nothing in the evaluation process interfered with the Appellant's right to present mitigating evidence, this Court should reject this exception on appeal

Even if this Court addresses whether a trial judge can order an independent examination when a capital defendant raises mental health issues, a new trial is unnecessary Judge Cole properly found that he had the inherent authority to require the Appellant's submission for an independent evaluation

Judge Cole ordered the evaluation because the Appellant indicated that he would raise mental health issues in the guilt and sentencing phases Nevertheless, the Appellant insists that he did not "give notice that he intended to plead guilty but mentally ill [('GBMI')]" B O A p 24 This contention has no merit

As shown above defense counsel said that their expert would testify the Appellant had a "mental illness that would cause him to lack capacity to [conform] his conduct to the requirements of the law at the time of the alleged offense " This diagnosis is consistent with the statutory requirements for a GBMI verdict See S C Code Ann § 17-24-20(A) (Supp 1998) The Appellant also indicated that he would introduce this testimony during the guilt phase Finally, defense counsel indicated that the Appellant was exploring the plea as a possible verdict R p 51, lines 2-21 Therefore, the Appellant squarely placed the contention that he was GBMI before the trial court Cf State v. Myers, 220 S C 309, 67 S E 2d 506 (1951) [Where defendant accused of murder requested sanity evaluation at veteran's, trial court properly concluded that a plea of insanity was provable and correctly

ordered evaluation at state hospital over objection]

Although the Appellant apparently abandoned his strategy at trial, Judge Cole correctly assumed *at the hearing* that the Appellant would pursue a GBMI verdict. Therefore, the issue is whether the trial court could order an independent evaluation under state law.

Section 44-23-410 requires the trial judge to order a psychiatric evaluation of a defendant “[w]henever [he] has reason to believe that a person charged with a criminal offense is not fit to stand trial because the person lacks the capacity to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity.” Section 44-23-420 further provides that the examiners’ report “shall not contain any findings nor shall the examiner testify on the question of insanity unless further examination is ordered by the court.”

Sections 44-23-410 and 44-23-420 do not specifically address an evaluation where the defendant contends that he is GBMI. However, Judge Cole correctly ruled that he had the inherent authority to order the examination.

“Courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible.” Ex Parte Dibble, 279 S. C. 592, 595, 310 S. E. 2d 440, 442 (Ct. App. 1983) [Upholding appointment of counsel for indigent inmate in civil action despite absence of express statutory or constitutional authority]. Accordingly, where express statutory or constitutional authority is lacking, the courts may look to its inherent powers in the administration of justice. This Court has recognized this principle. See, e.g., Ex Parte The State-Record Co., Inc., 332 S. C. 346, 504 S. E. 2d 592 (1998) “[A] court, once having obtained jurisdiction of a cause of action, has inherent power to do all things reasonably necessary to the administration of justice in the case before it”, In the Interest of Darlene C., 278 S. C. 664, 666, 301 S. E. 2d 136, 137 (1983) “[W]hen dealing with

juveniles, family courts may look to their inherent powers as well as to the Children's Code"], State v. Whitener, 225 S C 244, 81 S E 2d 784 (1954) [Supreme Court had inherent authority to set bond in any case, even where statute precluded appeal bonds where the sentence exceeds ten years]

Judge Cole held that legislature only intended to impose an affirmative duty on the trial court to order an evaluation whenever competency was in doubt R p 2522 Accordingly, nothing in the statute prohibited the trial judge from ordering additional evaluations under his inherent authority to do so Id

The case law from other jurisdictions supports Judge Cole's ruling Other jurisdictions have required a defendant to submit to a psychiatric examination when he raises the affirmative defense of insanity See R pp 2523 2524, *citing inter alia* State v. Jackson, 77 N C App 491, 335 S E 2d 903 (1985) The state courts have applied this principle to other mental health defenses that do not concern sanity or competency to stand trial

The New Hampshire Supreme Court addressed the State's right to an independent evaluation in State v. Briand, 130 N H 650 547 A 2d 235 (1988) In that case the State charged the defendant with murder Briand indicated that she would argue she suffered from battered woman s syndrome The State sought an independent psychiatric evaluation to verify this claim The State filed an interlocutory appeal after the trial court denied its request Id, 130 N H at 651-52, 547 A 2d at 236-37

Briand argued that the statute authorizing a psychiatric examination did not authorize an evaluation where other mental health issues were involved The New Hampshire Supreme Court disagreed

The Court first noted that the trial court had the inherent authority to order the evaluation based upon its responsibility "both to promote the ascertainment of truth and to insure the orderliness of judicial proceedings " Id, 130 N H at 652-53, 547 A 2d at 237

The Court reasoned

Where the accused supports claimed defenses at trial by introducing expert psychiatric testimony based upon personal interviews, **the finder of fact can intelligently evaluate that testimony only if the State has an opportunity to produce evidence of similar quality in rebuttal**. Concern that the trial proceed without interruption, thus minimizing inconvenience to the parties and insuring a coherent presentation of both sides of the case, further dictates that court-ordered examination by the State's expert should usually be pretrial [Emphasis added] Id, 130 N H at 653, 547 A 2d at 237

The New Jersey Superior Court reached the same conclusion in State v. Myers, 239 N J Super 158, 570 A 2d 1260 (1990). The State charged Myers with aggravated manslaughter. Myers contended that she suffered from battered woman's syndrome. Before trial the State requested and received an independent mental evaluation. On appeal, the New Jersey Supreme Court recognized that the integrity of the truth finding process required the evaluation.

The reason that the State may have an expert examine defendant in cases of claimed insanity or diminished capacity is to give the State the opportunity to respond to the anticipated testimony of defendant's experts on the same subject. No reason appears to us why the Battered Woman's Syndrome in its relation to self defense should be treated any differently. **Also involved here is the matter of insight into the operations of defendant's mind, which defendant seeks to illuminate and explain through the testimony of experts who have had the opportunity to examine her. As in cases of insanity and diminished capacity, the State must be afforded a similar opportunity and the management of the constitutional implications of defendant's statements should be essentially the same** [Emphasis added] Id, 239 N J Super at 169-70, 570 A 2d at 1266

Here, the Appellant indicated that he would present evidence concerning his capacity to conform at both the guilt and sentencing phases of trial. In order for the jury to fairly evaluate this evidence, the State was entitled to its own examination. Therefore, since an independent evaluation would ensure the integrity of the truth finding process, Judge Cole correctly concluded that he had the inherent authority to order it. Brand, Id, State v. Myers, Id

Additionally, the independent evaluation did not compromise the Appellant's right

to present his case in mitigation. See B O A p 27. As shown above, the sole purpose of the evaluation was to determine the Appellant's capacity to conform to the law, a guilt phase issue. Since the State did not use any information in the report during the sentencing phase, the Appellant has shown no prejudice to his presentation of mitigating evidence.

Finally, the Appellant cannot argue that the examination violated his right against self-incrimination. Having presented the mental health issue for the jury's consideration, "the compulsory examination for the purpose of determining his mental condition and testifying in regard thereto does not violate either the constitutional privilege of the accused of not being compelled to be a witness against himself." Myers, 220 S C at 312, 67 S E 2d at 507.⁸ This Court should reject this argument on appeal.

⁸Indeed, if the Appellant refused to submit to the examination, the State could ask the trial court to exclude his proposed mental health testimony. See State v. Sloan, 278 S C 435, 298 S E 2d 92 (1982).

III The lower court properly refused to direct a verdict because the evidence supported the 'great risk of death to more than one person in a public place' aggravator

The State sought the death penalty based upon S C Code Ann § 16-3-20(C)(a)(3) (Supp 1998) This aggravating circumstance authorizes the imposition of a death sentence where a defendant

by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person

At the conclusion of the State's sentencing phase case in chief, the Appellant moved for a directed verdict on this aggravator The Appellant contended that Tammy Bridges was the only person in danger when he shot her The Appellant further contended that the minimal distance between him and the victim did not expose anyone to danger in the street The Appellant concluded that any act of shooting at the Williams' yard or house would not support the aggravator because it was a private home, not a public place R p 2186, line 24 - p 2194, line 20

Judge Cole deferred ruling on the motion Judge Cole denied the motion at the conclusion of the sentencing phase Judge Cole concluded that "based upon the evidence in the case, there is sufficient evidence from which a jury could conclude that there was a great risk of death to more than one person, and that risk was created in a public place" R p 2408, lines 16-23 The Appellant now argues that he was entitled to a directed verdict for several reasons B O A pp 28-38 None of these exceptions require sentencing phase relief

The Applicant argues in passing that the aggravator does not apply to his case because it "was meant to cover situations where an object like an explosive was placed or used in a public place" B O A p 35, citing State v Stewart, 197 Neb 497, 250 N W 2d 849 (1977) This argument does not require a directed verdict on this aggravating factor

First, the Appellant did not present this argument to the trial judge as a ground for a

directed verdict. Defense counsel never argued that the aggravator only applied to ‘terrorist acts.’ A defendant cannot argue one ground for a directed verdict at trial, then raise a different exception on appeal. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989). Since the Appellant did not raise this argument at trial, he has waived the issue on appeal. Bailey, Id., State v. Hudgins, 319 S.C. 233, 460 S.E.2d 388 (1995).

Second, the Applicant reads a requirement into the law that contravenes the plain language of the statute. Where the statutory language is clear and unambiguous, this Court need not ‘divine’ the legislature’s intent. Gaster v. Evatt, 326 S.C. 33, 483 S.E.2d 19 (1997). Accordingly, ‘words must be given their plain and ordinary meaning without resort to subtle or forced construction in an attempt to expand the statute.’ State v. Sims, 304 S.C. 409, 423, 405 S.E.2d 377, 385 (1991).

The statutory aggravator only requires that the weapon used be ‘normally hazardous to the life of more than one person.’ The statute does not require that the weapon be one of mass destruction or commonly used by terrorists. Indeed, other jurisdictions have ruled that a gun fired in the direction of two persons satisfies the statutory aggravator. See, e.g., Jones v. State, 243 Ga. 820, 256 S.E.2d 907 (1979), *construing* GA. CODE ANN. § 27-2534 1(b)(3)⁹ *now codified as* GA. CODE ANN. § 17-10-30(b)(3) [32 caliber automatic pistol fired at two employees in convenience store supported the statutory aggravating circumstance], State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984), *construing* N.C. GEN. STAT. § 15A-2000(e)(10)¹⁰ [Shotgun fired into passenger compartment of car where two persons were seated satisfies requirements of statutory aggravating circumstance], Moran v. State 103

⁹This statutory aggravator exists when the defendant ‘by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.’

¹⁰The North Carolina statutory aggravator exists when the defendant ‘knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.’

Nev 138, 734 P 2d 712 (1987) *construing* NEV REV STAT § 200 033(3)¹¹ [Statutory aggravator existed where defendant reached around his companion seated immediately to his right in order to shoot victim] Including this requirement in the statute would be a forced construction adding terms not included or intended by the legislature Sims, Id

Third, the Appellant's reliance upon Nebraska law for an indication of legislative intent is misplaced. The Nebraska Supreme Court based Stewart on NEB REV STAT § 29-2523(1)(f). Nebraska law requires a showing that "[t]he offender knowingly created a great risk to **at least several persons**" [Emphasis added]. By its own terms, the Appellant must create a great risk of death "to more than **two other persons**" [Emphasis added]. State v. Stewart, 197 Neb. at 524, 250 N.W.2d at 864. Accordingly, the Nebraska aggravator requires that the murderer's weapon be capable of endangering a group, not just one other person. Nothing in the South Carolina statute requires a showing that the weapon must be dangerous to a group rather than the "lives of more than one person."¹²

Additionally, the Appellant's suggestion that the "great risk of death" only exists in a large, crowded setting such as a shopping mall has no merit. See B.O.A. p. 35, citing State v. Ivey, Id. and Stewart, B.O.A. p. 38. In Ivey, the defendant fired at a police officer in a shopping mall. The jury found *inter alia* the existence of the "great risk of death" aggravator. However, this Court's ruling did not address the sufficiency of the evidence supporting the aggravator or construe the statute. Nothing in Ivey suggests that the

¹¹The Nevada aggravator requires proof that "[t]he murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person]

¹²Florida's aggravator uses language like the Nebraska statute, and requires a showing that "[t]he defendant knowingly created a great risk of death to many persons." FLA. STAT. § 921.141(5)(c). "By using the word 'many,' the legislature indicated that a great risk of death to a small number of people would not establish this aggravating circumstance." Kampf v. State, 371 So.2d 1007 (Fla. 1979).

aggravator only applies in the setting suggested by the Appellant. Other jurisdictions have not read such a requirement into their analogous aggravating circumstances. Jones, Id., Moose, Id. Moran, Id. Accordingly, the proper issue before this Court is whether the State's evidence satisfied the plain, unambiguous requirements of the statute.

"In determining whether to submit an aggravating circumstance to the jury, the trial court is concerned only with the existence of evidence, not its weight. State v. Smith, 298 S. C. 482, 485, 381 S. E. 2d 724, 726 (1989). The trial judge should submit the aggravator to the jury "if supported by any direct or circumstantial evidence." Id. The Appellant contends that the evidence was deficient in several respects. None of these contentions require a directed verdict on this aggravator.

The Appellant contends that the State did not show he created a great risk of death 'in a public place.' The Appellant argues that the State's evidence only showed that he tried to fire in the direction of the Williams' house, which was not public property. The Appellant also notes he aimed at the Williams' house after he shot the victim. B. O. A. pp. 28-29, B. O. A. p. 32, B. O. A. p. 35. This argument ignores the State's theory concerning the zone of danger and the intended victims.

The State formally incorporated the testimony from the guilt phase of part of its sentencing case in aggravation. The guilt phase case showed that Allen Nichols' truck was parked on the wrong side of the street. Consequently, the passenger side of the truck faced the street. The Appellant talked to the victim on the passenger side while she stood in the street itself. R. p. 1783, line 7 - p. 1784, line 6, R. p. 1785, lines 7-20, R. p. 1819, lines 16-21, R. p. 1849, line 18 - p. 1851, line 8, R. p. 1852, lines 6-16, R. p. 2000, lines 9-14.

Robert Williams and his brother-in-law, Dewey Morgan, parked behind Nichols' truck while the Appellant talked to Tammy. Morgan parked partly on the sidewalk and in the street. Williams said the car was close enough to hear the victim talking to her mother.

R p 1780, lines 7-13, R p 1804, lines 19-21, R p 1806, lines 7-19, R p 1818, lines 13-17, R p 1819, line 22 - p 1820, line 13

Robert Williams said he heard the victim holler, "oh, my God " Tammy started to run alongside the back of the truck and toward the front of the car where Williams and Dewey Morgan were sitting Williams saw the victim duck, and heard a shot Williams then saw the Appellant carrying what appeared to be a flashlight Williams almost immediately heard a second shot The second shot hit Tammy in her back and caused her to fall in the road R p 1785, line 17 - p 1787, line 5, R p 1788, line 2 - p 1789, line 22, R p 1792, lines 18-20, R p 1807, line 20 - p 1808, line 7

Dewey Morgan also testified that he heard the victim yell before the Appellant jumped out of the truck Morgan said Tammy tried to run to the back of the truck toward Morgan and Robert Williams in the car Morgan saw "two little flashes like a little bitty flashlight shine " Morgan then realized the Appellant had shot Tammy Tammy collapsed in front of the car R p 1821, line 19 p 1822 line 24

Allen Nichols testified that the Appellant tried to fire the pistol several times, but the safety was engaged After a few seconds, the Appellant disengaged the safety and shot the victim while he pursued her Nichols saw the Appellant extend his arms as he fired Nichols believed the Appellant shot the victim from a distance of two to four feet Nichols said the victim hit the raised portion of the curb abutting the sidewalk when she fell R p 1857, line 6 - p 1860, line 4, R p 1882, line 7 - p 1883, line 25, R p 1886, line 7 - p 1887, line 24, R p 1895, lines 8-24, R p 1896, lines 8-14

The State also presented Captain Larry Gainey's testimony in the guilt phase Gainey testified that the murder weapon could hold eighteen 9 mm cartridges in its magazine Gainey received the gun for examination with fourteen cartridges in it Gainey also matched three shell casings from the scene to the gun During the penalty phase, Gainey

testified that the gun could fire a bullet up to a distance of a mile. Garney further testified that the bullets used in the gun would not deform or slow down upon impact. Instead, the bullets were designed to penetrate. Garney said the bullets could penetrate the metal of a car or pass through a person and strike others. R. p. 1724, lines 14-23, R. p. 1725, lines 3-15, R. p. 1727, line 22 - p. 1728, line 8, R. p. 2084, line 14 - p. 2085, line 24.

While the Appellant focuses upon the Williams' front yard, he ignores the street directly in front of it. Although Woodruff Street may not be "a main thoroughfare[.]" it is indisputably a public place. See B. O. A. p. 33. As the State correctly noted at trial, the Appellant's actions directly endangered "more than one person" in this public place - Dewey Morgan and Robert Williams. Both of Tammy's relatives were parked behind the truck and facing the Appellant when the victim was shot and killed. R. p. 2191, lines 9-21.

Furthermore, Tammy ultimately collapsed in front of the car as she ran toward it. Both Morgan and Williams were behind Tammy, but in the line of fire when the Appellant shot the pistol twice. As shown above, Dewey parked the car very close to Allen Nichols' truck. Accordingly, Tammy's relatives were in the zone of danger created by the firing of the pistol. See Lisle v. State, 113 Nev. 540, 937 P.2d 473 (1997) [Where defendant shot and killed victim seated in car, statutory aggravator existed because the passenger seated on the other side of the victim was in zone of danger]. See also Commonwealth v. Rios, 546 Pa. 271, 295-96, 684 A.2d 1025-1036-37 (1996), *construing* 42 PA. CONS. STAT. § 9711(d)(7)¹³ [It is not necessary that the endangered bystander be directly in the line of fire for a grave risk of death to occur"].

Moreover, in determining whether the murder weapon created a great risk of death, the trial judge may consider "the destructive capabilities of the weapon or device." Moose,

¹³The Pennsylvania aggravator requires proof that "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense."

310 N C at 497, 313 S E 2d at 517 Under appropriate circumstances, "[a] pistol used in public place may be hazardous to the lives of more than one person" Pope v State, 256 Ga 195, 211, 345 S E 2d 831, 845 (1986), *citing Jones v State*¹⁴

Here, the Appellant fired more than one shot in the direction of the car The first bullet missed when Tammy ducked As shown above, the 9 mm ammunition could penetrate flesh as well as car metal By virtue of the close range, direction and physical characteristics of the bullet, the first bullet created a grave risk of death to Robert Williams and Dewey Morgan Additionally, in light of the penetrating power of the bullet, the risk to Morgan and Williams continued when the Appellant fired the second shot at Tammy in their direction See R p 2191, line 12 - p 2192, line 2 The threat to other victims was clear, not speculative Moose, Id, Jones v State, Id Accordingly, the evidence supporting the aggravating circumstance required its submission to the jury

Additionally, the Appellant created a great risk of death to other persons in the street Allen Nichols testified that children were playing in the street when he arrived at the house Nichols said he maneuvered around the children to park his truck Immediately before the shooting, Tammy's mother yelled at some children to move away from the rear of the truck Dewey Morgan also testified that the children were "screaming and hollering" outside when the shooting started R p 1823, lines 16-17, R p 1850, lines 8-15, R p 1855, lines 9-13, R p 1880, lines 21-25

The Appellant attempted to shoot several times in Tammy's direction before disengaging the safety and firing twice The record shows the Appellant created a great risk

¹⁴In Pope, the defendant killed a shopkeeper while they struggled over the gun The third party victim was behind the defendant beating him with a mop when the gun fired The defendant then turned and deliberately shot the other victim Id, 256 Ga. At 196, 345 S E 2d at 834 In vacating the death sentence, Georgia Supreme Court ruled that the statutory aggravator was not present because the shooting of the shopkeeper did not necessarily create a great risk of death to the other victim Id, 256 Ga at 211, 345 S E 2d at 845

of death to the children playing in the immediate vicinity of Nichols' truck. Accordingly, Judge Cole correctly submitted the statutory aggravator to the jury.

The Appellant also cites Dr. Lewis' report that he did not harm anyone else at the scene. See R. p. 2541. The Appellant contends that Lewis' report "is perfectly consistent with the other evidence in this case that [he] did not go to Bridges' house intending to harm her." B.O.A. p. 34. The Appellant apparently contends that the State did not show he "knowingly" created a great risk of death. See S.C. Code Ann. § 16-3-20(C)(a)(3). This contention does not require relief.

As noted in Arguments I and II, above, Dr. Lewis' report was a court's exhibit and was not in evidence. Defense counsel did not refer to Dr. Lewis' conclusions in arguing the merits of the directed verdict motion. Accordingly, the Appellant cannot rely upon her report to show he did not 'knowingly' create a great risk of death.

Additionally, the Appellant never argued that he did not knowingly create a great risk of death to other persons. Instead, the Appellant focused upon the public nature of the crime scene and the threat to other persons. Accordingly, this argument is procedurally barred. Bailey, Id., Hudgins, Id.

Finally, even if the Appellant did not intend to harm other persons before he arrived at the scene, he clearly formed that intent when he shot Ms. Bridges. Likewise, the Appellant clearly intended to fire the first shot, as evidenced by his repeated attempts to shoot the victim while the safety was engaged. Any doubts about the Appellant's intent are erased by his subsequent attempt to fire at the house while the gun was jammed. This Court should reject this exception on appeal.

IV The lower court properly denied a directed verdict on the 'prior conviction for murder' aggravator because the statute places no time limits on the use of a previous conviction

The State also relied upon the aggravating circumstance that "[t]he murder was committed by a person with a prior conviction for murder" See S C Code Ann § 16-3-20(C)(a)(2) (Supp 1998) The Appellant moved for a directed verdict on this aggravator because "the murder [of Tammy Bridges] was committed by a person with a pending charge of murder Not a prior conviction of murder" The Appellant concluded that the statute required a showing that "at the time of the commission of the murder, the defendant had a conviction for murder" R p 2196, lines 8-11, R p 2198, lines 17-20

Judge Cole denied the directed verdict on this aggravator Judge Cole concluded that "prior conviction [means] prior to the trial of this particular case wherein Ms Locklar was also found guilty of murder" Judge Cole later informed the jury that '[a] prior conviction, within the meaning of the statute, means a conviction occurring prior to the trial of this particular case' Defense counsel objected to the instruction at the conclusion of the jury charge R p 2408, lines 4-15, R p 2460, lines 8-11, R p 2470, lines 12-14

The Appellant now argues that the legislature only intended the application of this aggravator where the prior murder conviction existed at the time of the capital murder This argument does not require a directed verdict on this aggravator

The statute does not state when the previous conviction must occur before the aggravator applies "In a capital case, the language of the statute should be construed strictly" State v Norns, 285 S C 86, 96, 328 S E 2d 339, 345 (1985) However, this Court should not construe a criminal statute "so strictly as to defeat the obvious intention of the legislature" Barrett v United States, 423 U S 212, 218, 96 S Ct 498, 502, 46 L Ed 2d 450, 455 (1976) Furthermore, this Court should not "resort to subtle or forced construction in an attempt to expand the statute" Sims, 304 S C at 423, 405 S E 2d at 385

South Carolina modeled its death penalty law on the Georgia sentencing statutes. See State v Shaw, 273 S C 194, 255 S E 2d 799 (1979). Georgia law authorizes the imposition of the death penalty where [t]he offense of murder was committed by a person with a prior record of conviction for a capital felony. GA CODE ANN § 17-10-30(b)(1).¹⁵ The Georgia Supreme Court construed this aggravator in Stephens v Hopper, 241 Ga 596, 247 S E 2d 92 (1978).

In Stephens, the defendant escaped from jail and burglarized a home. The homeowner's father arrived during the burglary, and the defendant assaulted him. The defendant then forced the victim to get into the car and ordered him to drive to another county. The defendant shot and killed the victim in an adjacent county. Id, 241 Ga at 597, 247 S E 2d at 94.

The defendant pled guilty to kidnapping-with-bodily-injury in the county where the burglary occurred. When the State tried the defendant for the murder in the adjacent county, it relied upon the kidnapping conviction as one of several aggravating circumstances. Id, 241 Ga at 597-98, 247 S E 2d at 94.

The defendant later argued that the aggravator did not exist because the 'prior record of conviction' for kidnapping did not exist when he killed the victim in the adjacent county. The Georgia Supreme Court disagreed, and held that the aggravator requires the jury to consider the defendant's status at the time of sentencing. Id, 241 Ga. at 602-3, 247 S E 2d at 97. Accordingly, "at the time of sentencing, the jury could correctly find that he had such a record." Id. The Court explained the policy reason for its conclusion:

To conclude otherwise would produce the intolerable result that an offender with no prior record could commit numerous separate murders one after the

¹⁵The South Carolina statute previously authorized the death penalty where the "[m]urder was committed by a person with a prior record of conviction for murder." S C Code Ann § 16-3-20(C)(a)(2) (1985). The General Assembly deleted the words "record of" from the statute in 1990. See Act No. 604, § 15, 1990 S C Acts 2549, 2568.

other before being apprehended, and then, at the trials for those murders, could never receive death under this aggravating circumstance, even though convicted of each and every one of the murders Id., 241 Ga. at 603, 247 S E 2d at 97

The Georgia Supreme Court has continued to apply this holding in other capital cases. See Childs v. State, 257 Ga. 243, 357 S E 2d 48 (1987) [Death penalty was proper where the State relied upon conviction for murder of defendant's wife as the aggravator in capital trial for defendant's murder of her paramour], State v. Terry, 257 Ga. 473, 360 S E 2d 588 (1987) [Where the defendant severed two of his six murder charges and was convicted of both, those convictions would support "prior record" aggravator in subsequent trial of another count]¹⁶ The Georgia Supreme Court's policy argument should be no less compelling here. This Court should not reward the Appellant simply because he evaded conviction before he killed Tammy Bridges.

At trial, the Appellant argued that the consecutive murder rationale was inapplicable because such crimes would authorize the death penalty under other aggravating circumstances. R. p. 2202, lines 4-12. If an act constitutes criminal conduct under several different statutes, the Solicitor has the discretion to select which offense to prosecute. Strickland v. State, 276 S C 17, 274 S E 2d 430 (1981), Simmons v. State, 264 S C 417, 215 S E 2d 883 (1975). Likewise, the State can seek the death penalty under the "prior conviction" aggravator although other aggravators may apply to the hypothetical facts advanced by the Appellant. Cf. State v. Woomer, 277 S C 170, 284 S E 2d 357 (1981) [State could seek death penalty for murder based upon armed robbery and larceny with a deadly weapon aggravating circumstances].

Furthermore, the Appellant's construction would not authorize the death penalty.

¹⁶Stephens construed the predecessor to GA CODE ANN § 17-10-30(b)(1). The language at issue was the same, and the Georgia Supreme Court has applied its reasoning to the current statute.

where the defendant commits two or more completely unrelated murders. In any event, other courts have recognized that the "serial murder" rationale is not the only policy argument supporting Judge Cole's construction of the statute.

Many states authorize the death penalty where the defendant was "previously convicted" of another qualifying crime before trial. None of the statutes expressly state when the previous convictions must occur before the aggravator applies. Nevertheless, those jurisdictions have held that the "previous conviction" can occur before the trial. Accordingly, the absence of the qualifying conviction before the capital offense occurred does not preclude the application of the aggravator. See, e.g., State v. Warren, 348 N.C. 80, 499 S.E.2d 431 (1998) [*Construing* N.C. GEN. STAT. § 15A-2000(e)(2)¹⁷], Jones v. State, 381 So.2d 983 (Miss. 1980) [*Construing* MISS. CODE ANN. § 99-19-101(5)(b)¹⁸], Calambro v. State, 114 Nev. 106, 952 P.2d 946 (1998) [*Construing* NEV. REV. STAT. § 200.033(2)¹⁹]. The Nevada Supreme Court explained the rationale for this construction of the aggravator:

Aggravating circumstances, as defined by the statute, provide direction to the sentencing authority as it considers an appropriate punishment for the defendant. The statute was never intended to operate on the vagaries of conviction sequences. Instead, the focal point is the time of sentencing. The sentencing panel is entitled to consider all relevant aspects of the defendant's criminal background prior to rendering sentence. It would be both absurd and counterproductive for this Court to construe the plain language of the statute so as to exclude convictions of murders or crimes of violence occurring after the primary offense but prior to the penalty phase of a defendant's trial. [Emphasis added] Gallego v. State, 101 Nev. 782, 792-93, 711 P.2d 856, 863-64 (1985).

¹⁷The North Carolina aggravator authorizes the death penalty where the "defendant had been previously convicted of another capital felony."

¹⁸The Mississippi statute authorized the death penalty where "[t]he defendant was previously convicted of another capital offense or of a felony involving the use of violence to the person."

¹⁹Nevada's statute permits capital punishment where "[t]he murder was committed by a person who was previously convicted of another murder or a felony involving the use or threat of violence to the person of another."

As the Nevada Supreme Court correctly noted, the focus of the aggravator is the defendant's conduct, not simply his criminal record. Accordingly, where the Applicant committed two murders six months apart, the aggravator authorizes the jury to consider the Appellant's past behavior in determining the appropriate punishment in the sentencing phase. This Court should adopt the construction and compelling policy rationale advanced by our sister states, and reject this exception on appeal.

Finally, the Appellant's construction of this Court's Sims opinion does not require a different result. In Sims, the defendant was convicted of murder in another state before his trial in South Carolina. This Court ruled that the defendant was not entitled to an instruction on the "no significant prior history of crimes of violence" mitigator. This Court held that the reference to "prior" in the statute meant before trial, not before the crime occurred. Id., 304 S.C. at 423, 405 S.E.2d at 385. Based upon Sims, the Appellant contends that the use of the word "defendant" in the statutory mitigator shows the legislature's intent to focus on his pre-trial status under the aggravator, which uses the word "person." B.O.A. pp. 42-43.

Nothing in Sims supports the Appellant's construction of the statute. Sims construed the legislative intent in the choice of the word "prior," not "defendant." Furthermore, as shown above, the statutory aggravator does not simply focus upon the defendant's record as an aggravating circumstance. The aggravator also directs the jury to consider the defendant's individual characteristics in determining the appropriate punishment. Accordingly, the word choice does not indicate the legislature intended the aggravator to apply only to pre-trial criminal convictions.²⁰ This Court should reject this exception on appeal.

²⁰As shown above, Nevada's aggravator includes the term "person." Nevada's analogous statutory mitigator directs the sentencer to consider whether "[t]he defendant has no significant history of **prior** criminal activity" [Emphasis added]. NEV. REV. STAT. § 200.035. Despite this language, Nevada has construed the aggravator to focus upon the defendant's status at the time of trial.

- V Even if one aggravating circumstance is invalid, this Court should affirm the death sentence where another aggravator supports its imposition

The Respondent submits that the law and the evidence amply supports both aggravating circumstances in this case. However, even if this Court rejects one of the aggravating circumstances, it should uphold the death sentence where another valid aggravator supports the verdict.

The sentencer does not “weigh” aggravating and mitigating circumstances in determining the appropriate punishment for capital murder. Jones v. State, 332 S. C. 329, 333, n. 1, 504 S. E. 2d 822, 824 (1998). Accordingly, the failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based. State v. Elkins, 312 S. C. 541, 545, 436 S. E. 2d 178, 180 (1993), citing Zant v. Stephens, 462 U. S. 862, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983). Therefore, the failure of one aggravating circumstance should not invalidate the death sentence where the other circumstance is present and supported by competent evidence.

The Appellant claims that the invalidity of even one of the aggravating circumstances requires the reversal of the death sentence. B. O. A. pp. 44-48, citing Tuggle v. Netherland, 516 U. S. 10, 116 S. Ct. 283, 133 L. Ed. 2d 251 (1995). This argument has no merit.

Tuggle vacated a Fourth Circuit Court of Appeals’ opinion reversing a grant of habeas corpus relief. The jury recommended a death sentence based upon two aggravating circumstances, vileness and future dangerousness. The Court held that where the State asserted “vileness,” the absence of defense testimony to rebut the psychiatric evidence could have affected the verdict, although another valid aggravator was present. Accordingly, the Supreme Court remanded the case to determine whether a harmless error analysis was

applicable Id., 516 U S at 13-14, 116 S Ct at 285-286, 133 L Ed 2d at 256 ²¹

Under Tuggle, the focus of the harmless error analysis is whether "the existence of a valid aggravator excuses a constitutional error in the admission or exclusion of evidence" [Emphasis added] Id., 516 U S at 14, 116 S Ct at 285, 133 L Ed 2d at 256. Accordingly, the presence of an invalid aggravator does not automatically require reversal. Instead, the reviewing court must determine whether the jury heard evidence affecting its verdict that would not have been introduced but for the submission of an invalid aggravator. See Stringer v. Black, 503 U S 222, 112 S Ct 1130, 117 L Ed 2d 367 (1992) [The reviewing court must determine what the sentencer would have done absent the presence of the invalid aggravating circumstance].

In this case, the State introduced evidence about the facts and circumstances of the Appellant's Laurens County murder conviction to support the prior conviction aggravator. The very purpose of the sentencing phase is to direct [the sentencer's] attention to the specific circumstances of the crime and the characteristics of the offender." State v. Matthews, 296 S C 379, 390, 373 S E 2d 587, 594 (1988). Accordingly, evidence and details about the defendant's prior murder would have been admissible as evidence of the Appellant's character in determining the appropriate sentence. See State v. Skipper, 285 S C 42, 328 S E 2d 58 (1985) [Details about defendant's rape of State's witness was admissible for jury's sentencing determination as evidence of defendant's individual characteristics]. See also State v. Gaskins, 284 S C 105, 124, 326 S E 2d 132, 143 (1985) [Details of other murders were admissible in capital trial]. Therefore, even if this Court deems the prior conviction aggravator invalid, no constitutional error resulted because the jury did not consider otherwise inadmissible evidence.

²¹After applying the correct standard, the Fourth Circuit ruled that the error was harmless. Tuggle v. Netherland, 79 F 3d 1386 (4th Cir.), cert denied 519 U S 894 (1996).

Furthermore, the primary evidence concerning the 'great risk of death' aggravator was the State's guilt phase case which was introduced without objection. The State also introduced Gertrude Langford's testimony that she was the Williams' next door neighbor when the shooting occurred. As shown in the *Statement of Facts*, Langford said she was in her living room facing the street and reading by the window when she heard two gunshots. Langford went to the door and heard someone yell "he killed my sister." The State also introduced Captain Garney's testimony concerning the firing characteristics of the murder weapon. This evidence would have been admissible as testimony concerning the circumstances of the crime. Matthews, Id. Accordingly, if the prior murder conviction aggravator is present, the invalidity of the great risk of death circumstance does not require the reversal of the Appellant's death sentence. This Court should reject this exception on appeal.

CONCLUSION

For all of the foregoing reasons, this Court should affirm the Appellant's conviction and sentence

Respectfully submitted,

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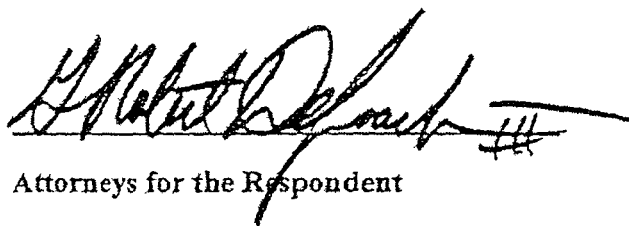
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Attorneys for the Respondent

Columbia, South Carolina

January 17, 2000

2660

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of General Sessions
Honorable J Derham Cole, Circuit Court Judge

Case No 95-GS-42-2521

The State,

Respondent,

v

Jimmy Clifton Locklair,

Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 210(b), SCACR

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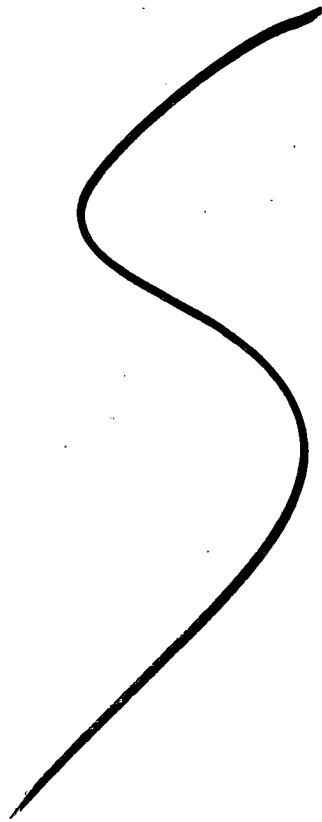
Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the Final Brief of Respondent in the above-referenced case has been served upon opposing counsel by mailing three (3) copies of the same to Robert M Dudek, Esquire, South Carolina Office of Appellate Defense, 1122 Lady Street - Suite 940, Columbia, SC 29201, with postage prepaid this 17th day of January 2000


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Charles Grose

From Don Zelenka [AGDZELENKA@ag.state.sc.us]
Sent Friday, October 17, 2008 4:26 PM
To Charles Grose; Alexander S. Law; Clerk Macaulay (Brittany Tye)
Cc Teresa Norris; Tara Schultz
Subject Re: John Hughey - Case Cite Correction

In my argument Wednesday in response to the question on the applicability of transferred intent to manslaughter I was able to recall the case but not the name concerning its applicability. The particular case cite I was recalling was *State v Fennell*, 340 SC 266, 531 SE2d 512 (2000) which stated "[T]his Court in several cases has held that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent."

I also note that applicability of this doctrine goes back to a common law concept affirmed in *State v Williams*, 189 SC 19, 199 SE 906 (1938) where a defendant was convicted of manslaughter (it may also be regarded as a well settled principle that a man will be held guilty of murder or manslaughter who in an attempt to kill one person by mistake kills a third person although there is no intention or design to kill such person'). Also *State v Gandy*, 283 SC 571, 324 SE2d 65 (1984).

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS
Case No 2008-GS-10-3142

THE STATE OF SOUTH CAROLINA

vs

STATUTORY INSTRUCTIONS

WILLIAM OLIVER DICKERSON,

Defendant

In determining whether to recommend that the Defendant, William Oliver Dickerson be sentenced by the Court to Life Imprisonment or to Death you may consider the following statutory AGGRAVATING CIRCUMSTANCE(S)

- 1 The murder was committed while in the commission of the crime of criminal sexual conduct
- 2 The murder was committed while in the commission of the crime of kidnapping
- 3 The murder was committed while in the commission of the crime of torture

You may also consider the following MITIGATING CIRCUMSTANCE(S)

- 1 The murder was committed while the defendant was under the influence of mental or emotional disturbance
- 2 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

3 The age or mentality of the defendant at the time of the crime

You may also consider any NON-STATUTORY mitigating circumstance(s)

Charleston, South Carolina

May 7, 2009

R MARKLEY DENNIS, JR Presiding Judge

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS
Case No 2008-GS-10-3142

The State of South Carolina

vs

JURY'S VERDICT ON PROOF OF
AGGRAVATING CIRCUMSTANCES

WILLIAM OLIVER DICKERSON,

Defendant

_____ (a) WE, THE JURY in the above-entitled case, find no statutory
aggravating circumstances

PRESIDING JUROR

_____ (b) WE, THE JURY in the above-entitled case, find beyond a
reasonable doubt the following aggravating circumstances

PRESIDING JUROR

May _____, 2009
CHARLESTON, SOUTH CAROLINA

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS
Case No 2008-GS-10 3142

THE STATE OF SOUTH CAROLINA

vs

RECOMMENDATION OF SENTENCE
LIFE IMPRISONMENT

WILLIAM OLIVER DICKERSON,

Defendant

WE, THE JURY in the above-entitled case, recommend to the Court that
the Defendant, WILLIAM OLIVER DICKERSON, be sentenced to life imprisonment
without the possibility of parole

PRESIDING JUROR

Charleston South Carolina

May _____ 2009

STATE OF SOUTH CAROLINA
 COUNTY OF CHARLESTON

IN THE COURT OF GENERAL SESSIONS
 Case No 2008-GS-10-3142

THE STATE OF SOUTH CAROLINA

vs

RECOMMENDATION OF SENTENCE
 DEATH PENALTY

WILLIAM OLIVER DICKERSON,

Defendant

 WE, THE JURY in the above-entitled case, having found beyond a reasonable
 doubt the existence of the following statutory aggravating circumstance(s)

do recommend to the Court that the Defendant, William Oliver Dickerson, be sentenced
 to death

 Foreman

Charleston, South Carolina

May _____, 2009

Mr Presiding juror and members of the jury, you have heard the testimony and evidence and arguments of the state and the defendant I will now explain to you the law that applies to this case

Under the constitution and laws of South Carolina, you are the finders of the facts in this case I do not have the right to pass upon the facts or even to express any opinion I might have as to them

In this proceeding, as in the first phase, ladies and gentlemen, a defendant has the constitutional right to remain silent, and the assertion of such constitutional right cannot and must not be considered by you in your deliberations Under your oath then, you are to reach no inference and draw no conclusion whatsoever from the fact that the defendant did not testify The failure of this defendant to testify should not even be discussed in the jury room The state is the only party having a burden of proof in this phase The failure of a defendant to testify is not a factor to be considered by you in determining whether the state has met its burden of proof beyond a reasonable doubt as to the existence of aggravating circumstances

As you may recall, a reasonable doubt is a doubt that makes an honest, sincere, conscientious juror in search of the truth in the case hesitate to act Proof beyond a reasonable doubt is proof that leaves you firmly convinced of a particular fact or circumstance There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every

possible doubt. If based on your consideration of the evidence you are firmly convinced that a particular fact or circumstance has been established then the state would have met its burden of proof as to that particular fact or circumstance. If on the other hand you think there is a real possibility that the fact or circumstance has not been established, you must give the defendant the benefit of the doubt and find that the state has failed to meet its burden of proof as to that particular fact or circumstance.

The evidence you are to consider consists of the testimony of the witnesses and the exhibits that have offered and received during the trial. My comments and the arguments of the attorneys are not evidence.

As you will recall, ladies and gentlemen, there are two types of evidence used in presenting a case-- direct evidence and circumstantial evidence.

Direct evidence is the testimony of a person who claims to have actual knowledge of a fact, such as an eyewitness. It is evidence which immediately establishes the main fact to be proved.

Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. It is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not on personal knowledge or observation.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. You should weigh all the evidence in the case.

The rules of evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call "expert witnesses." A witness who, by education and experience, has become expert in some art, science, profession, or calling may state an opinion as to relevant and material matter, in which the witness claims to be an expert, and may also state the reasons for the opinion.

You should consider any expert opinion received in evidence in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely. An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an expert's opinion, even though it is not contradicted.

It is your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth. You may consider

whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of a witness while on the witness stand -- was he or she straightforward, or hesitant in answering the questions? Was the testimony of a witness consistent -- or inconsistent? How did the witness come to know the facts that he or she testified to? What was his or her ability to know these facts?

A person who has a past criminal record is competent to testify during a trial. A past record does not affect the ability of that witness to testify. The past record may only be considered by you, if at all, in determining the witness' believability.

Remember, you are the sole judges of the facts in the case and of the believability of any and all of the witnesses. In determining the question of credibility or believability of the witness, you may believe one witness as against several witnesses or several witnesses as against one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. These considerations you do not exercise arbitrarily, but if in your good judgment there is sound reason in the record of this case for so doing, you have that prerogative. Your objective, ladies and gentlemen, is to find the truth, regardless of the source of evidence.

Mr Presiding juror and members of the jury, shortly it will become your duty to determine the sentence that this court will impose upon the defendant, William Dickerson

There are two verdicts that you are to consider in this case One is life imprisonment without the possibility of parole and the other is the death penalty The order in which I explain these two options is in no way a recommendation by this court as to which sentence you should choose to recommend, it is simply that one must be stated first Also remember that although I use the term "recommend," the defendant will actually be sentenced to whatever is recommended by you This court will follow your sentencing recommendation

In order for you to decide which sentence to recommend, you must first determine whether a statutory aggravating circumstance exists beyond a reasonable doubt

What is a statutory aggravating circumstance? It is a fact, an incident, a detail or an occurrence which the legislature has declared by statute would make worse, that is, "aggravate," the offense of murder when the two occur together In other words, it is something that increases the enormity of the offense or makes the injury more grievous

Torture

I CHARGE YOU that torture occurs when the victim is subjected to serious physical abuse before death Torture occurs when the victim is subjected to

aggravated battery What is aggravated battery? An aggravated battery is an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation, such as the use of a dangerous, or deadly object, the infliction of serious bodily injury with intent to commit a felony, a great disparity between the ages and physical condition of the parties, a difference in the sexes

Physical torture is the intentional infliction of serious, vile, horrible, or inhuman abuse upon the body of another before death The instantaneous death of the victim does not constitute torture Physical torture may include the malicious infliction of bodily harm to another by depriving her/him of a member of her/his body, or by rendering a member of her/his body useless, or by seriously disfiguring her/his body, or a member of her/his body, or the intentional and unmerciful prolonging of severe pain and abuse upon the body, or the intentional and unmerciful infliction of serious and extensive physical pain and abuse of the body of another

First degree criminal sexual conduct

I CHARGE YOU the first element which the state must prove beyond a reasonable doubt is that the defendant engaged in a sexual battery with the victim A sexual battery is any intrusion, however slight, of any part of a person's body or of any object into the anal openings of another person's body, except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes In addition the state must prove beyond a reasonable doubt at least one of the following

1) The defendant used aggravated force to accomplish the sexual battery Aggravated force means the use of physical force or physical violence of a high and aggravated nature to overcome the victim This includes the threat of using a deadly weapon, or

(2) The victim submitted to sexual battery while the victim was also the victim of forcible confinement, kidnapping, or any other similar act or offense

Kidnapping

I CHARGE YOU the state must prove beyond a reasonable doubt that the defendant knowingly and unlawfully seized, confined, kidnapped, abducted, or carried away another person without authority of law. The offense of kidnapping commences when one is wrongfully and unlawfully deprived of his freedom and continues until his freedom is restored.

Let me emphasize to you that these three circumstances are the only circumstances you may consider as an aggravating circumstance. If you find that the state has proven beyond a reasonable doubt the existence of at least one of the circumstances listed on the statutory instruction form, then you may consider recommending to this court that the defendant be sentenced to death. For you to reach this conclusion it must be a unanimous decision.

Please pay particular attention to this: you are never required to recommend the death penalty. Even if you find that a statutory aggravating circumstance existed at the time the offense occurred, you could still recommend a life sentence.

I instruct you further that should you find the state has not proven that such a circumstance existed -- that is to say, you find that you have a reasonable doubt as to the existence of such a circumstance -- then you

would not be authorized to recommend the death penalty, and your only recommendation must be life imprisonment

However, should you find beyond a reasonable doubt that the aggravating circumstance existed at the time of the murder, you would write such circumstance on the form "jury's verdict on proof of statutory aggravating circumstances," and complete the form as instructed with all twelve of you signing the form

As I previously instructed, if you find the existence beyond a reasonable doubt of a statutory aggravating circumstance, then you are permitted -- but not required -- to recommend the death penalty. There are other matters to be considered in reaching your decision. First, whether there is any evidence as to the existence of any statutory mitigating circumstance or any other mitigating circumstances, and second, whether, for any reason or for no reason at all, the defendant should be sentenced to life imprisonment.

What is a "statutory mitigating circumstance"? It is a fact, an incident, a detail or an occurrence which the general assembly has declared by statute would reduce the severity of the offense of murder. In other words, it is a circumstance recognized by statute as one which, in fairness and mercy, may be considered as extenuating or as reducing the degree of moral culpability for the commission of the act of murder. Ladies and gentlemen, a mitigating circumstance is neither justification

nor excuse for murder. It simply lessens the degree of the defendant's actions, that is, it tends to lessen the severity of the punishment.

What statutory mitigating circumstances should you consider in this case? The three which you are to consider are: the murder was committed while the defendant was under the influence of mental or emotional disturbance, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired and the age or mentality of the defendant at the time of the crime.

The phrase "any other mitigating circumstance" refers to those mitigating factors which are not specifically provided for by statute, but which the defendant claims reduces the degree of the punishment he should receive. You need not find the existence of a mitigating circumstance beyond a reasonable doubt and the defendant has no burden of proof as to mitigating circumstances.

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

If you conclude that a statutory aggravating circumstance exists, you must then also consider whether the defendant should be sentenced to life imprisonment for any reason, for no reason or as a recommendation of mercy. Should such be your decision, you would so indicate by returning to the court the "recommendation of sentence, life imprisonment without the possibility of parole" form, which will be signed by the presiding juror.

In other words, you may choose to recommend life imprisonment if you find a mitigating circumstance, or you may choose to recommend life imprisonment as an act of mercy. In any instance, whatever your decision it must be a unanimous one.

In considering whether to recommend that the defendant is to be sentenced to death or life imprisonment, I charge you that, as jurors, you must decide the issue involved in this proceeding without bias and without prejudice to any party. You cannot allow yourselves to be governed by prejudice, by passion, sympathy or by public opinion. Both the state and the defendant have the right to expect that each of you will carefully and impartially consider all of the evidence in the case, and that you will follow the law as I have explained it to you.

At this time, ladies and gentlemen, I will ask the alternate jurors to stand aside and the rest of you retire to the jury room. However, do not begin your deliberations until I send word for you to do so. I must talk

to the lawyers at this point, and I may have to call you back into the courtroom. You may retire to the jury room.

END

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE EIGHTH JUDICIAL CIRCUIT

COUNTY OF GREENWOOD)

John Kennedy Hughey, #5055,
 Applicant

v

State of South Carolina,
 Respondent

Case No 2000-CP-01-0212

Applicant's Post-Hearing Reply Brief

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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 (Issue IV) 18

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Applicable Legal Principles

Respondent asserts the ABA Guidelines are aspirational, not mandatory minimum standards, and that Applicant relies almost exclusively on them to support his contention trial counsel was ineffective. Both prongs of this statement are incorrect.

1) The ABA Guidelines have been accepted as mandatory minimum standards

Since the ABA published the first edition of the Guidelines in 1989,¹ they have been recognized as prevailing professional norms in the area of capital defense. In *Wiggins v. Smith*, 539 U.S. 510 (2003), the Guidelines were considered a component of defining prevailing professional norms for a mitigation investigation completed for a 1989 trial. More importantly, the Guidelines were held to be “well-defined norms” for the performance of counsel. *Id.* at 523. Likewise, in *Rompilla v. Beard*, 545 U.S. 374 (2005), trial counsel was held to be ineffective for failing to conform their investigation to the standards set forth in the Guidelines. The Court unequivocally defined the Guidelines as instructions on the minimum performance required of counsel.

In 1989, shortly after *Rompilla*’s trial [which took place in 1988], the ABA promulgated a set of guidelines specifically devoted to setting forth the **obligations** of defense counsel in death penalty cases. Those Guidelines applied the **clear requirements** for investigation set forth in the earlier Standards to death penalty cases and imposed a similarly **forceful directive**.

Id. at 387, fn. 7 (emphasis added)

Respondent erroneously argues that if the Guidelines are minimum requirements, each guideline must be strictly adhered to. Respondent fails to recognize, however, that the Guidelines themselves allow flexibility for counsel acting with “strong strategic reasons” not to

¹ ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. The first edition published in 1989 was eventually superseded by the second edition in 2003.

follow the blackletter Guidelines 1989 Guideline 11.8.6(A). Likewise, while both the United States and South Carolina Supreme Courts have recognized the Guidelines as standards to gauge the effectiveness of counsel, both courts have also recognized that deviations from the Guidelines' mandates may be acceptable when counsel has made reasoned, strategic decisions to do so. See *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) ("the Federal Constitution imposes one general requirement that counsel make objectively reasonable choices"), *Wiggins v. Smith*, 539 U.S. 510 (2003) (counsel's limitation on mitigation investigation must be supported by professional judgments deemed reasonable), *Council v. State*, 380 S.C. 159 (2008) (counsel's conduct will not be considered ineffective if there is a valid reason for their stated strategy and the strategy itself is reasonable).

2) The Applicant relies on sources other than the Guidelines

During the course of their representation, Tinsley and Garrett had a number of resources on how to properly defend a capital case at their fingertips,² but they failed to put the information to use and heed the advice they were given. Upon being retained for the case, Tarr presented Tinsley and Garrett with an affidavit outlining the components of a mitigation investigation. Tarr's affidavit tracks the mandates of the Guidelines and is additional evidence of the prevailing professional norms at the time of Hughey's trial. Applicant's Ex. 6. Further, Tinsley and Garrett sought David Bruck's advice on the application of transferred intent to the facts of Hughey's case. The state concedes "everything in [Garrett's] notes of the meeting [with Bruck] concerns the guilt phase of the case." Respondent's Post-Hearing Brief 45. Knowing Bruck is an

² Handling Your 1st Case Life in the Balance IX (1997) Applicant's Ex. 1, Understanding Mental Illness through Images & Metaphors Life in the Balance IX (1997) Applicant's Ex. 2 Possible Penalty Phase Themes Applicant's Ex. 3

authority on capital defense, trial counsel should have taken advantage of his expertise and vast knowledge on penalty phase strategies

Applicant also relies on and hereby incorporates the body of state and federal law outlined in the Applicable Legal Principles of his Post-Hearing Brief and the statement of the law contained in footnote 2 of the Respondent's Post-Hearing Brief Applicant's Post-Hearing Brief 12-22, Respondent's Post-Hearing Brief 18-19

Issue I

Despite substantial irrefutable evidence to support convictions for murder, counsel advised Hughey and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument that Hughey was guilty only of voluntary manslaughter, a defense contradicted by law and by Hughey's and the defense expert's testimony

The state summarizes the overwhelming evidence of Hughey's guilt. It was "[t]wo senseless, needless, tragic, unjustified murders." As documented by Marcus Harris' phone calls to his mother and Luevinia Harris' phone call to 911, Hughey held Jackson and Harris at gunpoint for eight minutes before killing them. Forced entry was evident by "the damage to the front door and the strike plate on the floor." "The ominous planning of the tragedy was revealed" by Hughey's suicide note. Respondent's Post-Hearing Brief 5-11. The state and Hughey agree about the essential facts.³ Applicant's Post-Hearing Brief 23-38.

Despite previously admitting Hughey's "actions do not support voluntary manslaughter" and trial counsel "struggle[d] to come up with some defense to the charges where none existed," Respondent's Pre-Hearing Brief 17-18, the state now argues trial counsel's strategy "was based on a reasonable investigation and legal analysis and supported by some evidence." Respondent's Post-Hearing Brief 28. After identifying the aggravating factors noticed by the prosecution, the state summarized trial counsel's strategy:

The defense decided to remove the existence of the [aggravating] factors in the guilt phase by affirmatively challenging through Hughey's testimony and expert

³The state asserts Hughey "was not willing to assume he would automatically be convicted of murder." Respondent's Post-Hearing Brief 28. This assertion is not supported by the record. Hughey offered to plead guilty to two murders and burglary first degree for consecutive life sentences and looked to his lawyers to avoid a death sentence. PCR 21-280-81-471. Additionally, counsel must respond to the state's comment. Hughey never testified in this PCR action, and misleading suggestion. It is unclear what alternate course Hughey would agree to that current counsel is now suggesting. Respondent's Post-Hearing Brief 28, fn. 5. That Hughey did not testify at the PCR hearing is irrelevant. He was present and agreed with his lawyers' presentation. Hughey's position can be presented by counsel. See Rule 801(d)(2) SCRE. At the time of his trial, Hughey had a 80 IQ. Tr. 89. His IQ had deteriorated to 69 by 2005 and to 67 by 2008, and Dr. Schwartz Watts testified Hughey's intellectual functioning will continue to decline over time. PCR 374-75-389-90, Applicant's Ex. 48.

witnesses each of these [aggravating] factors. As to the burglary, the defense sought to establish that Hughey was an invitee into Ms. Harris' mobile home and dispute through expert testimony the state's claim that the front door was forced open. As to the larceny of the vehicle, the defense sought to remove the [aggravating] factor by showing that Hughey has provided funding for the vehicle and has common possession and use of the vehicle. Finally, as to whether "Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct," the defense chose to prove the death of Ms. Harris was not murder but more probably an unintentional killing resulting at [sic] as an accident from the struggle between Hughey and Ms. Jackson over a weapon arising from an initial series of provocations begun by Ms. Jackson and to a lesser possibility that Ms. Jackson's was also one of manslaughter.

Respondent's Post-Hearing Brief 27

This strategy was doomed to fail from the start. Hughey has already analyzed South Carolina's law concerning the elements of voluntary manslaughter and transferred intent. Applicant's Post-Hearing Brief 43-59. Even if the state is correct that there was some evidence to support a voluntary manslaughter instruction, the evidence of Hughey's guilt was so overwhelming no reasonable attorney would pursue the manslaughter defense.⁴ The state concedes Garrett "recognized rather early on that it was highly likely they would not be successful," and "presenting this defense in the guilt phase **risked alienating the jury**." Respondent's Post-Hearing Brief 36, 38 (emphasis added). The state also concedes Tinsley "had

⁴ The state contends the voluntary manslaughter instruction was proper based on Hughey's initial statement to his sister and the police and Hughey's trial testimony. The state in fact continues to call attention to Hughey's inconsistent statements by pointing out that Hughey changed his story from Jackson bringing the shotgun into the encounter to his testimony at trial when confronted with the overwhelming evidence of his possession of the shotgun. The state relies on Hughey's claim there was an initial encounter with Jackson inside the house followed by a second encounter at the front door between the two after Hughey got the shotgun out of the car. Respondent's Post-Hearing Brief 31-32. For when a voluntary manslaughter instruction should be given, the state relies on *State v. Knoten*, 296 S.C. 296, 555 S.E.2d 184 (1993); *Carter v. State*, 301 S.C. 396, 392 S.E.2d 184 (1990) *overruled on other grounds by Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); and *State v. Gilliam*, 296 S.C. 395, 373 S.E.2d 596 (1998). The state argues the trial court cannot decline a voluntary manslaughter instruction when there is about to be a second encounter. Respondent's Post-Hearing Brief 64-66. The state's position, however, does not take into account Hughey's entire testimony and the legal effect of his admissions on the witness stand. Applicant's Post-Hearing Brief 31-37, 45-49. Counsel, however, knew how Hughey would testify at trial and failed to recognize the legal significance of Hughey's damaging admissions. Applicant's Post-Hearing Brief 43-59. In addition to Hughey's testimony dooming the manslaughter defense, Don Girndt, the defense's crime scene expert, confirmed the state's theory of the case. Applicant's Post-Hearing Brief 37-38, 47.

concerns about the manslaughter defense” and knew “that it was a stretch and had the possible risk of alienating the jurors” Respondent’s Post-Hearing Brief 49 (emphasis added) Under these circumstances, reasonable attorneys would have conceded guilt and “strive[n] at the guilt phase to avoid a counterproductive course” *Florida v Nixon*, 453 U S 175, 191 (2004) See also *Knowles v Muzayance*, 129 S Ct 1411, 1420 (2009) (defense counsel’s performance was effective in capital trial where counsel advised the defendant to abandon his insanity defense, which was “doomed to fail”)

The state contends Garrett thoroughly analyzed the law, in part, because he talked to David Bruck and Professor Wilham McAninch about transferred intent Respondent’s Post-Hearing Brief 43

When Garrett talked to Bruck, he and Tinsley had already decided to present the manslaughter defense PCR 294 Garrett did record, “Transferred intent Yes Mans To Aunt” Applicant’s Ex 28 Garrett’s notes, however, are compelling evidence Bruck warned Garrett Hughey would probably be convicted of two murders Specifically, Bruck warned Garrett about the felony murder rule ⁵ Garrett wrote

Felony murder = implied malice in SC
(1) Plead? No permissive
Gore v Leech [sic]

Applicant’s Ex 28,⁶ PCR 291-96 In *Gore v Leake*, 261 S C 308, 199 S E 2d 755 (1973), the South Carolina Supreme Court affirmed a murder conviction and held, “The law itself implies

⁵ According to Garrett s notes Bruck also warned him the statements from December 3 1995 where Hughey threatened Jackson were admissible the 911 tape was admissible and Harris statements to Marcus Harris were admissible present sense impressions Applicant s Ex 28

⁶ Even though Garrett s notes reflect the state did not plead felony murder it is well settled South Carolina follows the common law rule of murder and makes no distinction between murder and felony murder *State v Norris* 285 S C 86, 92 328 S E 2d 339 342 43 (1985) *overruled on other grounds by State v Torrence* 406 S E 2d 315 328

the malice from proof of the felony”⁷ Garrett discussed the burglary facts with Bruck and was aware malice could be inferred from the commission of a burglary Applicant’s Ex 28, PCR 295

The state also relies on Garrett’s claim he talked to Professor William McAninch There are no notes of this conversation The state cites McAninch, Fairy, and Coggiola, *The Criminal Law of South Carolina* (5th Ed 2007) Respondent’s Post-Hearing Brief 43 McAninch and Fairy, *The Criminal Law of South Carolina* (3rd Ed 1996), however, is the edition of the book in publication at the time of Hughey’s trial This edition discusses transferred intent in connection with an unintended victim McAninch writes

The result is sometimes described as being a function of the doctrine of “transferred intent” whereby the actor’s intent to kill his intended victim is said to be transferred to his actual victim This function is really unnecessary As is indicated by South Carolina cases, all that is required is the mental state of malice

McAninch (3rd Ed 1996), p 17 Professor McAninch, accordingly, would have directed Garrett to look at the evidence of malice in Hughey’s case As both parties have pointed out, there is overwhelming evidence Hughey killed both Jackson and Harris with malice aforethought Applicant’s Post-Hearing Brief 23-38, Respondent’s Post-Hearing Brief 5-11

Like Bruck, McAninch would have pointed Garrett to the felony murder rule He writes in his book, “[T]he commission of the felony supplies the malice which then makes any

305 S C 45 69 (1991) and *State v Thompson*, 278 S C 1 7 292 S E 2d 581 585 (1982) *overruled on other grounds by State v Torrence* 406 S E 2d 315 328 305 S C 45 69 (1991)

⁷ See also *Sessions v Clerk of Court Conway* 265 S C 41 216 S E 2d 764 (1975) (held that there was insufficient withdrawal from participation in robbery and fatal assault to prevent application of felony murder rule) and *State v Hicks* 257 S C 279 185 S E 2d 746 (1971) (when defendant was charged as a principal the court properly charged jury on the law of felony murder)

homicide committed pursuant to the felony, murder ” McAninch (3th Ed 1996), p 83 (citing *Gore v Leeke*)

Additionally, it was not reasonable for trial counsel to believe the jurors would acquit Hughey of burglary. Even if Hughey initially entered Harris’ home as an invitee, he lost that status once he went outside to the car to get the gun. Hughey testified Jackson tried to close the door in his face but he went inside anyway. Tr 3141-43, 3230-31. At that point, Hughey did not have permission to be in Harris’ home. Trial counsel defended the burglary based on evidence of prior damage to the front door. Tr 3267, 3272-74. It was not reasonable to believe the jurors would conclude there was not a burglary based on prior damage to the door because of the damaged front door frame and the strike plate of the front door lying on the floor. This obvious evidence of forced entry was confirmed by Mack Harris testifying about the condition of the door before and after the crimes, the observations of Abbeville Police Officer Barry New as he entered the house to investigate, the forensic crime scene investigation of SLED Agent David Black, the photographs the state introduced into evidence, and defense expert Don Girndt acknowledging it “took some force to break the [front] door frame.” Tr 2482-85, 2907, 2354 55, 3303, State’s Tr Exs 19, 20.

This defense also overlooked two important legal principles. First, burglary requires entry without permission. Forced entry is not required. S.C. Code §§16-11-311 through 16-11-313, *State v Kornahrens*, 290 S.C. 281, 350 S.E.2d 180 (1986) (“The crime of burglary no longer requires proof of a breaking”), *State v Cross*, 323 S.C. 41, 448 S.E.2d 569 (Ct. App. 1994) (“First degree burglary requires the entry of a dwelling without consent with the intent to commit a crime therein, as well as the existence of an aggravating circumstance”), Second, “In a burglary trial, the defendant’s actions after he entered the house can be evidence used to

determine if he had the intent to commit a crime at the time of entry” *State v Pinckney*, 339 S C 346, 349, 529 S E 2d 526, 528 (2000)

Likewise, it was not reasonable for trial counsel to believe the jurors would acquit Hughey of larceny. While South Carolina generally recognizes a person cannot be guilty of taking his own property, *State v Jackson*, 315 S C 219, 433 S E 2d 19 (Ct App 1993), different considerations exist when there is evidence of joint ownership. “‘Ownership,’ for the purposes of a statute defining the crime of robbery, does not require that the owner have an independent right of possession but only that he or she has a possessory right which, however limited or contingent, is superior to that of the defendant.” Am Jur Robbery §16 Ownership. “Despite the fact that defendants were arguably co-owners of the property they were alleged to have misappropriated, the courts upheld theft or criminal mischief convictions against them on findings that the misappropriated items were ‘property of another.’” 19 A L R 5th §7a Co-owned property – Held “property of another.” South Carolina has long recognized this principle. *E.g. State v Gay*, 1 Hill (SC) 364, 19 S C L 364 (Ct App 1833) (“One who is entitled to receive a share of the crop, for his services may commit larceny in stealing a part of the gathered crop”)

In short, while counsel had a strategy, it was an unreasonable one and, therefore, deficient conduct.

Issue II

Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Hughey'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

In attempting to refute Hughey's claims that Tinsley and Garrett were ineffective for failing to fully investigate and present key mitigating evidence, Respondent essentially relies on two arguments first, that evidence presented at the PCR hearing was merely a restatement of what the jury heard at sentencing and second, that the evidence not presented during sentencing was omitted as part of a reasonable defense strategy Both arguments are inherently flawed

At trial, the jury heard the following evidence in mitigation

- Family members described the abuse Hughey suffered and witnessed as a child in addition to their observations of Hughey after his mother was killed Applicant's Post-Hearing Brief 63-65
- Jeff Yungman testified Hughey's symptoms were consistent with PTSD but could not make a diagnosis ⁸ Tr 3913, 3955, Applicant's Post-Hearing Brief 71
- Dr Evans testified that Hughey had a low tolerance for stress and that he had concerns he suffered from PTSD and depression, but he never related Hughey's characteristics to the incident or made an actual diagnosis Tr 3973-89, Applicant's Post-Hearing Brief 66-67
- Dr Morgan⁹ did not testify at trial, but relayed his impressions of Hughey to the defense team ¹⁰

⁸ As a social worker Yungman was not able to make a diagnosis He testified a forensic psychiatrist would be an appropriate person to do so PCR 133

⁹ Tinsley and Garrett secured funding for a forensic psychiatrist on May 5 1997 Applicant s Ex 5 However he did not begin work on the case until October 18 1997 Applicant s Ex 15

¹⁰ His impressions were PTSD (?) complicated bereavement significant brain damage does not have capacity to stay composed under duress seizure like episodes, temporal lobe problems and cannot assist defense as far as telling what went on at critical time and not malingering PCR 358 364 Applicant s Ex 51

- There was no evidence of Hughey's adaptability to incarceration presented to the jury

The evidence presented during Hughey's PCR hearing was vastly different from that presented at trial. In preparation for the hearing, Hughey retained Dr. Schwartz-Watts to perform a complete forensic evaluation.¹¹ She reviewed all records Tinsley and Garrett had collected for trial as well as others available at the time of trial but not obtained, most notably records from Hughey's 1986 DJJ commitment and his pretrial detention at the Greenwood jail. Applicant's Exs. 35-46.

Based on her evaluation, Dr. Schwartz-Watts made a definitive diagnosis of both PTSD and major depression. Applicant's Ex. 48. Dr. Schwartz-Watts also discussed the similarities between her own report and both Dr. Siegel's report from Hughey's DJJ evaluation and Dr. Lewis' report from Hughey's competency evaluation.¹² PCR 405-6, 441. Her agreement with the findings of two state doctors would surely bolster the veracity of her evaluation and opinion.

Most importantly, Dr. Schwartz-Watts provided testimony that would have entitled Hughey to an instruction on statutory mitigating circumstance number six¹³ by linking Hughey's diagnoses to the incident. After listing the circumstances at play at the time of the incident and testifying about how each one individually would have affected Hughey, she stated that the cumulative effect left Hughey with a substantial impairment in his ability to conform his conduct to the requirements of the law. *See State v. Hughey*, 339 S.C. 439 (2000) (At trial, Hughey was

¹¹ See Applicant's Ex. 48 for an explanation of what her evaluation entailed.

¹² Tinsley testified he had reviewed Dr. Lewis' report but did not think she would be a helpful witness. He was also concerned with her status as a state employee. PCR 497.

¹³ 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. S.C. Code §16-3-20(C)(b)(6).

not entitled to an instruction on statutory mitigating circumstance number six because the trial testimony spoke only of Hughey's inability to cope with stress, not his ability to appreciate the criminality of his conduct or to conform his conduct to the law and, thus, there was no evidence to support the instruction)

Additionally, Dr. Schwartz-Watts was in a prime position to render an opinion on Hughey's adaptability to incarceration. Armed with a full understanding of Hughey's diagnoses and records from his DJJ commitment and pretrial detention, she commented on his history of cooperation while incarcerated and explained that a structured environment that controlled his stress, medications and alcohol consumption made his explosive tendencies a non-issue. Applicant's Ex. 48, PCR 450, 457-78, Applicant's Post-Hearing Brief 88-89. Her expert testimony expanded on the testimony of two jailers who also testified Hughey was highly adaptable. Applicant's Post-Hearing Brief 86-88.

Tinsley and Garrett's decisions at sentencing were not the result of sound strategy,¹⁴ but rather an inattention to sentencing and an unreasonably limited investigation. It is a fundamental principle of capital defense that trial counsel must attempt to uncover all reasonably available mitigating evidence and that assessment of an investigation for reasonableness must also consider if the information known to counsel would lead reasonable counsel to investigate

¹⁴ The state argues Tinsley's mitigation investigation and use of experts was reasonable. Respondent's Post Hearing Brief 116-23. The chronology of trial counsel's investigation of the case and employment of experts reveals otherwise. Applicant's Post Hearing Brief 9-11. Tinsley, in fact, acknowledged he should have retained a forensic psychiatrist sooner and his workload and responsibilities as public defender for two counties was the reason a lot of the work with experts was done during the protection period immediately before trial. PCR 66-68. Trial counsel is ineffective when an excessive caseload is the reason counsel did not present available, favorable expert testimony. *McKnight v. State* 378 S.C. 33, 661 S.E.2d 354 (2008) ("Counsel is the public defender for Horry County. She testified that between the two McKnight trials, she tried a death penalty case in addition to working on about two hundred other cases assigned to the public defender's office."). See *In re Sturkey* 376 S.C. 286, 657 S.E.2d 465 (2008) (public defender's excessive caseload does not relieve counsel of the obligations of representation).

further *Wiggins*, 539 U S at 524, 527. The Guidelines require that all mitigating evidence must be presented unless “there are strong strategic reasons to forgo some portion of such evidence.” 1989 Guideline 11.8.6(A). However, before counsel can make a strategic decision, they must either make all reasonable investigations or make a reasonable decision that certain investigations are not necessary. *Strickland*, 466 U S at 691.

Once there was so much as a suspicion Hughey suffered from PTSD, depression or any other mental illness, trial counsel had an affirmative duty to investigate further. In this case, trial counsel waited until the trial had begun to involve a forensic psychiatrist, who was then unable to complete a meaningful investigation or render aid to the defense.¹⁵

Likewise, when trial counsel learned that Hughey had adapted very well to his pretrial detention, they had an obligation to investigate further. Given Garrett’s dissatisfaction with the testimony of adaptability witnesses in the Elmore case, this obligation became even more important. A reasonable attorney would have sought alternate methods of introducing favorable evidence, especially if they were familiar with *Skipper*.¹⁶ However, Tinsley and Garrett halted their investigation after speaking with the number one and number two men at the jail. They did not acquire jail records. They did not interview additional jail staff, even though Garrett had an ongoing attorney-client relationship with one of the supervisors, Martha Ann Stewart. PCR 289-91. They did not seek the assistance of a forensic psychiatrist or adaptability expert. Further,

¹⁵ In Respondent’s Post Hearing Brief 117, the state contends that Dr. Morgan’s opinion was not helpful to the defense, when in reality he was unable to assist the defense due to his late involvement in the case. Dr. Schwartz-Watts testified there was no way for a complete evaluation to be done in the limited time frame. PCR 441. A review of Dr. Morgan’s initial impressions of Hughey and Dr. Schwartz-Watts’ diagnosis reveal indisputable similarities dispelling Respondent’s position that Dr. Morgan did not testify at trial because his opinion was not favorable. Applicant’s Exs. 48-51.

¹⁶ *Skipper v. South Carolina*, 476 U S 1 (1986). Tinsley was admittedly familiar with this opinion in which the US Supreme Court reinforced the importance of adaptability evidence. PCR 94-95. Applicant’s Ex. 22.

they failed to obtain records from Hughey's DJJ commitment, even after Yungman expressed a need for them

Under the *Strickland* analysis, Hughey must also show he was prejudiced by counsel's ineffective representation. If trial counsel had continued their investigation and employed the appropriate experts in a timely fashion, the jury would have heard evidence that Hughey was a highly adaptable inmate. They would have learned about his diagnoses and how they affected him on the incident date. Most importantly, the judge would have charged the jury that Hughey was substantially impaired in his ability to conform his conduct to the requirements of the law at the time of the crimes.

In determining prejudice, the court must decide if the previously undiscovered evidence would have influenced the jury's appraisal of the defendant's culpability. *Rompilla*, 545 U.S. at 376. Prejudice is also established if but for counsel's errors, there is a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. The evidence presented at the PCR hearing, all of which was available at the time of trial, is substantial and powerful, it went directly to Hughey's future dangerousness and his mental state at the time of the incident. Clearly, this evidence would have weighed heavily on the jurors as they decided his fate.

Issues III and IV

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 (Issue III).

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 (Issue IV).

Hughey has already reviewed the trial record. Applicant's Post-Hearing Brief 99-101. To summarize, Hughey called his sister Gloria Harrison to ask for mercy, and she testified she loved her brother and wanted to keep him. Tr 3880-81. The state characterizes Harrison's testimony as "an apparent plea for the jury to save [sic] her brother." Respondent's Post-Hearing Brief 92. Hughey then requested the trial judge instruct the jurors they could recommend a life sentence "as an act of mercy." Defendant's Request to Charge No 16, Tr 4126-27. During a charge conference prior to closing arguments, the trial judge stated, "My general instruction covers that." Tr 4018. Relying on this assurance, trial counsel argued in closing that Hughey could be sentenced to life in prison "should you decide to recommend a sentence of mercy" and

he asked the jury “to spare my client’s life” Tr 4045 The trial judge, however, ultimately instructed the jurors

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 existence [sic] 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 4062 (emphasis added)

Trial counsel did not object to this instruction Ti 4066-68 At the PCR hearing, trial counsel did not offer a strategic reason for not objecting Tinsley admitted he should have objected and testified, “I just didn’t hear it like that” PCR 114-17 Garrett acknowledged, “I missed it,” and described the error as “glaring” PCR 222 23, 276

Appellate Counsel, Robert Dudek, immediately recognized the error It was “the first time [he] had ever seen that instruction that you cannot sentence a defendant to life imprisonment as an act of mercy” Although there was not an objection to the mercy instruction, Dudek attempted to “blend” this issue with the properly preserved objection to the trial judge’s instruction on non-statutory mitigation circumstances PCR 314-15 Because of the lack of objection, Dudek thought the Supreme Court would consider the issue procedurally barred, allowing the issue to be addressed in post-conviction Dudek testified he should have briefed the incorrect mercy instruction as a stand-alone issue and had he done so, he would have distinguished mercy from passion “or those types of things” PCR 316-17

Between the time Hughey filed his post-hearing brief and the time the state filed its post hearing brief, the South Carolina Supreme Court decided *Rosemond v Catoe*, 383 S C 320, 680 S E 2d 5 (2009), overruling *Hughey* “to the extent it approved and sanctioned the charge given here” *Rosemond*, 383 S C at 330, 680 S E 2d at 10 In overruling *Hughey*, *Rosemond* relied on

State v Torrence, 305 S C 45, 406 S E 2d 315 (1991), a case decided prior to Hughey's trial
Rosemond, 383 S C at 329-30, 680 S E 2d at 10-11

Because the state argues *Rosemond* does not control,¹⁷ Hughey will (1) review the record in *Rosemond*, (2) review the evolution of the state's arguments in this case to demonstrate these arguments have already been rejected in *Rosemond*, (3) respond to the state's argument that the opinion in Hughey's direct appeal is the law of the case, and (4) identify prejudice in light of *Rosemond*

1) The Record in *Rosemond*

In order to understand just how identical Hughey's case is to *Rosemond*, it is helpful to review the *Rosemond* record

During sentencing, *Rosemond* proffered a witness who testified *in camera*

Your Honor, I would like to say that Andre [*Rosemond*] has not been in any trouble And this is his only offense That I know of And that I pray that that would be considered And that he would — you would — you would have mercy — would have mercy in your sentencing

Rosemond Tr 3250 (Appendix 1)

Recognizing *Torrence* controlled, the solicitor acknowledged, "[A] defendant may offer witnesses who know and care for him and are willing to ask for mercy" The Solicitor added, "There can be a plea for mercy" The trial judge observed, "Well, that's what I understood this witness was testifying to" *Rosemond* Tr 3252 (Appendix 1) The trial judge continued, "I believe that a witness or family member may also ask for mercy on the part of the defendant" *Rosemond* Tr 3253 (Appendix 1) The trial judge confirmed the witness may testify to *Rosemond*'s lack of a criminal record and ask for mercy *Rosemond* Tr 3254 (Appendix 1)

¹⁷ It is important to note that Assistant Deputy Attorney General Zelenka also handled the *Rosemond* case

When the jury returned, the witness testified in part, “I pray that you would have mercy on him ” *Rosemond* Tr 3255 (Appendix 1)

After this witness testified, Rosemond called a second witness who asked for mercy. Rosemond’s counsel asked, “Do you have a request or recommendation in this matter as it relates to Andre [Rosemond]?” The witness replied, “Yes, I would like to recommend mercy ” *Rosemond* Tr 3258 (Appendix 1)

Despite these witnesses’ testimony, the judge’s observations about the testimony, and *Toirrence*, the trial judge instructed the jurors

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 circumstance to exist

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**

Rosemond Tr 3348 (Appendix 1) (emphasis added) Rosemond’s trial counsel did not object

In PCR, Rosemond argued his “right to effective assistance of counsel was violated when trial counsel failed to object to the trial court’s instruction that the jury could not base a life sentence on mercy ” *Rosemond* Brief of Appellant 88 (Appendix 2) Rosemond contended, “[T]he trial court’s instruction could not be clearer on this point – mercy could *not* be the basis of a life sentence, period ” *Rosemond* Brief of Appellant 89 (Appendix 2) (emphasis in original)

Rosemond then asserted

South Carolina law has consistently recognized that it is appropriate for a witness to ask the jury to have mercy when sentencing the defendant *State v (Roger Dale) Johnson*, 388 S C 114, 525 S E 2d 519 (2000), *State v Toirrence*, 305 S C 45, 51, 406 S E 2d 315, 318 (1991) (“[A] defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf ”) (internal citations omitted) , *See also State v Sapp*, 366 S C 283, 287, 621 S E 2d 883 (2005) (error not to allow a defense witness to ask that a defendant not be sentenced to death)

Rosemond Brief of Appellant 89-90 (Appendix 2)

The state relied on the South Carolina Supreme Court's decision in *Hughey's* direct appeal *Rosemond* Brief of Respondent 72, 75 (Appendix 3) ¹⁸ Citing federal constitutional law and cases from other state courts, the state argued a capital defendant is not entitled to have the jury instructed on mercy *Rosemond* Brief of Respondent 75-80 (Appendix 3) The state specifically argued *Rosemond*

[I]mplicitly 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

Rosemond Brief of Respondent 79 (Appendix 3)

The state never addressed *Rosemond's* state law argument under *Johnson*, *Torrence*, and *Sapp*

The Supreme Court "agree[d] with *Rosemond* and [held] that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it," and noted *Torrence* "held a defendant may present witnesses to ask for mercy in the sentencing phase " *Rosemond*, 383 S C at 329, 680 S E 2d at 10 The Court then held

During the sentencing phase, the testimony of two family friends was properly admitted and these witnesses asked the jury for mercy In contrast, the trial court then instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy Notably, the trial court's jury instruction mirrored the instruction found proper subsequent to *Rosemond's* trial in *State v Hughey* 339 S C 439, 459, 529 S E 2d 721, 731

¹⁸ The state however misstated the record from *Hughey's* trial The state argued This same objection to the same language by the same trial judge was upheld in 2000 in *Hughey* and the Supreme Court with the benefit of cautious study determined that the identical language was *later* determined to not be error in 2000 when it was objected to in *Hughey's* trial *Rosemond* Brief of Respondent 75 (Appendix 3) (emphasis in original) As seen *Hughey's* trial counsel did not make this objection

(2000) We overrule *Hughey* to the extent it approved and sanctioned the charge given here

Rosemond, 383 S C at 330, 680 S E 2d at 10 The Court then clarified

It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy. A jury's consideration of mercy, if proper evidence of mercy is admitted, is well recognized in the sentencing phase of a capital case. Because a capital jury may consider properly admitted evidence of mercy in the sentencing phase, consideration of mercy is not inconsistent with the instruction that "the jury should not be guided by sympathy, prejudice, passion, or public opinion." *State v Singleton* 284 S C 388, 393, 326 S E 2d 153, 156 (1985) *overruled on other grounds by State v Torrence* 305 S C 45, 69 n 5, 406 S E 2d 315, 328 n 5 (1991)

Rosemond, 383 S C at 330, 680 S E 2d at 10-11

The state petitioned for rehearing. Despite previously arguing there is no requirement a capital jury be instructed a life sentence could be based on mercy, the state argued

Viewing the penalty phase instructions as a whole, it is clear that the trial judge, as well as counsel, was aware that consideration of mercy was proper for the jury in its sentencing consideration – *but also that the jury was not limited to mercy in its life sentence consideration*

Rosemond Petition for Rehearing 2 (Appendix 4) (emphasis in original). Then, despite having never responded to *Rosemond*'s reliance on state law, the state conceded for the first time "that state law authorized consideration of mercy by a capital sentencer" and that a capital jury should be able to consider a plea of mercy. *Rosemond* Petition for Rehearing 3 (Appendix 4). The state disagreed with the Supreme Court's conclusion the trial court "instructed the jury to discount such pleas by instructing the jury that it could not recommend a life sentence based on the evidence of mercy." *Rosemond*, 383 S C at 330, 680 S E 2d at 10. Rather, the state argued "a reasonable juror would have considered mercy evidence in making a decision." *Rosemond* Petition for Rehearing 5-8 (Appendix 4).

The Supreme Court disagreed and denied the state's petition for rehearing Appendix 5

2) The state's arguments supporting the "no mercy" instruction in Hughey's case have evolved since the time of trial and have already been rejected by the South Carolina Supreme Court in *Rosemond*

In June 1999, Dudek filed his Final Brief of Appellant in Hughey's direct appeal. He did not include the "no mercy" charge as a stand alone issue for reasons discussed above. Dudek argued the judge's charges on mitigating circumstances and mercy violated the Eighth and Fourteenth Amendments to the United States Constitution, but failed to cite any state law grounds to support his argument. Final Brief of Appellant 42-43. In response, the state argued that Judge Cole's instruction, when taken as a whole, permitted the jury to consider any mitigating evidence they found appropriate, thereby passing muster under the Eighth Amendment. Final Brief of Respondent 44. In reply, Dudek failed to make any new arguments, and merely reiterated the federal constitutional grounds on which he based his argument in his earlier brief. Final Reply Brief of Appellant 18-19.

In their decision in *Hughey*, the South Carolina Supreme Court addressed the issue of the judge's charge prohibiting mercy as a consideration in sentencing even though it had not been properly preserved at trial. The Court found the argument against the charge to be "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." *Hughey*, 339 S.C. at 460, 529 S.E.2d at 732. This holding was based on federal constitutional law, not state law allowing consideration of mercy.

Following the direct appeal on October 25, 2000, Dudek filed Hughey's initial Application for Post-Conviction Relief, citing trial counsel's "failure to specifically object to the 'no mercy' instruction on federal constitutional grounds" to support a claim of ineffective

assistance of counsel Application for Post Conviction Relief 2-3 In the Return to the Application for Post-Conviction Relief, the state strictly addressed Dudek's claim that an objection should have been raised under existing federal law The state adamantly argued the instruction was adequate because

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 ¹⁹

Return to Application for Post-Conviction Relief 26 27

Hughey subsequently filed two Amended Applications for Post-Conviction Relief, the first on September 15, 2006 and the second on December 15, 2006 In both, Hughey advanced his argument against the judge's "no mercy" charge by adding South Carolina statutes and case law to the federal constitutional grounds Dudek initially cited Hughey argued

This [no mercy] 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)

Second Amended Application for Post-Conviction Relief 3 The state's Return to the Amended Application continued to argue that Judge Cole's instructions were appropriate under the United States Constitution and remained silent on the state law grounds Hughey raised Return to Amended Application for Post-Conviction Relief 40-55

Hughey expounded on his state law argument in Applicant's Pre-Hearing Brief, differentiating the concept of mercy from sympathy, prejudice, passion and public opinion Relying on *Torrence*, *Johnson* and *State v Sapp*, 366 S C 283, 621 S E 2d 883 (2005), Hughey

¹⁹ Quoting *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)

pointed out the South Carolina Supreme Court has upheld the presentation of witnesses, including the defendant,²⁰ and appeals to the jury to ask for mercy on the defendant's behalf. Applicant's Pre Hearing Brief 38-39. Again, the state ignored Hughey's state law argument and focused instead on the Eighth Amendment and *Lockett*, *Eddings* and their progeny, stating

[Hughey] 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 [United States] Constitution. There is no Eighth Amendment requirement that the jury be so informed. Our capital punishment doctrine is rooted in the principle that the Eighth and Fourteenth Amendment[s] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and freakishly imposed.

Respondent's Pre-Hearing Brief 60

Prior to the Court's decision in *Rosemond*, Hughey filed his Post-Hearing Brief and once again argued the ineffectiveness of trial counsel and appellate counsel for failing to object to and fully brief the "no mercy" instruction. Hughey's brief included a historical review of mercy's role in capital sentencing and concluded by pointing out South Carolina case law supporting the presentation of pleas for mercy to the jury. Hughey also cited cases where counsel had been found ineffective for failing to present such pleas for the jury's consideration. Applicant's Post-Hearing Brief 130.

Before the state filed their Post-Hearing brief, the South Carolina Supreme Court decided *Rosemond*. Judge Cole's instruction in *Rosemond*'s trial was identical to the instruction he dispensed in Hughey's case, and *Rosemond*'s PCR counsel relied on the very same case law Hughey's PCR counsel is currently asserting.²¹ The state relied in part on the Court's opinion in

²⁰ See *State v. Moore*, 357 S.C. 458, 593 S.E.2d 608 (2004).

²¹ South Carolina law has consistently recognized that it is appropriate for a witness to ask the jury to have mercy when sentencing the defendant. *State v. (Roger Dale) Johnson*, 338 S.C. 114, 525 S.E.2d 519 (2000); *State v. Torrence*, 305 S.C. 45, 51, 406 S.E.2d 315, 318 (1991) ("[A] defendant may present witnesses who know and care

*Hughey*²² in arguing Judge Cole's "no mercy" instruction to be sound. *Rosemond* Brief of Respondent 75. The state's brief in *Rosemond*, nearly identical to their Pre-Hearing Brief in *Hughey*'s case, argued

[*Rosemond*] 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 [United States] Constitution. There is no Eighth Amendment requirement that the jury be so informed. Our capital punishment doctrine is rooted in the principle that the Eighth and Fourteenth Amendment[s] cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and freakishly imposed.

Rosemond Brief of Respondent 79-80

The Supreme Court rejected the state's arguments. Though the South Carolina Supreme Court ordered a new sentencing hearing on other grounds, they elected to address the "no mercy" charge, holding "that if a plea for mercy is admitted in evidence, then a jury should be entitled to consider it." *Rosemond*, 383 S.C. at 329, 680 S.E.2d at 10. The Court based this decision exclusively on South Carolina case law that allows presentation of evidence calling for mercy, including *Torrence*. *Id.* In explicitly overruling *Hughey* "to the extent it approved and sanctioned the charge given [in *Rosemond*]," the Court concluded that mercy is **not synonymous** with sympathy, prejudice, passion or public opinion. *Id.* 383 S.C. at 330, 680 S.E.2d at 10-11 (emphasis added). In short, the Court rejected the argument the state advances in the instant case, that Judge Cole's instruction was sufficient under federal constitutional principles, and relied on state law supporting the position of both *Rosemond* and *Hughey*.

for him and are willing on that basis to ask for mercy on his behalf) (internal citations omitted), *See also State v Sapp* 366 S.C. 283, 287, 621 S.E.2d 883 (2005) (error not to allow a defense to ask that defendant not be sentenced to death). *Rosemond* Brief of Appellant 89-90 (Appendix 2).

²² As discussed above, the Court's opinion in *Hughey* was reliant upon federal constitutional principles.

In the Petition for Rehearing in *Rosemond*, the state concocted outlandish arguments in an attempt to persuade the Court to abandon their ruling. First, the state argued that when taking Judge Cole's instruction as a whole, a reasonable juror would have known mercy was an appropriate consideration, despite the judge's clear language that a life sentence could be imposed for any reason or no reason at all, "other than as an act of mercy." Second, the state supported a tortured reading of the instruction, where the phrase "other than as an act of mercy" modifies "for no reason at all" instead of "for any reason." *Rosemond* Petition for Rehearing of Respondent/Petitioner 2-3. These arguments were rejected when the Court denied the Petition for Rehearing on August 6, 2009.

These same arguments, already rejected in *Rosemond*, now appear in the Respondent's Post-Hearing Brief and should be dismissed summarily. The Respondent again clings to an incredulous argument based on grammatical gymnastics, proposing the Applicant read the phrase "other than" as used in the judge's "no mercy" instruction as an adverb, not an adjective. State's Post-Hearing Brief 125-26. Asking a jury to determine whether a certain phrase is an adverb or an adjective and expecting them to give the phrase "other than as an act of mercy" anything other than its plain meaning is wholly unrealistic. Moreover, the Supreme Court already rejected this argument in *Rosemond*.

The Respondent now concedes state law permits a life sentence based on mercy but continues to reassert a federal constitutional argument, which has already been rejected.

Respondents concede and acknowledge as a matter of state law that a jury in South Carolina has a right to sentence a convicted murderer to a life sentence as an act of mercy. *Rosemond supra*. However, we disagree with any assertion that factors either require a sentence of death or require and [sic] act of mercy when statutory aggravating factors exist. In fact, the federal constitution doe[s] not require mercy.

Respondent's Post-Hearing Brief 135 Respondent continues to argue, word for word, the federal authority cited in his Pre-Hearing Brief in this case and on appeal in *Rosemond*

- 3) **Contrary to the state's argument, the Supreme Court's opinion in Hughey is not the law of the case because of the ineffectiveness of trial and appellate counsel in not properly presenting this issue to the Court**

The state argues the Supreme Court's holding in the direct appeal is the law of the case Respondent's Post-Hearing Brief 156-61 The state's position, generally, ignores the law of ineffective assistance of appellate counsel *Evitts v Lucey*, 469 U S 387 (1985), *Smith v Robbins*, 528 U S 259 (2000), and *Strickland v Washington*, 466 U S 668 (1984) The state's position, more specifically, ignores *Patrick v State*, 349 S C 203, 562 S E 2d 609 (2002)

Patrick claimed "trial and appellate counsel [were] ineffective in failing to properly raise the issue of prosecutorial retaliation at trial and on appeal " *Id* 349 S C at 206, 562 S E 2d at 610-11 After Patrick was granted a new trial in PCR, the state re-indicted him on charges that had been dismissed prior to the original trial Patrick's trial counsel moved to quash the re-indictments because it was improper for the state to revive 'those charges simply because [Patrick] was successful in PCR " *Id* 349 S C at 207, 562 S E 2d at 611 Trial "counsel never cited specific law to the court, but instead merely stated there was a 'general philosophy you can't punish a guy for appealing his case ' The trial judge denied the motion to quash, noting he was 'without anything to base it on '" *Id* The Supreme Court, nevertheless, held this general objection was sufficient to preserve a due process violation for appeal

The Supreme Court then held "counsel was ineffective for failing to properly address this same issue on appeal " *Id* 349 S C at 208, 562 S E 2d at 611 "In his brief to the Court of Appeals, counsel devoted three short paragraphs to this issue, did not give any useful analysis, and only cited one case " *Id* The Court of Appeals did not address prosecutorial retaliation and

decided the issue on other grounds. Even though counsel did not raise this issue in the petition for rehearing, the Court of Appeals *sua sponte* instructed the parties to address the issue. The state objected. The Court of Appeals denied the petition for rehearing noting, “The issue was argued in a conclusory fashion in [petitioner's] final brief” and “the issue was not stated with particularity in [petitioner's] petition for rehearing.” *Id.* 349 S.C. at 209, 562 S.E.2d at 612. The Supreme Court held, “As evidenced by counsel's briefs and the Court of Appeals' statement above, counsel was deficient in failing to adequately raise or address the merits of the issue of prosecutorial retaliation.” *Id.* The Supreme Court found prejudice because “[i]f counsel had properly argued the issue, the Court of Appeals would have” ruled differently. *Id.* 349 S.C. at 212, 562 S.E.2d at 612.

Patrick controls. Although Hughey's trial counsel requested the correct instruction, trial counsel did not object when the trial judge gave the improper instruction. Appellate counsel did not adequately raise or address the merits of this issue. He did not distinguish “mercy” from “sympathy,” “prejudice,” “passion” and “public opinion” and/or trace the history of the role of mercy in capital sentencing. See Applicant's Post-Hearing Brief 104-30. Appellate counsel did not even cite *Torrence* as the controlling authority. Just as in *Patrick*, had counsel properly argued the issue, including citing *Torrence*, the Supreme Court would have ruled differently in Hughey's direct appeal.

Finally, it would simply be absurd to apply *Hughey* as the “law of the case” and binding on Hughey when the Supreme Court explicitly held in *Rosemond* that *Hughey* is “overruled to the extent it approved and sanctioned the charge given.” *Rosemond*, 383 S.C. at 330, 680 S.E.2d at 10-11.

4) Prejudice

Hughey was prejudiced by the trial judge instructing the jury they could not sentence to life imprisonment based on mercy. As seen, Hughey called a witness who asked for mercy. Hughey's trial counsel asked the jury to sentence based on mercy. The court agreed. Counsel relied on this in arguments to the jury. The court then reversed itself and instructed the jurors to disregard mercy in sentencing.

Hughey's case is very similar to *State v. Jones*, 343 S.C. 562, 541 S.E.2d 813 (2001).²³ In *Jones*, the trial judge held a charge conference prior to closing arguments. "[N]either appellant nor the State objected to the trial judge's indication that he planned to give the reasonable doubt charge outlined in *State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991)." *Id.* 343 S.C. at 576, 541 S.E.2d at 820. Jones' lawyer structured his closing argument around the *Manning* "hesitate to act" reasonable doubt instruction, even to the point of predicting the language the trial judge would use to instruct the jurors. After closing arguments, the solicitor asked the trial judge to remove the "hesitate to act" language from the jury instruction. The Supreme Court observed, "The *Manning* charge, although not required, is a correct statement of South Carolina law." *Id.* 343 S.C. at 578, 541 S.E.2d at 821. Because Jones reasonably relied on the trial judge charging the "hesitate to act" language, "[t]he decision to alter the charge, after the argument, was fundamentally unfair." *Id.*

In *Jones*, there was no claim the instruction ultimately given was incorrect. The trial judge, essentially, substituted one correct instruction for another correct instruction. The Supreme Court found prejudice because "[t]he effect of the judge's after the fact decision to

²³ Rosemond's PCR counsel also relied on *Jones*. See *Rosemond* Brief of Appellant 90 (Appendix 2).

excise the hesitate to act language from his charge was to diminish appellant's attorney's credibility in the eyes of the jury” *Id*

In Hughey, the same thing happened. The trial judge held a charge conference prior to closing arguments in sentencing. The judge told trial counsel the Court would give the requested, correct instruction. Counsel relied on the charge conference and asked the jurors to sentence based on mercy, but the trial judge then replaced a correct instruction with an incorrect one. Hughey is prejudiced for three reasons. First, like in *Rosemond*, the trial judge instructed the jurors to disregard the witness who asked for mercy. Second, the trial judge instructed the jurors to disregard Hughey's counsel's plea for mercy. Third, like in *Jones*, the incorrect instruction diminished trial counsel's credibility in the eyes of the jury. In fact, the prejudice to Hughey is greater than the prejudice in *Jones* because rather than substituting a correct instruction with a different, yet correct instruction, the trial judge replaced a correct instruction with an incorrect one.

Issue V

Cumulative Error

The state has argued in the Respondent's Post-Hearing Brief, 171-75 that ineffective assistance of counsel cannot be found based on the cumulative effect of the errors of counsel

The South Carolina Supreme Court has never before explicitly applied a cumulative prejudice analysis. *Green v State*, 351 S C 184, 569 S E 2d 318 (2002). The court declined to do so in *Green*, however, because Green failed to meet the threshold requirement of showing error. Specifically, the Court held that, "[m]ultiple errors do not exist in this case to form any cumulative prejudicial effect." 351 S C at 197, 569 S E 2d at 325. Here, however, Hughey has shown the existence of numerous errors by trial counsel.

In light of the multiple error committed by Hughey's trial counsel, this Court must apply a cumulative prejudice analysis. *Kyles v Whitley*, 514 U S 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The United States Supreme Court's opinion in *Williams v Taylor*, 529 U S 362, 399 (2000), reveals that the Court considered "the entire postconviction record as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis.²⁴ Likewise, in *Strickland*, the Court stated, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." 466 U S at 694 (emphasis added). If the Court did not intend a cumulative

²⁴ See also *Porter v McCollum* 130 S Ct 447 452 (2009) (rejecting a prejudice analysis that separately considered each category of mitigating evidence) *Wong v Belmontes* 130 S Ct 383 (2009) (rejecting a prejudice analysis that considered the mitigating evidence not presented without considering the aggravation evidence that would have been presented in rebuttal)

analysis it would have discussed the prejudice analysis in terms of “individual error” or error-by-error evaluation instead of formulating the prejudice test in light of counsel’s “errors.”²⁵

²⁵ Numerous courts relying on Strickland have held that a cumulative prejudice analysis is appropriate. See e.g. *Pavel v Hollins* 261 F.3d 210 (2nd Cir. 2001); *Richards v Quarterman* 566 F.3d 553 (5th Cir. 2009); *Goodman v Bertrand* 467 F.3d 1022 (6th Cir. 2006); *Martin v Grosshans* 424 F.3d 588 (7th Cir. 2005); *Turner v Duncan* 158 F.3d 449 (9th Cir. 1998); *Cagle v Mullin* 317 F.3d 1196 (10th Cir. 2003); *Givets v Kukpatnick* 618 F. Supp. 2d 193 (E.D.N.Y. 2009); *Saranchak v Beard* 538 F. Supp. 2d 847 (M.D. Pa. 2008); *United States ex rel. Madej v Schomig* 223 F. Supp. 2d 968 (N.D. Ill. 2002); *In re Gay* 968 P.2d 476 (Cal. 1998); *McIntosh v State* 941 So. 2d 1 (Fla. Dist. Ct. App. 2006); *People v Davis* 879 N.E.2d 996 (Ill. App. Ct. 2007); *Ross v State* 954 So. 2d 968 (Miss. 2007); *State v Echols* 941 A.2d 599 (N.J. Super. Ct. App. Div. 2008); *State v Gondor* 860 N.E.2d 77 (Ohio 2006); *Mata v State* 141 S.W.3d 858 (Tex. Ct. App. 2004); *State ex rel. Humphries v McBride* 647 S.E.2d 798 (W. Va. 2007); *State v Thiel* 665 N.W.2d 305 (Wis. 2003).

Conclusion

For the forgoing reasons, this Court should order a new sentencing hearing

Respectfully submitted,

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December 11, 2009



MARIAN WILLIAMS - DIRECT BY MR PRIDE

1 Ladies and gentlemen, please go to your jury
2 room I'll bring you back in just a minute

3 (The following took place outside the presence
4 — of the jury)

5 MR PRIDE Your Honor, I'd like to proffer the
6 testimony that -- the statement that Mrs Williams would
7 like to make

8 THE COURT All right, Ms Williams Tell me, if
9 you will, what you would like to say

10 THE WITNESS Your Honor, I would just like to say
11 that Andre has not been in any trouble And this is his
12 only offense That I know of And that I pray that that
13 would be considered And that he would have -- you would
14 have -- you and the court would have mercy -- would have
15 mercy in your sentencing

16 THE COURT You may testify to that We just simply
17 needed to know what you were going to say, since it was
18 not in response to a question

19 THE WITNESS All right

20 THE COURT She may testify to that

21 MR PRIDE Thank you

22 We're ready whenever you are

23 SOL MABRY This is the second time that this has
24 occurred regarding a statement And we are concerned
25 that this may occur again and someone may testify about

MARIAN WILLIAMS - DIRECT BY MR PRIDE

1 their views on capital punishment That is improper

2 I understand what she said she's going -- this
3 witness is going to say And I understand the Court's
4 ruling on that But any further witnesses, getting into
5 something of that nature, Mr Pride knows that's
6 improper

7 THE COURT All right, Ms Williams Now, you
8 understand what you just told me that you wish to testify
9 to

10 THE WITNESS Yes

11 THE COURT That is all that you may testify to
12 unless it's pursuant to some other question Okay?

13 THE WITNESS All right.

14 THE COURT All right Bring the jury back

15 (Pause)

16 BAILIFF There will be a slight delay with the
17 jury

18 THE COURT Do you have something to address?

19 SOL MABRY Yes, sir I didn't know how far away
20 the jury was If they're coming in, it can wait

21 THE COURT Go ahead

22 SOL MABRY If I could ask this witness to step
23 out

24 THE COURT All right Ms Williams, let me ask you
25 if you will, just for the purpose of this hearing, if

MARIAN WILLIAMS - DIRECT BY MR PRIDE

1 you'll step outside the door for a moment We'll bring
2 you back in just a few minutes

3 (Whereupon the witness exited the courtroom)

4 — SOL MABRY For the record, Your Honor, this is
5 about the third witness now who has been asked -- two
6 have asked to make a statement and one was asked a
7 question that in my opinion was designed to draw out an
8 opinion on the death penalty, Mr Rosemond being
9 subjected to the death penalty

10 And the case law is clear in this state, under
11 State v Torrence, 305 S C 45 (1991), a defendant may
12 offer witnesses who know and care for him and are willing
13 to ask for mercy However, they may not testify to their
14 religious or philosophical attitudes about the death
15 penalty nor can they say what their opinion is on the
16 ultimate issue And that's State v Matthews and State
17 v Adams

18 We are not allowed to ask the victims' family
19 what they think the defendant should get and nor is his
20 family or his witnesses allowed to say what they think he
21 should get There can be a plea for mercy, but that is
22 all

23 THE COURT Well, that's what I understood this
24 witness was testifying to

25 SOL MABRY Yes, sir We're concerned that this is

1 the third witness, now, that this has happened with And
2 one question, I believe, was designed to elicit from the
3 Reverend his views on capital punishment That is what I
4 took the question to be

5 THE COURT All right, Mr Pride Do you wish to be
6 heard in response?

7 MR PRIDE I don't wish to be heard

8 THE COURT All right Let's just be certain we
9 understand There's no question in my mind that the law
10 is in South Carolina that a witness cannot be asked their
11 opinion as to what they believe the appropriate
12 punishment should be or what should be imposed

13 A witness may testify as to the background and
14 characteristics of the defendant And the witness may
15 testify or ask the jury to consider those factors that
16 are relevant to that issue

17 I believe that a witness or family member may
18 also ask for mercy on the part of the defendant But a
19 witness cannot express any view as to what their opinion
20 is on capital punishment, nor can that witness express
21 their opinion as to what they believe the appropriate
22 punishment should be in this case

23 Do we agree on that?

24 MR PRIDE I understand you, Judge

25 THE COURT All right, sir

1 SOL MABRY And I would ask if his witnesses have
2 been instructed on that, because two have wanted to
3 voluntarily make statements

4 THE COURT All right Let's ask -- Mr Pride, let
5 me ask that before the witnesses are brought in, please
6 be certain that they understand that they cannot testify
7 to those factors and they can only testify to those
8 factors that you will be asking them about

9 All right Ask Ms Williams to come back in,
10 please

11 (Whereupon the witness entered the courtroom
12 and returned to the stand)

13 THE COURT Ms Williams, I just want to be certain
14 that you understand the limitations on your testimony
15 that I have indicated to you earlier And that is, you
16 indicated that the defendant had not been in any trouble
17 so far as you were aware And you also indicated that
18 you would like for the jury to consider that fact And
19 you also indicated that you would like to ask that the
20 Court have mercy

21 You understand that you are limited to those
22 things You may testify to those, but you cannot testify
23 to any other matters that you are not asked about
24 specifically And then we can address whether or not it
25 should be admitted or not admitted Okay?

MARIAN WILLIAMS - DIRECT BY MR PRIDE

1 THE WITNESS All right

2 THE COURT Thank you, ma'am

3 MR PRIDE I would request that she not be limited
4 to the Court She can ask the jury to have mercy

5 THE COURT Well, I -- excuse me Yes I meant the
6 jury or the Court or both

7 All right Bring the jury in

8 (The following took place within the presence
9 of the jury)

10 CONTINUED DIRECT EXAMINATION

11 BY MR PRIDE

12 Q Mrs Williams, you had a request Go right ahead

13 A All right Thank you

14 I -- I just wanted to say to the Court and to the
15 jury that this is Andre's only offense And I pray that
16 you would consider that in your sentencing and have mercy
17 on him

18 Q Answer any questions, please, the Solicitor has to
19 ask

20 SOL MABRY No questions Thank you

21 THE COURT Thank you, ma'am You may step down

22 (Pause)

23 (Whereupon a witness entered the courtroom)

24 DOROTHY SCOTT, being first
25 duly sworn, testified as follows

DOROTHY SCOTT - DIRECT BY MR PRIDE

1 DIRECT EXAMINATION

2 BY MR PRIDE

3 Q State your full name, please

4 A This is Dorothy Scott

5 Q Mrs Scott, where do you reside?

6 A On 20 Morty Street

7 Q 20 Morty Street?

8 A That's right

9 Q In Greenville, South Carolina?

10 A That's right

11 Q How long have you lived there?

12 A Thirty-four years

13 Q Are you employed?

14 A No, I'm not

15 Q Where did you work?

16 A The Greenville Public Library

17 Q How long did you work there?

18 A Thirty years

19 Q And are the Rosemonds, that is to say, Andre's
20 mother and father, your neighbors?

21 A That's right Across the street

22 Q And how long have you known them?

23 A Thirty-two years

24 Q And have you -- in what kind of relation have you
25 had with them?

DOROTHY SCOTT - DIRECT BY MR PRIDE

1 A Well, they was my neighbors And -- and Andre was
2 my yard man, kept my yard My guess, I -- that was the
3 first job that he had, was helping me

4 Q And did you see and watch Andre grow and develop?

5 A I certainly did Grew up on that street

6 Q Do you remember when Andre got married?

7 A Yes, I did

8 Q And did you know his wife?

9 A No, I didn't I just

10 Q Did you know his children?

11 A Yeah, I met his children

12 Q Can you tell us what do you know about Andre's
13 growing up and what you know about him while he lived in
14 Greenville, South Carolina?

15 A Well, Andre, he was quiet He was smart He liked
16 to work He was intelligent. And he was obedient

17 Q Do you know of any instances where Andre ever got in
18 any trouble with the law?

19 A No

20 Q Do you know of any situations where Andre caused any
21 trouble in school?

22 A No

23 Q Do you know of any situations where Andre caused any
24 trouble or problems in his community?

25 A No

DOROTHY SCOTT - DIRECT BY MR PRIDE

1 Q Now, do you know whether or not the Rosemonds and --
2 along -- how many -- strike that, please How many
3 children did Mr and Mrs Rosemond have?

4 A Two

5 Q Andre and Stanley?

6 A Stanley That's right

7 Q And can you tell us, were they -- did they raise
8 them in a Christian home?

9 A Yes They saw to it they went to school They saw
10 to it they went to church And they saw to it that they
11 worked

12 Q Did they give them proper guidance and counseling?

13 A Yes

14 Q Now, have you observed Andre with his children?

15 A Yes

16 Q Did he take care of his children?

17 A Yeah When he would visit his parents

18 Q He would bring the children?

19 A He would bring his children

20 Q Do you have a request or a recommendation in this
21 matter as it relates to Andre?

22 A Yes I would like to recommend mercy

23 Q All right And who are you making that request to?

24 A To the jury

25 Q All right Answer any questions, please, the

1 though you may also find the existence of one or more
2 statutory or non-statutory mitigating circumstances

3 The existence of any statutory or non-statutory
4 mitigating circumstances is not a bar to the
5 recommendation of a death sentence, so long as you have
6 found the existence of at least one statutory aggravating
7 circumstance beyond a reasonable doubt

8 Conversely, you may also recommend a sentence
9 of life imprisonment even though you find at least one
10 statutory aggravating circumstance, beyond a reasonable
11 doubt, and find no mitigating circumstances to exist

12 Simply stated, you may recommend a sentence of
13 life imprisonment for any reason or for no reason at all
14 other than as an act of mercy

15 Whatever your decision may be regarding the
16 recommendation of sentence, the decision of the jury must
17 be unanimous All twelve jurors must agree as to what
18 your recommendation is, in order for you to return a
19 recommendation as to sentence

20 Now, Mr Foreman and ladies and gentlemen of
21 the jury, you will also have in the jury room with you
22 one other form And that is a form entitled aggravating
23 circumstances This form will be provided for you and
24 you are to consider it

25 In the event that you determine the appropriate

the self-evident fact that both prosecutors and defense counsel view some circuit judges as more oriented towards the prosecution or the defense, the actual record of *ex parte* selection leaves no doubt that the Seventh Circuit Solicitor's office preferred trying death penalty case before Judge Clary and Judge Cole, and made its selections accordingly App 4036-4038 The impropriety of this now-discontinued "system" for selecting trial judges warrants vacating Rosemond's convictions and death sentence in this case

VII ROSEMOND'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE TRIAL COURT'S INSTRUCTION THAT THE JURY COULD NOT BASE A LIFE SENTENCE ON MERCY

A RELEVANT FACTS

At Rosemond's trial, a defense witness specifically asked the jury to have mercy on Rosemond when sentencing him App 3255 Both the solicitor ("There can be a plea for mercy " at App 3252) and the trial court ("I believe that a witness or family member may also ask for mercy on the part of the defendant " at App 3253) agreed that such testimony was proper In its final sentencing phase instructions, however, the court 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* " App 3348 (emphasis added) Trial counsel made no objection to this instruction and the jury was sent to deliberate under the impression that it could not sentence Rosemond

to life as an act of mercy. Trial counsel testified that he had no strategic reason for failing to object to this instruction. App. 4573.

Denying relief based on this claim, the PCR court found only that “[i]t would take a tortious [sic] interpretation of that language to arrive at” the conclusion that the jury could not sentence based on mercy. App. 4911-4912.

B. ARGUMENT

The court’s only basis for denying relief based on this claim has no support in the record. Indeed, the trial court’s instruction could not be clearer on this point – mercy could *not* be the basis of a life sentence, period. The PCR court did not further explain its conclusion that the jury would not have believed that mercy could not support a life sentence.

South Carolina law has consistently recognized that it is appropriate for a witness to ask the jury to have mercy when sentencing the defendant. *State v. (Roger Dale) Johnson*, 338 S. C. 114, 525 S. E. 2d 519 (2000), *State v. Torrence*, 305 S. C. 45, 51, 406 S. E. 2d 315, 318 (1991) (“[A] defendant may present witnesses who know and care for him and are willing on that basis to ask for mercy on his behalf.”) (internal citations omitted), *See also State v. Sapp*, 366 S. C. 283, 287, 621 S. E. 2d 883 (2005) (error not to

allow a defense witness to ask that defendant not be sentenced to death)

And that is just what occurred in Rosemond's case

But, having allowed a defense witness to ask the jury to have mercy on Rosemond, the trial court then instructed the jury not to base their decision in any way on mercy. In effect, the trial court instructed the jury to disregard competent and proper testimony from this defense witness. While the instruction given in this case has been generally upheld by this court, *see State v Hughey*, 339 S C 439, 529 S E 2d 721 (2000), the judicial change-of-heart in Rosemond's case was improper because it occurred after the judge properly allowed testimony asking the jury exactly for that which the jury was later instructed it could not give – mercy. *See State v Jones*, 343 S C 562, 541 S E 2d 813 (2001) (improper for trial court to alter reasonable doubt charge after defense counsel, during closing argument, relied on earlier representations of trial court as to what charge it would give). Trial counsel's failure to object to this instruction in this context was professionally unreasonable and certainly prejudicial as it took from the jury a potential basis on which to sentence Rosemond to life imprisonment.

3

VII The PCR Court Correctly Concluded that there was the Petitioner failed in his burden of proof in showing ineffective assistance of counsel where counsel failed to object to the penalty phase instruction that “you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy” where neither deficient performance or prejudice can be shown when the South Carolina Supreme Court as recently as 2000 has upheld the same instruction by the same trial judge in *State v Hughey*, 339 S C 439, 529 S E 2d 721 (2000) [Order, p 4911-12, Brief of Petitioner, p 88-90]

In his seventh issue, Rosemond asserts that a new sentencing proceeding is mandated because his counsel constitutionally erred in failing to object to the mitigation instructions which included the phrase ‘you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy’ App p 3348 At the PCR hearing, trial counsel Pinder stated that he could not think of any strategic or tactical reason for failing to object to the instruction App p 4573, l 11-24 He further opined that he did not recall if he was aware of any legal issue related to the instruction at the time of the trial App p 4573, l 22-24

In his order denying relief Judge Alford noted that this ground was not addressed in the Petitioner’s posthearing brief App p 4911 He found that reading the trial judge’s instructions as a whole that there were complete and proper regarding mitigating factors Concerning the claim that the jury was left with the impression that it could not sentence Petitioner to life as an act of mercy, Judge Alford concluded “it would take a tortuous interpretation of that language to arrive at that conclusion’ He then concluded the instructions were proper and trial counsel was not ineffective when he did not object to them App p 4912

How The Issue Was Presented At Trial

Judge Cole satisfied state and federal law in the instruction on mitigating circumstances

In arriving at your decision as to what the appropriate sentence should be in this case, you are instructed that you must also consider any statutory

mitigating circumstances or circumstances

Now what is a statutory mitigating circumstance? A statutory mitigating circumstance 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 whether to recommend a sentence of life imprisonment, you should consider the following statutory mitigating circumstances. Those are set forth in the statutory instruction sheet.

And those statutory mitigating circumstances which you should consider, based upon the evidence presented is: 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 number three, the age or mentality of the defendant at the time of the offense.

Now you are should also consider, in addition to those circumstances any non-statutory mitigating circumstances which have been shown to exist by evidence presented in this 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 non-statutory mitigating circumstances that the defense contends should be considered are: the absence of prolonged premeditation, the lack of any reports of disciplinary problems throughout his school years and any reports of physical violence through his childhood and adult years, whether at work or play.

Also his cooperation with law enforcement officials after his arrest. Also his history of working and contributing to the community. Also, his participation in church activities. Also his ability to adjust and adapt to prison and incarceration. And also any other evidence in the record in this case, but not listed above which would tend to show the defendant deserves to be sentenced to a sentence of life imprisonment.

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 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.

App p 3344-3347 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.

App p 3348, l 8-14

In addition, Judge Cole re-instructed that

You can recommend a sentence of life imprisonment for any reason or no reason at all.

App p 3351, l 5-8 Additionally, Judge Cole declared

In considering whether to recommend a sentence as to the defendant, whether it be one of a sentence of death or whether it be one of a sentence of life imprisonment, I charge you that, as jurors in this case, you must decide that issue based upon the evidence presented during the case and the application of the law that has been given.

You are not to consider any bias or any prejudice or any sentiment, sympathy, public opinion, or consideration as to race, or other arbitrary factor in arriving at your decision.

App p 3352 No objection was presented as to the 'mercy' instruction in 1996

Why Postconviction Relief is not appropriate

In *State v Hughey*, supra, a similar free standing challenge was made to an identical instruction by Judge Cole. In addressing that identical claim in 2000, this Court opined

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

As the state PCR court reasonably found, the instructions were proper and counsel was not ineffective when he failed to object in 1996. This same objection to the same language by the same trial judge was upheld in 2000 in *Hughey*. Counsel Prude stated essentially that he was not aware of a challenge to that instruction in 1996 when the case is tried. His assessment cannot be deemed deficient performance and 'unreasonable' because this Court, with the benefit of cautious study determined that the identical language was later determined to not be error in 2000, when it was objected to in Mr. Hughey's trial.

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' 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) 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 Cf , Kansas v Marsh, 548 U S 163, 176, n 3 (2006) ('mercy instruction alone forecloses the possibility of Furman type error as it eliminates the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty) See Chamberlain v State 989 So 2d 320 (Miss 2008) (Marsh does not require mercy instruction, affirming its prior holding that a capital defendant is not entitled to an instruction to consider mercy as a mitigator because it could lead to a verdict based upon whim or caprice which a defendant is not entitled) Also, People v Wallace, 189 P 3d 971 (Cal 2008)(rejects request for mercy instruction), Kell v Utah, 61 P 3d 1019(2002)(same) Brown v State __ So 2d __, 2007 Westlaw 1865383 (Ala C11m App 2007)(defendant not entitled to mercy instruction in Alabama capital case) Commonwealth v Caison 913 A 2d 220 (Pa 2006)(instruction for jury not to consider sympathy for

defendant approved)

In Smith v Quateman, 515 F 3d 392 (5th Cir 2008), the Court rejected an analogous claim in denying habeas relief in a manner consistent with this Court's opinion in Hughey. Therein the 5th Circuit stated

Instead, Smith seems to be asking for an instruction that would allow a jury to dispense mercy on the basis of a sympathetic response to the defendant." *Johnson v Texas* 509 U S 350, 371, 113 S Ct 2658, 125 L Ed 2d 290 (1993) The Court rejected this idea and even noted that such a rule might render capital sentencing arbitrary. *Id* at 371-72, 113 S Ct 2658

Smith v Quateman, 515 F 3d 392, 410 (5th Cir 2008) The Sixth Circuit in a case coming from Ohio similarly rejected a claim concluding that there was no constitutional error in an instruction that the jury was not to consider sympathy or mercy concluding that it served the useful purpose of confining the jury's imposition of a death sentence by cautioning against reliance on irrelevant extraneous emotional factors. Durr v Mitchell, 487 F 3d 423, (6th Cir 2007) Accord State v Davis, 880 N E 2d 31 (Ohio 2008)(no plain error or ineffective counsel in failing to request an instruction to consider mercy where instruction was not proper nor required)

Here Judge Cole satisfied state and federal law in the instruction on mitigating circumstances. As recognized in Buchanan, he ignores the setting where the jury had just completed testimony from the Petitioner's family members, among others, and a psychologist presenting evidence to support both types of mitigating circumstances.²¹ He misreads the entirety of the instructions to suggest otherwise

²¹ Counsel P11de called the defendant's father, Roosevelt Rosemond, Jr., as the first witness in the penalty phase defense. He testified that Rosemond's mother Dorothy had died July 29, 1994. Roosevelt stated that he wanted to make apologies to the Norton family and go down and tell them Andie is sorry but he was told he could not do that. He said he wanted to get on his knees and tell them and join hands and go to heaven, because he believed Christine and the daughter are in heaven. R. 3235-36. When asked about what sentence is appropriate, Roosevelt responded "if it is God's will but I have to accept a lot of things just [like] the way

The argument is without merit. The jury would have considered the mitigating evidence appropriate for its review. 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

I accept my wife's death. R p 3239, ll 10-14. He said he goes back and gets on his knees and pray and God releases me from these things and that was what he was trying to teach his son.

Reverend Caesar Richburg of Allen Temple A.M.E. Church in Greenville testified next. Marian Williams, a family friend, testified that she had known the Rosemonds for 43 years. She concluded by stating that this was Andie's only offense and that "I pray that you will consider that in your sentencing and have mercy." R p 3255, ll 14-17.

Dorothy Scott, another family friend, testified that she lived across the street and knew the Rosemonds for 32 years. R 3255 57. Ms. Scott made a request to the jury that "I would like to recommend mercy." R p 3258 ll 20-24.

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 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)

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, as in *Hughey* where 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 *Hughey*, the South Carolina Supreme Court must find 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 PCR trial 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 either deficient performance or *Strickland* prejudice. Relief must be denied.



IN THE
SUPREME COURT OF SOUTH CAROLINA

CERTIORARI ON
APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Lee S Alford, PCR Circuit Court Judge
J Derham Cole, Trial Judge

1999-CP-42-3421

ANDRE K ROSEMOND,

Petitioner/Respondent,

versus

William CATOE, et al,

Respondent/Petitioner

PETITION FOR REHEARING
OF RESPONDENT/PETITIONER

The Respondents hereby make a Petition for Rehearing pursuant to SCACR Rule 221 to the opinion entered on June 29 2009 in *Rosemond v Catoe et al*, Op No 26679, __ S C __, -S E 2d __, 2009 WL 1851377 (S C S Ct June 29 2009) The Respondent submits that the Supreme Court may have misapprehended or overlooked the following points in its decision

I JURY INSTRUCTIONS ON MERCY CONSIDERATION

The Respondents submits that the Court may have overlooked or misapprehended the

following points in addressing the challenge to the jury instruction that you may recommend a sentence of life imprisonment for any reason or no reason at all other than as an act of mercy ' Particularly Respondents submit that the Court may have overlooked the following points that

1 Viewing the penalty phase instructions as a whole, it is clear that the trial judge as well as counsel was aware that consideration of mercy was proper for the jury in its sentencing consideration - *but also that the jury was not limited to mercy in its life sentence consideration*

A Judge Cole had previously declared that I believe that a witness or family member may also ask for mercy on the part of the defendant ' App p 3253 This Court's decision is now suggesting that Judge Cole's own instruction was contrary his own expressed understanding and interpretation of the law that mercy was a valid consideration

B The Court ignored the additional supportive finding by the post conviction relief judge in addressing this same issue Concerning the claim that the jury was left with the impression that it could not sentence Petitioner to life as an act of mercy Judge Alford concluded *"it would take a tortuous interpretation of that language to arrive at that conclusion"* He then concluded the instructions were proper and trial counsel was not ineffective when he did not object to them App p 4912

2 Viewing the instructions as a whole and not this sentence in isolation, a reasonable juror would have known it had the ability to consider mercy in determining the sentence See Boyde v California, 494 U S 370 (1990) (Eighth Amendment

satisfied where there is not a reasonable likelihood that the penalty phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner)

- 3 The Respondents agree [and have always agreed] that state law authorized consideration of mercy by a capital sentencer, although the federal constitution did not require it
- 4 Since this Court is apparently interpreting the challenged sentence in isolation, the Court overlooked the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence the Petitioner to a life sentence as an act of mercy **First, it is reasonable that the trial judge intended that the instruction tells the jury, “you may recommend a sentence of life imprisonment for no reason at all other than as an act of mercy ”** The phrase “other than as an act of mercy” modifies the phrase **for no reason at all**, not the phrase **“for any reason** The PCR Court properly found that the interpretation placed upon the instruction by Rosemond’s current counsel and now by this Court was “tortuous

The Respondents agree with Judge Cole and this Court that if a plea for mercy is admitted in evidence then a jury should be entitled to consider it ‘as a matter of state law Rosemond The problem with the Court’s new opinion, albeit in *obiter dicta*, is that it ignores that the jury in Rosemond’s sentencing, as well as the jury in State v. Hughey, 339 S C 439, 459, 529 S E 2d 721, 731 (2000) would have properly considered mercy evidence and that neither instructions “precluded a capital jury’s consideration of mercy evidence in the sentencing phase ”

Since it is unquestionably apparent that Judge Cole was aware and agreed that a sentencing

jury could consider mercy in its sentencing decision it is important that the instructions be viewed as a whole and not taken out of context.¹ It is the improper parsing of the instruction that has led to the Court's tortuous interpretation which is inconsistent with this Court's standard of review for jury instructions and matters on appeal from state post-conviction relief decisions. In order to prove counsel was ineffective, a PCR applicant must show that counsel's performance was deficient and that he suffered resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In determining whether a defendant was prejudiced by allegedly improper jury instructions, the court must find that, *viewing the charge in its entirety and not in isolation*, there is a reasonable likelihood that the jury applied the improper instruction in a way that violates the Constitution.² *Todd v. State*, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003), *Battle v. State*, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (S.C. 2009).

¹ 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.

² The Court may have misinterpreted the emphasis in the Brief of Respondent that the federal constitution did not require "mercy" in capital sentencing as an assertion that this instruction did not require mercy. This emphasis was naturally based upon implicit claims made in this case below and other cases that the federal constitution required mercy consideration. See *Brief of Respondent*, p. 79. However, it was not to suggest that mercy was an improper consideration *as a matter of state law* or that this particular instruction [or *Hughey*] precluded consideration of mercy. To the contrary, as the Brief of Respondent declared, "[t]he evidence that the Petitioner had previously emphasized in his PCR trial 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." *Brief of Respondent* p. 80-81. The implicit suggestion otherwise in this Court's opinion is a misapprehension by the Court of the State's position or the instruction itself.

Here viewing the penalty phase instructions as a whole a reasonable juror would have considered mercy evidence in making its decision

In arriving at your decision as to what the appropriate sentence should be in this case you are instructed that you must also consider any statutory mitigating circumstances or circumstances

Now what is a statutory mitigating circumstance? A statutory mitigating circumstance 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 whether to recommend a sentence of life imprisonment you should consider the following statutory mitigating circumstances. Those are set forth in the statutory instruction sheet.

And those statutory mitigating circumstances which you should consider based upon the evidence presented is: 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 number three, the age or mentality of the defendant at the time of the offense.

Now you are should also consider, in addition to those circumstances, any non-statutory mitigating circumstances which have been shown to exist by evidence presented in this 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 non statutory mitigating circumstances that the defense

contends should be considered are the absence of prolonged premeditation the lack of any reports of disciplinary problems throughout his school years and any reports of physical violence through his childhood and adult years whether at work or play

Also his cooperation with law enforcement officials after his arrest Also his history of working and contributing to the community Also his participation in church activities Also his ability to adjust and adapt to prison and incarceration And also any other evidence in the record in this case, but not listed above which would tend to show the defendant deserves to be sentenced to a sentence of life imprisonment

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 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

App p 3344 3347 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

App p 3348, 1 8 14

In addition, Judge Cole re-instructed that

You can recommend a sentence of life imprisonment for any reason or no reason at all ”

App p 3351 1 5 8 ¹ Additionally, Judge Cole declared

In considering whether to recommend a sentence as to the defendant, whether it be one of a sentence of death or whether it be one of a sentence of life imprisonment I charge you that as jurors in this case **you must decide that issue based upon the evidence presented during the case** and the application of the law that has been given

You are not to consider any bias or any prejudice or any sentiment, sympathy, public opinion, or consideration as to race, or other arbitrary factor in arriving at your decision

App p 3352 Further the solicitor recognized the authority of the jury to consider mercy App p

3252 ('there can be a plea for mercy)(solicitor's statement)

Simply put *State v Hughey* is not required to be overruled, particularly in a collateral setting, where the *Hughey* decision is not being interpreted by trial courts, post-conviction relief courts or trial counsel to either exclude or preclude mercy in a capital case ⁴ Instead, *Hughey* was a recognition

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No objection was made to this instruction in 1996 Respondent counsel has surveyed other capital instructions in cases by Judge Cole Similar instructions *without objection by any trial counsel*, were given in *State v Jimmy C Locklair* 341 S C 352 535 S E 2d 420 (2000), *State v Jonathan Binney*, 362 S C 353, 608 S E 2d 418 (2005) and *State v Kamell Evans*, 371 S C 27, 637 S E 2d 313 (2006), as well as *Rosemond* and *Hughey* See also, *State v Richard Tucker*, 319 S C 425, 462 S E 2d 263 (1995), habeas relief granted on other grounds, *Tucker v Catoe*, 346 S C 483 552 S E 2d 712 (2001)

4

In *State v Simmons*, 360 S C 33, 45 n 6, 599 S E 2d 448, 453 n 6 (S C ,2004), the South Carolina Supreme Court interpreted *State v Hughey* to stand for the proposition that "(jury may recommend life imprisonment for any reason or no reason at all)" However, it should also be noted that in *State v Hicks*, 330 S C 207, 218 219, 499 S E 2d 209 215 (S C ,1998), this Court held that "the trial judge is not required to instruct the jury it could impose a life sentence 'for any reason or no reason at all' where the jury is informed, as it was here, it could consider any mitigating circumstance authorized by law and could impose a life sentence even if aggravating circumstances were found " *State v Green* 301 S C 347, 359, 392 S E 2d 157, 163 (S C ,1990)(same), *State v Jones* 298 S C 118 378 S E 2d 594 (1989) (same)

that viewing instructions as a whole that the instructions did not prevent the appropriate consideration of evidence in mitigation including expressed evidence of mercy requests

Respondent requests this court to grant rehearing and vacate the portion of the decision which overruled *Hughey*

II Defense Counsel Ineffectiveness and Mental Health Evidence

In granting relief on the ineffective assistance of counsel in the penalty phase claim, Respondent submits that the Court may have overlooked in its analysis and applied an inappropriate standard of review based upon the PCR judge's findings because there is evidence in the record to support those findings

In this Court's analysis, it focused upon the evidence presented prior to and during the time of the 1996 trial. However, this Court may overlooked that at the time of the trial no expert had diagnosed Rosemond with a major mental illness

- 1 Dr. Steven Shea did testify in front of the jury in the penalty phase. He specifically testified that he had no diagnosed no mental illness for Rosemond and that he was not insane. App p. 3271, l. 6-10, Also, App p. 3277, l. 6-10
- 2 Although this Court emphasized that Dr. Harold Morgan testified in a pretrial competency hearing that Rosemond was "clearly paranoid," which he described as a 'symptom' App p. 4241-4242, Dr. Morgan later clarified at the state PCR proceeding that it was a diagnostic impression but not a diagnosis and suggested that it was in a schizophrenic spectrum from various personality disorders, including schizotypal personality disorder, paranoid personality disorder to schizoid personality disorder. App p. 3850-3852. None of these are major mental illnesses.

- 3 In the opinion the Court emphasized that Dr. Shea testified in a competency hearing that he learned that Rosemond's brother was paranoid schizophrenic, *but overlooked that Dr. Shea testified in front of the jury in the penalty phase that he had learned that Rosemond's brother Stanley suffered from Schizophrenia*. App. p. 3260.
- 4 Viewing the matter at the time of the trial, the Court overlooked that State PCR court's recognition under the *Strickland* prejudice prong analysis that had Dr. Harold Morgan been called in the penalty phase and opined about the delusions and possible schizophrenia based upon his 40-minute interview and reliance on Dr. Shea's information, the state would have pointed out that Dr. Shea had been unable to diagnose a mental illness and Dr. Morgan's bias as being paid by the defense. App. p. 4929. In addition, to counter Dr. Harold Morgan, the prosecution could have called the trio of experts, Dr. Schwartz-Watts, Dr. McKee and Dr. Donald Morgan who had each opined in the competency hearing that he did not have a mental illness. App. p. 4929. The PCR Court recognized that counsel's conduct must be viewed from the perspective at the time of the trial, not in hindsight. App. p. 4929-30. Respondent respectfully submits that there is probative evidence to support the conclusions that he has failed in his burden of proof under Strickland v. Washington, 466 U.S. 668 (1984).
- 5 Importantly, Dr. Shea was unable, despite three years and a number of interviews to have a diagnosis he could give to a reasonable degree of certainty in his field. Instead, Dr. Shea's only additional testimony would have been to elicit a list of odd and bizarre behaviors which may in fact have actually undermined the power of his

opinion on adjustment to prison by Rosemond

6 Under this Court's assessment this was a question of presenting what Rosemond and Pride had in 1996. What the Court either overlooked or misapprehended was that Pride only had in 1996 a set of opinions that had been presented to the trial judge during the March 14, 1996 competency hearing about odd and bizarre behavior by Rosemond. Contrasting that "odd behavior" presentation was his actual, but conflicting, defense presentation from family and neighbors that Rosemond was a good, normal, church going man who was pressured by the difficulty of a mixed race relationship to act uniquely in a domestic situation that would not happen again. This dichotomy was a dangerous two edged sword as obviously recognized by the PCR court in its analysis. Confidence in the outcome under Strickland was not undermined.

7 The Court misapprehended or overlooked the evidence about Rosemond that the neighbors presented that the defense (and Solicitor) relied upon in his argument that Rosemond was not mentally ill (Shea), had an education and was considered intelligent and smart by their standards. This was the evidence at trial.

III

Respondents respectfully request that the Petition for Rehearing be granted for all the reasons set out above. Alternately, Respondent request the portion of the opinion concerning State v. Hughey be vacated and removed.

Respectfully submitted,

HENRY D. McMASTER

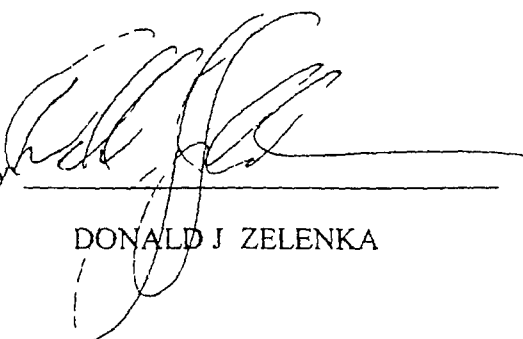
Attorney General

JOHN W McINTOSH
Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General
ID No 4425

Post Office Box 11549
Columbia South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENTS

By 
DONALD J ZELENKA

July 14 2009

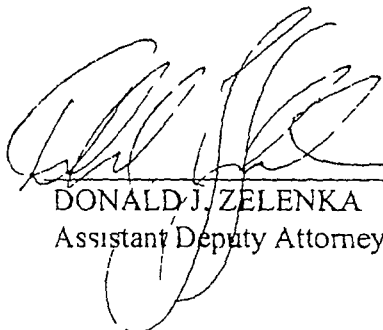
CERTIFICATE OF Service

I, Donald J Zelenka, hereby certify that I have served the Respondent's *Petition for Rehearing* in the foregoing action by depositing copies in the United States mail postage prepaid to the following

Robert E Lominack Esquire
Law Offices of Robert E Lominack P C
P O Box 5508
Columbia SC 29250

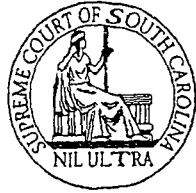
David I Bruck Esquire
Blume Weyble & Norris, LLC
P O Box 11744
Columbia SC 29211

This 14th day of July, 2009



DONALD J. ZELENKA
Assistant Deputy Attorney General





The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734 1499

August 6, 2009

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P O Box 11549
Columbia, SC 29211

Re Rosemond, Andre v. Catoe, William

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/ Costa M. Pleicones J

s/ Donald W. Beatty J

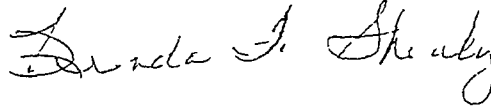
s/ John W. Kittredge J

August 6, 2009 "

The remittitur is today being forwarded to the lower court

Assistant Deputy Attorney General Donald J Zelenka
Page Two
August 6, 2009

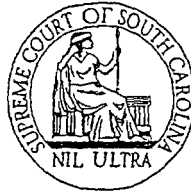
Very truly yours,

A handwritten signature in cursive script, appearing to read "Sandra J. Shady".

CHIEF DEPUTY CLERK

BFS/dmh

cc David I Bruck, Esquire
Division of Appellate Defense
Robert Edward Lominack, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734 1080

FAX (803) 734-1499

August 6, 2009

REMITTITUR

The Honorable Marcus W. Kitchens
Clerk of Court, Spartanburg County
180 Magnolia Street
PO Box 3483
Spartanburg, SC 29304-3483

Re Rosemond, Andre v. Catoe, William
1999-CP-42-03421

Dear Mr. Kitchens:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

CHIEF DEPUTY CLERK

BFS/dmh

Enclosure

cc David I. Bruck, Esquire
Division of Appellate Defense
Robert Edward Lominack, Esquire
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
IN THE COURT OF COMMON PLEAS

ATTORNEY GENERAL'S OFFICE
JUDGMENT IN A CIVIL CASE
CASE NO 2000-CP-01-212

JOHN KENNEDY HUGHEY V STATE OF SOUTH CAROLINA

CHECK ONE

- ☐ JURY VERDICT This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT This action came for a hearing before the court this date.
- ☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b) SCRPC ☐ Rule 41(a)
SCRPC (Vol Nonsuit) ☐ Rule 43(k) SCRPC (Settled) ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON) ☐ Rule 40(j) SCRPC ☐ Bankruptcy
- ☐ Binding arbitration subject to right to restore to confirm vacate or modify arbitration award
- ☐ Other _____

IT IS ORDERED AND ADJUDGED

☒ See attached order

☐ Statement of Judgment by the Court/Formal Order to Follow

Dated at Greenville, South Carolina, this 11th Day of May, 2010

Court Reporter NA


ALEXANDER S MACAULAY Presiding Judge

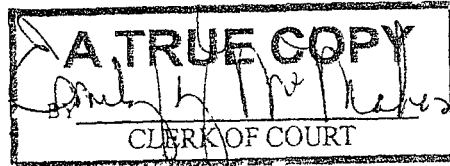
This judgment was entered on the _____ and a copy mailed first class this _____ to attorneys of record or to parties (when appearing pro se) as follows

E Charles Grose, Jr, Esquire Office of the Public Defender Greenwood and Abbeville Counties 600 Monument Street Box P 133 Greenwood South Carolina 29646 0 864 229 9505

Tara M Schultz, Esquire Khaled Law Firm PC, 1365 Ebenezer Road Rock Hill South Carolina 29732 803 908 1199

Teresa N Norris, Esquire Blume Weyble & Norris LLC Post Office Box 11744 Columbia South Carolina 29211 803 765 1044

Donald J Zelenka, Assistant Deputy Attorney General South Carolina Attorney General's Office Post Office Box 11549 Columbia South Carolina 29211 803 734 6305



ATTORNEY(S) FOR THE APPLICANT(S)

ATTORNEY(S) FOR THE RESPONDENT(S)

SCRPC APP 24/FORM 4

The Honorable Emily Y McMahan Clerk of Court

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 MAY 14 AM 8:48
EMILY Y MCMAHAN
CLERK OF COURT

STATE OF SOUTH CAROLINA)

COUNTY OF ABBEVILLE)

John Kennedy Hughey, #5055)

Applicant,)

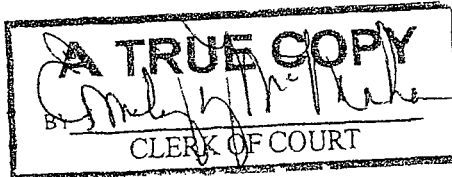
v)

The State of South Carolina,)

Respondent)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case Number 2000-CP-01-0212

ORDER GRANTING POST-
CONVICTION RELIEF

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 MAY 14 AM 8 48
EMILY MCMAHAN
CLERK OF COURT

This matter comes before the Court pursuant to an amended application for post-conviction relief (PCR) filed by the Applicant dated December 15, 2007. On October 13, 2008, this case was called before the Court of Common Pleas. The Applicant was present and represented by his appointed counsel Charles Grose, Esquire, Tara Schultz, Esquire, and Teresa Norris, Esquire. The Respondent was represented by Donald J. Zelenka, Esquire, Office of the South Carolina Attorney General. At the hearing, testimony was received from Robert Tinsley, Sr., Esquire, Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Esquire, Robert Dudek, Esquire, Paige (Tarr) Haas, and Dr. Donna Schwartz-Watts.

Following the hearing, this Court took the matter under advisement and requested Post-Hearing Briefs to be submitted by the parties. The Applicant, by and through his appointed counsel, submitted his post-hearing brief on June 8, 2009. On June 29, 2009, Applicant supplemented his post-hearing brief due to the South Carolina Supreme Court's decision overruling part of the opinion in the Applicant's direct appeal. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). Thereafter, the Respondent served its post-hearing brief on August 31, 2009 and the Applicant then served his reply brief on December 11, 2009.

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For the reasons stated more fully herein, Mr Hughey's Application for Post-Conviction Relief regarding the guilt phase of the Applicant's trial is DENIED and DISMISSED, with prejudice, and the Application for a new sentencing phase of the trial is GRANTED

TRIAL COUNSEL IS NOT INEFFECTIVE WHEN HE ARTICULATES A VALID REASON FOR EMPLOYING CERTAIN TRIAL STRATEGY (Issues I and II)

In *Strickland v Washington*, 466 U S 668 (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 *Id* at 687 To establish deficient performance under *Strickland*, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" *Id* at 688 In order to establish prejudice, the applicant must show, "but for counsel's errors, there is a reasonable probability the result of the trial would have been different" *Id* at 694, *see also Brown v State*, 340 S C 590, 533 S E 2d 308 (2000) Where counsel articulates a valid reason for employing certain strategy, the conduct will not be deemed ineffective *Capood v State*, 338 S C 103, 525 S E 2d 514 (2000)

A The Presentation of Manslaughter and Applicant and Sister's Guilt Phase Testimony

The Applicant contends that his trial counsel erred in advising his sister and himself to testify in the guilt phase of the trial where "evidence was irrefutable to support convictions for murder" (Applicant's Post-Hearing Brief, P 23) Based upon the argument presented at the hearing and Mr Hughey's Post-Hearing Brief, 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 Applicant and his sister to testify Nevertheless, the right to testify belongs to the Applicant and the trial court made a full inquiry

of whether the Applicant wanted to testify and was advised of his right to testify. The mere fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. *Strickland*, 466 U.S. at 689, *see also Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to asserting that trial counsel was ineffective for allowing the Applicant and his sister to testify during the guilt phase, Applicant contends that his attorneys were ineffective for pursuing a charge on the possible lesser included offense of voluntary manslaughter and transferred intent. Counsel's "strategic choices made after thorough investigation are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-691. In evaluating an ineffective assistance claim, a court "must judge 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.

Applicant's trial counsel testified at the PCR hearing that the trial strategy was to keep the case from being a death eligible case by presenting evidence that would entitle their client to an instruction on manslaughter. PCR 281, 1 10-14. Trial counsel was effective in properly presenting evidence to support a charge of voluntary manslaughter and the trial judge properly gave the manslaughter instruction and specifically included the manslaughter—transferred intent charge. R. 3465-68. With the trial counsel's success in having the charge given, deficient performance under *Strickland* cannot be found merely because the result was rejected.

This Court finds that the Record from the Applicant's trial and sentencing hearing, as well as the PCR hearing, conclusively demonstrate that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing the Applicant and his sister to testify

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during the guilt phase. In addition, the Applicant was not prejudiced in any way by trial counsel's performance.

B The Failure to Properly Investigate and Present Available Mitigating Evidence

In his second specification of ineffective assistance of counsel, the Applicant asserts that his counsel failed to investigate or present adequate mitigation evidence. In particular, he specifies adaptability to confinement and the capacity to appreciate the criminality of his conduct as two examples of this error. After considerable review of the record, this Court finds that the trial counsel investigated both the mental and family background of the Applicant and presented an appropriate case in mitigation.

Applicant contends that trial counsel failed to include any evidence of adaptability to prison life based upon his confinement history. At the PCR hearing, trial counsel testified that the mental health evidence revealed that the Applicant, in times of stress, would revert to his learned behavior of violence. In addition, trial counsel testified that they considered presenting the evidence, but because of previous negative experiences in capital murder trials on this very issue, they decided not to provide the testimony. Furthermore, trial counsel testified that they had met with the detention officers and learned that their testimony would not be of value to their case. This Court finds that was a strategic decision made by the counsel during the trial and concludes that the Applicant has failed to show the decision was based on neglect or ignorance. *Strickland*, 466 U.S. at 690-691. Furthermore, the Applicant has not demonstrated the prejudice that resulted by omitting this evidence required by *Strickland*, *supra*.

It is important to note that at trial the jury heard mitigation testimony 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

neuro-psychology and psychology. In addition, trial counsel ensured that the jury instructions during the sentencing phase focused the jury on potential mitigation suggested by the evidence. Specifically, the jury was instructed to consider

- 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

The record clearly reveals that counsel retained a number of experts who provided their opinions in the case as well as a series of lay witnesses to testify on Applicant's behalf in mitigation. The sentencing jury was readily aware of the dysfunctional family experience that the Applicant experienced. This Court finds that the appointed trial counsel for the Applicant put into evidence a thoughtful and thorough case in mitigation considering various themes and presentations. *Accord Tucker v. Ozmint*, 350 F.3d 433, 441-42 (4th Cir. 2003). Accordingly, Applicant's claim that trial counsel failed to properly investigate and present available mitigating evidence is denied.

THE JURY INSTRUCTION REGARDING MITIGATION THAT JURORS "MAY RECOMMEND A SENTENCE OF LIFE FOR ANY REASON OR NO REASON AT ALL OTHER THAN AS AN ACT OF MERCY," STATE V HUGHEY, 339 S.C. 439, 460, 529 S.E.2D 721, 732 (2000) (EMPHASIS THAT OF THE COURT), IS SO INIMICAL TO THE LAWS OF THE STATE AND THE UNITED STATES IN CAPITAL CASES AS TO ENTITLE THE APPLICANT TO A NEW TRIAL (Issues III, IV and V)

The jury was instructed on non-statutory mitigating circumstances, in pertinent part, as follows

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 or [sic] 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*

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Dr -

* * *

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

State v Hughey, 339 S C 439, 458-459, 529 S E 2d 721, 731 (2000) (emphasis that of the Court)

The Supreme Court noted “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 ” *Id* , 339 S C at 460, 529 S E 2d at 732 As for the Respondent’s contention that the trial court’s charge had become “the law of the case,” (Issue V), obviously the Supreme Court recognized and addressed it as an issue on appeal The Supreme Court went on to approve and sanction the jury charge given by the trial court

Nevertheless, in a prior trial, *State v Rosemond*, 335 S C 593, 598, 518 S E 2d 588, 590 (1999), where “the trial court’s jury instruction mirrored the instruction found proper in *State v Hughey* on a subsequent post-conviction relief application, the Supreme Court expressly held

We overrule *Hughey* to the extent it approved and sanctioned the charge given here

* * *

It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy

Rosemond v Catoe, 383 S C 320, 330, 680 S E 2d 5, 10 (2009)

It has long been the law of South Carolina “as to the right and duty of the jury to recommend the appellant to the mercy of the court, in the event the jury reached the conclusion that the appellant was guilty of murder” *State v Blakely*, 158 S C 304, 155 S E 408, 409 (1930) Prior to the enactment of Act No 530, 21 Stat at L 785 (1894), the punishment for the

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crime of murder was death only See Act No 91, 14 Stat at L 175 (1869) The 1894 Act,¹ “gave to a petit jury the right, when it found a defendant guilty of murder, to recommend him to the mercy of the court, and that the effect of such recommendation will be to save the accused from death, and cause him to be sentenced for life imprisonment at hard labor The presiding judge was in error in stating to the jury repeatedly that they had nothing to do with mercy, and he committed further error in telling the jury some of the instances in which they should recommend mercy ” *State v King*, 158 S C 251, 155 S E 409, 425-426 (1930)

Under our most recent case law applying S C Code Ann § 16-3-20 (2003), it is now well established that “It is proper to instruct a jury in a capital sentencing phase that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy ” *Rosemond v Catoe*, *supra* Because the jury was instructed that they “may recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*,” (emphasis supplied), the Applicant has established his entitlement to a new sentencing phase of his trial *State v Hughey*, *supra*, *Rosemond v Catoe*, *supra*

CONCLUSION AND JUDGMENT

Due to the overwhelming evidence of guilt and want of prejudice, the relief regarding the guilt phase of the Applicant’s trial is DENIED and DISMISSED, with prejudice, and, based on the foregoing, the Application for a new sentencing phase of the trial is GRANTED

AND, IT IS SO ORDERED


ALEXANDER S MACAULAY, Judge

May 7, 2010
Walhalla, South Carolina

¹ Section 109 (2454) Whoever is guilty of murder shall suffer the punishment of death *Provided however* That in each case where the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the Court whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner 1894 (21) 785 § 16 52 S C Code (1962) 1868 (14) 175

ATTORNEY GENERAL'S OFFICE
 RECEIVED 5-28-18
 AD. M. STP. T. T. PRODUCTIONS
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STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENWOOD)
)
 John Kennedy Hughey, #5055,)
 Applicant)
 v)
)
 State of South Carolina,)
 Respondent)
 _____)

IN THE COURT OF COMMON PLEAS _____
 FOR THE EIGHTH JUDICIAL CIRCUIT _____

 Case No 2000 CP-01-0212 _____

 Applicant's Rule 59(e), SCRCF Motion to Alter or
 Amend the Judgment _____

Pursuant to Rule 59(e), SCRCF, Applicant, John Kennedy Hughey, moves the Court for an order altering or amending the judgment and granting him post conviction relief (PCR) based on Issues I and II of the second amended PCR application. See Applicant's Post-Hearing Brief 23-98 and Post-Hearing Reply Brief 7-17

Procedural History

On December 4, 1995 Hughey murdered Tasheka Jackson and Luvenia Harris. The state charged Hughey with two counts of murder, first degree burglary, grand larceny of a motor vehicle, and possession of a firearm during the commission of a violent crime. Robert Tinsley and Billy Garrett were appointed to represent Hughey. Beginning on October 13, 1997, the state tried Hughey before the Honorable J. Derham Cole and a jury. On October 27, 1997, the jurors convicted Hughey of all counts. On October 30, 1997, following the recommendations of the jurors, Judge Cole imposed two death sentences.

Hughey appealed his convictions and sentences. The South Carolina Supreme Court affirmed the convictions and sentences on March 27, 2000. *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000). The United States Supreme Court denied *certiorari* on October 16, 2000. *Hughey v. South Carolina*, 531 U.S. 946 (2000).

On October 25, 2000, Hughey filed his initial application for PCR. Hughey filed amended PCR applications on September 15, 2006 and December 15, 2006. The second amended PCR application requested relief based on the following grounds:

- 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 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, 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.
- III 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.
- IV 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.

The Honorable Alexander S. Macaulay conducted a hearing on the second amended PCR application on October 13-15, 2008 and requested post hearing briefs upon conclusion of the hearing. Hughey served his post-hearing brief on June 8, 2009. By letter dated June 29, 2009, Hughey supplemented his post-hearing brief because the South Carolina Supreme Court overruled part of the opinion in Hughey's direct appeal. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The state served its post-hearing brief on August 31, 2009. Hughey served his reply brief on December 11, 2009.

By order dated May 7, 2010 the Court granted Hughey post-conviction relief and ordered a new sentencing hearing. Based on *Rosemond*, the Court ruled, "Because the jury was instructed that they 'may recommend a sentence of life imprisonment for any reasons or no reason at all **other than as an act of mercy**,' (emphasis supplied [by Court]), the Applicant has established his entitlement to a new sentencing phase of his trial." Order 7. The Court denied the other relief requested by Hughey. The Court signed the judgment on May 11, 2010 and it, along with the order, was filed with the Abbeville County Clerk of Court on May 14, 2010. Counsel received written notice of entry of the order and judgment on May 19, 2010.

This Motion to Alter or Amend the Judgment follows

Argument

- I. Despite substantial irrefutable evidence to support convictions for murder, counsel advised Hughey and his sister to testify during trial in a futile attempt to rebut the state's evidence and made the incredible argument that Hughey was guilty only of voluntary manslaughter, a defense contradicted by law and by Hughey's and the defense expert's testimony. *See Applicant's Post-Hearing Brief 23-61 and Applicant's Reply Brief 7-12*

In his post hearing brief and reply brief, Hughey reviews the trial record and summarizes the State's overwhelming case of guilt against him ¹ Applicant's Post-Hearing Brief 8 9, 23-30 and Applicant's Reply Brief 7-8 The Court agreed there was "overwhelming evidence of guilt" Order 7 However, the Court concluded

Applicant's trial counsel testified at the PCR hearing that the trial strategy was to keep the case from being a death eligible case by presenting evidence that would entitle their client to an instruction on manslaughter PCR 281, 1 10 14 Trial Counsel was effective in properly presenting evidence to support a charge of voluntary manslaughter and the trial judge properly gave the manslaughter instruction and specifically included the manslaughter – transferred intent charge R 3465-68 With the trial counsel's success in having the charge given, deficient performance under Strickland cannot be found **merely because the result was rejected**

The Court finds that the Record from the Applicant's trial and sentencing hearing, as well as the PCR hearing, conclusively demonstrate that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing applicant and his sister to testify during the guilt phase In addition, the Applicant was not prejudiced in any way by trial counsel's performance

Order 3-4 (emphasis added)

Hughey, however, does not seek relief merely because the jurors rejected the voluntary manslaughter defense The overwhelming evidence of guilt actually assured the jurors would reject trial counsel's manslaughter strategy Hughey was prejudiced because trial counsel alienated the jurors during the guilt phase, thereby guaranteeing the jurors would recommend

¹ On the day before the murders, Hughey discovered Jackson with another man, Michael Adams and threatened to kill both Hughey was angry Jackson and Adams reported the threats to the Abbeville Police Department Hughey soon located Jackson at Harris' house Hughey took a single shot shotgun and ammunition to Harris house to confront Jackson Hughey broke into the house through the front door threatened Jackson and Harris pursued her through the trailer, and shot at her in the bathroom Jackson fled to the back bedroom Hughey reloaded the shotgun shot and killed Harris in the hallway, and pursued Jackson to the back bedroom Hughey again reloaded the shotgun and killed Jackson Hughey stole Jackson's automobile and fled Using Jackson's ATM card, Hughey withdrew money from her account at a bank in Anderson He continued to flee to Georgia Later that day authorities located Hughey at his sister's house in Gainesville Georgia On December 5 1995 Hughey confessed Applicant's Post Hearing Brief 8 9 23 30

death sentences Trial counsel, therefore, was ineffective for presenting a guilt phase defense that led to the worst possible outcome in the penalty phase The Court overlooked or misapprehended three significant factors

- 1) The evidence presented by trial counsel during Hughey's case in chief revealed malice and supported convictions for two counts of murder, first degree burglary, and grand larceny,
- 2) Trial counsel's doomed strategy was influenced by errors of law, and
- 3) Trial counsel adopted this strategy knowing it was not likely to succeed and correctly predicting it would alienate the jurors

Each of these factors will be discussed in more detail below followed by a discussion of trial counsel's ineffectiveness

A The evidence presented by trial counsel during Hughey's case in chief revealed malice and supported convictions for two counts of murder, first degree burglary, and grand larceny See Applicant's Post Hearing Brief 23-38 and Applicant's Reply Brief 7-12

Despite Hughey's willingness to plead guilty to two counts of murder and one count of first degree burglary for three consecutive life sentences, trial counsel chose a "blame the victim" type theme and presented a voluntary manslaughter defense In his opening statement, Garrett lost credibility by outlining a chronology later contradicted by uncontestable evidence, including phone records

In Hughey's case in chief, trial counsel called four witnesses Hughey's friend Chris Burton testified Hughey was upset about something the day before the murders Hughey's sister, Gloria White Harrison, confirmed Hughey's confrontation with Jackson and Adams on December 3, 1995, but further alienated the jury by disputing the police department's incident reports Applicant's Post-Hearing Brief 8-9, 23 24, 30 31 Both witnesses confirmed malice and premeditation

Hughey testified in his own defense. His testimony revealed malice towards the victims and supported convictions for murder. Hughey admitted a history of violence in his relationship with Jackson and said he was upset when he discovered Jackson with Adams. He admitted to searching to learn where Jackson stayed that night. Hughey testified he was mad when he confronted Jackson at Harris' trailer and he did not like it when Jackson slammed the door in his face. Solicitor Townes Jones decimated Hughey on cross-examination. Further demonstrating malice, the cross-examination and even Garrett's re-direct highlighted Hughey having to reload the shotgun in order to murder both victims. Applicant's Post-Hearing Brief 31-37

Garrett called retired SLED Agent Don Girndt as an expert in crime scene investigation, but Solicitor Jones' questioning made Girndt an expert for the state's theory of how Hughey committed the murders. Girndt acknowledged it would have taken some force to break the front door frame. Girndt told Jones, "I am not arguing with your theory." When questioned about the sequence of shots, Girndt testified the first shot had probably been fired before Harris called the police department and based on the blood spatter, Girndt believed Harris dropped the phone to defend herself. Girndt testified Hughey had to walk towards Harris, standing about four feet from Harris, maybe a little less, when he shot her. After Hughey shot Harris, he would have had to reload and cock the shotgun before he killed Jackson. According to Girndt, that matched the dispatcher hearing five seconds of silence before another shot. Based on the blood spatter, Girndt acknowledged Jackson was likely lying on the bed face down when Hughey shot her in the side of the head. Hughey would have been to Jackson's right. Her head would have been near the bedspread, with the gun approximately four feet from her head. Applicant's Post Hearing Brief 37-38 and Tr 3265-3348

The Court overlooks an additional important point. For trial counsel's strategy of preventing Hughey's case from being death eligible to work, the jurors would have also had to acquit Hughey of first degree burglary and grand larceny. This aspect of trial counsel's strategy was also doomed from the start because of overwhelming evidence and well-settled legal principles. For an analysis of why it was not reasonable for trial counsel to believe the jurors would acquit of burglary and grand larceny, Hughey refers the Court to Applicant's Reply Brief, pages 11-12.

B Trial counsel's doomed strategy was influenced by errors of law. See Applicant's Post-Hearing Brief 43-59 and Applicant's Reply Brief 8-11

The Court's order overlooks or misapprehends trial counsel's decision to rely on the voluntary manslaughter defense, which was influenced by two errors of 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). See also *United States v Mooney*, 497 F 3d 397, 404 (4th Cir. 2007) ("Counsel's erroneous legal advice resulted from a failure to conduct the necessary legal investigation. Counsel in criminal cases are charged with the responsibility of conducting 'appropriate investigations both factual and legal,' to determine if matters of defense can be developed"), *Padgett v State*, 324 S C 22, 484 S E 2d 101 (1997) (counsel ineffective for failing to object to first degree burglary indictment which alleged burglary of dwelling, but the evidence revealed that the only building on the property was a barn, not valid strategy where "it appears counsel did not recognize a distinction between Richardson's barn and a dwelling for first degree burglary purposes").

Trial counsel's two legal errors are discussed below.

- 1 Hughey's killing of Jackson could not be voluntary manslaughter because of the cooling off period and because Jackson was exercising her legal right to defend herself *See Applicant's Post Hearing Brief 45-49*

Hughey's killing of Jackson could not be voluntary manslaughter because there was a sufficient cooling off period *State v Wharton*, 381 S C 209, 672 S E 2d 786 (2009) (act must be committed in a "sudden heat of passion upon sufficient legal provocation") Through Marcus Harris (the very first witness) it was clear that Hughey was in the home with a gun at 11 56 a m The first shot apparently happened, just before 12 O4 p m when Harris called 911² This is an eight minute cooling off period *See State v Putman*, 373 S C 527, 576, 647 S E 2d 144, 176 (2007) (Ten minutes has also been found to be a sufficient cooling off period to eliminate voluntary manslaughter), *State v Cole*, 338 S C 97, 525 S E 2d 511 (2000) (A time period as short as three to five minutes can constitute a cooling off period that eliminates the possibility of voluntary manslaughter as a charge as a matter of law), and *State v Walker* 324 S C 257, 261, 478 S E 2d 280, 282 (1996) (An attempt to defuse a situation deemed a period of cool reflection) *See Applicant's Post-Hearing Brief 45-48*

In addition, provocation cannot come from Jackson exercising her legal right to defend herself '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 Norris*, 253 S C 31, 39, 168 S E 2d 564, 567 (1969) *See also State v Ivey*, 325 S C 137, 481 S E 2d 125 (1997), *State v Franklin*, 310 S C 122, 425 S E 2d 758 (Ct App 1992) *overruled on other ground by Brightman v State*, 520 S E 2d 614, 616, 336 S C 348, 352 (1999) A fight alone is not enough to constitute sufficient legal provocation *Cole, supra*

² Significantly Grndt the defense expert relied on this time line *See Applicant s Post Hearing Brief 38*

Even according to his own testimony, Hughey wanted Jackson to think he had his 9mm pistol in his pocket to frighten her with the potential of committing a violent act. In addition, Tinsley admitted Hughey told him he brought the gun to Harris' home as a way to intimidate Jackson in retaliation for her relationship with another man. From Jackson's point of view, Hughey was angry with her over the other man, he had threatened to kill her the day before, he had a gun with him and her two young children were present in the house. Any actions Jackson took to protect herself in light of these facts were justified as defense of herself and defense of others.

Even assuming that she was not justified in defending herself and that she was instead the initial aggressor, the facts taken in the light most favorable to Hughey are still do not support the position trial counsel sought to advance, as addressed above.

2 Trial Counsel failed to recognize that South Carolina law requires the provocation to come from an act of the victim and not an innocent, third party. See Applicant's Post-Hearing Brief 49-59

Hughey's killing of Harris could not be voluntary manslaughter because South Carolina requires the provocation to come from an act of the victim and not an innocent, third person. Instead, counsel believed Hughey's intent could be transferred from one victim to the other victim even though this concept has never been recognized by the South Carolina Supreme Court. *State v. Wharton*, 381 S.C. 209, 672 S.E.2d 786 (2009).

The South Carolina Supreme Court has recognized the doctrine of transferred intent when the issue is transferring malice from the intended victim to the unintended victim but has never applied that doctrine to voluntary manslaughter cases. *Wharton supra*. Hughey's counsel failed to organize their defense theory around this fact, instead pursuing transferred intent in voluntary manslaughter as if it was a matter of law in South Carolina. There is no evidence in the record of

any provocation on the part of Harris to warrant a voluntary manslaughter charge in her killing³ Nonetheless, defense counsel went headlong into arguing that Jackson's provocation merited a reduction of the charge because the provocation transferred to Harris This "transferred provocation" is not viable under South Carolina law

Hughey refers the court to his review of South Carolina case law concerning the doctrine of transferred intent Applicant's Post-Hearing Brief 49-54⁴ South Carolina recognizes malice can be transferred from an intended victim to an unintended victim Even today, "[t]he applicability of the doctrine of transferred intent to voluntary manslaughter cases where the defendant kills an unintended victim upon sufficient legal provocation committed by a third party remains an unsettled issue in South Carolina " *Wharton*, 381 S C at 215, 672 S E 2d at 789 South Carolina has consistently required the provocation for voluntary manslaughter to come from the actual victim *State v Locklair*, 341 S C 352, 535 S E 2d 420 (2000), *State v Tucker*, 324 S C 155, 478 S E 2d 260 (1996), and *State v Franklin*, 310 S C 122, 425 S E 2d 758 (Ct App 1992) *overruled on other ground by Brightman v State*, 520 S E 2d 614, 616, 336 S C 348, 352 (1999)

C Trial counsel adopted this strategy knowing it was not likely to succeed and correctly predicted it would alienate the jurors See Applicant's Post-Hearing Brief 41-43

Garrett knew the voluntary manslaughter defense would likely alienate the jurors He testified

³ Girndt, the defense expert, opined Harris was defending herself See Section I A *supra* and Applicant's Post Hearing Brief 37-38

⁴ Hughey also distinguishes the case law traditionally relied upon by the state Applicant's Post-Hearing Brief 54-59

I told Robert that the good likelihood if that happened that my participation [during sentencing] didn't need to be out front. It needed to be more behind the scenes at that point in time because the jury had rejected my – my presentation of evidence for John.

Garrett recognized he would lose credibility with the jurors if they rejected the manslaughter defense. PCR 216. “One person would probably be burned if the jury verdict came back negative.” PCR 227. At the same time, Garrett recognized the jurors would associate him with Tinsley because the two were trying the case together and sitting at the same table with Hughey. PCR 299-301. And, of course, the jurors would associate both Tinsley and Garrett with Hughey's incredible testimony given based on their advice, and in support of their “useless charade” in the trial. *Florida v. Nixon*, 543 U.S. 175, 192 (2004).

Tinsley, likewise, had some concerns about presenting the voluntary manslaughter defense. “You've got to be careful in a case like this not to alienate your basically sentencing jury in phase one.” When asked about the strength of the defense, Tinsley knew “it was a stretch.” He was fully aware if the manslaughter defense did not work, then the risk was alienating the jurors. Tinsley “could have seen taking a different approach,” explaining, “I guess the word you use is punt. It's a football expression. It's to more or less punt on the defense of the – of the murder charge.” PCR 79.

D Trial Counsel's Ineffectiveness. See Applicant's Post-Hearing Brief 59-61

The Court correctly identifies *Strickland v. Washington*, 466 U.S. 668 (1984) and the controlling authority for establishing a claim of ineffective assistance of counsel. Order 2. The Court, however, overlooks the additional applicable legal standards that supplement *Strickland* and apply in capital cases. See Applicant's Post-Hearing Brief 12-22 and Applicant's Reply Brief 4-6. The United States Supreme Court has held the American Bar Association Guidelines

for the Appointment and Performance of Counsel in Death Penalty Cases are the prevailing professional standards *Wiggins v Smith*, 539 U S 510 (2003). The ABA Guidelines were issued in 1989 and revised in 2003. The 1989 Guidelines applied to Hughey's 1997 trial. *See Council v State*, 380 S C 159, 670 S E 2d 356 (2008).

Trial counsel's ineffectiveness is discussed in detail on pages 59-61 of Applicant's Post Hearing Brief. To summarize, trial counsel provided ineffective assistance of counsel by ignoring the ABA Guidelines and presenting incredible and misinformed theories that alienated the jurors. Trial counsel had a duty to conduct an immediate and expeditious investigation of the state's guilt phase evidence. 1989 Guideline 11.4.1(A). This investigation did not happen. Counsel settled on the voluntary manslaughter defense before receiving discovery from the state, visiting the crime scene or consulting an expert and they continued with the voluntary manslaughter defense even after Girndt's opinion failed to confirm the defense. *See also* Applicant Post-Hearing Brief 9-11, 38-42.

Trial counsel also breached the duty to "seek a theory that will be effective in both phases" of trial. 1989 Guideline 11.7.1. Counsel knew their dangerous strategy was a long shot likely to alienate the jurors, yet they proceed with it anyway. *See also* Applicant's Post Hearing Brief 41-43.

As the Supreme Court made explicit "[A]voiding execution [may be] the best and only realistic result possible." *Nixon*, 543 U S at 191 (quoting 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)). Thus, in circumstances where guilt is clear, counsel must "strive at the guilt phase to avoid a counterproductive course," and "to impress the jury with his candor and his unwillingness to engage in 'a useless charade.'" *Id.* at

191-2 *See also Council* 380 S C at 172, 670 S E 2d at 363) (Where the state's evidence of guilt was overwhelming, "counsel should have been aware that the defense accomplice theory was not that strong and that mitigation evidence was the only means of influencing the jury to recommend a life sentence")

In this case, however, despite Hughey's willingness to plead guilty to two counts of murder and one count of burglary for three consecutive life sentences, PCR 21, 280-81, 471, trial counsel chose to engage in a useless charade by blindly adopting a voluntary manslaughter defense, contrary to precedent and the facts of the case. This defense only served to alienate the jury, discredit the lawyers and assured sentences of death for Hughey. Had trial counsel conceded guilt and adopted a theory calculated to be successful in both phases of the trial, the outcome would have been different. The jurors would have recommended life sentences.

E Summary

Had trial counsel not presented the flawed and doomed manslaughter defense, the jurors would not have been alienated and would have sentenced Hughey to life imprisonment. The outcome of Hughey's trial would have been different. The Court, therefore, should reconsider the order and grant Hughey a new sentencing hearing based on Issue I as presented in the second amended PCR application.

II Counsel failed to adequately investigate, develop, and present mitigation evidence, including, but not limited to, evidence of Hughey'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. *See Applicant's Post-Hearing Brief 62-98 and Applicant's Reply Brief 13-17*

In his post-hearing and reply briefs, Hughey reviewed the evidence presented in mitigation during the trial. Applicant's Post Hearing Brief 63-68 and Applicant's Reply Brief

13 14 In finding trial counsel to be effective in presenting mitigation evidence, the PCR court held that failure to present evidence of adaptability was a strategic decision and that trial counsel had otherwise “put into evidence a thoughtful and thorough case in mitigation considering various themes and presentations ” Order 4 5

In making this conclusion, the Court overlooked that trial counsel failed to conduct an adequate investigation and neglected to present additional compelling mitigating evidence that was readily available at the time of trial Had trial counsel performed a proper mitigation investigation and presented all available evidence, the jury would have heard the following

- 1) Hughey was highly adaptable to incarceration, based on his prior detentions and his mental illness, and
- 2) Hughey’s mental illnesses caused his capacity to conform his conduct to the requirements of the law to be substantially impaired at the time of the incident

As discussed in more detail below, had the jurors heard this available mitigation evidence, the result would have been different The jurors would have recommended life sentences

A Hughey was highly adaptable to incarceration, based on his prior detentions and his mental illness See Applicant’s Post-Hearing Brief 86-90 and Applicant’s Reply Brief 15-17

The Court found trial counsel’s failure to present evidence of adaptability to incarceration to be a “strategic decision made by counsel during the trial” and further declared that “the Applicant has failed to show the decision was based on neglect or ignorance ” Order 4 This conclusion overlooks and misapprehends counsel’s deficient conduct and the testimony of trial counsel

Tinsley’s notes from trial reveal he did not present the adaptability evidence because he believed the state must allege Hughey’s future dangerousness before the evidence could be

presented. He held this complete misunderstanding of the law even though he had some legal research in his file labeled “future adaptability to prison life” and admitted familiarity with *Skipper v South Carolina*, 476 U.S. 1 (1986) (permitting evidence of adaptability to confinement as mitigation). Tinsley’s notes from various points during the trial further indicate this misunderstanding of *Skipper*. As possible mitigation, he listed Hughey’s “juvenile record” and “prison record.” Tinsley wrote “Adaptability (if future dang.)” During the trial, Tinsley listed “other possible mit[igation] wit[nesses],” including “Lt. Allen” and “J.L. Eidson.” According to Tinsley’s notes, he planned to call one of these witnesses only “if [the] st[ate] argues future dangerousness.” Applicant’s Post Hearing Brief 76-77.

While Garrett had concerns about calling adaptability witnesses because of a prior bad experience and concerns Eidson would not be a favorable witness because of his connection to Solicitor Jones, he testified that Tinsley “made the final call on” whether to present adaptability evidence. Regardless of whether Tinsley correctly understood when to present adaptability evidence, he testified at the PCR hearing that he should have presented evidence of Hughey’s adaptability to incarceration and could have presented it without encountering a problem. For instance, he could have called Allen, “the number two man” in the jail’s administration, or another jailer,⁵ or simply relied on the jail records. He admitted not having a good reason to present the adaptability evidence and stated “If I had to do it over again, I would have called Lieutenant Allen.” Applicant’s Post-Hearing Brief 77. These comments by Tinsley himself indicated a lack of strategic reasoning in omitting the adaptability evidence.

⁵ Julia Perlotte and Martha Ann Stewart were two former employees of the Greenwood County Sheriff’s Office who worked at the detention center during Hughey’s pretrial incarceration. They both testified favorably at the PCR hearing and would have been available to do so at the time of Hughey’s trial. Applicant’s Post Hearing Brief 86-88.

While the Court's order addresses some aspects of trial counsel's failure to present adaptability evidence, it overlooked Hughey's contention that obtaining the services of a forensic psychiatrist would have benefitted the adaptability case. As will be further discussed in subsection B, *infra*, trial counsel was ineffective for failing to retain a forensic psychiatrist though funding had been approved for such an expert.

Applicant's forensic psychiatrist, Dr. Schwartz Watts, who was retained for purposes of the PCR hearing, reviewed Hughey's DJJ records and inmate file from the Greenwood County Detention Center, neither of which counsel obtained prior to Hughey's 1997 trial. She testified the DJJ records showed that Hughey adapted well to a structured environment, followed rules and conformed his behavior. Additionally, the Greenwood County Detention Center records illustrated his good adjustment to structure and routine. He did not have any major infractions while in pretrial detention. She opined, "Adaptability to prison should have been considered [at trial]. DJJ records and Greenwood County Detention Center records show that Mr. Hughey was adaptable." In diagnosing Hughey with PTSD, Depression, Borderline Intellectual Functioning and Alcohol Abuse, she also noted, "The prognosis of these illnesses should have been presented [at trial] to demonstrate the likelihood of Mr. Hughey's adaptability to imprisonment." Applicant's Post-Hearing Brief 88 and Applicant's Reply Brief 15.

Tinsley and Garrett's decisions at sentencing were not the result of sound strategy, but rather an inattention to sentencing and an unreasonably limited investigation. It is a fundamental principle of capital defense that trial counsel must attempt to uncover all reasonably available mitigating evidence and that assessment of an investigation for reasonableness must also consider if the information known to counsel would lead reasonable counsel to investigate further. *Wiggins*, 539 U.S. at 524, 527. The 1989 ABA Guidelines require that all mitigating

evidence must be presented unless “there are strong strategic reasons to forgo some portion of such evidence” 1989 Guideline 11.8.6(A). However, before counsel can make a strategic decision, they must either make all reasonable investigations or make a reasonable decision that certain investigations are not necessary. *Strickland*, 466 U.S. at 691. Applicant’s Post Hearing Reply Brief 15-16.

Counsel failed to prepare and present evidence of Hughey’s adaptability to confinement, even though it is clear that, 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, 1560-1 (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 adaptability to confinement is proper mitigating evidence. *Skinner v. South Carolina*, 476 U.S. 1 (1976). Applicant’s Post Hearing Brief 94-95.

Hughey was prejudiced by the failure to present evidence of his adaptability to confinement. This evidence was significant because it is inevitable that a jury that has convicted the defendant of murder will be concerned about the defendant’s behavior in confinement if the death penalty is not imposed. Here, there was significant evidence that the jury was deprived of, namely that Hughey was a “model inmate” and adapted well to confinement. Applicant’s Post Hearing Brief 97. In determining prejudice, the court must decide if the previously undiscovered

evidence would have influenced the jury's appraisal of the defendant's culpability *Rompilla v Beard*, 545 U.S. 374, 376 (2005). Prejudice is also established if but for counsel's errors, there is a "reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537. The evidence presented at the PCR hearing, all of which was available at the time of trial, is substantial and powerful, it went directly to Hughey's future dangerousness and his mental state at the time of the incident. Clearly, this evidence would have weighed heavily on the jurors as they decided his fate. Applicant's Post-Hearing Reply Brief 17.

Had trial counsel fully investigated and presented evidence of Hughey's adaptability to incarceration, the jurors would have recommended life sentences.

B Hughey's mental illnesses caused his capacity to conform his conduct to the requirements of the law to be substantially impaired at the time of the incident. See Applicant's Post-Hearing Brief 83-85 and Applicant's Reply Brief 14-15.

In the order, the Court listed the experts and lay witnesses that testified on Hughey's behalf during the sentencing phase of his trial and listed the statutory mitigating factors. Judge Cole instructed the jurors to consider Order 4.5. However, the Court overlooked Hughey's contention that trial counsel was ineffective for failing to retain a forensic psychiatrist, who would have been in a position to diagnose Hughey's mental illnesses and explain the role those illnesses played in the incident. The Court also overlooked the additional statutory mitigating factor that would have been instructed pursuant to S.C. Code §16-3-20(C)(b)(6) had trial counsel presented the available evidence.

While Applicant did have a social worker and psychologist testify during his sentencing phase, neither diagnosed Hughey with any mental illnesses. Applicant's Post-Hearing Brief 71 and Applicant's Reply Brief 13. More importantly, neither gave testimony regarding Hughey's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements

of the law *See State v Hughey*, 339 S C 439 (2000) (At trial, Hughey was not entitled to an instruction on statutory mitigating circumstance number six because the trial testimony spoke only of Hughey's inability to cope with stress, not his ability to appreciate the criminality of his conduct or to conform his conduct to the law and, thus, there was no evidence to support the instruction)

Trial counsel did not retain a forensic psychiatrist until after jury selection was scheduled to begin, even though funding for such an expert had been approved months earlier. Had trial counsel secured a forensic psychiatrist in a timely fashion, Hughey would have been diagnosed with PTSD and major depression. Applicant's Post-Hearing Brief 80-82 and Applicant's Reply Brief 14. As evidenced by the testimony of Dr. Schwartz-Watts at the PCR hearing, a forensic psychiatrist would have been in a position to not only expand on the statutory mitigating factors the trial court did charge, but would have provided testimony that would have entitled Applicant to an additional statutory mitigating factor. Dr. Schwartz-Watts listed the circumstances at play at the time of the incident and testified about how each one individually would have affected Hughey. She went on to explain that if someone was under the influence of all these factors simultaneously, they would react "[i]mpulsively, poor judgment, explosively, with anger." When asked directly if, "[a]t the time of the incident then on December 4th, 1995 do you believe that Mr. Hughey was substantially impaired in conforming his conduct to the requirements of the law?" she replied, "Absolutely." She explained that untreated depression made Hughey irritable and violent and alcohol intoxication impaired his ability to conform his behavior to the requirements of the law. Conflict with Jackson and lack of sleep also contributed. Based on her testimony, statutory mitigating factor listed in S C Code §16-3-20(C)(b)(6) should have (and

would have) been charged if trial counsel had adequately developed and presented this evidence Applicant's Post Hearing Brief 85 and Applicant's Reply Brief 14

Trial counsel's failure to contact a forensic psychiatrist until after the trial was supposed to start was not the result of a reasoned strategic decision. Garrett admitted he was not involved in preparing for the sentencing phase. Garrett was not concerned about Hughey's mental capacity until his sudden and unexpected decompensation on the eve of trial.⁶ Both Garrett and Tinsley acknowledged they did not appreciate Hughey's mental limitations until this dramatic event. Applicant's Post Hearing Brief 10 11, 72-74. Tinsley acknowledged his failure to contact a forensic psychiatrist resulted from his enormous, excessive caseload. Applicant's Post Hearing Brief 9, 73 and Applicant's Reply Brief 15 fn. 14

Counsel's failure to prepare and present this information prejudiced Hughey because "[e]vidence of mental disturbance can be persuasive mitigating evidence for jurors considering the death penalty, and this evidence can determine the outcome." *Gray v. Branker*, 529 F.3d 220, ___ (4th Cir. 2008). Specifically, evidence of "psychotic episodes" under severe stressors and depression, such that the defendant suffers a "severe mental illness" is significant mitigation. *Id.*

This case is very similar to *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004), in this regard. In *Von Dohlen*, the defense mental health expert, who had not been provided with significant and necessary information, testified in sentencing that the defendant "did not have a chronic mental illness." The truth, however, was that Von Dohlen "suffered from 'severe chronic depression' a major mental illness," 360 S.C. at 606, 602 S.E.2d at 742, with "psychotic

⁶ This decompensation happened when Hughey learned the drunk driver who killed his mother was one of the potential jurors in his case.

and suicidal tendencies.” This difference in the mental health picture required reversal. *See also Turpin v Christenson*, 497 S E 2d 216, ___ (Ga 1998) (“The psychiatric evidence, if properly presented, could have totally changed the evidentiary picture. Psychiatric evidence may have provided the jury with an explanation for [the defendant’s] actions”), *State v Hamilton*, 699 So 2d 29, ___ (La 1997) (Evidence of mental illness “had the potential to totally change the evidentiary picture by altering the causal relationship which can exist between mental illness and homicidal behavior”).

In addition to the inherent mitigating value of the evidence of mental illness, it is significant that this evidence would have established the existence of a statutory mitigating factor that the trial court refused to charge. Failure to charge a statutory mitigating factor that is supported by the evidence is reversible error. *State v Caldwell*, 300 S C 494, 388 S E 2d 816 (1990).

C Summary

Trial counsel should have properly investigated and presented evidence of Hughey’s adaptability to incarceration and evidence supporting the additional statutory mitigating instructions. Had the jurors considered this evidence, then they would have recommended a life sentence. The outcome of Hughey’s trial would have been different. The Court, therefore, should reconsider the order and grant Hughey a new sentencing hearing based on Issue II in the second amended PCR application.

III Cumulative Prejudice. *See Applicant’s Post-Hearing Brief 135-138 and Reply Brief 33-34.*

The Court's order also overlooks or misapprehends Hughey's contention he is entitled to a new trial based on cumulative error. A detailed discussion of Hughey's position is contained in Applicant's Post-Hearing Brief, pages 135-38, and Applicant's Reply Brief, pages 33-34.

While Hughey is entitled to a new sentencing hearing for each of the issues raised in the second amended PCR application, cumulative error is particularly important concerning Issues I and II. As discussed in Argument I, *supra*, the ABA Guidelines required trial counsel to select a theory calculated to be effective in both the guilt and sentencing phases. Intentionally ignoring this obligation, counsel adopted the doomed and flawed manslaughter defense that alienated the jurors before the sentencing phase started. Counsel knew this strategy was not likely to be effective but proceeded with it anyway. While knowing this strategy would not be effective, counsel failed to properly investigate, develop and present available mitigation evidence.

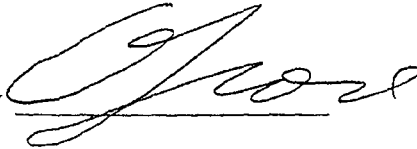
Had counsel sought and pursued a strategy that would be effective in both phases of the trial, the result would have been different. The jurors would have recommended Hughey be sentenced to life imprisonment.

Conclusion

For the forgoing reasons, this Court should reconsider the written order of May 7, 2010, grant Hughey post-conviction relief based on Issues I and II contained in the amended PCR application, and order a new sentencing hearing on these additional grounds.

IT IS SO MOVED

Respectfully submitted,

By 

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May 28, 2009

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 MAY 28 AM 11 53
EMILY Y MCMAHAN
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF GREENWOOD	)	
	)	
John Kennedy Hughey, #5055,	)	Case No 2000-CP-01-0212
Applicant	)	
v	)	
	)	Applicant's Rule 59(e), SCRCF motion to alter or
	)	amend the judgment
State of South Carolina,	)	
Respondent	)	

I certify that I served a copy of this motion on the date reflected below on opposing counsel by United States mail, postage prepaid, addressed as follows

Donald J Zelenka, Esquire
 SC Attorney General's Office
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 Columbia, South Carolina 29211

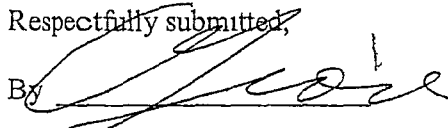
In compliance with Rule 59(g), SCRCF I certify that I provided the Court on the date reflected below with a copy of this motion by mailing a copy, postage pre-paid, addressed as follows

The Honorable Alexander S Macaulay
 Judge, Tenth Judicial Circuit
 P O Drawer 428
 Walhalla, SC 29691

FILED
 STATE OF SOUTH CAROLINA
 COUNTY OF ABBEVILLE
 2010 MAY 28 AM 11 53
 EMILY Y MCMAHAN
 CLERK OF COURT

Respectfully submitted,

By


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May 28, 2010
 Greenwood, South Carolina

Don Zelenka - John Hughey v State

From "Charles Grose" <cgrose@pdgreenwood.com>
To <amacaulayj@sccourts.org>, "Alexander S Law Clerk Macaulay" <AMacaulayLC@sccourts.org>, "Don Zelenka" <AGDZELENKA@scag.gov>
Date 5/28/2010 1:36 PM
Subject John Hughey v State
CC "Teresa Norris" <teresa@blumelaw.com>, "Tara Marie Schultz" <tschultz@co.laurens.sc.us>, "Jerry Peace" <jpeace@co.greenwood.sc.us>, "Andrew Hodges" <ahodges@greenwoodsc.gov>, "Elizabeth P White" <ewhite@co.greenwood.sc.us>
Attachments Hughey, Rule 59(e) motion, May 28, 2010 PDF, Hughey, Judge Macaulay, cover letter, Rule 59(e) motion, May 28, 2010 PDF

Dear all,

Attached please find a copy of the Rule 59(e) motion and cover letter to Judge Macaulay

I hope everyone has a good Memorial Day weekend

Best,
Charles

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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,

vs

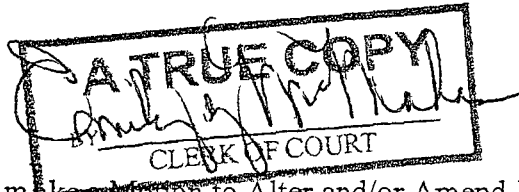
State of South Carolina

Respondent

RESPONDENT'S MOTION
 TO ALTER OR AMEND
 JUDGMENT PURSUANT
 RULE 59(e)

EMILY Y MCMAHAN
 CLERK OF COURT

FILED
 STATE OF SOUTH CAROLINA
 COURT, OF ABBEVILLE
 2010 JUN 1 PM 3 20



The Respondents, above -named, hereby make a Motion to Alter and/or Amend Judgment pursuant to Rule 59(e) The Order of the Honorable Alexander Macauley was filed on May 14, 2010 and received by below-signed counsel on May 19, 2010 Pursuant to Rule 59, Respondent State of South Carolina asserts that it is entitled to have the judgment altered and amended for the following reasons

I

In the Order, the Court concluded that the penalty phase instructions which included the phrase "may recommend a sentence of life for any reason or no reason at all other than as an act of mercy" warranted a new sentencing phase, citing *Rosemond v Catoe*, 383 S C 320, 330, 680 S E 2d 5, 10 (2009) The PCR Court concluded that

Under our most recent case law applying S C Code Ann § 16-3-20 (2003), it is now well established that "It is proper to instruct a jury in a capital sentencing proceeding that it may recommend a life sentence for any reason or no reason at all, including as an act of mercy" *Rosemond v Catoe supra* Because

the jury was instructed that they “may recommend a sentence of life imprisonment for any reason or no reason at all *other than as an act of mercy*,” (emphasis supplied), the Applicant has established his entitlement to a new sentencing phase of his trial *State v Hughey supra Rosemond v Catoe supra*

Order, p 7

1 The Court Erred In Addressing the Issue As A Free-Standing Claim Where the Claim Was Only Raised As Two Separate Sixth Amendment Violations of Ineffective Assistance of Trial Counsel and/or Appellate Counsel

The Order addressed the instructional issue concerning “other than as an act of mercy as a free-standing claim Respondent respectfully submits that this was error for a series of independent reasons However, the claims were raised in the application, as amended and during the hearing as a Sixth Amendment violation concerning either ineffective assistance of trial counsel or ineffective assistance of appellate counsel

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 [Allegation 11(a)(iii)]

and 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, 446 U S 668(1984), Smith v Robbins, 528 U S 259(2000)

However, the Order does not fails to address the Sixth Amendment claims Instead, it raised and addressed the issue as a free-standing instructional claim This was error that must be altered and amended The jurisdiction of the Court is limited by S C Code Ann § 17-27-20(b) (1985) Post-conviction relief is not a substitute for an appeal Drayton v Evatt, 312 S C 4, 430 S E 2d 517 (1993), Simmons v State, 264 S C 417, 215 S E 2d 883 (1974) A post-conviction relief application cannot assert any issues that could have been raised **at trial or on appeal** Ashley v State, 260 S C 436, 196 S E 2d 501 (1973) The Applicant in fact did raise this issue on appeal The Court erred in addressing the issue without resolving the condition precedent of either deficient performance or prejudice under Strickland v Washington, 466 U S 668 (1984)

Alternately, Respondent submits that the recent decision in Rosemond v Catoe, 680 S E 2d 5 (S C 2009) did not mandate post-conviction relief in this setting As noted in the original Respondent's Post-Hearing Memorandum, pages 154-161, Rosemond did not find reversible error in this particular instruction in Rosemond's case, concluding that PCR relief was warranted on a separate ground See *Respondent's Post-Hearing Memorandum of Law* p 154-156

Further, the "law of the case" doctrine should apply because this issue was addressed in the direct appeal While the Court in its May order granting the new sentencing hearing recognized that Respondent's assertion, as well as the fact that it was adversely decided to Hughey in *State v Hughey*, 339 S C 439, 529 S E 2d 721 (2000), it failed to address its vitality

as being previously ruled upon *Respondent's Post-Hearing Memorandum of Law* p 156-161

Finally, in summarily addressing the Rosemond decision revision of sanctioning the language in the instructions similar to those in *Hughey*, this Court failed to apply an appropriate standard of review for instructional analysis State v. Sims, 304 S C 409, 422, 405 S E 2d 377, 384 (1991) If this had been done, it would only reveal that jury would not have construed the particular instructions in a manner to prevent or preclude mercy The fundamental flaw in the logic on this issue is the claim that the "other than as an act of mercy" instruction was intended to preclude a consideration of mercy whereas according to Judge Cole that the instruction covered the defense counsel's request to authorize a sentence of mercy ROA 4018-19 Particularly, Respondents submit that the PCR Court has overlooked the following points that

- 1 Viewing the penalty phase instructions as a whole, it is clear that the trial judge, as well as counsel at the time of the trial, was aware that consideration of mercy was proper for the jury in its sentencing consideration - *but also that the jury was not limited to mercy in its life sentence consideration*
- 2 Judge Cole had previously declared that "my general instruction covers that " ROA 4018-19 The Applicant is now suggesting that Judge Cole's own instruction was contrary his own expressed understanding and interpretation of the law that mercy was a valid consideration and a sentence of mercy could be given
- 3 Viewing the instructions as a whole and not this challenged sentence in isolation, a reasonable juror would have known it had the ability to consider mercy in determining the sentence See Boyd v. California, 494 U S 370 (1990) (Eighth Amendment satisfied where there is not a reasonable likelihood that the penalty

phase instructions would preclude consideration of relevant mitigating evidence offered by the petitioner)

4 The Respondents agree [and have always agreed] that state law authorized consideration of mercy by a capital sentencer, although the federal constitution did not require it

5 Since the Applicant is now apparently interpreting the challenged sentence in isolation, the Court cannot overlook the ameliorating language within the remainder of the instruction which clarified the ability of the jury to sentence the Petitioner to a life sentence as an act of mercy **First, it is reasonable that the trial judge intended that the instruction tells the jury, “you may recommend a sentence of life imprisonment for no reason at all other than as an act of mercy ” The phrase “other than as an act of mercy” modifies the phrase “for no reason at all,” not the phrase “for any reason ”**

6 The problem with the Applicant’s assertion is that he fails to recognize that Judge Cole was using the term “other than” as an *adverb*, not as an *adjective* As an adverb, the phrase means “besides” and defined as “in addition to” or “as well” See *Roget’s 21st Century Thesaurus Third Edition (2009)* Also “other than” can be a preposition for “besides” and defined as in addition to with synonyms of “added to, along with, as well as , beside, beyond, together with Id Instead, the Applicant is limiting the phrase “other than” as an adjective meaning barring and defines as “except for ” Id

The Respondents agree with Judge Cole and the Court that “if a plea for mercy is

admitted in evidence, then a jury should be entitled to consider it” as a matter of state law Rosemond v Catoe, 680 S E 2d 5 (S C 2009) Beyond that, we would affirmatively assert as a matter of state law that even if no plea from witnesses for mercy is given the jury can consider a life sentence as an act of mercy The problem with the Supreme Court’s intervening new opinion in Rosemond v Catoe, albeit in *obiter dicta*, and Court and Applicant’s reliance upon it, is that it ignores that the jury in Rosemond’s sentencing, as well as the jury in State v Hughey, 339 S C 439, 459, 529 S E 2d 721, 731 (2000), would have properly considered “mercy” evidence and that neither instructions “precluded a capital jury’s consideration of mercy evidence in the sentencing phase,” because any reasonable jury would have read the term as an adverb and not as an adjective as Applicant’s isolated parsing suggests Here, the plain meaning of the instruction, in this setting demands that the jury would have reasonably interpreted the language to allow mercy, not exclude it As the Supreme Court has consistently stated, jury instruction must be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error 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)

Since it is unquestionably apparent that Judge Cole was aware and agreed that a sentencing jury could consider mercy in its sentencing decision, it is important that the instructions be viewed as a whole and not taken out of context Simply put, if the author of the language (Judge Cole) intended the language to be similar to the request for a sentence of mercy and the trial counsel who had sought such a charge did not see a contradiction when listening to the penalty charge in its entirety at trial, a reasonable juror would likely have reached the same

conclusion rather than the contrary conclusion assumed by the Applicant. The fact that in hindsight a different and alternate interpretation to the parsed language suggests a different result must fail in light of the directions to both consider the evidence presented, the expressed mitigating circumstance instructions and the simple fact that all at the time of the trial did not treat this sentence with the construction now suggested.

- 2 **As alleged in the Application, Hughey is unable to show deficient performance or prejudice related to ineffective assistance of trial counsel concerning the failure to object to the instruction with the phrase "other than as an act of mercy"**

The PCR court failed to address the Sixth Amendment issue related to trial counsel's failure to object to the instruction. Respondents incorporate its Post-Hearing Memorandum, pages 124-142.

A Defense counsel was not deficient in failing to object

Counsel Robert Tinsley testified that he made penalty phase instruction request 16 to try to get a life sentence "for no reason at all." PCR 114, ll 19-24. He admitted that this was to have the jury be allowed to consider mercy and have a life sentence as an act of mercy. PCR 115, ll 7-18. Counsel acknowledged that when the request was discussed at the charge conference, Judge Cole declared "my general instruction covers that." PCT 115-116, ll 3. However, at the hearing, counsel Tinsley opined that the "other than as an act of mercy" language in the instruction was contrary to the charge he requested. PCR 116, ll 6-17, citing ROA 4062. Counsel Tinsley stated that there was no specific objection to the "other than as an act of mercy" language. PCR 117, ll 4-6. Counsel Tinsley stated that he did not catch the instruction and that he would object to it because it should have been "for no reason at all" and even as an act of mercy, not the opposite of that. **"But I just did not hear it like that"** PCR 117, ll 15-19. Counsel affirmed that the

instruction could be construed as a comment on testimony if the defense puts in evidence requesting mercy PCR 118

Counsel Billy Garrett testified that he missed the instruction concerning mercy. He stated that in addition to counsel Tinsley, Ed McCallum was at counsel table with them whose job it was to listen to the instructions PCR 222-223. Counsel Garrett stated that they were asking in their requests for jurors to consider a sentence based upon mercy PCR 223. He stated from the "cold transcript" it makes the matter glaring. At the trial, Garrett claimed that he just did not see it and did not know how they missed it PCR 276 ¹

The admission by counsel that he did not hear that way, is an admission that a reasonable juror listening to the instructions would not hear it that way either. The problem with this new assessment by counsel is that a reasonable juror would have rejected that interpretation because it ignores the penalty phase instructions as a whole. Simply put, under Applicant's new concrete and parsed interpretation, the charge would have precluded a life sentence as an "act of mercy." This flies in the face of the other ameliorating instructions, as well as Judge Cole's expressed intent with his general instruction and the arguments. It is evident why defense counsel missed it - they read the instruction as Judge Cole and any reasonable juror would have considered it - as an adverb [in addition to, as well, besides] rather than as an adjective [barring, except for] - in light of the closing argument by counsel requesting "mercy" [ROA 4038, 4045 - "should you decide to recommend a sentence of mercy," "spare my client's life"]

B Sixth Amendment Prejudice Not Shown

¹Respondent submits that the problem with trial counsel's new retrospective assessment is that it was presented to him that the instruction precluded consideration of an act of mercy - treating the "other than" phrase as an adjective rather than an adverb

This Court should alter and amend its order and conclude that trial counsel was not deficient in failing to object and that 6th Amendment prejudice was not proven. Respondent submit that the Applicant has failed in his burden of proof in showing counsel was constitutionally deficient in failing to object specifically to the instruction in 1997. Further, in light of the rejection of the same claim in the direct appeal in State v. Hughey and the trial judge's expressed statement that his instruction covered their request, [ROA 4018-19,] prejudice under Strickland has not been shown. 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.

3 As alleged in the Application, Hughey is unable to show deficient performance or prejudice related to ineffective assistance of appellate counsel concerning the failure to object to the instruction with the phrase "other than as an act of mercy" which was not addressed in the Order

The PCR court failed to address the Sixth Amendment issue related to appellate counsel's failure to object to the instruction. Respondents incorporate its Post-Hearing Memorandum, pages 143-170. Because of this omission, Rule 59 is appropriate to address the deficiency. The Court should alter or amend its Order to address the claim of ineffective assistance of appellate counsel. This issue was raised in the application, but Respondent submits that Hughey is unable to show either deficient performance or prejudice under Strickland v. Washington.

Appellate counsel cannot be deemed constitutionally deficient and ineffective under the Sixth Amendment when he in fact raised the same issue to the Supreme Court within his initial merit brief and reply brief, the Supreme Court addressed and rejected the merits of this claim specifically in the direct appeal order, and that appellate counsel additionally argued it more specifically in his petition for rehearing the same assertions raised herein See, *Respondent's Post-Hearing Memorandum of Law* p 150-154 (how issue raised and decided in the direct appeal)

More importantly, Sixth Amendment prejudice was not shown where it is evident from a reasonable reading of the trial record, that the jury would have considered the challenged language to have allowed, not precluded an "act of mercy" See PCR 552 It is also evident that it was Judge Cole's own assessment that the charge he gave concerning "any reason or no reason at all other than an act of mercy" was similar to the particular instruction requested by the defense for a "sentence of mercy" [Judge Cole stated that "my general instruction covers that" [ROA 4018-19]

The Underlying Issue Was Presented And Decided In The Direct Appeal.

The issue actually raised in the PCR application is that appellate counsel was constitutionally deficient under the Sixth Amendment because he failed to assert his claim as a separate ground rather than within the section challenging the statutory mitigating circumstance instructions While better appellate practice may suggest that properly preserved claims should be raised in a separate issue presented, appellate counsel Dudek was faced with a unique situation because there was no specific objection to the charge as given setting out either any state law or federal constitutional claim Since appellate counsel reasonably perceived that the State would

likely oppose the first time challenge based upon a procedural defect, appellate counsel sought to blend the unpreserved issue into a properly preserved claim. This was done with the hopes that the Supreme Court would either address the claim or conclude that the claim was not properly before the court and should be presented in a state postconviction relief action - setting up the claim. However, the State chose to not assert the procedural bar and the merit of the state law instructional claim was addressed. The issue then becomes one of *style - not deficiency* under the Sixth Amendment. His claim must be denied.

First, appellate counsel cannot be deemed deficient because as noted in ground three, trial counsel did not object to the penalty phase instruction, as given, on this same issue. Appellate counsel is not deficient for failing to raise on appeal an issue that was not preserved for review. Legge v. State, 349 S C 222, 562 S E 2d 618 (2002); Gilchrist v. State, 612 S E 2d 702, 705 (S C 2004) (appellate counsel not ineffective where trial counsel's submission of the request to charge, without any further explanation of his point, was insufficient to preserve for review the trial court's failure to charge the specific language regarding "a right to act on appearances"). See State v. Hicks, 330 S C 207, 499 S E 2d 209, cert. denied, 525 U S 1022, 119 S Ct 552, 142 L Ed 2d 459 (1998) (issue must be raised to and ruled upon by trial court to be preserved for review). Simply put at no time did trial counsel make any specific objection that the "other than as an act of mercy" instruction violated state law because it precluded consideration of the evidence of a request for mercy or precluded a life sentence as an act of mercy. To the contrary, when his request was made for instruction request 16, Judge Cole declared that his own general instruction covered the same defense request - the request for a sentence of mercy. [As noted within, when the given charge is read with "other than" as an adverb or preposition, it does

exactly as Judge Cole suggested and defense counsel requested - it authorizes a sentence of life as an act of mercy]



The inquiry then becomes whether an appellate counsel be constitutionally deficient for raising an unpreserved claim, but not as a separate ground. The simple answer is that counsel cannot be deemed ineffective concerning the raising of an unpreserved claim. First, South Carolina preservation rules are clear. The failure to object to language in an instruction bars appellate review. State v. Hudgins, 319 S C 233, 460 S E 2d 388 (1996). See also State v. Bailey, 298 S C 1, 5, 377 S E 2d 581, 584 (1989) (holding making "standard motions" at trial does not preserve an issue for appellate review and stating, "A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal"), State v. Jordan, 255 S C 86, 93, 177 S E 2d 464, 468 (1970) ("This court has, in numerous cases, held that it will not consider a question on appeal which was not presented in the court below"), State v. Williams, 303 S C 410, 401 S E 2d 168 (1991) (an issue must be raised to and ruled on by the trial judge to preserve for appellate review), State v. Hoffman, 312 S C 386, 440 S E 2d 869 (1994) (an issue which is not properly preserved cannot be raised for the first time on appeal), State v. Crowley, 226 S C 472, 85 S E 2d 714 (1955) (objection must be on specific ground), State v. Nichols, 325 S C 111, 120-121, 481 S E 2d 118, 123 (1997) ("An issue may not be raised for the first time on appeal, but must have been raised to the trial judge to be preserved for appellate review"). The record is devoid of any showing that the issue was preserved at trial on the same grounds asserted. Contrary to the claim, at no time did Judge Cole state that the request 16 was rejected - it was instead that his instruction covered the request. Simply put, Judge Cole believed his language was similar to the request for a sentence of mercy instruction, not that mercy was an

invalid factor

To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal Strickland, supra, Johnson v. State, 325 S C 182, 480 S E 2d 733 (1997) That is, the Applicant must prove prejudice by showing he would have prevailed on appeal had a brief raising the same claim been filed by counsel and granted by the Court See, Simpkins v. State, 303 S C 364, 401 S E 2d 142 (1991) (appellate counsel ineffective in failing to raise issue, preserved below, which would have entitled defendant to reversal on appeal)

Respondent submits that the Petitioner has failed to show, in light of the South Carolina Supreme Court's prior treatment of the instruction in Hughey's appeal and appellate counsel's Initial and Final Brief of Appellant that to have argued his emphasis differently on the "other than as an act of mercy" the appeal would have been reversed and that the Court would have vacated the death sentence Absent this showing, complaints about technique and emphasis do not satisfy the burden of proof

The Court should grant the State's Motion to Alter and Amend and address this issue which it failed to address in the original order Respondent submits that this claim must be dismissed Appellate counsel Dudek was successful in raising the claim in the direct appeal in Hughey and having it addressed on the merits He cannot be deemed constitutionally deficient and ineffective under the Sixth Amendment when he in fact raised the same issue to the Supreme Court within his initial merit brief and reply brief, the Supreme Court addressed and rejected the merits of this claim specifically in the direct appeal order, and that appellate counsel additionally argued it more specifically in his petition for rehearing the same assertions raised, but rejected

Despite the recent action in *Rosemond*, it is evident from a reasonable reading of the trial record and the jury instructions, that the jury would have considered the challenged language to have allowed, not precluded an "act of mercy" the giving of a life sentence. See PCR 552. Simply put there is no showing in the record of any mandate for a death sentence. It is also evident that it was Judge Cole's own assessment that the charge he gave concerning "any reason or no reason at all other than an act of mercy" was similar to the particular instruction requested by the defense for a "sentence of mercy" [Judge Cole stated that "my general instruction covers that" ROA 4018-19]

CONCLUSION

WHEREFORE, Respondent request that the Court grant the Respondent's Motion to Alter and Amend and enter an Order denying the application for postconviction relief, as amended

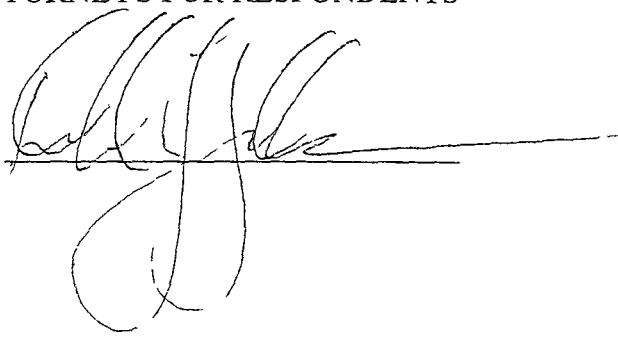
Respectfully submitted,

HENRY D McMASTER
Attorney General

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Deputy Attorney General

DONALD J ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENTS

By 

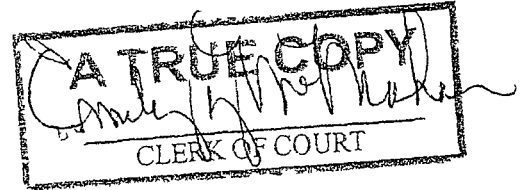
May 28, 2010

CERTIFICATE OF SERVICE

I, Donald J Zelenka, certify that I have served Respondents' Motion to Alter and Amend

Pursuant to Rule 59 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
Circuit Public Defender
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(864) 229-9505
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3 Tara M Schultz
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1365 Ebenezer Road
Rock Hill, S C 29732
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FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE
2010 JUN 1 AM 9 20
EMILY Y MCMAHAN
CLERK OF COURT

This 28th day of May, 2010

DONALD J ZELEENKA

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF ABBEVILLE

CASE NO 2000-CP-01 212

IN THE COURT OF COMMON PLEAS

ATTORNEY GENERAL'S OFFICE
RECEIVED
7-28-10

JOHN KENNEDY HUGHEY V STATE OF SOUTH CAROLINA

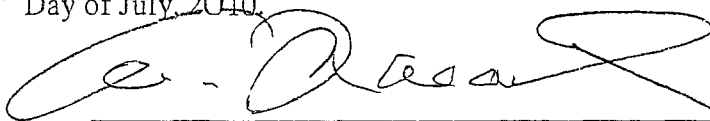
CHECK ONE

- ☐ JURY VERDICT This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT This action came for a hearing before the court this date. The parties shall file written argument as provided below.
- ☐ ACTION DISMISSED (CHECK REASON) ☐ Rule 12(b) SCRPC ☐ Rule 41(a)
 SCRPC (Vol Nonsuit) ☐ Rule 43(k), SCRPC (Settled) ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON) ☐ Rule 40(j) SCRPC ☐ Bankruptcy
- ☐ Binding arbitration subject to right to restore to confirm vacate or modify arbitration award
- ☐ Other

IT IS ORDERED AND ADJUDGED

☒ See attached order☐ Statement of Judgment by the Court/Formal Order to FollowDated at Walhalla, South Carolina, this 22nd Day of July, 2010.

Court Reporter NA



ALEXANDER S MACAULAY - Presiding Judge

This judgment was entered on the _____ and a copy mailed first class this _____
 record or to parties (when appearing pro se) as follows

E Charles Grose, Jr, Esquire Office of the Public
 Defender Greenwood and Abbeville Counties 600 Monument
 Street Box P 133 Greenwood South Carolina 29646 0
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 11549 Columbia South Carolina 29211 803 734 6305

EMILY Y MCMAHAN
 CLERK OF COURT

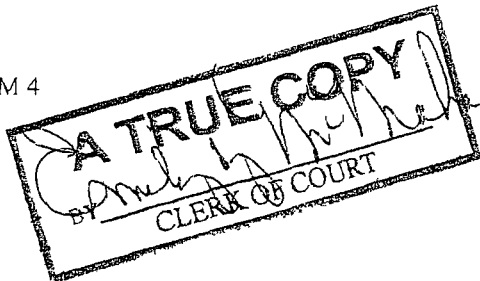
FILED
 STATE OF SOUTH CAROLINA
 COURT OF ABBEVILLE
 2010 JUL 28 PM 9 53

ATTORNEY(S) FOR THE APPLICANT(S)

ATTORNEY(S) FOR THE RESPONDENT(S)

SCRPC APP 24/FORM 4

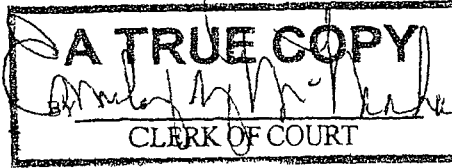
The Honorable Emily Y McMahan Clerk of Court



STATE OF SOUTH CAROLINA)
COUNTY OF ABBEVILLE)
John Kennedy Hughey, #5055)
Applicant,)
v)
The State of South Carolina,)
Respondent)

IN THE COURT OF COMMON PLEAS
FOR THE EIGHTH JUDICIAL CIRCUIT

Case Number 2000-CP-01-025



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

EMILY Y MCMAHAN
CLERK OF COURT

2010 JUL 26 AM 9 54

FILED
STATE OF SOUTH CAROLINA
COUNTY OF ABBEVILLE

This matter comes before the Court pursuant to an amended application for post-conviction relief (PCR) filed by the Applicant dated December 15, 2007. On October 13, 2008, this case was called before the Court of Common Pleas. The Applicant was present and represented by his appointed counsel Charles Grose, Esquire, Tara Schultz, Esquire, and Teresa Norris, Esquire. The Respondent was represented by Donald J. Zelenka, Esquire, of the South Carolina Office of the Attorney General. At the hearing, testimony was received from Robert Tinsley, Sr., Esquire, Jeff Yungman, Esquire, Julia Perlotte, Esquire, Martha Ann Stewart, Esquire, Billy Garrett, Esquire, Robert Dudek, Esquire, Paige (Tarr) Haas, and Dr. Donna Schwartz-Watts.

Following the hearing, this Court took the matter under advisement and requested Post Hearing Briefs to be submitted by the parties. The Applicant, by and through his appointed counsel, submitted his post-hearing brief on June 8, 2009. On June 29, 2009, the Applicant supplemented his post-hearing brief due to the South Carolina Supreme Court's decision overruling part of the opinion in the Applicant's direct appeal. *See Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 4 (2009). Thereafter, the Respondent served its post-hearing brief on August 31, 2009 and the Applicant then served his reply brief on December 11, 2009.

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By order dated May 7, 2010 and filed May 14, 2010, this Court denied and dismissed, with prejudice Mr. Hughey's application for Post Conviction Relief regarding the guilt phase of the Applicant's trial and granted a new sentencing phase of the trial for the Applicant. Applicant and Respondent timely submitted their respective Motions to Alter or Amend the Judgment pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

After careful consideration of the able arguments and filings of Counsel and review of the record, the Court finds that its Order entered on May 14, 2010 is supported by the record. Moreover, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Applicant's and Respondent's respective Motions to Alter or Amend Judgment, pursuant to Rule 59, SCRCP¹ is each DENIED.



ALEXANDER S. MACAULAY, Judge

Walhalla, South Carolina
July 22, 2010

¹ The Court in its discretion has determined this Motion on the filings without oral argument pursuant to Rule 59(f) SCRCP.