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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 06-CP-11-223
Appellate Case No. 2012-212107

Jonathan Kyle Binney, #6009, *Petitioner-Respondent*,

v.

State of South Carolina, *Respondent-Petitioner*.

BRIEF OF PETITIONER-RESPONDENT

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Whether the PCR Court erred in finding that trial counsel was not ineffective for failing to adequately investigate and present evidence concerning the possibility that the victim's husband may have had some involvement in her death.

II.

Whether the PCR Court erred in finding that trial counsel was not ineffective for failing to develop and present all available evidence to support their theory that Petitioner-Respondent [hereafter, "Petitioner"] entered the victim's home with the intent to commit suicide.

STATEMENT OF THE CASE

Petitioner, Jonathan Binney, was charged with murder and first-degree burglary for the Cherokee County shooting death of Judy Southern. *State v. Binney*, 362 S.C. 353, 608 S.E.2d 418 (2005). On June 7, 2000, police responded to a call that Ms. Southern had been shot at her home. When police arrived, they found a suicide note written and signed by Petitioner in the yard near the Southern house. Police later discovered Petitioner in the crawl space of his Spartanburg County residence and arrested him. *Id.* at 355, 608 S.E.2d at 419. Trent N. Pruett and Sam "Mitch" Slade, Jr., were appointed to represent Petitioner on charges of murder and burglary. *Id.* at n.2.

At trial, the State argued that Petitioner hatched a meticulous plan to stalk and kill Judy Southern, making preparations and then waiting over six hours for her to return home. *App. p.2301.* To counter this argument, Pruett and Slade designed a two-part defense strategy. First, they attempted to challenge the burglary charge by arguing that Petitioner did not enter the Southern residence with the intent to commit a crime. *App. p.4495.* Rather, they suggested that Petitioner's intent was to commit suicide, which is not a crime. Second, trial counsel planned to raise questions about the involvement of Judy Southern's husband, Allan Southern, and to "leave the door open" to the possibility that Allan may have participated in some way in Judy's death. *App. p.4496.* Trial counsel cross-examined a handful of the State's witnesses about the potential involvement of Allan Southern, but did not introduce other available evidence to support their theory and ultimately failed to argue to the jury that Allan had both a motive and an opportunity to ensure Judy's death. Moreover, trial counsel successfully moved the trial court to instruct the jury that suicide is not a crime in South Carolina, but did not offer any evidence, apart from

Petitioner's suicide note, to support their claim that he was suicidal when he entered the Southern residence.

The jury convicted Petitioner and sentenced him to death. This Court affirmed Petitioner's convictions and sentence on direct review. *Binney*, 362 S.C. at 355, 608 S.E.2d at 419. Petitioner sought post-conviction relief, and this Court appointed the Honorable J. Michael Baxley to preside over the PCR proceedings. On May 11, 2012, Judge Baxley entered an order granting Petitioner a new sentencing hearing based on trial counsel's failure to object to the trial court's erroneous charge that the jury could not give life as an act of mercy. Judge Baxley denied relief on all other grounds.

ARGUMENT

I. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO INVESTIGATE AND PRESENT ALL AVAILABLE EVIDENCE REGARDING ALLAN SOUTHERN'S POTENTIAL INVOLVEMENT IN THE VICTIM'S DEATH.

A. RELEVANT LEGAL PRINCIPLES.

In order to prove that trial counsel was ineffective, a PCR applicant must show that: (1) counsel's performance was deficient; and, (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. *Id.* at 694. Trial counsel "must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). Moreover, "[w]here counsel articulates a strategy, it is measured under a standard of objective reasonableness." *Id.* (finding counsel's reliance on client's assurance that a witness was honest in not interviewing her before presenting her as witness to be unreasonable); *see also Roseboro v. State*, 317 S.C. 292, 293-94, 454 S.E.2d 312,

313 (1995) (finding counsel's strategic decision not to ask for an alibi charge unreasonable where client "felt that the alibi testimony 'did not come off too well in front of the jury.'"). Finally, "[t]his Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable 'only to the extent that reasonable professional judgment supports the limitations on the investigation.'" *McKnight v. State*, 378 S.C. 33, 45, 661 S.E.2d 354, 360 (2008) (quoting *Von Dohlen v. State*, 360 S.C. 598, 607, 602 S.E.2d 738, 743 (2004)). "'[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case.'" *Ard v. Catoe*, 372 S.C. 318, 331-32, 642 S.E.2d 590, 597 (2007) (quoting *Troedel v. Wainwright*, 667 F. Supp. 1456, 1461 (S.D. Fla. 1986)).

Counsel's failure to raise an available defense falls below the objective standard of reasonableness and prejudices the defendant if such a defense is reasonably supported by available evidence. *See, e.g., Brunson v. State,* 324 S.C. 117, 119, 477 S.E.2d 711, 713 (1996) (finding ineffective assistance where counsel failed to request a mere-presence charge in a prosecution for possession with intent to distribute, stating that "[m]ere presence instructions are required when evidence supports" such a defense and that "[f]ailure to request this charge was prejudicial to petitioner's case"); *Battle v. State,* 305 S.C. 460, 464-65, 409 S.E.2d 400, 402 (1991) (finding that counsel was ineffective for failing to request self-defense charges on "appearances" and "retreat" where evidence supported each defense).

B. RELEVANT FACTS.

Trial counsel was aware of extensive evidence implicating Allan Southern in some involvement in his wife's death. Prior to the shooting, the Southerns had been having marital problems for at least a year. *App. p.2374.* Indeed, the problems in the couple's marriage were so

severe that one month before Judy's death, Allan Southern attempted to commit suicide. *App. p.2379.* Both parties had had extramarital affairs and they were in the process of marriage counseling. *App. p.4572.* At the time of Judy's death, Allan believed that she was having an affair, and he had been secretly recording her telephone conversations by "put[ting] recording devises on the residential telephone without his wife's knowledge." *Id.* Allan had also enlisted the help of his friend and employee, Roy Chapman, to follow Judy around town and track her movements. *App. p.4645-4646.* From listening to the recorded calls, Allan learned that his wife "had definitely taken affirmative steps" to leave the marriage. *App. p.4630.*

This was not the first time that Judy Southern had sought to end the marriage. Trial counsel was aware that Judy "had previously . . . requested a divorce from Mr. Southern because of an affair that he had, [but] that didn't happen at the time because Mr. Southern did not want to divide the marital assets." *App. p.4629.* Counsel deduced that it was "probably true" that, because Allan had previously been married and divorced, "he would have some idea of the financial ramifications of another divorce," *App. p.4630*, and that "the inevitable financial division of assets which occurs during a dissolution of a marriage" was a "possible motive." *App. p.4497.* Indeed, after Judy was killed, police discovered "some notes left in the house about a potential property split." *App. p.4467.*

On the morning of her death, just hours before she was shot, Judy told her co-worker, Tonya Brown, "[t]oday is the day I am going to die." *App. p.4330.* Ms. Brown worked with Judy at the post office. Before she made this chilling prediction of her own death, Judy was "just standing there just looking like she was lost . . . she was just real pale, almost white as a ghost." *Id.* When Ms. Brown asked her what was wrong, Judy explained that she thought her husband, Allan, was going to kill her. *Id.* Judy stated that Allan had made "a list of things he didn't like

about her, that he was unhappy with her about," *App. p.4331*, and that he had been reading a book that said "if you were to kill somebody that you loved, some family member or somebody that was close to you, that you could commit these other acts and you would get forgiven for killing the person you loved." *App. p.4332*. Judy's words and demeanor worried Ms. Brown because Judy "was not . . . usually the kind of person that would express those kind of emotions or make those kind of statements." *App. p.4571*. Ms. Brown was so concerned for her friend's safety that she "asked [Judy] to let me call somebody at Safe Homes [a battered women's shelter] and let [her] talk to them." *App. p.4331*. Unfortunately, Judy never made that call. *App. p.4332*.

Allan Southern testified at trial that he and Judy were supposed to meet at home that afternoon to go to a marriage counseling appointment. *App. p.2352*. Allan's friend, Roy Chapman, testified that Allan had already left the bowling alley where the two worked when Chapman received a phone call from Judy around 4:00 p.m. *App. p.2328*. Chapman stated that he thought Judy said, "I need help. I have been stabbed," so Chapman called the Southern residence and left a message on the answering machine for Allen, telling him that Judy had been stabbed. *App. p.2328-2329*. A few minutes later, Chapman received a second phone call from Judy during which she told him that she had run out of the house and into an isolated pasture close by. *App. p.2329*. Chapman left a second message for Allen on the answering machine. *Id.* He also called Allan's cell phone and spoke to him directly, telling him "Judy just called, [she] said she has been stabbed and she is in the pasture." *App. p.2354*.

Neither Chapman nor Allan Southern called for ambulance assistance. Instead, Chapman left the bowling alley and began driving toward the Southern home. Allan continued his drive home and parked near the pasture, but "went to the house first," despite having been told by

Chapman where Judy was located. *App. p.2354-2355; 2383-2383.* He later found Judy in the pasture, where Chapman had said she would be. *App. p.2355-2356.* Although Allan noted Judy's severe injuries, he not only failed to tend to her wounds but also stopped to answer a call on her cell phone. *App. p.2388-2389.* He took the time to answer this call, but did not take the time to dial 911. Moreover, Tonya Brown testified at the PCR hearing that it was she who made the call to Judy's cell phone:

> I called Judy's phone . . . [a]nd when I did, that's when Allan answered . . . I asked Allan to let me speak to Judy. And he was yelling saying, who is this? And I said, just let me speak to her . . . He asked me a couple of times, who is this? . . . And I said, you just let me speak to Judy. And in the background I heard somebody say, give me the phone. And then the phone went dead.

App. p.4334-4335. Thus, although Judy asked for her phone when the call came in, Allan refused to give it to her.[1]

By the time Allan and Judy reached his truck, Chapman had arrived at the scene. *App. p.2358.* Allan again failed to call 911, but instead decided that he would transport Judy to Mary Black Hospital himself. *App. p.2359.* Chapman subsequently called 911. *Id.* Despite the fact that the pasture in which Judy was found is quite small, according to Allan's trial testimony it took him over twenty minutes, at least, to locate her and leave for the hospital.[2] *App. p.2339; 2353-2361.* Dr. Leroy Riddick, a forensic pathologist, testified at the PCR hearing that "with

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[1] Ballistics evidence suggested that the fatal wounds suffered by Judy Southern could have been from either a 9mm or a .22 caliber gun. *App. p.4511; 4644.* Allan Southern had both a .22 and 9mm, though he claims that he could not find the .22 at the time of his wife's death. *App. p.2380; 4500-4501; 4644.* What is more, there was no blood found inside the house, where it is alleged that Petitioner shot Judy, and no blood or tissue was found on the bullet in the house, allegedly fired by Petitioner. *App. p.4469; 4644.*

[2] Trial counsel presented no evidence regarding the time between when Judy was shot and the time that she arrived at the hospital. Thus, except for the information provided by Allan Southern and his friend, Roy Chapman, there is no objective measure in the record regarding the timing of events.

very rapid medical intervention [Judy Southern] could have survived." *App. p.4033.* Dr. Janice Ross, who served as the State's medical examiner, also initially opined that if Judy had received treatment or gotten to an EMS truck within twenty or twenty-five minutes of the shooting, she very possibly could have survived.[3] *App. p.2777.*

En route to Mary Black Hospital, Allan failed to stop at an EMS substation that is manned twenty-four hours a day by paramedics and equipped with an ambulance. The substation is less half the distance to the hospital.[4] *App. p.2386.* Although Allan was apparently able to carry Judy three hundred yards from the pasture to his truck, he did not carry her into the emergency room. *App. p.2361.* Instead, he left her alone and helpless in the truck and went inside the hospital to get someone to come out. *Id.* According to Allan, no one responded. *Id.* Again, rather than bringing his wife inside he simply left her in the truck, going into the hospital on two or three separate occasions. *Id.* Finally, someone came out to get Judy and bring her inside. *Id.* By the time she was brought into the hospital, Judy had lost over half her volume of blood. *App. p.2773.* She ultimately died from loss of blood. *App. p.2777.*

After Judy's death, her family and friends gave statements to law enforcement indicating that they believed Allan Southern had some involvement in her death. *App. p.4427.* Judy's twin sister, Trudy, even contacted the FBI and asked them to investigate Allan Southern. *App. p.4427-4428.* Despite these facts, however, police never tested Allan for gunshot residue nor did they investigate what guns he owned or search his vehicles. Allan was allowed to take control

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[3] A couple of weeks before trial, however, Dr. Ross met with the solicitor's office to discuss her findings and subsequently changed her opinion, testifying at trial that she was no longer certain about this view. *App. p.2777-2778.*

[4] Had Allan stopped at this substation or previously called for ambulance assistance, Judy would have been transported to Spartanburg Regional Hospital, which is a Class One hospital that – unlike Mary Black Hospital – is fully equipped to deal with severe traumas such as a gunshot wound.

over the crime scene less than twenty-four hours after the shooting. *App. p.2361-2362.* He subsequently made claims about evidence he allegedly discovered inside his residence that were proven to be untrue. For example, Allan testified at trial that all the telephone lines at his home had been cut. *App. p.2364.* Allan did not "discover" this alleged fact until six days after his wife died. When he was asked about his answering machine, Allan testified that he and Judy did not own an answering machine at that time. *App. p.2375-2376.* However, Chapman testified that he had left two messages on the Southern's answering machine and the calls went through without any problem. *App. p.2334.* Police investigators confirmed that they found an answering machine inside the Southern home on which messages were recorded after Judy was shot. *App. p.2449-2450.*

As a result of Judy's death, Allan Southern received approximately $100,000 in life insurance funds and kept nearly $90,000 in property they owned, as well as at least three businesses, without the division that would have inevitably resulted from a divorce. *App. p.4930-4971.* Allan purchased a new truck for himself and another one for Roy Chapman. He also installed an in-ground pool and made other improvements to his home and properties. *App. p.4572; 4930-4971.*

C. THE AVAILABLE EVIDENCE REASONABLY SUPPORTED AN INTERVENING CAUSE DEFENSE.

It is well-settled law in South Carolina that a defendant cannot be convicted of murder unless his act is the proximate cause of the victim's death. 23 S.C. Jur. Homicide § 6. "Proximate cause is defined as 'that cause which in natural and continuous sequence, *unbroken by any efficient intervening cause,* produces the injury, and without which the result would not have occurred.'" *Id.* (emphasis added). While mere negligence on the part of another actor, which proximately causes a victim's death, is not an efficient intervening cause sufficient to relieve a

defendant of liability for murder, "*gross negligence or intentional activity* on the part of the same [actor] would so relieve [the defendant]." *State v. Matthews,* 291 S.C. 339, 347, 353 S.E.2d 444, 449 (1986) (emphasis added) (holding that where the defendant was charged with murder for shooting the victim, the propriety of subsequent medical procedures was an integral question to causation, and stating that "[i]f ... the [medical practitioners] pronouncements of death were premature due to the gross negligence or the intentional wrongdoing; that is, the reckless or willful wrongdoing, ... the intervening medical procedure [i.e., organ removal] would then interrupt the chain of causation and then become the legal cause of death"); *see also State v. Burton,* 302 S.C. 494, 497, 397 S.E.2d 90, 91 (1990) ("[W]here a [medical] treatment was so gross, where a treatment was so deliberate, so willful, that it was the cause of death, then the defendant would not be liable" for murder.).

Here, the jury clearly could have found an efficient intervening cause because the available evidence reasonably supported a conclusion that Allan Southern was either grossly negligent or intentionally inactive in seeking medical assistance following his wife's shooting, thereby violating his duty to furnish medical care and proximately causing her death. Numerous jurisdictions recognize a husband's duty to furnish medical assistance to his wife – especially where the latter is in a helpless position – and have held that failure to perform such a duty supports a charge of involuntary manslaughter. *See Neveils v. State,* 145 So.2d 883, 884 (Fla. Dist. Ct. App. 1962); *Westrup v. Commonwealth,* 93 S.W. 646, 646 (Ky. 1906) ("Where the husband neglects to provide necessaries for his wife, or medical attention in case of her illness, he will be guilty of involuntary manslaughter, provided it appear that she was in a helpless state and unable to appeal elsewhere for aid, and that the death, though not intended nor anticipated by him, was the natural and reasonable consequence of his negligence."). Indeed, a husband's

omission to perform such a duty can sustain a conviction, even if his wife would not have survived her injuries had she received medical care, where the husband's omission merely hastens the victim's death. *State v. Mally,* 366 P.2d 868, 873 (Mont. 1961) (sustaining a conviction for involuntary manslaughter based on a husband's failure to furnish medical care for his wife, even though it was "apparent that even with immediate medical aid [the wife] in all probability would not have survived," where evidence supported a conclusion that the husband's omission hastened the wife's death).

A similar duty to furnish medical care arises when "one has voluntarily assumed the care of another and so secluded the helpless person as to prevent others from rendering aid." *Jones v. United States,* 308 F.2d 307, 310 (D.C. Cir. 1962). Such a duty can be violated by failing to aid the victim at the scene and failing to seek medical help at the nearest possible locale. *See Flippo v. State,,* 523 S.W.2d 390, 393-94 (Ark. 1975) (sustaining convictions for involuntary manslaughter where defendants found a victim with a severe gunshot wound in the woods, did nothing to prevent bleeding, and "drove twelve to fourteen miles to reach [their] residence although phones were in the vicinity of the shooting . . . [and a] public phone, which the [defendants] passed, was 2.3 miles from the scene of the tragedy").

An omission to perform a duty of care that results in the death of another can rise to the level of murder, most notably where such omission is willful or intentional. *See Martinez v. State,* 498 S.W.2d 938, 943 (Tex. Crim. App. 1973) ("The omission or neglect to perform a duty resulting in death ... may constitute murder where the omission was willful and there was a deliberate intent to cause death."); *Vaughan v. Corn,* 376 S.E.2d 801, 806 (Va. Ct. App. 1989) ("[W]here a person maliciously omits to perform a duty of care that is owed and that omission results in death, the offense is murder."); Am. Jur. *Homicide* § 81 ("As a general rule, where one

person owes to another either a legal or a contractual duty, an omission to perform that duty resulting in the death of persons to whom the duty was owing renders the person charged with the performance of such duty guilty of a culpable homicide."); W.S. McAninch & W.G. Fairey, *The Criminal Law of South Carolina* 77 (2d ed. 1989) ("Murder[] can be committed by an actor's omission if the [actor] had a legal duty to act and the failure to perform the legal duty causes the victim's death.").

As Judy Southern's husband, Allan Southern owed his wife a duty to furnish medical care when he found her lying alone in a pasture with a severe gunshot wound, rendering her alone and helpless. He further owed a duty because he voluntarily assumed Judy's care and secluded her from the aid of others by, *inter alia,* assuming control of her cell phone, removing her from the presence of the only other person aware of her injuries, and isolating her from ambulance assistance by driving her to the hospital himself.

Moreover, the jury could have reasonably concluded that Allan Southern failed to fulfill his legal duties because he: (1) failed to call 911 at any time; (2) unreasonably delayed in obtaining medical assistance; (3) failed to take any steps to prevent bleeding or otherwise aid his wife at the scene; (4) failed to stop at the EMS substation; and, (5) failed to immediately bring Judy inside the hospital after he claimed that no one would come out from the emergency room. Given that the court in *Flippo* sustained involuntary manslaughter convictions for omission where the defendants merely failed to take steps to stop bleeding at the scene and to use the nearest phone to call for assistance, Allan Southern's collective failures undoubtedly supported a finding of omission to perform a legal duty. *See Flippo,* 523 S.W.2d at 393-94. Given the extensive available evidence of Allan Southern's potential motive and opportunity, the jury could have reasonably concluded that his failure to fulfill these duties was either intentional or

grossly negligent. Indeed, this Court has found similar circumstantial evidence sufficient to sustain a murder conviction and imposition of the death penalty. *See State v. Williams,* 321 S.C. 327, 333, 468 S.E.2d 626, 629-30 (S.C. 1996) (concluding that sufficient evidence linked husband to homicides of his wife and adopted son where husband and wife were having severe marital and financial difficulties, husband increased life insurance benefits on wife and son and forged wife's name on the forms, husband knew details about homicides and his hand was injured, and husband did not deny killing wife and son shortly after the murders).

Finally, the available evidence reasonably supported a conclusion that, at a minimum, Allan Southern's omissions hastened Judy's death. Thus, even if the jury did not believe that Judy would have ultimately survived, it nonetheless could have determined that her husband's conduct hastened her death and thereby became an intervening cause. *See Matthews,* 291 S.C. at 347, 353 S.E.2d at 449 (noting that gross negligence on the part of another actor that causes a victim's death suffices as an efficient intervening cause); *Mally,* 366 P.2d at 873.

D. TRIAL COUNSEL'S FAILURE TO RAISE AN INTERVENING CAUSE DEFENSE WAS UNREASONABLE AND PREJUDICIAL.

Trial counsel's failure to present an intervening cause defense to the jury constituted ineffective assistance of counsel because it was a plausible theory that was not inconsistent with their proposed strategy.[5] Trial counsel conceded that they wanted to "leave the door open" to

[5]Courts find deficient performance (outside that of reasonably competent counsel) where counsel fails to adequately investigate and present information to the jury that counsel knew or should have known to be beneficial to the client. For example, counsel in *Porter* was ineffective because counsel "ignored pertinent avenues of for investigation of which he should have been aware." *Porter v. McCollum*, 558 U.S. 30, 40 (2009). As a result, counsel failed to present a compelling theory in mitigation relating to Porter's mental capacity. In *Rompilla v. Beard*, 545 U.S. 374, 383, 385 (2005), counsel did not read a file that he knew that the prosecutor planned to use; in failing to do so, counsel ignored information that was essentially staring him in the face that, if reviewed, would have revealed to counsel a compelling theory of mitigation that counsel could have presented to the jury. In *Wiggins v. Smith*, 539 U.S. 510 (2003), and *Williams v.*

show Allan Southern's involvement in case Petitioner implicated him in a murder-for-hire or other collaborative scheme to kill Judy Southern. *App. p.4456.* However, despite the fact that the "slow drive" theory (that Allan Southern's delay in getting his wife medical attention was an intervening cause of her death) was both plausible and furthered this goal, counsel did virtually nothing to investigate or present this theory to the jury. Trial counsel failed to present all of the available evidence regarding the extent of the marital discord, Allan Southern's possible financial motivations for not assisting in his wife's rescue, or Ms. Brown's testimony that Judy actually feared that Allan planned to kill her on the very day that she died. Trial counsel did not hire a private investigator to explore the timeline of the day of Ms. Southern's death as it related to Allan Southern's actions on that day, such as when he left the bowling alley, when he received the call, how long he actually spent at home allegedly attempting to rescue his wife, and how long it took him to drive to the hospital. Instead, counsel merely relied on the testimony of Allan Southern and his friend and employee, Roy Chapman. Finally, counsel failed to use a forensic pathologist to testify that Judy Southern's chances of survival increased the sooner that she received medical attention, which is precisely the testimony provided by Dr. Riddick at the PCR hearing. *App. p.4033.* Had trial counsel presented this evidence to the jury, the jury would have been able to evaluate Petitioner's guilt in light of evidence suggesting that Allan Southern was an intervening cause in his wife's death.

Moreover, trial counsel did not articulate any reasonable strategic reason for omitting an intervening cause defense. Trial counsel testified that Petitioner denied a murder-for-hire

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Taylor, 529 U.S. 362 (2000), respective trial counsel ignored available information that could have been used in the sentencing phase. Though each of these cases arose in the context of the sentencing phase, the reasoning of the Court that counsel unreasonably failed to investigate and present evidence beneficial to the client is equally applicable to the guilt/innocence phase.

scenario and so they abandoned the inquiry into Allan Southern's actions. *App. p.4568-4569.* But, at the same time, trial counsel wanted to "leave the door open" in case Petitioner later changed his story and implicated Allan Southern. *App. p.4456.* Trial counsel "wanted to leave the door open with [Allan] looking like he's got a motive or some lack of enthusiasm about getting her to the hospital." *App. p.4469.* Counsel's failure to present an intervening cause defense was unreasonable in light of this strategy for a number of reasons. First, if counsel truly wanted to "leave the door open," available evidence such as the full extent of the Southern's marital discord (including Judy's statements on the morning of her death), full investigation of Allan Southern's and Chapman's accounts of the timeline of that day (not sole reliance on their testimony), and the testimony of a forensic pathologist regarding the effect of time on Judy Southern's chances for survival were all highly relevant, and it was unreasonable to exclude such readily available evidence about which trial counsel should have known. Even if trial counsel were merely trying to leave the door open only in case Petitioner later changed his story, presenting such evidence was wholly consistent with Allan Southern's hypothetical collaboration with Petitioner. Evidence suggesting that Allan Southern was, at least, less than diligent in acquiring medical attention for his wife, and was thus an intervening cause in her death, would not have foreclosed the possibility of presenting evidence that Allan Southern actually collaborated with Petitioner, if this evidence later came to light.

Finally, it was unreasonable for trial counsel to stop investigating and fail to present evidence relating to Mr. Southern's potential complicity in his wife's death because the "slow drive" scenario could have played out completely independent of a murder-for-hire scheme, and without the knowledge of Petitioner. Petitioner had no personal knowledge of Allan Southern's actions after the shooting. Even in the absence of a collaborative enterprise, the facts support the

likely scenario that Allan Southern happened upon what, for him, was a fortuitous opportunity and then proceeded less than diligently in seeking medical attention for his wife, thereby acting as an intervening cause in her death.

Counsel's failure to present an intervening cause defense prejudiced Petitioner because it prevented the jury from hearing a plausible and alternative theory regarding the cause of the victim's death. Under *Sears v. Upton*, 130 S. Ct. 3259, 3265 (2010), the fact that counsel presented some theory at trial "[does] not obviate the need to analyze whether counsel's failure to conduct an adequate . . . investigation . . . prejudiced [the defendant]." . Here, trial counsel's insistence on presenting only the suicide theory and then attempting to "leave the door open" to an alternative theory without investigating or presenting evidence to support that theory was unreasonable and prejudicial.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER AVAILABLE EVIDENCE TO SUPPORT THE THEORY THAT PETITIONER ENTERED THE VICTIM'S HOME WITH THE INTENT TO COMMIT SUICIDE.

Trial counsel's second strategy for the guilt-or-innocence phase was to argue that Petitioner entered the Southern's home with the intent to commit suicide, rather than with the intent to commit a crime and, therefore, he did not commit a burglary. Without a burglary conviction, there was no aggravating circumstance and thus, Petitioner would have been ineligible for the death penalty. In support of their suicide theory, however, trial counsel called only a single witness – Mr. Don Thompson, a public defender who briefly served as Petitioner's counsel immediately following his arrest. *App. p.2794*. Thompson testified that shortly after his arrest Petitioner seemed "self-destructive" and talked only about his wish to die. *App. p.2795*. Thompson stated that he believed Petitioner was suicidal. *App. p.2796*. On cross examination, Thompson admitted that he was not a psychiatrist, or a psychologist, or a sociologist. *App.*

p.2797. He further admitted that he did not specifically discuss with Petitioner his reasons for wanting to die, nor did Thompson have any way of determining what Petitioner's ideations were at the time of the crime. *App. p.2798.*

Following the testimony of this single witness at the guilt-or-innocence phase, trial counsel rested. Mitch Slade then argued to the jury that if there was any real possibility that Petitioner went inside the Southern's house with the intent to commit suicide, then he had not committed a burglary. *App. p.2886.* Slade himself acknowledged that he "do[es] not know the reasons why people commit suicide or why they pick the places they pick." *Id.* Slade further observed that "not everyone who attempts suicide actually completes it." *Id.* He suggested that the answers to such questions were unimportant because "what matters is [Petitioner's] intent." *Id.* The State, however, harped on these unexplained details as evidence that Petitioner was not seriously bent on suicide when he went inside the Southern's home. *App. p.2860-2861.* Specifically, the Solicitor argued that "the best evidence of what someone intended to do is what they actually ended up doing. You don't have to go inside somebody else's house to kill yourself. What sense does that make?" *App. p.2860.* The jury returned a verdict of guilty for both the first degree murder charge and the burglary charge.

The advice and testimony of an expert familiar with "the reasons why people commit suicide" and "the places they pick" was readily available to trial counsel at the time of trial. A suicidologist could have assisted trial counsel in making their argument that Petitioner intended to commit suicide, and not some other crime, when he entered the Southern's residence. A suicide expert could have explained to the jury the factors indicating that Petitioner's suicidal

actions at the time of the crime were sincere.[6] For example, Dr. Janet York, an expert in suicidology, prepared an affidavit that was entered into the PCR record in which she testified that, at the time of the crime, Petitioner "was in an acute suicidal state" and "also was a high chronic suicidal risk." *App. p.5261 at ¶ 6.* Petitioner had a number of psychological, environmental and familial risk factors for suicide.

In terms of psychological risks, Petitioner made multiple previous suicide attempts throughout his lifetime. *Id. at ¶ 8.* "[P]ersons with multiple attempts are known to be at higher risk for suicide as compared to persons with a single attempt." *Id.* Petitioner also "had multiple psychiatric diagnosis (comorbidity), including polysubstance abuse, mood disorder, and personality disorder, all of which independently increase suicide risk as does comorbidity." *Id. at ¶ 6.* "He had a history of impulsive behavior, poor judgment, reality testing, and disorganized thinking, all of which contribute to suicide risk." *Id. at ¶ 8.* On the day of the crime, Petitioner "used alcohol (which has a disinhibiting effect) and multiple nicotine patches (which have an energizing effect)." *App. p.5262 at ¶ 9.* "Alcohol is associated with a disinhibiting effect and more frequent choices of firearms as a method of attempting suicide." *App. p.5261 at ¶ 6.*

Petitioner also had several environmental risk factors for suicide. He had access to a gun and "had a suicidal rehearsal (holding the loaded firearm to his head) the day of the incident. Rehearsals also are known to have a disinhibiting effect and serve as a kind of practice for an attempt." *Id. at ¶ 7.* Petitioner was also homeless, unemployed, and facing incarceration – all which contribute to a feeling of hopelessness, which is "a major predictor of suicide." *Id.* Demographically, Petitioner was in a high risk group for suicide because he was a young,

[6] Moreover, had trial counsel conducted a thorough mitigation investigation and retained an expert in Fetal Alcohol Syndrome, they would have discovered that Petitioner had a long history of depression and that he previously made multiple suicide attempts, owing in large part to his struggle with Fetal Alcohol Syndrome.

Caucasian male. *Id. at ¶ 8.* He also had a significant familial risk factor because his biological mother took her own life. *Id.* Shortly before the crime occurred, Petitioner was discharged from Patrick B. Harris psychiatric hospital following a suicide attempt. Dr. York explained that "the risk of a suicide attempt increases within a month of discharge." *Id. at ¶ 6.* At the time of his release, Petitioner "needed intensive outpatient services, such as psychiatric day hospitalization." *App. p.5262 at ¶ 10.* But no such services were offered to him. Moreover, "[o]ne week prior to the [crime, Petitioner] ran out of his psychotropic medication which often causes rebound, [or] reoccurrence of acute psychiatric symptoms." *App. p.5261 at ¶ 6.* Finally, the fact that Petitioner did not complete suicide "is consistent with the ambivalence of acute suicidal states." *App. p.5262 at ¶ 9.*

Trial counsel's failure to consult with a mental health expert specializing in suicide constituted ineffective assistance of counsel because proving that Petitioner was suicidal was trial counsel's primary defense at the guilt-or-innocence phase. Trial counsel claim that they did not want to introduce evidence relating to Petitioner's mental health because they feared that this would open the door for the prosecution to introduce testimony regarding Petitioner's prior conviction for criminal sexual conduct, and that the jury would find Petitioner guilty based on that conviction. *App. p.4455-4456.* However, trial counsel also admitted that they did not believe that they could establish innocence, and they were prepared to lose on the murder charge. Their theory was that if they could show that Petitioner did not enter the house with the intent to commit a crime, then they would prevail on the burglary charge and Petitioner would not face the death penalty due to the absence of an aggravating circumstance. *App. p.4585-4586.* Thus, trial counsel knew that an acquittal on the murder charge was unlikely and that evidence would come up in sentencing about the criminal sexual conduct charge (and likely influence the jury in

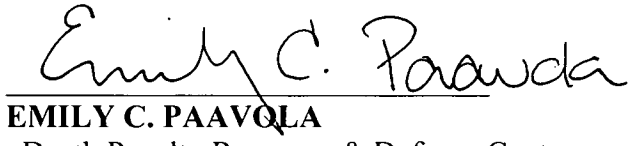
imposing a death sentence). Trial counsel's concern that introduction of mental health evidence would prejudice the jury was unreasonable because the suicide theory was weak in the absence of expert testimony. *See People v. Baines*, 927 N.E.2d 158, 170 (Ill. App. Ct. 2010) ("it defies reason to believe that defense counsel would intentionally fail to bring out the very essence of the defense theory in the clearest possible manner."); *People v. Bryant*, 907 N.E.2d 862, 874 (Ill. App. Ct. 2009) ("We cannot conclude that counsel's failure to call any witnesses in support of the defense that he had both promised and adhered to throughout the defendant's trial was a reasonable strategic decision."); *see also Ard*, 372 S.C. 318, 642 S.E.2d 590 (trial counsel's failure to challenge the State's evidence with expert testimony was deficient and prejudicial).

Furthermore, trial counsel could not have made a reasonable determination as to whether testimony from a suicide expert was proper, or would even open the door to the type of prejudicial testimony that counsel feared, without first consulting with such an expert. *See, e.g., Council v. State*, 380 S.C. 159, 175, 670 S.E.2d 356, 364 (2009) (internal quotations omitted) ("This Court has recognized that strategic choices made by counsel after an incomplete investigation are reasonable only to the extent that reasonable professional judgment supports the limitations on the investigation"); *see also Wiggins,* 539 U.S. at 523 (same). It was unreasonable for counsel to make the decision that they could not present such testimony regarding suicide without first knowing what that testimony might be. Trial counsel's failure to investigate and present evidence regarding Petitioner's suicidal tendencies at the time of the crime resulted in prejudice because expert testimony was critical to show that Petitioner did not commit a burglary. As noted above, without the burglary as an aggravator, Petitioner would never have faced a death sentence.

CONCLUSION

For all of the reasons above, this Court should grant Petitioner a new trial.

Respectfully submitted,



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June 4, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHEROKEE COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2012-212107

Jonathan Kyle Binney, #6009, Petitioner/Respondent

v.

State of South Carolina, Respondent/Petitioner.

CERTIFICATE OF SERVICE

I, Jill Rider, hereby certify that I have served upon the attorney for the Respondent/Petitioner one (1) copy of the Brief of Petitioner/Respondent in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage pre-paid, addressed as follows:

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This the 4th day of June, 2014, in Columbia, South Carolina.

Jill Rider
JILL RIDER