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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

v.

The State, Petitioner/Respondent.

Respondent/Petitioner's Brief of Petitioner

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
charles@groselawfirm.com

Tara Schultz Waters
Waters Law Firm, LLC
120 S. Magnolia Street
Summerville, SC 29483
(843) 834-3600
tara@waterslawsc.com

Attorneys for Respondent/Petitioner John Kennedy Hughey

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

QUESTIONS PRESENTED

I. Trial counsel presented a baseless voluntary manslaughter defense considering the overwhelming evidence of guilt and South Carolina precedent establishing the defense was untenable. Was Hughey denied effective assistance of trial counsel when counsel knew this defense would not work and correctly predicted it would alienate the Jurors?

II. Was Hughey denied effective assistance of trial counsel when 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?

STATEMENT OF THE CASE

On December 4, 1995 Hughey murdered Tesheka Jackson and Luevinia Harris. The state charged Hughey with first degree burglary, grand larceny of a motor vehicle, possession of a firearm during the commission of a violent crime, and two counts of murder. The Court appointed Robert Tinsley and Billy Garrett 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, Judge Cole imposed two death sentences in accordance with the jury's recommendation.

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 asserted four grounds for relief: Ground I alleged ineffective assistance of trial counsel for presenting a voluntary manslaughter defense that was not supported by the facts or law when trial counsel knew presenting the defense would alienate the jurors; Ground II alleged ineffective assistance of trial counsel for failing to investigate, develop, and present available mitigation evidence; Ground III alleged ineffective assistance of trial counsel for not objecting to a penalty phase jury instruction that prohibited the jurors from considering mercy evidence; and Ground IV alleged

ineffective assistance of appellate counsel for inadequately briefing the no mercy instruction and failing to cite the then existing, controlling precedent.

The Honorable Alexander S. Macaulay conducted an evidentiary 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* in *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 PCR court granted Hughey post-conviction relief and ordered a new sentencing hearing based on Grounds III and IV of the second amended PCR application. Based on *Rosemond*, the PCR 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 PCR Court]), the Applicant has established his entitlement to a new sentencing phase of his trial." PCR Order 7, App. 5928. Hughey was denied the other relief sought in Grounds I and II. Judge Macaulay signed the judgment on May 11, 2010, and it was subsequently filed with the Abbeville County Clerk of Court on May 14, 2010. Counsel received written notice of entry of the PCR Order on May 19, 2010.

On May 28, 2010 both parties timely served motions to alter or amend the judgment, pursuant to Rule 59(e), SCRCP. App. 5929-68. By order dated July 22, 2010 the PCR Court denied both motions. App. 5969-71. On August 25, 2010 the state served

a notice of intent to appeal. Hughey filed a notice of intent to cross-appeal on August 26, 2010.

The state filed its Petition for *Certiorari* on January 12, 2011. Hughey filed his return to the State's petition on March 29, 2011. Hughey filed his Petition for *Certiorari* on April 29, 2011, followed by the state's return on August 8, 2011, and Hughey's reply on September 2, 2011.

By Order dated April 16, 2014, this Court granted both petitions for certiorari.

This brief follows.

BRIEF STATEMENT OF FACTS

On December 4, 1995, Hughey shot and killed his ex-girlfriend, Tesheka Jackson, and her cousin, Luevinia Harris, with a single-shot shotgun. Jackson was also cut early in the attack and bled as she retreated through the house. App. 2501. Hughey shot at her in the bathroom and missed. App. 2656. While Hughey reloaded the shotgun, Jackson retreated to the master bedroom at the rear of the house. App. 2362. Hughey pursued Jackson down the narrow hallway. Harris was on the phone with the police dispatcher. App. 2278. Hughey shot Harris in the face. App. 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. App. 2279. Jackson died instantly. Hughey dropped the gun and fled in Jackson's car. App. 2362. He left his two young sons, who were in the house during all of these events. App. 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. App. 2887.

- On December 3, 1995, Hughey caught Jackson with Michael Adams, whom she had been dating for nine to ten months. App. 2400. Hughey did not know about Adams until that day. App. 3105. Hughey became angry, threatened to kill both, and stormed away. App. 2403, 2651. Jackson reported the threats to the Abbeville Police Department. App. 2651. Officers wanted Jackson to go to a safe house but she, instead, decided to stay with Harris.

- Later that night, Hughey tried to locate Jackson. When Jackson was not where she normally stays, he called Harris' home and talked to her husband Mack. Mack told Hughey Jackson was not there. App. 2912-13.

- Hughey then went by Jackson's workplace looking for her. App. 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. App. 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. App. 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. App. 2219.

- Luevinia 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. App. 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. App. 2285.

- At 12:35 p.m., Hughey used Jackson's ATM card to withdraw money from Jackson's bank account. App. 2325.

- Later that afternoon, Georgia authorities arrested Hughey at his sister's house in Gainesville, Georgia. App. 2453-57.

- On December 5, 1995, Hughey confessed to killing Jackson and Harris. App. 2876-78.

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. App. 4665. Tinsley was aware the prosecutors considered the case capital from the start. When the case was noticed capital, Billy Garrett was appointed as co-counsel. App. 4834. The lawyers divided responsibility for the trial - Garrett was responsible for the guilt phase, and Tinsley was responsible for the sentencing phase. App. 4665, 4835. A combination of the trial record and the PCR record reveals the following chronology concerning trial counsel's investigation of the case:

- On January 7, 1997, Garrett began work on Hughey's case. Applicant's Ex. 24, App. 5298.[1]

- On February 13, 1997, there was "a disclosure meeting where [the prosecutors laid] out all the evidence they intended to present in the trial." App. 5129, 5164; Applicant's Ex. 52, App. 5238-39.

- On March 6, 1997, Garrett and Tinsley met with members of Hughey's family. By the time of this meeting, prior to retaining a crime scene expert, Garrett had already decided to present a voluntary manslaughter defense. Applicant's Ex. 24, 5298.

- In April 1997, trial counsel retained Don Girndt, a retired State Law Enforcement Division (SLED) agent, as the crime scene expert. App. 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" and up to $5,000.00 for "a licensed psychiatrist, for the purpose of conducting a psychological examination of the defendant." Applicant's Ex. 5, App. 5229-31.

- 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, App. 5248.

- Dr. James Evans, a psychologist was retained by trial counsel and saw Hughey for the first time on July 9, 1997. App. 3966. He did not meet with Hughey again until September 27, 1997. App. 3968; Applicant's Ex. 10, App. 5255.

- 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 Exs. 11-13, App. 5256-59, 5269.

- 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, App. 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, App. 5272.

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[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.

- 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. Wright testified at the hearing. Judge Cole ordered a Department of Mental Health competency evaluation. App. 199.

- 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 move forward. Applicant's Exs. 8, 24, App. 5250, 5298.

- 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, App. 5274-75.

- 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, life imprisonment for burglary first degree, and ten years for grand larceny of a vehicle.

In PCR, Hughey sought a new sentencing hearing on four grounds. The PCR Court granted a relief based on two of these grounds and denied relief on the other two. Cross-petitions for *certiorari* were subsequently filed and granted by this Court. Hughey's appeal, and this brief, addresses the two grounds on which the PCR Court denied relief. Each ground involves 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. *See also Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) ("We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ... ."). 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.C.

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., Ard 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.C. 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 of 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 Respondents 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.'" *Skipper 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 (3rd 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.

Trial counsel presented a baseless voluntary manslaughter defense considering the overwhelming evidence of guilt and South Carolina precedent establishing the defense was untenable. Hughey was denied effective assistance of trial counsel when counsel knew this defense would not work and correctly predicted it would alienate the jurors.

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,'" *Florida v. Nixon*, 435 U.S. 175, 191-92 (2004). *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, despite Hughey's willingness to plead guilty to two counts of murder and one count of burglary for three consecutive life sentences, App. 4674, 4933-34, 5124, trial counsel chose to engage in such a "useless charade" by blindly adopting a voluntary manslaughter defense wholly unsupported by precedent and the facts of the case. This defense was only successful in alienating the jury, discrediting the lawyers, and assuring a death sentence for Hughey.

In denying Hughey's PCR claim on this ground, the PCR Court found that trial counsel's "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" and that they, in fact, presented sufficient evidence to support the judge's decision to charge voluntary manslaughter. The PCR Court held "deficient performance under *Strickland* cannot be

found **merely because the result was rejected."** PCR Order 3, App. 5924. (emphasis added).

Contrary to the PCR Court's belief, Hughey does not seek relief merely because the jurors rejected the voluntary manslaughter defense. Instead, Hughey asserts his trial counsel was ineffective because the overwhelming evidence of guilt actually assured the jurors would reject trial counsel's manslaughter theory. Hughey was prejudiced because trial counsel alienated the jurors during the guilt phase, thereby guaranteeing they would recommend death sentences. In denying relief on this ground, the PCR court overlooked or misapprehended three significant factors. First, evidence presented by trial counsel during Hughey's case in chief revealed malice aforethought undermined the voluntary manslaughter defense. It actually supported convictions for two counts of murder, first degree burglary, and grand larceny. Second, trial counsel's doomed course of action was influenced by errors of law regarding provocation, cooling off, and transferred intent. Finally, trial counsel admittedly adopted this manslaughter defense knowing it was not likely to succeed and correctly predicting it would alienate the jurors.

A. The Trial Record.

1) The State's Case in Chief.

The State proved Hughey shot and killed Jackson and Harris and his motive for the murders. Around noon on Saturday, December 3, 1995, Hughey went to where Jackson lived and found her sitting in a car with Michael Adams. Hughey asked Adams if he and Jackson were dating and Adams told him "that's not any of [your] business." Hughey pushed Jackson, and when Adams got out of his car "to protect her," Hughey ran saying "he was going to kill" both of them. App. 2401-05.

Jackson called the police to report Hughey's threat. Abbeville Police Officers Neil Henderson and Barry New recommended she go to a safe house. Instead, Jackson told Henderson "she had a place in Greenwood to stay and that she would feel more comfortable going over there and staying." App. 2319, 2338-39, 2347, 2650-52. She went to the home of Mack and Luevinia Harris.

Later that day, Hughey searched for Jackson. Sometime around midnight, he called Mack Harris looking for her. He called again at about 6:00 a.m. on December 4. Mack called Jackson to the phone to talk to Hughey. App. 2910-13.

Mack left Jackson and Harris at the home around 10:55a.m. App. 2906. When his son, Marcus Harris, called the home at 11:56 a.m, Harris told Marcus that Hughey was there and had a gun. App. 2213-14, 2225. Marcus wanted to talk to Hughey, but he refused to 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." He testified that both his mother and Jackson sounded scared. When Marcus called back at 12:00p.m., App. 2228, Jackson activated the speaker phone. Marcus heard "some cussing going on" and heard his mother say, "John, just leave." Then she said, "Just leave. Call the police. Call the police!" App. 2214-20.

Harris called the Abbeville Police Department at 12:04p.m. and spoke to Angela Patterson, who was the supervisor of communications and a dispatcher. She asked for immediate assistance. Patterson recalled, "She was extremely agitated, you could tell she was upset, a lot of emotion in her voice." App. 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, she heard "absolutely nothing" - no "voices," "scuffling," or "fighting." Patterson had already dispatched officers to the crime scene. While the line was still open at the crime scene, Patterson received a call from Marcus, who excitedly "said his mother had just called him and that there was someone there with a gun." Shortly thereafter, Lieutenant New and Corporal Henderson arrived at the scene. Hughey was gone. App. 2278-85. Hughey's small child pointed the police to the location of the two bodies. App. 2358.

After the murders, Hughey stole Jackson's car and raced to Anderson where he used an ATM machine to take money out of Jackson's bank account. From there, he fled to his sister, Gloria Harrison's, house in Gainesville, Georgia. After a standoff with the police and a suicide attempt, the police apprehended Hughey and returned him to Abbeville. Hughey confessed to the killings, but tried to shift the blame to Jackson. App. 2842-45, App. 2869-76, App. 2876-78

The forensic evidence supported larceny, burglary, and two murders. The strike plate for the front door "was actually on the floor . . . inside the threshold of the doorway," and the frame of the door was bent, indicating forced entry. Just inside the door, there was a knife that appeared to have blood on it. App. 2482-90, 2494-96. A broken vase, knocked over chairs, and blood splatter revealed a struggle in the living area of the house. Hughey shot a total of three times inside the house. The first shot was in the bathroom before Harris called 911 and missed its target. Hughey reloaded the single-

shot shotgun. The second shot killed Harris in the hallway where she was on the phone with 911. Her body was found near the phone. Again, Hughey reloaded. He used force to push his way into the bedroom where Jackson had retreated. He killed her with a single, close-range shot to the face. App. 2548-49.

Investigators found a murder-suicide note that Hughey left on the front door of his house. He had written, "[a]s of this morning, I will be dead. Love you all. Please take care of my kids. John K." App. 2390-93.

2) Hughey's Case in Chief.

During Hughey's case in chief, trial counsel attempted to presente a voluntary manslaughter defense. However, their own evidence established Hughey's motive and revealed his plan to murder Jackson and commit suicide. Hughey's testimony alone gave the jurors enough information to dismiss manslaughter as a viable defense, and Don Girndt, the defense's own crime scene expert, confirmed the plausibility of the State's theory of the incident.

Gloria Harrison, Hughey's sister, was an eyewitness to the December 3 confrontation with Jackson and Adams. She saw Jackson in the car with a man. "Jackson got out and she met John and they were talking." She heard Hughey say, "[n]ever mind." He "got back in the Jeep and he said, '[c]ome on, Gloria, let's go.'" She then took him home returned to her home in Gainesville, Georgia. App. 3018-21.

Hughey admitted there was violence in his relationship with Jackson. He "would still hand her," and they slapped each other. App. 3081-83. He was not aware Jackson had been seeing Adams since February 1995. The first time he saw Adams was

December 3, when he found Jackson and Adams sitting inside a Mustang. He confronted Jackson. He was hurt. He admitted, "I'd had enough." App. 3106-07.

When Hughey got back to his house, he called his friend Chris Burton. App. 3107. He "was crying and was upset about something." He told Burton, "I can't take it no more" and asked him to "tell my sisters and them I love them" and to "take care of my kids." App. 2992-93.

Hughey wrote a suicide note. App. 3112. On cross-examination, the solicitor questioned Hughey about the note and, in particular, the "take care of my kids" part. 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." App. 3193-3203.

Hughey admitted he had called around looking for Jackson on December 3 and 4, but denied driving around looking for her.[2] App. 3110-20. He admitted he wanted to find out where she was staying the night of December 3 after he learned she was not at her grandmother's. App. 3193-3203.

On December 4, when he woke up, Hughey went to the Harris home on his brother's bicycle. 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" to have some work done on it. App. 3120-23.

According to Hughey, as they were preparing to leave for Anderson, Hughey was "laughing" about the confrontation the day before and asking Harris if Jackson had told

[2] The jury learned during the sentencing hearing testimony that was not true, App. 3660-67.

her. Jackson did not want Hughey telling Harris their "business," but Harris wanted to know and invited the two inside, offering Hughey some coffee. Jackson "started getting mad." She wanted to know what was in Hughey's pocket because she thought he had his 9mm pistol. He answered, "Think what you want to." Hughey testified Jackson was arguing, but he was not, when Marcus Harris called. App. 3123-35.

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," and she threw a knife. Hughey heard some dishes rattle and he "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, who was taller than Hughey and outweighed him by thirty pounds, "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." He ran out the house. App. 3125-40.

On direct examination, Garrett asked Hughey why he did not keep running. 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," which already had a shell in it. Jackson was standing "at the top of the steps with the knife and she stood there hollering and cussing." Hughey addressed Jackson to try to defuse the situation telling her, "[i]f you want to talk, let's talk. You put the knife down, I'll put the gun down." Hughey walked towards her as she spit at him 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.

App. 3208-33. He said they fought "sort of like tussling" inside the front entrance and "[t]hat's when the [first] shot went off." App. 3040-47.

Hughey testified about what happened in the house:

> I just remember coming back up toward like through the kitchen and everything then...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." App. 3040-47. Hughey testified, "when I shot Luevinia she was just in the wrong place at the wrong time." App. 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.

Hughey's testimony on cross-examination about the actual shootings was damaging. He testified, "I tripped over the chair and kind of got focused. I just remember shooting and Miss Luevinia getting hit." He went on to say he did not remember too much after the first shot, including hearing Harris say, "[d]on't you shoot that gun in this house," or stepping over Harris' body to get to Jackson in the back bedroom. He said it happened so fast he did not remember breaking down the shotgun to put the second and third shells in it. He could not recall how the other two shotgun shells came into his possession or how they got into the shotgun. On redirect, further

establishing deliberation, Garrett reinforced that Hughey would have had to get the shells from the car with the shotgun. App. 3234-45.

Don Girndt, the defense's final witness, was qualified as an expert in the areas of blood stains, firearms analysis, and crime scene analysis. 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, which, of course, negated any possibility that the shot that killed Jackson occurred during a struggle. App. 3253-64.

On cross-examination, the solicitor turned Girndt into an expert for the state's theory of how Hughey committed the murders. He opined that no burglary took place because neither Jackson nor Harris had mentioned it during the contemporaneous phone calls. 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 Solicitor Jones, "**I am not arguing with your theory**. I'm just saying there is an alternate theory" (emphasis added). Girndt acknowledged that the phone calls established Hughey was in the home at 11:56 a.m. with the shotgun and that the displaced strike plate on the door indicated someone had forced the door open at some point. App. 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. Hughey had to walk towards Harris and was about four feet from her, maybe a little less, when he shot her. He would then have reloaded and cocked the shotgun before killing Jackson. That matched the dispatcher hearing five seconds of silence in between shots. 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 with the gun about four feet from her head. App. 3313-48.

B. Evidence Presented at the PCR Hearing.

During the PCR hearing, defense counsel admitted the hopelessness of their voluntary manslaughter theory. The decision to present this defense was made before any real preparation or investigation 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 present the voluntary manslaughter defense, yet pursued it anyway.

Garrett testified that he focused on the facts of the crime, including allegedly researching the law on voluntary manslaughter and transferred intent. Hughey "was adamant he wasn't guilty of burglary." App. 4850-52. Garrett, admitting they were dealing with "an awful set of facts and circumstances," theorized that when Hughey "was intending to commit a manslaughter against Ms. Jackson, that intent transferred to Ms. Harris." App. 4862-63.

Tinsley testified Hughey had "some variations at times in his recollection." Hughey initially "was pretty fairly intent on defending the – the killing of Ms. Harris as being unintentional," and 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." App. 5117-19. Tinsley explained the guilt/innocence phase defense was to "reduce the number of aggravating circumstances." App. 5134.. According to Tinsley,

"there wasn't a burglary." Rather, Hughey "was an invitee." App. 4728. *See also* App. 4662-72.

The decision to present a manslaughter defense was made early and never changed. Tinsley recalled that the decision to present this defense was made by the time of the March 6, 1997, meeting with Hughey's relatives. App. 5165-67. At that point, trial counsel had not yet retained either crime scene expert Don Girndt or mitigation investigator Paige Tarr. Garrett did not meet with Girndt until the week before trial and only then learned that Girndt believed Hughey's account of the facts "wasn't probable." App. 4949-57. 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. App. 4724-27.

Going into the trial with this knowledge of the facts, Garrett knew the voluntary manslaughter defense was unlikely to succeed, saying "[i]t would be a long shot." App. 4850, 4861, 4900, 4952. He considered it "a dangerous strategy." App. 4904. 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 knew the facts did not support a verdict of voluntary manslaughter as to Jackson. Reloading the shotgun could be considered malice aforethought. Going outside to get the shotgun was a sufficient cooling off period. Garrett believed he had formed malice aforethought by the time he reloaded the shotgun, chased Jackson into the master

bedroom, and killed her. Further, he knew Harris did nothing to provoke Hughey. App. 4861-69, 4887.

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

> I told Robert that the good likelihood if [Hughey was convicted of murder] 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. App. 4869. At the same time, Garrett would still be associated with Tinsley because the two were trying the case together and sitting at the same table with Hughey. App. 4952-54. 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. *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." The defense "was a stretch." 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." App. 4732.

Nonetheless, even though Girndt disagreed with Hughey's account of the events, counsel knew Hughey had an "inability to recall events of [the] crime" and supplied "false details" about the crime, App. 5167-71; Applicant's Ex. 20, App. 5286, and there was a risk of alienating the jury, counsel chose to present this incredible defense.

Counsel's conduct did alienate the jurors. After the trial was over, Yungman documented his observations about the jurors during the penalty phase: "[A]fter observing the jury, I don't think they wanted to hear anything myself or Dr. Evans had to say by way of explaining the reasons for Mr. Hughey's behavior." Applicant's Ex. 13, App. 5268.

C. Counsel's Errors at Trial.

Trial counsel did not provide effective assistance to John Hughey and failed him miserably by ignoring the A.B.A. standards for capital lawyers and presenting alienating and misinformed theories to the jury. *See, Council, supra.* Tinsley and Garrett failed to conduct a timely and thorough investigation of the state's guilt phase evidence and opted to present a sham of a defense that was legally and factually unsound. Their theory of the case alienated Hughey's sentencing jury, all but ensuring a death sentence.

1) Neither the facts nor the law supported a voluntary manslaughter defense as to Jackson.

In South Carolina, voluntary manslaughter requires a killing to be committed in a "sudden heat of passion upon sufficient legal provocation." *State v. Wharton*, 381 S.C. 209, 214, 672 S.E.2d 786, 788 (2009). If a sufficient cooling off period has passed after sufficient provocation, the defendant cannot establish a sudden heat of passion. As a matter of law, Jackson's death could not have been voluntary manslaughter because, as Hughey himself testified, there was a sufficient cooling off period and Jackson's alleged provocation came as she was exercising a legal right to defend herself and others.

a) There was a sufficient cooling off period.

As a matter of law, there was a sufficient cooling off period between any alleged provocation from Jackson and Jackson's murder. A time period as short as three to five

minutes can constitute a cooling off period that eliminates the consideration of voluntary manslaughter as a matter of law. *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (2000). In *Cole*, the victim attacked the defendant in the defendant's own home, left, was followed by the defendant, and shot to death three to five minutes later. Those few minutes were enough to constitute a cooling off period. Ten minutes has also been found to be a sufficient cooling off period. *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 as they slept after one of them had paddled him. That ensuing ten minute period, where the defendant obtained his shotgun and entered the victims' bedroom, was a sufficient cooling off period; the defendant was not entitled 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.

Further, 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 de-escalate the situation. The Court held this was clearly a situation where a charge of voluntary manslaughter was not warranted.

In Hughey's case, there clearly was a cooling off period. Even though Garrett stated in his opening, "[i]t's not murder but instead it's manslaughter [that] occurred within thirty seconds in the heat of passion and after legal provocation." App. 2199,

2205. The very first witness, Marcus Harris, supplied evidence that Hughey was in the home with a gun at 11:56 a.m, almost eight minutes before the first shot.

Girndt, the defense's own expert, also recognized the cooling off period and described the deliberate nature of the killings. He accepted the State's time chronology. In addition to the 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: "[i]f 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 de-escalate the situation, just as in *Walker*, 324 S.C. at 261, 478 S.E.2d at 282. When Jackson tried to retreat, Hughey admitted, "[s]he tried to slam the door and I did not like that." He re-entered the home 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) South Carolina law states that the requisite provocation necessary for voluntary manslaughter cannot come from the victim exercising a legal right.

Even if a defendant is acting in a sudden heat of passion, the killing must be done upon sufficient legal provocation in order for a voluntary manslaughter charge to be warranted,. "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.

According to his own testimony, Hughey wanted Jackson to think he had his 9mm pistol in his pocket in an attempt to frighten her. In addition, Tinsley testified Hughey told him he brought the gun to Harris' home as a way to intimidate Jackson in retaliation for her relationship with Adams. 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. In light of these facts, any actions she took to protect herself and her children were justified as defense of herself and defense of others and, therefore, cannot be sufficient legal provocation.

2) The use of a voluntary manslaughter defense to Harris' death was not factually or legally sound because Harris did nothing to provoke Hughey and intent does not transfer in a manslaughter case.

Harris' killing 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. There is no evidence in the record of any provocation by Harris to warrant a voluntary manslaughter charge in her killing. Trial counsel erroneously 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. *Wharton, supra.*

Trial counsel's manslaughter defense was based on the doctrine of transferred intent. App. 5666. While this Court has recognized the doctrine of transferred intent when the issue is transferring malice from the intended victim to the unintended victim,[3] "[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. Hughey's counsel failed to recognize this and organized

[3] 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, this 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).

their defense theory around the transfer of intent in voluntary manslaughter as if it was a matter of law in South Carolina. Trial counsel adamantly argued 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.

This Court has consistently held that provocation must come from the actual victim. *State v. Pittman*, 373 S.C. 527, 647 S.E.2d 144 (2007) ("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."); *State v. Childers*, 373 S.C. 367, 373, 645 S.E.2d 233, 236 (2007) ("The overt act that produces the sudden heat of passion must be made by the victim."); *State v. Locklair*, 341 S.C. 352, 535 S.E.2d 420 (2000) ("South Carolina has not recognized sufficient legal provocation from a third party that can be transferred to the victim."); *State v. Tucker*, 324 S.C. 155, 478 S.E.2d 260 (1996) ("The provocation [for voluntary manslaughter] must come from some act of or related to the victim in order to constitute sufficient legal provocation."); 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) (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.).

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 grate, and [Harris's girlfriend] ran in between the two men and was hit by one of the bullets." *Id.* Relying on *Tucker* and *Locklair*, a majority of the Supreme Court[4] 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 2009, 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." *Wharton*, 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

[4] 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.

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, reason dictates that was also unsettled at the time of Hughey's trial in 1997.

Immediately following the conclusion of the PCR hearing, the state cited three cases to support the viability of trial counsel's transferred intent defense: *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 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). App. 5198. By email dated October 17, 2008, see Appendix 2, the state provided these three cases. App. 5822 However, the state's reliance is misplaced. None of these cases address the transfer of intent in the context of voluntary manslaughter[5].

[5] As previously discussed, neither *Fennell* nor *Gandy* addressed transferred intent in a voluntary manslaughter situation. See FN 3, p. 37. Both cases affirmed murder convictions based on the transfer of "malice" from the intended victim to the unintended victim. *Williams*, while confusing, actually addressed the concept of accomplice liability instead of transferred intent.

3) It was not reasonable for trial counsel to believe the jurors would acquit of burglary and larceny.

The PCR court found "the trial strategy was to keep that case from being a death eligible case by presenting evidence that would entitle [Hughey] to an instruction on manslaughter." The PCR court then found trial counsel effective in presenting this defense. PCR Order 3, App. 5924. As discussed in Section I(C), *supra*, trial counsel's decision to present this defense was influenced by errors of law, and reasonable counsel never would have pursued this course of action. Additionally, in the event Hughey was convicted of only one murder, the jurors would also have had to find him not guilty of burglary and larceny in order to prevent his case from being death-eligible. The PCR court failed to consider the overwhelming evidence to support those convictions.

If Hughey initially entered Harris' home as an invitee, he lost that status once he went outside to the car to get the gun. Further, Hughey testified Jackson tried to close the door in his face but he went inside anyway. App. 3141-43, 3230-31. At that point, Hughey did not have permission to be in Harris' home. Trial counsel defended the burglary by saying the damage to the front door did not happen during this incident. App. 3267, 3272-74. It was not reasonable to believe the jurors would agree. The obvious signs of forced entry - the damaged door frame and strike plate lying on the floor - were confirmed repeatedly: Mack Harris testified about the condition of the door before and after the crimes, the damage was observed by responding officer Barry New and forensic crime scene investigator SLED Agent David Black, photographs of the door were introduced into evidence, and defense expert Don Girndt acknowledged it "took

some force to break the [front] door frame." App. 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 an element of the crime. 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."). Hughey would have been guilty of burglary if he entered Harris' home without consent, regardless of whether the damage to the door came from this incident. 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"). *See also State v. Singley*, 392 S.C. 270, 709 S.E.2d 603 (2011) ("ownership does not preclude a burglary conviction as a matter of law" when the defendant does not have a possessory interest in the home).

D. Trial Counsel's Ineffectiveness.

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 or hiring a crime scene expert. Even after Girndt was hired, counsel did not take advantage of his expertise until the week before trial. Applicant's Ex. 24; A. 5296-98. *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"). Though Girndt disputed the defense theory, counsel proceeded to trial under that theory. They knew it would not succeed. Indeed, it was undermined by the defense's own witnesses. *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 viable, trial counsel was aware such a defense might alienate the jurors. Nonetheless, they proceeded with this defense, aptly described as "hop[ing] to have the luck of a lawless decision-maker" and succeeded only in alienating the jurors. State's Prehearing Brief, App. 4570-4636. *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").

The State made a mockery of the defense. First, the state pointed out that the defense was essentially blaming Jackson. "[T]hey continue to attack her today." App. 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"). Second, the state also mocked the defense's assertion that Harris was in the wrong place at the wrong time when she was in her own home when she was murdered. App. 3391. Finally, the state

argued to the jury that even if they believed Hughey's testimony, he was still guilty of murder. App. 3394. The state criticized the "audacious" defense argument asking for manslaughter convictions based on the evidence in this case. App. 3411. *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").

Trial counsel's decision to rely on the voluntary manslaughter defense was not plausible under the facts of Hughey's case or the law, and, therefore, cannot be considered "strategy." "[C]ounsel 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").

E. Conclusion

In short, while trial counsel may have had a strategy, it was an unreasonable one and, therefore, was deficient conduct. Had trial counsel conceded guilt, the result would have been different because they would not have alienated the sentencing jury by presenting the voluntary manslaughter defense in the first phase of trial. As noted by defense expert Jeff Yungman, the jurors were very uninterested during the presentation of mitigation evidence, showing that Hughey was prejudiced by his counsel's ineffective assistance. Therefore, the PCR Court should have ordered a new sentencing hearing on this issue alone. In the alternative, as discussed in Section III, *infra*, the PCR Court should have ordered a new sentencing hearing due to the cumulative prejudice of counsel's deficient conduct.

II.

Trial counsel was ineffective for failing 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. The PCR Court erred in finding that strategic decisions accounted for these failures.

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." PCR Order 4-5, App. 5925-26.

In making this conclusion, the Court overlooked that trial counsel's inadequate investigation and failure to present additional compelling mitigating evidence that was readily available at the time of trial. Had trial counsel performed the proper mitigation investigation and presented the 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.

Had the jurors heard this available mitigation evidence, the result would have been different: The jurors would have recommended life sentences.

A. The Trial Record.

1) State's evidence in aggravation.

The state's evidence from the first phase of the trial was incorporated into sentencing and it supported the jury finding 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 in one act or pursuant to one scheme or course of conduct. App. 4072-74.

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. App. 3622-58. The state then presented victim impact testimony from Jackson's grandmother and mother, who were left to care for Jackson 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... and sitting here giving this testimony and John... she was in the...wrong place at the wrong time in her own home. That's tough to hear. She was in her own home.

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

2) Hughey's evidence in mitigation.

The defense presented testimony from several lay witnesses, Hughey's friends and family members, as well as social worker Jeff Yungman and neuropsychologist Dr. James Evans.

a) Hughey's friends and family.

Testimony from Hughey's family members established that Hughey's mother, Dolly May, had three children with a white man named Alan Carlyle, App. 3769-71, and then married and had children with her second husband, John Henry Smith, also known as Bozo. He was Hughey's father. Bozo was an abusive alcoholic and when he drank, "he was mean, violent." App. 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. App. 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 had caught him with another woman. Hughey witnessed that entire incident. App. 3789-91. 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.

App. 3792.

> Gloria Harrison, another one of Bozo's children, recalled:
>
> I remember when we were staying on the Old Greenville Highway we was living in a mobile home, and [Bozo] 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.

App. 3858-59.

In addition to the "hard life," Hughey experienced a number of head traumas as a child, the most serious of which occurred when Hughey was only 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 and it was "touch and go" for about two days. App. 3777-78, 3840. After this incident, Hughey frequently suffered migraine headaches and blackouts.[6] App. 3785, 3863.

Hughey's primary emotional attachment and support through all of this was his mother. App. 3786-87. He lived with her until she was hit and killed by a drunk driver. App. 3782. After her death, Hughey seemed to lose his mind and walked the streets. He drank more. 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[d] her." He would also tell his sister that he would hear things in the house. App. 3784-88. He was not "the same John he used to be." While two of his sisters, Anthony and Ruby, got counseling after Dolly May's death, Hughey did not seek any such help. He became withdrawn. App. 3869-72.

b) Social Worker Jeff Yungman

Jeff Yungman, the social worker, also testified.[7] He found that Hughey suffered at least six different head traumas between 1973 and the incident date. He started huffing

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

[7] He had reviewed Hughey's records from the Abbeville County School District, Northeast Georgia Medical Center, Anderson Hospital, Abbeville County Memorial

gas between ages six and eight and this lasted for about a year or two. His low average IQ of 80, combined with his father's abuse could have led to low self-esteem. App. 3906-11, 3916.

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." App. 3912. 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 this sister's house where [his mother's death] occurred.

App. 3912. Yungman saw Hughey's behaviors after Dolly May's death as being *consistent with* a diagnosis of Post-Traumatic Stress Disorder ("PTSD"). App. 3913.

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

> 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.

App. 3923-27.

On cross-examination, the solicitor elicited testimony that Yungman had been contacted by the defense to become involved in the case only three weeks to a month earlier and was relying on incomplete or inaccurate information. App. 3939; 3944-45.

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. App. 3903-05.

c) Neuropsychologist Dr. James Evans

The final witness for the defense was Dr. James 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. App. 3965-68. He described the various tests he administered and reported he found evidence of brain dysfunction, which could hinder the ability to adapt to stress, App. 3970-73.

Evans "didn't pick up much depression" when he first saw Hughey, but he had not tested 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. App. 3977. Evans explained PTSD and that it can be caused by the death of a loved one. Hughey's behaviors differed from someone who would "occasionally remember [their] last moments with a loved one," in that "it seems like he literally thinks [his mother's] there." A possible diagnosis for Hughey would be depression with psychotic features, though he did not actually make this diagnosis. App. 3979-80.

Hughey's abusive past was a major stressor with continuing residual effects. App. 3984. He is "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." App. 3988-89.

On cross-examination, the solicitor focused Evans on the potential PTSD diagnosis, asking Evans, "Well, does he have it?" Evans replied that he was "strongly suspicious" he did, but stopped short of making a diagnosis saying, "I'm not going to say that... he has post-traumatic stress disorder." App. 3990-91. Importantly, he conceded that he was not hired to consider PTSD, and, therefore, remained focused on neuropsychological issues. App. 3995. During a pre-trial hearing, Evans testified that Hughey's possible PTSD "was an area we hadn't yet investigated" and "it would be worthwhile checking out" that potential diagnosis. App. 4743-44, 4772-73.

3) Court's charge on statutory mitigating factors.

Prior to closing arguments, the trial judge held a charge conference. App. 4011. Defense counsel asked the court to charge five of the ten statutory mitigating 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."

App. 4118-19.

The Court agreed to instruct the jury on mitigating factors one, two, and seven as requested but declined to charge number six[8] and number ten. App. 4118-19.

B. Evidence from the PCR hearing.

1) The investigation, preparation, and presentation of mitigation evidence was incomplete, inadequate, and ineffective.

As addressed in Argument I, *supra*, trial counsel focused primarily on their manslaughter defense, and thus, little effort was devoted to the mitigation investigation. The meager investigation that was conducted began on May 14, 1997, when Tinsley retained Paige Tarr as the mitigation investigator. Tarr described her role as a mitigation investigator as being "responsible for putting together a life history for the defendant, trying to find out as much...information as possible about their life, actually usually going generations back." App. 4984. In Tarr's experience, these investigations "routinely require between 200 and 500 hours of uninterrupted, intensive work over a period of six months to two years." App. 4696; Applicant's Ex. 6, App. 5243. Here, Tarr was retained only five months prior to trial, allowing her to only devote seventy-two hours to this case. App. 4697; Applicant's Ex. 8, App. 5250.

In mid-June, she received a release for information from counsel, signed by Hughey, which was delivered a few days later "doctor's offices, school, hospital, health department [and] DSS." App. 4699, 4991-92; Applicant's Exs. 7-8, App. 5245-46, 5248. She requested Bozo's records from Patrick B. Harris Psychiatric Hospital, but they were never obtained because the records department objected to producing these records without "court order or consent." App. 4701-02, 5171; Applicant's Exs. 8-9, 5247, 5252.

[8] This Court affirmed the trial court's decision not to charge this statutory mitigating factor "because no evidence introduced supported it." *Hughey*, 339 S.C. at 456, 529 S.E.2d at 730.

a) Mental health experts.

Trial counsel received funding approval for a psychologist and a psychiatrist on May 5, 1997. App. 4689-90, 4842; Applicant's Ex. 5, App. 5229-31. Tarr recommended Dr. James Evans as the psychologist.[9] App. 4703. Jeff Yungman, a social worker,[10] was not retained until the eve of trial, with his work on the case beginning on October 1, 1997. App. 4703-04, 4780-81; Applicant's Ex. 11, App. 5256. He requested from trial counsel, 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. App. 4782-83; Applicant's Ex. 12, App. 5260. Yungman believed these records were important because:

> 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, in 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 times psychiatric problems run in the family. And I wanted to see if there was any correlation, but I couldn't do it.

App. 4783. In addition to reviewing records, he conducted interviews of some of Hughey's family members[11] on October 2, 1997, and October 5, 1997, less than two weeks before trial. App. 4706, 4784; Applicant's Exs. 12-13, App. 5260, 5269.

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[9] Evans' involvement and findings were described in his sentencing testimony, discussed in Section II(A)(2), *supra*.

[10] Yungman was also recommended by Paige Tarr, with whom he was working on a Greenville capital case simultaneously with Hughey's case. App. 4780.

[11] Anthony Wilson, Donnie Ray White, Ruby White, and Nancy Ramey were interviewed in person. Dorothy Hughey, Gloria Harrison, and Barbara Hughey were only interviewed by phone. App. 4706, 4784; Applicant's Ex. 12 and 13, App. 5257-5271.

Yungman's report of October 6, 1997 was sent to Tinsley. App. 4706, 4785; Applicant's Exs. 12, App. 5257-58. In his report, Yungman expressed his belief that Hughey was suffering from depression and his concern that Hughey suffered from PTSD. App. 4785; Applicant's Ex. 12, App. 5261, 5265-66. 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 Posttraumatic Stress Disorder." (emphasis added) 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. App. 3955.

Yungman did not have any information about the other defense experts or what their expected testimony would be. He "didn't know what the big picture was." He 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. Yungman spent a total of thirty-one and a quarter hours on the case, which included his testimony on October 29, 1997. App. 4787-88; Applicant's Ex. 13, App. 5270.[12]

Despite the inability of Yungman or Evans to adequately address PTSD or depression, counsel did not consult a forensic psychiatrist until Hughey's competence

[12] Following the trial, Yungman expressed his concerns about how Hughey's case was handled in a letter to Tarr. The letter contrasts the preparedness of the defense team in the Greenville case Yungman and Tarr worked on simultaneously with Hughey with the lack of preparation by the defense team in Hughey's case. App. 4789, Applicant's Ex. 31, App. 5366-67. He did not inform counsel of his concerns though. App. 4794.

was questioned on the eve of trial. Even then counsel did not ask the psychiatrist to expand the scope of the evaluation to address potential mitigation evidence.

Tinsley recalled Garrett bringing in psychiatrist Dr. Donald Morgan following Hughey's evaluation at DMH.[13] App. 4716-17. Garrett, however, did not "recall ever being with him or discussing his findings at all," because working with Dr. Morgan was Tinsley's responsibility. App. 4858-59. *See also* App. 4941.

Tarr recalled having a phone conference with Dr. Morgan after the trial had begin, where he revealed his initial impressions:

> 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.

App. 5017; Applicant's Ex. 51, App. 5437. Tarr did not know the purpose of Dr. Morgan's evaluation or why he ultimately did not testify. App. 5014, 5016, 5210.

Tinsley did not believe a psychiatrist was necessary in this case prior to Hughey's decompensation and the resulting DMH evaluation, even though he had previously requested and received the necessary funding for one. He acknowledged that a psychiatrist could address Hughey's mental health "in greater detail and clarity" than a psychologist. App. 4717.

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

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[13] According to his timesheet, Dr. Morgan reviewed records, attended a court proceeding and interviewed Hughey over a two day period. His total involvement in Hughey's case was for seven hours. App. 4714-17, 5177-79; Applicant's Ex. 15, App. 5274-75.

testing for and, therefore, could not diagnose PTSD and was surprised by his limited testimony at trial. App. 5175-77.

Tinsley had included Dr. Morgan on the witness list, and in his notes of possible mitigation witnesses. App. 4762; Applicant's Exs. 18, 21, App. 5283, 5287. Tinsley recalled that Morgan, "found some problems with John, but [he didn't] recall exactly what he indicated his testimony would be." App. 5180-81. *See also* App. 5124-34. While Tinsley claimed in PCR that Dr. Morgan could not help Hughey by testifying, his limited recollection suggested otherwise[14]. He recalled that Dr. Morgan opined Hughey was "clearly suffering from depression, major depression. And...I think he could have established the PTSD." App. 5146-47. 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 "contemporaneously with the last day of trial" that included the language: "PCR = Dr. Morgan/venue." He testified this note linked the failure to call Dr. Morgan as a ground for post-conviction relief. App. 4762-63, 5156-57.

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

[14] As is discussed in Section I(B)(1)(a), *infra*, Tinsley did not consult Dr. Morgan soon enough for him to conduct a proper forensic evaluation. A forensic psychiatrist provided with all necessary information and afforded adequate time to perform a complete evaluation would have provided exceptionally valuable testimony.

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." App. 4720-21.

b) Trial counsel did not present evidence of adaptability to incarceration.

Both Tinsley and Garrett were aware that Hughey adapted well to confinement and was a good inmate during his pre-trial detention. App. 4671. They identified at least three jailors from the Greenwood County Detention Center who had favorable opinions of Hughey: Major J.L. Eidson, Lt. Robert Allen, and Martha Ann Stewart. Tinsley did not, however, obtain Hughey's Detention Center records or his records from a juvenile incarceration in the Department of Youth Services, now known as DJJ.

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.[15] App. 4747-48; Applicant's Exs. 18-20, App. 5283-85. Tinsley repeatedly made notes of his plan to call adaptability witnesses in response to the state's evidence of future dangerousness. App. 4740-46; Applicant's Exs. 17-19, App. 5278-84.

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.

App. 4739-40; Applicant's Ex. 17, App. 5281. Tinsley underlined "commit such acts in the future" and next to this phrase, he wrote "(i.e., future dangerousness) Lt. Allen adapt.

[15] He had this misunderstanding even though he had some legal research in his file labeled "future adaptability to prison life" citing *Skipper v. South Carolina*, 476 U.S. 1 (1986) (permitting evidence of adaptability to confinement as mitigation). App. 4747-48; Applicant's Ex. 22, App. 5289-94.

prison." App. 4741-42; Applicant's Ex. 17, App. 5378-82. Tinsley also wrote some notes before the beginning of the sentencing phase 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 dang.)." App. 4742-44; Applicant's Ex. 19, A. 5284. 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." App. 4744-46; Applicant's Ex. 18, App. 5283. Tinsley additionally made some notes about sentencing phase themes. The first thing listed on this page states, "Adaptability (Maj. Eidson Lt. Allen/Future Dang[erousness]." App. 4746; Applicant's Ex. 19, A. 5284.

Garrett testified he had two concerns about calling Major Eidson[16] as a witness. First, he had a bad experience presenting adaptability evidence in the Eddie Lee Elmore re-sentencing trial when Department of Corrections guards' testimony was more reserved than expected. Second, Garrett was concerned by Eidson's relationship with Solicitor Jones. App. 4740-42. He did not have any similar concerns about the other jailors, including Ms. Stewart. App. 4942-44. According to Garrett, however, Tinsley "made the final call on" whether to present adaptability evidence or not and he did not know why Tinsley ultimately decided not to. App. 4870, 4872-74.

[16] Major Eidson was in charge of the jail while Hughey was in pretrial detention.

Tinsley could have presented adaptability evidence without encountering a problem, such as the one Garrett encountered in Elmore, by calling Lt. Allen,[17] another jailor, or simply relying on the jail records. App. 4748-50. He admitted he did not have a good reason for not presenting evidence of Hughey's adaptability to incarceration and agreed the failure to present this evidence might have affected the outcome of Hughey's trial. App. 4752-54.

C. Evidence available at the time of trial, but not presented.

1) Mental health.

a) Dr. Schwartz-Watts' forensic evaluation.

At the PCR hearing, Dr. Donna Schwartz-Watts, an expert in forensic psychiatry, testified about what is required to perform a complete forensic evaluation. 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." App. 5020-22. Hughey required four visits because of his mental state and his guarded nature:

> 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.

App. 5031-32; Applicant's Ex. 48, App. 5430, 5433.

[17] Lt. Allen was second in command at the jail while Hughey was in pretrial detention.

Dr. Schwartz-Watts' report listed the records she reviewed and relied upon, which included those obtained by trial counsel, in addition to Hughey's DJJ records and the psychiatric hospital records for his father - the exact records Yungman requested but never was provided. App. 4782-83, 5171; Applicant's Exs. 12, 48, App. 5260, 5424. She also reviewed, among other things, Hughey's juvenile and adult criminal and detention records, excerpts of testimony from Hughey's trial, and mental health records of Hughey's siblings. Dr. Schwartz-Watts 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. App. 5024-27; Applicant's Ex. 48, App. 5424-25. She also consulted with other experts that had evaluated Hughey for the PCR hearing.[18]

b) Records that were readily available at the time of trial and requested by defense experts but not obtained by trial counsel proved to be valuable sources of information.

Hughey's father, Bozo, was hospitalized in 1989 at Patrick B. Harris Psychiatric Hospital. The records revealed the reason for the admission was "a closed head injury, seizure disorder and from alcoholism." He suffered from dementia and was diagnosed with organic personality and organic brain disorder. App. 5025; Applicant's Ex. 48, App. 5424.

In October 1986, at the age of seventeen, Hughey was committed to DJJ for an indeterminate sentence not to exceed his 21st birthday. App. 5048; Applicant's Ex. 35,

[18] Dr. Schwartz-Watts consulted with Dr. Bachman, a neurologist, and Dr. Brawley, a neuropsychologist. She incorporated their findings into her report. App. 5027-29; Applicant's Ex. 48, App. 5425, 5431.

App. 5371. 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, App. 5427-28. 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. Hughey's IQ from 1986 was 83, which is similar to what it was at the time of his 1997 trial. App. 5054-57; Applicant's Ex. 46, App. 5427-28.

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, App. 5424. 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. App. 5058-59.

c) Hughey was diagnosed 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, 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. App. 5033-34; Applicant's Ex. 48, App. 5431-33.

Second, Hughey was diagnosed with Chronic PTSD, which could find its source in multiple life events. 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.[19] App. 5035-37; Applicant's Ex. 48, App. 5432. Additionally, the death of a loved one can cause PTSD. Hughey reports his most significant trauma to be the death of his mother. He was never treated by a psychiatrist or psychologist after her death, though two of his sisters sought counseling and were both diagnosed with PTSD. Dr. Schwartz-Watts noted Hughey had "the numbing of general responsiveness seen in the illness," avoided discussing the traumas and experienced difficulty sleeping and irritability. App. 5081-83; Applicant's Ex. 48, App. 5429, 5432.

Third, Dr. Schwartz-Watts determined that, given his symptoms, a diagnosis of Major Depression, single episode, moderate with psychotic features in partial remission was more appropriate than Hughey's past diagnosis of Complicated Bereavement.[20] Her concerns about the inadequacy of Hughey's original diagnosis arose from his frequent visions of his mother as well as his impaired functioning - "[t]he presence of certain symptoms that are not characteristic of 'normal' grief reaction may be helpful in differentiating bereavement from a Major Depressive Episode." App. 5037-38; Applicant's Ex. 48, App. 5432-33 (quoting Diagnostic and Statistical Manual of Mental Disorders, 4th Edition Text Revision, p. 741).

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[19] Hughey was in three car accidents between January 1993 and September 1994. Applicant's Ex. 48, App. 5427.

[20] Dr. Catherine Lewis, the court-appointed examiner, made this diagnosis after evaluating Hughey on the eve of trial. App. 5037-38; Applicant's Ex. 48, App. 5428.

d) The testimony of a forensic psychiatrist would have linked Hughey's mental illness to the incident, thereby requiring the trial court to charge the jury on an additional statutory mitigating factor - 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.

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 PTSD and reported to Dr. Schwartz-Watts that he was intoxicated. He was experiencing all of these things in addition to his already limited intellectual functioning at the time of the incident. App. 5044-45; Applicant's Ex. 48, App. 5433.

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, App. 5433. In explaining her opinion, she addressed each individual 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... 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 explained that someone who had been drinking alcohol, had a low IQ, and suffered from PTSD would overreact in a stressful situation: "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 limited the choices Hughey could make. App. 5086-

87. Voluntary intoxication should have been presented both as complication of Hughey's PTSD and as a factor in the incident.[21] Applicant's Ex. 48, App. 5433.

Hughey reported to Dr. Schwartz-Watts not sleeping much before the crime. Applicant's Ex. 48. She testified that lack of sleep would also decrease his ability to cope because it can impair your cognitive functioning. App. 5087.

Dr. Schwartz-Watts testified that Hughey's previously undiagnosed and untreated Major Depression was "one of the most significant factors on that day." It made him impulsive, irritable, and angry. "[H]e harmed people because of that anger." App. 5088.

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 [she believed] Mr. Hughey was substantially impaired in conforming his conduct to the requirements of the law" she replied, "[a]bsolutely." App. 5088. 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. App. 5046. Based on her testimony, statutory mitigator number six 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.

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[21] 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 3:00a.m. App. 5085-86. "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, App. 5433.

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 and neither of them testified at Hughey's trial.

Julia Perlotte was employed at the Greenwood County Detention Center from 1992-2001.[22] 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. App. 4806-08.

Relying on Hughey's jail records, Perlotte testified he was in the Greenwood County Detention Center from December 8, 1995, until October 30, 1997. App. 4809; Applicant's Ex. 46, App. 5313. Hughey's write-ups involved smoking in D-block, disrespecting an officer, arguing, and excessive noise. Hughey, and several other inmates were cited for destruction of jail property, but they never determined who actually damaged the property. App, 4813; Applicant's Ex. 30, App. 5332, 5335, 5337, 5339, 5358. There was one incident where a razor was found in Hughey's possession, but Perlotte testified Hughey was not solely to blame. The officer who handed out the razors during showers should not have let the razor go unaccounted for at the end of the shift and should have been reprimanded. App. 4821-22; Applicant's Ex. 30, App. 5333. Though Hughey did break the rules, there was no actual violence associated with the incident. App. 4812; Applicant's Ex. 30, App. 5333. Perlotte characterized his violations as being non-violent and minor. App. 4810-11.

[22] As a shift supervisor, she was responsible for overseeing the entire detention center during a specific shift. App. 4807.

Perlotte testified: "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." App. 4814-15.

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.[23] Stewart did not recall Hughey giving them any problems. She testified: "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." App. 4824-26.

After reviewing Hughey's jail records, she characterized his file as very minor. App. 4826-27. She considered Hughey to be adaptable to confinement. App. 4828.

b) A forensic psychiatrist would have testified about Hughey's past adjustment to incarceration and explained why he would continue to be highly adaptable to prison.

Dr. Schwartz-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. App. 5052. 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. Given Hughey's diagnoses (PTSD, Depression, Borderline Intellectual Functioning and Alcohol Abuse), she believed "[t]he prognosis of these illnesses should

[23] 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. App. 4824-25.

have been presented [at trial] to demonstrate the likelihood of Mr. Hughey's adaptability to imprisonment." Applicant's Ex. 48, App. 5433.

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. App. 5053; Applicant's Ex. 37, App. 5373-75. Dr. Schwartz-Watts explained why this noteworthy:

> 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.

App. 5054.

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. App. 5065; Applicant's Ex. 40, App. 5380-82. His educational progress reports showed he received the highest marks possible except in the areas of completing his assignment, working to capacity, showing good judgment, and exercising self-control. Dr. Schwartz-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 5070-55; Applicant's Ex. 43, App. 5393-5409

After seven months in DJJ, his attitude towards authority figures was noted as positive and respectful. App. 5064; Applicant's Ex. 39, App. 5378-79. In the classroom

setting, he received several handwritten comments applauding his good attitude. Applicant's Ex. 43. He was cited for a few minor, non-violent infractions, [24] but "very mild behavior for a juvenile." App. 5066-69; Applicant's Ex. 42, App. 5384-92.

In addressing Dr. Siegel's concerns about Hughey's potential for periodic angry explosions,[25] Dr. Schwartz-Watts testified none of the incarceration records she reviewed included any write-ups for explosive behavior. His only explosions have happened when he was not incarcerated. App. 5110-31. 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. App. 5103.

D. Trial counsel's ineffectiveness.

1) Trial counsel failed to conduct a mitigation investigation that was adequate under prevailing professional norms and they had no valid strategic reason for limiting the investigation or presentation of the evidence.

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 did neither. Instead, the inadequate mitigation investigation was a product of inattention and preventable time constraints.

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

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[24] 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 5066-69; Applicant's Ex. 42, App. 5384-92.

[25] See Applicant's Exs. 46 and 48, App. 5412-15, 5424-34.

introduced by the prosecutor." *Id.* at 523 (quoting 1989 Guideline 11.4.I(C) (1989)) (emphasis added). Additionally, as set forth in *Rompilla v. Beard*, 545 U.S. 374 (2005), mandates that 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 [their] 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-Burrola v. State*, 157 P.3d 749, 767 (Okla. Crim. App. 2007). Trial counsel requested Hughey's DJJ records but failed to follow-up when they were not received and, consequently, did not receive them. 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 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").

Jeff Yungman requested additional records needed to complete his social history and was not provided with them. "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"). Yungman also raised concerns about PTSD but he, as a social worker, was not qualified to make a diagnosis. Due to his late involvement in this case, his report was submitted to Tinsley a mere five days prior to trial and there was no time to further investigate. Thus, it is clear that counsel's investigation was limited not due to time constraints and inattention, not strategy.

If counsel had obtained the DJJ records, they would have discovered "red flags" and "mitigation leads that no other source had opened up." *Rompilla*, 545 U.S. at 390. These records from Hughey's 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. Yungman's request for these records did not yield any results. Likewise, Yungman's request for Hughey's father's records from Patrick B. Harris did not prompt trial counsel to follow-up on the fact they had not been obtained. Thus, Yungman's social history was not as accurate as possible. *See Bond*, 539 U.S. at 288 (Counsel "failed to give their consulting expert sufficient information to evaluate [the defendant] accurately"). Counsel had no strategic reason for not obtaining the records.

Counsel also failed to adequately develop and present the mental health evidence. Counsel did not have Hughey evaluated by any potential experts 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. He alerted defense counsel to the possibility of depression with psychotic features in his initial report, but counsel did nothing to further explore this information.

Additional mental health practitioners were not involved until competence became an issue on the eve of trial, and even then, counsel was focused solely on the issue of competence. Dr. Morgan, who was initially contacted after the trial had already begun, spent only a few hours working on Hughey's case but was never called to testify at trial. Counsel acknowledged his own ineffectiveness in his notes from the trial, noting, "PCR = Dr. Morgan."

Tinsley directly attributed his failure to retain experts in sufficient time to prepare a mitigation defense to his excessive public defender work load. App. 4719-21. This Court has consistently held that excessive public defender caseloads do not relieve counsel of the obligations of representation. *McKnight v. State,* 378 S.C. 33, 661 S.E.2d 354 (2008) (trial counsel ineffective for failing to present favorable expert testimony) and *In re Sturkey*, 376 S.C. 286, 657 S.E.2d 465 (2008) (public defender had the obligation to only accept as many cases as he could ethically handle).

In addition, although both Yungman and Evans alerted counsel to the possibility of PTSD, counsel did not develop this information. Rather than discuss Dr. Evans' findings with him in advance of trial, counsel learned through his testimony at trial, that he could not make a diagnosis because that was not the focus of his testing. At that point it was too late to do anything to remedy the situation.

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 and cannot articulate a valid reason for its omission.

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 as 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. However, trial counsel expressed concerns about presenting this evidence because of a poor experience in a prior capital case and the relationship of the jail administrators with the solicitor. They did not explore alternative avenues to present adaptability evidence, such as other jailors, jail records or forensic psychiatrists, but later acknowledged that these were other ways the evidence could have been presented.

Further, Tinsley did not properly understand the law regarding the presentation of evidence of adaptability to incarceration, as confirmed by his own notes. He repeatedly linked the concept of adaptability to future dangerousness. His testimony at the PCR hearing that he understood *Skipper* and the independent admissibility of adaptability evidence was clearly rebutted by his contemporaneous notes.

The PCR Court erred in finding the omission of adaptability evidence was a reasoned strategic decision made by trial counsel. Garrett did not know why Tinsley did not present evidence of Hughey's adaptability and Tinsley admitted he did not have a sound reason for not presenting the evidence. He even acknowledged that his failure to present this evidence may have affected the outcome. Clearly, neither Garrett nor Tinsley made an attempt to justify the omission of adaptability evidence as strategic.

3) Prejudice.

Rather than being the jealous, angry monster the state portrayed Hughey to be, he was actually 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. As the traumas continued and culminated in his mother's untimely death, his alcohol abuse escalated. 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. On the incident date, Hughey's 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. Branker*, 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.

In this regard, Hughey's case is similar to *Von Dohlen*. 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. This vast difference in the mental health picture required reversal. *See also Turpin 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 presenting the full picture of Hughey's mental health would have established the existence of a statutory mitigating factor that trial counsel was not otherwise entitled to. 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). It should follow that failure to investigate and present evidence that would lead to an additional statutory mitigating factor would also be reversible error.

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 sentencing jury will be concerned about the defendant's behavior in confinement if the death penalty is not imposed. Hughey's jury did not hear that he 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, and reversal is required. *See Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006).

III.

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).[26] Thus, in this context, the question is not whether the jury would have given Hughey a life sentence if counsel had performed adequately, rather, 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 ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis. Likewise, in *Strickland*, the

[26] In *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*.

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."[27]

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* 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. While the application of the cumulative error doctrine is an unsettled issue in this state, South Carolina recognizes the doctrine in other contexts. The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied

[27] 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); *Cargle 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).

the cumulative error doctrine in *State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App. 2000) ("[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.").[28]

Here, Hughey has shown the existence of numerous errors by trial counsel. While each individual error, standing alone, requires reversal, the cumulative impact leaves no doubt that the death sentence must be vacated.

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 they would establish that Hughey was guilty only of manslaughter in the face of overwhelming evidence of murder, such as firing three shots from a single-shot shotgun. As discussed in Section I, *supra*, Hughey's own testimony supported murder convictions as to both victims. This manslaughter defense was not only rejected but it reverberated throughout the state's arguments and the victim impact testimony. The solicitor exploited the extremely damaging and prejudicial argument that Harris was in "the wrong place at the wrong time" in her own home in his guilt phase closing argument and Marcus Harris discussed the offensiveness of this statement in his victim impact testimony. App. 3151, 3391, 3728-31.

Due to counsel's failure to adequately prepare the mitigation evidence, the jury only heard that Hughey was an angry man, who had a bad childhood, and killed Jackson and Harris in a jealous rage in front of his own children. If counsel had adequately prepared, the jury would have heard that Hughey had limited intelligence, major

[28] The South Carolina Supreme Court denied the state's petition for writ of *certiorari* on October 7, 2000. After granting Blurton's cross petition for writ of *certiorari* on April 26, 2001, the Supreme Court ordered a new trial for Blurton on an additional ground. *State v. Blurton,* 352 S.C. 203, 573 S.E.2d 802 (2002).

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.

Further, the jury never heard that Hughey adapted well to confinement. His behavior while in DJJ and 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.

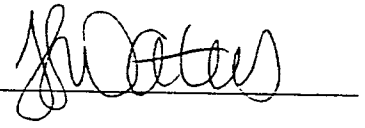
Finally, defense counsel sat by silently while the trial court instructed the jury that it could not consider mercy in sentencing, when trial counsel's failure to adequately prepare for sentencing left them in the position of relying on mercy almost exclusively in pleading for Hughey's life. *See* Respondent/Petitioner's Return to State's Petition for *Certiorari*.

The combination of all these errors was clearly prejudicial and requires reversal.

Conclusion

This Court should reverse the PCR Court's denial of relief on these grounds set forth above and order a new sentencing hearing.

Respectfully submitted,

By 

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, South Carolina 29646
(864) 538-4466

Tara Schultz Waters
Waters Law Firm, LLC
120 S. Magnolia Street
Summerville, South Carolina 29483
(843) 834-3600

June 16, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
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S.C. Supreme Court

APPEAL FROM ABBEVILLE COUNTY
Court of Common Pleas
Alexander S. Macaulay, Circuit Court Judge

Case No. 2000-CP-01-210
Appellate Case Number: 2010-170387

John Kennedy Hughey, Respondent/Petitioner

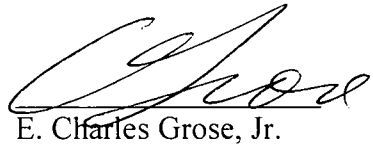
v.

The State, Petitioner/Respondent.

Certificate of Service

I certify that I have served a copy of the Respondent/Petitioner's Brief of Petitioner and Petition for Extension of Time to File Mr. Hughey's Brief of Respondent on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows:

Donald J. Zelenka, Esquire
SC Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211



E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

June 16, 2014
Greenwood, SSC