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

John Kennedy Hughey, Respondent/Petitioner

v

The State, Petitioner/Respondent

Respondent/Petitioner's Reply to State's Return to Petition for *Certiorari*

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Standard of Review

1) Ineffective Assistance Analysis after *Harrington v Richter*

The State implies that *Harrington v Richter*, __ U S __, 131 S Ct 770 (2011) somehow changed the standard for analyzing ineffective assistance of counsel Petition/Respondent's Return to Petition for *Certiorari* (hereinafter "State's Return") 4-9 *Richter* did not alter the standard for ineffective assistance of counsel set forth in *Strickland v Washington*, 446 U S 668 (1984), but rather it interpreted 28 U S C §2254(d),[1] which limits when the Federal Courts can grant a writ of *habeas corpus* The State also points out that *Cullen v Pinholster*, ___ U S ___, 131 S Ct 1388, 1403 (2011) observed that *Strickland* "requires a substantial, not just conceivable, likelihood of a different result" State's Return 7 *Pinholster*, like *Richter*, interpreted §2254(d) and did not establish a new standard under *Strickland*

Richter, moreover, points out that under *Strickland* trial counsel is "entitled to formulate a strategy that [is] reasonable at the time" *Richter*, 131 S Ct at 789 As will be discussed in Sections I and II, *infra*, trial counsel's strategy was not reasonable at the time

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[1] 28 U S C §2254(d) Provides

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

2) ABA Guidelines

The State criticizes Hughey's reliance on the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (hereinafter "1989 ABA Guidelines") State's Return 9-10 and 10 (fn 2) The State cites *Bobby v Van Hook*, ___ U S ___, 130 S Ct 13 (2009), which can be distinguished from Hughey's case because Van Hook's crime occurred in 1985, prior to both the 1989 and 2003 editions of the ABA Guidelines Because Hughey's trial took place in 1997, two years after his crime, his reliance on the 1989 ABA Guidelines is proper *E g* App 5639-49, 5650, 5686-87, 5718, 5760 This Court has determined the 1989 ABA Guidelines apply to capital trials occurring after those Guidelines became effective *Council v State*, 380 S C 159, 173, fn 5, 670 S E 2d 356, 363, fn 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 ")

Additionally, the Supreme Court of the United States has long recognized that evidence of the prevailing professional standard can come for multiple sources These sources include, but are not limited to, the ABA Criminal Justice Standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Defense, and the Department of Justice Office of Justice Programs' Compendium of Standards for Indigent Defense Systems, as well as treatises and bar publications *See Padilla v Kentucky*, ___ U S ___, 130 S Ct 1473, 1482-83 (2010) In addition to the 1989 Guidelines, Hughey has provided other evidence of the professional standards prevailing at the time of his trial (1) NLADA "Life in the Balance" materials, (2) Affidavit of Paige Tarr, and (3) *The Champion*, "Death is Different – Your Approach to a Capital Case Must be Different, Too " App 5212-27, 5232-44, 5299-5306

Issue I

Presenting a voluntary manslaughter defense was not reasonable under the facts of Hughey's case This Court must reject the State's attempt to justify trial counsel presenting the manslaughter defense The State tries to minimize Hughey's position by arguing Hughey "has now pointed out the contradictions in the trial testimony that revealed the crimes were one of murder, not manslaughter" State's Return 14 Trial counsel, however, knew the voluntary manslaughter defense would not be successful, would alienate the jurors, and would diminish their ability to represent Hughey during sentencing *See* Petition for *Certiorari*, Section I(B), 27-29 In fact, the State previously acknowledged the lack of merit to the manslaughter defense by arguing

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

State's Pre-Hearing Brief (emphasis added), App 4586-87 The State, therefore, asks this Court to approve of jury nullification and condone lawless and unprincipled decision making, which has long been rejected as appropriate in any case, let alone, in capital cases *See e g Roberts v Louisiana* 428 U S 325, 335 (1976) *See also State v Owens*, 362 S C 175, 607 S E 2d 78 (2004) (It is inappropriate for a court to sanction juror misconduct)

The State, moreover, mistakenly argues, "Since any verdict of manslaughter on either death would have removed the possibility of a death sentence on either homicide, it should not be concluded that counsel was deficient in the strategy" State's Return 14 This argument ignores the other aggravating factors resulting from the murders being committed during a burglary and larceny *See* Petition for *Certiorari*, Section I(C)(3) 38-40

Hughey committing the burglary and larceny also undermines the State's reliance on Garrett consulting David Bruck and Professor William McAninch about transferred intent State's Return 14, 32, 35, 42 When Garrett talked to Bruck, he and Robert Tinsley had already decided to present the manslaughter defense App 4947 Garrett did record, "Transferred intent Yes Mans To Aunt" Applicant's Ex 28, App 5310 Garrett's notes, however, are compelling evidence Bruck warned Garrett Hughey would probably be convicted of two murders Specifically, Bruck warned Garrett about the felony murder rule [2] Garrett wrote

> Felony murder = implied malice in SC
> (1) Plead? No permissive
> Gore v Leech [sic]

App 4944-49, Applicant's Ex 28,[3] App 5310 In *Gore v Leeke*, 261 S C 308, 199 S E 2d 755 (1973), this Court affirmed a murder conviction and held, "The law itself implies the malice from proof of the felony"[4] Garrett discussed the burglary facts with Bruck and was aware malice could be inferred from the commission of a burglary App 4948, Applicant's Ex 28, App 5310

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[2] According to Garrett's notes, Bruck also warned him the statements from December 3, 1995 where Hughey threatened Jackson were admissible, the 911 tape was admissible, and Harris statements to Marcus Harris were admissible present sense impressions Applicant's Ex 28, App 5310

[3] Even though Garrett's notes reflect the state did not plead felony murder, it is well settled "South Carolina follows the common law rule of murder and makes no distinction between murder and felony-murder" *State v Norris*, 285 S C 86, 92, 328 S E 2d 339, 342-43 (1985) *overruled on other grounds by State v Torrence*, 406 S E 2d 315, 328, 305 S C 45, 69 (1991) and *State v Thompson*, 278 S C 1, 7, 292 S E 2d 581, 585 (1982) *overruled on other grounds by State v Torrence*, 406 S E 2d 315, 328, 305 S C 45, 69 (1991)

[4] *See also Sessions v Clerk of Court Conway*, 265 S C 41, 216 S E 2d 764 (1975) (held that there was insufficient withdrawal from participation in robbery and fatal assault to prevent application of felony murder rule) and *State v Hicks*, 257 S C 279, 185 S E 2d 746 (1971) (When defendant was charged as a principal, the court properly charged jury on the law of felony murder)

There are no notes of Garret's conversation with Professor McAninch While the State cites McAninch, Fairy, and Coggiola, *The Criminal Law of South Carolina* (5th Ed 2007), App 5486, an earlier edition of the book was in publication at the time of Hughey's trial [5] This edition discusses transferred intent in connection with an unintended victim McAninch writes

> The result is sometimes described as being a function of the doctrine of "transferred intent" whereby the actor's intent to kill his intended victim is said to be transferred to his actual victim This function is really unnecessary As is indicated by South Carolina cases, all that is required is the mental state of malice

McAninch (3th Ed 1996), p 17 Professor McAninch, accordingly, would have directed Garrett to look at the evidence of malice in Hughey's case As both parties have pointed out, there is overwhelming evidence Hughey killed both Jackson and Harris with malice aforethought Like Bruck, McAninch would have pointed Garrett to the felony murder rule He writes in his book, "[T]he commission of the felony supplies the malice which then makes any homicide committed pursuant to the felony, murder " McAninch (3th Ed 1996), p 83 (citing *Gore v Leeke*)

Contrary to the State's argument, the trial judge's decision to charge the law of voluntary manslaughter does not preclude relief *See* State's Return 15, 21-25, 41 Voluntary manslaughter was not supported by this record Trial counsel's presentation of this defense and the trial judge's decision to charge manslaughter were influenced by multiple errors of law *See* Petition for Certiorari, Section I(C)(2), 32-37

Finally, this Court must also reject the State's suggestion that Hughey himself was not willing to concede guilt State's Return 28 Rather, it is undisputed that Hughey was willing to plead guilty to all charges for a life sentence State's Return 14 "[A]voiding execution [may be] the best and only realistic result possible," and in circumstances where guilt is clear, counsel

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[5] McAninch and Fairy, *The Criminal Law of South Carolina* (3th Ed 1996)

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*, 543 U S 175, 191-92 (2004)

Issue II

The State contends "trial counsel reasonably investigated [Hughey's] mental [health] and family background and presented an appropriate case in mitigation" State's Return 61 The State's position is not supported by the record

1) Forensic Psychiatrist

Respondent asserts that the PCR Court was correct in finding counsel's investigation and presentation of possible mitigation evidence to be reasonable However, trial counsel did not involve a mitigation investigator, psychologist, social worker or forensic psychiatrist until it was too late for them to effectively perform their duties Petition for *Certiorari* 46-50, 52-57

Respondent would like this Court to believe that Dr Morgan did not testify because his findings would not have been helpful to Hughey State's Return 90, 92 However, the initial findings Dr Morgan relayed to Paige Tarr were consistent with what Dr Schwartz-Watts ultimately concluded App 5437 Dr Morgan was unable to testify because he was contacted by trial counsel after Hughey's trial had already begun and was not afforded the time necessary to complete a full and reliable evaluation Tinsley, who was responsible for the sentencing phase of Hughey's trial, admitted he made inaccurate assumptions about the need for a psychiatric evaluation Petition for *Certiorari* 49-50

Tinsley knew at the time Hughey was sentenced to death that not having a prepared forensic psychiatrist undoubtedly affected the outcome of sentencing 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 witness to post-conviction relief App 4762-63, 5156-57

At the PCR hearing, Tinsley blamed his work load and responsibilities as the public defender for two counties for his inattention, thereby negating the theory that omissions during sentencing were strategic He explained, "I was handling a huge, huge load of cases at that time" 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"[6] App 4720-21

Respondent focuses on the similarities between the presentation of mitigation evidence at trial and the evidence presented at the PCR hearing, but overlooks two important factors First, neither Dr James Evans nor Jeff Yungman actually diagnosed Hughey as suffering from Post-traumatic Stress Disorder (PTSD) Petition for *Certiorari* 47-48 Trial counsel's failure to complete the mental health evaluation and present accurate evidence to the jurors was not reasonable

Second, the expert witnesses did not connect Hughey's mental health problems to the incident At trial, the jury heard about Hughey's upbringing and how he exhibited signs of mental illness, but not a single witness explained how his life experiences and potential diagnoses impacted him on the incident date This is why this Court affirmed Judge Cole's decision to not charge statutory mitigating factor number six *State v Hughey*, 339 S C 439, 454-56, 529 S E 2d 721, 729-30 (2000) At the PCR hearing, Dr Schwartz-Watts testified about each aspect of her full evaluation of Hughey and explained how each of his diagnoses would

[6] 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)

have affected his thinking and actions on the incident date It was the absence of this nexus that renders trial counsel's performance deficient *See* Petition for *Certiorari*, 52-57, 59-64

Hughey was prejudiced by counsel's deficient performance because had counsel conducted a more thorough investigation and retained the proper experts in a timely manner, the jury would have heard evidence that Hughey suffered from mental illness that substantially impaired his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law on the date of the incident S C Code §16-3-20(C)(b)(6) Therefore, reversal is required

2) Adaptability to Incarceration

Respondent asserts that trial counsel properly investigated evidence of Hughey's adaptability to prison and made a sound strategic decision not to present this evidence In reality, trial counsel failed to present this immensely valuable evidence because of a misunderstanding of the law and incomplete preparation

Though Respondent goes to great lengths to point out each exhibit that listed "adaptability" as a possible theme in the penalty phase, State's Return 71, fn 18, trial counsel's notes continually link the presentation of adaptability evidence to the State's introduction of evidence on Hughey's future dangerousness App 4740-48, Applicant's Exs 17-20, App 5278-85

Further, Respondent cites Garrett's prior experience with adaptability evidence in Edward Lee Elmore's resentencing hearing[7] as a sound strategic reason for not calling witnesses

[7] As noted in State's Return (p 75) Garrett's hesitations were rooted in a capital case he had work on where SCDC guards made the defendant "sound like he was merely normal, nothing special" It should be noted that this does not illustrate adaptability evidence that backfired or cast the defendant in a negative light

on the issue Tinsley could have presented adaptability evidence without encountering a problem, such as the one Garrett encountered in Elmore, by calling only select jailors, relying on jail records,[8] or using a forensic psychiatrist[9] These alternative means of introducing the evidence were neither explored nor utilized 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

Counsel's failure to present any evidence of Hughey's adaptability to incarceration was highly detrimental and prejudicial because 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) In recognizing its importance, the United States Supreme Court has specifically recognized adaptability to confinement as proper mitigating evidence *Skipper v South Carolina*, 476 U S 1 (1976) By neglecting such a key

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[8] Trial counsel did not obtain Hughey's records from either the Greenwood County Detention Center or the Department of Youth Services

[9] If trial counsel had sought a forensic psychiatrist in a timely fashion, Hughey's diagnoses and prognoses could have been presented to the jury in a way that would explain why he was suited to a structured environment

piece of the puzzle, the jurors had no reason to think Hughey would not be a future danger in prison, and therefore, his life was not spared

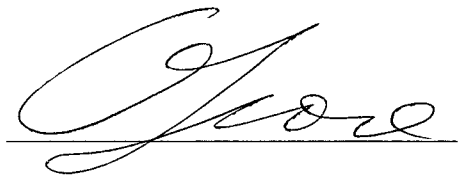
Issue III

Hughey and the State disagree about the applicability of the cumulative prejudice analysis in South Carolina *Compare* Petition for *Certiorari* 68-71, *with* State's Return 96-100 This Court should grant certiorari to clarify the applicability of the cumulative prejudice analysis in this state Hughey's case illustrates the importance of applying such an analysis

Conclusion

But for trial counsel's ineffectiveness, the jurors would have sentenced Hughey to life imprisonment This Court should grant Hughey's petition for *certiorari*, reverse the PCR Court for the reasons set forth in this petition, and order a new sentencing hearing on these additional grounds

Respectfully submitted,

By 

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Certificate of Service

I certify that I have served a copy of the Respondent/Petitioner's Reply to the State's Return to Petition for *Certiorari* on the State of South Carolina by placing a copy in the United States Mail, postage prepaid, on date reflected below, addressed as follows

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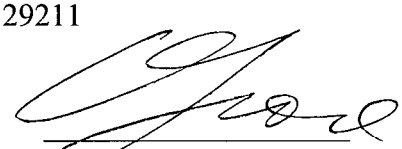

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