

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**Appeal from Abbeville County
Alexander S Maçaulay, Circuit Court Judge**

Case No 2000-CP-01-21

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S.C Supreme Court

JOHN KENNEDY HUGHEY,

Respondent/Petitioner

v

STATE OF SOUTH CAROLINA,

Petitioner/Respondent

**PETITIONER/RESPONDENT'S RETURN TO
PETITION FOR CERTIORARI**

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CERTIFICATE OF SERVICE

JOHN HUGHEY'S 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 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 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?

STATE'S STATEMENT OF THE CASE

This Return by the State of South Carolina is to John Hughey 's Petition for Writ of Certiorari from the State of South Carolina concerning the denial of state post-conviction relief on grounds one and two and the granting of re-sentencing by the Honorable Alexander Macaulay in post-conviction relief orders filed May 14, 2010 and July 26, 2010 App p 5922-5928, 5970-5971

Concerning the guilt phase issues, Judge Macaulay concluded that counsel Robert Tinsley and Billy Garrett were not ineffective in the guilt phase concerning the strategy of the presentation of manslaughter and allowing the Applicant and his sister to testify in the guilt phase, against Petitioner's claim "that the evidence was irrefutable to support a conviction for murder " App p 5923-25, Order, p 2-4 The PCR judge found that Hughey had failed to show that there was a reasonable probability that the result of the proceeding would have resulted in a different verdict and the right to testify belongs to the defendant App p 5924, Order, p 3

Concerning the allegation that counsel was ineffective in pursuing a verdict of voluntary manslaughter and transferred intent, Judge Macaulay also concluded that appointed counsel were not deficient in presenting manslaughter as a jury charge and allowing Applicant and his sister to testify during the guilt phase and were not prejudiced App p 5924-25, Order, p 3-4

In addressing the second specification of ineffective assistance of counsel, Judge Macaulay denied relief on the claims that counsel failed to investigate or present adequate mitigation evidence, specifically concerning his adaptability to confinement and the capacity to appreciate the criminality of his conduct App p 5925-26, Order, p 4-5 "This Court finds that was a strategic decision made by counsel during the trial and concludes that the Applicant has

failed to show the decision was based on neglect or ignorance ” He further concluded that Applicant had not demonstrated prejudice under *Strickland* App p 5925, Order, p 4

Summarizing the presentation of evidence in mitigation that was presented at the sentencing proceeding and the statutory mitigating factors instructed, Judge Macaulay that “the sentencing jury was readily aware of the dysfunctional family experience that the Applicant experienced The Court finds that the appointed trial counsel for the applicant put into evidence a thoughtful and thorough case in mitigation consisting of various themes and presentations ” App p 5926, Order, p 5

PROCEDURAL HISTORY OF THE APPLICATION FOR POST-CONVICTION RELIEF

On October 19, 2000, John Kennedy Hughey, through appointed appellate counsel, Robert M Dudek of the South Carolina Office of Appellate Defense, filed a petition for a stay of execution asserting a desire to pursue state post-conviction relief proceedings contending that his appointed trial counsel did not adequately represent him at trial The stay request was granted November 2, 2000 App p 4307 Counsel Charles Grose and Teresa Norris were appointed on November 13, 2000 in Newberry County by the Honorable Wylie Saunders, assigned judge App p 4309-4314 An order of appointment was entered on November 16, 2000 App p 4315

The initial application was filed on October 25, 2000 App p 4298-4306 The State’s initial Return was filed on January 19, 2001 App p 4323-4364 An amended application for post-conviction relief dated December 15, 2006 was filed App p 4405-4410 The Respondent made a Return on January 7, 2008 App p 4411-4465

On August 17, 2007, the Supreme Court re-assigned the Honorable Alexander Macaulay

to replace Judge Saunders in the action App p 4468 On June 28, 2008, Judge Macaulay entered an order of continuance in the matter App p 4469-72 On March 31, 2008, the Applicant made a Trial Brief App p 4473-4569 On May 2, 2008, Respondent State of South Carolina made its Trial Brief App p 4570-4636

The evidentiary hearing was convened in Abbeville County before the Honorable Alexander Macaulay on October 13, 2008 and was completed on October 15, 2008 App p 4654-5212 The Applicant was present and represented by his appointed counsel E Charles Grose, Tara Schultz and Teresa Norris The Respondent was represented by Donald J Zelenka of the Attorney General's Office Testimony was received from Robert Tinsley, Sr , Jeff Yungman, Julia Perlotte, Martha Ann Stewart, Billy Garrett, Robert Dudek, Paige (Tarr) Haas, and Dr Donna Schwartz Watts App p 4654-5183 Closing statements were made by counsel App p 5184-5211, PCR Tr p 531-556 Judge Macaulay took the matter under advisement pending posthearing briefing

The Applicant filed his post-hearing memorandum of law on June 8, 2009 App p 5622-5839 The State of S C made its post-hearing memorandum on August 31, 2009 App p 5444-5621 Hughey made a reply memorandum on December 11, 2009 App p 5840-5920

On May 14, 2010, the Honorable Alexander S Macaulay, Presiding Judge entered his Order Granting Post-Conviction Relief dated May 7, 2010 App p 5921-5927 In the Order, Judge Macaulay concluded that the issues regarding the guilt phase of the trial was denied and dismissed , with prejudice, and the application for post-conviction relief for sentencing was granted The State of South Carolina made a Motion to Alter and Amend pursuant to SCRCP 59 on May 28, 2010 App p 5954 - 5968 The Applicant, through counsel, also made a Rule 59(e),

SCRCP Motion to Alter or Amend the Judgement on May 28, 2010 App 5929-5953

On July 26, 2010, Judge Macaulay filed his Order denying Respondent's Motion to Alter and Amend Judgment Pursuant to Rule 59(E) App p 5969- 71

On August 25, 2010, the State of South Carolina filed and served its notice of appeal On August 26, 2010, the Applicant, John Hughey made notice of cross-appeal

This petition for writ of certiorari by the State of South Carolina was filed January 12, 2011 Hughey made a Return to the State's petition

Hughey made his Petition for Writ of Certiorari on April 29, 2011 This Return by the State of South Carolina follows

Prior Trial and Appellate Proceedings

The Respondent State of South Carolina incorporates by reference the State's Petition for Writ of Certiorari pages 7-14

STANDARD OF REVIEW

In reviewing a PCR court's decision, an appellate court is concerned only with whether there is any evidence of probative value that supports the decision Kolle v State, 386 S C 578, 589, 690 S E 2d 73, 79 (2010) The appellate court will reverse the PCR court only where there is either no probative evidence to support the decision or the decision was controlled by an error of law Id In performing this analysis, the appellate court is to give great deference to the PCR court's findings of fact and conclusions of law Id , Edwards v State, 392 S C 449, 455, 710 S E 2d 60, 64 (S C 2011)

INEFFECTIVE ASSISTANCE ANALYSIS AFTER HARRINGTON V RICHTER

To demonstrate ineffective assistance of counsel, Petitioner must show "that counsel's

performance was deficient, and that the deficiency prejudiced the defense ” Wiggins v Smith, 539 U S 510, 521, 123 S Ct 2527, 156 L Ed 2d 471 (2003), Harrington v Richter, 131 S Ct 770 (2011) To establish deficient performance, a person challenging a conviction must show that “counsel’s representation fell below an objective standard of reasonableness ” Strickland v Washington, 466 U S 668, at 688 (1984) A court considering a claim of ineffective assistance must apply a “strong presumption” that counsel’s representation was within the “wide range” of reasonable professional assistance Id , at 689 The challenger’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment ” Id , at 687 Harrington v Richter, 131 S Ct at 787 (internal quotation marks omitted), DeCastro v Branker, 642 F 3d 442, 450 (4th Cir 2011)

A court’s deferential assessment of counsel’s performance must “include [] a context-dependent consideration of the challenged conduct as seen from counsel’s perspective at the time ” Wiggins, 539 U S at 523, 123 S Ct 2527 (internal quotation marks omitted) Further, we must resist the temptation to “second-guess counsel’s assistance after conviction or adverse sentence” and make “every effort to eliminate the distorting effects of hindsight ” Strickland, 466 U S at 689, 104 S Ct 2052 Indeed, we must review with “scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve ” Harrington, 131 S Ct at 788 (internal quotation marks omitted)

Strickland does not guarantee perfect representation, only a “ ‘reasonably competent attorney ’ ” 466 U S , at 687 (quoting McMann v Richardson, 397 U S 759, 770 (1970)), see also Yarborough v Gentry, *supra*, at 7 Representation is constitutionally ineffective only if it “so undermined the proper functioning of the adversarial process” that the defendant was denied a

fair trial Strickland, supra, at 686 Just as there is no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities An attorney can avoid activities that appear “distractive from more important duties ” Bobby v Van Hook, 558 U S ___, ___ (2009) (per curiam) (slip op , at 8) See Huffington v Nuth, 140 F 3d 572, 580 (4th Cir 1998) (“The Sixth Amendment does not always compel counsel to undertake interviews and meetings with potential witnesses where counsel is familiar with the substance of their testimony ”)

In Harrington, the Supreme Court emphasized that

[t]here are countless ways to provide effective assistance in any given case Even the best criminal defense attorneys would not defend a particular client in the same way Rare are the situations in which the wide latitude counsel must have in making tactical decisions will be limited to any one technique or approach Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective trial tactics and strategies See Knowles v Mirzayance, 556 U S ___, ___ (2009) (slip op , at 14–15), Rompilla v Beard, 545 U S 374, 383 (2005), Wiggins v Smith, 539 U S 510, 525 (2003), Strickland, 466 U S , at 699

131 S Ct at 788–89 (internal quotation marks and citation omitted) If the chosen defense strategy is unsuccessful, “even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better ” Id at 790 But which strategy might have been best is not the pertinent inquiry, instead, we ask whether the strategy counsel chose was objectively reasonable Id

Although courts may not indulge “ post hoc rationalization” for counsel’s decisionmaking that contradicts the available evidence of counsel’s actions, Wiggins, 539 U S , at 526–527, neither may they insist counsel confirm every aspect of the strategic basis for his or her actions

There is a “strong presumption” that counsel’s attention to certain issues to the exclusion of others reflects trial tactics rather than “sheer neglect ” Yarborough v Gentry, 540 U S 1, 8 (2003) (per curiam) After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome Strickland, however, calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind 466 U S , at 688 Harrington v Richter, __ U S __ (Jan 19, 2011)

Regarding the second prong—that is, whether counsel's deficiency prejudiced the defense—“the prejudice inquiry centers on ‘whether there is a reasonable probability that, absent [counsel's] errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death ’ ” Williams v Ozmint, 494 F 3d 478, 484 (4th Cir 2007) (quoting Strickland, 466 U S at 695, 104 S Ct 2052) See also Strickland, 466 U S at 687, 104 S Ct 2052 (“Second, the defendant must show that the deficient performance prejudiced the defense This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable ”) **Such a showing “requires a substantial, not just conceivable, likelihood of a different result ”** Cullen v Pinholster, — U S —, 131 S Ct 1388, 1403, 179 L Ed 2d 557 (2011) (internal quotations omitted) In making this determination we review the “totality of the evidence before the jury ” Ozmint, 494 F 3d at 484 (internal quotation marks omitted) ¹

¹With respect to prejudice, a challenger must demonstrate “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 ” Id , at

Surmounting Strickland's high bar is never an easy task " Padilla v Kentucky, 559 U S ___, ___ (2010) (slip op , at 14) An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve Strickland, 466 U S , at 689–690 Even under de novo review, the standard for judging counsel's representation is a most deferential one Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence " Id , at 689, see also Bell v Cone, 535 U S 685, 702 (2002), Lockhart v Fretwell, 506 U S 364, 372 (1993) The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom Strickland, 466 U S , at 690

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently See Wong v Belmontes, 558 U S ___, ___ (2009) (per curiam) (slip op , at 13), Strickland, 466 U S , at 693 Instead, Strickland asks whether it is "reasonably likely" the result would have been different Id , at 696 This does not require a showing that counsel's actions "more likely than not altered the outcome," but the difference between Strickland's prejudice standard and a more-probable-than-not standard is

694 It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding " Id , at 693 Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable " Id , at 687 See Harrington v Richter, supra

slight and matters "only in the rarest case " *Id* , at 693, 697 The likelihood of a different result must be substantial, not just conceivable *Id* , at 693 Harrington, *supra*

ABA GUIDELINES

Throughout the Hughey's petition, he refers to the A B A Guidelines as his standard. However, the United States Supreme Court recently clarified what *Strickland v Washington*, 466 U S 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984) requires in the context of investigation and preparation of penalty phase mitigating evidence

The Sixth Amendment entitles criminal defendants to the " 'effective assistance of counsel' "--that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms " That standard is necessarily a general one. Restatements of professional standards, we have recognized, can be useful as "guides" to what reasonableness entails, but only to the extent they describe the professional norms prevailing when the representation took place

Bobby v Van Hook --- U S ----, ----, 130 S Ct 13, 16, 175 L Ed 2d 255 (2009) (citations omitted) Accord, *Cox v McNeil*, 638 F 3d 1356 (11th Cir 2011) (habeas relief not warranted even if counsel's performance fell short of standards for reasonableness as articulated by American Bar Association guidelines for capital defense work, absent showing that there was reasonable probability that outcome of either his guilt or penalty phase would have been different had his counsel discussed mitigation at greater length with potential jury members)

The U S Supreme Court held the Federal Circuit Court erred in applying 2003 ABA guidelines pertaining to specifics defense counsel should investigate in preparing mitigation evidence, when such guidelines were announced 18 years after the defendant's trial. The Court then reiterated *Strickland*'s emphasis that such bar standards are " 'only guides' to what reasonableness means,

not its definition " Id , at 17 (quoting Strickland, at 688) ²

ARGUMENT WHY CERTIORARI SHOULD BE DENIED

I Certiorari should be denied on the issue of ineffective assistance of counsel for sentencing issue where the PCR judge reasonably concluded that counsel was not deficient in seeking to prevent the jury's consideration of a death sentence by attempting to present a manslaughter argument and burglary argument after consideration of facts and law, with the assistance of a law professor who supported a transferred intent theory where the trial judge gave an instruction on manslaughter and Hughey was adamant about not meaning to kill Ms Harris and not committing burglary, and counsel felt if they could get Hughey to the jury early in the case, the jury would see that he was not the killer the state was portraying him to be

John Hughey seeks a new sentencing hearing based upon a claim that his counsel - in the guilt phase - erred in seeking to prevent the jury's consideration of the eligible statutory aggravating factors - by presenting evidence through John Hughey and his sister's guilt phase testimony Judge Macaulay denied relief on this issue, concluding that Hughey had failed to prove that counsel were either deficient nor that their performance was prejudicial App p 5923-5925 ³ He seeks to make three points in his current petition - that counsel Tinsley and Garrett

²Petitioner points to the ABA Guidelines to suggest it is per se ineffective assistance of counsel to fail to do as it commands But ABA Guidelines are not "inexorable commands", rather, they are " 'only guides' to what reasonableness means, not its definition " Bobby v Van Hook, --- U S ----, ----, 130 S Ct 13, 17, 175 L Ed 2d 255 (2009) (quoting Strickland, 466 U S at 688, 104 S Ct 2052) (internal quotations omitted) As the Strickland Court explained, "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions " Id at 688-89, 104 S Ct 2052 Lindsey's counsel were between a rock and a hard place in determining the best way to spare him a death sentence, given the overwhelming evidence of his guilt See, Post v Bradshaw 621 F 3d 406, 418 (6th Cir 2010)

³This issue was thoroughly briefed and summarized in the Respondent's Post-Hearing Memorandum, p 26-80 App p 5469-5523 Respondent incorporate the pleading by reference

failed to investigate the circumstances of the crime, that the facts and law did not support a verdict of manslaughter under a theory of transferred intent, and it was not reasonable for counsel “to believe” the jurors would acquit of burglary and larceny. Each of these points were rejected by the PCR court. The State submits that there is probative evidence in the record to support the PCR court’s conclusions in denying relief concerning the penalty phase based upon counsel’s guilt phase acts. It must be noted that Hughey is not asserting that he would be entitled to a new trial based upon his claims. To the contrary, he is claiming that Hughey’s guilt of murder, burglary, and larceny were virtually automatic and that the death penalty likely resulted because counsel sought to present evidence in the guilt phase.

The defense strategy during the guilt phase of the trial was to attempt to remove any potential statutory aggravating circumstances proffered by the State and to remove the legal possibility (eligibility) of a death sentence (and penalty phase). The statutory aggravating factors that the State noticed and relied upon were

On Count One,

- 1 That the murder of Tesheka L. Jackson was committed while in the commission of **the crime or act of burglary in the first degree**
- 2 That the murder of Tesheka L. Jackson was committed while in the commission of **the crime or act of larceny with the use of a deadly weapon**
- 3 Two or more persons were **murdered by the defendant pursuant to one scheme or course of conduct**

On Count Two,

- 1 That the murder of Luevinia H. Harris was committed while in the commission of the crime or **act of burglary in the first degree**
- 2 Two or more persons were **murdered by the defendant**

pursuant to one scheme or course of conduct

The defense decided to attempt to remove the existence of the factors in the guilt phase by affirmatively challenging, through Hughey's guilt phase testimony and expert witnesses each of these potential factors

As to the burglary, the defense sought to establish that Hughey was an "invitee" into Ms Harris mobile home and dispute through expert testimony the state's claim that the front door was forced opened. As to the larceny of the vehicle, the defense sought to remove the factor by showing that Hughey had provided funding for the vehicle and had common possession and use of the vehicle. Finally, as to whether "Two or more persons were murdered by the defendant pursuant to one scheme or course of conduct," the defense chose to prove the death of Ms Harris was not murder, but more probably an unintentional killing resulting at as an accident from the struggle between Hughey and Ms Jackson over a weapon arising from an initial series of provocations begun by Ms Jackson and to a lesser possibility that Ms Jackson death was also one of manslaughter. The attempt to prove this was based upon both Hughey's testimony and expert testimony from forensic investigator Donald Girndt.

Even if the jury had convicted Hughey of the murder of Ms Jackson, had the jury accepted the showing the Ms Harris killing was the result of the shooting upon sudden heat and passion with sufficient legal provocation resulting from the fight and struggle between Hughey and Jackson, the instruction on "transferred intent" would have allowed the jury to convict only of manslaughter. Had this scenario been successful, there would have been no penalty phase due to rejection of the underlying aggravating circumstances even if Hughey was convicted of the murder of Ms Jackson. Although unsuccessful in the end, deficient performance cannot be

shown where it was based upon a reasonable investigation and legal analysis and supported by some evidence ⁴

WHY THE DENIAL WAS SUPPORTED BY THE EVIDENCE

In his initial specification, Hughey contends counsel erred in advising his sister and the Applicant to testify in the guilt phase of the trial where “evidence was irrefutable to support convictions for murder ⁵” Respondent submits that this issue is a red herring because it assumes in the allegation that Hughey would automatically be convicted on murder, something neither counsel nor apparently the Applicant was not willing to assume. The Applicant has failed to show either that there is a reasonable probability under Strickland that the result of the proceeding would have resulted in a different verdict assuming that counsel did advise the Applicant and his sister to testify. Nevertheless, the right to testify belongs to the Applicant. The trial court made full inquiry of whether the Applicant wanted to testify and was advised of his right to testify or not. App p 3060-3064. The Applicant stated that he wanted to testify and did. App 3064.

It appears that the focus of the Applicant’s present complaint in which he only seeks a new sentencing hearing is that defense counsel and the Applicant lost credibility with the jury in

⁴The mere fact that trial counsel’s strategy was unsuccessful does not render counsel’s assistance unconstitutionally ineffective. Strickland, 466 U S at 689. Bell v. Evatt, 72 F 3d 421, 429 (4th Cir 1995). App p 5924.

⁵Respondent must point out that Hughey never testified in this PCR action. It is unclear what alternate course Hughey would agree to that current counsel is now suggesting, particularly in light of Hughey’s sworn statement about how the incident occurred and his claim that Ms Harris’ killing was unintentional and that he did not intend to kill Ms Jackson when he arrived at the scene. The PCR Court found that Hughey had a right to testify in his defense and Hughey has not suggested that he would not have testified or that he was misadvised to testify. App p 5923-24. *Simply put where the testimony from Hughey would be the same in the penalty phase how is the alleged loss of credibility from the guilt phase any different*

seeking a conviction [and instruction] for manslaughter rather than either a concession of guilt or no defense at all in the guilt phase. It is uncontradicted that the defense team prior to the trial had sought through unsuccessful negotiations to get a life sentence for Hughey. Further, it is clear that the defense received the assistance of a U S C law school professor, Professor McAninch, a criminal law specialist, and also consulted with a recognized expert in death penalty trial strategy, David Bruck, concerning seeking a lesser verdict in the guilt phase and the legal possibility of using a manslaughter-transferred intent theory (which the trial judge ultimately concurred in). Counsel recognized that the chances of success on this strategy were slim, but evidence was sufficient to allow and require Judge Cole to instruct the jury on the possibility of a verdict of manslaughter. 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, merely because any manslaughter potential requires some showing of provocation by Ms. Jackson. It must be noted that in the appeal, as well as in his testimony before this Court, one observer of the record, appellate counsel Dudek, referred to this case as a “classic manslaughter” case. If such observation was drawn by the jury, trial counsel’s strategy would be applauded, not criticized.

Respondent would agree that the Applicant has now pointed out the contradictions in the trial testimony that revealed that the crimes were one of murder, not manslaughter. Such a recognition, in hindsight, can be assumed because the jury actually found the existence of murder beyond a reasonable doubt as to both deaths. However, Respondent must disagree with the Applicant’s underlying premise that there was no evidence in the record to support a charge of voluntary manslaughter. Although the evidence to support the charge may have been

contradicted, Judge Cole properly gave the manslaughter instruction and specifically included that manslaughter-transferred intent charge. With the defense team's success in having the charge given, deficient performance cannot be found merely because the result was rejected.⁶

In this initial allegation, Hughey asserts various deficiencies in counsel's performance. First, he contends that the killing of Jackson could not be voluntary manslaughter because there was an adequate "cooling off" period, citing State v. Cole, 338 S.C. 97, 525 S.E. 2d 511 (2000), State v. Pittman, 373 S.C. 527, 576, 647 S.E. 2d 144, 176 (2007), State v. Walker, 324 S.C. 257, 261, 478 S.E. 2d 280, 282 (1996). Second, he contends that since Jackson was exercising her legal right to defend herself, it could not be voluntary manslaughter because the exercise of a legal right is never deemed a provocation sufficient to justify or mitigate an act of violence, citing

⁶It must be remembered that the Applicant is not seeking a new guilt phase in the case, only a new sentencing proceeding. It remains difficult to construe that the prejudice prong in this setting would have *required* under the Sixth Amendment that defense counsel concede guilt in the guilt phase or prevented the Applicant from testifying about his recollection that Ms. Jackson began the assaults through throwing the vase, a knife, and then charged him with a knife. Respondents can locate no cases supporting the proposition that a new sentencing proceeding was constitutionally required because counsel failed to concede guilt. The only case located was the case cited in Applicant's Petition, p. 31: *Daniels v. Woodford*, 428 F.3d 1181, 1210 (9th Cir. 2005). However, a close reading of *Daniels* does not support that proposition. In *Daniels*, the Court found that a new guilt phase was required because a capital murder defendant was prejudiced by counsel's ineffective assistance under the Sixth Amendment at the guilt phase of trial, which occurred due to breakdown in communication between defendant and counsel, although it was clear that defendant shot two police officers and was guilty of some type of unlawful killing, there was evidence that defendant's mental state at time of offense could have been used as a defense to first degree murder under the diminished capacity standard, in that defendant suffered from severe mental illness and possible brain damage, or imperfect self-defense, in that defendant may have believed that officers were coming to kill or seriously harm him. These defenses presented a possibility of a sentence less than murder which would have removed the possibility of a death sentence. Therefore, *Daniels* actually supports the actions of the defense in this case by their attempt to present a defense theory to get a manslaughter verdict which, like *Daniels*, would have precluded the possibility of a death sentence. Unlike *Daniels*, the proffered defense was supported by testimony from the Applicant and an expert and did not exclude another available defense.

State v. Norris, 253 S C 31, 39, 168 S E 2d 564, 567(1969) Finally, he asserts that counsel failed to recognize that the provocation must come from the victim rather than an innocent third party, asserting that the doctrine of transferred intent does not apply to a voluntary manslaughter situation in South Carolina As shown below, these concerns are without merit for post-conviction relief

WHAT THE DEFENSE PRESENTED AT TRIAL

The defense theory of the case sought to present a more stable relationship between the victim and the Petitioner though the testimony of Chris Burton, a friend, and Gloria White Harrison, the Petitioner's sister Burton, however, admitted that on December 3, 1995, Hughey called him upset and crying, but he did not see him after the call App pp 2955-60 He told Burton "I couldn't take it no more", crying and upset App p 2973, ll 6-21, p 2992 ("I can't take it no more, tell my sisters and them I love them take care of my kids for me")

His sister Gloria described her alleged presence at the December 3, 1995 incident when she drove him over to the grandmother's house to pick up the children She said she viewed the confrontation, but denied there were any threats to kill made App pp 3017-20 She then described the arrest at her Georgia home on December 5 and his attempt to cut his wrist App pp 3023-24

John Hughey testified in the guilt phase He revised his version from what he told police, in fact, denying he told them anything He claimed they "assumed" those facts App pp 3175-76 In this version, he arrived at the scene to take the car to be fixed, but that Tesheka slapped him while he held his youngest child He said that Jackson became mad and had initially slapped him because she didn't want Hughey to tell Ms Harris about her adultery App 3125 He said

they calmed down after that before he went inside App 3129

He claimed Mrs Harris then invited him in for coffee App 3129 At that time, he claimed that Jackson started getting mad and wanted to know what was in his pocket because she thought he had his 9mm pistol App 3130-32 However, he did not have a pistol in his pocket, only a black braided belt and some keys App 3130

After Marcus Harris called and Tesheka told him that Marcus wanted to talk to him App 3140-41 When he was getting ready to go toward the phone, Jackson started attacking him first with a vase, then knives, ultimately resulting in her coming at him with a knife and he pushed her resulting in a stab Hughey stated that she did this because Hughey wanted to tell Marcus about her affair App 3133 He said that she pushed him first, then he pushed back and then the fight began She threw the vase that he blocked with a chair Next she grabbed a knife and threw it at him After hearing some dishes rattle, he saw she had another knife and he blocked her, but she pushed back He stated that he became scared App 3134, l 25 He stated that she was yelling that she was going to get him at that time App 3134 See also, App 3217-20

He stated that Tesheka still had the knife and he ran out of the house and got the shotgun from the trunk of the car App pp 3133-40 He stated that “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 He stated that he did not keep running because his kids were there

He stated that he then opened the trunk and got the gun He said the shell was already in the gun He said that Tesheka was standing on the top of the steps with the knife and was hollering and cussing that “I’m going to get you ” App p 3141-42 See also, 3223, l 9-15 He stated that he told her if she put the knife down, he’d put the gun down App p 3142 Walking

toward her, she then spit on him and tried to slam the door in his face App 3143 He stated that they were tussling at the door App 3143 He proceeded into the house He stated that he began struggling with Jackson because “she still had the knife, I remember tussling and that’s when the shot went off While tussling at the door, the gun went off and somehow Mrs Harris got hit App pp 3143-45 He said he was mad and was trying to shoot at Tesheka App p 3146 Although the knife had apparently dropped, he thought she had the knife and chased her App pp 3146-47 He said Mrs Harris was “just in the wrong place at the wrong time ” App p 3151, ll 5-10

As to the death of Ms Jackson, Hughey testified that they continued down the hall after the first shot and got in the back bedroom and continued tussling App 3145 He stated that “ I was mad at the did and didn’t know what I was doing ” App 3146 He stated that he was provoked because she came at him with a knife and that she had stabbed him before App 3145, l 6-8 He said that he was unaware that she had dropped the knife at the door He described his route in chasing her to the bedroom App 3146-47 He said the door was already open when he got to the bedroom App 3147

He stated that he did not go over to Ms Harris with an intent to kill them App 3157 He stated that he was guilty of manslaughter App 3156 [On direct examination, he does not give any details concerning the death of Ms Jackson] He also claimed he was not guilty of burglary or the larceny of the his car App 3157-58

On cross-examination, he denied having the shotgun when he initially entered the home upon Ms Harris’ invitation App p 3213 Further, he denied hearing Mrs Harris tell Marcus that he was here with a gun App 3213 He also denied hearing Ms Harris say “don’t shoot that

gun ” App 3238 As to the series of assaults from Ms Jackson, he stated that she was chasing me and we [was] fighting constantly App 3221, 1 22-23

He stated that he got the shotgun because “ she had the knife She was going to kill me Something had to give ” App 3224-25 He stated that he told her to put the knife down and he’d put the gun down while she was standing on the steps App 3226-27 He did not recall who advanced first, but she then spit on him , but she refused to put the knife down and she said “come on, come on” and spit on him a second time He said he was worried about her holding the knife and was mad and scared ” He said he thought that she would put the knife down so they could talk, but she continued trying to cut him and came at him with the knife ” App 3230 He stated that he did not recall if the door closed or not He stated that when he got inside the house with the shotgun, there were just “fighting and fighting” He denied that he knew what she was going to do when she stood outside with the knife He stated that he remembered the gun going off, but did not know why it shot because “I didn’t go over there to kill her “ App 3233-34 He stated that they were just fighting and fighting He stated that after the first shot, “my mind just went blank ” App 3234 He stated he recalled that Jackson went down the hall and he recalled tripping over a chair and that he went down the hall and then just shot App 3235-37 He did not remember where he shot App 3235 He stated that he was not aiming at her App 3236 He stated that he did not want to shot her He thought that she still had the knife and all he knew was that they were still fighting App 3237

He stated that he recalled Jackson being in the back bedroom and that they were “fighting constantly” and tussling over the gun He denied that she was hiding in the bedroom App 3239 Importantly, he also did not recall why he had more shotgun shells with him or how the shells got

into the shotgun App pp 3238-44

Forensic Investigator Don Girndt testified as an expert in crime scene analysis App 3259-61 He opined that the state was in error in claiming that the shot to Ms Harris could have been rendered as close as 12 inches App 3262-63 He stated that because there was no blood on the weapon and a distance pattern showing four feet that it could have been from 4 feet or greater App 3264 He further opined that the presence of blood on the outside of the door indicated that Ms Jackson was in that area to him, a factor consistent with Hughey's version App 3266-67

He further opined that there was evidence in the case to contradict the existence of a burglary App 3272-73 These factors, according to Girndt included that there was no mention of a break-in burglary or stabbing in any of the phone calls, the subsequent cut of Ms Jackson , the blood on the outside of the front door which seemed consistent with a struggle at the door rather than a break-in App 3273 Further, he opined that there was past evidence of a burglary with old damage on the door Id

Girndt opined that the evidence was inconclusive upon which telephones had been used, other than the second call with the son App 3278-79 Further, he testified the location of the blood spatter on the dryer area indicated the location of Ms Harris in that area App 3275-77 Further, the location of the blood at the door leading to the back bedroom was likely Ms Jackson based upon the fact that she had been cut and location of castoff blood in the front bathroom and her location in the bedroom App 3280 Each of these were consistent with Hughey's testimony

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

On cross-examination, he confirmed that in his opinion it did not appear on this incident

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

On re-direct examination, Girndt confirmed his opinion that the shooting and cutting occurred after the first phone call, supported by Hughey's explanation that there was a discussion about a gun in his pocket and that she did not say it was a shotgun App 3355 He further opined that it was logical based upon the evidence that Ms Jackson initially ran into the bathroom and then into the bedroom App 3358-59

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

WHAT THE TRIAL JUDGE DID

In this case, Judge Cole instructed on the possible lesser included offense of “voluntary manslaughter” and “transferred intent ” App pp 3465-68 The contrary state’s theory of the case pointed to the expressed malicious intent of John Hughey to murder his girlfriend Simply put, driven by malice towards his ex-girlfriend, after a verbal threat to kill her and notes that he intended to be dead, Hughey tracked her down in a safe house of her aunt or cousin, Luevinia Harris He forcibly entered the home with a shotgun and confronted his ex-girlfriend While Mrs Harris was on the telephone begging the police to arrive, he shot her in the head, instantly killing her He then chased Tesheka back to a bedroom She had previously been stabbed with a knife, dropped by the front door Like her aunt, she was also killed instantly by a shotgun blast to her face, after having received a blunt blow to her face Hughey fled the scene instantly stealing Tesheka white Mitsubishi He stopped at an ATM in Anderson where he used her stolen ATM card to get \$30 00

Unlike the state’s theory, evidence was presented that Hughey initially claimed to his sister it was an accident, then told the police that Tesheka had brought the shotgun into the home and she had shot Mrs Harris while they struggled He contended initially that she threw a knife and vase at him and eventually chased him to the back bedroom where she was shot in a struggle over the shotgun At trial, however, confronted with the overwhelming evidence of his possession of the shotgun, Hughey contended that he arrived on the scene without any intent to kill He contended that after Tesheka had slapped him and that Mrs Harris invited him into her home for coffee [This testimony undermined the burglary issue] According to Hughey, Tesheka then assaulted him after he was going to talk to Marcus on the telephone by throwing a vase and knife at him She then assaulted him by coming after him with a knife App pp 3134-35 He

blocked her assault and pushed her back when she apparently got stabbed App pp 3133-36 Hughey said he left the house and went to her car and retrieved a shotgun, rather than leaving App pp 3141-42 He returned to the house where she still held the knife cussing at him and she spit on him App pp 3141-42 Tussling at the door, a shot went off as he held the gun and Mrs Harris was hit inadvertently App pp 3143-45 He said he was still mad, trying to shoot at Tesheka and continued to chase her back to the bedroom where she was shot App pp 3146-3151

Hughey testified that he was guilty of two counts of manslaughter, but not guilty of murder App, p 3157, ll 11-21 He further denied going to the home with either hatred in his heart or the intent to kill App 3158-59

The Applicant sought to get special instructions that specifically “pulling a knife on defendant”, “pointing a gun at defendant”, “spitting in the defendant’s face”, “mutual combat” and “finding spouse in the act of adultery” were examples of “acts of provocation sufficient to negate malice ” Request to charge #10 These instructions on the facts were rejected by the court in favor of the general charge on voluntary manslaughter App pp 3372-3376 At the outset, the trial judge announced “I’ll not give any instruction that’s incumbent upon the facts ” App p 3376, ll 2-3 After the closing arguments of counsel, the court considered the defense counsel’s Request No 10 for voluntary manslaughter This request included, among other matters specific examples of provocation in the request to charge *Defense Request to Charge #10*, App p 4113 Counsel Tinsley for the defense pointed out “on our request to charge number ten that our examples came right out of Erwin’s book section 29-9 pages 224 and 25, of course, Solicitor

Coulter objected to our paragraph seven⁷ We further point out “they are examples right out of the book, and Solicitor Jones actually argues a couple of those ” App p 3442, ll 1-17

The trial court, however, responded that there was nothing wrong with counsel arguing the facts I just don’t feel comfortable with giving the instruction on the facts of the case If the jury comes back at some point needing some further explanation, then I’ll consider giving them some type of explanation But until that time, “I have a general instruction that I provide that I think will be clear ” App p 3442 Ll 18-24

The trial court then instructed the jury on murder and the lesser included offense of manslaughter App pp 3460-2468 The trial judge’s entire instruction on manslaughter is set forth at App p 3464, l 20 - p 3468, l 2

The judge charged the jury that “voluntary manslaughter is the felonious taking of the life of another human being in sudden heat of passion provided it based upon a sufficient legal provocation ” App 3465, ll 6-9 See App p 3465, l 17 - p 3467, l 11, App 3488-3489

On the doctrine of “*transferred intent*,” Judge Cole gave the following instruction as to manslaughter

I further instruct you that where a person with malice aforethought **or in the sudden heat of passion based upon sufficient legal provocation** attempts to unlawfully kill a certain person, but in mistake or misadventure in such attempt kills a different person from the one who he intended to kill, the law nevertheless hold the assailant responsible for his felonious intent merely transferring his direction from the original object of the intent to the person actually killed

The homicide so committed is still murder or voluntary manslaughter The degree of guilt is the same as it would have been if the attempt had resulted in the death of the person at whom it was actually aimed It does not matter under the law that a person other than the intended victim was killed

⁷ Erwin’s South Carolina Request to Charge - Criminal, S C Bar (1994)

App p 3467-68 (emphasis added) At the conclusion of the jury instructions, defense counsel renewed his general request for charge number ten and specifically the examples from paragraph seven App p 3475, ll 20-21 The trial judge denied the request stating he felt the instructions as given were a correct statement of the law and sufficiently covered the appropriate law App p 3478, ll 4-13

The jury subsequently requested re-instruction on the definitions of murder and voluntary manslaughter App pp 3482-3489, l 15 The court also instructed the jury on a definition of common law marriage App pp 3489-90 Defense counsel Tinsley requested the trial judge to include paragraph seven of defense request number ten (on voluntary manslaughter) App p 3491, ll 3-7 The request was implicitly denied App 3491

PCR TESTIMONY OF COUNSEL

BILLY GARRETT, Jr

Counsel Billy Garrett testified that he was working with Don Girndt very heavily as to the facts of the case through scene investigation and studying the law as it relates in the area of transferred intent and manslaughter App p 4850, PCR 197 He recognized rather early on that it was highly likely that they would not be successful App p 4850, 4861, PCR 197, 208 Like Tinsley, he knew that Hughey was adamant that he was not guilty of burglary, murder of Ms Harris, or grand larceny of a vehicle that he claimed he owned by putting money into it App p 4850-51, PCR 197-198

He felt that it was unlikely that they would succeed because there were two dead people, a breached loaded shotgun that needed to be reloaded, two babies crawling through the brain matter on the floor, and Hughey trying to kill himself which was a horrible fact pattern Garrett noted

that the gun had to be reloaded which often times is argued as malice aforethought App p 4861-62, PCR 208-09

Concerning the burglary, Garrett stated that Hughey did not commit burglary based upon Hughey's version and the forensic evidence supported by Don Girndt's investigation App p 4862, PCR 209 Although there was some blood outside the door, it was consistent with his story that she was already cut with the knife that she pulled on him on the inside when he ran out of the house and got the gun App p 4862, PCR 209 Garrett rejected that there was evidence of forced entry on the outside door, claiming that the evidence of the damage was old App p 4863, PCR 210 However, he did not that there was some damage on a bedroom door Id He admitted that Hughey was ultimately found guilty of burglary

Concerning transferred intent, Garrett stated that there are circumstances called "heat of passion" when you do not have time to reflect and you do something in the heat of the fight He stated that there was no question that Hughey and his wife were physically fighting throughout the trailer He felt that the problem that they had in the case was that it appeared when the gun went off in the struggle or when he was shooting at his wife, Ms Harris was lined up between the gun and his wife and she was shot without having anything to do with this App p 4864, PCR 211 He stated that the intent to kill transfers from the intended victim to the actual victim, Ms Harris He stated that they were trying to get the manslaughter verdict to Ms Harris on the theory that when he was intending to commit manslaughter against Ms Jackson the intent transferred to the killing of Ms Harris He stated that was the issue that they had to work through to get a charge on it which they did App p 4864-65, PCR 211-12

Garrett confirmed that there was nothing in their theory that Ms Harris had provoked the

shooting. Further, Hughey indicated to them that he never intended to kill Ms. Harris at all. He recognized that since malice can be inferred by the use of a deadly weapon that the facts and law were against them, but Hughey was very clear that he had never intended whatsoever to kill Ms. Harris. App p. 4865, PCR 212. He further felt that Ms. Harris was killed first and that Hughey then continued to follow Ms. Jackson into the back area of the house toward the bedroom where the gun discharged and killed his wife. Counsel Garrett opined that it was his belief that there was sufficient evidence of malice as to the second murder of Ms. Jackson. He stated that he did not think that he would be found innocent or not guilty of murder, but of manslaughter of his girlfriend since it all happened within three to four minutes. App p. 4868, PCR 213. Counsel Garrett noted a conflict in the testimony concerning whether Hughey got on the telephone with Marcus Harris on whether he got on the phone or was going toward the phone and when it was prevented the tussling started. App p. 4867, PCR 214. He admitted that when the call took place both victims were alive and at some point later the gun came into the house. According to Hughey's comments to them, they had gotten into a tussle when she threw a vase at him, then threw a knife at him and then came at him with another knife. He recalled that it was during the tussle that Ms. Jackson got cut when he went quickly out the door and retrieved a shotgun from the trunk of the car and retrieved some bullets. Garrett admitted that taking more than one bullet suggested more deliberation. App p. 215.

Garrett recognized that there were some problems with the factual issues in the case. However, he noted that on the tape of the telephone call, at no time did Ms. Harris say anything about Hughey burglarizing the house, but stated that John's in here with a gun. Hughey's theory was that he was invited into the house and that he and his wife then got into a fight, then he went

out and got the gun and during that period of time the phone call was made App p 4868-69, PCR 215-216

Counsel confirmed that in presenting this defense in the guilt phase that it risked alienating the jury. He stated that he and Tinsley decided that if that happened in the guilt phase, Garrett would have to be more behind the scenes in the penalty phase because they had rejected his presentation for Hughey App p 4869, PCR 216. He believed it would reflect a loss of credibility for Garrett. Id.

On cross-examination by the State, Garrett stated that the decision was made to have Tinsley first chair and do the penalty phase and have Garrett do the guilt phase because Tinsley had more experience. Further, it was made because of the uniqueness of the case and that one lawyer would be burned if the jury verdict in guilt came back negative App p 4880, PCR 227. He further declared that the decision was made not to concede guilt throughout because Hughey was not going to concede guilt on at least one murder, on burglary and on grand larceny App p 4880, PCR 227.

Garrett stated that Hughey's versions of the incident were consistent with his trial testimony with the brief exception when he appeared to become incompetent. He stated that he attempted to pick it apart and cross-examine him, but it remained consistent App p 4881, PCR 228. He stated that the minor details would sometimes fall apart during the time when the fight was actually going on about which happened first and then next or what he was able to observe during the fight. However, after the fight, it was pretty clear. He stated that the version was that he went to his car where his grandfather's shotgun was kept and got it out. He stated that state's version was that he rode a bicycle with a box of shells through Abbeville with a box of shells and

a shotgun Garrett stated that version did not make any sense and was not consistent with what Hughey told him App p 4882, PCR 229 However, he did tell him that he got to the aunt's house by riding the bicycle, but not with a shotgun App p 4883, PCR 230

According to Garrett, there was some discussion between Jackson and Hughey about working on the car and going to have it repaired that afternoon App p 4883, PCR 230 It was Hughey's intention to go over and pick up the car and have it repaired He told him that when he arrived Jackson and the children were outside and heading toward the car He described everyone being nice and no bad blood at the time with Ms Harris inviting him inside App p 4883, PCR 230 He said that He put his child on the bicycle and rode him around to the side of the house At that point he sat the child down and went in and had coffee Garrett stated the evidence from the scene supported the presence of coffee cups around the house App p 4884, PCR 231, l 5-8 At that point there became a discussion about Jackson having an adulterous relationship and Ms Harris declared that she wanted to stay out of it They initially started arguing and it gradually escalated App p 4884, PCR 231 At this point, Ms Harris's son called and she wanted him to talk According to Garrett, Hughey told him that the fight ensued because Jackson did not want Hughey to tell Marcus Harris what she had been doing At that point Jackson threw a vase at Hughey, then a knife, and then came at him with a knife App p 4885, PCR 232, l 1-6

Garrett described the high detail that Hughey gave him about this matter He stated that the description of the car problem included that there was a leak on the side of the sunroof He described the type of bicycle he was riding "He convinced me that that's what happened " App p 4885, PCR 232, l 22

Garrett stated that Hughey told him that after Ms Jackson threw the knife that it escalated

to the point that she actually pulled a knife on him and they tussled with the knife resulting in her being cut in a unique way and he described how he pushed her away

Garrett stated that at that point Hughey got fed up and went out and got the gun from the car by using his key to the trunk. He got the shotgun and went back in and they were fighting at the door. Hughey was adamant that during the fight over the gun with Jackson the gun went off and Ms. Harris was hit. App p. 4886, PCR 233. Hughey advised Garrett that he never intended to harm Harris. App p. 4886, PCR 234. According to Hughey, Jackson still possessed the knife at the time of the tussle. He stated that he felt Hughey returned not with the intent to shoot her but to calm her down and have her put the knife down. However, it escalated again and the gun went off. Hughey told Garrett the gun went off accidentally in the direction of Ms. Jackson and hit Harris. App p. 4887-88, PCR 234-235. He stated that after the shooting they continued to run after each other through the hall and into the bedroom of the mobile home. App p. 4888, PCR 235.

Garrett testified that the struggle had begun about whether Hughey was going to speak with Marcus on the telephone about what Jackson was doing. She did not want her adultery disclosed to Marcus and that Marcus would have been concerned about the impact these activities would have had on the children. Marcus was a person the family respected and Jackson feared she would lose his respect if he learned what she had done, according to Hughey. App p. 4889, PCR 236. Garrett did not recall Hughey stating that he actually spoke with Marcus. App p. 4890, PCR 237.

Garrett described Hughey advising him that he ran down the hall and into the bedroom in the continuing fight as they continued to fight over the gun. App p. 4890, PCR 237. He stated that

the gun went off, but Hughey did not recall reloading the gun App p 4891, PCR 238 At that point Hughey advised Garrett that he left the scene in the car to his sister's in Georgia, stopping at an ATM on the way to get money App p 4893, PCR 240

Garrett stated that it was consistent from the beginning that Hughey had shared purchase of the vehicle and that he had the victim's PIN number and had given her money in that account App p 4894-95, PCR 241-42 Garrett stated that Hughey might have stated that he was on the phone and that Marcus was telling him to leave, but whether he was paying attention to the telephone when the vase was thrown at him and the fight ensued

It was important to Garrett that Ms Harris never stated on the phone that Hughey had broken into the house, although she did say that he had a gun, but she did not describe the gun There was a question as to whether he had a pistol in his pocket which he said he did not He stated that he did not go over to the house with any weapon App p 4897, PCR 244

Counsel Garrett stated that he retained former SLED agent Donald Girndt to objectively look at the evidence and advise him concerning the consistency of the versions App p 4897-98, PCR 244-45 Counsel Garrett stated that Girndt advised him that the Applicant's version was "possible " App p 4898, PCR 245, l 4-7 Garrett stated that this information was important because if they were trying to get a manslaughter charge concerning the aunt's death the physical facts had to back that up He stated that Girndt had advised him that the facts backed it up to that point App p 4898, PCR 245, l 10-17 However, Garrett admitted that Girndt became more skeptical and critical concerning the shooting of Ms Jackson App p 4898, PCR 245, l 19-23

Garrett also had Girndt to determine that the evidence of burglary was wrong He stated that Girndt backed up Hughey's version that the front door was not kicked in and the damage was

not contemporaneous with the incident App p 4899, PCR 246

Garrett thought Girndt's usefulness was to bolster Hughey's credibility concerning the physical layout and facts consistent with Hughey's version App p 4900-01, PCR 247-248

Prior to trial, Garrett discussed these findings and theories with Tinsley He stated that the defense team had decided early on to present Hughey's position to show innocence as it relates to murder on the facts concerning Ms Harris He stated that they had to make a decision as to whether they had a shot at and resolved it was a long shot App p 4900, PCR 247 However, since the client was adamant about not meaning to kill Ms Harris and not committing burglary, he did not see punting as an option under the facts of the case App p 4900, PCR 247, ll 16-25 Counsel felt that if Hughey were able to hold up on cross-examination there would be members of the jury who would understand that this was really a family dispute and not a situation where he went there with intent to kill Jackson, Ms Harris, and the children, etc Garrett asserted that Hughey was not a vicious killer for which the death penalty was designed App p 4901, PCR 248

Instead, Garrett viewed it as a family fight that just got out of hand and a gun was brought into a knife fight He felt these facts were different than what the state was trying to portray App p 4901, PCR 248

Counsel Garrett stated that in addition to talking to co-counsel, he consulted with others Particularly, he noted that he spoke with David Bruck and Professor William McAninch on the transferred intent issue App p 4901, PCR 248, l 20-25 ⁸ Counsel Garrett stated that he

⁸Professor William McAninch is currently a Distinguished Professor Emeritus of Law at the University of South Carolina Law School He is the author of the primarily treatise on substantive criminal law in South Carolina The Criminal Law of South Carolina, currently in its

considered Bruck the foremost authority on death penalty defense in South Carolina App p 4903, PCR 250 He stated that he discussed with him early on concerning guilt and innocence mitigation Id Garrett stated that he tried to go to as many sources as he could to try and make sure that his legal theory was correct one that without legal provocation of a victim that got killed in the transferred intent area Garrett stated that there was a legal debate and the consensus was that it was appropriate because the *mens rea* and act would go together and that the entire case would transfer to the victim App p 4902, PCR 249

Counsel Garrett confirmed that his legal theory was that it Hughey was acting upon sufficient legal provocation in shooting Ms Jackson and Ms Harris got in the way that transferred intent would equal voluntary manslaughter App p 4902 He stated the sufficient legal provocation he was relying upon was the assault that Ms Jackson initiated towards him, which initiated the confrontation App p 4902, PCR 249 He confirmed that from that point of time the factual issue became whether there was a sufficient cooling off period App p 4903, PCR 250

Garrett stated that he met with his client and his family concerning the discussions and how this defense would play out at trial App p 4904, PCR 251 Garrett recognized that this was a dangerous strategy, but felt like after reviewing the evidence that it was the one that they had to pursue App p 4904-05, PCR 251-252

Counsel stated that there were discussions about saving Hughey's testimony for the

fifth edition The treatise includes sections on manslaughter and transferred intent McAninch, Fairy, Coggiola, *The Criminal Law in South Carolina* (5th Ed 2007), p 11-17176-190

David Bruck is the former Chief Attorney at the South Carolina Office of Appellate Defense and currently a Professor of Law at Washington and Lee School of Law He is currently Director of the Virginia Capital Case Clearinghouse and Federal Death Penalty Resource Counsel

penalty phase rather than the guilt phase App p 252 However, he felt it was questionable He stated that Hughey was on, he was a likeable fellow and that you could not believe that he would murder two people and that he did not present that way PCR 252 He stated that he felt it they could get him to the jury early in the case, the jury would see that he was not the killer the state was portraying him to be He felt that Hughey handled cross-examination well and it helped personalize him with the jury to identify him as not being heinous App p 4905, PCR 252

Counsel stated they discussed just having him described the facts and circumstances on direct in the guilt phase He stated that if the jury found him not guilty of larceny and burglary and found one of the deaths manslaughter, they would have a legal shot at keeping him out of the death penalty App p 4905, PCR 252-53 He stated that the facts similarly did not fit either kidnapping or torture App p 4906, PCR 253 [Neither of these aggravators were charged] Counsel opined that the state's version of the case was overkill "They tried to say things that he did that he didn't do " App p 4907, PCR 254

Counsel Garrett stated that he thought they clearly were entitled to instruction on manslaughter, particularly as it related to the aunt App p 4916, PCR 263, l 17- 18 He stated that he had his doubts as to the wife because of the timing and reloading of the gun and it seemed like a bigger stretch to him App p 4916, PCR 263, l 17-22 He stated that the Judge gave the instructions on manslaughter App p 4916, PCR 263, l 24

Garrett confirmed that the strategy was to try to keep the case from being a death eligible case and never get to phase two App p 4934, PCR 281, l 10-14 Counsel confirmed that Hughey was less detailed in his statements to him about the fight with the knife and both shootings App p 4936, PCR 283 He admitted that these factors were matters in manslaughter Id

Counsel stated that he had the telephone conversation with Mr Bruck and they went through a series of issues App p 4945, PCR 292 He confirmed that everything in the notes of the meeting concerns the guilt phase of the case App p 4946, PCR 293

Garrett stated that the transferred intent issue was difficult to get his hands around Garrett stated that he wanted Mr Bruck and Greenwood County defense lawyer Rauch Wise to think about that issue and see if he was correct on the applicability of it with no provocation against the aunt App p 4946, PCR 293 He stated that at the time of the discussions around March 1997 there was a leaning toward the decision to present it as manslaughter, but it was not a “never changing” decision App p 4948-49, PCR 295-296 He acknowledged the initial decision to present manslaughter was also before he made met with Girndt concerning his findings App p 4951-52, PCR 298-99

Garrett confirmed that if the jury did not accept manslaughter and convicted, whichever lawyer presented it would be burned and could risk alienating the jury by continued involvement App p 4952, PCR 299 Counsel speculated that by continuing to sit at counsel table could have affected their ability to listen to mitigation

Counsel Garrett stated that when Girndt met with him and Paige Tarr in October, he learned that Girndt disagreed with both versions of the case - the state and the Hughey versions App p 4965, PCR 303 Although he disagreed with the Hughey’s version concerning the death of Ms Jackson was possible, but not probable App p 4956, PCR 303, ll 3-12 Girndt’s biggest difference with Hughey was the question as to whether the bedroom door got knocked down or knocked open and a question as to whether he went through the bathroom and entered the bedroom on a different side Girndt had a concern about the location of the body in relation to the

gun blast and in relation to the door being open Garrett said that Hughey was aware of that *but Hughey remained adamant that the way he said it was the way it happened* App p 4957, PCR 304

Counsel conceded that losing credibility in the guilt phase would happen in any death penalty case where there was a challenge to guilt App p 4957, PCR 304

ROBERT TINSLEY

Counsel Robert Tinsley stated that the state started talking about this double homicide as a potential death penalty case shortly after the incident App p 4872, PCR 19 He stated that the factors were primarily based upon burglary and the double homicide although there was also the claim of larceny App p 4873, PCR 20 Tinsley opined however that this case was more akin to a domestic dispute based upon the fact that Hughey had been involved with one of the victims, Tesheka Jackson for over ten years, had two sons together, had an automobile ,and joint checking account App p 4873-74, PCR 20-21 He felt that the event was among loved ones and was not a cold calculating incident with a stranger which weighed in his mind against a death penalty App p 4874, PCR 21 He stated that he was involved in negotiations with Solicitor Jones and Chief Deputy Solicitor Mike Coulter, but also discussed it with law enforcement App p 4874, PCR 21

Counsel Tinsley stated that although he was first chair in the case, they agreed that Billy Garrett would be involved in the guilt phase preparation and presentation and Tinsley would be primarily involved in penalty phase matters App p 4875, PCR 22 Tinsley admitted that he was aware and consulted various materials on preparation and presentation of death penalty cases, including the A B A Standards App p 4875-76, PCR 22-30 He admitted that a goal was to try

to present the defendant in the best light and to avoid alienating the jury App p 4685, PCR 32 He admitted that there was a theory to not be aggressive in a guilt phase in order to not alienate the jury in the penalty phase and try to resolve inconsistencies between each phase of the trial to ameliorate the jury App p 4686, PCR 33

Counsel stated that it was the state's theory that Hughey had busted into Ms Harris's home and murdered Ms Harris and Ms Jackson App p 4721, PCR 68 He stated that the state theory was that he went in and shot Ms Harris in the head with the 20 gauge shotgun, reloaded and shot Ms Jackson He stated that under the theory, that both shootings were at close range and appeared to be accurate shots App p 4722, PCR 69 He recalled the telephone call with the son of Ms Harris while the incident was occurring He stated that the son was worried, due to the volatile domestic relationship what Hughey might do and that both were still alive when he spoke with Hughey App p 4723-24, PCR 70-71

Counsel Tinsley stated that there were disheveled areas at the crime scene Particularly, the front door became an issue because the state tried to assert the damage to the door was contemporaneous with the incident to support burglary App p 4725, PCR 72 Further, the gun used, a single shot shotgun, was significant because it had to be reloaded App p 4725-26, PCR 72-73

Counsel Tinsley stated in preparation of the defense, he went with forensic investigator Don Girndt He recalled that Girndt had some differences with Hughey version Particularly, Girndt did not think that the killing of Ms Jackson was accidental, but that it could be deemed intentional or "heat of passion " App p 4726-27, PCR 73, l 24-p 74, l 17

Counsel Tinsley stated that the initial defense theory first ,was that there was not a

burglary because he was an invitee. Second, the theory was that the killing of Ms. Harris was either accident or involuntary manslaughter and that the killing of Ms. Jackson was either voluntary manslaughter or murder. App p. 4728, PCR 75. Counsel stated that the voluntary manslaughter theory was primarily related to Ms. Jackson, but with a transferred intent theory would also relate to Ms. Harris. App p. 4728, PCR 75.

Tinsley stated that Hughey admitted that Hughey said the gun was initially in the truck of the car and brought it into the house after Ms. Jackson had two knives and a vase and was getting after him. App p. 4728, PCR 75. He confirmed that Hughey had claimed that he did not bring the gun to kill her but to intimidate her because he thought she was dating someone else or was neglecting him. At trial evidence was presented about a confrontation that Hughey had with Michael Adams.⁹

Tinsley acknowledged that an element of manslaughter is “sufficient legal provocation.” App p. 4729, PCR 76. He admitted that there was no provocation from Ms. Harris evident in his investigation or record. He noted that Ms. Harris would also have a right of self-defense and had no duty to retreat and to protect her home. He noted that this would include asking someone to leave if they brought a weapon into her home. App p. 4730-31, PCR 77-78. Tinsley stated that he also thought that Ms. Jackson, as an invitee into Ms. Harris home, would also have a right to defend herself and have a right to ask someone to leave, with force if necessary. App p. 4731, PCR 78.

⁹Michael Adams, who started dating Tesheka in February 1995, testified at the trial that on December 3, 1995, Hughey came up and pushed Tesheka and stated that he was going to kill both of them and then ran away. App pp. 2402-03. This incident was reported to the police. It was reported by the decedent that Hughey told her “I’m going to kill you, I’m going to kill both of you.” App p. 2443.

Counsel Tinsley had concerns about manslaughter as a defense. He felt that they had to be careful not to alienate the sentencing jury by their presentation in the guilt phase. App p 4732, PCR 79. His opinion about the strength of the manslaughter defense was that it was a stretch and had a possible risk to alienate the jurors. He stated that they could have taken a different approach and have “punted” on the defense to the murder charge. He stated that where you run into problems if you punt on both. App p 4733, PCR 80.

Counsel speculated in hindsight that there was a possibility to have just punted on one murder. He stated that if you are convinced that he intended to kill his girlfriend, then you are going to transfer the intent to the killing of Ms. Harris. He theorized that the fight between Ms. Jackson and Hughey was in the heat of passion. App p 4733, PCR 80. He stated that he considered doing manslaughter as to Ms. Jackson and not Ms. Harris. App p 4733, PCR 80, ll 20-21.

Counsel stated that he did not know the effect their presentation had on the jurors. However, he noted that Judge Cole did give a charge on voluntary manslaughter. App p 4734, PCR 81. Although he was aware of focus group presentation, he did not do one in this case. App p 4734, PCR 81. He was aware of a jury selection expert, Denise DeLarue, who does focus groups, but did not retain her. App p 4735, PCR 82.

Counsel stated that a decision was also made that in the penalty phase that they would not seek a statutory mitigating circumstance instruction that the defendant was provoked by the victim into committing the murder. App p 4738, PCR 85.

Counsel Tinsley subsequently stated that throughout his representation of Hughey he offered a three consecutive life sentences - two murder and one burglary to avoid a death.

sentence App p 5124, PCR 471 However, the state never indicated that this was a possibility so they prepared throughout for a trial App p 5124-25, 5151, PCR 471-472, 498 In preparation for the trial, Tinsley and Garrett had several conversations with David Bruck He stated that they discussed the existence of the felony murder doctrine , transferred intent, voluntary manslaughter and whether burglary existed in this factual situation, jury selection and admissibility of the photographs in the case App p 5127-28, PCR 474-75

Counsel Tinsley stated that they developed defenses to each of the statutory aggravating factors He stated that their theory as to the larceny of the car was that there was common ownership between the defendant and his common law wife on the Mitsubishi As to the burglary, it was the theory that he entered the home as a guest He stated that Hughey was adamant in their discussions pre-trial that he did not break into the home and did not kidnap anyone He stated that he had made the down payment on the vehicle and that it drove it sometimes Similar, he stated that he financial transaction card was partially his App p 5134, PCR 481 Tinsley stated that a decision was made to raise these matters in the guilt phase of the trial rather than waiting for the penalty phase Tinsley stated that co-counsel Garrett and the Applicant were in agreement with this approach App p 5135, PCR 482

Counsel stated that in his initial conversations with Hughey, he claimed that the shooting of Ms Harris was an accident App p 5166, PCR 513 He felt that potentially under those facts it would equal criminal negligence or involuntary manslaughter App p 5166,PCR 513 In some other discussions the possibility of self-defense was presented App p 5166-67, PCR 513-14 He acknowledged that the decision was made to go with self-defense as a defense was made early, but was always open App p 5167, PCR 514, 1 2-3 He noted that on March 6, 1997 there was a

meeting with the Hughey family and a discussion was held that counsel thought included the manslaughter defense App p 5167, PCR 514

Tinsley concurred that forensic investigator Don Girndt became involved and disagreed to some extent with Hughey's account of the crime concerning some particulars with Ms Jackson's death App p 5167-68, PCR 514-15 Counsel noted that in his mitigation list he noted that a factor that needed to be considered was the Applicant's ability to recall events as a potential mitigator App p 6168, PCR 515 Counsel further acknowledged that prior to the trial he had evidence that Hughey began drinking heavily after his mother's death and that he potentially had PTSD and that he got mean and would allow the least little thing to provoke him App p 5174-75, PCR 521-22 He stated that this was a two edged sword in response to whether it was wise to seek manslaughter with this information when being "mean" is supportive of murder, but noted that there was also "heat of passion " App p 5175, PCR 522

ANALYSIS

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

- 1 The trial judge gave a charge on "manslaughter " App 3465-67, 3488-89
- 2 The trial judge gave a charge on "transferred intent" as it related to manslaughter App 3467-68
- 3 The Applicant's expert forensic investigator witness, Donald Girndt, agreed that the circumstances leading to the death of Ms Harris from Hughey's testimony were consistent with his conclusions, particular based upon the location of the body, the nature of the physical area and the fact that the blood of Ms Jackson

being outside of the door meaning that they were fighting while the door was open

- consistent with Hughey's testimony App p 3266-3365

4 Counsel did a reasonable investigation of the facts through his interviews with Hughey and forensic investigation by Girndt

5 Counsel did a reasonable investigation of the law of manslaughter and transferred intent, including consultation with legal experts - Prof McNinch and David Bruck App p 4901, 5127-28, PCR 248, 1 20-25, They discussed the existence of the felony murder doctrine, transferred intent, voluntary manslaughter and whether burglary existed in this factual situation, jury selection and admissibility of the³ photographs in the case App p 5127-28, PCR 474-75

6 Garrett felt if they could get him to the jury early in the case, the jury would see that he was not the killer the state was portraying him to be He felt that Hughey handled cross-examination well and it helped personalize him with the jury to identify him as not being heinous App p 4905, PCR 252

7 The Applicant concurred in counsel's theory and was adamant that he did not commit burglary or larceny of the house and did not intend to hurt Ms Harris App p 5135

8 Had counsel been successful in limiting the Harris killing to manslaughter and received an acquittal in burglary and larceny - **no statutory aggravating circumstances would have remained to authorize a death penalty**, even if Hughey was convicted of murder involving Ms Jackson

9 The defense argued that at the time of the killing of Ms Harris, Hughey's intent

was to shoot Ms Jackson after she had thrown a vase, a knife and came at him with a knife and then after he retrieved a gun continued to taunt him with the knife, spit at him and then a fight began “in sudden heat of passion ” App 3430-31 The was argued on a theory of transferred intent App 3432

10 The Applicant testified that he was guilty of manslaughter and the defense requested that he be convicted of manslaughter App 3434

11 Appellate counsel Dudek referred to the instant case is a “classic case of voluntary manslaughter” in his pleadings in the direct appeal wherein the Supreme Court found the manslaughter charge given was adequate and did not conclude manslaughter was not appropriately instructed based upon the facts ¹⁰ App p 4979

In his current memorandum, Hughey contends that the defense was defective concerning any assertion of voluntary manslaughter because there was an absence of sufficient legal provocation because a victim’s exercise of a legal right cannot be sufficient legal provocation He focuses upon counsel Garrett’s testimony that it was more of a voluntary manslaughter accident kind of situation that probably ripened into murder with the wife, but may very well have been manslaughter on the aunt

Respondent admits that there was evidence by which the jury could and did find the

¹⁰Dudek admitted that he stated in his brief that

There was an abundance of evidence in this case that the homicide resulted from a domestic dispute **There was evidence of a classic manslaughter arising from a lover’s triangle, and a fatal argument that turned violent**

PCR 326, citing *Final Brief of Appellant*, p 22 App p 4979 (emphasis added)

existence of malice murder beyond a reasonable doubt and that therefore these actions do not support voluntary manslaughter. Further, counsel admitted that the guilt phase theories were not likely to succeed with a jury, but that it also gave them an opportunity to get him to the jury early in the case, the jury would see that he was not the killer the state was portraying him to be. App p 4905, PCR 252

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

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

heat of passion and sufficient legal provocation must be present at the time of the killing *Cole* 338 S C at 101, 525 S E 2d at 513 “The sudden heat of passion, upon sufficient legal provocation, which mitigates a felonious killing to manslaughter, while it need not dethrone reason entirely, or shut out knowledge and volition, must be such as would naturally disturb the sway of reason, and render the mind of an ordinary person incapable of cool reflection, and produce what, according to human experience, may be called an uncontrollable impulse to do violence ” *Id* at 101-02, 525 S E 2d at 513 (quoting *State v Byrd* 323 S C 319, 474 S E 2d 430 (1996)) Merely displaying a willingness to fight, unaccompanied by any overt threatening act toward a defendant, does not constitute sufficient legal provocation *See State v Johnson* 324 S C 38, 40-41, 476 S E 2d 681, 682 (1996) (holding that the trial judge properly refused to charge voluntary manslaughter despite testimony that individuals approached the defendant as they were “trash talking” and that one of the individuals removed his hat and “stepped out a little bit,” demonstrating a willingness to fight, because there was no evidence that anyone made an overt threatening act toward the defendant) When “death is caused by use of a deadly weapon, the offending words must be accompanied by an overt, threatening act ” *Id* at 525, 466 S E 2d at 362-63 (quoting *State v Lowry* 315 S C 396, 399, 434 S E 2d 272, 274 (1993) (internal quotations omitted))

Moreover, “[t]he exercise of a legal right, no matter how offensive to another, is never in law deemed a provocation sufficient to justify or mitigate an act of violence ” *State v Ivey* 325 S C 137, 142, 481 S E 2d 125, 127 (1997) “A victim's attempts to resist or defend himself from a crime cannot satisfy the sufficient legal provocation element of voluntary manslaughter ” *State v Shuler* 344 S C 604, 632, 545 S E 2d 805, 819 (2001), *State v Tyson* 283 S C 375, 379, 323

S E 2d 770, 772 (1984) (holding that the trial court properly refused to charge the jury on voluntary manslaughter because evidence of a struggle as the victim resisted an armed robbery showed that the victim was defending himself) See also, *State v Holland* 2009 WL 2591257, 3 (S C App) (S C App ,2009) ¹¹

The South Carolina Supreme Court recently considered the propriety of manslaughter instructions in State v Starnes, 388 S C 590, 698 S E 2d 604 (2010) and State v Wharton, 381 S C 209, 214-215, 672 S E 2d 786, 788 (S C 2009) In Starnes, that Court held that there was no evidence that defendant shot victims in the heat of passion upon sufficient legal provocation, where defendant's testimony that he felt threatened and was in fear when one victim pointed a gun at him was not evidence that defendant was out of control as a result of his fear or was acting under an uncontrollable impulse to do violence when he shot victims In Wharton, the Court concluded that there was no evidence in the record of sufficient legal provocation Testimony showed that Wharton was in a rage after his argument with Suber and that several people were trying to calm him After attempts to calm him failed, Wharton deliberately instructed someone to bring him a gun, *despite there being no threat of another person with a weapon* There was no evidence showing Victim provoked Wharton, and although there was evidence that Wharton and Shaw argued and exchanged words, there was no evidence Shaw posed a threat to Wharton either by possessing a weapon or through hostile acts See *State v Byrd* 323 S C 319, 322, 474 S E 2d 430, 432 (1996) (holding that where death is caused by the use of a deadly weapon, words alone,

¹¹In *Holland*, the Court recently concluded that “the requirement that we view the evidence in the light most favorable to the defendant does not allow us to throw out all reason from our analysis or to ignore the overwhelming, clear evidence of Holland's mission of violence against Koehler-a state of mind that began before Koehler even stepped out of Caruthers' vehicle ”

however opprobrious, are not sufficient to constitute a legal provocation, but words accompanied by hostile acts may, according to the circumstances, reduce a charge from murder to voluntary manslaughter) The Court concluded that while Wharton may have been in a rage and acting under a sudden heat of passion, there is no evidence of sufficient legal provocation See *State v Pittman* 373 S C at 573, 647 S E 2d at 168 (recognizing that both heat of passion and sufficient legal provocation must be present at the time of the killing) ¹²

¹² Three critical cases are frequently considered in whether a manslaughter instruction should be given *State v Knoten* 347 S C 296, 555 S E 2d 391 (2001), *State v Lowry* 315 S C 396, 434 S E 2d 272 (1993), *Carter v State* 301 S C 396, 392 S E 2d 184 (1990), *overruled on other grounds by Brightman v State* 336 S C 348, 520 S E 2d 614 (1999), and *State v Gilliam* 296 S C 395, 373 S E 2d 596 (1988)

In *Knoten* our Supreme Court held that a jury charge on voluntary manslaughter was required when the evidence included a confession that showed sufficient legal provocation despite other evidence showing that the defendant later recanted the confession *Id* at 308-09, 555 S E 2d at 397-98 See, *State v Commander* 2009 WL 1676014, 4 (S C App) (S C App ,2009) One of Knoten's given to police indicated that the victim cut the defendant with a knife and chased him out of her apartment into the frigid weather while he was naked and that he reached into his trunk to obtain a metal pipe, presumably to defend himself as he went back into the apartment to retrieve his clothes 347 S C at 303-04, 555 S E 2d at 395 As he entered the apartment, the victim cut him with a knife a second time, and the defendant then hit the victim on the head with the metal pipe 347 S C at 304-05, 555 S E 2d at 395-96

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

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

In *Carter* the defendant's heat of passion was provoked by the victim's striking the defendant and forcefully ejecting him from the victim's house 301 S C at 397, 392 S E 2d at

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

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

Cooling Off Period

185 And in *Gilliam* the defendant's heat of passion was provoked by the victim's firing a gun at the defendant 296 S C at 397, 373 S E 2d at 597. But in *State v Holland*, the Court of Appeals found that Holland's rage was provoked by a mere verbal argument inside a bar, which does not rise to the level of legal provocation. Again, there is no **reasonable** inference of a specific, identifiable hostile act of victim Koehler that posed a genuine threat to Holland. However, in the instant case, Hughey he was initially provoked by the vase and knife assault and it continued as he returned with Jackson into the house and the struggle continued when Mss Jackson refused to put the knife down.

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

Deficient performance decision must be viewed from counsel’s perspective at the time of the representation and not through hindsight from subsequent appellate decisions. The Applicant relies upon opinions of the Court that occurred **subsequent** to Hughey’s trial to suggest it was deficiency. In *State v. Cole*, 338 S.C. 97, 525 S.E.2d 511 (200), the Court found that a period of three to five minutes constituted a sufficient cooling off period. In *Cole*, a fight occurred between the victim and the defendant at the victim’s home. *Id.* Focusing on the actions of the defendant in the intervening time between the provocation and killing (as distinguished from the quantity of time that passed), the Court found that the actions taken by the defendant to go out to his car, get a knife and return to fatally stab the victim indicated “cool reflection.” *Id.* The facts in *Cole* demonstrated cooling off as a matter of law, especially since the defendant himself admitted that “he had enough time to get his head together.”

Unlike Cole, while Hughey was at the car, Jackson *continued* in her assault by wielding the knife that was a part of her attack accompanied by the verbal threats, according to Applicant. Although there may be evidence within the defense theory of deliberation by hoping that she would drop the knife with the showing of the gun, he similarly noted his fear by the continuing threats within his testimony.

The Applicant contends that the short time frame was enough to remove manslaughter. However, there is no bright-line timeline as he may suggest. In *State v. Pittman*, 373 S. C. 527, 575, 647 S. E. 2d 144, 169 (S. C., 2007), the Court held that the law has not defined a bright-line rule for what constitutes a sufficient time for cooling off; the Court indicated that whether the defendant's actions during the intervening time between the provocation and the killing indicate the absence of sudden heat of passion is an appropriate question for the court as a matter of law.

13

¹³See *State v. Walker*, 324 S. C. 257, 261, 478 S. E. 2d 280, 281-82 (1996) (finding that the defendant demonstrated cool reflection through his actions between the alleged provocation and the killing), and *State v. Byrd*, 323 S. C. 319, 322-23, 474 S. E. 2d 430, 432 (1996) (holding that the defendant's actions between the alleged provocation and killing did not support a finding of sudden heat of passion). See also, *State v. Smith*, 609 S. E. 2d 528 (S. C. S. Ct. 2008) (cert. pending) (defendant hears allegations of victim molesting child in morning, goes to work and other activities, and then does not violently confront victim till evening "Sufficiently reasonable time" had passed to allow passions to cool).

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

In *State v. Walker*, the Court in 1996 did note that cool reflection suggested by asking the victim to cool down removed the possibility of manslaughter. However, unlike Walker, here the victim was still wielding a weapon and making threats against his life when the assault continued at the door. There was some evidence to suggest renewed and continued heat of passion. In *State v. Byrd*, the case clearly was not evidence of any manslaughter. Here, unlike Byrd, the victim was shown as wielding a knife and continuing the actual threats against Hughey in her version. In *Byrd*, after the initial threat was made, there was no evidence of it continuing prior to the

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

Transferred Intent and Manslaughter

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

Respondent submit that it cannot be ignored that the trial judge accepted the legal theory presented by the defense of transferred intent and manslaughter in his instructions. This advocacy

shooting that resulted in Ms Harris death

on the part of the defense was supported by decisions of the South Carolina Supreme Court going back to 1938. Although the Court now claims the issue is “unsettled” in 2009, viewing it in 1997, there was not caselaw that precluded its possibility in a manslaughter setting. Counsel was not deficient in attempting to such mitigation to get a manslaughter verdict as to Ms. Harris’s death.

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

Since it remained an unsettled question of the law in 2009, plainly defense counsel’s approach in 1995 through the trial in 1997 could not be deemed deficient. A review of the existing precedent may assist. See *State v. Kennedy*, 85 S.C. 146, 67 S.E. 152 (1910), *Annotation*

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

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

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

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

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

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

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

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

Where accused shoots at one party and unintentionally kills a second party, he is guilty of murder in the second degree, if killing of first party would have constituted murder, or he is guilty of manslaughter if killing of first party would

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

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

State v Williams 199 S E 906, 908 (S C 1938) In upholding this conviction for **manslaughter**, the Court necessarily relied upon this “well-settled principle” of transferred intent and its expressed application in 1938 ¹⁵ Under Applicant’s current construction, the direct verdict motion would have to have been granted Necessarily, applying transferred intent it was not

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

have constituted manslaughter Pen Code 1925, art 42 *Covert v State*, 134 Tex Crim 12, 113 S W 2d 556 (1938)

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

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

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

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

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

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

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

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

Next, the Court addressed the general concept of transferred intent in *State v Fennell*, 340

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

This Court in several cases has held that a defendant may be found guilty of murder or manslaughter in a case of bad or mistaken aim under the doctrine of transferred intent In the classic case, the defendant intends to kill or seriously injure one person, but misses that person and mistakenly kills another Although the defendant did not act with malice toward the unintended victim, the defendant's criminal intent to kill the intended victim (i e , his mental state of malice) is transferred to the unintended victim “If there was malice in [defendant's] heart, he was guilty of the crime charged, it matters not whether he killed his intended victim or a third person through mistake ” *State v Hayward* 197 S C 371, 377, 15 S E 2d 669, 672 (1941) (affirming murder conviction where defendant testified he mistakenly shot and killed police officer who allegedly broke open his front door, believing the officer to be an assassin sent by an angry former employer) See also *State v Gandy* 283 S C 571, 324 S E 2d 65 (1984) (affirming murder conviction where defendant intending to kill one man shot

through a closed door, killing unintended victim instead), *overruled on other grounds by State v Lowry* 315 S C 396, 434 S E 2d 272 (1993), *State v Horne* 282 S C 444, 447, 319 S E 2d 703, 704 (1984) (holding that State in future may prosecute defendant for murder of viable fetus when defendant attacks a pregnant woman with malice and in the process kills the fetus, an unintended victim), *State v Williams* 189 S C 19, 24, 199 S E 906, 908 (1938) (affirming murder conviction where defendant shot at intended victim who was driving a wagon of cotton, but missed him and mistakenly killed the man sitting beside him), LaFave & Scott, *Substantive Criminal Law* § 3 12(d) (1986) (discussing transferred intent), McAninch & Fairey, at 17-19 (same)

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

The Applicant argues that a different concept prevents the applicability of transferred intent to manslaughter because of case law that “sufficient provocation necessary to justify a voluntary manslaughter charge must come from the victim ” In *State v Childers*, 358 S C 614, 595 S E 2d 872 (Ct App 2004), the testimony showed the victim was Childers’ estranged ex-girlfriend The defendant testified he saw the victim at a turkey shoot and they tried to reconcile After the turkey shoot, the defendant drove to the home of the victim’s mother and wanted to talk with the victim He brought a loaded gun with him in case he encountered stray dogs during his walk The defendant testified that when he arrived at the house, he saw the victim, her sister, and her sister’s ex-husband in the yard The defendant said that as he approached, the ex-husband shot at him The defendant testified he immediately fired back and ran away, and the victim was shot and killed The trial judge refused the defendant’s request for an instruction on voluntary manslaughter and the defendant was convicted of murder The Court of Appeals reversed, finding the defendant was provoked The Court of Appeals held the act of Childers pointing and firing of the gun under the circumstances warranted a voluntary manslaughter instruction It further held,

“[a]lthough it was the victim’s brother-in-law, and not the victim herself, who allegedly shot at and thereby provoked Childers, the doctrine of transferred intent justifies a voluntary manslaughter charge as to the killing of the victim ” Id , 595 S E 2d at 875

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

However, in *Childers*, in dissent Justice Pleicones, joined by Justice Moore, however, believed “this case represents a classic claim of transferred intent ” Id They held the critical question was Childers’ mental state at the time he shot and, if there was evidence he fired in sudden heat of passion upon sufficient legal provocation, “it matters not that his aim was poor ” Id The dissent found that since Childers testified his sudden heat of passion was aroused when the victim’s brother-in-law shot at him and that in returning fire, he mistakenly shot the victim, the doctrine of transferred intent applied to the submission of a voluntary manslaughter instruction, stating that the majority misapplies the doctrine of transferred intent, citing *Fennell State v Gandy and State v McElveen* 280 S C 325, 313 S E 2d 298 (1984) The dissent further

asserted that there was error in the majority decision where it relied on a case where the legal provocation of “A” was used by the defendant to justify his intentional shooting of “B,” *State v Locklair* 341 S C 352, 535 S E 2d 420 (2000), and one where there was simply no legal provocation *State v Tucker* 324 S C 155, 478 S E 2d 260 (1996)

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

State v Locklair, 341 S C 352, 535 S E 2d 420 (2000) also supports this conclusion. In Locklair, the defendant argued he was entitled to a charge on voluntary manslaughter, because (1) there was evidence of a domestic dispute between him and the victim, and (2) the victim’s mother threw a cigarette lighter at him immediately before he shot the victim. This Court held the victim’s words alone, absent any overt physical actions, was insufficient provocation to reduce the crime to manslaughter. This Court further explained that any alleged provocation of the victim’s mother was insufficient to reduce the crime to manslaughter for the *defendant’s intentional shooting of the victim*.

Harris and *Locklair* are distinguishable from the circumstances in the present case. Hughey was allegedly provoked by Jackson’s initial assault upon him with the vase and knives.

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

and continuing threat to kill him. Although the state was able to disprove its existence, the defense was not constitutionally deficient in seeking to present a defense arguable available under any evidence standard. See *State v. Cottrell*, supra.

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

Further, the second prong of Strickland cannot be satisfied. It is the Applicant's current theory that guilt on each of the murders should have been conceded. *Strickland* prejudice can not be shown as to guilt. Further, his speculation about its impact on the penalty phase is inadequate speculation and not sufficient to show but for requiring the state to prove guilt beyond a reasonable doubt in the guilt phase, that there is a reasonable probability that the result of the proceeding would have been life rather than death. The Applicant ignores that the same presentation of evidence would have been made in the penalty phase to attempt to remove the existence of the aggravating factors of burglary and larceny. Further, since there is no evidence

that Hughey has changed his version of the incident, a version that he was adamant about at trial, how can it be said that the mere presentation in the guilt phase of a defense which still admitted the killings, created *Strickland* prejudice. His claim was properly denied.

II Certiorari is not warranted where the PCR court concluded that trial counsel reasonably investigated the mental and family background and presented an appropriate case in mitigation

In his second argument of ineffective assistance of counsel, Hughey claims that his counsel failed to investigate or present adequate mitigation evidence. He specifies adaptability to confinement and the capacity to appreciate the criminality of his conduct as two examples of this error. The PCR court rejected these claims concluding that counsel made strategic decisions during the trial. Concerning adaptability to prison life, the Court found that counsel considered presenting this evidence, but because of negative experience in capital trials on this same issue, counsel decided not to present similar testimony, after they had met with detention officers. The PCR court concluded that neither deficient performance or prejudice under *Strickland* was shown. App p 5925. Concerning mental health issues, the PCR court concluded that counsel reasonably investigated the mental health background and through the mitigation presentation, the jury was aware that Applicant came from a dysfunctional experience. App p 5926. Respondent submits that counsel reasonably investigated the background of the Applicant, both mental and family background, and presented an appropriate case in mitigation. Although the Applicant has presented a fancier case in mitigation in the PCR proceeding, Respondent submits that in light of what evidence, much of it similar, that the jury heard, there is probative evidence to support the PCR court's conclusion that Hughey has failed in his burden of proof to show a reasonable probability that the result of the proceeding would have been different.

What The Jury Heard At The Trial

The record reveals that mitigation testimony was presented from Ms Anthony Wilson, Anthony Scott Harrison, Jessie Christopher Brown, Nancy Leigh Ramey, Rev Wendall Cox, Gloria White Harrison, social worker Jeff Yungman, and Dr James Evans, an expert in neuro-psychology and psychology App p 3768-4003 ¹⁷ In addition, the Applicant had already

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CASE IN MITIGATION

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

Counsel Tinsley called Anthony Wilson to testify to testify about the Applicant and his family background App 3768 Wilson testified that her mother was Dolly Mary Hughey and father was Alan Carlyle Although her father was not John Henry Hughey Smith, she said the Applicant was her brother, albeit half-brother App 3770 She said that their childhood was “fat”, with seven (7) children The Applicant was the youngest son and 6th of 7

She said she did not know his father well because her father was white and did not live in the home App 3771 Her father had fathered three (3) of the children She said her biological father was now dead Id 3771-72

She said Mr Hughey (John Henry Hughey Smith) came into the picture when she was young and he moved in with her mother They had four (4) children, including the Applicant

Wilson described her stepfather as black and that he hated Wilson because she was not his own child App 3773 She described being beaten, deprived of food and being run out of the house by her step-father App 3773

Wilson said her stepfather worked construction She recalled that he would come home drunk every Friday when he returned from a week of work App 3774-75 Wilson said her stepfather would be drunk, out of money, and he would fuss and fight with her mother resulting from her requests for money to buy groceries App 3775

Wilson described that the family lived in a different places throughout her childhood

Wilson said the Applicant’s father did not treat the younger four as badly as the older because they were his own children and he was a better father to them App 3775-76 However, Wilson declared that he wasn’t a good father to anybody Id Wilson described the fact that her stepfather would hit Wilson with a stick or anything he would pick up She also said her stepfather hit the Applicant Id She said the Applicant left home as soon as he was able to leave She felt John Henry was an alcoholic who drank all the time App 3777

Wilson recalled in the early 1970's that the Applicant getting his head cut open She described the parents fussing with her stepfather engaged in drinking She recalled that the Applicant ran to get into the car with them to leave However, when the car unexpectedly went into reverse and the Applicant fell out and cut his head open on the bottom part of the door Wilson described seeing the “white stuff” inside his cut open head He has taken to the hospital and had surgery and remained there for awhile before he came home App 3779

Wilson stated the Applicant had two more head injuries Once he was hit in the head with

a golf club and a second time he hit his head on the windshield in a another car wreck which scarred up his face App 3779 Wilson also described her brother being in an another accident when he drove the pulp wood truck when he was a child App 3780-81

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

Wilson described seeing the Applicant and Sheka living together before and after his mother's death App 3784 He said John's relationship with his mother was good, that he was her baby boy Wilson said the stepfather lost his mind and drank more after Dolly May's death

She said the Applicant complained of headaches after his accident She felt the Applicant was ashamed of his head and would wear caps and grow his hair out She said the Applicant treated his mother good and they would move furniture together She said John Henry died a year after his wife App 3786-87

She described the Applicant's changes after his mother died The Applicant did not seem to care for himself anymore and did not care how he dressed stopped lifting weights, and isolated himself from his family App 3787 She said the Applicant would write things on mirrors about his mother like the date she was born and died The Applicant described hearing talking in the house to him, but did equate it with his mother

Wilson said John and Sheka had two sons She said they would come over to her house App 3789

Wilson described a gun, Exhibit 48, that the Applicant's father gave to the Applicant She said her stepfather would shoot it all the time, including one time at her App 3789 The basis for it was when Wilson caught him with another woman and told her mother App 3790 Her stepfather told her Wilson was lying App 3790-91

Wilson said her stepfather would also call them names, such as half-white and other things She said the Applicant was exposed to this repeatedly App 3791

Wilson said she loved her brother She opined that Hughey had a hard life, saw terrible things that his father did, and did not have a positive male role model in his father App 3792 She felt the Applicant had suffered an abusive childhood from the violence he saw toward his mother and the shooting of weapon inside the home App 3793

On cross-examination, though, she admitted that when she went over to the Applicant's she saw Sheka with him App 3800-01

2 Anthony Scott Harrison

Harrison testified he met Hughey in 1984 and that he was introduced to Hughey's sister Gloria He said he had been married to her for 14 years and that they had four children App 3803-04 He observed Hughey before his mother's death as treating him like a big brother and that Hughey respected him and his wife App 3804 After the death, the Applicant changed a little and would not talk much and was distant to the family App 3805 He felt the death affected the Applicant deeply because of the close relationship App 3806

Harrison described the Applicant's help around his house where he helped out cutting grass, cleaning gutters, and putting a new roof on his mother's home App 3806 He also helped build his sister Ruth's house App 3807-08 He did roofing Id

Harrison felt John Henry Smith was a “good father”, but drank a little too much App 3807 However, he did not observe how he treated Ms Dolly or the older children Id

On cross-examination, Harrison stated he was married to Gloria, the sister When he visited the family, he said nothing troubled him about the Applicant App 3810-11 After the death, he said he saw the Applicant, but found “he was still acting the same” and “wasn’t no strange behavior ” App 3811 He found him to have a normal life App 3812

Harrison further stated that the day after Applicant murdered Tesheka Jackson, Hughey told them he was in Georgia because he took someone to the hospital because they had AIDS App 3815 After Harrison had learned Sheka had been killed, he would not talk to them After he attempted suicide, he admitted the killing App 3816

3 Jessie Christopher Burton

Burton, a friend and cousin of the Applicant and victim, described Hughey helping on jobs at his house, including roofing, cutting grass, and helping around the house after Burton had broken his arm App 3818-19

He described a birthday party in September 1991 for Burton’s son which revealed Hughey’s interaction with children He introduced a videotape of the family gathering and described Hughey treating the children “like his own ” App 3824 He described another event on December 4, 1995 App 3825-26

Burton felt that Hughey changed after his mother’s death and it was the first time he saw Hughey cry App 3837-38

On cross-examination, it was developed that Hughey did not bring his older son to the birthday party because the mother’s family would not allow him around that son App 3832 Burton opined that everything was fine with Hughey prior to 1991 He said after 1991 he was concerned about Hughey’s driving because his license was suspended App 3834-35

4 Nancy Ramey

Ramey, half-sister of the Applicant’s mother, testified about her relationship with John Henry Smith She described him as “a good person, and then he would drink and he was a violent person ” App 3838-39 She said she saw him hit her sister when he was drinking on more than once occasion

Ramey testified that Smith did not treat his stepchildren like he did his own and was mean to than App 3839

She described in the 1970's when Smith was drinking, got in his car and the three year old Applicant fell out of the car and was run over when Smith was drinking App 3840, 3845 She said that they took him to the hospital and was bleeding and he had a head wound and it was touch and go for a few days Id

She described an April 1991 birthday party for Justin at her home and saw the Applicant playing with the children at the party She also saw Hughey with Sheka and their children playing at her work App 3841

She felt that Hughey treated her with respect as his aunt App 3842 She described him helping her every year haul wood to get ready for winter and help “in other ways ” App 3842

She felt Hughey was affected in September 1991 by her sister’s death when she was mowing the grass and was killed by a drunk driver Id She said he was living with his mother

and father at that time She concluded that he was helpful and respectful to her App 3844

On cross-examination, she stated she only knew of the two children the Applicant had with Sheka App 3846

She felt after 1991 that Hughey was just different and not the same after his mother's death, but she could not be more specific App 3846 She noted that the two children he had with Sheka were born after 1991 in 1992 and 1994 and the oldest would have been three when Sheka was killed App 3847

5 Reverend Wendell Cox

Reverend Cox of the New Friendship Missionary Baptist Church testified he knew the Applicant from church and his mother's home He recalled Hughey's mother being killed by a drunk driver and visited the home He felt the mother played the important role in the family decisions and moral support He saw Hughey at church before and after his mother's death through the years with his mother and later with Sheka and the children App 3841

6 Gloria White Harrison

Gloria Harrison testified again in the mitigation phase concerning the family background App 3853 She stated her parents were John Hughey Smith and Dolly Hughey She confirmed that the family moved frequently She said she had two older sisters and one older brother and two younger sisters and one younger brother App 3854 She stated her mother was the sole support for all seven

She said her mother was initially married to Alan Carlyle who parented the first three, but did not live in the home or provide any financial support Subsequently, her mother married John Henry Hughey Smith who was Gloria's father App 3856 She said her father always drank She described seeing him violent when he drank She said he had a good job and made good money, but his downfall was women and his drinking habit She described his return on the weekends and her mother asking for money and he'd always get angry and take it out on everybody, including the Applicant App 3858 She felt he was rougher on the stepchildren App 3859 At one time, her father started shooting up the ceiling with his rifle, her parents fought and then they called the police App 3859

She also described the car incident in the 1970's when the Applicant was thrown from the car when his father was driving drunk App 3860 She said the open door struck Hughey and cut his head open App 3860 She said Hughey was in the hospital a long time She described another event when Hughey fell off a tractor and he hit his head On another event Hughey was "sniffing gasoline", fell asleep and fell off the truck when he was six App 3861 She also recalled another accident when they were in a car accident near Anderson App 3862

She said that Hughey always complained about having headaches and had several blackouts after the trauma App 3863

Harrison stated that there was a blessed mother-son relationship between Hughey and his mother where they would do things together She said he took care of his mother, particularly after his father had a work-site accident and had to have a plate put in his head App 3865

In September 1991, she learned her mother was killed while cutting grass at her sister Ruby's home when a drunk driver lost control She said her sisters Ruby and Anthony (Tony) witnessed it They had to get counseling and her death destroyed the family App 3867

Gloria similarly described how her father treated the family members different by not buying things for the step-family. Gloria noted the difference in the family after her mother's death from the shared large family gatherings on Sundays and holidays. App 3868-69

She described her own relationship with the Applicant as initially being full of life until his mother died. At that time, he became distant, not coming by to see her. She said he did not receive counseling. App 3870. She said he appeared to remain distant and running from the truth of his mother's death after it. App 3871. She said he drank more after her death. App 3872

She said her own father died one year after his mother's death. Her father would be withdrawn and sit in the chair crying and saying she would be home. Ultimately, he ran out of money and started begging for change for a drink. App 3873

She described after the death that the Applicant was calm, but was looking for someone to be his mother. Id. However, she denied that he was ever talking to his (dead) mother, but his dad did. App p 3873, ll 20-25

She said her brother had always been there for her and that they share a bond together. App 3875-76

She described the Applicant helping around the house with yard work, changing curtains, taking out the ashes. The family would also call upon John to do manual labor for them. App 3876-77. She recalled the Applicant helping an elderly lady at Wal-Mart take bags to her car which created a new position there. She said he was always willing to help others. He helped her when he took and buried her puppy after it had been hit. App 3878

She again described him before 1991 as a "more good person" and after he became withdrawn. Gloria stated that she was saddened by Sheka's loss and went to her funeral. She stated that she recalled the other victim, Mrs. Harris, walking with her boys and they'd all play together.

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

On cross-examination, she said Hughey told her on December 4 that killing Mrs. Harris was an accident. App 3881. She said she could not believe that Sheka was gone. She denied knowing a Tiara Sade DeVette, Lachina Ophny, and Aquata Ophny. App 3884-85

She testified about Hughey suffering from blackouts. She recalled a blackout by the Applicant at her home, but could not remember when it was, but did not take him to a hospital. App 3885-86. She also recalled a second blackout in Abbeville after her mother died, but did not take him to a hospital then either. She did not think he had any medical attention. App 3887. She was not contending he was in a blackout on December 4 when the crime occurred. App 3887

She admitted Hughey did not have any relationship with his daughter Kiara over the past few years, but had gotten money before through a court order. She did not know about any support he gave for Tiara.

She did not think he appeared distant when he was with the children at his home. App 3890

7 Jeff Yungman

Forensic Social Worker Jeff Yungman testified as an expert in social work App 3899-3904 He testified that he wanted to determine if Hughey was maltreated as a child and the effect on his decision making powers, whether he had head trauma and if it made a difference on his decision making, and the impact of the death of his mother App 3904 He said he reviewed school records, medical records from Northeast Georgia Medical Center, Anderson Hospital and Abbeville County Memorial Hospital He also reviewed a “notebook” found at his residence and interviewed Anthony, Donny Ray, Ruby, Gloria and Barbara

He stated that he located five (5) separate occasions where Hughey suffered head trauma and taken to the hospital including a 1973 car incident, a 1976 fall off a tractor, a 1981 hit in the head with a shovel, a 1994 auto accident, a 1995 auto accident, and a 1995 hit in the head with golf club App 3906

He noted there were two distinct families He learned that his father was an alcoholic and took rage out on his children and beat his wife with children intervening He noted he would shoot his shotgun in the house Further, the family lived in five (5) different locations in his childhood He also beat his children with belts, straps, tree limbs, etc He described the different reactions from the children to even hiding in the woods to avoid the beatings App 3908

Yungman noted that the father targeted the older children, though the younger observed the beatings Hughey at age 6 to 8 started huffing gasoline fumes as a way to deal with the beatings or his mother’s treatment App 3909 Yungman stated that studies have shown the huffing causes “severe cognitive impairment” if done over a long period, and Hughey did it for one to two years App 3909

According to school records, Hughey had an 80 IQ which is on the bottom and of the low average range He did not receive any special education and dropped out of school at age 16 when he was in the tenth grade App 3910

He opined the lack of school success can bring about low self-esteem and can be the result of being abused as a child App 3911

His relationship with his mother was close and special and that he did everything for her and was with her at all times App 3911 He described her as his emotional support App 3911 He described her death by a drunk driver He said everything changed for the Applicant after his mother passed away He was withdrawn, had auditory hallucinations feeling his mother was in the house, not listen or take advice from others, and started drinking heavily App 3912 He also refused to go to his sister’s house where the death occurred

Yungman stated these symptoms were consistent with what he had seen in disturbed children who suffer from post-traumatic stress disorder (PTSD) App 3913 He opined the traumatic event was the described the first head injury where he was hospitalized for 6 days when his scalp was peeled back App 3914 He noted this was caused by his father when he was intoxicated App 3915

He described the “poor home life” as unique in the abuse caused by shooting the weapon He noted the father being struck by the backhoe caused seizure disorders App 3916 He noted family on his father’s side had been committed to a mental hospital and two others committed suicide App 3916

He described the father's drinking episodes on payday and beating the family, including when his wife was pregnant with the Applicant App 3917

He noted as the children got older the level of violence and drinking increased App 3919

Yungman stated, that depending on the school district, someone with an 80 IQ would have some special education Further, after his mother's death, it would have been appropriate for him to have counseling App 3920

He felt, after her death, that he lost everything and all emotional support App 3920 He was withdrawn and had suicide ideation because he felt hopeless App 3921 "He thought he heard his mother speaking to him and he would answer her by writing on the mirrors of his room " App 3921

Yungman opined this affected his relationship with others and ability to make decisions When stressed, he reverted to the violent behavior he learned as a child App 3922-23 After her death, he started drinking heavily App 3923

Yungman noted that Hughey was exposed to violence in his home, he received abuse himself He was affected when a caretaker father through neglect caused his initial head injury App 3925 His third area of 6 head traumas in 22 years had an affect on his decision making power App 3925 His fourth area was his ability to cope while his mother was alive and then unable to do so after her death App 3926 This may explain why in stressful situations, as on December 4, he acted as he did, according to Yungman

He noted that in stressful situations, he would revert back to learned behavior This was supported by his employment reports where after her death he did not hold a steady job App 3928 after her death, things went progressively downhill App 3929

Yungman summarized that his opinion is not an excuse, but providing an explanation for the behavior App 3932

On cross-examination, Yungman stated that he was first contacted three weeks to one month prior to trial App p 3933, ll 23-25 He stated he had not prepared a report He said he advised counsel of his findings after the trial started App 3936

He noted that there was no medical history of blackouts App p 3938, ll 8-10 He noted the initial injury was sewn up but there was no operation on the brain or skull App 3942 As to the other injuries, he was treated in the emergency room and released Id The family described after his mother's death and lost a job due to drinking App 3948-49 Yungman initially stated Hughey had not gotten through the grieving process, but did not ask him how he felt when his children were born with Sheka App 3952-53

7 Dr James Evans

Dr James Evans, a psychologist testified as an expert in psychology and neuropsychology App 3965 He administered the major portion of the Halsted-Reitan neuropsychological test battery, Wechsler Normal Intelligence Scale and a few Rorschach tests App 3966 He spent six hours with the Applicant September 27 and July App 3967-68 He also performed malingering tests App 3967 He opined that he was not faking App 3968

Dr Evans stated he initially performed a Quantitative E E G test in July App 3968 He found "strong evidence" of brain dysfunction which he opined would lead to trouble with verbal

testified in the guilt phase about his general background App p 3064-3253

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

1 The defendant has no significant history of prior criminal conviction involving the use of violence against another person

2 The murder was committed while the defendant was under the influence of mental or emotional disturbance

learning App 3970

He also stated similar evidence found on the neuro-psychological tests showed dysfunction. He said the head injury could have been the source of it or made it worse App 3971. These problems could make school-type learning difficult in reading, spelling, and efficient speaking App 3972. He opined it could also lead to an inability to adapt to stress App 3973. He felt he had a verbal learning disability in school and it would have made it difficult App 3973.

As to his IQ level, it was within average range but on the bottom. He felt he was at a seventh grade level for recognizing words and doing arithmetic App 3974.

Dr. Evans stated he did not find organic brain damage App 3975. However, there was no M R I scan or X-ray that showed it App 3975. Dr. Evans stated that he did not see signs of depression in his first two meetings, but a couple of weeks prior to trial he seemed depressed and decompensated App 3977.

Dr. Evans also opined that his mother's death created problems. He described seeing him ten (10) days before saying "he saw his mother in the room with them" App 3979. He told him it happened regularly and he heard her talking App 3979. He said it sounded like malingered, but he felt it was not because he told him she always says the same thing which were the last words she told him about keeping the dinner warm until she got back from the store and then they would eat together App 3979-80.

Dr. Evans stated he does not opine it was dissociation, but evolved from PTSD App 3981-82. He stated this would make him less capable of making decisions and have a lower tolerance for stress App 3982. He confirmed that prior abuse could be a stressor and could affect memory through dissociation App 3984. Avoidance of his sister's home was another symptom of PTSD App 3985.

Since he could not tell what caused the scars on Hughey's head, he did not opine they were from head trauma, but are consistent with it App 3987-88.

Dr. Evans opined Hughey was different than the average person and this difference may be factors in the crime App 3989. He said there was a lot of converging evidence of organic brain dysfunction App 3989.

3 The age or mentality of the defendant at the time of the crime

App 4060 The trial judge did not charge the statutory mitigating factor that “ the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired ” R 4059 In addition, Judge Cole instructed

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose That is to lessen or reduce the degree of the defendant’s guilt in the commission of the crime of murder

Those that the defense contends should be considered are

- Any prior good acts of the defendant,
- the defendant’s level of intellectual functioning whether as a natural consequence of his birth or as a result of physical and/or emotional trauma suffered as a child or as an adult,
- and any other evidence relating to a mitigating circumstance which you find to be appropriate and which you find to have been established by the evidence in the case

App 4060, 1 13-4061, 1 2

A COUNSEL ACTED REASONABLY IN DECIDING NOT TO PRESENT ADAPTABILITY TO CONFINEMENT MITIGATION EVIDENCE

Respondents submit that the case in mitigation did not include any evidence of adaptability to prison life based upon his present confinement history As revealed in the above summary, the mental health evidence revealed that Hughey, in times of stress will revert to his learned behavior of violence The testimony of the Applicant’s counsel reveal it was considered by counsel Tinsley with the assistance of counsel Garrett negative experience in the earlier

Elmore trial Although counsel was aware that Hughey had not been in any serious trouble in jail, he chose not to present the evidence even though he had the jail guards on his witness list Respondent submit that this was a strategic decision made by the defense team in the trial The Applicant has failed to show the decision was based on neglect or ignorance

1 COUNSEL TINSLEY ASSESSMENT

Counsel Tinsley stated that he and Garrett were both aware that evidence of adaptability to prison was appropriate evidence in a capital proceeding He was aware that jail and prison records was appropriate information to gather in defense App p 4681-82, PCR 28-29 More particularly, he testified that he specifically considered it in Hughey's case as a good penalty phase issue as good adjustment to custody and adaptability to prison App p 4682, PCR 29 Exhibit 3 ¹⁸

¹⁸Counsel Tinsley stated that he considered a number of themes in his preparation for the penalty phase These were including **adaptability**, head injuries, sniffing of gasoline, disassociation, dysfunctional family, domestic nature of the crime, his mother's death, the killer's punishment from her death, resulting PTSD, bereavement, the killing of ms Harris while trying to kill the common law wife, because of the children don't execute the remaining parent, young age of 26 at the time of the crime, mental functioning at 13 year old level, no significant prior violent crime history, mental duress at the time, capacity substantially impaired, some provocation, borderline intellectual functioning, abused by father and prior good acts App p 5137, PCR 484

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

Counsel Tinsley noted on the notice of evidence in aggravation document that he received on September 7, 1997, Lt Allen's name for adaptability in prison 4741, PCR 88, Exhibit 17 App p 5278-82 He stated that Lt Allen was a jailer in Greenwood from 1995 to 1997 while Hughey was in custody Id However, he was deceased at the time of the PCR hearing Tinsley stated that he felt that Lt Allen would have been a favorable jailer and would deflect issues of future dangerousness if presented PCR 90 He had also made reference in his records in preparation for the penalty phase in mitigation Hughey's juvenile record and prison record App p 4744, PCR 91, Exhibit 19 App p 5284

In addition to Lt Allen, counsel noted J L Edson, the head jailer in the Greenwood jail as a potential witness on prison adaptability App p 4745, PCR 92 He noted their use "if the state argues future dangerousness " App p 4745-46, PCR 92, 93 Counsel stated that if the state had argued future dangerousness, the defense would have had to present adaptability evidence to offset it App p 4745, PCR 92 However, the state did not present such specific evidence

with stress, left lobal syndrome, borderline mentality, learning disability, delusional - relating to visions of his mother, decompensation

Tinsley noted that following stressors his mother's death, his father's behavior/mental illness, his inability to face negative situations, the abuse, physical and emotional and psychological, the multi-generational problems, his inability to recall events of the crime, possibly false detail, recalling statement App p 5138-39 He also noted as something to look into "not an intoxication mitigation," more a result of his dad's abuse coupled with gasoline sniffing as a child and heavy drinking following his mom's death He also noted a question mark the testimony of Michael Bowie, the person who drive the car that resulted in killing his mother App p 5140, PCR 487 Counsel stated that he felt that the jury would not take a voluntary drinking intoxication mitigation in a positive manner compared to the other types of mitigation they could present App p 5140, PCR 487

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

Counsel further stated that he had a memorandum of law on future adaptability to prison, citing *Skipper v South Carolina*, on admissibility of adaptability evidence Exhibit 22 App p 4748, PCR 95

In hindsight, counsel Tinsley stated that if he had to do it over again, he would have called Lt Allen despite co-counsel's objection based upon the Elmore experience. However, he would not have called Major Edson App p 4648-49, PCR 95-97. He confirmed that it would not have prevented him from calling other jailers or presenting prison records. Id. He recalled that he felt that Lt Allen would have been more favorable than Major Edson and was aware that Mr. Garrett did not want him to call Edson.

On cross-examination by the state, Tinsley confirmed that he did not call either Lt Allen or Major Edson App p 5141. He stated that prior to the trial he specifically had discussions with both Lt Allen and Major Edson about the potential testimony. He stated that Major Edson was more or less non-committal, but that Lt Allen was favorable toward Hughey App p 5141-42, PCR 488-89.

Tinsley stated that although in hindsight he should have, he stated that the discussion that he had with Garrett about adaptability and it had backfired on him. He said this sent up a red flag and that they were employees of the state and were working for them at the time App p 5142, PCR 489, 1 15-18.

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

2 COUNSEL GARRETT'S ASSESSMENT

Counsel Garrett testified that he thought that Hughey had been a good inmate and was

generally quiet and reserved. He felt he could along with the guards, noting that one of his clients, Ms. Stewart, always made Hughey available to him and seemed to get along with him. App p 4870, PCR 217. He stated that Tinsley made the call on whether to put in adaptability evidence. App p 4873, PCR 220. He stated that when Tinsley asked him about it, he referred to his own experience in the Elmore case when he put in adaptability evidence and it backfired on them. App p 4870-71, PCR 217-218. While the officers in Elmore had given glowing reports, it did not play as well in front of the jury. He told Tinsley to be cautious in presenting the testimony. App p 4871, PCR 218. He noted that they were concerned about Major Edson. He noted that while the individuals were still employed at the detention center, unlike the present witness in the PCR hearing, the testimony may have been tempered and not be as helpful, due to Edson's relationship with the Solicitor. App p 4871, PCR 218. Garrett admitted that he had no idea who Lt. Allen was and had never talked to him. App p 4872, PCR 219.

Although it was Tinsley's decision on whether to present adaptability evidence, Garrett stated that he would have taken Garrett's counsel seriously in making the decision. App p 4873-74, PCR 220-221. He stated that the guards in Elmore did not do near the job that they had hoped they would do. App p 4873, PCR 220.

Counsel Garrett stated that he was of the opinion that everyone like Hughey in jail and that Hughey always had a smile on his face. App p App p 4916, PCR 263. He felt that Tinsley knew about jail incidents. He said that he would have been very concerned about an allegation with a razor, even if it were an electric razor just because of the facts of this case. App p 4917-18, PCR 264-65. Garrett stated that after Skipper v. South Carolina, he was aware that adaptability evidence was information that could be presented at trial. Although it appeared that

Hughey had a normal existence in the jail, he told Tinsley specifically about the negative experience he had in the Elmore case. He noted that Elmore, like Hughey, did not have a history of violence and that basically that he was a normal inmate who followed directions which was expected of every inmate. App p 4919-21, PCR 266. Garrett felt the guards from CCI who testified in the Elmore case ended up sounding like he was merely normal, nothing special. He felt their testimony softened the presentation on adaptability.

Garrett stated that they had discussion with Tinsley in detail about the benefits and risks of the testimony. He advised him to be cautious and careful and make sure the witnesses stayed firm. App p 4921, PCR 268.

3 What Evidence The Applicant Asserts Should Have Been Presented On Adaptability

During the PCR hearing, the presented testimony from two former employees at the Greenwood Detention Center, Julia Perlotte and Martha Ann Stewart. None of these witnesses were on counsel Tinsley projected witness list.

Ms Julia Perlotte testified that she was employed at the Greenwood Detention Center throughout Hughey's incarceration. He found Hughey to be quiet and reserved and never gave any officers on her shift any problems. PCR 153-155, 161-62. Upon review of the records, she found he was at the detention center from December 8, 1995 until October 30, 1997. She opined that he did not have any incident that she considered major, although she did find that there was an incident with contraband which involved not returning a razor and hiding it under his bed. PCR 157-158. She noted that the razor was never used as a weapon before it was confiscated. PCR 159. She opined that she felt that Hughey was adaptable to confinement. App p App p 4806-4815.

She confirmed that he had about six incidents according to her records while incarcerated there. She stated that normally during that length of incarceration there would be more incidents than that. App p 4821, PCR 168

On cross-examination, she confirmed that the razor was found under his mattress. App p 4815, PCR 162. She stated that she had no idea from her review of the reports why Hughey was possessing it and Hughey gave no reason for it in the report. She admitted that Hughey had disciplinarys for arguing with another inmate, although it did not result in violence, and cursing at a correctional officer. She thought that Hughey had a cell by himself at the time of the razor incident. [She noted that Hughey was on a five day lockdown after the razor incident. App p 4822, PCR 169]

She stated that he was supposed to return the razor and was supposed to not argue with other inmates and not supposed to curse at the jailers. She stated that normally when someone is charged with murder, they would try to house them by themselves and with another person also charged with murder. App p 4819-20, PCR 166-67

Martha Stewart testified about the same period of his incarceration in Greenwood. Although retired in 2007, she was a shift supervisor while Hughey was there. App p 4824-25, PCR 171-172. Like Perlotte, she did not see any problems with Hughey and he would talk to them in a polite manner. App p 4825, PCR 172. She noted that there were some defendants other than Hughey who would cause greater problems. Hughey was very calm and would comply with them.

She described the incident reports that he had as very small in size compared to some other inmates. PCR 174. She opined that he would be adaptable to confinement. PCR 175. She

had no records of him getting into fights App p 4827-28

On cross-examination, she recalled having discussions with Hughey and thought at some point he was depressed App p 4829, PCR 176 However, she never found anything disturbing, irrational or confusing in her discussions with him

Dr Donna Schwartz Watts also testified about her review of the juvenile records of Hughey, which he claims counsel never obtained prior to the 1997 trial She opined that Hughey had adjusted well at the Department of Juvenile Justice which suggested he adapted in a well-structured environment App p 5052, PCR 399 Similarly, she opined that the Greenwood records gave her the same impression of a good adjustment to structure and routine She suggested that adaptability to prison should have been considered App p 5424, PCR Exhibit 48 She opined that although he suffered from PTSD, Depression, Borderline Intellectual Functioning and Alcohol Abuse, the prognosis should have been presented to demonstrate the likelihood of Hughey's adaptability PCR Exhibit 48 Dr Watts recalled that Tinsley contacted her in 1997 about Hughey App p 5093, PCR 440 However, she was unavailable to interview him at that time PCR 440 She recommended Dr Donald Morgan to Tinsley due to her work conflict App p 5093-94, PCR 440-41

On cross-examination, Dr Watts testified that Hughey explosive behavior that happened when he was not incarcerated did not show up in either his DJJ or Greenwood records App p , 5110-11, PCR 457-58 Dr Watts conceded that his criminal history suggested that he did not avoid possession of weapons, including shooting leisure with his girlfriend, a possession of a knife on school grounds, a series of assaults and batteries against other individuals, disobedience with corrections officers, using profane language including such that might provoke violence

App p 5097-98, PCR 444-445

She admitted that the report that was done by the Department of Youth Services suggested that he suffered from “periodic explosive disorders ” App p 5102, PCR 449 She noted that he would suppress his feelings until they literally burst out App p 5103, PCR 450 The report noted that it took little to provoke Hughey and that he had general mistrust of others App p 5103, PCR 450 Despite that conclusion, Dr Watts disagreed that it would impact on adaptability She stated that he would not have drugs or alcohol and it would be a structured environment and he was removed from his chaotic family PCR 450 She confirmed that he was diagnosed at DYS with a conduct disorder, but found that Dr Lewis later did not diagnose him pre-trial for anti-social personality disorder App p 5103, PCR 451

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

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

App p 5104-05 PCR 451-452

4 ANALYSIS ON ADAPTABILITY ISSUE

In the petition before this court, the Petitioner seeks to parse various comments from the juvenile records to suggest that while he may make poor decisions and fail to consider the consequences of his behavior, App p 5065, PCR 412, Exhibit 40, he was also seen to show good

judgment and exercise control App p 5073-74, PCR 420-421

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

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

own cell rather than the less structured general prison population. Respondents submit that the Applicant cannot show that there is a reasonable probability that Hughey would have been sentenced to life had counsel chosen to have presented adaptability evidence. Certiorari on the adaptability specification is not warranted.

B COUNSEL WAS NOT DEFICIENT IN PRESENTING MENTAL HEALTH MITIGATION AND PRESENTATION

The PCR Court reasonably concluded that counsel adequately investigated and presented evidence concerning Hughey's mental health background. App p. 5926. Hughey contends that the mitigation investigation for the penalty phase was incomplete and presentation inadequate. The Applicant based this primarily upon the testimony of Paige Tarr and Jeff Yungman. In addition, he seeks relief upon the testimony of Dr. Donna Schwartz Watts. A review of the evidence presentation at trial and in the PCR action reveals that Hughey has failed in his burden of proof of either deficiency or prejudice under *Strickland*.

Paige Tarr Haas Mitigation Investigator at Trial

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

John Smith were obtained PCR 340 However, Yungman's report shows that he was not provided them PCR 341 App p 4984-4993

Tarr testified that she felt that 12 months (one year) was a minimum for a mitigation investigator to prepare a case PCR 339 Tarr testified that she contacted and got social worker Jeff Yungman and Dr James Evans involved in the Hughey case PCR 343 Tarr stated that she had a concern that she was unable to obtain a forensic psychiatrist PCR 346 App p 4998-4999

Tarr stated that her outline for mitigation included Jeff Yungman for social history, Dr Jim Evans for neuropsychological work-up, Dr Morgan for neurological and psychiatric and a guard for future dangerousness and adaptability PCR 347 For family members, she had included Gloria, John, Aunt Nancy Ramey PCR 348 App p 5000-01

On cross-examination, Tarr admitted that the affidavit use4d was a form prepared by Scharlotte Holdman to assist in getting continuances App p 5006, PCR 353 Further, Tarr stated that she attempted to locate a psychiatrist, including Dr Bellard from North Carolina App p 5007-08, PCR 354-55 However, she was never told not to find a psychiatrist PCR 355 Tarr recalled from her notes a telephone conversation with Dr Donald Morgan App p 5011, PCR 358 According to the notes of an October 22, 1997 conversation, it revealed "PTSD (?), complicated bereavement, significant brain damage, does not have capacity to stay composed under duress, seizure like episodes for temporal lobe problems and cannot assist defense as for as telling what went on at critical time and not malingering " App p 5011, 5017, 5437, PCR 358 364, Exhibit 51

Tarr noted that in her notes it reflects that she was seeking to acquire the juvenile records

and detention records, but her notes did not include the end result App p 5013, PCR 360¹⁹

Jeff Yungman Retained Social Worker At Trial App p 4775-4804

Jeff Yungman testified that he was not employed until October 1, 1997 He stated that he had requested Hughey's juvenile records and the father's psychiatric records, but claimed he never received them, as documented in his report and testimony App p PCR 129-130

Yungman asserted that he needed this data to do a complete psycho-social history He testified that the juvenile records may have been useful to him to show his functioning and educational abilities PCR 130 Concerning his father's psychiatric records, Yungman wanted those because psychiatric problems run in the family App p 4775-4783

Yungman completed family interviews before October 5, two weeks prior to trial App p 4784, PCR 53, 131, Exhibits 12, 13 On October 6, 1997, he sent his written report to Tinsley 4706, 4785, PCR 53, 132 Yungman's conclusions as a social worker was that Hughey was suffering from depression and had a concern that he also suffered from post-traumatic stress disorder Exhibit 12 He stated that behaviors described by the Hughey family was consistent with the symptoms for PTSD [At trial, Yungman testified that Hughey "may or may not" have PTSD, but that "he is consistent with it App 3955] He stated it was not his role as a social worker to diagnose, but he was able to recognize symptoms App p 4788, PCR 133

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

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

Yungman complained that he had not met with other experts and feared he did not understand the big picture. He also complained that he met with counsel only twice and prepared for his testimony over lunch. PCR 134-35. He also felt that a psychiatrist should have been involved to do some evaluations. PCR 133, 135. He stated he spent 31.25 hours on the case. PCR 135. App p. 4787 - 88.

Yungman stated that after the trial he wrote a letter complaining to Paige Tarr about his work with Tinsley. App p. 4789, 4794, PCR 136, 141. He based this upon his belief that Post-Traumatic Stress Disorder should have been stressed. App p. 4794, PCR 141. However, he did not share his complaints or concerns with Tinsley. App p. 4794, PCR 141.

Yungman admitted that he is morally opposed to the death penalty. App p. 4795, PCR 142. He further stated that he was upset that the jury made the death verdict. App p. 4795, PCR 142.

Yungman admitted that he had completed his written report and conclusions on October 8. He confirmed that he provided counsel then with information on how to qualify him and humanize him and to bring out the fact he was a former police officer. App p. 4795, PCR 143.

Yungman admitted that on the day he sent the report that he also spoke on the telephone. App p. 4796, PCR 144.

Yungman admitted that he also wrote counsel and told him that he would come up the afternoon before so that they can meet to discuss his testimony. App p. 4797-98, PCR 144-45.

Yungman conceded that his trial testimony was consistent with his written report. App p. 4799-4800, PCR 145-46. He did not recall any factors being missed. App p. 4799, PCR 146.

Yungman, subsequent to the verdict, wrote Tinsley and asserted that he did not think the jury was

listening or wanted to listen to Yungman or Dr Evans App p 4799, PCR 146 Despite his current complaints, Yungman declared that he would be willing to work on other cases in Abbeville with him App p 4799, 5268 PCR 146, Exhibit 13

Dr Donna Schwartz Watts - Retained Psychiatrist for PCR Action

Dr Donna Schwartz Watts testified at the hearing As noted earlier, she was unavailable at the time of the trial and had recommended Dr Donald Morgan to counsel Tinsley For this hearing, Dr Watts prepared a written report based upon her evaluation and record review of Hughey App p 5424-5424, Exhibit 48

She testified that she interviewed Hughey on four separate occasions PCR 377-78 She stated that due to his post traumatic stress disorder, he was not immediately forthcoming with details However, he gradually over time would provide more information PCR 379 App p 5030-32

Dr Watts stated she had reviewed Hughey's juvenile record She found he had been committed to DJJ on October 6, 1986 for carrying a concealed weapon and public disorderly conduct PCR 395 Dr Watts believed that the records were important to her evaluation PCR 396, 398 She opined that it allowed her to see what his cognitive functions looked like in 1986 Id She noted that the late Dr David Siegel had evaluated Hughey at the 1986 commitment and found Hughey approached tasks at a slow pace and was evasive In addition, he found Hughey would blame others for his trouble PCR 403 Dr Siegel also noted that his IQ was 83, with a verbal of 80 and performance of 81 PCR 404 App p 5049- 5057

Dr Watts also reported that Dr Siegel found that Hughey suffered from "periodic explosive tendencies" and would "suppress his feeling until they would literally burst out "

Further, he found that he was easily provoked by others PCR 405 He also found that Hughey's anger may be based upon his prior victimization However, he exhibited a "grossly inadequate style of coping with frustration, disappointment and rejection " PCR 405 App p 5058

Dr Watts felt that Dr Siegel's impressions were consistent with hers PCR 405-06 She felt his findings were consistent with her conclusions of post traumatic stress disorder, depression, and his low IQ App p 5059, PCR 406 Further, she noted that the Interdisciplinary Team noted that Hughey had problems controlling his temper, which Hughey denied showing little insight PCR 409-10 Although the team found his behavior and attitude toward authority figures was positive, the team set goals for Hughey to include controlling frustration, hostility and anger, as well as decreasing physical aggression PCR 409-10 App p 5062-63

Dr Watts diagnosed Hughey with a series of illnesses She opined that he had dementia due to multiple etiologies PCR 380 She noted it could be caused by his reported high blood pressure, the head traumas, his earlier alcohol abuse and family history, including his father's dementia PCR 380-81, Exhibit 48 App p 5033-34

She also stated that he had an alcohol abuse history App p 5034, PCR 381 She opined that he had been arrested for it previously In addition it could impact his cognitive impairment She further stated he reported drinking the evening before and the day of the offense PCR 381 She was also aware of the family history of the abuse

Dr Watts focused on her opinion that he suffered from "Post-Traumatic Stress Disorder - Chronic " App p 50335, PCR 382 She found that it could be based upon various traumatic events he experienced including the death of his mother, his violent childhood, or the multiple car accidents he was involved in PCR 382-83 She noted his experience in seeing his father beat his

mother and shoot guns at his sisters PCR 382 She also referred to the car accident that resulted in his head injury PCR 383 App p 5035-36

Dr Watts opined that the mother's death contributed to PTSD App p 5036-37, PCR 383-84 Dr Watts noted that in addition to her death, he viewed the body at the hospital which "would certainly cause PTSD " PCR 384 in her report, she described that fact that he never received grief counseling or treatment She found that Hughey had difficulty sleeping and completing tasks Exhibit 48

Dr Watts further opined that Hughey suffered from "Major Depression, Single Episode, moderate with psychotic features and partial remission" and "complicated bereavement by history" App p 5037, PCR 384 Dr Watts found that Hughey had deterioration in functioning following his mother's death In addition, it was reported that he currently has visions of his mother This led to the diagnosis of major depression App p 5038, PCR 385

In addition, Dr Watts concluded that he also had "inhalent abuse by history " App p 5039, PCR 386 She determined this was based upon reports that he used to sniff gasoline from age 6 to 10 PCR 386

An Axis II diagnosis he received was "borderline intellectual functioning by history " App p 5039, PCR 386 She found that in 1997, Dr Lewis at the Dept of Mental Health made that diagnosis which suggested his IQ was higher than mentally retarded, but less than 80 PCR 387 Dr Watts also found evidence of hypertension, headaches, legal stressors and health problems App p 5040, PCR 387

Dr Watts felt Hughey had declined since October 1997 which she felt was based upon his dementia App p 5042, PCR 389 she pointed to the difference and decline from school grades

to later testing App p 5043-44, PCR 390-91

Dr Watts opined that Hughey was voluntarily intoxicated at the time of the crime PCR 391 She stated that Hughey had told her he had drunk a case of beer with Chris Burton the night before the incident up to 3 a m and had one more beer the next day before he went to the victim's home App p 5045, 5098-99, PCR 392, ll 12-16²⁰ PCR 445-46

Dr Watts opined that her testimony would address certain defined statutory mitigating circumstances First, Applicant claimed her testimony would provide more support for the "mentality" mitigator Particularly, her use of the school records from the DJJ files also revealed deficits in school work and testing below grade level App p 5043-44, PCR 390-91

Concerning the mitigator "under the influence of mental or emotional disturbance", she opined that her diagnosis of PTSD and major depression, which were not fully diagnosed at trial, would support those App p 5044-45, PCR 391-92 She found that the decline in functioning and impulsivity resulted after his mother's death Further, his intellectual level and PTSD met the mitigator As noted above, she also claimed, from his self-report, that he was intoxicated that date App p 5045, PCR 392 Also, Exhibit 48

Dr Watts also opined that she had evidence that could be used to show "substantial impairment in his capacity to conform his conduct to the requirements of law " App p 5045-46, PCR 392-93 She found that was based upon his depression, his alleged drinking of alcohol surrounding the incident, his irritability, and his "substantial difficulty conforming his impulses "

²⁰ On cross-examination, Dr Watts stated that neither Hughey nor Burton were asked at trial about drinking PCR 445 She was not aware if he had reported the information to trial counsel However, she was not aware if anyone considered him intoxicated that day who saw him She admitted this was an excessive amount, and could cause a question as to its veracity PCR 446

App p 5046, PCR 393 She stated that he had been up all night drinking and that he was depressed App p 5046, 5085-86, PCR 393, 432-33 See also Exhibit 48

She opined that the alcohol abuse and PTSD went hand in hand for the crime PCR 433 She stated it caused him to over-react, decreases his ability to cope and he will react more impulsively App p 5087, PCR 434 She stated that if you layer all the facts together you get

Impulsively, poor judgment, explosively, with anger

App p 5088, PCR 435, 1 9

On cross-examination, Dr Watts confirmed that she did not disagree with Dr Lewis' evaluation in 1997 App p 5094, PCR 441 She stated that her opinions were similar other than PTSD App p 5094, PCR 441

She confirmed that symptom of PTSD was to avoid situations which relate back to the traumatic event, including the family violence However, Dr Watts admitted that Hughey did not avoid possession and use of weapons and his criminal history included possession of concealed weapons and a number of assaults PCR 444-46 She confirmed that she never saw any report or information around the time of the incident that Hughey was intoxicated PCR 445 App p 5097-98

Dr Watts restated the version that Hughey provided to her of events that led to the deaths [These factors were generally consistent with Hughey's trial version, except for the new evidence of drinking] App p 5099-5100, PCR 446-47 Hughey told her that the gun was in the trunk of the car, that he got the gun after the victim pulled the knife on him, that he did not mean to shoot the aunt, that it was caused because his girlfriend got upset because she didn't want the aunt to know about the fact she had been unfaithful to Hughey App p 5100, PCR 447 She stated that

Hughey included in his version information that the children had been in the car at some point when an argument began outside App p 5101, PCR 448 In addition, Hughey also now claimed that the aunt bumped the gun App p 5101, PCR 448 Similar to trial, he did not describe how he shot Ms Jackson, other than the fact that he shot her App p 5102, PCR 449

Dr Watts confirmed that the DYS included a suggestion he suffered from “periodic explosive disorder” Dr Watts stated Dr Siegel was predicting his future behavior She found his assessment similar to what happened on the day of the crime little to provoke, general distrust of others, wants things to go his way in relationships App p 5103, PCR 450

Dr Watts testified that if Hughey was on the street today, she would expect more explosive outbursts PCR 450 Dr Watts stated that the killing of the aunt and his girlfriend could create PTSD However, she noted he does not have flashbacks about the event App p 5106-07, PCR 453-54 She stated that “he sees the death of his mother as more significant ” App p 5109, PCR 455, ll 9-10

Counsel Robert Tinsley

Counsel Robert Tinsley testified that Hughey did not indicate to him prior to the trial the use of the level of alcohol or a case of beer that Dr Watts stated Hughey recently asserted App p 5121, PCR 468 Tinsley stated that Paige Tarr was hired as a mitigation specialist Tinsley stated that they ultimately retained Dr Donald Morgan later in the preparation App p 5131, PCR 478 Tinsley stated that Dr James Evans, a psychologist, had already seen Hughey and did not express any need to him for either a psychologist or neurologist He found Dr Evans’ testimony was consistent with the information that he had been provided App p 5132, PCR 479

Tinsley stated that he was aware of the A B A Guidelines at the time of the trial App p

5144, PCR 491 He was aware that forensic psychiatrist were frequently used PCR 492 Tinsley explained that he did not initially retain a psychiatrist because he was already familiar with Hughey and had represented him previously PCR 492 He said he had known him and worked with him for nearly two years App p 5145, PCR 492

However, he ultimately retained Dr Donald Morgan, who evaluated Hughey App p 5145-46, PCR 492-93 He recalled that he learned that Hughey was suffering from depression and that Dr Morgan could establish PTSD App p 5147, PCR 494 However, he chose not to call him as a witness because Dr Morgan indicated that he could not help him App p 5146, PCR 493

Tinsley also confirmed that he spoke with the retained social worker, Jeff Yungman, on October 8 when the report was sent He stated that they spoke about his conclusions and potential testimony on that date PCR 495 He stated Yungman's testimony was consistent with the report and he did not indicate any need to meet with other experts before he testified App p 5148, PCR 495

Counsel further stated that he reviewed the findings of Dr Lewis from the State Hospital who found the existence of "complicated bereavement, alcohol abuse in remission, and borderline intellectual functioning" App p 5150, 5414, PCR 497, Exhibit 48 He stated that he chose not to call her in mitigation because she was a state employee and did not feel that she would have been particularly helpful App p 5150, PCR 497

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

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

App p 5154, 5440-5443, PCR 501 State Exhibit 1, 2

ANALYSIS

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

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

First, we submit that he had failed in his burden of proof to show the excess intoxication claim presented through Dr Watts This self-report by Hughey prior to the hearing lacks credibility Hughey never advised his counsel, nor apparently anyone else, prior to the trial that he drank a case of beer the night before and more the morning of the incident To the contrary, there was no record of any similar suggestion until Dr Watts received this self-report Respondents

request that factual assertion must be rejected. The record revealed that numerous accounts were given to counsel prior to the trial. There is no record of any similar suggestion being presented. As a factual matter, this must be rejected.

2 *Counsel's Mitigation Investigation Was Reasonable and Not Deficient*

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

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

Additionally, Dr. James Evans opined that a possible diagnosis for Hughey could be "depression with psychotic features." App. 3979-80. He confirmed in his written report that

Hughey had “minor signs of rejections and depressions ” App 3977 Dr Evans testified about post-traumatic stress disorder App 3977-3986 He presented the series of symptoms Hughey possessed which were supportive of that diagnosis However, on cross-examination, Dr Evans declared that he was “strongly suspicious that he suffers from post-traumatic stress disorder ” He further opined that although he could not give an express opinion “to the degree of certainty,” but found that there was converging evidence that would support that diagnosis App 3990

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

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

Respondent does not dispute that Dr Watts presented testimony that would have been admissible at trial However, she admitted that she was not available in 1997 to do an evaluation

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

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

The sentencing jury was aware of the dysfunction family experience that Hughey had, as well as a series of traumas. In addition it was presented with a favorable picture of him through his family. The picture that Dr. Watts presents is essentially the same picture of Hughey that the jury was in fact presented. Deficient performance has not been shown.

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

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

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

Contrasted with the presentation that was made and the slight difference in the beneficial testimony of Dr. Watts, the negatives with the presentation would remove any reasonable probability that the result of the proceeding would have been different had Dr. Watts testimony been presented. His claim must be denied.

III THE CUMULATIVE PREJUDICE ISSUE IS WITHOUT MERIT

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

In his final arguments in his certiorari petition, p 68-71, Hughey re-asserts that a cumulative prejudice analysis is required under Kyles v Whitley, 514 U S 419, 434 (1995). For the reasons set forth in the earlier specifications, Respondent submits that the Applicant has failed to show any Sixth Amendment violation on the claims. In this portion, Hughey merely re-argues his prior claims which lacked a showing of either deficient performance or both deficient performance and prejudice as set out above. His claims are without merit.

The South Carolina Supreme Court has never specifically addressed matters under a cumulative prejudice analysis. See Green v State, 351 S C 184, 569 S E 2d 318 (2002), Fisher v Angelone, 163 F 3d 835, 852 (4th Cir 1998).²¹ In *Fisher* the Court held that it is not appropriate to consider the cumulative effect of attorney error when the individual claims of ineffective assistance do not violate the defendant's constitutional rights. *Id.* at 852-53. The individual claims in *Fisher* were reviewed on the merits and determined not to amount to error. Thus, cumulatively,

²¹ See also Lorenzen v State, 376 S C 521, 657 S E 2d 771 (2008) (stating it is an unsettled question in South Carolina whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief).

the Court held they could not amount to error²² Id , see *Moore v Reynolds* 153 F 3d 1086, 1113 (10th Cir 1998) (stating that cumulative error analysis applies where there are two or more actual errors, it does not apply to the cumulative effect of non-errors)

There is federal precedent that such is not required under Strickland See *Middleton v Roper*, 435 F 3d 858 (8th Cir 2006) Also e g *Strickland*, 466 U S at 697, 104 S Ct 2052 (“If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice that course should be followed ”)

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

We reject Hughey’s argument for two basic reasons First, Hughey advances an erroneous interpretation of Supreme Court precedent Neither *Wiggins* nor *Williams* stand for the proposition courts should accumulate the prejudice from separate ineffective assistance claims in

²² See also *Jones v Stotts*, 59 F 3d 143, 147 (10th Cir 1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors), *United States v Stewart*, 20 F 3d 911, 917-18 (8th Cir 1994) (same), *United States v Gutierrez*, 995 F 2d 169, 173 (9th Cir 1993) (same) But see *Williams v Washington*, 59 F 3d 673, 682 (7th Cir 1995) (stating that “a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]”), *Rodriguez v Hoke*, 928 F 2d 534, 538 (2d Cir 1991) (noting that a “claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions”)

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

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

Alternately, the relief need not be granted even if the *Strickland* test requires that prejudice be evaluated in light of the cumulative effect of all constitutionally infirm actions by counsel. See e.g. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 (requiring consideration of counsel's actions "in light of all of the circumstances"), *id.* at 695, 104 S.Ct. 2052 (noting that the question to be answered in cases such as this is whether, "absent the *errors* the factfinder would have had a reasonable doubt respecting guilt" (emphasis added)).

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

Id at 696, 104 S Ct 2052, *cf* Kyles v Whitley, 514 U S 419, 434, 436, 115 S Ct 1555, 131 L Ed 2d 490 (1995) (considering cumulative effect of errors in another context in which the *Strickland* standard for prejudice (though not the *Strickland* test for ineffective assistance) had been applied) ²³

Moreover, because none of petitioner's assertions of ineffective assistance satisfy the prejudice prong of *Strickland* calculating the "cumulative" effect of petitioner's ineffective assistance claims herein amounts to finding the sum of a series of zeros and does not warrant federal habeas relief *See* Coble v Quarterman 496 F 3d at 440 (holding federal habeas relief is only available for cumulative errors that are of a constitutional dimension and, because none of the petitioner's ineffective assistance claims satisfied both prongs of *Strickland* the petitioner had not presented any errors of constitutional dimension), Leal v Dretke, 428 F 3d 543, 552-53 (5th Cir 2005)(holding the cumulative errors of trial counsel did not warrant a certificate of appealability where none of the errors satisfied the prejudice prong of *Strickland*), *cert denied* 547 U S 1073, 126 S Ct 1771, 164 L Ed 2d 522 (2006), Livingston v Johnson, 107 F 3d 297,

²³ In United States v Rivera, 900 F 2d 1462, 1471 (10th Cir 1990) (en banc), the 10th Circuit stated that "a cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors " *Rivera* considered both the performance and prejudice prongs of each individual act of alleged ineffective assistance of counsel under *Strickland* in order to determine whether there was error that could be cumulated. The consideration of the prejudice prong prior to cumulation of the effects of all the counsel's inadequate performance was dicta, however, since the Court concluded that there was no deficient performance *See id* at 1474. In fact, *Strickland* as quoted above, makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong

309 (5th Cir 1997)(cumulative error analysis is only appropriate where errors are of a constitutional dimension), *cert denied* 522 U S 880, 118 S Ct 204, 139 L Ed 2d 141 (1997), Derden v McNeel, 978 F 2d 1453, 1454 (5th Cir 1992), *cert denied* 508 U S 960, 113 S Ct 2928, 124 L Ed 2d 679 (1993)(holding the same), Cordova v Johnson, 993 F Supp 473, 543 (W D Tex 1998)(“a petitioner who attempts to cumulate trial court errors that do not rise to the federal constitutional dimension has presented nothing to cumulate ”), *certificate of appealability denied* 157 F 3d 380 (5th Cir 1998), *cert denied* 525 U S 1131, 119 S Ct 922, 142 L Ed 2d 971 (1999), Moore v Quarterman, 526 F Supp 2d 654, 711 -712 (W D Tex ,2007) This analysis has been included and considered within the allegations set out above For those reasons he failed in his burden of proof

V CONCLUSION

WHEREFORE, Respondent request that the certiorari petition of John K Hughey be denied

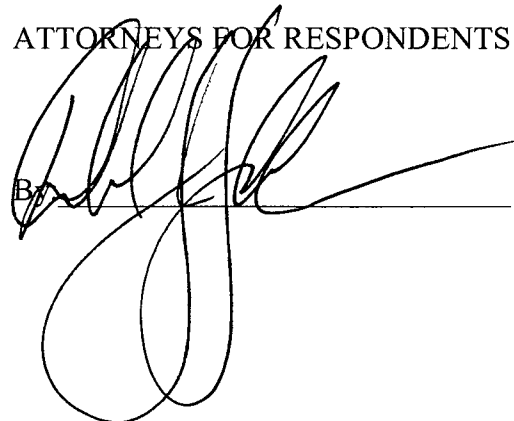
Respectfully submitted,

ALAN WILSON
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ATTORNEYS FOR RESPONDENTS

A large, stylized handwritten signature in black ink, likely belonging to Alan Wilson, is written over a horizontal line. The signature is highly cursive and loops around, extending below the line.

August 8, 2011

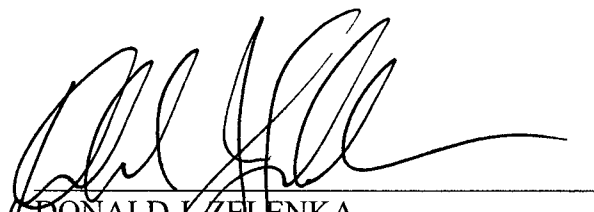
CERTIFICATE OF SERVICE

I, **Donald J Zelenka**, hereby certify that I have served the Petitioner/Respondent's
Return to Petition for Writ of Certiorari in the foregoing action by depositing copies in the
United States mail, postage prepaid, to the following

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This 8th day of August, 2011



DONALD J ZELENA
Assistant Deputy Attorney General