

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Spartanburg County

Paul M. Burch, Circuit Court Judge

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S.C. Supreme Court

MARION ALEXANDER LINDSEY,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-206087

PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX	i
ISSUES PRESENTED	1
ARGUMENT	
Introduction.....	2
1. <u>Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial</u>	2
A. Relevant Facts	4
1. Testimony at the PCR Hearing Regarding Lack of Preparation	6
a. Trial Counsel.....	6
b. Lenora Topp.....	7
c. Margaret Melikian.....	9
d. Dr. Tora Brawley	10
2. Failure to Preserve Evidence and Present Testimony from Rod Tullis	12
3. Failure to Interview and Prepare Witnesses and Family Members.....	15
a. Vincent Bell	15
b. Family Members and Friends.....	16
i. Bill and Patsy Burton.....	16
ii. Virginia Lindsey	17
iii. Bessie Smith.....	18
iv. Steven Pilgrim	18
v. Timothy Sims	19
B. Order of Dismissal.....	19
C. Discussion.....	20
1. Deficient Performance	21
a. The PCR Court Incorrectly Disregarded the ABA Guidelines in Measuring Trial Counsel's Performance	21

b. Trial Counsel's Performance is Deficient When Measured	
Against the ABA Guidelines	26
i. Failure to Promptly Investigate and Assemble the Defense Team	26
ii. Bartosh Failed to Attend Important Interviews with the	
State's Mental Health Expert	27
iii. Trial Counsel Failed to Call Witnesses and Preserve Evidence	28
iv. Trial Counsel Failed to Prepare Witnesses to Ask the Jury for Mercy	29
v. Trial Counsel Failed to Retain, Prepare, and Present Expert Witnesses	30
c. Trial Counsel's Performance Was Deficient When Measured	
Against Existing Precedent	31
i. United States Supreme Court Precedent	31
ii. South Carolina Precedent	34
2. Prejudice	37
a. Prejudice Flowing from Lay Witnesses Who Did Not Testify at Trial	39
b. Prejudice Flowing from Expert Witnesses Who Did Not Testify at Trial	44
c. Prejudice Flowing from Lay Witnesses Who Testified at Trial and at	
the PCR Hearing	46
i. Virginia Lindsey	46
ii. Bessie Smith	55
iii. Steven Pilgrim	58
iv. Bill Burton	60
d. Prejudice Flowing from the Expert Witness Who Testified at Trial	60
D. Conclusion	61
2. <u>Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's miserable upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting</u>	63
A. Jan Vogelsang's PCR Testimony	63
B. Order of Dismissal	67
C. Discussion	68
1. Deficient Performance	68
2. Prejudice	73

3.	<u>Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify</u>	76
A.	Introduction	76
B.	Relevant Facts	76
	1. The Late Retention of Melikian and Her Lack of Experience	76
	2. The Lack of Records	77
	3. Melikian’s Single Visit with Lindsey	79
	4. Pressed into Service as a Neuropsychologist	79
	5. The Attempt at Obtaining a Continuance	79
	6. Melikian’s Testimony at Trial	80
C.	The Order of Dismissal	86
D.	Discussion	87
	1. Deficient Performance	87
	2. Prejudice	90
4.	<u>Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State’s aggravation evidence</u>	93
A.	Relevant Facts	93
	1. Sentencing Proceeding	93
	a. Celeste Nesbitt	93
	b. Sharon Smith	94
	c. Police Officer Witnesses	94
	d. Stanford Wilkins and Jessica Cannon	94
	e. Martha Smith	95
	f. Sarah Simmons	95
	g. James Sligh	96

2. Evidence Regarding Adaptability Presented at PCR Hearing	96
a. Trial Counsel	96
b. James Aiken	97
B. Order of Dismissal	99
C. Discussion	99
1. Deficient Performance	100
2. Prejudice	103
5. <u>Marion Lindsey’s rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the court’s wholesale adoption of the State’s proposed order.</u>	105
CONCLUSION	110

ISSUES PRESENTED

1.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial?

2.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's miserable upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting?

3.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify?

4.

Whether trial counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence?

5.

Whether Marion Lindsey's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the court's wholesale adoption of the State's proposed order?

ARGUMENT

1.

Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to conduct an adequate mitigation investigation and failing to prepare and present an adequate mitigation case at trial.¹

Introduction

Trial counsel Michael Bartosh waited until **one month** before Marion Lindsey's capital trial to begin preparations. Two years elapsed between Lindsey's arrest and his trial. In those two years, Bartosh failed to: (1) assemble his trial team; (2) hire a psychiatrist; (3) hire an investigator; (4) obtain all of Lindsey's medical, school, and incarceration records; (5) hire a social worker who could investigate Lindsey's miserable² upbringing; (6) interview and prepare witnesses; and (7) hire a prison adaptability expert. The ABA Guidelines for Death Penalty trials advise, and the Sixth, Eighth, and Fourteenth Amendment require, that all of these things should have been timely and thoroughly done.

¹ The issues presented in this Argument were raised at the PCR hearing, in grounds 1, 2, 3, 5, 7, 8, and 9 in Lindsey's Post-Hearing Memorandum, and in Lindsey's Rule 59(e) Motion. App. 3544-45. The PCR court ruled on all of these issues in its Order of Dismissal and in its Order Denying Motion to Reconsider, Alter, or Amend. App. 3593, 3597, 3601, 3624, 3707, 3711, 3751

² The evidence at the PCR hearing showed, *inter alia*, that Lindsey's family comes from extreme poverty (App. 2718, l. 13 – 2719, l. 23); mental illness runs in his family (App. 2784, l. 24 – 2786, l. 8); several members of Lindsey's immediate family attempted suicide (App. 2814, ll. 7 – 16); Lindsey was ignored and abandoned by his father (App. 2050, ll. 1 – 17); Lindsey's mother played a limited role in his upbringing (App. 2684, ll. 22 – 25); Lindsey failed the eighth grade three times and dropped out of school in the ninth grade (App. 2805, l. 14; 2806, l. 20 – 2807, l. 1); virtually every member of Lindsey's immediate family had been convicted of violent crimes (App. 2809, ll. 10 – 13); Lindsey suffered from kerosene inhalation and his was head run over by a car as a baby (App. 2047, ll. 1 – 13; App. 2721, ll. 2 – 16); Lindsey's uncles, who lived in his house, were violent men who burned Lindsey's cat alive in front of him when he was a small child (App. 2631, l. 8 – 2632, l. 5); and Lindsey tried to kill himself when he was a teenager and spent three weeks in inpatient treatment in mental health (App. 2636, l. 7 – 2637, l. 22).

With only a month to prepare, the best Bartosh could do was hire a psychiatrist, Margaret Melikian, who had little to no experience with capital cases and an investigator, Lenora Topp, who had never worked on a mitigation case. App. 2883, ll. 12 – 18; App. 2405, ll. 19 – 22. The investigator scrambled to get records and interview the few witnesses she could locate. App. 2429, ll. 10 – 25. The psychiatrist had trouble obtaining the records she needed from Bartosh. App. 2882, ll. 4 – 11. She did not have time to read the records she had. App. 2908, ll. 19 – 23. She only saw Lindsey **one time**, for a total of two-and-a-half hours. App. 2882, ll. 21 – 25. Bartosh only spent **thirty minutes over the telephone** preparing the psychiatrist for trial. App. 2900, ll. 8 – 12. When she knew she could not be ready for trial, Bartosh left it to her—a non-lawyer—to convince the trial judge in a telephone conference that a continuance was necessary. App. 2892, l. 1 – 2894, l. 7. Bartosh did not even bother to participate in the telephone call with the judge. App. 2893, ll. 1 – 8. No continuance was formally requested, much less granted. App. 3622. Bartosh also failed to communicate key facts to the psychiatrist and as a result, she was utterly destroyed on cross-examination. Bartosh never obtained a social worker or a prison adaptability expert. The trial ended in a sentence of death. State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007), cert. denied, Lindsey v. South Carolina, 552 U.S. 917 (2007).

At the PCR hearing, Lindsey presented a mountain of mitigating evidence that Bartosh should have used at trial, including a social work expert and a prison adaptability expert. Melikian and Topp testified about the woeful preparation. Melikian said she has never seen such poor preparation in the 15 - 20 death penalty cases she has worked on *since* Lindsey's trial. Melikian also testified that her opinions would have changed had she been better prepared and spent more time with Lindsey. Lindsey's family members testified in great detail about their family's history of violence and mental illness. A social worker, Jan Vogelsang, testified about

the patterns in Lindsey's family that contributed to his depressed and dysfunctional mental state at the time of the crime. All of the information necessary to present a full and complete case in mitigation was available to Bartosh; he simply failed to begin work in time to accomplish even a minimally adequate defense.³

Any of the evidence presented at the PCR hearing could have made a difference in this trial. The only statutory aggravating factor in this case was simply that Lindsey committed the crime in a public place. S.C. Code Ann. § 16-3-20(C)(a)(3). This converted a domestic homicide into a capital offense. Whether this code section even applied to Lindsey's case was argued on direct appeal. Had Lindsey shot his wife at her house under the exact same circumstances, he would not have been death eligible. With a case that met only the bare minimum of qualifications under the statutory aggravator, a strong mitigation presentation would have tipped the scales in favor of a life sentence. Because of trial counsel's failure to present a full, competent, and coherent mitigation case, Lindsey's constitutional rights were violated.

Finally, the PCR court did not give Lindsey's case its constitutionally required consideration. The court adopted the State's proposed order in full without changing a single word. The evidence sadly suggests the PCR court did not even read the proposed order before signing it.

A. Relevant Facts

The crime in this case was committed on September 18, 2002. No evidence exists showing any preparation by Bartosh for Lindsey's trial until Doug Brannon was hired as second

³ Bartosh died after Lindsey's trial and before the PCR hearing. The other members of the trial team testified that Bartosh was solely responsible for the sentencing phase and they played no role in it. App. 2310, ll. 1 – 13; App. 2521, ll. 14 – 17.

chair on March 5, 2004. No significant work was done until April 16, 2004, when Lenora Topp was hired as a mitigation investigator. The trial began one month later, on May 17, 2004.

A timeline helps illustrate the complete lack of preparation by the defense team:

DATE

EVENT

September 18, 2002

Lindsey is arrested. App. 3537.

September 19, 2002...

...until...

NO EVIDENCE OF ANY PREPARATION

...March 4, 2004

March 5, 2004

Brannon appointed as second chair.
App. 3588

March 12, 2004

Brannon meets Lindsey for the first
time. App. 3588

April 6, 2004

Bartosh first calls Dr. Margaret
Melikian, a forensic psychiatrist,
about examining Lindsey.
App. 2881, l. 24 – 2882, l. 4.

April 12, 2004

Bartosh first calls Dr. Tora Brawley, a
neuropsychologist, about examining
Lindsey. App. 2356, ll. 6 – 7.

April 16, 2004

Mitigation investigation begins when Topp
is hired and **begins** collecting records and
interviewing witnesses. No investigation
was done nor were any records collected
prior to Topp's involvement. App. 2944;
2393, ll. 8 – 18; App. 2429, ll. 10 – 20.

April 28, 2004	Melikian first receives records from the defense. App. 2882, ll. 5 – 14.
May 4, 2004	Melikian meets Lindsey for the first and only time. Meeting lasts two-and-a-half hours. App. 2882, ll. 21 – 25.
May 15, 2004	Lindsey's mother is interviewed for the first time by the defense. App. 2944; App. 2398, ll. 12 – 25.
May 17, 2004	Trial begins. App. 3538.

The defense failed to begin preparing for this capital case until approximately one month before trial.

1. Testimony at the PCR Hearing Regarding Lack of Preparation

a. Trial Counsel

Doug Brannon worked as second chair on Lindsey's trial. App. 2300, ll. 8 – 14. This was the first and only capital case on which Brannon has worked. App. 2296, l. 24 – 2297, l. 1. Bartosh delegated to Brannon responsibility for the guilt phase of the trial. App. 2300, ll. 8 – 14. Bartosh was solely responsible for the sentencing phase and Brannon had no involvement in the mitigation investigation. App. 2310, ll. 1 – 13. When Brannon began working on the case, he was not given any records, memoranda, or any information that had already been gathered. App. 2312, ll. 9 – 14.

Karen Quimby worked as third chair. She began approximately one month before the trial. App. 2517, ll. 9 – 14. Up until March 2004, Quimby was working as third chair in another death penalty case. App. 2516, l. 22 – 2517, l. 14. She was also lead counsel in the capital trial of Frederick Antonio Evans in early November of 2004. App. 2517, l. 20 – 2518, l. 10. She carried a caseload of approximately 500 cases. App. 2518, ll. 21 – 25. Quimby's "limited role"

was to be a liaison between Bartosh and Topp and to organize the file. App. 2520, ll. 4 – 14. Quimby had no knowledge concerning trial strategy. App. 2521, ll. 14 – 17.

b. Lenora Topp

Topp served as the defense team's mitigation investigator. She did not testify at Lindsey's trial. Topp had never been a mitigation investigator prior to this case. App. 2405, ll. 19 – 22. She only had two interviews with Lindsey. App. 2409, ll. 16 – 19. Trial counsel was not present when Topp interviewed Lindsey. App. 2426, l. 25 – 2427, l. 6. Her major job was to gather records. App. 2319, l. 19. By the time of the PCR hearing, Topp was no longer an investigator and sold batteries online. App. 2390, ll. 21 – 24.

Topp's billing invoice was admitted as Applicant's Exhibit 2 at the PCR hearing. App. 2944 – 45. Topp's invoice shows that her first involvement in the case was April 16, 2004, one month prior to trial. App. 2944; App. 2393, ll. 8 – 18. On her first day on the job, she had to get Lindsey to sign a medical records release because defense counsel had yet to obtain one. App. 2944; App. 2394, ll. 5 – 18.

Before trial, Topp spent only forty hours working on the case. App. 2396, ll. 12 – 15. She "did not have sufficient time to do the work that was needed." App. 2397, ll. 11 – 12. In death penalty trials that she worked on between Lindsey's case and the PCR hearing, she spent up to three years on mitigation investigation. App. 2397, ll. 13 – 16. Trial counsel never asked Topp to generate a genogram, family tree, or any other demonstrative exhibit that could show the jury the Lindsey family's background. App. 2397, ll. 19 – 23.

Topp conducted the defense team's first interview with Lindsey's mother two days before trial, on May 15, 2004. During this interview, Topp learned about Lindsey's childhood physician, Dr. Barry Henderson. Topp unsuccessfully attempted to obtain medical records from

Henderson or determine whether he would be a good defense witness until after the trial. App. 2398, ll. 8 – 25; App. 2400, ll. 6 – 19. Dr. Henderson told Topp after the trial that he would have been glad to testify for Marion. App. 2400, l. 24 – 2401, l. 6. Dr. Henderson died before the PCR hearing. App. 2402, ll. 21 – 24.

Topp testified that during any investigation, it is important for the investigator to have time to develop relationships with witnesses. App. 2399, ll. 1 – 5. It takes time for witnesses to trust her and give her information. Witnesses' memories sometimes work slowly and they process questions and remember answers after the end of an interview. App. 2399, ll. 6 - 25.

Topp was still seeking records even during the course of the trial. App. 2403, l. 23 – 2404, l. 3. She did not obtain medical releases from Lindsey's aunts, Robin Pilgrim (a/k/a Robin Keith) and Bessie Smith, until during the trial (May 21st and May 24th, respectively). App. 2404, ll. 4 – 13; App. 2951 – 52. She never got any medical records related to Robin Pilgrim or Smith. App. 2404, ll. 14 – 16. Bartosh never asked her to get any family records other than Marion Lindsey's. App. 2404, ll. 17 – 19.

Topp's quest for records prevented her from interviewing witnesses:

[B]ut as far as being asked to interview any of the family members or spend time, gosh, I was more involved in trying to get records and get them to them in time and they had no records at all as far as I know. No medical, no mental health, no social services. They had none. No school records.

So, I had to go to almost every location more than one time and pick up records or send, give them subpoenas and wait. And, so, as far as the rest of the, that normally would go with my work as a mitigator, there wasn't time to do it and they didn't ask me to do it. . . . So, I thought someone else was taking care of it. I could only follow the direction of the attorney at that point. There was no time to argue with them about what they needed to do. They had no time.

App. 2429, ll. 10 – 25. She "didn't do any, any witness interviews at all. It was trial. They were here coming and going." App. 2436, ll. 21 – 25.

Approximately May 12, 2004, Topp sent Bartosh a fax stating that Lindsey had cried for help as a child and young adult, but no one did anything about it. App. 2438, l. 20 – 2439, l. 4. Topp suggested to Bartosh that he subpoena family members who were currently using mental health programs such as Bessie Smith, Steven Pilgrim, Paul Pilgrim, and Virginia Lindsey. She also suggested that mental health problems possibly ran in the family. App. 2439, ll. 5 – 13.

PCR counsel asked the following questions drawn from the ABA guidelines:

Q. The mitigation specialist compiles a comprehensive and well documented psychosocial history of client based on an exhaustive investigation. Were you able to do that?

A. No.

Q. Analyze the significance of the importance in terms of the impact on development including [effect] on personality and behavior. Were you able to do that?

A. No.

App. 2444, ll. 14 – 25.

c. Margaret Melikian

At the sentencing proceeding, Bartosh called Dr. Margaret Melikian as an expert in forensic psychiatry. Bartosh did not retain her until approximately a month before trial. App. 2882, ll. 3 – 11. She did not receive any medical records from Bartosh until April 28, 2004 (approximately three weeks before trial). App. 2882, ll. 4 – 11. Melikian only had one visit with Lindsey (May 4, 2004) that lasted a scant two-and-one-half hours. App. 2882, ll. 21 – 25. Melikian knew she could not be prepared for trial, but Bartosh left it to her in a conference call to persuade Judge Few to postpone the case. App. 2892, l. 1 – 2894, l. 7. **Bartosh did not even participate in the call.** App. 2893, ll. 1 – 8.

As will be discussed in greater detail in Argument 3.B.6, Melikian was completely destroyed on cross-examination by the solicitor. The State discredited Melikian because she had not seen any documentation to corroborate what Lindsey had told her. App. 2026, ll. 16-22. Most damaging, the State blindsided Melikian concerning whether Lindsey was malingering. Lindsey described to Melikian an “imaginary friend” named “Jimmy.” Bartosh never gave Melikian the important detail that the first mention of Jimmy was on the day Lindsey was served with the State’s Notice of Intent to Seek the Death Penalty. App. 2017, l. 2 – 2018, l. 25. Once Melikian admitted she did not know this key fact, she crumbled and her testimony was damaging to Lindsey’s defense. App. 2017, l. 2 – 2018, l. 25.

d. Dr. Tora Brawley

Bartosh **failed to call Dr. Tora Brawley at trial.** She testified at the PCR hearing. Brawley is a neuropsychologist. App. 2355, ll. 6 – 9. She previously worked as a court-appointed examiner in forensic cases at William S. Hall Institute. App. 2355, ll. 10 – 14. Neuropsychology focuses on cognitive functioning. App. 2355, ll. 18 – 22.

Brawley’s first involvement in Lindsey’s case was when she received a telephone call from Bartosh on April 12, 2004. App. 2356, ll. 6 – 7. She was not able to see Lindsey until April 27, 2004. App. 2356, ll. 8 – 12. This was the **only** time Brawley saw Lindsey. Prior to this, Bartosh did not provide Brawley with any of Lindsey’s records. App. 2356, ll. 13 – 16. Bartosh only told Brawley that Lindsey had a history of head trauma that included a gunshot wound and a car accident. Bartosh never told Dr. Brawley that several of Lindsey’s family members suffered from depression. App. 2380, ll. 4 – 7. He also mentioned that there was a question of whether or not Lindsey was malingering. App. 2356, ll. 15 – 22.

During her one visit with Lindsey, Brawley spent three hours with him administering tests. She spent another three hours scoring and interpreting these tests. App. 2370, ll. 10 – 15. During her evaluation she performed “an extended clinical interview and a battery of neuropsychological tests.” App. 2356, ll. 23 – 25. Brawley’s “bottom line finding was that there [were] some scattered neuropsychological deficits, and I recommended that they obtain medical and school records and speak with collateral sources of information to further investigate this.” App. 2357, ll. – 14.

During Brawley’s interview with Lindsey, the only source of information that Brawley had was Lindsey himself. Lindsey told Brawley that, as a child, he had fallen on the steps and hit his head several times; that he was run over by a car at age two and had surgery on his face; he had been in two or three motorcycle wrecks; had a history of migraine headaches; and suffered a self-inflicted gunshot wound in 2002 (the shooting). App. 2358, ll. 6 – 14. Brawley had no records to corroborate what Lindsey told her. Concerning his educational background, Lindsey incorrectly reported to Brawley that he had repeated the 1st grade, finished the 9th grade, and quit the 10th grade. He told her that he had to repeat the 7th grade. In actuality, Lindsey’s school records showed that he failed the 1st grade, failed the 8th grade three times and was advanced to the 9th grade at the age of 16 or 17, and then dropped out of school. App. 2805, l. 14; 2806, l. 20 – 2807, l. 1. He also said that he had speech therapy and learning classes because his speech was not good and that he had problems spelling. App. 2358, ll. 15 – 23.

Lindsey told Brawley about a suicide attempt when he was twelve and another suicide attempt in 2001. App. 2359, ll. 2 – 6. When he was twelve, Lindsey was hospitalized after taking an overdose of pills when his mother told him she did not love him. App. 2372, ll. 2 – 8. Lindsey’s 2001 suicide attempt was provoked by problems with his wife and Lindsey’s cousin

had to take a gun away from him. App. 2372, ll. 9 – 11. He also told her about a third suicide attempt in August of 2002 when he planned to drive his truck off a cliff. App. 2372, ll. 12 – 15.

Brawley gave Lindsey nineteen neuropsychological tests. App. 2373, ll. 4 – 18. Based on her examination and testing, Brawley found that Lindsey's brain did not function normally. She found that he suffered from the following impairments: severely impaired speed of mental tracking; severely impaired verbal fluency; severely impaired confrontation naming; below average immediate verbal memory; severely impaired verbal learning ability; and impaired ability to copy and recall a complex figure. App. 2360, l. 4 – 2362, l. 6. Brawley could not tell what caused these brain dysfunctions in Lindsey because she had no medical records or school records to review and there were "multiple possibilities [of] damage to the brain." App. 2362, ll. 10 – 18

Brawley could not remember why Bartosh did not call her to testify. She gave Bartosh a verbal report of her results during a one-half hour consultation with Bartosh during which she shared the results of her testing and her interview. App. 2375, ll. 10 – 15; App. 2365, ll. 12 – 19. Melikian asked for a written report, not Bartosh. App. 2365, ll. 20 – 25. Brawley recommended to Melikian that medical and school records be obtained because she had not been provided them. She also recommended that interviews be conducted for collateral sources of information. App. 2366, ll. 1 – 17. The only records Brawley received were sent after she had written her report and was told that she was not going to testify. She did not look at them. App. 2366, ll. 18 – 24.

2. Failure to Preserve Evidence and Present Testimony from Rod Tullis

Rod Tullis practiced law in Spartanburg. He testified at the PCR hearing, but not at trial. Tullis began representing Lindsey in the late 1990s. App. 2447, ll. 11 – 14. Over time, Tullis

got to know both Lindsey and his wife, Nell, very well. App. 2447, l. 21 – 2448, l. 5. Before the shooting, Lindsey had spoken with Tullis regarding his domestic issues with Nell. App. 2448, l. 12 – 2449 l. 2. Lindsey’s biggest concern was that he would continue to have access to his children. App. 2450, ll. 7 – 10. Lindsey discussed with Tullis the fact that Nell was having an extramarital affair. He was concerned about how Nell’s new boyfriend would affect his relationship with his sons. App. 2451, ll. 12 – 21.

On the day of the shooting, Tullis left his office around noon. App. 2453, l. 24 – 2454, l. 3. Tullis heard about the shooting on the news and immediately went back to his office to prepare a notice of representation. He listened to his answering machine and heard a message from Lindsey. The message was recorded after Tullis left his office and before the shooting—very likely within an hour of the shooting. App. 2453, l. 3 – 2454, l. 3. Tullis described the message at the PCR hearing:

I heard Mr. Lindsey’s voice there where he was trying, he was calling my name and was asking for me to pick up the phone, and that he needed to talk to me, that – – he sounded very distressed, very distraught. He – it was a disturbing tape to listen to because of, of how he came off emotionally on this, on this tape. . . . He wasn’t angry or agitated at all. That was what was so frightening about it. That he was very distraught, very emotionally down and upset. Not manic at all.

App. 2453, l. 17 – 2454, l. 11. Tullis described this answering machine tape as a “mini, micro cassette.” App. 2453, ll. 15 – 17.

After the shooting, Lindsey’s mother gave Tullis several suicide notes Lindsey wrote several weeks before the shooting. App. 2456, ll. 5 – 18; 2479, ll. 9 – 14. These suicide notes appear in the record at Page 2991 of the Appendix. In the notes, Lindsey tells his mother and brother they “won’t have to worry anymore” about him. App. 2988. He tells Nell that she should “always know I love you and the boys” and to show the boys his picture every day. App.

2986. Lindsey tells his son, "If I couldn't be with y'all as a family I don't want to be here anymore." App. 2985.

Tullis gave Bartosh his entire file, including the original answering machine microcassette and the suicide notes. App. 2456, ll. 5 – 18. At some point, Tullis also described the tape to the prosecution. App. 2473, ll. 19 – 25. Brannon testified that by the time he was involved, the defense team did not have this tape. App. 2350, ll. 12 – 16. Brannon never saw the suicide notes. App. 2307, ll. 5 – 18.

It now seems apparent that Bartosh lost the Tullis answering machine tape. Applicant's Exhibit 26 was entered into evidence during Quimby's testimony and is not the Tullis tape. App. 2527, l. 24 – 2528, l. 5. Quimby testified that she had no specific memory of listening to Exhibit 26 before the PCR hearing, but confirmed the handwritten sticky notes on Exhibit 26 are in her handwriting. App. 2527, l. 8. No transcript of Exhibit 26 exists in the record. Both appellate counsel have listened to Exhibit 26 and its contents do not match Tullis' description of Lindsey's message. Exhibit 26 is a full-size audiotape, not a microcassette. It contains six separate messages. Much of the tape is inaudible, but the voice is Lindsey's. He several times mentions "being holed up in a hotel." A list of discovery items received by the defense includes an answering machine tape recovered from Nell's mother, Carol Wright. In all likelihood, this is the same tape as Exhibit 26. Therefore, the logical conclusion is that Bartosh lost the microcassette given to him by Tullis.

After Lindsey was released from the hospital following the shooting, Tullis visited Lindsey at the jail. App. 2456, l. 25 – 2457, l. 2. Tullis noticed that Lindsey's head was bandaged and still bleeding. App. 2457, ll. 3 – 4. Lindsey told Tullis that he had been bashing his head against the concrete wall in his cell, had ripped out his stitches, and was attempting to

kill himself. App. 2457, ll. 7 – 11. Tullis reported the incident to the jailers and they put Lindsey on suicide watch. App. 2457, ll. 12 – 17. Tullis testified, “he was trying to die and he was not shy in telling me that he wanted to die and he was trying to die.” App. 2458, ll. 3 – 4. Lindsey’s demeanor grew worse in the weeks after the shooting. App. 2457, ll. 17 – 24. Tullis also noticed that Lindsey lost weight. App. 2457, l. 25 – 2458, l. 4.

The public defender’s office did not subpoena Tullis to testify at trial. App. 2460, ll. 19 – 20. Tullis’ office had not changed location. App. 2460, l. 21 – 2461, l. 14. Tullis saw Bartosh on a regular basis both in court and socially. App. 2461, ll. 17 – 18. He also saw Brannon and Quimby. App. 2461, ll. 19 – 24.

Tullis “was a bit surprised” that none of the attorneys for Lindsey contacted him about testifying because “I was probably the best witness as to state of mind that there was since I was the one who had spent the most time with Marion Lindsey and was more involved with this and his family and his wife than anyone else in the courthouse....” App. 2462, ll. 9 – 13.

3. Failure to Interview and Prepare Witnesses and Family Members

a. Vincent Bell

Vincent Bell was a paramedic with Spartanburg EMS. App. 2381, ll. 5 – 10. Bartosh did not call him to testify at trial. He testified at the PCR hearing. Bell responded to the Inman Police Department on the day of the shooting. He attended Lindsey at the scene. Lindsey was conscious. App. 2382, ll. 14 – 16. Lindsey did not originally cooperate with treatment and told the paramedics that he wanted to die and they should let him die. App. 2384, ll. 4 – 8. Bell testified regarding his conversation with Lindsey:

Q. All right. What type of questions did you ask him that evening?

A. I asked him basically what happened. He initially said that he shot himself and then my partner, Susan, had asked him, you know, the same type of question,

and he said he had shot himself, let me die, and then during that time he also turned around and said – I said, I asked him again what happened. He said I shot myself and then I shot my wife.

App. 2383, ll. 9 – 16. The jury never heard Bell’s testimony that Lindsey said he wanted to die.

b. Family Members and Friends

Several family members and friends of Lindsey testified at the PCR hearing regarding the defense team’s lack of preparation. As the testimony of the family members makes clear, and as will be discussed in depth in Argument 2, the information given by these individuals about Lindsey’s awful upbringing makes it clear that Bartosh erred by not retaining a social work expert to coherently present and explain the effect of Lindsey’s youth on his behavior as an adult.

i. Bill and Patsy Burton

Bill Burton testified both at trial and at the PCR hearing. He runs the United States division of a German chemical company. App. 2588, l. 23 – 2589, l. 1. Growing up, Burton was a lifeguard at a pool and became friends with Lindsey after teaching him to swim. Burton said that prior to the trial, he tried to call Bartosh several times and never could speak with him. Burton said, “It was difficult to contact him.” App. 2589, ll. 10 – 18. He never had a one-on-one discussion with Bartosh. App. 2589, ll. 21 – 23.

Burton’s sole preparation for trial was the same day as his testimony when he met with Bartosh along with a group of other witnesses. They were only told to say what they knew about Lindsey. App. 2589, ll. 18 – 23. This was the entire extent of Bartosh’s preparation of these witnesses. Burton explained it:

Q. Okay. And was it a – – well, let me rephrase it. I don't want to lead you.
How [were] the general questions posed to you and to what your role was, why were they calling you?

A. Say what you know about Marion was pretty much the scope of it. It was clear – I left that meeting with the general impression that the, the case was unorganized and I was very concerned about it, that I didn't understand the logic of– the, the direction that the defense was going, and I, I'm not an experienced person in this. But just as a layman, I wanted to understand what was the strategy and what were the facts and how could that best be used to defend the, to defend Marion and hopefully avoid the death sentence, but I didn't have a very good feeling about preparation.

App. 2590, l. 25 – 2591, l. 14.

Burton did not ask the jury for mercy during his testimony at trial. App. 2067, ll. 19 – 23. At the PCR hearing, Burton said he certainly would have asked for mercy had the question been posed to him. App. 2600, ll. 3 – 8.

Burton's mother, Patsy Burton, did not testify at trial but did testify at the PCR hearing. She was on the witness list for the trial, but was not aware of that fact until the PCR hearing. App. 2601, ll. 16 – 24. She testified that Lindsey frequently came to her house to fish in their family's pond and she developed a relationship with him during that time. App. 2602, l. 22 – 2603, l. 24. Had she been called as a witness she "would certainly have asked for mercy." App. 2607, ll. 4 – 5.

ii. Virginia Lindsey

Virginia Lindsey is Marion Lindsey's mother. She testified both at trial and at the PCR hearing. She testified that the **only** pretrial meeting she had with the defense team was when Topp and Brannon visited her for one hour approximately two weeks before the trial. App. 2648, ll. 4 – 2649, l. 5. She stated that during the eighteen months that elapsed between the shooting and that visit, no one from the defense team ever contacted her. App. 2650, ll. 1 – 14. Ms. Lindsey testified about the preparation as follows:

Q. And then, based on that one hour meeting, you were then called to testify both at the [guilt] phase and at the sentencing phase, correct?

A. Yes.

Q. During that hour long meeting, did you feel like you had been prepared enough to testify during Marion's trial?

A. No, I didn't think I had been prepared enough cause it wasn't enough time. They didn't get me, ask me enough questions and stuff about it and nothing. I don't think it really was.

Q. Did you feel you had enough time to give them background information about Marion and your family and his history?

A. No, which they didn't ask me nothing about that. But I don't think I had enough time to give them all that stuff before the trial. Bartosh or either, either Lenora I didn't, Mrs. Topp.

App. 2649, ll. 7 – 23. The defense team did not ask her to sign releases to obtain her medical or school records. App. 2650, ll. 15 – 19.

iii. Bessie Smith

Lindsey's aunt, Bessie Smith, testified at both the trial and the PCR hearing. She said the only conversation she had with the defense team was approximately a week before the trial. App. 2700, ll. 10 – 18. This meeting lasted approximately 30-40 minutes. App. 2700, ll. 19 -20. She did not tell them much about Lindsey's family history during that meeting. App. 2701, ll. 6 – 9. Smith refused to answer personal questions about herself "because I wasn't the one on trial." App. 2701, ll. 10 – 16. Bartosh spent no time after this meeting preparing Smith to testify. App. 2702, ll. 2 – 7. Smith did not ask the jury for mercy at trial.

iv. Steven Pilgrim

Steven Pilgrim, Lindsey's uncle, testified at both the trial and the PCR hearing. The only time he met with the defense team was approximately thirty minutes during a group meeting the day before the trial started. App. 2726, ll. 1 – 22. He was never asked to sign a medical records release, even though he had a history of mental illness. App. 2727, ll. 2 – 19. He testified he

was not prepared to take the stand and that the attorneys never asked him anything about the events leading up to the shooting or Lindsey's personal history. App. 2728, ll. 6 – 17. Pilgrim testified regarding what the defense team told him about asking for mercy:

Q. One last little topic we need to talk about. Did they prepare you to or ask you if you wanted to address the jury and ask for mercy for Marion?

A. Yes, they did.

Q. All right. What was that conversation like? How did they prepare you to, to ask that of the jury?

A. They, they told me not to do that. They told me not to ask the jury for mercy.

Q. If you had been given the opportunity to ask that jury for mercy for Marion, would you have done so?

A. I would.

App. 2728, l. 25 – 2729, l. 10 (emphasis added).

v. Timothy Sims

Timothy Sims, Lindsey's younger brother, did not testify at trial, but testified at the PCR hearing. No one from the defense team ever contacted him. App. 2755, ll. 10 – 13. Sims attended the entire trial. App. 2756, ll. 13 – 14. During the trial, he approached Brannon and asked to testify because he knew "more about Nell and Marion than anybody." App. 2756, l. 18 – 2757, l. 5. Sims was not called as a witness. He said at the PCR hearing that he would have asked the jury for mercy. App. 2757, ll. 19- 21.

B. Order of Dismissal

In the Order of Dismissal, the PCR court summarily dispatched Lindsey's argument that trial counsel failed to adequately prepare a mitigation case:

In this allegation, the Applicant has merely asserted a general claim that counsel must meet the checklist that he claims the A.B.A. has established. While

it appears that counsel did not retain a mitigation investigator under [sic] months before the trial, he [sic] has not proven that no mitigation investigation was done. He has failed to show that the investigation was unreasonable. He failed to prove either deficiency or prejudice based on his “time spent” argument.

App. 3716. The PCR court also gave a summary of the scant evidence presented at mitigation that focused primarily on the limited evidence trial counsel was able to acquire during their hasty investigation and not on what was actually presented to the jury. App. 3713-15. The evidence regarding lack of preparation compelled the PCR court to correctly admit, “[A]bsent Mr. Bartosh’s testimony, it appears that the bulk of the preparation was done two months prior to the trial with the retention of the psychologist, psychiatrist and mitigation investigator in that period.” App. 3715.

C. Discussion

The PCR court misunderstood Lindsey’s argument. The PCR Court erred by interpreting Lindsey’s argument as only that trial counsel failed to spend enough time investigating and preparing a mitigation case. While appellate counsel submits that the failure to investigate and prepare until one month before trial is deficient performance, what the PCR court failed to understand was that it was not only the lack of time spent, but: (1) the evidence the jury never heard; and (2) the ineffective way the witnesses testified that denied Lindsey’s rights under the Sixth, Eighth, and Fourteenth Amendments. In this argument, and again in more detail with the specific claims related to the failure to prepare Melikian, the failure to call a social work expert, and the failure to call a prison adaptability expert, Lindsey will show specific evidence ignored by the PCR court that prejudiced Lindsey and could have persuaded the jury to give Lindsey a life sentence.

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel’s performance was deficient and such deficiency prejudiced

petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688.

1. Deficient Performance

a. The PCR Court Incorrectly Disregarded the ABA Guidelines in Measuring Trial Counsel's Performance

Ignoring precedent from this Court and the United States Supreme Court, the PCR court mistakenly refused to use the ABA Guidelines to measure trial counsel's performance. At multiple places in its Order of Dismissal, the PCR court treats the ABA Guidelines with dismissiveness. App. 3551-52, 3624, 3697, 3712-13, 3716. The court misunderstood the United States Supreme Court's holding in Bobby v. Van Hook, 130 S.Ct. 13 (2009). The PCR court determined that Van Hook represented a retreat from United States Supreme Court precedent utilizing the ABA Guidelines. App. 3551. With respect to trial counsel's failure to present evidence of Lindsey's terrible family history through a social worker, the PCR Court dismissed the ABA Guidelines, stating, "[Lindsey's] reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case." App. 3705. Again citing Van Hook, the PCR court scorned the use of the ABA Guidelines in addressing trial counsel's failure to investigate and present an adequate mitigation case by perplexingly listing as unreasonable investigation requirements such basic steps as interviewing the client's family members, neighbors, case workers, and doctors. App. 3712-13.

The United States Supreme Court has consistently explained that the ABA Guidelines provide evidence of well-defined and prevailing professional norms. "The ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover all

reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.” Wiggins v. Smith, 539 U.S. 510, 524 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C)(1989) (hereinafter, “1989 Guidelines”). The ABA Guidelines were revised in 2003, in between the shooting and Lindsey’s trial. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Revised Edition February 2003, 31 Hofstra L. Rev. 913 (2003) (hereinafter, “2003 Guidelines”).⁴ “The Guidelines clarity and thoroughness has helped to establish what constitutes thorough mitigation investigation and capital defense advocacy.” Emily Hughes, Arbitrary Death: An Empirical Study of Mitigation, 89 Wash. U. L. Rev. 581, 629 (2012).

Together with Wiggins, the United States Supreme Court has used the ABA Guidelines to reverse death sentences in two other ineffective assistance of counsel cases. Rompilla v. Beard, 545 U.S. 374, 387, n.6, n.7 (2005); Williams v. Taylor, 529 U.S. 362, 396 (2000). The citation of and approval of the ABA Guidelines demonstrates their importance in providing an objective standard against which an attorney’s performance can be measured. Since Wiggins and the promulgation of the 2003 Guidelines, they have been cited with approval by multiple courts. Except for the Fifth Circuit, every federal court of appeals to have addressed their usage has cited them with approval.⁵ See Blystone v. Horn, 664 F.3d 397, 422 (3rd Cir. 2011) (citing Guideline 11.4.1(C) addressing investigation); Gray v. Branker, 529 F.3d 220, 229 (4th Cir.

⁴ The 2003 Guidelines appear in the record at pages 3109 – 3283. As the 2003 Guidelines were issued between the shooting of Nell Lindsey and the trial, both the 1989 and 2003 Guidelines apply to this case. For the Court’s convenience, further citation to the 2003 Guidelines will include the relevant pages in the Appendix.

⁵ The First, Second, and District of Columbia Circuits do not cite to the ABA Guidelines, presumably because the states comprising these circuits have, with the exception of New Hampshire (which has not executed anyone since before 1976), outlawed capital punishment.

2008) (citing Guideline 11.4.1(C) addressing investigation); Foust v. Houk, 655 F.3d 524, 534 (6th Cir. 2011) (citing Guideline 11.4.1(C) addressing investigation); Stevens v. McBride, 489 F.3d 883, 895 & n.1 (7th Cir. 2007) (citing Guideline 11.4.1(C) addressing investigation); Ortiz v. United States, 664 F.3d 1151, 1170 (8th Cir. 2011) (citing Guideline 11.4.1(A), (C), and (D) addressing investigation and contacts with victim’s family); Detrich v. Ryan, 677 F.3d 958, 974 & n.7 (9th Cir. 2012) (citing Guideline 11.4.1(C) addressing investigation and stating, “The Supreme Court has consistently recognized the utility of considering the ABA Guidelines in evaluating the reasonableness of attorney performance in ineffective assistance claims.”); Hooks v. Workman, ___ F.3d ___, 2012 WL 3140916 at *41 (10th Cir. Aug. 3, 2012) (stating “We judge counsel’s performance by reference to prevailing professional norms, which in capital cases include the ABA Guidelines. . . .”) (internal quotations omitted); Stephens v. Secretary, Fla. Dep’t Corr., 678, F.3d 1219,1229 n.2 (11th Cir. 2012) (citing Guideline 11.4.1(C) addressing investigation); see also, Summary of Cases Citing to ABA Guidelines, American Bar Association Publication updated August 6, 2012, available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003summary.authcheckdam.pdf.

State governmental and legal organizations have adopted the ABA Guidelines to ensure adequate representation of defendants in capital prosecutions. See ABA Death Penalty Representation Project, Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Updated January 2012, available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/implementation_fact_sheet_01_2012.authcheckdam.pdf. Among the jurisdictions that have adopted the Guidelines are Louisiana, which adopted a version of them by law; Ohio, which adopted

them by court rule; Nevada, whose supreme court promulgated capital litigation standards by court order; and Arizona, whose supreme court amended that state's criminal procedure rules to require that death penalty counsel be familiar with the Guidelines. See id. As these states have recognized, "[w]ithout consistency in enforcing the prevailing professional norms clarified through the Guidelines, inconsistent understandings of what constitutes thorough mitigation investigation will continue to contribute to the arbitrariness with which defendants receive the death penalty." Hughes, *supra* at 630.

As early as 1981, this Court recognized the utility of the ABA Guidelines in criminal cases. In Harden v. State, 276 S.C. 249, 253, 277 S.E.2d 692, 694 (1981) (citing § 14-3.3 of the Standard for Criminal Justice), the Court set forth in full the ABA Guideline dealing with the responsibilities of a trial judge during a plea agreement. The Court used the ABA standard to affirm a trial judge's involvement in a plea bargain and to set a future standard to ensure litigants had access to a trial judge while avoiding the appearance of a judge coercing a litigant to extend or accept a plea. Id. at 256-57, 277 S.E.2d at 695. The Court stated, "We believe that the position of the ABA Standard here set forth is sound." Id. at 256, 277 S.E.2d at 695.

More recently, in Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007), this Court cited the 2003 Guidelines with approval in a capital case involving trial counsel's failure to call an independent expert witness who could rebut the State's evidence. Ard stated, "The American Bar Association (ABA) has specifically provided guidelines for defense counsel's performance regarding investigation of a capital case. . . ." Id. Citing both the 2003 Guidelines' admonition to obtain the assistance of experts to aggressively dispute the State's forensic experts and Wiggins' use of the Guidelines, this Court held trial counsel ineffective for failing to investigate and obtain an expert to dispute the State's gunshot residue expert's testimony. Id.

Again in the capital case of Council v. State, this Court used the ABA Guidelines as a reference to measure an attorney's performance. 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008). This Court held trial counsel's decision not to further investigate Council's background and present even the minimal mitigating evidence obtained was unreasonable. Much like in Lindsey's case, counsel was deficient in failing to begin investigation into Council's background as soon as the prosecution served its Notice of Intent to Seek the Death Penalty. Id. This Court held counsel's conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing 1989 Guidelines, 11.4.1(2)(C)).

Nothing in Van Hook represents a reluctance by the Supreme Court to use the ABA Guidelines to measure an attorney's performance. In Van Hook, the Supreme Court simply reversed the Sixth Circuit for applying the 2003 Guidelines to the conduct of trial counsel in 1985, stating the obvious fact that current standards of performance cannot be used to judge eighteen-year-old actions by trial counsel. Van Hook, 130 S.Ct. at 17. The Court emphasized the "narrow grounds" of its holding in Van Hook and that it should not "be regarded as accepting the legitimacy of a less categorical use of the Guidelines to evaluate post-2003 representation." Id. at n.1. In a later decision, the Court recognized that the comment in Van Hook that the ABA Guidelines are not "inexorable commands" does not permit them to be ignored. See Padilla v. Kentucky, 130 S.Ct. 1473, 1482 (2010) (citing the "ABA Standards for Criminal Justice") (non-capital case). After quoting Van Hook's "inexorable commands" statement, the Court explained that ABA standards "may be valuable measures of the prevailing professional norms of effective representation." Id. Therefore, the PCR court erred in relying on Van Hook for the proposition that it could ignore the ABA Guidelines.

b. Trial Counsel's Performance is Deficient When Measured Against the ABA Guidelines

i. Failure to Promptly Investigate and Assemble the Defense Team

From a review of the record below, trial counsel deficiently performed in several areas. The ABA Guidelines state that they “apply from the moment the client is taken into custody and extend to all stages of every case.” 2003 Guideline 1.1(B), App. 3115; see 1989 Guideline 11.3, 11.4.1. The commentary to the 2003 Guideline states that:

Investigation and planning for both phases **must begin immediately upon counsel's entry into the case**, even before the prosecution has affirmatively indicated that it will seek the death penalty. Counsel must promptly obtain the investigative resources necessary to prepare for both phases, including at minimum the assistance of a professional investigator and a mitigation specialist, as well as all professional expertise appropriate to the case.

App. 3121 (emphasis added).

[The] Eighth Amendment right to offer mitigating evidence does nothing to fulfill its purpose unless it is understood to presuppose that the defense lawyer will unearth, develop, present, and insist on the consideration of those compassionate or mitigating factors stemming from the diverse frailties of humankind.

App. 3123 (internal quotations omitted).

This duty to begin immediately is reinforced by the suggested makeup of the defense team as consisting of “no fewer than two attorneys ... an investigator ... a mitigation specialist [and] at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” 2003 Guideline 4.1(A)1 & 2, App. 3148; see 1989 Guidelines 11.4.1, 11.8.3(A), (D), & (F). The comments addressing the need for a mitigation specialist apply with particular force to Lindsey's case:

Perhaps most critically, having a qualified mitigation specialist assigned to every capital case as an integral part of the defense team insures that the presentation to be made at the penalty phase is integrated into the overall preparation of the case **rather than being hurriedly thrown together** by defense counsel still in shock at the guilty verdict.

App. 3155 (emphasis added). The 2003 Guidelines make it clear that these members of the defense team should be assembled “[a]s soon as possible after designation.” 2003 Guideline 10.4(C), App. 3194; see also 1989 Guideline 11.3, 11.4.1, 11.8.3.

“Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.” 2003 Guideline 10.7(A). Counsel may not “sit idly by, thinking that investigation would be futile.” Comment to 2003 Guideline 10.7, App. 3216; see 1989 Guideline 11.4.1(C) & (E). “[P]enalty phase preparation requires extensive and generally unparalleled investigation into personal and family history,” including: (1) medical history; (2) family and social history; (3) educational history; (4) military service; (5) employment history; and (6) prior juvenile and adult correctional experience. Id. and at App. 3217-18.

As stated above, trial counsel failed to begin preparation immediately and sat idle until a month before trial. Trial counsel failed to hire a mitigation specialist who could begin work immediately and who was experienced in mitigation investigation. As a result, no meaningful mitigation investigation began until a month before trial. The second chair was not appointed until two months before trial. Trial counsel failed to hire mental health experts who could have performed independent evaluations close to the time of the offense. Trial counsel’s performance was deficient with respect to these Guidelines.

ii. Bartosh Failed to Attend Important Interviews with the State’s Mental Health Expert

Trial counsel also violated 2003 Guideline 10.11(J), which states:

If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel should:

1. carefully consider

- a. what legal challenges may appropriately be made to the interview or the conditions surrounding it, and
 - b. the legal and strategic issues implicated by the client's cooperation or non-cooperation;
2. insure that the client understands the significance of any statements made during such an interview; and
3. **attend the interview.**

App. 3252-53 (emphasis added); see also 1989 Guideline 11.8.3(D). Bartosh failed to attend two interviews with the State's psychiatrist Dr. Pratap Narayan. App. 129. These interviews were of critical importance as it was Dr. Narayan who diagnosed Lindsey as a malingerer. Bartosh's failure to attend these interviews with his client violated this guideline and prevailing professional norms.

iii. Trial Counsel Failed to Call Witnesses and Preserve Evidence

Trial counsel also performed deficiently by not calling several witnesses who would have aided Lindsey's mitigation case. The ABA Guidelines state that counsel should consider:

1. Witnesses familiar with and evidence relating to the client's life and development, from conception to the time of sentencing, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2003 Guideline 10.11(F)(1), App. 3250-51; see 1989 Guideline 11.8.3(F)(1). Trial counsel failed to call Rod Tullis as a witness. Tullis knew both Lindsey and his wife very well. App. 2447, l. 21 – 2448, l. 5. He would have testified about how much Lindsey cared for his sons. App. 2450, ll. 21 – 22. Tullis would have testified about Lindsey's suicidal state at the time of the shooting, including the suicide notes Lindsey wrote a few weeks before the incident. App. 2456, ll. 5 – 18; App. 2479, ll. 9 – 14. Most importantly, Tullis could have testified regarding the despondent and suicidal message Lindsey left on his answering machine in the hours

immediately before the incident. App. 2453, l. 17 – 2454, l. 11. Bartosh’s failure to preserve Tullis’ answering machine tape made his testimony critical. No reasonable strategy exists that would justify the failure to call Tullis or preserve the answering machine tape.

Bartosh failed to call Vincent Bell. Bell would have testified about Lindsey’s suicidal state in the immediate moments after the shooting. Bell would have testified about Lindsey’s self-inflicted head wound and the fact that Lindsey told him to “Let me die.” App. 2383, ll. 9 – 16. No reasonable trial strategy exists that would justify the failure to call Bell. The late start investigating the case also prevented the defense from calling Dr. Barry Henderson, Lindsey’s childhood physician.

Bartosh failed to call Lindsey’s brother, Timothy Sims. Sims knew Lindsey and his wife very well. App. 2756, l. 18 – 2757, l. 5. Sims actually approached the defense team and begged to testify. App. 2756, l. 18 – 2757, l. 5. No reasonable trial strategy exists that would justify the failure to call Sims.

Trial counsel also failed to fully prepare and exploit the testimony of the lay witnesses who did testify. Each of the lay witnesses testified regarding the almost nonexistent preparation for their testimony, which essentially consisted of a group meeting immediately before they took the stand. Bartosh failed to obtain the medical records of Robin Pilgrim, Bessie Smith, and Steven Pilgrim, who all had histories of mental illness. App. 2404, ll. 14 – 16. The defense team never even obtained a medical release from Steven Pilgrim. App. 2727, ll. 2 – 19.

iv. Trial Counsel Failed to Prepare Witnesses to Ask the Jury for Mercy

Trial counsel failed to have the lay witnesses ask for mercy for Lindsey. A defendant in a capital proceeding is permitted to present witnesses “who know and care for him and are willing on that basis to ask for mercy on his behalf.” State v. Torrence, 305 S.C. 45, 406 S.E.2d 315

(1991). In the following exchange, Bartosh failed to object to the trial judge's erroneous ruling that the defense witnesses could not ask for mercy:

The Court: That was the last closing argument from the witness that I'm going to allow. I'm not going to allow any other witnesses to answer the question is there anything you want to tell the jury. Okay?

Mr. Bartosh: Yes, sir.

App. 2078, ll. 15 – 20.

Bill Burton, Steven Pilgrim, and Bessie Smith, all of whom testified at trial, failed to ask for mercy. Bill Burton specifically testified at the PCR hearing that he would have asked the jury for mercy. App. 2600, ll. 3 – 8. Bessie Smith testified that she would “do what I could if it was gonna help Marion.” App. 2701, l. 25 – 2702, l. 1. Steven Pilgrim testified that he was told by the defense team **not** to ask for mercy. App. 2728, l. 25 – 2729, l. 10. Among the witnesses Bartosh failed to call, Timothy Sims and Patsy Burton both testified they would have asked for mercy. App. 2757, ll. 19- 21 (Sims); App. 2607, ll. 4 – 5 (Mrs. Burton). The failure to have these witnesses ask for mercy and the failure to object to the trial judge's erroneous ruling with respect to requests for mercy constitute deficient performance.

v. Trial Counsel Failed to Retain, Prepare, and Present Expert Witnesses

Trial counsel's failure to prepare also led to deficient performance with respect to expert witnesses. Trial counsel has a duty to call expert witnesses

along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense. . . and/or to rebut or explain evidence presented by the prosecutor;

2003 Guideline 10.11(F)(2), App. 3251; see 1989 Guideline 11.8.3(F)(1) & (2). Bartosh failed to call Brawley who could have explained Lindsey's cognitive deficits. As will be seen in

Argument 2, Bartosh failed to call a social work expert who could have testified regarding Lindsey's personal and family history. As will be seen in Argument 3, Bartosh failed to have Lindsey seen early in the investigation by a psychiatrist and failed to prepare Melikian, an inexperienced forensic psychiatrist, who was hired a month before trial. And as will be seen in Argument 4, Bartosh failed to call a prison adaptability expert to rebut the State's evidence of future dangerousness. The failure to call these witnesses and to prepare the sole expert presented during sentencing was constitutionally deficient performance.

c. Trial Counsel's Performance Was Deficient When Measured Against Existing Precedent

i. United States Supreme Court Precedent

In addition to trial counsel's failure to comply with the ABA Guidelines, trial counsel also failed to meet constitutional standards for effective assistance as demonstrated in the opinions of the United States Supreme Court and of this Court. In Wiggins, trial counsel's mitigation investigation into Wiggins' life history consisted of two parts: (1) a written pre-sentence investigation, which included a one-page account of Wiggins' personal history, and (2) the state's social services records documenting Wiggins' various placements in the state's foster care system.⁶ Wiggins, 539 U.S. at 523. Counsel then abandoned their investigation of Wiggins' background. Id. at 524. The Court held counsel's decision not to extend their investigation fell short of prevailing professional norms in light of their failure to retain a forensic social worker to prepare a social history report, which was standard practice in the state at the time, and their failure to investigate all reasonably available mitigating evidence, as mandated by the ABA Guidelines. Id.

⁶ Wiggins' trial took place in 1989. Id. at 515.

In addition, the Wiggins Court held counsel's investigation was unreasonable due to the evidence counsel actually uncovered in the social services records, which indicated Wiggins' mother was an alcoholic, Wiggins displayed emotional difficulties in foster homes, and had frequent, lengthy absences from school. Id. at 525. The Court concluded "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." Id. The Court explained that "[i]n assessing the reasonableness of an attorney's investigation ... a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Id. at 527. Just as in Wiggins, trial counsel here failed to conduct a full investigation and should have hired a competent mitigation investigator who, unlike Topp, had time to do her job. Trial counsel also should have retained a clinical social worker.

In Williams, the Supreme Court found trial counsel ineffective for failing to investigate and prepare an adequate mitigation case. Williams, 529 U.S. at 395. Much like Lindsey's case, Williams' attorneys failed to prepare for the sentencing phase until a week before trial. Id. The attorneys failed to uncover mitigating evidence about his "nightmarish childhood," the poverty in which he lived, that he was borderline mentally retarded, that he received commendations for good behavior earned during prior incarcerations, and did not call a witness who volunteered to testify favorably for Williams. Id. at 395-96 & n.19. The Court stated, "Whether or not those omissions were sufficiently prejudicial to have affected the outcome of sentencing, they clearly demonstrate that trial counsel did not fulfill their obligation to conduct a thorough investigation of the defendant's background." Id. at 396. The Court ultimately determined that Williams was prejudiced by his attorneys' deficient performance. Id. at 396-97. Just as in Williams, Lindsey's

counsel should have uncovered mitigating evidence through his family members and should have called Tullis, Timothy Sims, Dr. Barry Henderson, and Vincent Bell as witnesses.

In Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 3261-62 (2010), the United States Supreme Court reversed a death sentence for trial counsel's failure to investigate his client's family history. At the sentencing proceeding, trial counsel called seven witnesses to "present evidence describing [the defendant's] childhood as stable, loving, and essentially without incident." Id. at 3161. As the Court noted, this strategy predictably backfired when the prosecutor argued to the jury that even with his privileged background, the defendant "'rejected every opportunity that was afforded him.'" Id. at 3262 (quoting the prosecutor). In fact, the defendant did not have a happy upbringing and trial counsel failed to uncover evidence of physical, verbal, and sexual abuse. Id. The defendant had trouble in school and had brain abnormalities. Id. at 3262-63. The Court found counsel's performance to be constitutionally deficient both in the selection of an unreasonable trial strategy and for failing to fully investigate their client's history. Id. at 3264. Similarly, Bartosh did not fully investigate Lindsey's family history.

In Porter v. McCollum, ___ U.S. ___, 130 S.Ct. 447, 449 (2009), trial counsel only presented the defendant's ex-wife and deposition excerpts during the sentencing phase. The Court summarized the mitigation evidence as "inconsistent testimony about [the defendant's] behavior when intoxicated" and that the Porter had a good relationship with his son. Id. The PCR litigation revealed that, similar to Lindsey's case, trial counsel had only a month to prepare for the sentencing hearing and had never represented a defendant during a penalty phase trial. Id. at 453. Trial counsel failed to obtain Porter's school or military records. Id. Similar to the present case, trial counsel in Porter failed to personally interview any members of Porter's family

or any other witnesses. Id. PCR counsel presented evidence of Porter’s extensive and horrific combat experiences in the Korean War. Porter was awarded two Purple Hearts and other decorations for his actions in two of the bloodiest battles in the war, but these experiences left him a broken man with severe mental health issues. Id. at 450-51. The Court stated, “Counsel thus failed to uncover and present any evidence of [the defendant’s] mental health or mental impairment, his family background, or his military service. The decision not to investigate did not reflect reasonable professional judgment.” Id. at 453.

ii. South Carolina Precedent

This Court has also reversed death sentences for trial counsel’s failure to investigate and present mitigating evidence during the penalty phase. In Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008), this Court held the trial attorney’s decision not to further investigate Council’s background and present even the minimal mitigating evidence obtained was unreasonable. According to this Court, and just as in Lindsey’s case, counsel was deficient in failing to begin his investigation into Council’s background as soon as the prosecution served its Notice of Intent to Seek the Death Penalty. Id. Despite the strong case of guilt against Council, the trial attorney obtained only his juvenile justice records and state hospital records before trial. Trial counsel did not request certain background records until the day of jury selection and did not set up a meeting with the defense’s retained mental health expert, who had received only limited records, until a month before trial. Id. Counsel’s conduct fell below the standards set by the ABA. Id. at 172-173, 670 S.E.2d at 363 (citing 1989 Guideline 11.4.1(2)(C)). The late start and deficient performance in Council mirrors the case at bar.

Additionally, this Court held the limited information obtained by trial counsel should have put him on notice that Council’s background could potentially provide powerful mitigating

evidence. Id. at 173, 670 S.E. 2d at 363. Not only did trial counsel unreasonably delay in investigating Council's background, trial counsel failed to conduct an adequate investigation. Id. The retained mental health expert evaluated Council for competency and criminal responsibility only, had inadequate records, and met with Council only once, shortly before trial. Id. Trial counsel did not utilize the services of a social history investigator, despite available funding. Id. Finally, this Court concluded "it was unreasonable for trial counsel not to obtain [Council's] family records." Id. at 174, 670 S.E.2d at 363. The limited records obtained by trial counsel "should have alerted him to the fact that the family was dysfunctional." Id. at 174, 670 S.E.2d at 364. The identical factors contributing to a finding of deficient performance in Council are present here.

This Court held "[e]ven if trial counsel's investigation could be deemed sufficient or adequate, we believe trial counsel also failed to present any significant mitigating evidence [where the] mitigation presentation consisted solely of [Council's] mother's extremely limited testimony." Id. at 174-175, 670 S.E.2d at 364. In light of the State's damaging character evidence, Council's character could not have been further damaged by the presentation of additional mitigation evidence. Id. at 175, 670 S.E.2d at 364.

In Von Dohlen v. State, this Court held trial counsel's investigation concerning the defendant's mental state was not reasonable despite the fact that counsel made "some effort." 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004). The mitigation case presented during the trial was that Von Dohlen was a good husband, had been married for seventeen years, was a good father to his four children, and was a dependable employee. At trial, witnesses testified he grew up in a very poor family and had been physically abused and emotionally neglected as a child. Von Dohlen's personality dramatically changed when his brother was murdered just two weeks

before the homicide involving Von Dohlen. He began abusing alcohol and Valium. A psychiatrist, Dr. Michael Lampkin, testified that Von Dohlen suffered from an adjustment reaction, which was easily treated, short-term, and not a chronic mental illness. Id. at 604, 602 S.E.2d at 741.

However, the same psychiatrist testified during post-conviction proceedings that had he been provided with the additional medical and psychiatric records uncovered by post-conviction counsel, he would have testified Von Dohlen suffered from “major depressive episodes with severe symptoms of anxiety and possible prepsychotic features.” Id. at 605, 602 S.E.2d at 741. Another psychiatrist, Dr. John DeWitt, testified at the PCR hearing that Von Dohlen suffered from a major mental illness at the time of the murder and was predisposed to such based upon his family history of mental illness and alcohol or drug abuse. Id. at 606, 602 S.E.2d at 742. Although trial counsel “exerted some effort,” their failure “to adequately investigate and prepare expert testimony about Von Dohlen’s condition as it existed at the time of the murder” was deficient performance. Id. Similar to Von Dohlen, trial counsel in Lindsey’s case presented some mitigating evidence, but failed to uncover and present substantial and consequential evidence that was available.

Trial counsel’s performance here was also deficient for failing to fully investigate and present a complete and coherent mitigation case. As in Council and Von Dohlen, Bartosh failed to conduct a complete investigation into Lindsey’s background and obtain the records necessary to prepare Melikian. Bartosh failed to obtain records concerning Lindsey’s background. No records were obtained with respect to Lindsey’s family members who suffered from mental illnesses. As in Porter, Bartosh failed to begin meaningful preparation until a month before trial.

As in Williams, Bartosh failed to present evidence regarding Lindsey's horrible childhood. He also failed to call witnesses who knew Lindsey and would have asked the jury for mercy.

Furthermore, trial counsel was also ineffective for failing to call experts who would have helped Lindsey's mitigation case. Bartosh failed to call Brawley who would have testified regarding Lindsey's cognitive impairments. In McKnight v. State, 378 S.C. 33, 43-44, 661 S.E.2d 354, 359-60 (2008), this Court reversed a death sentence because of trial counsel's failure to call a doctor who testified favorably at a previous trial. Similarly, Bartosh knew Brawley's testimony would be helpful, had her listed as a witness, but inexplicably failed to call her to testify. The same rationale applies to Bartosh's failure to call a social work expert and a prison adaptability expert, as will be discussed in Arguments 2 and 4. The above-cited precedent demonstrates trial counsel's performance was constitutionally deficient.

2. Prejudice

Lindsey demonstrated substantial prejudice at the PCR hearing. Trial counsel's failure to investigate and prepare a complete and coherent mitigation presentation prevented the jury from hearing substantial evidence that could have resulted in a life sentence. The PCR court erred in concluding that because the jury heard some mitigating evidence that Lindsey could not show prejudice. The PCR court ignored the evidence and witnesses that trial counsel should have presented to the jury at sentencing.

To show prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Wiggins, 539 U.S. at 534 (quoting Strickland, 466 U.S. at 694). Only one juror is needed to

prevent a death sentence. “A capital jury can recommend a life sentence for any reason or no reason at all.” State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

The PCR court fundamentally erred in its prejudice analysis. It determined that because trial counsel presented some mitigating evidence, that *ipso facto* Lindsey could not show prejudice. The United States Supreme Court directly rebuffed this approach in Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259 (2010). In Sears, a *per curiam* opinion, the state PCR court found counsel’s mitigation investigation was constitutionally deficient, but in a “surprising” conclusion, determined that the defendant was not prejudiced. Id. at 3264. The state PCR court concluded that “[b]ecause Sears’ counsel did present some mitigation evidence during his penalty phase . . . ‘[t]his case cannot be fairly compared with those where little or no mitigation evidence is presented and where a reasonable prediction of outcome can be made.’” Id. (quoting the state PCR court).

The Court resoundingly rejected this interpretation of the prejudice prong of Strickland and its progeny, stating:

Second, and more fundamentally, the court failed to apply the proper prejudice inquiry. We have never limited the prejudice inquiry under Strickland to cases in which there was only “little or no mitigation evidence” presented. True, we have considered cases involving such circumstances, and we have explained that there is no prejudice when the new mitigating evidence “would barely have altered the sentencing profile presented” to the decisionmaker, Strickland, *supra*, at 700, 104 S.Ct. 2052. But we also have found deficiency *and* prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase.

Id. at 3265-66 (emphasis in original). In support of this statement, the Court cited Williams, Rompilla, and Porter. The Court further condemned this erroneous application of Strickland:

We certainly have never held that counsel’s effort to present *some* mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant. To the contrary, we have consistently explained that the Strickland inquiry requires precisely the type

of probing and fact-specific analysis that the state trial court failed to undertake below.

Id. at 3266 (emphasis in original). Just like the state PCR court in Sears, the PCR court in this case erroneously assumed that Lindsey was not prejudiced because trial counsel presented some evidence at sentencing. Also like Sears, and as will be more fully explained in Argument 5, the PCR court's wholesale adoption of the State's proposed order demonstrates its failure to engage in "the type of probing and fact-specific analysis" required by the Sixth, Eighth, and Fourteenth Amendments. Id.

At the PCR hearing, Lindsey showed multiple instances where trial counsel did not uncover and present material mitigating evidence to the jury. The PCR court here made the same error as the state court in Sears which prevented it from apprehending these instances.

a. Prejudice Flowing from Lay Witnesses Who Did Not Testify at Trial

With respect to the witnesses presented at the PCR hearing who were not called at trial, prejudice is easy to demonstrate because the jury never heard their testimony. Lindsey was substantially prejudiced by trial counsel's failure to call Tullis as a witness. Tullis could have provided key testimony on multiple points that would have: (1) rebutted the State's aggravation evidence; and (2) shown Lindsey's state of mind at the time of the shooting and its aftermath.

During its penalty phase case, the State focused on violent incidents during Lindsey's marriage. The State presented the testimony of Celeste Nesbitt, Sharon Smith, Cathy Mullinax, and Brian White who all testified that they saw Lindsey beat his wife. (Nesbitt) App. 1775, ll. 15 – 24; App. 1777, ll. 5 – 9; App. 1779, ll. 5 – 16; (Mullinax) App. 1925, l. 2 – 1927, l. 10; (Smith) App. 1821, ll. 5 – 8; App. 1823, ll. 2 – 7; (White) App. 1919, l. 15 – 1921, l. 7. Magistrate Judge Sarah Simmons also testified regarding a criminal domestic violence charge that was pending against Lindsey at the time of the shooting. App. 1931, ll. 10 – 25.

The Solicitor emphasized these incidents in his closing argument. The Solicitor argued that Lindsey consistently beat his wife and refused to use the court system to settle his disputes with Nell about their marriage and children. The Solicitor stated:

I've got these two images doling [sic] in my mind. I've got a woman who follows the system. She believes in the system. She takes out an arrest warrant. He is processed. He is served. A judge tells him to stay away from his wife. That is somebody on that side. Then you've got Marion Lindsey who ignores what a judge tells him and takes justice in his own hands and guns his wife down. You want the context of the crime? There is the context of the crime.

App. 2115, ll. 14 – 23.

Tullis would have blunted the force of these witnesses' testimony and the Solicitor's argument. Tullis would have testified that over the years, he got to know both Lindsey and his wife very well. App. 2447, l. 21 – 2448, l. 5. He would have testified that Lindsey had never been convicted of any criminal domestic violence charge. App. 2482, ll. 16 – 22. Regarding the past incidents of violence against Nell, Tullis "had a lot of contact with Mrs. Lindsey also, and, in fact, Mrs. Lindsey was the main one who would come and pay my fees for her husband during those periods of time." App. 2476, l. 25 – 2477, l. 4.

Tullis also would have testified that Lindsey had been to see him regarding his domestic issues in the weeks leading up to the shooting, which would have rebutted the Solicitor's argument that Lindsey ignored the justice system. App. 2448, l. 12 – 2449 l. 2. Tullis would have told the jury that Lindsey's biggest concern was being able to see his children and that due to Nell having an extramarital affair, Lindsey was worried about how her new boyfriend would affect his relationship with his sons. App. 2451, ll. 12 – 21. As shown by the Solicitor's emphasis on this point in his closing argument, the State rested much of its aggravation case on the claim that Lindsey took the law into his own hands. App. 2115, ll. 14 – 23. Bartosh's closing statement shows his ignorance of what Tullis knew:

The Solicitor has made a great deal about the fact that there were alternatives available for Marion to handle the problem of custody with his children. I ask you to consider this, given Marion's education, his upbringing, his situation in life, **I don't know whether or not he really knew about those that you go and get a lawyer.** And you go up to Family Court and you get your kids. **I don't know if that ever entered his mind that that was an option to him.**

App. 2140, l. 23 – 2141, l. 6 (emphasis added). To not call a witness who was ready and willing to rebut this assertion by the State was an egregious and extremely prejudicial error.

The State also viciously attacked Lindsey's claim that he was depressed and suicidal. The State destroyed Melikian during cross-examination and repeatedly emphasized that Lindsey was malingering. During his closing, the Solicitor argued:

I hear he was hellbent on suicide. But he had all day and ten bullets and not one of them wound up in his head. Suicide? She wanted [sic] wound up with an autopsy. He gave himself a little nick on the neck. Suicide? Ten bullets? All day to do it. Never got around to killing himself.

App. 2114, l. 22 – 2115, l. 2. The Solicitor also argued:

You can rest assured that they will talk about his psychiatric problems. They brought Dr. Melikian in here. Here's what I remember from Dr. Melikian. When she was asked about depression, what part of depression will make somebody shoot somebody in the back of the head three times in a parking lot? She said nothing. What part of having cognitive deficits makes you shoot somebody in the back of the head in a parking lot? Nothing.

App. 2117, ll. 11 – 19. Without Tullis (and other witnesses who were not called), the State's argument essentially went unchallenged.

Tullis' testimony (which was made without an adverse credibility finding) concerning the message left on his answering machine hours before the shooting was invaluable evidence that could have rebutted the State's argument concerning Lindsey's desire to commit suicide and would have been very persuasive to jurors. At the PCR hearing, Tullis vividly described Lindsey calling his name and asking for help. App. 2453, l. 17 – 2454, l. 11. Lindsey was "not manic," but "distressed" and "distraught." App. 2453, l. 17 – 2454, l. 11. Trial counsel also should

have introduced the tape itself into evidence, but Bartosh lost it. Tullis also would have testified regarding the suicide notes written by Lindsey in the weeks before the shooting. App. 2456, ll. 5 – 18; App. 2479, ll. 9 – 14. Trial counsel never introduced these notes into evidence. Finally, Tullis could have testified about Lindsey’s self-inflicted injuries at the jail and that Lindsey was placed on suicide watch. App. 2457, ll. 7 – 11. Had Tullis been called to tell the jury about the answering machine message, the suicide notes, and Lindsey’s pathetic behavior at the jail, he would have shown that Lindsey was trying to seek the help of an attorney to deal with Nell, that he was legitimately suicidal, and would have refuted key components of the State’s sentencing strategy. The defense’s failures with respect to Tullis—especially considering that they lost a monumentally important piece of evidence—is by itself sufficient prejudice to warrant reversal.

Trial counsel’s failure to call EMS worker Vincent Bell as a witness prejudiced Lindsey. Bell would have told the jury that Lindsey was uncooperative with treatment at the scene. Lindsey told the paramedics that he wanted to die and they should let him die. App. 2384, ll. 4 – 8. This supported Lindsey’s claims regarding his severely distressed mental state and helped counter the State’s argument that he was not suicidal and was a malingerer.

Had the jury heard Timothy Sims’ testimony, they would have known that Sims viewed his older brother as a father figure and that Lindsey helped raise him. App. 2738, l. 5 – 2789, l. 1. Sims lived with Lindsey, Nell, and their children. App. 2740, ll. 9 – 23. He would have told the jury that while Lindsey and Nell had their share of arguments, Sims never saw Lindsey hit Nell. App. 2741, ll. 8 – 17. Sims would have rebutted the State’s argument that Lindsey was a drug dealer by testifying that Lindsey only “got into the drug game or whatnot to take care of me and my mom and my, my other brothers and everything because my daddy wasn’t there.” App. 2741, ll. 22 – 24.

Sims also would have told the jury about Lindsey's suicide attempt several weeks before the shooting. App. 2743, l. 23 – 2744, l. 7. One evening, Lindsey called Sims crying. App. 2744, ll. 14 – 19. Sims described Lindsey on the phone as “nervous,” “broken up in the heart” and telling Sims “I feel like I’m about to take my life.” App. 2744, ll. 18 – 21.

Sims, Steven Pilgrim, Bessie Smith, and Virginia Lindsey all went to check on Lindsey. App. 2744, ll. 8 – 11. They found Lindsey “laying in the bed” and crying. App. 2745, ll. 9 – 17. The family talked to him and tried to calm him down. App. 2746, ll. 6 – 12. Pilgrim gave him a “nerve pill.” App. 2746, ll. 6 – 12. Lindsey gave them suicide notes. He had written notes to Nell, his sons, his mother, and Sims. App. 2746, l. 21 – 2747, l. 18. Lindsey's mother kept the notes. App. 2747, ll. 13 – 15. These are the same notes discussed by Tullis in his testimony. App. 2985 – 2998. The family left Lindsey by himself that night and never sought any professional help for him. App. 2746, ll. 15 – 17. The jury never heard this evidence.

Sims also would have told the jury about a telephone conversation he overheard between Lindsey and Nell the day before the shooting. App. 2750, l. 2 – 2751, l. 9. Sims called Nell for Lindsey from a different telephone because she would not answer if Lindsey called. App. 2750, ll. 2 – 11. Lindsey told Nell, “I understand you don’t want to be with me no more, just let me get the boys.” App. 2750, ll. 11 – 13. Sims heard Nell cursing at Lindsey and telling him he could not see them. App. 2750, ll. 14 – 15. Sims heard Lindsey's son say “I want my daddy” to which Nell replied “we is not living with him no more, that’s not your daddy” before hanging up. App. 2750, ll. 15 – 19.

Sims talked to Lindsey the next day (the day of the shooting) on the telephone. App. 2753, ll. 1 – 18. A friend of Sims' had spoken to an acquaintance about Nell and relayed what

he learned to Lindsey. App. 2752, ll. 2 – 25. Sims described his subsequent conversation with Lindsey:

[A]bout 30 to 45 minutes later he called back crying and said, said that she had told him a whole lot of stuff about Nell, and that her new boyfriend or whatever, he said he don't know what's, where his head it all messed up, and he was crying that day, that, that same day he was crying and going on and all out of his mind about whatever, what she had told him or whatever.

App. 2753, ll. 4 – 10. Sims attempted to calm Lindsey down and made plans to meet him at their brother's house, but Lindsey never showed up. App. 2753, ll. 11 – 16.

The jury never heard this moving and humanizing testimony from Sims because trial counsel never interviewed him and rebuffed his request to testify during the trial. App. 2756, l. 10 – 2757, l. 18. Sims would have asked for mercy had he testified. App. 2757, ll. 19 – 21. Lindsey was prejudiced by trial counsel's failure to investigate what Sims knew and refusal to present his testimony to the jury. The prejudice flowing from trial counsel's inexplicable refusal to call Sims as a witness is by itself sufficient to warrant reversal.

Lindsey was also prejudiced by trial counsel's failure to call Patsy Burton to testify. Her testimony about Lindsey as a polite child would have counterbalanced the prosecution's suggested image of Lindsey as a violent man who beat his wife. App. 2602, l. 22 – 2603, l. 24. The jury never got to hear this testimony or Patsy Burton's request for mercy. App. 2607, ll. 4 – 5.

b. Prejudice Flowing from Expert Witnesses Who Did Not Testify at Trial

Lindsey was prejudiced because trial counsel inexplicably failed to call Dr. Tora Brawley. Brawley was on the defense team's witness list, but was not called. No reasonable strategy supports Bartosh's decision not to call Brawley. Based on her examination and testing, Brawley would have testified that Lindsey suffered from multiple cognitive impairments and

“scattered neuropsychological deficits.” App. 2360, l. 4 – 2362, l. 6; App. 2357, ll. – 14. Brawley could not tell what caused these brain dysfunctions in Lindsey because there were “multiple possibilities from the damage to the brain.” App. 2362, ll. 10 – 14. Trial counsel also failed to provide Brawley with any records until after they eliminated her as a witness. App. 2366, ll. 18 – 24. She never learned that Lindsey’s family had a history of depression. App. 2380, ll. 4 – 7. Had trial counsel begun their investigation sooner, they could have provided Brawley with the documentation she needed and would have made her a strong witness at trial.

The PCR court erroneously found that Brawley’s testimony was adequately presented through a report she wrote for Melikian. This finding is unreasonable. A written report is no substitute for live testimony. Furthermore, Melikian admitted that she could not explain the results of the psychological tests administered by Brawley. App. 2910, ll. 9 – 15. Brawley’s testimony would have demonstrated for the jury Lindsey’s mental deficits and reinforced the traumatic events from his childhood. Trial counsel’s failure to prepare and present Brawley’s testimony to the jury by itself constitutes sufficient prejudice to require reversal.

As will be discussed in greater detail in Argument 2, Lindsey was prejudiced by trial counsel’s failure to retain and present a social work expert to explain Lindsey’s terrible childhood and his family’s miserable history. Had the jury heard the testimony presented at the PCR hearing by Jan Vogelsang, there is a substantial probability it would have recommended a life sentence.

And as will be discussed in greater detail in Argument 4, Lindsey was prejudiced by trial counsel’s failure to retain and present an expert in prison adaptability to rebut the State’s evidence of future dangerousness. Had the jury heard the testimony presented at the PCR

hearing by James Aiken, there is a reasonable probability that it would have recommended a life sentence.

c. Prejudice Flowing from Lay Witnesses Who Testified at Trial and at the PCR Hearing

Four witnesses who testified at trial also testified at the PCR hearing. The testimony at the PCR hearing revealed numerous parts of Lindsey's background and family history that was not heard at the sentencing proceeding. The new evidence and detailed descriptions presented at the PCR hearing were available to trial counsel during sentencing. By not fully investigating and preparing these witnesses, trial counsel prevented the jury from hearing substantial mitigating evidence.

i. Virginia Lindsey

Virginia Lindsey testified at both proceedings. During the trial, she testified that she had four boys and one drowned. App. 2044, ll. 17 – 19. The only male influence in Lindsey's life was his uncle Steve Pilgrim. App. 2045, ll. 14 – 15. Lindsey's father never took any interest in him. Lindsey would get upset when his brothers' fathers would come pick them up to play with them. App. 2050, ll. 1 – 17. She and her four boys lived in a two-bedroom home. The boys stayed in one room together and shared a bed. App. 2045, l. 18 – 2046, l. 7.

She testified about an accident that occurred when Lindsey was nineteen months old and poured kerosene all over himself. App. 2047, ll. 1 – 13. She took him to the hospital. App. 2047, ll. 14 – 17. A month after the kerosene accident, Lindsey's head was run over by a car driven by his uncle Paul. App. 2047, l. 18 – 2048, l. 13. Lindsey received a head wound from which he still has scars. App. 2048, ll. 3 – 4. Steven Pilgrim took him to the hospital and Lindsey was released that evening. App. 2048, ll. 5 – 13.

Marion was slow in school and no one was available to help him with his homework. He had problems with his speech and had to go to speech class. She said he repeated eighth grade three times. App. 2048, l. 14 – 2049, l. 18.

Ms. Lindsey testified that Marion was hospitalized at the age of fifteen. App. 2056, ll. 18 – 21. Her entire testimony about what was actually a suicide attempt was as follows:

Q. Let me go back to, let me ask you one question about when Marion was 15 and was hospitalized for attempted suicide.

A. Yes.

Q. Did he ever describe his experiences to you?

A. About the suicide?

Q. About his experiences at the hospital.

A. Yes.

Q. What did he tell you?

A. Marion told me that he was very afraid because the man who was in the room with him look like Charles Manson. He was very afraid.

Q. How long did he stay in the hospital for that?

A. He stayed in the hospital about four days.

App. 2056, l. 18 – 2057, l. 6. At no point did she describe Lindsey's suicide attempt or the events preceding it.

In the days before the incident, Nell Lindsey blocked their phone calls and refused to let Marion have any contact with his children. App. 2058, ll. 13 – 19. Marion "could not live any longer if he could not get his family back." App. 2059, ll. 3 – 4. The last time Ms. Lindsey saw Marion was three days before the shooting. He had lost weight and seemed very "worried,"

“upset,” and “very depressed.” App. 2059, ll. 5 – 15. Ms. Lindsey did ask the jury for mercy. App. 2060, ll. 2 – 5.

Bartosh attempted to elicit testimony from Ms. Lindsey about Bessie Smith’s mental health, but was unsuccessful:

Q. Do you have a sister named Bess Smith?

A. Bessie Smith.

Q. Has she ever attempted suicide?

A. Yes, she have.

Q. [Does] she suffer from any kind of mental illness?

MR. GOWDY: Your Honor, I hate to object, but I'm going have to for lack of foundation.

THE COURT: Sustained.

Q. Do you know if she has been treated for anything?

A. Yes, I do.

Q. What has she been treated for?

MR. GOWDY: I'm going to have to –

THE COURT: Sustained.

App. 2056, ll. 3 – 16. She did testify that one of her sons drowned, but did not testify regarding the effect of the drowning on Lindsey. App. 2045, ll. 4 – 5. Bartosh asked her no other significant questions about their family history.

Ms. Lindsey’s testimony at the PCR hearing was far more revealing and extensive.⁷ The testimony from Ms. Lindsey that the sentencing jury never heard was as follows. She testified

⁷ Ms. Lindsey’s direct examination at sentencing spans sixteen pages. Her testimony at the PCR hearing spans forty-four pages.

regarding her own background and her family's background. Ms. Lindsey quit school after completing the ninth grade. App. 2613, ll. 10 – 19. She had eight siblings and only one of them graduated high school. App. 2613, l. 20 – 2614, l. 12. Her father left the family when she was thirteen. App. 2615, ll. 11 – 13. Most of her brothers and sisters quit school to find jobs in a mill or to pick peaches and cotton.

Ms. Lindsey and her eight siblings grew up in a four bedroom house with only a small coal stove for heat. App. 2617, ll. 10 – 23. They never had much money. App. 2618, ll. 6 – 18. Ms. Lindsey got married when she was seventeen and at the same age had her first child, Claude Lindsey. She also had another son, Frederick Lindsey, and a little girl by her first husband. App. 2619, ll. 2 – 9.

She, her husband, and the children continued to live at her mother's, who by this time had a smaller house with only four rooms and two bedrooms. App. 2619, ll. 10 – 15. She and her first husband eventually divorced and Ms. Lindsey and her children continued to live at her mother's. App. 2619, ll. 16 – 18. Ms. Lindsey's siblings also lived in the house with them. Marion was born in and lived in this house until he was seven. App. 2620, ll. 12 – 25. During Marion's first seven years, up to twelve people lived in this tiny house. App. 2621, ll. 1 – 17.

Virginia Lindsey's daughter, Vanessa, was killed in a car accident when she was seven months old. App. 2619, ll. 7 – 8. Vanessa's traumatic death severely affected Ms. Lindsey. App. 2622, ll. 3 – 24. After Vanessa's violent death, it took her, "about a year to really come to my senses, you know, and realize that she was gone and I wasn't gonna have her no more." App. 2622, ll. 15 – 18. This episode affected her life for years to come and affected her ability to deal with day-to-day stress. App. 2622, ll. 19 – 24.

After Marion was born, Ms. Lindsey had a live-in boyfriend named Roger Sims. He was the father of Timothy Sims. They lived together for about twenty years. App. 2622, l. 25 – 2623, l. 5. Sims had “a real bad drinking problem” that caused him to act violently in the home. App. 2623, ll. 6 – 10. Marion and the other boys took the brunt of Roger Sims’ violence. App. 2623, ll. 11 – 13. When Mr. Sims became violent, Marion would run to get Virginia Lindsey’s mother. App. 2623, ll. 14 – 23.

Ms. Lindsey testified about several head injuries Marion received as a child. These injuries were not mentioned at the sentencing hearing. When Lindsey was six or seven years old, he fell on his head and had to go to the doctor. App. 2626, ll. 2 – 13. Two weeks after that fall, he fell onto a cement porch and hit the same spot on his head. App. 2626, ll. 2 – 13. When Lindsey was sixteen, he was in a car accident and injured his eye. App. 2626, ll. 2 – 13. This testimony regarding his head injuries would have supported Brawley’s expert testimony about Lindsey’s brain abnormalities.

Ms. Lindsey testified about the negative influence exerted on Marion by her brothers Paul and Willie, who both lived with them. App. 2629, ll. 5 – 10. Both were violent. App. 2629, ll. 16 – 18. Ms. Lindsey described them: “They got good attitudes, but they always love to fight. They just love to fight a lot and beat their girlfriends, Paul did, Willie did, and they would just loved to fight a lot.” App. 2629, ll. 7 – 10. They also fought other people in the community. App. 2630, ll. 2 – 7. Paul owned guns and knives and Willie probably owned a knife. App. 2630, ll. 8 – 13. Ms. Lindsey described a shootout in the house when Marion was a child:

Well, I remember one time when Paul, it was a little café down below our house where we lived, and Paul, he had got into it with some guys down there. So, it was like three or four o’clock in the morning, he came home, bamming on the door. So, he didn’t give nobody time to open the door. He just kicked the door open and came in, and we didn’t all wondering what was going on.

So, he come in there. He know my mama always kept a pistol. So, he come in there and got my mama pistol and went back out the door shooting it, and then the guy that he was shooting at, they were shooting back. So, he went out the back door, and the guy that was shooting him shot through our house, and we all had to get down on the floor cause they was doing the shooting. And my brother, Steve, he was hollering y'all get on the floor, get on the floor.

App. 2630, ll. 17 – 2631, l. 6. The jury did not hear any of this evidence at trial.

Virginia Lindsey described another violent and cruel incident:

Q. Do you remember an incident with Paul and Willie and a cat?

A. Yeah, I remember that incident, incident. Marion had a little cat, a little small kitten, and Paul – he didn't like it. Paul and Willie didn't like the cat. They didn't like the cat. So, they had been telling him mama, they gonna kill that cat, you need to get him out of there.

So, one night, we was just sitting there watching TV and stuff, and all, the little kitten come in there, and Willie was trying to get him, get the kitten out. Paul said leave it, open it up, we'll put him in the heater, and, so, Paul opened – Willie says open the heater, Paul. So, Paul, Paul, he opened the heater and held it open while Willie threw the cat in the heater, you know, and that hurt Marion too cause he loved that little cat.

Q. I was going to say was Marion in the, in the house when, when that happened?

A. Yeah, Marion was there, yeah, cause he was small. He was there.

Q. So Marion got to watch his two uncles –

A. Burn his cat.

Q. – toss his cat and burn it alive?

A. Burn him alive.

App. 2631, l. 8 – 2632, l. 5.

On cross-examination, the State asked Ms. Lindsey whether she attempted to stop Paul and Willie from throwing the cat into the heater to which she responded “No.” App. 2665, ll. 5 – 9. On redirect, Ms. Lindsey further explained her inaction:

Yeah, I just couldn't see how they could just stand up there and open the heater and throw the cat in there. It surprised me cause I couldn't see how they just opened up a real hot heater and throwed the cat in it. But I was sitting there when they throwed it in there and it was an awful smell in the house. The smell was so bad you couldn't hardly stay in the house. But they did it.

Q. For a long time did that smell remind you of what happened?

A. Yep.

Q. Why didn't you try to stop it?

A. I was scared of them.

Q. You were scared of your brothers?

A. Yeah. Yep.

Q. Why were you scared of them?

A. I don't know. I was too scared to tell them not to throw the cat in the heater. I } didn't know what they might do cause they had already done grabbed the cat up and throw him in the heater. He might would of throwed me in there too.

Q. And these were the uncles that were living in the house with you and Marion?

A. Yeah, they lived there.

App. 2670, l. 10 – 2671, l. 6. The only testimony at trial about this was a brief mention by Bessie Smith that did not indicate Marion was present when the cat was burned alive.

When Marion was twenty-three years old, his older brother drowned in Lake Jocassee. App. 2633, ll. 3 – 9. The body was never recovered. App. 2633, l. 7. His brother's death upset Marion to the extent that he and his other brother searched the lake in a boat trying to find their brother's body. App. 2633, ll. 10 – 15. The jury never heard this evidence.

When Lindsey was a young adult the family lived in a rough neighborhood in Inman. App. 2333, ll. 19 – 24. Drinking, drug dealing, and violence were a normal part of everyday life. App. 2633, l. 25 – 2634, l. 9. Ms. Lindsey believed this had an effect on Marion. App.

2634, ll. 10 – 12. She wished her children had never been exposed to that environment. App. 2634, l. 24 – 2635, l. 1.

Ms. Lindsey did testify at the sentencing hearing that Marion attempted suicide when he was fifteen, but she gave no details regarding the attempt or the events that preceded it. App. 2056, l. 18 – 2057, l. 6. At the PCR hearing, Ms. Lindsey fully described the incident. Marion had been fighting with a sibling. Ms. Lindsey went into the boys' room. Ms. Lindsey described what happened next:

So, Marion, he hauled off and held me down on the bed. So, I told him don't never ask me for nothing else in your life cause I won't never give you nothing else and I won't never buy you nothing else and I don't love you no more and you don't treat your mama like that. Yeah, I told them that in anger.

Q. Now, how did Marion react to that?

A. Marion didn't like that. He went in the bathroom, went in the bathroom, poured out a whole lot of pills and took a whole lot of pills. And, so, I was laying on the bed watching TV and I heard him call Tim in the room. So, Tim went in the room. Tim, he was small. So, he called Tim in the room, told Tim to go in there and tell his daddy to come here.

So, Tim come back there and told his daddy that Marion said come here. So, he went in the bathroom and Marion in there down on his knees throwing up. So, he came back and say you better call the rescue squad or something, that boy done went in there and took a whole lot of pills. Say he in there throwing up.

So, I went in the bathroom and he was on his knees throwing up in the commode, and he had a bunch of more pills laying on the back of the commode. But then he had took all kinds cause I had all kinds like Tylenol, Advils, Ibuprofen, everything up in the cabinet where he just mixed them all up together and took them.

Q. Once – did he get to the hospital that evening?

A. Yes, they carried him to the hospital and they pumped his stomach and they kept him for, up there for, at the hospital like three days and **after that they put him in mental health for two weeks.**

Q. So, for a little over two weeks he was in inpatient treatment for the suicide attempt?

A. Yes, sir.

Q. When he was released from the inpatient treatment, did he come home?

A. Yeah, he came home after that.

Q. Was there any follow-up treatment that Marion was required to get?

A. No, they just sent him home. They didn't tell me I had to bring him back for no follow-up or nothing.

App. 2636, l. 7 – 2637, l. 22 (emphasis added). At trial, Ms. Lindsey only said Marion was in the hospital for four days and did not mention Marion's two weeks of inpatient care at mental health. Ms. Lindsey said that no one in the family ever took Lindsey for any mental health treatment following his release. App. 2637, l. 23 – 2638, l. 3. None of these details were in Ms. Lindsey's testimony at the original trial.

During sentencing, Ms. Lindsey was asked about the last time that she saw her son before the shooting and testified only that Marion had lost weight and seemed very depressed. App. 2059, ll. 5 – 15. At the PCR hearing Ms. Lindsey described in detail Marion's suicide attempt that occurred approximately three weeks before the shooting. App. 2646, l. 11 – 2648, l. 1. She testified that Marion gave her suicide letters addressed to her, Timothy Sims, and Marion's two boys. App. 2647, ll. 2 – 10. She kept the notes in a box until after the shooting when she gave them to Rod Tullis. No one tried to get Marion any medical treatment after this suicide attempt. App. 2647, l. 17 – 2648, l. 1.

None of this testimony was elicited by trial counsel during the sentencing proceeding. Had trial counsel fully investigated and taken the time to interview and prepare Ms. Lindsey, they should have discovered this further evidence that would have explained Marion's family background and the violent and sad household in which he was raised. Since trial counsel failed

to do this, the jury was never able to hear this additional testimony from Ms. Lindsey. This failure prejudiced Lindsey.

ii. Bessie Smith

Smith testified at the sentencing proceeding and at the PCR hearing.⁸ Smith's entire testimony consisted of a brief description of Lindsey's uncles throwing his cat in the heater. App. 2081, ll. 14 – 25. Importantly, Smith did not describe the incident in detail or relate to the jury that Marion was present and observed the burning of the cat. App. 2081, ll. 17 – 25. She said, "And one day, my brothers took the cat and threw it in the heat **without his knowledge.**" App. 2081, ll. 21 – 22 (emphasis added). Bartosh also asked Smith whether she had attempted suicide. She answered "yes" but then was cut off by a sustained objection from the state. App. 2082, ll. 6 – 12. Bartosh gave up questioning Smith after this objection was sustained. App. 2082, ll. 6 – 15. No other testimony was elicited from Smith.

At the PCR hearing, Smith gave a detailed family history. She described the lack of education and the poverty in their household. App. 2674, l. 2 – 2675, l. 14. Marion's grandmother suffered "a deep depression" after her husband left her and "she stayed in the bed most of the time." App. 2676, ll. 3 – 5. Smith described having to bathe and feed her mother during her depression. 2676, ll. 3 – 5. The jury never heard that Lindsey's grandmother suffered from depression.

Smith also testified regarding the violent behavior of her brothers Paul and Willie. She described Paul's drinking, fighting, and use of knives. App. 2678, l. 2 – 2679, l. 14. Paul and Willie's behavior continued to grow worse while they lived with Smith's mother in a household that included Marion. App. 2680, ll. 4 – 11. Smith also provided the history of Marion's aunt,

Robin Pilgrim, who was addicted to drugs, lived on the street, and was in and out of jail. 2681, ll. 8 – 17.

Smith also provided an in-depth description of Virginia Lindsey's history of depression, her background, and her relationship with her children. After her young daughter's violent death, Virginia Lindsey was "devastated." App. 2682, ll. 6 – 14. Virginia Lindsey's husband began drinking and started dating Ms. Lindsey's cousin, who grew up in the same house and was considered a sister. App. 2682, ll. 16 – 21. She said "that kind of tore [Virginia Lindsey's] nerves up." App. 2682, ll. 22 – 24.

After the separation from her husband, Ms. Lindsey began to drink and stay out late at night. App. 2682, l. 25 – 2683, l. 3. Smith said that Virginia Lindsey was rarely around her children because she worked second shift. App. 2683, ll. 12 – 18. The children's grandmother was left with them, but she was often too feeble and depressed to supervise them. App. 2683, ll. 19 – 25. Marion was approximately two years old when his mother began drinking and staying out late. App. 2684, ll. 4 – 7. This meant that his grandmother and his uncles Paul, Willie, and Steven were primarily responsible for his guidance and care from the time he was very young. App. 2684, ll. 22 – 25. Virginia Lindsey was not involved with her children's education. App. 2689, ll. 4 – 6.

Smith also described Marion's suicide attempt that took place a couple of weeks before the shooting. App. 2692, l. 3 – 2694, l. 4. Smith was present at the family meeting as described by Timothy Sims. She described Lindsey as depressed and suicidal. App. 2692, l. 18 – 2693, ll. 3. Lindsey told them that he had nothing to live for and "just wanted to end it all." App. 2692, l.

⁸ Smith's trial testimony spans less than two pages. App. 2081, l. 1 – 2082, l. 7. Her PCR testimony spans thirty-six pages. App. 2672-2708.

16 – 2693, l. 3. No one helped Lindsey obtain any professional help after that evening. App. 2694, ll. 2 – 4.

The day before the shooting, Smith had a telephone conversation with Lindsey. App. 2695, ll. 21 – 2696, l. 25. Lindsey was upset and crying and saying that his wife would not let him see his children. App. 2695, ll. 21 – 2696, l. 13. Lindsey called Smith back the day of the shooting and was again very upset. App. 2697, ll. 1 – 2. He told his aunt that Nell and her mother had taken out several warrants on him and he was afraid to go to work because he was sure that he would be arrested. App. 2697, ll. 1 – 12. This conversation took place “a couple of hours” before the shooting. App. 2700, ll. 2 – 6. The jury never heard about these telephone conversations that were so close in time to Nell’s death.

Trial counsel’s interaction with Smith before the trial involved only thirty to forty minutes of conversation approximately a week before the trial started. App. 2700, ll. 7 – 20. Smith’s description of this encounter shows that trial counsel did not build a rapport with her. She stated, “they was asking me a lot of stuff about me, which I told them I didn’t want to answer because I wasn’t the one on trial.” App. 2701, ll. 13 – 16. Trial counsel’s failure to build a rapport with Smith and learn what she knew about the family history, Lindsey’s history, and Lindsey’s state of mind in the weeks and days prior to the crime and present this evidence to the jury prejudiced Lindsey. This evidence supported and explained Lindsey’s suicidal depression at the time of the shooting, and rebutted the State’s arguments to the contrary.

iii. Steven Pilgrim

Steven Pilgrim, Lindsey's uncle, testified at trial and at the PCR hearing.⁹ His testimony at trial consisted entirely of stating that he took Lindsey to the hospital after his automobile accident when he was a child, that he knew Lindsey had inhaled kerosene, that Pilgrim suffered from high blood pressure, panic attacks, and anxiety attacks, and that Pilgrim's daughter suffered from panic attacks. App. 2079, l. 15 – 2080, l. 16.

In stark contrast, at the PCR hearing, Pilgrim relayed many details of the family's background and history of mental illness. Pilgrim suffered from depression and anxiety. App. 2727, ll. 2 – 11. Trial counsel never obtained a medical release from Pilgrim and he would have given them one had they asked. App. 2727, ll. 16 – 21. Virginia Lindsey attempted to commit suicide after Marion Lindsey's father stopped helping her raise Marion. App. 2715, l. 5 – 17. Bessie Smith attempted suicide. App. 2715, ll. 21 – 25. Smith was hospitalized for approximately a month after her suicide attempt. App. 2716, l. 23 – 2717, l. 3. Robin Pilgrim attempted suicide approximately three times. App. 2717, ll. 4 – 10. She was hospitalized on more than one occasion. App. 2717, ll. 15 – 18. She also exhibited violent behavior during the time that she was residing in the same house as Lindsey. App. 2717, ll. 19 – 21. Robin Pilgrim was incarcerated at the time of the PCR hearing. App. 2718, ll. 3 – 7. None of this testimony about the number of suicide attempts in Lindsey's family was presented to the jury.

Steven Pilgrim related the abject poverty in which the family lived. App. 2718, l. 13 – 2719, l. 23. Applicant's Exhibit 27, on file with the Court, depicts the four-room house (which was little more than a shack) where Lindsey was born and lived until he was ten years old. App. 2718, l. 13 – 2719, l. 16. Approximately ten people lived in the house. App. 2718, l. 25 –

2719, l. 2. The house did not have inside plumbing or air conditioning. For heat, the house only had an old coal or wood stove. App. 2719, ll. 17 – 23.

During the time Lindsey lived in this house, he saw violent behavior on a regular basis from his uncles Paul and Willie. App. 2719, l. 24 – 2720, l. 8. Pilgrim described Paul and Willie as acting violently towards him, other family members, other people in the community, and the women in their lives. App. 2720, ll. 9 – 16.

Pilgrim gave more detail about the automobile accident that occurred when Lindsey was approximately 18 months old:

Well, my brother, Paul, wanted to borrow my car and, and he drink a whole lot. So, he didn't really look, and Marion always followed me everywhere I go, and, and my brother just got in the car and backed up. And I looked. I said well, he ran over a rock with my car. And I – then he looked back. I said oh, that was the baby and Marion was the baby and I ran and grabbed him.

And I kind of hollered and called my brother to come back because the baby – I had the baby in my arms. So, we grabbed him. I grabbed him and we took him to Inman Police Department and he never cried, never, never moved or anything. And we took him to – we took, got the ambulance and took him to Spartanburg Regional. And, like I say, he never responded, and, until we got into the hospital and they got to working on him he finally responded.

App. 2721, ll. 2 – 16. The hospital sent Lindsey home that same day. App. 2721, ll. 17 – 23.

Pilgrim described Lindsey's suicide attempt three weeks before the shooting. App. 2722, ll. 10 – 13. Lindsey was "depressed, real depressed." App. 2722, ll. 21 – 23. Lindsey was crying. Pilgrim had never seen Lindsey cry as a grown man until that night. App. 2723, ll. 3 – 10.

Approximately a week later, Lindsey called Pilgrim wanting to borrow his gun. App. 2723, l. 18 – 2724, l. 2. Pilgrim did not give Lindsey his gun. App. 2724, ll. 15 – 17. Shortly

⁹ Pilgrim's trial testimony spans almost two pages. App. 2079, l. 1 – 2080, l. 16. His testimony at the PCR hearing spans twenty-five pages. App. 2711 – 2736.

after that phone call, someone broke into Pilgrim's house and "trashed it looking for something." App. 2724, ll. 18 – 23.

Trial counsel should have spent more time with Pilgrim investigating what he knew about the family's history and Lindsey's upbringing. Had they done so, the jury would have heard the above-described mitigating evidence. Trial counsel's failure to elicit this testimony prejudiced Lindsey.

iv. Bill Burton

Burton's testimony at the PCR hearing corroborated the testimony of Lindsey's family. Burton testified that Lindsey lived in "real poverty conditions" and that Lindsey's house "was falling apart." App. 2594, ll. 1 – 7. Growing up, Lindsey and his siblings were "completely unsupervised" and had "no encouragement to perform in school." App. 2593, ll. 21 – 25. Lindsey essentially "lived on the street." App. 2594, ll. 8 – 16. Burton said "of course" he would have asked the jury for mercy, had trial counsel asked.

The failure to fully develop Burton's testimony prejudiced Lindsey. Burton was a responsible business leader and his observations would have carried significant weight with the jury. Furthermore, the fact that trial counsel never requested that Burton ask the jury for mercy prejudiced Lindsey.

d. Prejudice Flowing from the Expert Witness Who Testified at Trial

As will be seen in Argument 3, Lindsey was prejudiced by trial counsel's deficient performance with respect to the defense's mental health expert. Bartosh hired Melikian, an inexperienced psychiatrist, only a month before trial and failed to prepare her to testify. App. 2882, ll. 3 – 11. Bartosh did not obtain the necessary records nor send them to Melikian in time for her to sufficiently analyze them. App. 2908, ll. 19 – 23. The defense's late start prevented

Melikian from seeing Lindsey more than once and from developing any rapport with him. App. 2923, ll. 16 – 18. The lack of preparation led to Melikian’s woeful performance and she failed to adequately present Lindsey’s mental health problems to the jury. Had the defense team hired a psychiatrist in a timely fashion and adequately prepared her, there is a reasonable chance the outcome of the sentencing proceeding would have been different.

D. Conclusion

Whether counsel’s performance is measured against the ABA Guidelines or existing precedent, there can be little question it was deficient. Bartosh’s failure to investigate and prepare a minimally adequate mitigation case cannot be deemed constitutionally sufficient. Trial counsel’s deficient performance gave the jury an incomplete picture of Lindsey and prevented them from considering important humanizing evidence. This evidence directly related to whether Lindsey suffered from a “mental or emotional disturbance” and his mentality at the time of the crime. S.C. Code Ann. § 16-3-20(C)(b)(2) and (7).

Had the jury heard Tullis’ testimony and the message Lindsey left him hours before the shooting, the result could have been different. Had the jury seen the suicide notes Lindsey wrote, the result could have been different. Had the jury heard the extensive testimony from his family members about his horrible upbringing and deteriorating mental state in the weeks leading up to the crime, the result could have been different. Had the jury heard complete testimony from expert witnesses about Lindsey’s mental health, his family history, and his adaptability to prison, the result could have been different. Had trial counsel bothered to attend the interview with Narayan and learn about or prevent a diagnosis of malingering, the result could have been different. Had the jury heard mercy requests from Lindsey’s friends and family, the result could have been different. The feeble mitigation presentation at trial deprived Lindsey

of his rights under the Sixth, Eighth, and Fourteenth Amendments and this Court should grant him a new sentencing proceeding.

Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a social work expert who could testify regarding Marion Lindsey's miserable upbringing, his awful family history, and the effect this had on his mental state at the time of the shooting.¹⁰

As related in Argument 1, trial counsel failed to adequately investigate and prepare a mitigation case. The mitigation evidence that was presented was haphazard, poorly organized, and had no coherent narrative. The mitigation case also omitted many important details regarding the Lindsey family's history and Marion's background. It is for these reasons that trial counsel should have retained a social work expert who could investigate and congeal Lindsey's and his family's history for the jury. Bartosh's failure to retain and present such an expert constituted deficient performance that prejudiced Lindsey.

A. Jan Vogelsang's PCR Testimony

Without objection, Jan Vogelsang was qualified as an expert in clinical social work "with expertise in bio-psychosocial assessments." App. 2779, ll. 1 – 4. A clinical social worker "is a mental health professional who is trained, licensed, and credentialed to diagnose and treat mental, emotional, and behavioral disorders." App. 2766, ll. 15 – 21. She is board certified in social work, licensed in South Carolina, and a member of several organizations and boards. App. 2767, l. 1 – 2768, l. 8.

¹⁰ The issues presented in this Argument were raised at the PCR hearing, in grounds 5 and 7 in Lindsey's Post-Hearing Memorandum, and in Lindsey's Rule 59(e) Motion. App. 3544-45. The PCR court ruled on all of these issues in its Order of Dismissal and in its Order Denying Motion to Reconsider, Alter, or Amend. App. 3707; 3716; 3751.

Vogelsang explained that a “bio-psychosocial assessment is a clinical social work method of gathering extensive information on an individual in an effort to understand how they came to their current circumstances.” App. 2770, l. 25 – 2771, l. 3. The social worker conducts interviews, reviews documents both related to the subject and his family members, and consults with other professionals who have assessed the subject. App. 2771, ll. 3 – 9. The social worker also reviews research and literature and visits the subject’s community. App. 2771, ll. 10 – 13. This investigation is important because “there are patterns of behavior that tend to run in families.” App. 2774, ll. 4 – 5. These assessments usually take between eight months to a year to complete. App. 2778, ll. 17 – 18. Vogelsang turns down cases from attorneys when they are going to trial “in two weeks or two months” because “you simply can't complete one of these assessments in that short a period of time.” App. 2778, ll. 18 – 22.

Vogelsang conducted a bio-psychosocial assessment which provided a comprehensive history of Lindsey and his family. App. 2779, ll. 7 – 9. As part of her assessment, she interviewed Lindsey, Virginia Lindsey, Bessie Smith, Steven Pilgrim, Timothy Sims, Patsy Burton, Robin Pilgrim, Lenora Topp, Rod Tullis, Margaret Melikian, and Tora Brawley. App. 2779, ll. 14 – 18. She also reviewed Lenora Topp’s records; Virginia Lindsey’s medical records and criminal history; Bessie Smith’s mental health records and prior criminal history; Steven Pilgrim’s mental health records, medical records, and prior criminal history; Timothy Sims’ school records and Department of Corrections records; Robin Pilgrim’s medical and prison records; and voluminous records pertaining to Marion Lindsey himself. App. 2779, l. 22 - 2781, l. 11. She consulted with Melikian, Brawley, and read Lindsey's records from the William S. Hall Institute. App. 2781, ll. 12 – 14. She also visited parts of the community where Lindsey was raised. App. 2781, ll. 18 – 19.

Based on information she compiled, Vogelsang testified about patterns of behavior she discovered in Lindsey's family. App. 2782, ll. 4 – 16. Vogelsang found patterns of substance abuse; “mental, emotional, and behavioral impairments;” sexually inappropriate behavior; and criminal domestic violence charges, assaults, and incarcerations. App. 2784, l. 24 – 2786, l. 8. She also saw a pattern of abandonment. App. 2789, ll. 1 – 3.

Regarding the pattern of substance abuse, Vogelsang testified that cocaine and crack began invading small communities like Lindsey’s during his early teen years. App. 2804, ll. 3 – 6. Lindsey began to notice drugs in his community, and “see his family members dealing in drugs and using drugs.” App. 2004, ll. 11 – 13. Lindsey’s uncles used him as a courier in their drug dealing. App. 2882, ll. 4 – 21. By the eighth grade, “Marion hit the streets.” App. 26, ll. 9 – 10. She correlated this with his mother working third shift, Lindsey’s absences from school, his uncles’ involvement in drugs, and Mr. Burton no longer being in his life. She said at this point Lindsey “just simply succumbs to the streets, that this life that he has had has finally claimed him.” App. 2806, ll. 9 – 19.

Vogelsang elaborated on the pattern of mental health problems in the family. Virginia Lindsey attempted suicide. App. 2814, ll. 14 – 16. Robin Pilgrim attempted suicide. App. 2814, ll. 11 – 13. Bessie Smith attempted suicide. App. 2814, ll. 7 – 8. Steven Pilgrim began treatment in the 1990s for anxiety, depression, and panic attacks and “seems to be preoccupied with thoughts about somebody putting the root on him or putting something in his drink that will cause his penis to draw up inside him.” App. 2817, ll. 10 – 19. Pilgrim told Vogelsang that almost everyone in his family believes in roots and root doctors. App. 2817, ll. 20 – 23. Vogelsang added that children who grow up in homes with histories of mental illness or violence are “further confused by the use of roots, and especially if it’s being used to deal with problems

in relationships.” App. 2816, l. 23 – 2817, l. 2. She testified that the idea of roots confused Lindsey and further decreased his ability to solve problems during family conflicts. App. 2818, ll. 9 – 22.

The pattern of violence in Lindsey’s family was extreme. His uncle Willie “went to prison for 15 years for beating a man to death.” App. 2807, l. 25 – 2808, l. 1. His uncle Paul got into trouble with drugs and violent behavior. App. 2808, ll. 1 – 2. His aunt Robin ended up in prison. App. 2808, ll. 2 – 3. Lindsey lived under a “constant threat of harm.” App. 2808, ll. 21 – 23. He watched his uncles burn his cat alive, beat their girlfriends, fight each other, and fight with other people in the community. App. 2808, l. 25 – 2809, l. 7. Many members of the family were charged with assault and battery with intent to kill and criminal domestic violence.¹¹ App. 2809, ll. 10 – 13. Lindsey saw his mother shoot at her boyfriend, Roger Sims. App. 2809, ll. 13 – 14.

One of the most important skills learned by children during their developing years is how to be resilient in the face of adversity. App. 2796, ll. 4 – 11. No one in Lindsey’s home helped him through these important developmental stages. App. 2796, ll. 12 – 14. This left Lindsey as a child who had to guess at how to behave. App. 2796, ll. 15 – 19. Vogelsang opined that without learning resiliency as children, as adults they will be unable to make good decisions under stress. App. 2798, ll. 3 – 8. She described the lack of this skill in the Lindsey family: “It seemed to me one of the most significant behaviors in this family was that no one saw any options for resolving problems in relationships other than violent options. That seemed to be the only options anyone felt were available.” App. 2799, ll. 16 – 20. She testified, “Marion was

¹¹ A list of family members’ arrests and convictions as compiled by Vogelsang appears in the record at page 3049 of the Appendix. Vogelsang further details the family’s criminal record at page 2810 of the Appendix.

living, from the day he was born, he was living everyday, every week, every evening, every month, every year with this family system in which he was witnessing a constant threat of harm.” App. 2802, l. 23 – 2803, l. 1.

Vogelsang summarized her assessment by stating that Lindsey had an accumulation of risk factors that led to his inability to deal with stressful situations. App. 2830, l. 12 – 2831, l.

13. Vogelsang testified:

This accumulation is based on studies and literature and research that says most of us can handle one or two stressors in our lives at any given time. We know that we’re gonna lose a job, a parent is gonna die. We may have a change in financial status, that most of us can function with one or two. But any of us, no matter what our backgrounds, when we get between the third and the fourth stressor, we begin to see changes in our behavior, our ability to concentrate, to remember things, to parent our children, to manage our jobs well.

And, so, with this accumulation of risk factors, we are looking at the sort of ongoing and building events in [Lindsey's] life from the time he came into the world. That would ultimately – it would be reasonable to say this affected his decision making, this affected his judgment, this affected his insight, in his, his impulsivity, and would place him at a higher risk to end up committing a serious act.

App. 2830, l. 22 – 2831, l. 13.

B. Order of Dismissal

The PCR court concluded that Lindsey failed to prove prejudice with respect to this ground.¹² App. 3638. The court disregarded Lindsey’s references to the ABA guidelines. App. 3638. The court stated, “The family background was investigated and not ignored. In addition, evidence was presented through lay witnesses at trial concerning the background in the guilt and penalty phases.” App. 3638-39.

¹² The court initially said there was no deficient performance, but when it actually discussed this prong of Strickland, it avoided ruling on the performance issue and only considered the prejudice prong. App. 3705.

Interestingly, the PCR court stated, “Applicant has failed to show what material counsel was unaware of that was critical to the defense, just that in depth evidence was not presented.” App. 3704. The Order of Dismissal engages in a lengthy comparison of Lenora Topp’s investigation and that of Vogelsang, but fails to explain how this comparison is relevant **because Topp did not testify at trial.** App. 3698 – 3703. Based on Topp’s testimony, the court concluded that the defense team’s investigation was reasonable but failed to explain why, even assuming their investigation was complete, they failed to present what they learned to the jury. App. 3703.

The PCR court also held that “the danger of using a social worker who relies frequently on anecdotal hearsay risks making a difficult case even worse” and could “make a death sentence more likely.” App. 3706. To support this opinion, the court stated that Vogelsang could have opened the door for evidence that Lindsey became “a controlling and violent person,” even though the State presented **many witnesses** who testified to these negative aspects of Lindsey’s life during its aggravation case. App. 3707.

C. Discussion

1. Deficient Performance

By any measure, trial counsel performed deficiently in failing to call an expert who could explain to the jury the effect of Lindsey’s miserable family history on his mental state. See S.C. Code Ann. § 16-3-20(C)(b)(2) & (7). As discussed in detail in Argument 1.C.1.a, the PCR court erred in refusing to consider the ABA Guidelines to judge Bartosh’s performance. The PCR court also ignored established precedent relating to presentation of mitigating evidence of family history and a defendant’s upbringing.

The ABA Guidelines state that counsel should consider presenting:

1. Witnesses **familiar with and evidence relating to the client's life and development, from conception to the time of sentencing**, that would be explanatory of the offense(s) for which the client is being sentenced, would rebut or explain evidence presented by the prosecutor, would present positive aspects of the client's life, or would otherwise support a sentence less than death;

2003 Guideline 10.11(F)(1), App. 3250-51; see 1989 Guideline 11.8.3(F)(1) (emphasis added).

Trial counsel has a duty to call expert witnesses and lay witnesses

along with supporting documentation (e.g., school records, military records) to provide medical, psychological, **sociological, cultural or other insights into the client's mental and/or emotional state and life history** that may explain or lessen the client's culpability for the underlying offense. . . and/or to rebut or explain evidence presented by the prosecutor;

2003 Guideline 10.11(F)(2), App. 3251; see 1989 Guideline 11.8.3(F)(1) & (2) (emphasis added). The commentaries state:

Since an understanding of the client's extended, multi-generational history is often needed for an understanding of his functioning, construction of the narrative normally requires evidence that sets forth and explains the client's **complete social history** from before conception to the present. Expert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations.

Comment to 2003 Guideline 10.11, App. 3256 (emphasis added). As measured against these guidelines, counsel performed deficiently by not calling an expert like Vogelsang.

Counsel also performed deficiently when measured against existing precedent. Wiggins, decided almost a year before Lindsey's trial and judging attorney conduct that occurred in 1989, provides the best example. See 539 U.S. at 514-15. In Wiggins, the United States Supreme Court reversed a death sentence based in large part on the testimony of a social worker. Id. at 516-17 (discussing the testimony during a state PCR proceeding of "a licensed social worker certified as an expert by the court."). Like Vogelsang, the social worker in Wiggins "testified

concerning an elaborate social history report he had prepared” and “chronicled petitioner’s bleak life history.” Id. at 516.

The Wiggins Court noted that trial counsel had not retained a forensic social worker “even though the State made funds available for that purpose.” Id. at 517. In Lindsey’s case, trial counsel never even bothered to seek funding for a clinical social worker. The Court quoted with approval the Maryland PCR judge’s observation from the bench “that he could not remember a capital case in which counsel had not compiled a social history of the defendant, explaining, ‘[n]ot to do a social history, at least to see what you have got, to me is absolute error. I just – I would be flabbergasted if the [Maryland] Court of Appeals said anything else.’” Id. The Court criticized the method, just as occurred in Lindsey’s case, of putting “on a halfhearted mitigation case” and taking a “shotgun approach.” Id. at 526 (internal quotations omitted).

In Porter, similar testimony to Vogelsang’s was presented through a neuropsychologist. Porter, 130 S.Ct. at 451. The neuropsychologist took the stand **after** the testimony of family members and his commanding officer in the Korean War laid the foundation for Porter’s deteriorated mental health. Id. at 450-51. Trial counsel’s failure to uncover and present this mitigating evidence was constitutionally deficient performance. Id. at 453. As in Porter, Bartosh should have fully prepared and presented the testimony of Lindsey’s family and friends and **then** presented Vogelsang to complete the narrative and connect Lindsey’s upbringing to the statutory mitigating factors regarding a defendant’s mental state. See also Nance v. Ozmint, 367 S.C. 547, 556, 626 S.E.2d 878, 882 (2006) (criticizing trial counsel for the order in which he called witnesses because he called the defendant’s sister after his mental health expert which denied the expert “the opportunity to inform the jury of how the sister’s testimony of Petitioner’s mental

irregularities as a child could lead to a conclusion that Petitioner was mentally ill at the time of the murder.”).

Council v. State also compels the conclusion that Bartosh’s performance was deficient. 380 S.C. at 172, 670 S.E.2d at 363. This Court stated that “trial counsel was deficient in not beginning his investigation into [Council’s] background once the State served its notice of intent to seek the death penalty. . . .” Id. Council’s attorneys’ performance was deficient because they “chose not to hire a social history investigator” and failed to obtain records related to Council’s family members. Id. at 173-74, 670 S.E.2d at 363. This Court specifically referenced the ABA Guidelines in determining that Council’s attorneys performed deficiently. Id. at 174, 670 S.E.2d at 363-64. Citing Penry v. Lynraugh, 492 U.S. 302, 319 (1989) with approval, the Court reiterated that “evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems may be less culpable than defendants who have no such excuse.” Id.

No evidence in the record shows that trial counsel ever considered the possibility of retaining a clinical social worker. Nor could they have hired an effective investigator or clinical social worker because of their eleventh-hour start in preparing Lindsey’s mitigation case. As Vogelsang explained, she turns down cases unless she has at least eight months to prepare. The purpose of the PCR court’s discussion of what Topp uncovered in her limited time on the case seems to be to support a conclusion (never stated) that counsel could have made a reasonable strategic decision not to use a social worker. No evidence supports such a conclusion. The PCR court’s own analysis nearly admits as much:

It is undisputed that defense counsel in 2004 did not retain a clinical social worker such as Jan Vogelsang in 2002-2004. Although the decision not to retain

a social worker is not reflected in the record due to counsel's death, This Court finds that the failure does not amount to deficient performance

As to deficient performance, Applicant appears to assert that the retention of a social worker is required in all capital cases. His reliance upon the ABA Standards notwithstanding, the 6th Amendment does not require the retention of any particular expert in every case. . . . However, the Court need not address deficient performance where the Applicant has failed to satisfy the prejudice prong.

App. 3704-05. Since the court could not compare Bartosh's performance to the ABA Guidelines (or any other standard) and find it sufficient, it ignored the issue of deficient performance.

Lindsey does not assert that a clinical social worker is constitutionally required in every capital case. He asserts that a clinical social worker was required in **his** case. The minimal investigation and preparation of Lindsey's family members did not give the jury any meaningful ability to understand Lindsey's history. Their testimony, like the investigation, was brief, scattershot, and often incoherent. Their testimony was not used to lay a foundation for any narrative.

Bartosh's opening and closing statements for the sentencing phase demonstrate the lack of narrative concerning Lindsey's family history. During his extremely short opening statement,¹³ Bartosh did not tell the jury anything about the mitigating evidence they would hear other than saying they were "going to hear evidence about Marion Lindsey, about his family, about his childhood." App. 1749, ll. 1 – 2. No other reference was made to the mitigation evidence the jury would hear. Trial counsel's closing statement unfortunately agreed with the Solicitor about Marion's background: "Once again, ladies and gentlemen, as Solicitor Gowdy said, there are plenty of people who would be within a half-mile of this courtroom, we could

¹³ Bartosh's opening statement spans approximately three pages in the trial transcript and largely consists of warnings to the jury about the graphic evidence they will see and an argument on reasonable doubt, for which he received a caution from Judge Few. App. 1746, l. 5 – 1749, l. 12.

find people who had grew up in worst situations than Marion did and have not come to the point that Marion has.” App. 2139, l. 22 – 2140, l. 2. Bartosh never articulated any theme or made a clear attempt to tie any of the mitigation testimony to the statutory mitigating factors. Considering the patterns in Lindsey’s family that were uncovered by Vogelsang and articulately presented by her at the PCR hearing, this Court should find that trial counsel’s performance was constitutionally deficient.

2. Prejudice

Trial counsel’s deficient performance prejudiced Lindsey. The PCR court wrongly determined that Lindsey could not show prejudice because of the danger that Vogelsang’s testimony would open the door for the prosecution to highlight bad incidents in Lindsey’s life. This conclusion ignores the fact that the State actually introduced much of this evidence during its case in aggravation. Nor did the State need to wait on Lindsey to open to the door to introduce such evidence.

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). Here, the State introduced testimony that Lindsey beat his wife, sold drugs, and was convicted of assault and battery with intent to kill for shooting into another car. App. 1775, ll. 15 – 24; App. 1779, ll. 5 – 16; App. 1821, ll. 5 – 8; App. 1823, ll. 2 – 7; App. 1936, ll. 5 – 11; App. 1829, ll. 18 – 23; App. 1862, ll. 9 – 20; App. 1943, ll. 2 – 5; App. 1950, ll. 4 – 15. The PCR court did not explain what additional bad evidence would be introduced through Vogelsang, but merely said that “she also confirmed that he had become a controlling and violent person.” App. 3707. This conclusory statement ignores that Vogelsang

was not presented to deny that Lindsey was violent, but to explain the factors that led to his violent acts.

Specifically, the lack of a clinical social worker prejudiced Lindsey because testimony like Vogelsang's would have allowed the jury to hear a court-recognized expert connect Lindsey's pitiful family history and his own miserable childhood to his mental state at the time of the crime. See S.C. Code Ann. § 16-3-20(C)(b)(2) & (7). Vogelsang tied the substance abuse, violence, poverty, and mental health problems in Lindsey's family's history to the present. Without an expert like Vogelsang, and with the stunted investigation trial counsel performed, the testimony of Lindsey's family members was lost because of its disjointed and incoherent presentation. For example, at trial the judge prevented Bessie Smith from testifying about her history of mental illness and her suicide attempt. App. 2082, ll. 6 – 12. Such testimony would have been admissible through an expert like Vogelsang who could have testified about family members' mental health problems as a basis for her conclusions. See S.C. R. Evid. 703.

Furthermore, like in Wiggins and Council (and as described in detail in Argument 1.C.2.a and c), the jury did not hear evidence of the extreme extent of mental illness in the family, including the suicide attempts of Virginia Lindsey, Robin Pilgrim, and Bessie Smith. Nor did the jury know anything about the circumstances of Lindsey's own suicide attempt when he was a teenager. Trial counsel failed to present evidence regarding the extent of Steven Pilgrim's mental illness, including his and Lindsey's belief in "roots." The jury did not hear about the violent household in which Lindsey was raised, including his mother shooting at her boyfriend, Steven Pilgrim's CDV conviction, Robin Pilgrim's violent history, and the extent of the violence of Lindsey's awful uncles, Paul and Willie. Finally, the jury heard no evidence concerning the

rampant drug abuse in Lindsey's community. The State's aggravation evidence that Lindsey was a drug dealer should have been countered with the testimony that his uncles pressed him into service as a courier. Vogelsang testified regarding all of these issues. Furthermore, the fact that Vogelsang testified after many of these incidents were discussed by Lindsey's family during their PCR testimony properly laid the foundation for her opinions.

Vogelsang's expert analysis would have allowed the jury to place Lindsey's family history in its proper context as it related to the crime and the statutory mitigating circumstances. Failure to present this evidence prevented the jury from giving "meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual." Abdul-Kamir v. Quarterman, 550 U.S. 233, 246 (2007). Had the jury been able to consider the testimony and evidence presented through Vogelsang, it is likely the outcome of the sentencing proceeding would have been different. Therefore, the PCR court's decision should be reversed and Lindsey should be granted a new sentencing proceeding.

Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by hiring an inexperienced forensic psychiatrist one month before trial and failing to prepare her to testify.¹⁴

A. Introduction

Margaret Melikian was ill-prepared in all respects for this trial. Trial counsel's decision to hire her and failure to prepare her was constitutionally deficient and prejudiced Lindsey. Melikian had little to no experience in capital cases. She was hired only a month before trial. Bartosh did not give her complete records and she did not have time to review the records she had. She only saw Lindsey one time. This complete breakdown in preparation led to her destruction on cross-examination and essentially left Lindsey without the benefit of a mental health expert, or worse off than none at all.

B. Relevant Facts

1. The Late Retention of Melikian and Her Lack of Experience

Dr. Margaret Melikian is a forensic psychiatrist. App. 2879, ll. 4 – 7. She testified at trial and at the PCR hearing. Bartosh first called Melikian sometime between April 6, 2004, and April 16, 2004. App. 2882, ll. 3 – 11. Lindsey's case was either her first or second death penalty trial. App. 2883, ll. 12 – 18. When Bartosh first called Melikian in April, she was concerned that she would not be able to prepare in time for the May trial. She testified at the

¹⁴ The issues presented in this Argument were raised at the PCR hearing, in grounds 1, 2, and 4 in Lindsey's Post-Hearing Memorandum, and in Lindsey's Rule 59(e) Motion. App. 3544-45. The PCR court ruled on all of these issues in its Order of Dismissal and in its Order Denying Motion to Reconsider, Alter, or Amend. App. 3593, 3597, 3623, 3751.

PCR hearing that she only accepted the case because she did not know any better at the time.

Melikian stated:

Due to my lack of experience at the time, I accepted the case thinking that, if all the mitigation was done, I could be prepared in that amount of time. Because of my lack of experience, I didn't really understand how much was gonna be involved in gathering information, and that mitigation had barely just begun at that time, and, and there really wasn't anyway we could be prepared for trial.

App. 2884, ll. 13 – 19. Since Lindsey's trial, Melikian has been involved in 15-20 death penalty cases. App. 2884, ll. 20 – 22. Regarding her preparation and testimony for the Lindsey case, she said, "This case has bothered me since that day. I recall, on that day of testimony, wondering if it was my ethical duty to refuse to testify I felt so unprepared." App. 2904, ll. 20 – 22.

2. The Lack of Records

At the PCR hearing, Melikian testified regarding the importance to a forensic psychiatrist of reviewing records. Forensic psychiatrists rely heavily on records because they cannot take what their patient has to say at face value. App., 2887, l. 24 – 2888, ll. 4. Forensic psychiatrists must corroborate the statements of their patients because they may be lying. She stated, "In a forensic setting, you're addressing legal matters and you need to know the truth of the matter as much as you can. So, you review lots of records to corroborate what a patient or defendant has told you." App. 2888, ll. 10 – 13. As Melikian testified, "Relying solely on the defendant for a history is being out on the limb pretty far." App. 2921, ll. 24 – 25.

The defense team's late start on the mitigation investigation severely hampered Melikian's preparations. Melikian had trouble getting complete records from the defense team and was unable to thoroughly review the documentation she received. On April 20, 2004, Melikian called Bartosh's office asking for medical records. Melikian received no records from Bartosh, so she called his office again on April 27, 2004. Melikian finally received some

medical records from Bartosh on April 28, 2004. App. 2882, ll. 4 – 11. These records did not include Lindsey's evaluation by the State's experts at William S. Hall Institute. App. 2885, ll. 1 – 14. She received an incomplete set of Lindsey's school records on May 4, 2004. App. 2908, ll. 6 – 7. She received incomplete records from Lindsey's psychiatric hospitalization for a suicide attempt when he was a teenager and from Lindsey's hospitalization when he was eighteen months old after his uncle ran over his head with a car. App. 2906, ll. 2 – 19.

Melikian never received the suicide notes Lindsey wrote to his family before the shooting. App. 2905, ll. 21 – 22. She was never told about the message Lindsey left on Tullis' answering machine the day of the shooting. App. 2905, ll. 18 – 25. The defense team did not give her any records concerning Lindsey's self-inflicted head wounds at the Spartanburg County Detention Center. App. 2989, l. 17 – 2900, l. 1. She did not know about the interviews with Lindsey's family that Lenora Topp had conducted. App. 2920, ll. 7 – 12. She never received the records from a neurologist, Dr. Absher, who had seen Lindsey. App. 2907, ll. 3 – 4. She summarized the incompleteness of what she received:

Q. Okay. And given the records that you had at that time versus the records that you have seen with the PCR preparation, is there a difference?

A. Yes, the records I received at that time, the, the file, as, as I got it back from my office, was three or four inches thick. **I've seen six to seven times that amount of information in preparation for PCR.**

App. 2886, l. 24 – 2887, l. 5 (emphasis added). Melikian also testified about the short time period she had to review the records:

And I'd also like to make sure and clarify that even though I had, we didn't have complete records, I would not have had time to review the complete records had I had them. I was concerned that I didn't know the records that we did have.

App. 2908, ll. 19 – 23.

3. Melikian's Single Visit with Lindsey

Melikian also had no time to spend with Lindsey before the trial. Before showing up for trial, Melikian only spent seven hours and forty-five minutes on the case. App. 2882, ll. 15 – 18. Of this time, two-and-one-half hours were spent during her single visit with Lindsey. App. 2882, ll. 21 – 25. She saw him on May 4, 2004. Melikian testified, “To see a defendant one time only in a death penalty case I would, I would not do again. I cannot imagine doing that for any serious case.” App. 2923, ll. 16 – 18.

4. Pressed into Service as a Neuropsychologist

On April 29, 2004, Melikian had a telephone conversation with Brawley, who had examined Lindsey for the first and only time on April 27, 2004. App. 2885, ll. 15 – 22; 2356, ll. 8 – 12. On May 18, 2004 (during the trial), Melikian learned that Brawley would not be testifying and she would be putting Brawley's information into the record herself. App. 2885, l. 22 – 2886, l. 4. Melikian “didn't feel comfortable doing that” so she requested a written report from Brawley on May 20, 2004 (three days **after** the start of the trial). App. 2886, ll. 2 – 3.

5. The Attempt at Obtaining a Continuance

As the trial grew closer, Melikian began to grow very concerned about the lack of preparation. App. 2891, l. 20. On April 30, 2004, she called Bartosh's office and told Quimby she needed a continuance and could not be prepared for trial. App. 2536, ll. 15 – 25. Quimby made a note for Bartosh about her inability to be ready. App. 3028. According to Quimby's note, she advised Bartosh of Melikian's concerns. App. 3028. Quimby memorialized Bartosh's response: “She knew time constraints before she started and said she'd be OK.” App. 3028.

Apparently in response to Melikian's mounting fears, Bartosh then set up a conference call between Melikian and Judge Few on May 12, 2004. App. 2891, l. 20 – 2892, l. 1. Melikian

spent forty-five minutes speaking with Judge Few about her concern that she could not be ready to testify and trying to persuade him to grant a continuance. App. 2892, l. 1 – 2894, l. 7. **No member of the defense team participated in Melikian’s call with Judge Few.** App. 2893, ll. 1 – 8. Bartosh never formally asked for a continuance. App. 3622. None was granted.

6. Melikian’s Testimony at Trial

Melikian was the second witness called by the defense. None of Lindsey’s family had testified when Melikian took the stand. Therefore, the jury knew nothing about Lindsey’s family history or background when she testified and had no frame of reference in which to place her testimony.

After her qualifications, the first thing the jury heard from Melikian was that she interviewed Lindsey once, three weeks before the trial. Based on this one interview and a review of records supplied by Bartosh, she diagnosed Lindsey as suffering from “major depressive disorder.” App. 2002, l. 24 – 2003, l. 12. On direct-examination, she stated she had reviewed Lindsey’s

[M]edical records, the records from a psychiatric hospitalization when he was a teenager, records of a head injury when he was an infant, as well as neuropsychological testing. I saw school records. That’s all I can recall at this point. I also had the opportunity to see the reports from William S. Hall where he had been evaluated.

Q. So you reviewed the records from Hall?

A. Yes, I did. I reviewed their reports.

App. 2003, ll. 15 – 23.

Melikian was the first witness at trial to bring up the question of malingering. App. 2005, ll. 3 – 6. She stated that Lindsey’s records from the Hall Institute diagnosed him as malingering because he said that he heard voices and because of his imaginary friend, “Jimmy.” App. 2005

ll. 7 – 14. Melikian stated that she did not diagnose Lindsey as malingering because the Hall Institute’s objective testing and Brawley’s testing did not show he was malingering. App. 2005, ll. 7 – 24. On direct, Melikian told the jury that Lindsey said Jimmy first came to visit him when he was in the hospital after his “overdose.” App. 2006, ll. 12 – 15. Relying only on what Lindsey told her, she said that Jimmy first showed up at this hospital because Lindsey had a roommate who “looked very much like Charlie Manson.” App. 2007, ll. 11 – 20.

When asked about Lindsey’s intellectual functioning, she disagreed with the Hall Institute’s diagnosis of “borderline intellectual functioning.” App. 2009, ll. 2 – 18. Melikian relied on an IQ test given by Brawley on which Lindsey scored in the 80s. App. 2009, ll. 10 – 12. Lindsey’s earlier IQ score at the Hall Institute was 76. App. 2009, ll. 8 – 9. During this discussion, Melikian made no comments or observations connecting Lindsey’s low IQ score on the Hall Institute test with his depression.

She also said that Lindsey had cognitive deficits and this finding was based on the neuropsychological testing done by Brawley. App. 2004, ll. 15 – 19. She stated her belief that Lindsey had a brain abnormality that explained “his low test scores and sudden neurological findings,” but she could not pinpoint the source of the injury to the brain. App. 2010, ll. 9 – 20. Melikian incorrectly asserted that Lindsey had been seen by a behavioral neurologist, but did not explain the results of any testing. App. 2010, l. 23 – 2011, l. 4.

When asked about the events surrounding the shooting, Melikian related only what Lindsey told her. She said Lindsey told her that he had planned “to commit suicide by driving off [a] cliff.” App. 2013, ll. 1 – 2. Lindsey told her he had lost approximately sixty-five pounds in three weeks. App. 2013, ll. 13 – 14. Melikian told the jury that Lindsey’s plan on the day of the shooting was “to go to his mother in law’s home and blow his brains out... in front of the

house.” App. 2013, ll. 18 – 22. When he saw his wife’s cousin drive away, “he just snapped.” App. 2013, ll. 22 – 25.

Melikian’s performance on cross-examination was a disaster. Melikian’s inexperience led her to immediately concede that she should have written a report:

Q. And you did not prepare a report in this case?

A. That is correct.

Q. You understand if you had prepared a report, that would have to given?

A. Yes.

Q. And it would have been beneficial to proving your testimony?

A. I would think so, yes.

Q. That was not done?

A. Right.

Q. And why not?

A. I was not asked to prepare a report in this case.

App. 2015, l. 22 – 2016, l. 8 (emphasis added). She then admitted that, during the trial, she avoided Dr. Pam Crawford who was the director of forensic psychiatry at the Hall Institute and who trained Melikian. App. 2016, ll. 9 – 18.

The most devastating portion of the cross-examination involved “Jimmy.” The solicitor asked Melikian if she knew the first time Jimmy came into existence. App. 2016, ll. 23 – 24. Melikian stated, “by Mr. Lindsey’s report, Jimmy came in to exist[ence] when he was 15 and in the hospital.” App. 2016, l. 25 – 2017, l. 1. The solicitor blindsided her with the fact that the first recorded mention of Jimmy coincided with the day Lindsey was served with the State’s Notice of Intent to Seek the Death Penalty:

Q. Now, other than what he told you – we're going to get to the stuff he told you later. Other than what he told you, when was the first documented evidence of there ever being any Jimmy?

A. There was mention of the Jimmy on intake to Spartanburg Mental Health. I am not sure if there was mention of Jimmy when he was hospitalized with the gunshot wound.

Q. Okay. Did you rely on the report of Freeman Smith, Dr. Smith, during your evaluation?

A. I did look at the information, yes.

Q. I think that is probably the first time that he mentions Jimmy. Do you disagree with that?

A. I believe so. Can I look at those notes?

Q. Sure, you can.

A (Reviewing.) I don't see Ms. Howard's notes who was on the stand earlier. She had, Ms. Howard saw him initially and referred him to Dr. Freeman.

Q. Uh-huh. (affirmative).

A. And she was concerned because he did mention auditory hallucinations with her at that time. I don't know whether he used the name Jimmy or not. But that was part of her referral to Dr. Freeman.

Q. And that has effective 10/10/02?

A. That is when Dr. Freeman saw him.

Q. Okay. No mention of Jimmy in particular until 10/10/02?

A. Correct.

Q. Would, you don't think he is malingering?

A. No, I do not.

Q. Would it be any significance to you, Doctor, to know that that is the date that the State served the notice of intent to seek the death penalty on him?

A. Well, that would be interesting to know. And had I had that information, I would've asked him about that during the evaluation?

Q. I'm going to show you the notice to seek the death penalty. I'll have you look at it.

A. (Reviewing.)

Q. It is dated what day?

A. That is dated October 10, 2002.

Q. I went to show you an affidavit of service.

A. (Reviewing.)

Q. It shows it was served what day?

A. October 10, 2002.

Q. So the same day that he came up with Jimmy or the first time we have documented in the records about a Jimmy, correct?

A. That is correct.

App. 2017, l. 2 – 2018, l. 25. Following this exchange the solicitor again asked about malingering which Melikian defined as “the conscious [feigning] of symptoms for a secondary gain.” App. 2019, ll. 6 – 8. The solicitor asked whether a secondary gain “would be to avoid responsibility.” App. 2019, ll. 9 – 10. Melikian responded “That could be one of them, yes.” App. 2019, l. 11. Once again the solicitor blasted Melikian on this issue:

Q. Would blaming Jimmy help avoid his responsibility?

A. Blaming Jimmy might avoid responsibility. It may be a coping mechanism of Mr. Lindsey's in dealing with what he had done.

Q. That is exactly what he tried to do on 10/10/02, wasn't it? The highlighted part.

A. Yes.

Q. He tried to say it was Jimmy's fault, not his?

A. That is correct.

Q. That is avoiding responsibility, right?

A. Correct.

Q. But he is not malingering?

App. 2019, l. 17 – 2020, l. 4. The solicitor asked Melikian about Lindsey’s interview with Narayan [**that Bartosh did not attend**] and whether Lindsey “pulled a chair right next to him and started carrying on a conversation with [Jimmy]?” To which Melikian replied “yes.” App. 2020, l. 24 – 2021, l. 1. The solicitor then again asked if she thought he was malingering. App. 2021, l. 2. The solicitor repeated the question of whether Lindsey was malingering five more times during cross-examination when asking her about Jimmy, hammering this point home each time with the jury. App. 2021, l. 17; App. 2029, l. 7; App. 2031, l. 6; App. 2037, l. 25; App. 2039, l. 9.

Melikian also was forced to admit that she lacked important records and had not interviewed important witnesses in formulating her opinions. She admitted that she had not seen the records from Lindsey’s incarceration following the Stanford Wilkins conviction. App. 2026, ll. 16 – 22. She was unable to refute the assistant solicitor’s assertion that the medical records from the Department of Corrections did not show any symptoms of depression. App. 2026, l. 23 – 2028, l. 13. Melikian could not counter the solicitor’s assertion that Lindsey’s suicide attempt at the age of fifteen was only an attempt to get attention because she did not know anything about the circumstances regarding the incident. App. 2030, l. 11 – 2031, l. 7. She admitted that she only had “some” of his school records. App. 2031, ll. 18 – 19. She admitted that she did not have Lindsey’s employment application for BMW dated September 12, 2002, even though it would have been helpful. App. 2036, ll. 9 – 15. She was asked whether she had been given a copy of the defense’s case file and replied, “I’m not sure how complete a case file.” App. 2036,

ll. 21 – 24. She had not spoken with Dr. Crawford, Dr. Narayan, Celeste Nesbitt, Officer Benny Godfrey, or Latresse Smith. App. 2036, l. 16 – 2038, l. 22. She essentially admitted that the only person she had spoken with was Lindsey. The solicitor asked her, “Now, a lot of what you testified to is based on what he told you?” She responded, “That is correct.” App. 2039, ll. 4 – 8. The solicitor asked her again on recross:

Q. But you never talked to a single soul that saw him on that day?

A. I reviewed notes. I did not speak to anyone other than Ms. Howard who takes care of him at the detention center.

Q. Well, that was not the answer to my question. The question was you had not talked to anyone, not one single soul that saw him on the day that he murdered his wife?

A. That is correct.

App. 2043, ll. 11 – 20. At this point Melikian was excused. App. 2043, ll. 23 – 24.

C. The Order of Dismissal

The PCR court held that trial counsel’s performance was not deficient. App. 3619. This conclusion was based on two factors. First, the PCR court found that while it was “apparent that there was a difference in the quantity of material that Dr. Melikian reviewed in 2004 contrasted with this hearing,” she did have some records and Melikian could not “cogently express what material made a difference to her conclusions other than it would be corroborative evidence concerning information that she had learned and relied upon in 2004.” App. 3619.

Second, the PCR court used a “double-edged sword” analysis. It speculated that had Melikian known more about Lindsey’s history, it would have somehow altered her opinion in a negative way. The PCR court stated:

The problem with her retrospective analysis of her own testimony is that it ignored the danger that her review of the additional material presented and [sic] allowed the Respondent in this proceeding to additionally develop the negative

evidence – as the prosecution would have been developed [sic] at trial, and as it was similarly done with the proffered social work testimony of Jan Vogelsang [sic]. In cross-examination, based upon her review and reliance upon information both developed by the original trial team and then enhanced by the collateral team, Dr. Melikian had to address the bad as well as the beneficial because of her reliance of [sic] the extensive, but limited data.

App. 3620. Without any reasoning or other explanation, the court added, “[T]his Court concludes that had [Melikian] been exposed [sic] and relied upon the material presented through Jan Vogelsang, the likelihood of a death verdict became even more enhanced.” App. 3621.

The PCR court also concluded that even if trial counsel’s performance was deficient, Lindsey suffered no prejudice as a result. App. 3621. The court stated that Melikian’s diagnosis did not fundamentally change. App. 3620. It also determined that Lindsey failed to show that a continuance would have been granted. App. 3622.

D. Discussion

1. Deficient Performance

The PCR court erred in denying Lindsey’s application on this ground because counsel’s performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). Bartosh’s retention of Melikian a month before trial falls short of the ABA Guidelines’ advice that assembling the defense team shall begin immediately and the team shall include “at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.” 2003 Guideline 4.1(A)1 & 2, App. 3148; see 1989 Guidelines 11.4.1, 11.8.3(A), (D), & (F). Bartosh’s late and haphazard mitigation investigation violated constitutional requirements and the ABA Guidelines. See Wiggins, 539 U.S. at 527; Council at 172, 670 S.E.2d at 363; 2003 Guideline 10.7(A), App. 3210; 1989 Guideline 11.4.1(C) & (E). Bartosh’s thirty minutes spent preparing Melikian to

testify and his scattershot provision of documentation was deficient. 2003 Guideline 10.11(F)(2), App. 3251; see 1989 Guideline 11.8.3(F)(1) & (2).

The PCR court's conclusion that Lindsey cannot show deficient performance because of a lack of specificity regarding the information Melikian received and her lack of preparation is not supported by the record. Melikian specifically testified that she did not see the suicide notes Lindsey wrote three weeks before the shooting and did not know about Lindsey's call to Tullis the day of the shooting. App.2905, ll. 19 – 21; App. 2905, l. 22 – 2906, l. 1. She also testified that she did not see any pictures and had incomplete incident reports from Lindsey's self-inflicted injuries at the Spartanburg County Detention Center. App. 2899, ll. 17 – 24; App. 2887, ll. 19 – 20. At trial, she "didn't know much of Mr. Lindsey's family history at all" and what she did know came mostly from Lindsey. App. 2920, ll. 7 – 12. Regarding the records that were provided by Bartosh, Melikian testified at the PCR hearing that they were incomplete. App. 2887, l. 18; App. 2906, ll. 15 – 19 (mental health records); App. 2887, l. 18; App. 2906, ll. 15 – 19 (medical records); App. 2907, l. 18 – 2908, l. 23 (school records); App. 2907, ll. 3 – 4 (neurologist's records). Furthermore, the fact that the first thing the jury heard was that Melikian only saw Lindsey one time two weeks before trial immediately created the perception that she was a "hired gun" and her opinion lacked credibility.

Perhaps most importantly, the defense team failed to prepare Melikian concerning Jimmy and the accusation of malingering. They did not provide Melikian with Lindsey's incarceration records showing that Lindsey made statements that Jimmy had taken over his body or was responsible for the shooting. App. 2887, ll. 18 – 19; App. 2899, ll. 5 – 8. They did not tell her that Lindsey acted with them as if Jimmy were a real person and present in the room with them. App. 2896, l. 16 – 2897, l. 25. Had Bartosh been even minimally competent and attended the

interview with Dr. Narayan, he would have known the importance placed on Lindsey's conduct regarding Jimmy and relayed this critical information to Melikian. Most importantly, as glaringly pointed out by the State at trial, the defense team never told Melikian that the first time Jimmy appeared coincided with the day he was served with the State's intent to seek the death penalty. The lack of preparation with Melikian regarding the serious accusation of malingering is startlingly constitutionally deficient.

Just as in Von Dohlen, the failure to prepare Melikian was constitutionally deficient. Von Dohlen, at 604-08; 602 S.E.2d at 741-43. Von Dohlen's attorneys failed to adequately prepare his psychiatrist. They failed to provide the psychiatrist with adequate records and information. Id. at 604, 602 S.E.2d 741. At the PCR hearing, the psychiatrist identified additional materials that would have changed his opinion. Id. at 604-05, 602 S.E.2d 741. Similarly, Lindsey's attorneys failed to prepare Melikian and the destruction of her credibility deprived Lindsey of the benefit of any mental health expert during sentencing.

Finally, as shown in Argument 2.C.2, the PCR court's "double-edged sword" reasoning is legally and logically wrong. First, trial counsel's strategy was not to show that Lindsey was a good person. Bartosh attempted to show Lindsey had a miserable background and suffered from depression; Bartosh just failed to begin preparation in time to adequately present this evidence to the jury. In this case, no reasonable trial strategy could exist that would justify withholding information from the defense team's psychiatrist. Second, any aggravating evidence was admissible and available to the State regardless of the expert witnesses used by the defense. Indeed, the State presented a large amount of aggravating evidence from Lindsey's background that went unrefuted by the defense. The PCR court's conclusion that trial counsel's performance was constitutionally sufficient is unsupported by either the law or the record.

2. Prejudice

Had trial counsel properly prepared Melikian to testify, there is a reasonable probability that the outcome of the sentencing proceeding would have been different. Wiggins, 539 U.S. at 534. The State's destruction of Melikian on cross-examination deprived Lindsey of any credible expert witness. Trial counsel's failure to prepare Melikian prevented her from credibly testifying about the severity of Lindsey's depression. Had she known about the Tullis message, seen the suicide notes, and known about the family history of depression, she could have better withstood cross-examination. As it turned out, she could not even remember why Lindsey attempted suicide when he was fifteen. App. 2030, l. 11 – 2031, l. 7.

Melikian's credibility and ability to withstand cross-examination was severely affected by the lack of preparation. The assistant solicitor forced Melikian to concede that she essentially relied on what Lindsey told her about his history and background instead of on clinical observations, interviewing witnesses and other doctors, and reviewing records. The assistant solicitor's reference to Melikian's preparation as "trash-in/trash-out" went unchallenged. App. 2040, ll. 10 – 23. Had the jury seen a prepared psychiatrist who had done a thorough investigation and examination instead of a "hired gun" doctor who had done nothing in the case until weeks before trial, the result could have been different.

Lindsey was also prejudiced by Melikian's inability to explain how the severity of his depression caused a dramatic decrease in his already low level of intellectual functioning. At trial, Melikian stated only that she disagreed with the Hall Institute's diagnosis of borderline intellectual functioning. App. 2009, ll. 2 – 18. She based her disagreement on Brawley's later test which showed Lindsey's IQ to be nine points higher. App. 2009, ll. 10 – 12. At the PCR

hearing, Melikian was able to explain that Lindsey's initial low score was due to his depression.

App. 2894, l. 24 – 2895, l. 7.

Melikian described how the lack of preparation led her to the wrong conclusion about the connection between his depression and his intellectual functioning:

It would [have] changed the diagnosis that I made in that I didn't understand the seriousness of Mr. Lindsey's depression at the time around the incident. I didn't understand the level of depression that Mr. Lindsey was showing at the time of my evaluation around the trial. It would have changed the way I looked at his cognitions in terms of he had testing results that were low. I didn't realize, because I didn't have family history, I didn't have enough time with Mr. Lindsey, to see that he was not functioning at his best level at the time.

App. 2888, l. 23 – 2889, l. 3. Lindsey's low level of intellectual functioning would have explained his mental state at the time of the shooting and given credence to Lindsey's statement that he "just snapped" and was suicidal. App. 2013, l. 18 – 2014, l. 8.

Finally, had the defense team told Melikian what they knew about Jimmy, provided her with Lindsey's complete incarceration records, and had her ready to answer the accusation of malingering, the result could have been different. The revelation during cross-examination that Jimmy first appeared when Lindsey was served with the death notice and that Melikian did not know this fact obliterated any remaining shred of credibility. It allowed the State to turn her assertion that Lindsey was not malingering into proof that Lindsey was a liar.

Melikian testified at the PCR hearing that if she had known more about Jimmy, the malingering accusation would have been "the focus of my evaluation." App. 2899, ll. 12 – 16. Since Lindsey told her Jimmy was imaginary, to her that meant he was not psychotic. Psychotics would not describe a hallucination as imaginary. App. 2898, ll. 17 – 21. Instead of unintentionally proving the prosecution's malingering accusation, she could have turned

Lindsey's invention of Jimmy into further evidence of the severity of his depression, as she did at the PCR hearing:

Yes, I wish I had had that information at the time because I could have explained that with his level of depression and cognitive ability, he's believing [inventing Jimmy] is a good idea. It doesn't even go to his end means. He was suicidal at the time. He was still suicidal when I saw him. He's been suicidal throughout this time.

Malingering mental illness was not going to further his goals. I think it has to do with his lack of cognitive ability and thinking things through very well that he agreed to do something some other inmates told him.

App. 2914, l. 22 – 2915, l. 6.

It cannot be questioned that the malingering accusation severely hurt Lindsey's chances of receiving a life sentence. If Melikian had more time to prepare and understand the significance of Jimmy, she could have explained to the jury that creating Jimmy demonstrated not that Lindsey was a liar and malingerer, but a seriously mentally ill person whose depression was so severe that he could not even comprehend the stupidity of inventing Jimmy. Had the defense team presented a psychiatrist with the experience, time, and support from counsel to explain Jimmy and the malingering accusation, the result at trial could have been different.

Trial Counsel rendered ineffective assistance, in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by failing to hire a prison adaptability expert who could dispute the State's aggravation evidence.¹⁵

A. Relevant Facts

1. Sentencing Proceeding

During its case in aggravation, the State presented evidence of Lindsey's prior convictions and bad acts through multiple witnesses. The State attempted to paint Lindsey as a violent drug dealer. The State also called a witness from the Department of Corrections to testify regarding how inmates are housed and classified. Trial counsel presented **nothing** to counter the State's evidence that Lindsey posed a future danger.

The State presented the following witnesses who testified regarding Lindsey's dangerousness:

a. Celeste Nesbitt

Nesbitt testified regarding several incidents of violence. She claimed she saw Lindsey beat his wife in a parking lot at the beach. App. 1775, ll. 15 – 24. She claimed that on another occasion, Lindsey hit his wife at Nesbitt's house. App. 1777, ll. 5 – 9. She also testified regarding an incident in an Applebee's parking lot when Lindsey allegedly hit Nell. App. 1779,

¹⁵ The issues presented in this Argument were raised at the PCR hearing, in ground 6 in Lindsey's Post-Hearing Memorandum, and in Lindsey's Rule 59(e) Motion. App. 3544-45. The PCR court ruled on all of these issues in its Order of Dismissal and in its Order Denying Motion to Reconsider, Alter, or Amend. App. 3637, 3751.

ll. 5 – 16. Nesbitt said the police were called about the Applebee’s incident and the incident at her house. App. 1787, ll. 2 – 6.

b. Sharon Smith

Smith was Nell’s first cousin. She claimed she saw Lindsey hit Nell at Smith’s house. App. 1821, ll. 5 – 8. She also claimed that she often saw Nell with bruises and black eyes. App. 1823, ll. 2 – 7.

c. Police Officer Witnesses

The State presented several police officers in an effort to show that Lindsey was violent and that he sold drugs. First, they called Chris Smith, a DEA agent and former narcotics investigator with the Spartanburg County Sheriff’s office. App. 1829, ll. 18 – 23. He testified that he arrested Marion Lindsey for trafficking crack cocaine. App. 1833, l. 19 – 1834, l. 1. Brian Duncan, a deputy with the Spartanburg County Sheriff’s office, also testified regarding the same investigation and arrest as Chris Smith. App. 1862, ll. 9 – 20.

Brian White, another deputy with the Spartanburg County Sheriff’s office, testified about the incident at Applebee’s. App. 1919, l. 15 – 1921, l. 7. Deputy White signed an arrest warrant for Lindsey for criminal domestic violence related to the Applebee’s incident. App. 1921, l. 12 – 15.

d. Stanford Wilkins and Jessica Cannon

Stanford Wilkins was the victim in Lindsey’s 1996 ABWIK conviction. Wilkins testified that Lindsey used his vehicle to block Wilkins’ car in the road. App. 1942, ll. 17- 24. Wilkins claimed that Lindsey got out of his car and shot at Wilkins twice through his windshield. App. 1943, ll. 2 – 5. Wilkins was hit once in the arm. App. 1943, ll. 11 -12.

Jessica Cannon was a passenger in Wilkins' car. Her testimony corroborated Wilkins' claims regarding the shooting incident. App. 1950, ll. 4 – 15. Bartosh did not cross-examine Wilkins or Cannon.

e. Martha Smith

Martha Smith was an employee with the Spartanburg County Clerk of Court. App. 1952, ll. 4 – 8. The State called Smith to introduce Lindsey's 1996 ABWIK conviction for the shooting of Stanford Wilkins. App. 1952, ll. 14 – 23. She testified that Lindsey pled guilty to ABWIK and that he received two years' imprisonment suspended to one year in jail and one year of probation. App. 1953, ll. 2 – 10.

f. Sarah Simmons

Sarah Simmons was a magistrate judge in Spartanburg County. App. 1930, ll. 13 – 21. Judge Simmons was the magistrate on duty the night before the shooting. App. 1931, ll. 1 – 5. She presided over Lindsey's bond hearing on a CDV charge.¹⁶ App. 1931, ll. 10 – 25. The State presented her testimony to show that: (1) Lindsey had been arraigned for allegedly committing criminal domestic violence against his wife; and (2) as a condition of his release, Lindsey was barred from having any contact with Nell. App. 1936, ll. 5 – 11.

¹⁶ Interestingly, Judge Simmons' testimony is telling regarding Lindsey's mental state. Lindsey did not respond when Judge Simmons called his name to be arraigned. She called his name three times and he never moved. App. 1935, ll. 3 – 7. It was only after an officer touched him that Lindsey realized his name had been called. App. 1933, ll. 3 – 9. Judge Simmons described Lindsey as unresponsive and mumbling during the bond arraignment. App. 1933, l. 18 – 1934, l. 19. She had to recall Lindsey to the bench to make sure he understood her instructions. App. 1934, ll. 1 – 5. She had to tell Lindsey several times that he would not receive a personal recognizance bond before he understood. App. 1933, l. 10 – 1934, l. 19.

g. James Sligh

James Sligh, division director of classification of inmate records for the South Carolina Department of Corrections, testified during the State's case in aggravation. App. 1908, ll. 10 – 14. The State presented Sligh to testify regarding how inmates who receive life sentences are classified. App. 1908, ll. 18 – 24. Sligh testified that inmates who receive life sentences have: cellmates, access to the yard, frequent interaction with other inmates, opportunities to work and go to school, are fed in a cafeteria setting, receive visitation, and have contact with guards and other prison employees. App. 1909, l. 2 – 1912, l. 1. See State v. Plath, 281 S.C. 1, 8-9, 313 S.E.2d 619, 623 (1984); see also State v. Burkhardt, 371 S.C. 482, 487-88, 540 S.E.2d 450, 453 (2007); State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 387 (2005). The State introduced this testimony, in part, in order to prove that Lindsey presented a future danger and would have multiple opportunities to pose a danger to other inmates and prison employees.

Importantly, in his position with the Department of Corrections, Sligh would have had access to Lindsey's incarceration records. Had the State chosen to do so, they could have introduced evidence of Lindsey's altercations and fights in prison through Sligh's testimony. Bartosh and the defense team were obviously on notice that Sligh would be testifying and that information regarding Lindsey's incarceration history was fair game. Nevertheless, no evidence was introduced to counter Sligh's testimony.

2. Evidence Regarding Adaptability Presented at PCR Hearing

a. Trial Counsel

Brannon's sole responsibility, as delegated to him by Bartosh, was the guilt phase of the trial. App. 2300, ll. 8 – 14. Brannon testified that anything regarding the mitigation phase, including prison adaptability experts, was not within his purview and that he had no testimony to

offer at the PCR hearing regarding these questions. App. 2309, ll. 20 – 25. He never reviewed any records regarding Lindsey’s prior incarceration. App. 2337, l. 25 – 2339, l. 6.

Quimby testified that she had no knowledge concerning Bartosh’s trial strategy. App. 2521, ll. 14 – 17. She had “a very limited role” that did not include making decisions in the case. App. 2520, ll. 4 – 21. Quimby specifically testified that she had no input into whether a prison adaptability expert would be called. App. 2533, l. 22 – 2534, l. 4. She could not remember ever calling a prison adaptability expert in any capital case in which she had been involved. App. 2541, l. 6 – 2542, l. 2. Quimby could not remember whether she reviewed any records from Lindsey’s incarcerations. App. 2555, ll. 12 – 25.

b. James Aiken

James Aiken was qualified as an expert in prison adaptability at Lindsey’s PCR hearing. App. 2510, l. 19 – 2511, l. 5. Aiken began working with the South Carolina Department of Corrections in 1971. App. 2485, ll. 13 – 24. He was promoted through the ranks of the South Carolina Department of Corrections and eventually served as Warden at the Central Correctional Institution. App. 2485, l. 21 – 2486, l. 24. He was Commissioner of Corrections for the state of Indiana and the Director of Corrections for the United States Virgin Islands. App. 2487, ll. 13 – 22. He also served on a congressional commission for prison rape elimination. App. 2489, ll. 10 – 13.

Prior to this testimony, Aiken reviewed Lindsey’s records from the Spartanburg County Detention Center and also from the South Carolina Department of Corrections for Lindsey’s 1996 incarceration. App. 2490, l. 22 – 2491, l. 13. Based on his evaluation of these records, Aiken’s opinion was “that the South Carolina Department of Corrections has and can manage

this type of offender for the remainder of his life without causing unreasonable risk of harm to staff, inmates, as well as the general community.” App. 2491, ll. 18 – 21.

Specifically, Aiken testified that the Department of Corrections has the expertise, equipment, and knowledge to manage Lindsey. App. 2492, ll. 2 – 6. Lindsey did not have relationships with security threat groups such as prison gangs. App. 2492, ll. 7 – 11. Aiken also testified that life imprisonment without possibility of parole is a very severe sentence and compared such an inmate to a figurine on the shelf that sits “day after day, month after month, year after year, decade after decade.” App. 2492, l. 19 – 2493, l. 6.

On cross-examination, the State confronted Aiken with incidents from Lindsey’s prior incarcerations. Specifically, the State asked Aiken questions regarding a recommendation that Lindsey be treated for anger management and three altercations with other inmates – two from 1996, and one from February 2004. App. 2499, l. 17 – 2503, l. 24. Aiken dealt easily with these questions:

Q. And you would agree that the South Carolina Department of Corrections, at Dutchman Correctional Institution in 1996 that Lieber correctional institution in 2004 and 2006, was unable to manage Mr. Lindsey to prevent violence against other inmates, isn’t that correct?

A. Not necessarily so, sir. Prisons are very dangerous places and they contain violent people. I, I know inmates or know of inmates and **I have to manage inmates that have gotten into more trouble before lunchtime than what we’re talking about over a period of years**, have been gassed continuously and use of force. I’ve even had to make a sniper, had a sniper to, to kill an inmate in a hostage situation. **So, when you put it in the proper context, we have to evaluate prison behavior using prison standards and not community standards.**

Q. Okay. Let’s go back. So, so, what you’re essentially testifying is that there are inmates within the Department of Corrections who are more violent than Mr. Lindsey and would cause a correctional officer more trouble? Is that what we’re saying?

A. No, sir, hypothetically that could be true, that's not what I'm saying. I am saying, because he had these altercations and fights, doesn't indicate to me or any other person with correctional knowledge that he [cannot] be managed within a prison setting.

App. 2507, l. 9 – 2508, l. 8 (emphasis added).

B. Order of Dismissal

The PCR court held that there was “no showing” that Lindsey would have been adaptable to prison. App. 3625. He speculated that Bartosh had a strategy regarding whether to call a prison adaptability expert, guessing that Bartosh must have believed that calling such an expert could introduce evidence of violent incidents in Lindsey's past. App. 3627. Finally, the PCR Judge ruled that Lindsey could not show prejudice because any evidence of prison adaptability would have been a “two-edged sword.” App. 3636 (internal quotation omitted). The PCR Court stated, “[T]he proffered evidence revealed the two-edge [sic] sword that any seasoned trial lawyer like Bartosh would have recognized as a high risk of harmless [sic] information and emphasis by a prosecutor lay in wait [sic] for this type of evidence due to inconsistent history on being adaptable.” App. 3633.

C. Discussion

In denying Lindsey's application, the PCR court made multiple errors. First, the court held there was “no showing” that Lindsey would have been adaptable to prison, which completely disregarded Aiken's testimony. App. 3625. Second, the court improperly speculated regarding the existence of a trial strategy regarding prison adaptability. App. 3632-33. Even if such speculation were allowed, the reasoning for this holding regarding effectiveness is flawed. The PCR court also incorrectly held that Lindsey was not prejudiced by the failure to call Aiken. App. 3636-37.

1. Deficient Performance

In order to obtain relief based upon a claim of ineffective assistance of counsel, a petitioner must show that counsel's performance was deficient and such deficiency prejudiced petitioner. Strickland v. Washington, 466 U.S. 668, 687 (1984). An attorney whose representation fell below an objective standard of reasonableness provided deficient performance. Id. at 688. An attorney's performance is measured against prevailing professional norms. Id. at 688. As explained in Argument 1.C.1.a, the PCR court improperly disregarded the ABA Guidelines in measuring trial counsel's performance. This Court and the United States Supreme Court have repeatedly used the ABA Guidelines in capital cases. Wiggins v. Smith, 539 U.S. 510, 524 (2003); Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008).

Both the 1989 and 2003 Guidelines provide that trial counsel should consider presenting evidence of the client's prison adaptability and expert testimony concerning such. 1989 Guidelines, 11.8.6(B)(6) & (8)(1989); 2003 Guidelines, 10.11.F.2 & 3, App. 3250-51. The 2003 Guidelines state:

F. In deciding which witnesses and evidence to prepare concerning penalty, the areas counsel should consider include . . .

2. Expert and lay witnesses along with supporting documentation (e.g., school records, military records) . . . to give a favorable opinion as to the client's capacity for rehabilitation, or adaptation to prison; to explain possible treatment programs; or otherwise support a sentence less than death; and/or to rebut or explain evidence presented by the prosecutor; [and]

3. Witnesses who can testify about the applicable alternative to a death sentence and/or the conditions under which the alternative sentence would be served;

2003 Guidelines, 10.11.F.2 & 3, App. 3250-51. Without question, evidence of a defendant's future adaptability to prison life is admissible during the penalty phase as it is evidence of a

mitigating circumstance. Exclusion of such testimony is reversible error. Skipper v. South Carolina, 476 U.S. 1, 8 (1986); State v. Matthews, 291 S.C. 339, 348-349, 353 S.E.2d 444, 449-450 (1986); State v. Patterson, 290 S.C. 523, 530-531, 351 S.E.2d 853, 857 (1986); State v. Riddle, 291 S.C. 232, 235-236, 353 S.E.2d 138, 140-141 (1987), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The PCR court improperly assumed that Bartosh considered the use of a prison adaptability expert. The PCR court cited as evidence that Bartosh considered a prison adaptability expert the fact that Quimby noted that adaptability to prison life was a mitigating factor. App. 3631-32. The PCR court's assumption based on this mote of evidence amounts to pure speculation.

Furthermore, the decision not to call a prison adaptability expert could not have fallen within the ambit of reasonable professional judgment. After assuming that Bartosh debated whether to call a prison adaptability expert, the PCR court guessed that Bartosh exercised "reasonable professional judgment" in not calling such an expert because it could introduce harmful evidence. App. 3633. This finding by the PCR court is based on an error of law.

The State was fully able to present evidence of Lindsey's altercations in prison in its case in aggravation. Contrary to the PCR Court's analysis, the State did not need to wait for the defense to open the door in order to introduce this evidence. "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Skipper, 476 U.S. at 8. Thus, evidence that a defendant would pose a danger in the future may be considered as aggravating evidence in capital sentencing proceedings. Jurek v. Texas, 428 U.S. 262, 275-276 (1976); Barefoot v. Estelle, 463 U.S. 880 (1983). "A jury must be allowed to consider on the basis of all relevant evidence not only why a

death sentence should be imposed, but also why it should not be imposed.” Jurek, 428 U.S. at 271.

The trial judge may allow the introduction of additional evidence of aggravation to aid the jury in determining whether to recommend a death sentence. State v. Shuler, 353 S.C. 176, 184, 577 S.E.2d 438, 442, (2003). Evidence of a defendant’s violent behavior in prison is relevant to future dangerousness, an issue properly before the sentencing jury. State v. Shafer, 352 S.C. 191, 198-199, 573 S.E.2d 796, 799-800 (2002). As explained by this Court, “it is well-settled that evidence of the defendant’s behavior in prison is admissible in capital sentencing because it bears upon his character.” State v. Hughes, 336 S.C. 585, 591-592, 521 S.E.2d 500, 503-504 (1999) (holding evidence that defendant killed a sleeping cellmate by stabbing him with a shank was admissible as evidence of the defendant’s character and future dangerousness). As explained in State v. Tucker, 324 S.C. 155, 173-174, 478 S.E.2d 260, 270 (1996), a defendant’s future dangerousness and his adaptability to prison life are legitimate interests in the penalty phase of a capital case.

For example, in an incident similar to one in Lindsey’s history, this Court held the prosecution’s introduction during its case-in-chief of a video recording of a capital defendant refusing an order of prison guards and the guards using pepper spray to force his compliance was “probative on the issue of [the defendant’s] adaptability to prison life, which is a legitimate concern in the sentencing phase of a capital case.” State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). This Court held “[t]he video recording presented the jury with competent evidence to showcase Torres’ character in an actual routine prison situation.” Id. Although the prosecution had introduced evidence of Torres’ prior convictions and his inability to abide by conditions of parole, this Court held the video was still admissible as it “was unique

in its application to a specific parameter held by this Court to not be arbitrary in the sentencing phase of a capital murder trial.” Id. at 625-626; 703 S.E.2d at 230.

Here, the State had on its witness list James Sligh, who could have testified regarding Lindsey’s incarceration history. The State also included on its witness list a “DOC/SCDF” witness who would testify regarding “any prior conduct while in either facility,” and a “DPPPS Agent(s)” who would testify regarding “any prior conduct while on probation or parole.” App. 3082 (Section III, “Other Witnesses”). Sligh offered testimony on future dangerousness by testifying that Lindsey, should he receive a life sentence, would have daily interaction with other inmates and guards. The State also offered numerous witnesses regarding Lindsey’s history of violence, including Stanford Wilkins, Jessica Cannon, Sharon Smith, Celeste Nesbitt, and several police officers. Trial counsel knew this evidence would be presented to the jury, yet did nothing to rebut it. Under these circumstances, the failure to call a prison adaptability expert to challenge the State’s evidence of future dangerousness was unreasonable and was deficient performance.

2. Prejudice

The PCR court ruled that Lindsey did not suffer prejudice because of the “horrific evidence in aggravation.” App. 3637. This ruling is error. Only one aggravator was proven at trial. “When a defendant challenges a death sentence, prejudice is established when ‘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.’” Jones v. State, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (quoting Strickland, 466 U.S. at 695 (1984)). As this Court noted “the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A

capital jury can recommend a life sentence for any reason or no reason at all.” State v. McClure, 342 S.C. 403, 409, 537 S.E.2d 273, 275 (2000).

Aiken’s opinion that Lindsey was adaptable to prison was sufficient to demonstrate prejudice. Aiken’s opinion was not seriously challenged by the State at the hearing. Had the jury heard Aiken’s opinion, it would have placed Lindsey’s history in the proper context for consideration of a life sentence. Aiken’s testimony would have given the jury the ability to understand the severity of a life sentence and that the DOC manages inmates like Lindsey successfully every day. Had the jury learned of Lindsey’s high likelihood of adaptability and low risk of future dangerousness from an expert and placed this evidence on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance. See Wiggins, 539 U.S. at 537.

Furthermore, prejudice is apparent because of the weakness of the aggravating factors in the prosecution’s case. As stated previously, the only reason this case qualified for capital sentencing is because Lindsey shot his wife in a public place, therefore transforming a domestic homicide into a capital crime. Any evidence in mitigation presented by the defense could have made a difference in this close case. For these reasons, the judgment of the PCR court should be reversed and Lindsey granted a new sentencing hearing.

Marion Lindsey's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the court's wholesale adoption of the State's proposed order.

The PCR court made only one change to the proposed order submitted by the State: it crossed out "June" and handwrote "August" on the signature page. App. 3727. Otherwise, the 192-page Order of Dismissal is exactly the same as the proposed order submitted by the State. This wholesale adoption of the proposed order violates the express commands of this Court to South Carolina's trial judges. It also violates Lindsey's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

This Court has on two occasions warned PCR judges against wholesale adoption of proposed orders. In Pruitt v. State, the Court stated:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992). Despite the Court's admonishment in Pruitt, the practice continued. This Court again was forced to address this issue in Hall v. Catoe, stating:

Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). In Hall, the Court found that the evidence indicated that the PCR judge “spent an adequate amount of time reviewing the order before adopting it.” Id. In this case, a comparison of the proposed order and the Order of Dismissal demonstrates exactly the opposite.

On May 2, 2011, the PCR court requested a proposed order from the State. App. 3537. The court did not request a proposed order from Lindsey at the same time. App. 3537. On August 10, 2011, Judge Burch signed the Order of Dismissal.

Except for striking through the month on the signature page, the PCR court made no changes to the State’s proposed order. App. 3727. More disturbing, the sheer number of errors in the proposed order, which appear uncorrected in the final order, casts grave doubts on whether the court even read the proposed order. The following identical errors occur in both the proposed order and the Order of Dismissal:

1. Eight (8) sentence fragments (See, e.g., App. 3569 (“A violent tempered criminal involved in the drug trade.”));
2. Thirty-six (36) spelling errors (See, e.g., App.3550 (“the” spelled “th”));
3. Eight (8) incorrect subject/verb agreements (See, e.g., App. 3596 (“This was not neglect by counsel, but reflect a conscious decision on counsel Bartosh’s part on this issue.”));
4. Nine (9) incorrect tense agreements (See, e.g., App. 3645 (“she [sic] received information from him that he worked at Burger King where his brothers work but lost that job, then worked for United Cloth in Spartanburg.”));
5. Four (4) references to the document as a “pleading” or “argument” (See, e.g., App. 3555 (“within this pleading”));

6. Forty-eight (48) capitalization or punctuation errors (See, e.g., App. 3650 (sentence begins without a capital letter: “she described....”)).

The best example of the errors that pollute the Order of Dismissal can be found on page 153 of the Order. App. 3688. This single page contains a sentence fragment, tense agreement errors, and the substitution of the word “shit” for “shift.” App. 3688. Errors such as these occur throughout the Order and are identical to the errors in the proposed order. App. 3904.

With the improvements in technology since Pruitt and the ubiquity of email, proposed orders are often submitted to trial judges electronically. This enables a trial judge to easily review and revise a proposed order before adopting and signing it. In a capital case, it would seem that even if a judge decided to disregard this Court’s instruction to draft its own order, it would take the simple and easy step of correcting the typographical and grammatical errors in its own electronic version before adoption. Clearly, no such review occurred in this case or the PCR judge would undoubtedly have corrected these errors.

Statements made by the PCR court during the proceeding seem to show its impatience with this case. During Steven Pilgrim’s testimony, the State objected to the relevance of Pilgrim’s testimony about the family’s history. App. 2712, ll. 9 – 12. PCR counsel explained that Pilgrim’s testimony was important because a family history is essential to humanizing a defendant, relates to statutory mitigating factors, and is important to lay a foundation for expert witnesses. App. 2712, l. 13 – 2713, l. 21. After the State withdrew its objection, the court stated “[I]f the objection stands, I’m gonna overrule it, but we’re not gonna spend all morning now going back a hundred years in history.... Let’s move on with this thing now.... We bogged down yesterday.” App. 2714, ll. 1 – 7. This inclination to rush through important mitigating

evidence presented by Lindsey becomes very troubling when viewed in light of the PCR court's complete failure to consider the proposed orders submitted in this case.

Just like this Court, the United States Supreme Court recognizes that wholesale adoption of proposed orders in capital cases raises serious questions about the fairness of the process and a trial court's factual findings. Jefferson v. Upton, ___ U.S. ___, 130 S.Ct. 2217, 2223 (2010). In Jefferson, the state PCR court adopted an *ex parte* proposed order verbatim.¹⁷ Id. at 2222. The Supreme Court remanded the case based solely on the impropriety of the PCR court's actions. Id. at 2223. The Court stated, "Although we have stated that a court's 'verbatim adoption of findings of fact prepared by the prevailing parties' should be treated as findings of the court, we have also criticized that practice." Id. (quoting Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)).

Other state courts also expressly disapprove of the verbatim adoption of proposed orders in capital cases. "We cannot . . . in this post-conviction case involving a review of the propriety of a death sentence, condone the wholesale adoption by the post-conviction court of an advocate's brief." Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999); see also Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000) (criticizing practice and quoting Anderson).

The State will likely argue that this issue is not preserved for review since it was not raised in a Rule 59(e) motion. See SCRCR R. 59(e); see also Hall at 365, 601 S.E.2d at 341. Lindsey submits that this issue may be reviewed for several reasons. First, PCR counsel did file a Rule 59(e) motion that alleged the court erred in its analysis of numerous factual and legal issues. App. 3728-36. Assuming the State will object to the Rule 59(e) motion's failure to

address the specific issue of the court's wholesale adoption of the proposed order, Lindsey responds that asking an arbiter to consider its own failure to review the proposed order seems futile and quixotic.

Regardless, the Court should reach this issue because it will be addressed during federal habeas proceedings. Should the Court rule that this issue is not preserved for appeal, then Lindsey will be able to raise it in federal court in an allegation that PCR counsel was ineffective. See Martinez v. Ryan, 132 S.Ct. 1309, 1315 (2012). In light of Martinez, judicial economy, and the relaxation of procedural and evidentiary rules in capital sentencing, the Court could take up this issue without setting a precedent that would nullify its error preservation and waiver jurisprudence. The Court can consider this question under a very narrow exception limited to Martinez issues in capital cases and the unique circumstances of the Order in this case.

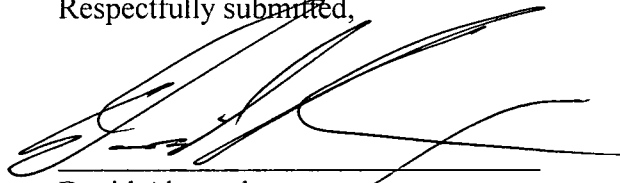
Therefore, this issue is ripe for consideration and the Court should disregard the findings of the PCR court because it did not fully and fairly consider Lindsey's claims. A state PCR court must engage in a "probing and fact-specific analysis" in capital cases. Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 3266 (2010). Just as in Jefferson, and in violation of this Court's strictures concerning proposed orders, the verbatim adoption of a proposed order rife with errors demonstrates Lindsey did not receive a full and fair hearing as required by the Eighth and Fourteenth Amendments. Therefore, Lindsey is entitled to a new PCR hearing before a different judge.

¹⁷ The proposed order in this case was not solicited or provided *ex parte*, but this should not change the Court's analysis.

CONCLUSION

The State stretched a single statutory aggravator to its limit to convert a domestic homicide into a capital case. Had Lindsey received the constitutionally required minimum effective assistance from trial counsel, there is a reasonable probability that at least one juror would have recommended a life sentence. For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'David Alexander', written over a horizontal line.

David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

This 7th day of September, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County
Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER,

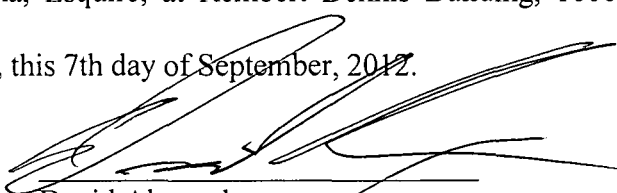
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 7th day of September, 2012.

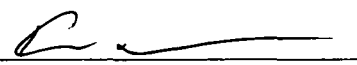


David Alexander
Appellate Defender

Robert M. Dudek
Chief Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 7th day
of September, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.