STATE OF SOUTH CAROLINA

ORIGINAL

IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Paul M. Burch, Circuit Court Judge

MARION ALEXANDER LINDSEY,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2019-001271

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1.

Whether the PCR court, in flagrant disregard of this Court's remand Order and Petitioner Lindsey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General's proposed orders of dismissal under circumstances that show the PCR court failed to consider Lindsey's grounds for PCR and did even not read the proposed order before signing it?

2.

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 especially where counsel did not hire a social work expert who could testify regarding petitioner's miserable upbringing, where counsel hired an inexperienced forensic psychiatrist on month before trial, and then failed to prepare her to testify to petitioner's considerable prejudice?

3.

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 would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community?

ARGUMENT

1.

The PCR court, in flagrant disregard of this Court's remand Order and Petitioner Lindsey's rights under the Fifth and Fourteenth Amendments to the United States Constitution and under state law, erred in twice adopting the Attorney General's proposed orders of dismissal under circumstances that show the PCR court failed to consider Lindsey's grounds for PCR and did even not read the proposed order before signing it.

Introduction

Petitioner Marion Lindsey's death penalty PCR case is before this Court for the second time. Five years ago, after examining the compelling evidence leading to the dispiriting conclusion that the PCR judge did not review the state's proposed order before signing it, this Court attempted to correct what was an embarrassment to the reputation of our state's bar and its lower court judiciary. In an extraordinary step required by the sad circumstances below, this Court remanded the case back to the PCR judge to draft his own order and comply with constitutional requirements. Instead of taking advantage of the lifeline offered by this Court, the PCR judge, with the express encouragement of the Attorney General, "doubled down" on the original severe constitutional errors and has again left its mess at this Court's doorstep. Petitioner's case will continue to be a blight on South Carolina's judicial history unless, once again, this Court takes decisive action.

The First PCR Order and this Court's Remand

In Petitioner Lindsey's petition for certiorari filed in 2012, petitioner asserted that the PCR court's signing of a verbatim proposed order submitted by the Attorney General under circumstances that sadly indicated the judge had not read the order before signing it violated

state and federal due process. 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 petitioner at the same time. App. 3537. On August 10, 2011, Judge Burch signed the state's proposed 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.

Unlike other cases in which the adoption of proposed orders by a PCR judge were approved, here the vast number of typographical errors in the Attorney General's proposed order that went uncorrected in the signed order cast grave doubt on whether the judge even read the order at all. Petitioner cited examples of the identical errors in his original petition, including:

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 polluted the first order were found on page 153. App. 3688. That single page contained a sentence fragment, tense agreement errors, and the substitution of the word "shit" for "shift." App. 3688.

Petitioner argued that the action (and inaction) of the PCR court deprived him of due process and a full and fair hearing before an impartial tribunal. Petitioner cited precedent from the United States Supreme Court, this Court, and other state courts criticizing the practice of wholesale adoption of proposed orders in capital PCRs. Jefferson v. Upton, 560 U.S. 284 (2010); Anderson v. Bessemer City, 470 U.S. 564 (1985); Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004); Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992); Commonwealth v. Williams, 732 A.2d 1167 (Pa. 1999); Dobyne v. State, 805 So.2d 733 (Ala. Crim. App. 2000). Petition for writ of certiorari at 105-110.

In Jefferson, the United States Supreme Court dealt with the state PCR court's verbatim adoption of an *ex parte* proposed order. Jefferson, 560 U.S. at 292-93. The proposed order in petitioner's case was not *ex parte*, but does not change the critical portion of the analysis here. The Supreme Court remanded the case, stating, "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, 470 U.S. at 572).

This Court also recognized the inherent problems with proposed orders and, on two occasions prior to the execution of the Order in petitioner's case, 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.

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).

In its return to petitioner's 2012 petition, the Attorney General improvidently challenged petitioner's assertion about the vast number of identical errors. Return, p. 110. Petitioner therefore included in his reply an exhibit with a catalogue of 155 identical errors (hereinafter, the "Catalogue of Errors"). After the reply and Catalogue of Errors were filed, this Court then considered whether to grant certiorari.

On September 30, 2014, instead of granting certiorari, this Court took the extraordinary step of vacating the PCR court's Order and remanded the case. Supp. App. II. at 1. This Court

stated, "In light of the Court's concern with the frequency and severity of the drafting errors in the Order of Dismissal, and this Court's admonishments to PCR judges in [Pruitt] and [Hall], we vacate the Order of Dismissal and remand the matter to the circuit court for the issuance of an amended order that complies with Pruitt and Hall and with S.C. Code Ann. § 17-27-80 (2003), to include specific findings of fact and conclusions of law on each issue presented, based on accurate references to the record and the applicable law." Supp. App. II at 1. This Court's remand Order was unanimous. Supp. App. II at 1.

The PCR Court and the State Ignore this Court's Instructions Post-Remand

Relying on this Court's strong language and citation to Pruitt and Hall, counsel for petitioner sent a letter to the Attorney General stating, "It is my interpretation of the Order that it forbids the submission or solicitation of a proposed order from the parties." Supp. App. II at 3. Counsel for petitioner copied PCR Judge Burch on the letter. Supp. App. II at 3. Nevertheless, on February 26, 2015, Judge Burch's law clerk emailed the parties asking for "Microsoft Word versions of the proposed orders submitted after the PCR hearing." Supp. App. II at 17.

Counsel for petitioner responded within an hour objecting to the submission of proposed orders, citing this Court's remand order. Supp App. II at 20. However, the Attorney General responded two minutes earlier. Supp. App. II at 23. The Attorney General attached the proposed order in electronic format. Supp. App. II at 23. Incredibly, the Attorney General also attached the Catalogue of Errors prepared by petitioner's counsel. Supp. App. II at 23. The Attorney General wrote Judge Burch, "I do not recall making any other corrections to the best of my recollection *to other typographical errors which were pointed out* to the Supreme Court in Mr. Dudek and Mr. Alexander's Reply to the Return to the Petition for Writ of Certiorari *which I am*

also attaching for your information." Supp. App. II at 23 (emphasis added). The Attorney General gave the PCR judge a list (compiled by defense counsel) of errors to fix.

Petitioner filed a "Petition for Extraordinary Relief" in this Court the same day. Supp. App. II at 7. Petitioner argued that the request for the electronic copy of the Attorney General's proposed order showed its intent to violate Hall, Pruitt, and the remand order and simply cut and paste a new order. Supp. App. II at 11-12. Petitioner requested a new PCR hearing before a new judge. Supp. App. II at 12. This Court denied the Petition for Extraordinary Relief. Supp. App. II at 89.

Petitioner's prediction in the Petition for Extraordinary Relief came true. The PCR court filed an Amended Order Denying Post-Conviction Relief which differed only slightly from the original Order. Supp. App. II at 97-283. The primary difference between the original Order and the Amended Order was only the correction of the errors pointed out by petitioner in the Catalogue of Errors. Supp. App. II at 97-283. It contained no substantive changes from the state's proposed order. It contained no new factual findings. It contained no new legal conclusions. It cited no new cases. Almost every sentence had exactly the same wording. The most significant change between the state's proposed order and the Amended Order was that the Amended Order *italicized* case names instead of underlining them.

Petitioner's line-by-line comparison of the Amended Order and original Order did reveal a few other minor stylistic and typographical corrections, including:

a. Italicizing instead of underlining case names in citations;

b. Decreasing the point size of the footnotes;

c. Altering outline formats from bullet points or roman numerals to letters;

d. Bolding some headings and un-bolding other headings;

e. Altering spacing in headings.

The Amended Order corrected some typographical errors petitioner did not include in the Catalogue of Errors; however, many typographical errors petitioner did not catch were not fixed. For example, a sentence on page 109 (Supp. App. II at 205) of the Amended Order (and the original Order, App. 3648), reads: "She confirmed that she was not an expert in mental health area."

These "biggest" differences between the original Order and the Amended Order demonstrate the lack of any significant difference at all. Page 58 of the original Order (App. 3593) and page 56 of the Amended Order (Supp. App. II at 152) contain the most significant change between the two documents that was not suggested in petitioner's Catalogue of Errors. The original Order states: "Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest at prior counsel's feet as current counsel now speculate." App. 3593 (emphasis added). The Amended Order's version is: "Although he has recanted presently after the fact of his conviction and sentence, the blame does not rest on prior counsel's shoulders." Supp. App. II at 152 (emphasis added). The single biggest difference between the two documents is whether "shoulders" or "feet" should bear no blame.

Because his prediction came to pass, petitioner renewed his Petition for Extraordinary Relief in this Court. Supp. App. II at 284. Three days later, petitioner also filed a "Motion for a Stay, for a New PCR Hearing Before a Different Circuit Judge, and, Alternatively, to Alter or Amend the Judgment Pursuant to Rule 59(e). Supp. App. II at 316-17. This Court requested petitioner to inform it of all pending matters in the case and on March 24, 2016, counsel wrote listing the Renewed Petition and the motion in circuit court. Supp. App. II at 383. The next day, this Court denied the Renewed Petition which left the circuit court a final chance to correct the

constitutional flaws inherent in once again adopting the state's proposed order in full. Supp. App. II at 386.

The PCR Court's Hearings on Petitioner Lindsey's Motions

The PCR court held a hearing on petitioner's motions on September 22, 2016. Supp. App. II at 389. Petitioner first argued Judge Burch should vacate the Amended Order and recuse himself with the result being a new PCR hearing before a different circuit judge. Supp. App. II at 392, ll. 14-18. Judge Burch denied the motion to recuse, which will be discussed in Issue 2 of this petition. Supp. App. II at 408, ll. 4-7.

Petitioner stated the facts showing the PCR court failed to read the first order and did not comply with this Court's remand Order or due process. Supp. App. II at 392, l. 19-395, l. 7. The court violated due process by wholly substituting "the judgment of the Attorney General, an advocate, for the judgment of the Court and deprives Marion Lindsey of his right to a hearing and a decision from a neutral arbitrator." Supp. App. II at 396, ll. 6-13. Petitioner argued it was now impossible for the PCR court to draft its own order because of the passage of time. Supp. App. II at 395, l. 3-397, l. 9. Petitioner further argued that if the Amended Order were left in place and not reversed on this ground alone, it would be accorded no deference either at this Court or in federal habeas review. Supp. App. II at 394, ll. 6-23.

During the Attorney General's argument in response, he mentioned petitioner's letter stating the interpretation of this Court's remand Order that it forbade solicitation or submission of proposed orders after the remand. Supp. App. II at 396, l. 20-400, l. 5. Judge Burch then stated, "I vehemently disagree with Appellate Defense in making, in making that statement. No where have I read that." Supp. App. II at 400, ll. 6-9.

The Attorney General failed to point to any substantive difference between the proposed order, the original Order, and the Amended Order. Supp. App. II at 402, l. 1-405, l. 18. Instead, the Attorney General argued, "The order did include some—*it wasn't an exact replica* of the word document which we submitted to you and it was essentially done after a significant period of time." Supp. App. II at 402, ll. 1-5 (emphasis added). The state acknowledged Hall's directive concerning proposed orders, but then argued that because the "significant period of time" between the remand and the issuance of the Amended Order was sufficient for the PCR court's review, Hall and Pruitt's requirements "were satisfied for the purposes of the remand." Supp. App. II at 402, l. 6-403, l. 7. The Attorney General also argued that a presumption should exist that a judge has reviewed a proposed order before signing it, but did not cite any specific evidence or example showing meaningful review. Supp. App. II at 404, l. 10-405, l. 18. Petitioner replied, "I don't know of any other way to interpret the Supreme Court's remand order when it's read together with Hall and Pruitt is that it intended the Court to draft its own order. The amended order in place is identical, in all material respects, to the original order, and I don't believe that the Supreme Court sent this case back in a death penalty case merely as a proofreading exercise." Supp. App. II. at 406, ll. 1-11.

The PCR judge stated, "When I received that first set of proposed orders from both sides, I'm known as a speed reader." Supp. App. II at 407, ll. 4-5. Judge Burch took "a couple of courses about speed reading" on the suggestion of Judge Kinard. Supp. App. II at 407, ll. 5-7. Judge Burch stated he "went through those orders probably too hastily and I didn't make any corrections because of that. I admit that. But the base order was exactly as I, as I saw the case that was presented to me." Supp. App. II at 407, ll. 4-11.

Regarding preparation of the Amended Order post-remand, Judge Burch stated that he and his law clerk spent numerous hours "going through all these documents." Supp. App. II at 407, ll. 12-14. The PCR judge then said he left some errors in the document on purpose:

> And even after we loaded the final proposed order, and after all my changes and adjustments, after we loaded that, I even instructed [my law clerk] *to not make some corrections on purpose* to prove to everyone that could possibly be concerned on this case that I was involved in redrafting that order and there were many changes made.
>
> As I said, I purposely asked him *to leave some errors in there so I could initial them* to prove that point, and I even took the extra step **to call the Clerk of the Supreme Court** to let them know over there that I had purposely done that to prove what I'm stating.

Supp. App. II at 407, ll. 14-24 (emphasis added).

After hearing arguments on the Rule 59(e) motion, Judge Burch took the matter under advisement. Supp. App. II at 415, ll. 11-13. The PCR court stated, "I'm not gonna put Appellate's or Applicant's counsel in a precarious situation by asking for proposed orders. I think I can handle that on my own, but, once again, I certainly disagree with any proposition that trial judges can not ask for proposed orders." Supp. App. II at 415, ll. 13-17. The court said that without proposed orders, the judicial system "would lock down" because of a lack of resources. Supp. App. II at 415, ll. 17-21. Judge Burch then asked for "very brief briefs" from the parties. Supp. App. II at 415, ll. 22-23. Petitioner and the state filed supplemental memoranda. Supp. App. 431 and 442.

Almost two-and-a-half years passed between the above-described hearing and the next hearing, held February 20, 2019. Supp. App. II at 493. Petitioner briefly restated the failure to comply with due process and this Court's remand Order. Supp. App. II at 496, l. 14-497, l. 7. Judge Burch again stated his disagreement with petitioner "that we just simply copied something

here." Supp. App. II at 497, ll. 8-15. The court explained that the delay was because his law clerk suffered a severe illness and that the court also became ill. Supp. App. II at 497, l. 15-498, l. 3.

The Attorney General restated its position and near the conclusion of his argument, stated, "Now you ask how we can bring this matter to completion. I would submit that to expedite the process, I know he may object, but to ask each side for a proposed order." Supp. App. II at 500, ll. 5-10.

Petitioner again argued that in addition to the original due process concerns regarding the proposed order, that it had been "almost nine years since the last PCR witness testified" and "over 16 years since the crime." Supp. App. II at 501, ll. 13-19. Petitioner argued that due process required a new PCR hearing. Supp. App. II at 501, ll. 6-19. Judge Burch stood by his prior ruling and reasoned that this Court had not "barred asking for proposed orders." Supp. App. II at 501, l. 20-502, l. 11.

Judge Burch then asked for "another brief and along with any proposed order you may want me to review." Supp. App. II at 502, ll. 12-16. Petitioner objected to the submission of proposed orders. Supp. App. II at 502, ll. 17-23. Petitioner argued that any order regarding the recusal and due process deficiencies concerning the proposed order adoption "needs to come from Your Honor. I don't believe it is proper for either party to submit a proposed order." Supp. App. II at 502, ll. 21-22.

On March 26, 2019, the Attorney General submitted via email a Word version and a pdf version of a proposed order denying petitioner's motions. Supp. App. II at 565. Judge Burch signed the Attorney General's proposed order without making a single change except adding page numbers. Compare Supp. App. II at 567-606 with App. 607-40.

Discussion

If, applying after conducting a *de novo* review this Court determines that Lindsey is not entitled to a new sentencing hearing, Due Process requires a new PCR hearing. Preserving the reputation of our judiciary requires a new PCR hearing. Enforcing the integrity of this Court's Orders and jurisprudence requires a new PCR hearing. This Court did not remand petitioner's case for proofreading or to whitewash the serious due process violations inherent in the wholesale adoption of the Attorney General's proposed order. The PCR court refused the opportunity offered by this Court with the remand. The problems that caused the remand—over five years later—are unchanged. The actions by the state and the PCR court have respectfully left this Court with no option but to grant Petitioner Marion Lindsey a new PCR hearing if a new sentencing hear is not granted.

The Fifth and Fourteenth Amendments to the United States Constitution guarantee that no citizen shall be deprived "of life . . .without due process of law." U.S. Const. amends. V, XIV. See also S.C. Const. Art. I, § 3. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). "The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." Id. "At the same time, it preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done. . . ." Id. (internal quotations and citations omitted).

Signing a proposed order that will send a man to his death without reading it—or perhaps only "speed reading" it—violates these bedrock tenets of due process. Post-remand, the PCR court corrected the typographical errors found and catalogued by petitioner. It made minor

stylistic changes. But in every material respect, the Amended Order is the same as the Attorney General's first proposed order. The PCR court even—over objection from petitioner—refused to draft its own order denying petitioner's Rule 59 motion and again adopted the Attorney General's proposed order without making changes.

"[A] judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 285, 433 S.E.2d 856, 857 (1993). In Ellis, after the court held a hearing, one of the parties submitted an *ex parte* memorandum. Id. at 284-85, 433 S.E.2d at 857. After the filing of the appeal, the other party learned of the *ex parte* submission and obtained a remand from the Supreme Court "for factual findings regarding the effect of the ex parte communication." Id. The trial judge found that the memorandum had no effect on his ruling. Id. Despite the trial judge's finding, this Court reversed. Id. As part of its reasoning for reversal, the Court stated that one of the judge's findings was unsupported by the record. Id. The Ellis Court found "evidence of judicial prejudice," in part based on the unsupported factual finding could cause a reasonable person to question the trial judge's impartiality. Id. As appellant argued below, "[i]f a judge's impartiality might be questioned when factual findings are not supported by the record, it certainly follows that a judge's impartiality might be questioned when he likely did not read his first order and ignored the Supreme Court's mandate in issuing a poorly camouflaged version of the first order as an Amended Order." Supp. App. II. 319.

In contrast to the judge's actions here and in Ellis stand the trial judge's actions in Patel v. Patel, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). In Patel, one of the parties got three state senators to send the judge letters regarding the case. Id. Reviewing the judge's actions, this Court wrote he "acted promptly to alleviate any perception of injustice" by writing to the

senators explaining he could not consider their letters and informing all parties of the communication. Id. The judge in Patel was faced with a problem not of his own making, reacted quickly and properly, and this Court affirmed his actions. Id.

Here, the problem is of the PCR judge's own making (at the urging of the Attorney General). Unlike the judge in Patel, the PCR judge here "doubled down" on his initial improper actions by attempting to issue a barely disguised version of the original Order and then also adopting the Attorney General's Rule 59(e) proposed order *in toto*. Despite being given the opportunity by this Court to correct the due process violations, the PCR judge pressed on with the same exact mistakes that caused the 2014 remand.

The PCR court adopted the Attorney General's reasoning that the demands of Hall and Pruitt are satisfied if a significant period of time passes between the submission of the proposed order and its signing. Supp. App. II at 609-17. If this reasoning were valid, there would have been no need for this Court to remand the case in 2014. Sixty-nine (69) days elapsed between the day the Attorney General submitted its proposed order in June 2011 and the day Judge Burch signed it in August 2011. Supp. App. at 6. App. 3727. Sixty-nine days is adequate time for review of a document; but the important question is whether the proposed order **was actually reviewed at all.**

This Court certainly did not remand because of a lack of time spent with the original proposed order. The Court's remand Order directed compliance with Pruitt and Hall. The operative part of Pruitt and Hall was not the time for review as suggested by the Attorney General and adopted by the PCR judge. The direction of Pruitt and Hall was that judges draft their own orders in PCR cases. This Court's recognition of that failure led to the 2014 remand. It is therefore illogical to argue that the lapse of time **which again produces no changes** can

satisfy the remand's requirements. The PCR court's minor stylistic changes and correction of typos from the Catalogue of Errors will not fool this Court.

The wholesale adoption of the Attorney General's proposed Rule 59 order further shows the PCR court's disturbing refusal to comply with the remand Order. Once again, the PCR judge signed the Attorney General's proposed order verbatim with no material changes.[1] And once again, the evidence indicates that the PCR judge may not have even read this proposed order before signing it. Petitioner has identified fifty-nine (59) identical typographical errors in the proposed Rule 59 order and the Order signed by Judge Burch. A list of the identical errors is attached to this petition as "Exhibit A." This error rate (1.475 errors per page) is actually **higher** than the rate of the errors in the 2011 orders that caused the remand (0.82 errors per page). That the PCR court would commit the exact same mistake indicates no ability or appetite to follow this Court's instructions.

The flagrant defiance of this Court by the PCR court is similar to the twin reversals in the death penalty cases of State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001) (hereinafter, "Jones I") and State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009) (hereinafter, "Jones II"). In Jones I, this Court held that expert testimony about "barefoot insole impression" did not meet the reliability and scientific requirements for admission, and reversed. Jones I at 571-74, 541 S.E.2d at 818-19. Incredibly, during the retrial, despite this Court's reversal, the state sought and again obtained the admission of expert testimony about "barefoot insole impressions." Jones II, at 548-58, 681 S.E.2d at 586-92. Confronting the same issue again eight years later, this Court wrote, "Based on our decision in Jones I and the lack of any subsequent research developments

[1] The only changes are the addition of page numbers and a horizontal line separating footnotes from the main text. No other changes were made.

which would validate "barefoot insole impression" evidence, we find the trial judge erred in denying Jones's motion to suppress this evidence. Jones II at 550, 681 S.E.2d at 588. This Court again reversed Jones' conviction and death sentence. Just like in Jones II, this Court is again confronted with a lower court making the same error (at the state's urging) despite explicit instructions to the contrary and should reverse to ensure compliance with its decisions.

Even if this Court concludes that due process does not require reversal and a new PCR hearing, this Court should pay no deference to the lower court's findings and review petitioner's appellate issues *de novo*, as they will be reviewed in federal habeas should the lower court's Orders stand. See Jefferson v. GDCP Warden, 941 F.3d 452 (11th Cir. 2019) (hereinafter, "Jefferson II"). The Eleventh Circuit's decision in Jefferson follows from the Supreme Court's remand in Jefferson v. Upton, *infra*.

In the subsequent Jefferson habeas proceeding following the Supreme Court's remand, the federal district court allowed extensive discovery regarding whether the state habeas court's procedures were "consistent with due process." Jefferson II, 941 F.3d at 462-65. The state habeas judge was deceased. Id. at 463. But the district judge allowed the assistant attorney general and the state habeas judge's law clerk to be deposed. Id. at 462-63.

The law clerk could not recall the judge giving any instructions to the attorney general about how to draft the order. Id. at 463. The clerk did not "recall ever receiving or reviewing the proposed order or doing any research on it." Id. at 463-64. The judge never asked the law clerk to "review the order or to do any drafting with respect to the order." Id. at 464.

The Eleventh Circuit found that the state habeas judge "executed an order that, except for the concluding sentence, the date, and his signature on the final page, was identical to the proposed order drafted by the State." Id. Here, the only differences were the date and signature.

The Eleventh Circuit also performed a textual analysis of the two orders. Id. at 464-65. The Court found that the state judge "did not correct many misspellings, grammatical errors, or any miscitations to cases." Id. at 464. The Eleventh Circuit then listed twenty-one (21) identical errors in the two documents. Id. at 464-65. Several examples of the errors were: "battery" misspelled as "batty"; "incorrect usage of "state's"; use of "institute" instead of "constitute." Id. In comparison to the **twenty-one (21)** identical errors in Jefferson II, petitioner's Catalogue of Errors identified **one hundred fifty-five (155) identical errors**. Supp. App. II at 358-62. One of the errors used "shit" instead of "shift." App. 3688. Supp. App. II at 361. The district judge in Jefferson II concluded that "the state habeas court had not afforded Jefferson a full, fair, and adequate hearing consistent with due process, and, thus, that the state habeas court's findings were not entitled to a presumption of correctness." Id. at 471. The Eleventh Circuit upheld both this finding by the district court and the reversal of Jefferson's death sentence. Id. at 474, 487.

This Court has the opportunity to remedy both the denial of due process to petitioner and to prevent an embarrassment to our state's judicial system like what happened to Georgia in Jefferson II. This Court's concerns that caused the 2014 remand remain uncorrected. This Court should review petitioner's claims *de novo* and grant a new sentencing hearing, or, in the alternative, reverse and grant Petitioner Lindsey a new PCR hearing.

EXHIBIT A

TABLE OF IDENTICAL ERRORS

Catalogue of Errors in the State's Proposed Order Denying Motion to Recuse and Order Denying Motion to Alter/Amend

ERROR NO.	PAGE NO. OF ERROR	TYPE OF ERROR	TEXT OF ERROR OR EXPLANATION OF ERROR
1	1	Word Omission	"before this [ ] pursuant to" - "Court" is omitted
2	1	Typographical/Citation	"310 S[,] E[,]2d 254" - commas used instead of periods
3	2	Singular Instead of Plural	"memorandum" instead of "memoranda"
4	2	Word Omission	"post-[ ]" ; "hearing" is omitted, should be "post-hearing"
5	2	Subject-Verb Disagreement	"provide" instead of "provided"
6	2	Singular Instead of Plural	"memorandum" instead of "memoranda"
7	2	Incorrect Word Choice	"and" instead of "an"
8	3	Typographical/Citation	**In footnote**: Unmatched bracket - "Hall [v. Catoe"
9	3	Typographical/Citation	**In footnote**: Double comma - "(2004) [,,] and"
10	4	Incorrect Word Choice	"[If] fact, the Court" - "If" instead of "In"
11	5	Typographical	"In Hall, the Court" - "Hall" should be underlined
12	5	Grammatical	"…challenging [his] impartiality" - "his" refers back to Appellant when intention is to refer back to the Judge
13	5	Singular Instead of Plural	**In footnote**: "memorandum was received" - instead of memoranda were received
14	6	Capitalization	**In footnote**: "May 2, 2011, [T]he Court"
15	6	Typographical/Citation	Unmatched bracket - "423 S.E.2d 127 (1992),] and Hall"
16	7	Typographical/Citation	"[See] 560 U.S. at 292" - "See" should be underlined
17	7	Inconsistent Citation Style	"*See Jones*" italicized instead of underlined
18	9	Singular Instead of Plural	"order" instead of "orders"
19	9	Typographical/Citation	"267 Ga. 605, 607-608(3),"
20	10	Incorrect Word Choice	"no judge could never" instead of "no judge could ever"
21	11	Repeated Word	"counsel for Applicant counsel"
22	11	Typographical	"Sixth[.] Eighth[.]"- periods used instead of commas
23	12	Unknown Emphasis	"(emphasis added)" – when no emphasis in preceding sentence/paragraph
24	13	Word Omission	"addressed in [ ] Order" - "the" is omitted
25	17	Missing Apostrophe	"showing the tape[ ]s existence" - no apostrophe for possessive
26	17	Subject-Verb Disagreement	"Applicants reasserts" instead of "Applicant reasserts"
27	18	Typographical	"himself[ ]," - unnecessary space before comma
28	21	Incorrect Word Choice	"Altering the judge" instead of "altering the judgment"
29	23	Typographical/Citation	"Id." should be underlined
30	23	Word Omission	"it [ ] clear" - "is" is omitted
31	23	Word Omission	"that [ ] Court" - "the" is omitted
32	23	Nonsensical Sentence	"To the contrary…" - Run-on, nonsensical sentence
33	24	Typographical	**In footnote**: "had feed" instead of "had fed" - Repeated error from original Order when quoting the original Order
34	24	Nonsensical sentence	**In footnote**: "he was running drugs" - incorrect word/verb usage make sentence unintelligible
35	25	Word Omission	"that [ ] probative" - "the" is omitted
36	25	Grammatical	**In footnote**: "questions it[ ] relevance" - missing " 's " for possessive
37	25	Grammatical/Tense	"violate" instead of "violated"
38	26	Nonsensical Sentence	"the Court addressed the limited …"
39	26	Typographical	Block quotation mistakenly begins with a period

40	28	Grammatical	"record's" - improper use of apostrophe
41	28	Typographical	"pages 13-14[,] The proper" - comma instead of period
42	30	Word Usage	"because…and therefore" - improper word usage with clauses
43	30	Lack of possessive	"defense team[ ] consideration" - should be "team's"
44	31	Grammatical/Tense	"he not specifically retains" – should be "he [did] not specifically retain[ ]"
45	32	Typographical	"basis. They" - period instead of comma
46	32	Typographical/Citation	"[See] Strickland" - "See" should be underlined
47	32	Incorrect Word Choice	"harmless" instead of "harmful"
48	32	Grammatical	"prosecutor lay in wait" - unintelligible
49	33	Typographical/Citation	**In footnote**: "[See] Morva" - "See" should be underlined
50	33	Incorrect Use of Possessive	"experts' core opinion" - should be "expert's core opinion"
51	33	Lack of Possessive	"Lindsey[ ] own" - should be "Lindsey's"
52	36	Typographical/Citation	"Belmontes , 130" - unnecessary space after Belmontes
53	37	Incorrect Word Choice	"than" instead of "that"
54	37	Typographical/Citation	"Id." should be underlined
55	37	Typographical/Citation	"Id." should be underlined
56	38	Typographical/Citation	"In [Bowman]" - "Bowman" should be underlined
57	39	Singular Instead of Plural	"inmate" instead of "inmates"
58	39	Singular Instead of Plural	"incident" instead of "incidents"
59	40	Subject/Verb Disagreement	"Motion [is] not" - should be "are"

2.

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 especially where counsel did not hire a social work expert who could testify regarding petitioner's miserable upbringing, where counsel hired an inexperienced forensic psychiatrist on month before trial, and then failed to prepare her to testify to petitioner's considerable prejudice.

Relevant Facts

Trial counsel Michael Bartosh waited until **one month** before petitioner's capital trial to begin preparations. Two years elapsed between petitioner's arrest and his trial. In those two years, Bartosh failed to: (1) assemble his trial team; (2) hire and prepare a psychiatrist; (3) hire an investigator; (4) obtain all of petitioner's medical, school, and incarceration records; (5) hire a social worker who could investigate petitioner's miserable upbringing; and (6) interview and prepare witnesses. 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.

The crime in this case was committed on September 18, 2002. No evidence exists showing any preparation by Bartosh for petitioner's trial until **nearly two years later** when Doug Brannon was hired as second 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.

Doug Brannon was second chair. App. 2300, ll. 8-14. This was the first and only capital case for Brannon. App. 2296, l. 24-2297, l. 1. Bartosh delegated the guilt phase to Brannon.

App. 2300, ll. 8-14. Bartosh, who died before Lindsey's PCR, was solely responsible for sentencing. App. 2310, ll. 1-13. Brannon was not given any records, memoranda, or any information. App. 2312, ll. 9-14. Karen Quimby was third chair and began approximately one month before the trial. App. 2517, ll. 9-14. Quimby's "limited role" was to be a liaison between Bartosh and Topp and to organize the file and she had no knowledge concerning trial strategy. App. 2520, ll. 4-2521, l.17. Topp was the mitigation investigator and did not testify at trial. Topp had never been a mitigation investigator before. App. 2405, ll. 19-22. She only had two interviews with petitioner (both without Bartosh present). App. 2409, ll. 16-19; App. 2426, l. 25-2427, l. 6. 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 shows her first involvement 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 petitioner 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 and "did not have sufficient time to do the work that was needed." App. 2396, ll. 12-15; App. 2397, ll. 11-12. 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 petitioner's mother only two days before trial, on May 15, 2004. App. 2398, ll. 8-25; App. 2400, ll. 6-19. 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 petitioner's aunts, Robin Pilgrim (a/k/a Robin Keith) and Bessie Smith, until during the trial (May 21st and May 24th, respectively) and did not get their medical records. App. 2404, ll. 4-16; App. 2951-52. Bartosh never asked her to get any family records other than

petitioner's. App. 2404, ll. 17-19. Topp "didn't do any, any witness interviews at all. It was trial. They were here coming and going." App. 2436, ll. 21-25. Topp informed Bartosh about potential mental health problems in the Lindsey family, but it was too late to do anything about it. App. 2439, ll. 5-13; 2444, ll. 14-25.

Bartosh called Dr. Margaret Melikian as an expert in forensic psychiatry at sentencing, but did not retain her until approximately a month before trial. App. 2882, ll. 3-11. She got medical records from Bartosh approximately three weeks before trial and had only had one visit with petitioner. App. 2882, ll. 4-25. 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.

Bartosh failed to call neuropsychologist Dr. Tora Brawley at trial. App. 2355, ll. 6-9. Bartosh first called her on April 12, 2004. App. 2356, ll. 6-7. During her only visit with petitioner, Brawley administered tests with a "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. Petitioner 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 petitioner told her. Concerning his educational background, petitioner 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, petitioner'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.

Petitioner 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, petitioner was hospitalized after taking an overdose of pills when his mother told him she did not love him. App. 2372, ll. 2-8. Petitioner's 2001 suicide attempt was provoked by problems with his wife and petitioner'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 found that petitioner's brain did not function normally: 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. Without medical or school records, Brawley could not tell what caused these brain dysfunctions. App. 2362, ll. 10-18. She could not remember why Bartosh did not call her to testify even though she gave Melikian a written report and recommended getting records and doing interviews. App. 2375, ll. 10-15; App. 2365, ll. 12-19; App. 2365, ll. 20-25; App. 2366, ll. 1-17.

The defense team failed to preserve crucial mitigating evidence from Rod Tullis, a lawyer in Spartanburg. Tullis began representing petitioner in the late 1990s, including domestic issues. App. 2447, ll. 11-14; App. 2448, l. 12-2449 l. 2. Petitioner's biggest concern was access to his children. App. 2450, ll. 7-10. Petitioner 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 but 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 petitioner that 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. The tape was a "mini, micro cassette." App. 2453, ll. 15-17. After the shooting, petitioner's mother gave Tullis several suicide notes written several weeks before the shooting. App. 2456, ll. 5-18; 2479, ll. 9-14; 2991. Petitioner wrote his mother and brother that they "won't have to worry anymore" about him and Nell that she should "always know I love you and the boys," and wrote 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 and described the tape to the state. App. 2456, ll. 5-18; 2473, ll. 19-25. Brannon testified that he never saw the tape or suicide notes. App. 2350, ll. 12-16; 2307, ll. 5-18. It now seems apparent that Bartosh lost the Tullis answering machine tape, which could have countered the state's powerful tape of the actual shooting. The defense did not subpoena Tullis to testify at trial, which surprised Tullis because of his involvement with petitioner's family. App. 2460, ll. 19-20; App. 2462, ll. 9-13.

Bartosh failed to interview and prepare witnesses for trial. Bartosh did not call a paramedic, Vincent Bell, who attended petitioner after the shooting and would have testified that petitioner said he wanted to die. App. 2383, ll. 9-16. Bill Burton, a friend of petitioner's from

their youth who now runs the United States division of a German chemical company, testified that his sole preparation with Bartosh was the same day of his trial testimony with a group of other witnesses. App. 2588, l. 23-2589, l. 23. Burton did not ask for mercy during his testimony at trial, but would have done so if asked. App. 2067, ll. 19-23; 2600, ll. 3-8. Burton's mother Patsy (who did not testify at trial) "would certainly have asked for mercy." App. 2607, ll. 4-5.

Virginia Lindsey, petitioner's mother, only had a single one-hour pretrial meeting with the defense team approximately two weeks before trial and no contact in the prior eighteen months. App. 2648, ll. 4-2650, l. 14. Petitioner's aunt, Bessie Smith, said her only conversation with the defense team was for about 40 minutes approximately a week before the trial. App. 2700, ll. 10-20. She refused to answer personal questions about herself "because I wasn't the one on trial." App. 2701, ll. 10-16. Smith did not ask the jury for mercy at trial. Steven Pilgrim, petitioner's uncle, only met with the defense team for about 30 minutes during a group meeting the day before the trial started. App. 2726, ll. 1-22. The defense did not get a medical records release, even though he had a history of mental illness. App. 2727, ll. 2-19. Incredibly, the defense team told Pilgrim **not** to ask for mercy. App. 2728, l. 25-2729, l. 10. The defense never contacted petitioner's younger brother, Timothy Sims, who would have asked for mercy and knew "more about Nell and Marion than anybody." App. 2755, l. 10-2757, l. 21.

The defense team failed to hire a social work expert who could investigate and congeal petitioner's history and his family's history for the jury. At PCR, Jan Vogelsang was qualified as an expert in clinical social work "with expertise in bio-psychosocial assessments." App. 2779, ll. 1-4. Vogelsang conducted a bio-psychosocial assessment which provided a comprehensive history of petitioner and his family. App. 2779, ll. 7-9. Based on information she compiled, Vogelsang testified about patterns of behavior she discovered in petitioner's family. App. 2782,

ll. 4-16. Vogelsang found patterns of abandonment, substance abuse; "mental, emotional, and behavioral impairments;" sexually inappropriate behavior; and criminal domestic violence charges, assaults, and incarcerations. App. 2784, l. 24-2789, l. 3.

Vogelsang learned that petitioner's uncles used him as a courier in their drug dealing. App. 2882, ll. 4-21. With an absent mother, by the eighth grade, "Marion hit the streets." App. 2806, ll. 9-19. Vogelsang found a pattern of mental health problems in the family. Virginia Lindsey, Robin Pilgrim, and Bessie Smith all attempted suicide. App. 2814, ll. 7-16. 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. Vogelsang learned that almost everyone in petitioner's family believes in magical roots. App. 2817, ll. 20-23. She testified that the idea of roots confused petitioner and further decreased his ability to solve problems during family conflicts. App. 2818, ll. 9-22. The pattern of violence in petitioner'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. Petitioner 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. App. 2809, ll. 10-13; App. 3049. Vogelsang summarized her assessment by testifying that most people can handle "one or two stressors in our lives," but that petitioner's multiple stressors and background affected his judgment and ability to control

his impulses, placing him at higher risk of committing a serious act of violence. App. 2830, l. 22-2831, l. 13.

The defense team completely failed to prepare its forensic psychiatrist, Dr. Margaret Melikian. Bartosh did not contact Melikian until about six weeks before trial. App. 2882, ll. 3-11. Petitioner's case was either her first or second death penalty trial. App. 2883, ll. 12-18. She only accepted the case because she assumed the mitigation investigation had already been done. App. 2884, ll. 13-19. Melikian only received scant or incomplete records, forcing her to rely on petitioner for information. App. 2882, ll. 4-2906, l. 19. Melikian said, "Relying solely on the defendant for a history is being out on the limb pretty far." App. 2921, ll. 24-25. Even so, she was only able to meet with petitioner one time for 2.5 hours. App. 2882, ll. 21-25. 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.

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. As the trial grew closer, Melikian began to grow very concerned about the lack of preparation. App. 2891, l. 20. Quimby made a note for Bartosh about her inability to be ready. 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.

The failure to prepare Melikian resulted in her destruction on the stand by the prosecutor, specifically with regards to the devastating charge of malingering. She diagnosed petitioner as suffering from "major depressive disorder." App. 2002, l. 24-2003, l. 12. She stated that petitioner's records from the Hall Institute diagnosed him as malingering because of his imaginary friend, "Jimmy." App. 2005 ll. 7-14. Melikian did not diagnose petitioner as malingering because the Hall Institute's objective testing and Brawley's testing did not support it. App. 2005, ll. 7-24.

On cross-examination, 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 then blindsided Melikian with the fact that the first recorded mention of Jimmy coincided with the day petitioner was served with the state's Notice of Intent to Seek the Death Penalty. 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" and succeeded in getting Melikian to admit that blaming Jimmy was a way to avoid responsibility for the crime. App. 2019, ll. 9-10. Melikian responded "That could be one of them, yes." App. 2019, l. 11-2020, l. 4. The solicitor asked Melikian about petitioner's interview with Narayan **[that Bartosh did not attend]** and whether petitioner "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 repeated the question of whether

petitioner 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. App. 2026, ll. 16-2038, l. 22. She essentially admitted that she mostly relied on petitioner for information and talked to no one who saw him the day of the crime. App. 2039, l. 4-2043, l. 24.

Discussion

The PCR Court erred by interpreting petitioner'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 petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments. The PCR court ignored the specific evidence from the hearing that, had it been prepared and presented at trial, would have persuaded the jury to give petitioner 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. As explained in Issue 1, the standard of review is *de novo*.

The PCR court erred in refusing to use the ABA Guidelines as a tool to determine the prevailing professional norms. 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. "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"); Rompilla v. Beard, 545 U.S. 374, 387, n.6, n.7 (2005); Williams v. Taylor, 529 U.S. 362, 396 (2000); 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); Ard v. Catoe, 372 S.C. 318, 332, 642 S.E.2d 590, 597 (2007); Council v. State, 380 S.C. 159, 172, 670 S.E.2d 356, 363 (2008).

The ABA Guidelines were revised in 2003, in between the shooting and petitioner'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"). At multiple places in its Order of Dismissal, the PCR court treats the ABA Guidelines with dismissiveness. Supp. App. II 112, 183, 253, 268-269, 272. App. 3551-52, 3624, 3697, 3712-13, 3716. The court misunderstood the United States Supreme Court's holding in Bobby v. Van Hook, 558 U.S. 4 (2009). The PCR court determined that Van Hook represented a retreat from United States Supreme Court precedent utilizing the ABA Guidelines. Supp. App. II 112. App. 3551. 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. Supp. App. II 268-269. App. 3712-13.

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.

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. 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.

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. See also Williams, 529 U.S. at 395; Sears v. Upton, 561 U.S. 945 (2010); Porter v. McCollum, 558 U.S. 30 (2009).

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 petitioner'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. See also Weik v. State, 409 S.C. 214, 761 S.E.2d 757 (2014); Von Dohlen v. State, 360 S.C. 598, 608, 602 S.E.2d 738, 743 (2004).

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. 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). "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. This failure to prepare was the seed of counsel's errors in failing to hire a social worker like Vogelsang, prepare witnesses, or obtain an experienced psychiatrist and prepare the inexperienced Melikian. 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.

Trial counsel also violated 2003 Guideline 10.11(J), which states that the defense lawyer should attend any interview by any part of the government's team. 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 petitioner as a malingerer. Had Bartosh attended, he would have seen Lindsey's attempt to use Jimmy to fool Narayan and could have warned Melikian. Bartosh's failure to attend these interviews with his client violated this guideline and prevailing professional norms.

Trial counsel also performed deficiently by not calling several witnesses who would have aided petitioner'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).

The failure to call Rod Tullis as a witness and preserve the answering machine tape is extremely significant and by itself is grounds for reversal. Tullis could have testified regarding the despondent and suicidal message petitioner left on his answering machine in the hours immediately before the incident. App. 2453, l. 17-2454, l. 11. No reasonable strategy exists that would justify the failure to call Tullis or preserve the answering machine tape.

Bartosh failed to call Vincent Bell, the paramedic, who would have testified about petitioner's self-inflicted head wound and the fact that petitioner told him to "Let me die." App. 2383, ll. 9-16. Bartosh failed to call petitioner's brother, Timothy Sims, who knew petitioner 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.

Trial counsel failed to have the lay witnesses ask for mercy for petitioner. 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). 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.

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 concerning a defendant's social history and obtain all relevant supporting documentation. 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 petitioner's cognitive deficits. He failed to call a social work expert like Vogelsang who could have testified regarding petitioner's personal and family history. Bartosh failed to have petitioner seen early in the investigation by a psychiatrist and failed to prepare Melikian, an

inexperienced forensic psychiatrist, who was hired a month before trial. The failure to call these witnesses and to prepare the sole expert presented during sentencing was constitutionally deficient performance.

Petitioner 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 petitioner 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* petitioner could not show prejudice. The United States Supreme Court directly rebuffed this approach in Sears v. Upton, 561 U.S. 945 (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 951-56. 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, finding that the presentation of some mitigation evidence does not foreclose inquiry into what should have been uncovered and presented. Id.

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. Petitioner 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 petitioner'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 petitioner's marriage. The state presented the testimony of Celeste Nesbitt, Sharon Smith, Cathy Mullinax, and Brian White who all testified that they saw petitioner 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 petitioner at the time of the shooting. App. 1931, ll. 10-25.

The Solicitor emphasized these incidents in his closing argument. The Solicitor argued that petitioner 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 petitioner and his wife very well. App. 2447, l. 21-2448, l. 5. He would have testified that petitioner 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 petitioner had been to see him regarding his domestic troubles in the weeks leading up to the shooting, which would have rebutted the Solicitor's argument that petitioner ignored the justice system. App. 2448, l. 12-2449 l. 2. 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 petitioner 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). 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 petitioner's desire to commit suicide and would have been very persuasive to jurors. At the PCR hearing, Tullis vividly described petitioner calling his name and asking for help. App. 2453, l. 17-2454, l. 11. Petitioner 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. The 911 call captured the shooting and the horrified cries of the children in the car. It was a devastatingly powerful piece of evidence for the state. A defense tape, made just an hour before the shooting, would have blunted its impact and shown petitioner's depressed mental state. Tullis also would have testified regarding the suicide notes written by petitioner 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 petitioner's self-inflicted injuries at the jail and that petitioner 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 petitioner's pathetic behavior at the jail, he would have shown that petitioner 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.

Had the jury heard Timothy Sims' testimony, they would have known that Sims viewed his older brother as a father figure and that petitioner helped raise him. App. 2738, l. 5-2789, l. 1. Sims lived with petitioner, Nell, and their children. App. 2740, ll. 9-23. He would have told the jury that while petitioner and Nell had their share of arguments, Sims never saw petitioner hit Nell. App. 2741, ll. 8-17. Sims would have rebutted the state's argument that petitioner was a drug dealer by testifying that petitioner 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 petitioner's suicide attempt several weeks before the shooting. App. 2743, l. 23-2744, l. 7. One evening, petitioner called Sims crying. App. 2744, ll. 14-19. Sims described petitioner 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 petitioner. App. 2744, ll. 8-11. They found petitioner "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. Petitioner gave them suicide notes. He had written notes to Nell, his sons, his mother, and Sims. App. 2746, l. 21-2747, l. 18. Petitioner'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 petitioner 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 petitioner and Nell the day before the shooting. App. 2750, l. 2-2751, l. 9. Sims called Nell for petitioner from a different telephone because she would not answer if petitioner called. App. 2750, ll. 2-11. Petitioner 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 petitioner and telling him he could not see them. App. 2750, ll. 14-15. Sims heard petitioner'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 petitioner the next day (the day of the shooting) on the telephone. App. 2753, ll. 1-18. Petitioner cried on the phone to Sims about Nell, her new boyfriend, and said that his head was "all messed up." App. 2753, ll. 4-10. Sims attempted to calm petitioner down and made plans to meet him at their brother's house, but petitioner never showed up. App. 2753, ll. 11-16. The jury never heard this 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 also would have asked for mercy had he testified. App. 2757, ll. 19-21.

Petitioner was prejudiced by trial counsel's failure to call Patsy Burton to testify. Her testimony about petitioner as a polite child would have counterbalanced the prosecution's suggested image of petitioner 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.

Petitioner 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 petitioner suffered from multiple cognitive impairments and "scattered neuropsychological deficits." App. 2357, ll. 8-14; app. 2360, l. 4-2362, l. 6. Brawley could not tell what caused these brain dysfunctions in petitioner 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 petitioner'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 petitioner'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.

Failure to call a social worker like Vogelsang prejudiced petitioner. The PCR court wrongly determined that petitioner could not show prejudice because of the danger that Vogelsang's testimony would open the door for the prosecution to highlight bad incidents in petitioner's life. This conclusion ignores the fact that the state actually introduced much of this evidence during its case in aggravation and did not need to wait on petitioner to open to the door. 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 petitioner 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." Supp. App. II 263. App. 3707. This conclusory statement ignores that Vogelsang was not presented to deny that petitioner was violent, but to explain the factors that led to his violent acts.

Specifically, the lack of a clinical social worker prejudiced petitioner because testimony like Vogelsang's would have allowed the jury to hear a court-recognized expert connect petitioner'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 petitioner's family's history to the present. Without an expert like Vogelsang, and with the stunted investigation trial counsel

performed, the testimony of petitioner'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, 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 petitioner'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 petitioner's belief in "roots." The jury did not hear about the violent household in which petitioner 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 petitioner's awful uncles, Paul and Willie. Finally, the jury heard no evidence concerning the rampant drug abuse in petitioner's community. The state's aggravation evidence that petitioner 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.

Vogelsang's expert analysis would have allowed the jury to place petitioner'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). Failure to present an expert like Vogelsang prejudiced petitioner.

The failure to prepare Melikian prejudiced petitioner. 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 petitioner of any credible expert witness. Trial counsel's failure to prepare Melikian prevented her from credibly testifying about the severity of petitioner'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 petitioner attempted suicide when he was fifteen. App. 2030, l. 11-2031, l. 7.

Melikian's credibility and ability to withstand cross-examination were severely affected by the lack of preparation. 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.

Petitioner 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 petitioner's IQ to be nine points higher. App. 2009, ll. 10-12. At the PCR hearing, Melikian was able to explain that petitioner's initial low score was due to his depression. App. 2894, l. 24-2895, l. 7. Had Melikian been properly prepared, she could have explained that the severity of petitioner's depression affected his cognition and intellectual functioning. App. 2888, l. 23-2889, l. 3. Petitioner's low level of intellectual functioning

would have explained his mental state at the time of the shooting and given credence to petitioner's statement that he "just snapped" and was suicidal. App. 2013, l. 18-2014, l. 8.

Had the defense team told Melikian what they knew about Jimmy, provided her with petitioner's complete incarceration records, and had her ready to answer the accusation of malingering, the result would have been different. The revelation during cross-examination that Jimmy first appeared when petitioner 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 petitioner was not malingering into proof that petitioner 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 petitioner 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 petitioner's invention of Jimmy into further evidence of the severity of his depression, as she did at the PCR hearing. App. 2914, l. 22-2915, l. 6.

It cannot be questioned that the malingering accusation severely hurt petitioner'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 petitioner 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.

Four witnesses who testified at trial also testified at the PCR hearing. The testimony at the PCR hearing revealed numerous parts of petitioner's background and family history that was not heard at the sentencing proceeding. By not fully investigating and preparing these witnesses, trial counsel prevented the jury from hearing substantial mitigating evidence. 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 petitioner's life was his uncle Steve Pilgrim. App. 2045, ll. 14-15. Petitioner's father never took any interest in him. Petitioner 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 petitioner 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, petitioner's head was run over by a car driven by his uncle Paul. App. 2047, l. 18-2048, l. 13. Petitioner received a head wound from which he still has scars. App. 2048, ll. 3-4. Steven Pilgrim took him to the hospital and petitioner was released that evening. App. 2048, ll. 5-13. Petitioner 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 petitioner was hospitalized at the age of fifteen. App. 2056, ll. 18-21. Her entire testimony about what was actually a suicide attempt was brief. App. 2056, l. 18-2057, l. 6. At no point did she describe petitioner's suicide attempt or the events preceding it.

Bartosh attempted to elicit testimony from Ms. Lindsey about Bessie Smith's mental health, but was unsuccessful when the state's objections were 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 petitioner. 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. The testimony from Ms. Lindsey that the sentencing jury never heard was as follows. She testified regarding her own background and her family's background. Ms. Lindsey quit school after completing the ninth grade. App. 2613, ll. 10-19. Her father left the family when she was thirteen. App. 2615, ll. 11-13. 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. 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. During petitioner's first seven years, up to twelve people lived in her mother's tiny shack of a house. App. 2619, l. 10-2621, l. 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 petitioner 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.

Ms. Lindsey testified about several head injuries petitioner received as a child. These injuries were not mentioned at the sentencing hearing. When petitioner 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 petitioner 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 petitioner's brain abnormalities.

Ms. Lindsey testified about the negative influence exerted on petitioner 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 petitioner was a child when Paul rushed through the house, grabbed a gun, and returned fire at people shooting at him into the house. 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 throwed 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 (emphasis added). For a long time, the smell of the burned cat lingered in the small house. 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 petitioner was present when the cat was burned alive.

When petitioner 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 petitioner 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.

Ms. Lindsey did testify at the sentencing hearing that petitioner 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. petitioner had been fighting with a sibling. Ms. Lindsey went into the boys' room and had a physical altercation with petitioner after which she told him she no longer loved him. Petitioner took pills and went to the hospital and then inpatient mental health for two weeks. App. 2636, l. 7-2637, l. 22. At trial, Ms. Lindsey only said petitioner was in the hospital for four days and did not mention petitioner's two weeks of inpatient care at mental health. Ms. Lindsey said that no one

in the family ever took petitioner 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 petitioner had lost weight and seemed very depressed. App. 2059, ll. 5-15. At the PCR hearing Ms. Lindsey described in detail petitioner's suicide attempt that occurred approximately three weeks before the shooting. App. 2646, l. 11-2648, l. 1. She testified that petitioner gave her suicide letters addressed to her, Timothy Sims, and petitioner'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 petitioner any medical treatment after this suicide attempt. App. 2647, l. 17-2648, l. 1.

Bessie Smith testified at the sentencing proceeding and at the PCR hearing. Smith's entire testimony consisted of a brief description of petitioner'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 petitioner 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. Petitioner'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. Smith also testified regarding the violent behavior of her brothers Paul and Willie and how their behavior continued to grow worse while they lived with petitioner. App. 2680, ll. 4-11. Smith also provided the history of petitioner'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. Petitioner 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 corroborated petitioner's suicide attempt that took place a couple of weeks before the shooting. App. 2692, l. 3-2694, l. 4. The day before the shooting, Smith had a telephone

conversation with petitioner. App. 2695, ll. 21-2696, l. 25. Petitioner was upset and crying and saying that his wife would not let him see his children. App. 2695, ll. 21-2696, l. 13. Petitioner 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. This evidence supported and explained petitioner's suicidal depression at the time of the shooting, and rebutted the state's arguments to the contrary.

Steven Pilgrim, petitioner's uncle, testified at trial and at the PCR hearing. His testimony at trial consisted entirely of stating that he took petitioner to the hospital after his automobile accident when he was a child, that he knew petitioner 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 petitioner's father stopped helping her raise petitioner. 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 petitioner. 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 petitioner'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 petitioner 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.

Pilgrim gave more detail about the automobile accident that occurred when petitioner 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 petitioner home that same day. App. 2721, ll. 17-23.

Pilgrim described petitioner's suicide attempt three weeks before the shooting. App. 2722, ll. 10-13. Petitioner was "depressed, real depressed." App. 2722, ll. 21-23. Petitioner was crying. Pilgrim had never seen petitioner cry as a grown man until that night. App. 2723, ll. 3-10. Approximately a week later, petitioner called Pilgrim wanting to borrow his gun. App. 2723, l. 18-2724, l. 2. Pilgrim did not give petitioner his gun. App. 2724, ll. 15-17. Shortly

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 petitioner'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 petitioner.

Burton's testimony at the PCR hearing corroborated the testimony of petitioner's family. Burton testified that petitioner lived in "real poverty conditions" and that petitioner's house "was falling apart." App. 2594, ll. 1-7. Growing up, petitioner and his siblings were "completely unsupervised" and had "no encouragement to perform in school." App. 2593, ll. 21-25. Petitioner 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 petitioner. 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 petitioner.

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 petitioner and prevented them from considering important humanizing evidence. This evidence directly related to whether petitioner 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 petitioner left him hours before the shooting, the result could have been different. Had the jury seen the suicide notes petitioner

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 petitioner'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 petitioner's friends and family, the result could have been different. The feeble mitigation presentation at trial deprived petitioner of his rights under the Sixth, Eighth, and Fourteenth Amendments. This Court should grant certiorari and order further briefing on this issue.

3.

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 would have rebutted the state's aggravation and future dangerousness evidence against petitioner by testifying petitioner did not pose an unreasonable risk of harm to prison staff, other inmates, or the community.[2]

Relevant Facts

During its case in aggravation, the state presented evidence of petitioner's prior convictions and bad acts through multiple witnesses. The state attempted to paint petitioner 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 petitioner posed a future danger.

Celeste Nesbitt claimed she saw petitioner beat his wife, Nell, in a parking lot at the beach. App. 1775, ll. 15-24. On another occasion, petitioner hit Nell at Nesbitt's house. App. 1777, ll. 5-9. In another incident, petitioner allegedly hit Nell in an Applebee's parking lot. App. 1779, 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.

Sharon Smith was Nell's first cousin. She claimed she saw petitioner 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. 2-25. The state also presented several police officers in an effort to show that

[2] The issues presented in this Argument were raised at the PCR hearing, in ground 6 in petitioner's Post-Hearing Memorandum, and in petitioner's Rule 59(e) Motion. Supp. App. II 105-106. 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. Supp. App. II 195; App. 3637, 3751.

petitioner was violent and that he sold drugs. Chris Smith, a DEA agent and former narcotics investigator with the Spartanburg County Sheriff's office, testified that he arrested petitioner 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 petitioner for criminal domestic violence related to the Applebee's incident. App. 1921, l. 12-15. Stanford Wilkins was the victim in petitioner's 1996 ABIK conviction. Petitioner allegedly used his vehicle to block Wilkins' car in the road. App. 1942, ll. 17-24. He claimed petitioner shot at him 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. Martha Smith was an employee with the Spartanburg County Clerk of Court. App. 1952, ll. 4-8. The state used her to introduce the 1996 ABIK conviction for the shooting of Stanford Wilkins. App. 1952, ll. 14-23. She testified that petitioner pled guilty to ABIK and that he received two years' imprisonment suspended to one year in jail and one year of probation. App. 1953, ll. 2-10. 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 petitioner's bond hearing on a CDV charge. App. 1931, ll. 10-25. The state presented her testimony to show that: (1) petitioner had been arraigned for allegedly committing criminal domestic violence against his wife; and (2) as a condition of his release, petitioner was barred from having any contact with Nell. App. 1936, ll. 5-11.

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. This penalty stage testimony euphemistically over the years has become known as the state's "good prison conditions" or "little village behind bars" testimony. Sligh testified that inmates who receive life sentences have access to the yard, frequent interaction with other inmates, opportunities to work and go to school, are fed in a cafeteria setting, receive "contact" visitation, and have personal contact with guards and other prison employees. App. 1909, l. 2- 1912, l. 1. "[H]e is going to be housed in a living unit with as many as 300 other inmates. He has access to move throughout that unit with some restrictions. Depending upon the nature of the job assignment or school assignment or whatever, he is going to be interacting with other inmates throughout the day and visitation or recreational opportunities. It will be almost impossible to say how many. Obviously quite a few." App. 1909, l. 16 – 1910, l. 3. See State v. Plath, 281 S.C. 1, 8-9, 313 S.E.2d 619, 623 (1984); see also State v. Burkhart, 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). Thus, the state offered witnesses in aggravation on what a dangerous person petitioner allegedly was as seen above, and then offered Sligh's testimony to impart that petitioner, if sentenced to life imprisonment, still had a lot of freedom of movement, privileges and opportunities in prison which made him a future danger. The defense did not counter, as seen below, or rebut this evidence with available testimony that petitioner would be controlled in prison, that he could adapt to prison, and that he would not be a future danger.

PCR Evidence

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. 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. Quimby could not remember whether she reviewed any records from petitioner's incarcerations. App. 2555, ll. 12-25.

James Aiken

James Aiken was qualified as an expert in prison adaptability at petitioner'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 petitioner's records from the Spartanburg County Detention Center and also from the South Carolina Department of Corrections for petitioner'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. (emphasis added).

Specifically, Aiken testified that the Department of Corrections has the expertise, equipment, and knowledge to manage petitioner. App. 2492, ll. 2-6. Petitioner 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 petitioner's prior incarcerations. Specifically, the state asked Aiken questions regarding a recommendation *that petitioner 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 noting that "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." Aiken also said petitioner having 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).

Order of Dismissal

The PCR court ruled that there was "no showing" that petitioner would have been adaptable to prison. Supp. App. II 183; App. 3625. It 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 petitioner's past. Supp. App. II 185-186; App. 3627. Finally, the PCR Judge ruled that petitioner could not show prejudice because any evidence of prison adaptability would have been a "two-edged sword." Supp. App. II 194; 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." Supp. App. II 191. App. 3633.

Discussion

In denying petitioner relief, the PCR court made multiple errors. First, the court held there was "no showing" that petitioner would have been adaptable to prison, which completely disregarded Aiken's testimony. Supp. App. II 183; App. 3625. Second, the court improperly speculated regarding the existence of a trial strategy regarding prison adaptability. Supp. App. II 191. App. 3632-33. Even if such speculation were allowed, the reasoning for this ruling regarding effectiveness is flawed. The PCR court also incorrectly held that petitioner was not prejudiced by the failure to call Aiken. Supp. App. II 194-195; App. 3636-37.

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. Cf. Bowman v. State, 422 S.C. 19, 41, 809 S.E.2d 232, 244 (2018) (There was evidence of counsel making a strategic decision to

elicit limited testimony on prison conditions). 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. Supp. App. II 189-190; App. 3631-32. The PCR court's assumption based on this mote of evidence amounted to pure improper 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. Supp. App. II 191; App. 3633. This finding by the PCR court is based on an error of law. The state was fully able to present evidence of petitioner's altercations in prison in its case in aggravation which also was probative of future dangerousness, and it did so. Thus, petitioner got the worst of both worlds: The state introduced evidence petitioner was a future danger, and his attorneys failed to introduce the available testimony of James Aiken that petitioner could adapt to prison and easily be managed by the Department of Corrections without unreasonable danger to prison staff, other inmates, and the community in general. It is apparent that a defendant's future dangerousness in prison and to the general community is a factor that is going to weigh large in a normal capital sentencing jury's decision between death and life without parole. See Kelly v. South Carolina, 534 U.S. 246, 253-54 (2002)("A jury hearing evidence of a defendant's demonstrated propensity for violence reasonably will conclude that he presents a risk of violent behavior . . .").

While the issue in Kelly v. South Carolina was the defendant's right to a jury instruction that "life" meant "life without parole" where the state introduced evidence of his future dangerousness, the concept of the right to rebut the state's evidence of violent or bad behavior in prison with evidence that the defendant can adapt to prison as evidence in mitigation is well

settled. Skipper v. South Carolina, 476 U.S. 1, 5 (1986)("any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose.") *citing* Jurek v. Texas, 428 U.S. 262, 275 (1976)(opinion of Stewart, Powell and Stevens, JJ). Thus, the failure to present the available evidence that petitioner could be managed and adapt to prison without being a danger to prison staff, other inmates, and the community in general precluded petitioner from rebutting the state's evidence of his future dangerousness with this strong evidence in mitigation.

Again, contrary to the PCR Court's erroneous 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). Here, the state had James Sligh testify on future dangerousness by him offering that petitioner, should he receive a life sentence, would have daily interaction with other inmates, and guards, and would have some freedom of

movement and privileges. The state also offered numerous witnesses regarding petitioner'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, here James Aiken, to challenge the state's evidence of future dangerousness was unreasonable and was deficient performance.

The PCR court ruled that petitioner did not suffer prejudice because of the "horrific evidence in aggravation." Supp. App. II 195; App. 3637. This ruling was error. Only one aggravator was proven at trial, and petitioner unsuccessfully argued on direct appeal that that "great risk of danger" did not even apply to the facts of this case. See State v. Lindsey, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007). "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). Further, it is elementary that it only takes one juror to insist that a life sentence without parole will be the punishment, not death.

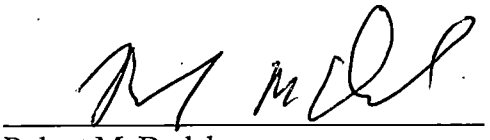
Aiken's opinion that petitioner was adaptable to prison was sufficient to demonstrate prejudice. Aiken's opinion was not seriously challenged by the state at the PCR hearing. Had the jury heard Aiken's opinion, it would have placed petitioner's history in the proper context for

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 petitioner successfully every day. Had the jury learned of petitioner'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 petitioner 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, this Court should grant certiorari to allow more expansive briefing on this issue.

CONCLUSION

By reason of the foregoing arguments, this Court should grant the writ of certiorari to allow full briefing on these issues. In the alternative, this Court should issue an order remanding this case to the Spartanburg Court of Common Pleas for a new post-conviction relief hearing before a different judge.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

David Alexander
Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR PETITIONER

This 17th day of January, 2020.

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 17th day of January, 2020.

Robert M. Dudek
Chief Appellate Defender

David Alexander
Appellate Defender

Lara M. Caudy
Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of January, 2020.
(L.S.)
Notary Public for South Carolina
My Commission Expires: December 31, 2029.