STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Spartanburg County
Paul M. Burch, Circuit Court Judge

Appellate Case No. 2012-206087

MARION ALEXANDER LINDSEY,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

SUPPLEMENTAL APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

DAVID ALEXANDER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEYS FOR PETITIONER

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar # 5758

P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

Paul M. Burch
Judge

Post Office Box 276
601 West McGregor Street
Pageland, SC 29728-0276
Phone: (843) 672-3270
Fax: (843) 672-5960
pburchj@sccourts.org

May 2, 2011

Donald J. Zelenka
Assistant Deputy Attorney General
P.O. Box 11549
Columbia, SC 29211-1549

Re: *Marion Alexander Lindsey v. State*
2007-CP-42-2848

Dear Mr. Zelenka:

I am writing with regard to the above-referenced case. Judge Burch has had an opportunity to review the written submissions of both the Applicant and the Respondent. Please submit a proposed order reflecting the Respondent's Post-Hearing Memorandum of Law within 30 days from reciept of this letter.

If you need anything further, please do not hesitate to contact me.

With kindest personal regards, I remain,

Yours sincerely,

Bryan C. Letteer
Law Clerk of the Honorable Paul M. Burch

cc: Richard Vieth, Esquire
David M. Collins, Jr., Esquire

From: "Burch, Paul M." <PBurchJ@sccourts.org>
To: "rvieth@hbvlaw.com" <rvieth@hbvlaw.com>
CC: "agdzelenka@scag.gov" <agdzelenka@scag.gov>, "ASimon@sccag.gov" <ASimon@...
Date: 5/12/2011 11:37 AM
Subject: Marion Lindsey Proposed Order

Rick,

I went back and checked after we talked in Spartanburg, and you were right. Because of it's size, I thought the packet you sent in October included a proposed order. Obviously, Don hasn't sent his order yet and I'll certainly hold the matter open for a reasonable amount of time for you to submit an order. Sorry about the mix up on our part.

Best,

Paul

From: "Rick Vieth" <rvieth@hbvlaw.com>
To: "Burch, Paul M." <PBurchJ@sccourts.org>
CC: <agdzelenka@scag.gov>, <ASimon@sccag.gov>
Date: 5/12/2011 11:45 AM
Subject: RE: Marion Lindsey Proposed Order

Judge Burch - I checked as well and then got tied up with other stuff. We will work on an Order, but anticipate it to take about a month. David Collins is in a seminar all next week in Houston and he will need to help me with this - I don't mind trying death penalty cases, but I hate doing briefs, etc. So when he gets back, we'll hook up to work on it. I imagine Don needs that kind of time frame easily as well.
Thanks - Rick

Rick Vieth
Henderson, Brandt & Vieth, P.A.
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private line (864) 583-5430
office ph.: (864) 582-2962
fax (864) 583-1894
rvieth@hbvlaw.com
www.hbvlaw.com

-----Original Message-----
From: Burch, Paul M. [mailto:PBurchJ@sccourts.org]
Sent: Thursday, May 12, 2011 11:36 AM
To: Rick Vieth
Cc: agdzelenka@scag.gov; ASimon@sccag.gov
Subject: Marion Lindsey Proposed Order

Rick,

I went back and checked after we talked in Spartanburg, and you were right. Because of it's size, I thought the packet you sent in October included a proposed order. Obviously, Don hasn't sent his order yet and I'll certainly hold the matter open for a reasonable amount of time for you to submit an order. Sorry about the mix up on our part.

Best,

Paul

Henderson Brandt & Vieth, P.A.

Matthew A. Henderson
George Brandt, III
Richard W. Vieth
Joshua M. Henderson*

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Attorneys At Law

May 26, 2011

Hon. Daniel E. Shearouse
The Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: Marion Alexander Lindsey vs. State
Case No.: 2007-CP-42-2848

Dear Clerk Shearouse:

Since my last notification of March 25, 2011, to this Court, this PCR case was tried the week of July 19, 2010 and is now ended. Both the U.S. Attorney General's Office and Defense counsel are working on proposed Orders to submit to Judge Burch.

Very truly yours,

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
RWV/kw

cc: Hon. Paul Burch
Donald J. Zelenka, Esq.
David Collins, Esq.

STATE OF SOUTH CAROLINA
Before the Supreme Court

FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Paul Burch

Case No. 2007-CP-42-2848

Marion Alexander Lindsey, Applicant,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Richard W. Vieth, attorney for Petitioner, Marion Alexander Lindsey, certify that I have this 26th day of May, 2011 mailed a copy of the Status Report Letter in the following manner to the Respondent in a duly franked envelope addressed as follows:

Donald J. Zelenka, Asst. Deputy Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

Respectfully submitted,

ATTORNEY FOR THE APPLICANT

SC Bar # 5711 Fed. ID.# 4468
Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
360 East Henry St., Suite 101
Spartanburg, SC 29302
(864) 582-2962

5/26, 2011
Spartanburg, South Carolina

ALAN WILSON
ATTORNEY GENERAL

June 2, 2011

Honorable Paul M. Burch
P. O. Box 276
Pageland, SC 29728

Re: Marion Alexander Lindsey v. State
07-CP-42-2848

Dear Judge Burch:

Enclosed please find the ***Respondent's Proposed Order of Dismissal*** in the above-referenced case. If this Order meets with your approval, please sign and return to me and I will file with the Clerk of Court's Office. Please note that I have also enclosed a cover page titled "Order of Dismissal" should you approve this Order. By copy of this letter, I am serving opposing counsel with same.

If you have any questions please or need anything further please contact me.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Richard W. Vieth, Esquire
David M. Collins, Jr., Esquire

Don Zelenka - Lindsey proposed Order

From: "Rick Vieth" <rvieth@hbvlaw.com>
To: "Burch, Paul M." <PBurchJ@sccourts.org>
Date: 6/7/2011 12:56 PM
Subject: Lindsey proposed Order
CC: "David Collins" <david@dmcjr.com>, <agdzelenka@scag.gov>

Judge Burch, David and I are getting together in a couple weeks to get our proposed Order to you. As you may recall, we submitted our brief several months before the brief from Don Zelenka was sent; shortly afterwards I received a copy of a letter from you to Mr. Zelenka, asking that the AG's office prepare a proposed Order. A few weeks after that, you indicated that you had thought we had submitted a proposed Order much earlier, which had not been done since one wasn't requested. Now, David and I had to coordinate schedules, which wasn't easy last few weeks, to get together to spend a day putting one together. It will be done before end of June. Thanks. Rick

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Attorneys At Law

July 29, 2011

Hon. Paul M. Burch
Judge of the Fourth Judicial Circuit
Post Office Box 276
Pageland, SC 29728-0276

RE: Marion Alexander Lindsey vs. State
2007-CP-42-2848

Dear Judge Burch:

Please find enclosed our proposed Order Granting Post-Conviction Relief in regards to the above captioned case.

If you need anything further, please do not hesitate to let me know.

Very truly yours,

Richard W. Vieth
Henderson, Brandt & Vieth, P.A.
Private line: 583-5430
rvieth@hbvlaw.com
www.hbvlaw.com
RWV/kwh

enclosure

cc: Donald J. Zelenka, Esq. (w/enclosure)
David Collins, Esq.

Note: Lacid Dismissed
Order of Dismissal
8/11/2011, signed 8/10/2

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	SEVENTH JUDICIAL CIRCUIT
Marion Alexander Lindsey SCDC No. 6015	)	
Applicant,	)	ORDER GRANTING POST-CONVICTION RELIEF
vs.	)	
State of South Carolina,	)	2007-CP-42-2848
Respondent.	)	

NOT SIGNED

This matter came before this Court on July 19th, 20th and 21st, 2010 for a contested hearing on Marion Alexander Lindsey's Application for Post-Conviction Relief.

Applicant was present in the Courtroom represented by his attorneys of record Richard W. Vieth and David M. Collins, Jr.. The State of South Carolina was represented by Donald J. Zelenka and Alphonso Simon, Jr., of the South Carolina Attorney General's Office.

At the conclusion of the contested hearing, this Court instructed Applicant's attorneys to submit a memorandum setting forth the relief they sought together with the factual and legal bases for their requests. The Court's instructions allowed Applicant's counsel to obtain and review the transcript of the July 2010 hearing prior to preparing and submitting their memorandum. The State was then allowed time to file a memorandum in response.

The Findings of Fact and Conclusions of Law which follow are based on (1) a review of the Court's file in this matter which includes a copy of the record from the

original trial of Mr. Lindsey in 2004, (2) the witnesses and evidence presented at the contested hearing in this action on July 19th, 20th and 21st, 2010 and (3) the arguments of counsel presented in the parties' memoranda.

Procedural History

Applicant was indicted on October 3, 2002 by the Court of General Sessions for Spartanburg County for murder. The charge arose from the homicide of Ruby (Nell) Lindsey on September 18, 2002.

On October 10, 2002, the Solicitor served a Notice of Intent to Seek the Death Penalty consistent with S.C. Code Ann § 16-3-26. He further served an additional Notice of Life Sentence pursuant to § 17-25-45(A) based upon Lindsey's February 20, 1994 conviction of assault and battery with intent to kill. Both were personally served on Applicant and his counsel, Michael Bartosh.

A Notice of Statutory Aggravating Circumstances and Evidence in Support of Aggravating Circumstances was served on Applicant on March 10, 2004. The listed statutory aggravator was:

> That the Defendant, Marion Alexander Lindsey, did murder Ruby Nell Lindsey, and by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person, Section 16-3-20(C)(a)(3) of the Code of Laws of South Carolina (1976) as amended (Cum. Supp. 1990).

Supplemental notices were made on May 11, 2004 and May 14, 2004.

On May 17, 2004, the matter was called for trial before the Honorable John C. Few. Applicant was present and represented by Spartanburg County Public Defender, Michael Bartosh, Doug Brannon and Karen Quimby Hatcher. The prosecution was

represented by Seventh Circuit Solicitor Harold "Trey" Gowdy and Deputy Solicitors Barry Barnette and Donnie Willingham. On May 21, 2004, the jury convicted Lindsey of murder.

On May 22, 2004, the penalty phase began. After testimony, the jury was instructed to consider the sole aggravating circumstance: The offender by his act of murder knowingly created a great risk of death to more than one person *IN A PUBLIC PLACE* (italics added) by means of a weapon which normally would be hazardous to the lives of more than one. The jury was also instructed to consider as mitigating circumstances (1) that the murder was committed while the Defendant was under the influence of mental and emotional disturbance and (2) the age or mentality of the Defendant at the time of the crime.

On May 24, 2004, the jury found the existence of the statutory aggravating circumstance and recommended a sentence of death. Judge Few subsequently made findings that the evidence warranted the imposition of the death penalty and that its imposition was not a result of passion, prejudice or arbitrary factor. Judge Few then sentenced Lindsey to death in the manner provided by law.

Applicant made an appeal to the South Carolina Supreme Court. Applicant was represented by Robert Dudek of the South Carolina Office of Appellate Defense. In the appeal, he raised the following questions presented:

1. Whether the Court erred by excusing potential Juror Krisher for cause, and ruling that Krisher's belief that life imprisonment without parole was a more substantial punishment that the death penalty was incompatible with South Carolina law, since Krisher stated that he could impose the death penalty and sign the death form and he was a qualified juror?

2. Whether the judge erred by refusing to replace Juror Mauldin with an alternate where Mauldin was conducting his own measurements during a jury view of the automobile in which the decedent was shot, since a juror conducting his own measurements or experiments during a jury view was improper?

3. Whether the court erred by refusing to direct a verdict on the "great risk of death" aggravator since appellant shot his wife at close rangeand there was no evidence appellant knowingly created a risk of death to more than one person?

4. Whether appellant's death sentence should be vacated as both excessive and disproportionate since this case involves a domestic dispute pertaining to child visitation and no death sentence has been imposed in this state in the modern era under similar circumstances?

The Respondent, through Assistant Deputy Attorney General Donald J. Zelenka, opposed the direct appeal of Applicant's sentence.

On February 20, 2007, the South Carolina Supreme Court entered its opinion denying relief. State v. Lindsey, 372 S.C. 185, 642 S.E. 2d 557 (2007). A petition for rehearing was made through appellate counsel. The petition was denied on April 4, 2007 in an unpublished order.

Applicant, through counsel Dudek made a petition for writ of certiorari in the United States Supreme Court on June 29, 2007. In the petition, Lindsey raised the following questions:

> Whether juror Krisher's belief that life imprisonment without parole was a more substantial punishment than the death penalty was an acceptable reasons to disqualify him from service for cause under Wainwright v. Witt, 469 U.S. 412 (1985) where the juror testified he could impose death as punishment for murder, and his belief was not incompatible with the law as the trial court reasoned?

The Respondent filed a Brief in opposition on August 20, 2007. The United States Supreme Court denied certiorari on October 1, 2007. Lindsey v. South Carolina, 552 U.S. 917 (2007).

Applicant filed his initial Application for Post-Conviction Relief on August 14, 2007, and an Amended Application for Post-Conviction Relief on August 6, 2009. An evidentiary hearing was held on Applicant's requests for post-conviction relief on July 19th, 20th and 21st, 2010.

Issues Presented at the Post-Conviction Hearing

At the evidentiary hearing held on July 19th, 20th and 21st, 2010, Applicant Applicantpresented the following allegations of ineffective assistance of counsel in support of his request for post-conviction relief:

1. Trial counsel failed to adequately prepare Applicant for the pre-trial mental health evaluation. Specifically, Applicant alleges:
    a. Trial counsel inappropriately allowed Applicant to take the advice of a "jail house" lawyer to feign mental illness as part of his defense.
    b. Trial counsel failed to spend sufficient time with Applicant prior to the evaluation and, as a result, failed to learn of his intentions to feign mental illness and failed to discuss with him the dangers of that course of action.
2. Trial counsel failed to adequately present the issue of malingering to the jury during the penalty phase. Specifically, Applicant alleges that Trial counsel failed to call Dr. Tora Brawley as a witness during the sentencing phase of the trial. Dr. Brawley is an expert in Clinical Pscyhology with specialty in neuropsychology. She evaluated Applicant prior to trial, performed psychological testing on Applicant and reviewed records from his previous evaluations and testing. Dr. Brawley's testimony supported the testimony of Dr. Margaret Melikian and could

have refuted the State's allegations that Applicant was malingering when he was examined by defense experts and in psychological testing of the court-examiners..

3. Trial counsel failed to adequately present requests for mercy to the jury during the sentencing phase of the trial. Specifically, Applicant alleges:

   a. Trial counsel failed to prepare the witnesses who testified on behalf of Applicant to request that the jury show mercy and impose a life sentence instead of the penalty of death.

   b. Trial counsel failed to call both family members and non-family members who could have made an effective request for mercy to the jury during the penalty phase.

   c. Trial counsel failed to ask appropriate questions to elicit the requests for mercy from the witnesses during the penalty phase.

   d. Trial counsel failed to adequately argue the Court's refusal to allow the witnesses to request mercy during the penalty phase of the trial.

   e. Trial counsel failed to preserve the trial record on the issue of mercy by not presenting adequate arguments to the court in support of their attempts to present the requests for mercy and by not requesting to proffer the testimony of the witnesses on the issue of mercy.

4. Trial counsel failed to provide sufficient information to Dr. Margaret Melikian to allow her to properly evaluate Applicant and to testify on his behalf during the penalty phase of the trial. Specifically, Applicant alleges:

   a. Trial counsel failed to obtain and provide to Dr. Melikian historical information and records of Applicant and his family members which were

necessary for her to perform a proper evaluation of Applicant and to present her findings and conclusions to the jury during the penalty phase of the trial.

b. Trial counsel failed to seek a continuance of the trial in this action after Dr. Melikian informed them that she needed additional time and information to properly perform her duties and to present her findings and conclusions at trial.

c. Trial counsel failed to elicit testimony from Dr. Melikian about statutory mitigating factors during her testimony in the penalty phase of the trial.

5. Trial counsel failed to adequately present to the jury the history of mental illness and impairment in Applicant's family and the relevance of that information to the jury's decision on the issue of sentencing. Specifically, Applicant alleges:

a. Trial counsel failed to adequately interview the family members to discover the extent and nature of mental illness and impairment in the family.

b. Trial counsel failed to adequately prepare the family members to present the extent and nature of mental illness and impairment in the family.

c. Trial counsel failed adequately to argue to the Court the admissibility and relevance of the evidence of family mental illness and impairment.

d. Trial counsel failed to adequately preserve the record relating to family mental illness and impairment by not presenting adequate arguments to the court in support of their attempts to present the testimony of the family

members and by failing to proffer the testimony of the family members on this issue.

6. Trial counsel failed to retain and present a prison adaptability expert during the penalty phase of the trial to testify about Applicant's ability to adapt to prison life without undue risk to others and the relevance of that information to the jury's sentencing decision.

7. Trial counsel failed to retain and present a mitigation expert during the penalty phase of the trial to testify regarding the psycho-social history of Applicant and the relevance of that information to the jury's sentencing decision.

8. Trial counsel failed to elicit testimony from the EMS workers, Joseph Stewart and Vincent Bell, regarding Applicant's desire to commit suicide immediately after the death of his Ruby Nell Lindsey. Specifically, Applicant alleges:

    a. Trial counsel failed to adequately interview the EMS workers to determine what information and testimony they could provide which would be beneficial to Applicant.

    b. Trial counsel failed to adequately prepare the EMS workers to testify during the penalty phase of the trial.

    c. Trial counsel failed to ask appropriate questions of the EMS workers to elicit admissible testimony regarding Applicant's state of mind immediately after the shooting occurred.

    d. Trial counsel failed to adequately argue that the testimony of the EMS workers related to Applicant's words, actions and state of mind immediately after the shooting were admissible.

e. Trial counsel failed to preserve the trial record regarding the testimony of the EMS workers about Applicant's words, actions and state of mind immediately after the shooting by not presenting adequate arguments to the court in support of their attempts to present the testimony and by not requesting to proffer the testimony.

9. Trial counsel failed to commit sufficient time to perform an adequate investigation for the sentencing phase of the trial and to adequately prepare for the presentation of the case in support of mitigation during the sentencing phase of the trial. Specifically, Applicant alleges:

a. Trial counsel failed to assemble the complete defense team until approximately one (1) month prior to the trial.

b. Trial counsel failed to perform an investigation of Applicant's life history, family history and other relevant factors until approximately two (2) months prior to trial. The first half of the investigation, which lasted approximately four (4) weeks, was conducted without the assistance of a mitigation investigator. The investigation was limited in nature and scope and failed to uncover information which would have been beneficial to Applicant during the penalty phase of the trial.

c. Trial counsel failed to spend sufficient time interviewing potential witnesses to determine what beneficial testimony they could provide on behalf of Applicant during the penalty phase of the trial.

d. Trial counsel failed to spend sufficient time preparing witnesses to testify during the penalty phase of the trial so that their testimony would include

all the beneficial information available and would be presented in a manner that was clear, logically structured and easily understood by the jury.

10. Trial counsel failed to adequately argue against the statutory aggravating factors alleged by the state. Specifically, Applicant alleges that although Trial counsel did address the statutory aggravating factors alleged by the State he did so in a cursory fashion and failed to present sufficient arguments against the application of those factors to Applicant.

Standard of Review – Ineffective Assistance of Counsel

When asserting a claim for ineffective assistance of counsel, an applicant in a Post Conviction Relief action must establish "that: (1) counsel's performance was deficient; and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (citing Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000) and Strickland v. Washington, 466 U.S. 668 (1984)). These two prongs can be summarized by saying that the applicant must show both error and prejudice. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004) and Strickland at 687.

To establish error, Applicant must show that counsel's performance fell below an objective standard of reasonable. No specific guidelines have been established by our courts for evaluating claims that trial counsel erred, instead claims of error are evaluated in terms of "reasonableness under prevailing professional norms." Wiggins v. Smith, 539 U.S. 510 (2003) (citing Strickland, supra.).

While the court has rejected specific guidelines for evaluating the performance of counsel, both the United States Supreme Court and the South Carolina Supreme Court have acknowledged the standards promugated by the American Bar Association as guides in determining whether or not counsel's performance was reasonable. Strickland at 688 and Council at 174.

To establish prejudice, Applicant "must show that there is a reasonable probablility that, but for counsel's errors, the result of the proceeding would have been different." This standard does not require that Applicant show that it is more likely than not that the result would have been different; in fact that standard was specifically rejected by the Court in Strickland. Instead, Applicant must show a "reasonable probablility" that the result would have been different. "A reasonable probability is a probablility sufficient to undermine confidence in the outcome." Strickland at 693-694. In a capital sentencing hearing, this means that "[t]here is a reasonable probability that at least one juror would have struck a difference balance." Wiggins at 515.

In evaluating whether there exists a reasonable probability of a different outcome, the Court must consider "the totality of the available mitigation evidence"and weigh it against the evidence in aggravation. The "totality of available mitigation evidence" consists of the evidence presented during the original trial and the evidence presented during the post-conviction procedings. Sears v. Upton, 130 S. Ct. 3259 (2010).

When an applicant establishes that his counsel's performance fell below the reasonable standard of care and his deficiencies were significant enough to undermine confidence in the penalty imposed, then Applicant has met his burden of proof and is entitled to a new hearing on the issue of sentencing.

Summary of the Court's Decision

A detailed discussion of this Court's decision is set forth below and concludes with an Order setting aside Applicant's sentence of death and ordering a new trial to determine the appropriate sentence for his conviction of murder.

This Court has not made that decision lightly. However, after careful consideration this Court has determined that it is the only appropriate and just determination available to it in this matter.

Applicant has met his burden of proof on all of the issues discussed below and each of the instances of ineffective assistance of counsel discussed below is individually sufficient to support the Court's decision. In each instance, Applicant was denied his Sixth Amendment right to effective assistance of counsel in these capital proceedings.

Witnesses Presented During the Post-Conviction Relief Hearing

Defense Team

N. Douglas Brannon

PCR Testimony – Transcript pages 11 – 69
Trial Testimony – Did not testify

Mr. Brannon was the first witness called by Applicant in this PCR trial. Mr. Brannon was the second chair attorney in Mr. Lindsey's original trial. The remaining members of the original defense team were Mr. Mike Bartosh, who was the

lead attorney, Karen Quimby, who was the third chair attorney, and Lenora Topp, who was the mitigation investigator for the team.

Mr. Brannon testified that Mr. Lindsey's case was his first and only death penalty case. He had previously been involved in a murder case but had no experience in capital defense cases.

Mr. Brannon was a young attorney having only been practicing for three years prior to the trial of this case. Mr. Brannon was sworn into the South Carolina Bar in May 2001 and this trial commenced on May 17, 2004.

In addition to his lack of experience at the time of his involvement in this case he was brought into the case only weeks prior to trial. He became involved in this case after receiving a telephone call from the primary attorney for the defense team Mr. Bartosh who asked Mr. Brannon if he would be interested in sitting second chair during this trial. Mr. Bartosh made this phone call because Mr. Brannon had previously expressed an interest in learning how to do capital defense work.

After Mr. Brannon was appointed on March 5, 2004 he had approximately 1 ½ months to prepare for trial. After receiving the phone call from Mr. Bartosh, Mr. Brannon agreed to serve as a second chair in this trial. Once he was appointed on March 5, 2004, Mr. Brannon then met with Mr. Lindsey for the first time on March 12, 2004.

Mr. Brannon continued his preparation over the next few weeks. Mr. Brannon acknowledged that during these weeks of preparation, he had experience in trying a murder case, but admitted that he did not know how to try a death penalty case. Despite his lack of knowledge about Mr. Lindsey and his situation prior to March 5, 2004 and his

lack of knowledge about death penalty litigation, Mr. Brannon only devoted 107 hours of time to this death penalty case prior to trial.

Mr. Brannon acknowledged during his testimony that as of the time of trial in this case, he had no knowledge of what a prison adaptability expert was or what a social historian was. Mr. Brannon indicated that his role in this trial was to perform the guilt phase portion of the defense. While Mr. Brannon acknowledged that he did not have any legitimate legal defense, he did acknowledge that the things brought out during the guilt phase would have some impact in the sentencing phase of the trial.

Mr. Brannon only interviewed one family member that he could identify during the investigation of this case. Mr. Brannon acknowledged that he interviewed Mr. Lindsey's mother, Virginia Lindsey, on a Saturday prior to trial. He said he vaguely remembered interviewing another relative who was possibly a brother, but could not give any details about that interview or what they discussed. Mr. Brannon indicated during his testimony that his interview of Ms. Lindsey was focused only on issues related directly to the guilt phase and he did not take any steps to elicit information from Ms. Lindsey which may have been beneficial to Mr. Lindsey's mitigation case.

Karen Quimby Hatcher

PCR Testimony – Transcript pages 229 - 304
Trial Testimony – Did not testify

Ms. Hatcher was the third-chair attorney on Mr. Lindsey's original defense team. Ms. Hatcher, along with the first-chair attorney, Mr. Mike Bartosh, was an employee of the Spartanburg County Public Defender's Office.

Ms. Hatcher testified that she joined the original defense team approximately 30 days prior to the trial of this case, on May 17, 2004. At the time she became involved

in this case, Ms. Hatcher had some experience in capital litigation because she had just served as third-chair attorney on a capital defense case that had ended just weeks prior to her involvement in Mr. Lindsey's case. However, Ms. Hatcher acknowledged that she had no recollection of any formal training in capital litigation prior to her involvement in Mr. Lindsey's case. She said it was possible that she attended a short breakout session at a continuing legal education seminar a few months prior to Mr. Lindsey's trial, but she could not recollect whether or not she had actually attended that session or not.

Ms. Hatcher also testified that during her involvement in this case of approximately 30 days, she was also responsible for over 500 other active criminal defense cases in her role as a public defender, as well as being the lead attorney on another death penalty case which was scheduled to be tried six months after Mr. Lindsey's case, in November 2004. During the 30 days leading up to the trial of Mr. Lindsey's case in which Ms. Hatcher was involved as part of the defense team, she was still having to handle the required day-to-day activities on her 500 other cases, as well as the other death penalty case where she was the lead attorney.

Ms. Hatcher also indicated that her role in Mr. Lindsey's case was very limited even though she was the third-chair attorney and had at least been involved in one other death penalty case. She was relegated to the role of an assistant who organized the file, served as a liaison between the first-chair attorney and the mitigation investigator, and, in general, acted as a gopher for the lead attorney. In this role, she reviewed discovery, catalogued discovery, and located documents, but was not involved in the decision-making aspect of this case, either on the guilt phase or the sentencing phase.

Lenora Topp

PCR Testimony – Transcript pages 106 - 162
Trial Testimony – Did not testify

Ms. Lenora Topp was the final member of Mr. Lindsey's original defense team. Ms. Topp testified that she was brought into the defense team to serve as a mitigation investigator.

Ms. Topp was first involved in Mr. Lindsey's defense on April 16, 2004, approximately one month prior to the start of the trial of his case on May 17, 2004. Ms. Topp was the last member of the team to be retained and she acknowledged that once she became involved the complete defense team had been assembled and had approximately one month to prepare for Mr. Lindsey's defense.

Ms. Topp testified that she had experience in law enforcement and as a private investigator prior to her involvement in Mr. Lindsey's case. She had never served in a capital case as a mitigation investigator and had never worked on a capital case in South Carolina.

Once Ms. Topp became involved in Mr. Lindsey's defense team she only performed 40 hours of actual work on the case prior to the start of trial on May 17, 2004. During that time her primary role was attempting to gather documents and identify potential witnesses. Ms. Topp opined during her testimony that she did not have sufficient time to perform her job or obtain the information that was needed for Mr. Lindsey's defense. In fact Ms. Topp testified that even during the actual trial of the case she was still attempting to locate documents and witnesses for the defense. An example of this were the attempts to obtain records of relatives during the trial of the case as shown by medical releases executed by those family members four days after the start of the trial on May 21, 2004.

As part of her testimony Ms. Topp was questioned about her ability to perform the functions of a mitigation expert as described and recommended by the ABA Guidelines. Ms. Topp candidly acknowledged during her testimony that she was not able to perform the functions described in the ABA Guidelines and that no one on the defense team or hired by the defense team was able to perform the recommended functions of a mitigation specialist. Ms. Topp also acknowledged that her late involvement in this case was contrary to the recommendations of the ABA Guidelines which recommended that a mitigation expert be retained and involved from the early stages of the capital litigation.

Fact Witnesses

Vincent Bell

PCR Testimony – Transcript pages 97 - 106
Trial Testimony – Did not testify

Mr. Bell was one of the EMS workers who arrived at the Inman Police Department shortly after the shooting to provide medical care to the individuals who were involved.

Mr. Bell along with two other paramedics treated Mr. Lindsey that evening. As part of his evaluation of the situation and treatment of Mr. Lindsey, Mr. Bell engaged Mr. Lindsey in a conversation that took place both at the scene of the shooting and continued during the ambulance ride to the hospital.

During that conversation Mr. Lindsey acknowledged shooting his wife and himself. Mr. Lindsey went on to explain that he shot his wife and himself because his wife was having an affair.

Mr. Lindsey was also very adamant in his interaction with Mr. Bell that he did not want to be treated for the self-inflicted gunshot wound. Mr. Lindsey was uncooperative

in his treatment and stated more than once that he wanted the paramedics to leave him alone and let him die.

Mr. Bell indicated that he was never contacted or interviewed about the statements by Mr. Lindsey or his interaction with Mr. Lindsey by the original defense team. Mr. Bell testified that the only individuals he had spoken with about Mr. Lindsey and the events of that night were Mr. Lindsey's PCR team and not the original defense team.

Rod Tullis

PCR Testimony – Transcript pages 162 - 199
Trial Testimony – Did not testify

Mr. Rodman Tullis was an attorney who practiced law in Spartanburg and had represented Mr. Lindsey since the late 1990s. Mr. Tullis had represented Mr. Lindsey over the years on a variety of issues, but primarily issues in criminal court and family court.

Mr. Tullis had an ongoing relationship with Mr. Lindsey as his attorney and, as a result, was quite familiar with Mr. Lindsey and his family life.

At the time of the shooting, Mr. Tullis was representing Mr. Lindsey on various criminal matters and had also had a consultation with Mr. Lindsey about his domestic issues involving his wife and children.

Mr. Lindsey had consulted with Mr. Tullis about problems with his wife and children, but at the time of the shooting had not retained Mr. Tullis to file an action in family court. Mr. Tullis indicated that Mr. Lindsey was very concerned about his children and the possible negative impact that Ruby Nell Lindsey's extra-marital affairs may have on his relationship with his children. Mr. Lindsey had some circumstantial

evidence supporting his belief that Ruby Nell Lindsey was having an affair and he was greatly concerned because he did not want another man affecting his relationship with his children by virtue of a relationship with Mrs. Lindsey.

Because of the ongoing relationship between Mr. Lindsey and Mr. Tullis, Mr. Lindsey contacted Mr. Tullis' office shortly before the shooting incident. Mr. Tullis was not available that afternoon, so Mr. Lindsey left a telephone message for Mr. Tullis. Mr. Tullis testified that the recording of that message was very disturbing because Mr. Lindsey was obviously upset and distraught over his current situation. Mr. Tullis testified that Mr. Lindsey did not sound angry or agitated, but just the opposite that he was depressed and upset.

Mr. Tullis filed a notice of appearance and began acting as Mr. Lindsey's attorney on the murder charges almost immediately after his arrest. Because of his ongoing relationship with Mr. Lindsey, Mr. Tullis felt this step was necessary and that he was the only one who could protect Mr. Lindsey's legal rights at that early stage in the proceedings. Mr. Lindsey's family relied on Mr. Tullis as Mr. Lindsey's regular attorney. Because of their trust for Mr. Tullis, the family members provided him the suicide notes Mr. Lindsey had written days before the shooting.

Once the Spartanburg County Public Defender's Office took over as Mr. Lindsey's attorney in this case, Mr. Tullis turned over the recording of the telephone message and the suicide notes to the Public Defender's Office. Neither piece of evidence was used during the original trial and, at this point, the tape of the telephone message cannot be located.

In his role as Mr. Lindsey's attorney, Mr. Tullis saw Mr. Lindsey in jail during the weeks following the shooting. Mr. Tullis described Mr. Lindsey as very upset and distraught over what had happened. He described incidents where Mr. Lindsey continued to express his desire to die and the actions that he took in an attempt to cause his own death. Mr. Tullis described an incident where he observed Mr. Lindsey bleeding. Mr. Lindsey told him that he had been banging his already injured head against a wall in an attempt to cause further damage and kill himself. As a result of this incident, Mr. Lindsey was put on suicide watch.

Despite his knowledge of Applicant's state of mind before and after the shooting, as well as his intimate knowledge of the audio tape and notes which could have provided further documentation of Mr. Lindsey's state of mind, Mr. Tullis was never called as a witness nor was he contacted by the defense team about serving as a witness at the original trial. Mr. Tullis stated that he felt he would have been one of the best witnesses for Mr. Lindsey in the sentencing phase because of his intimate knowledge of his situation and his state of mind. Based on this belief, Mr. Tullis specifically approached Mike Bartosh as the lead attorney for Mr. Lindsey's defense team about testifying. Despite his inquiries, Mr. Tullis was never given the opportunity to fully explain the information that he had to the defense team nor was he given the opportunity to testify.

Bill Burton

PCR Testimony – Transcript pages 304 - 316
Trial Testimony – Transcript pages 2061 - 2070

Mr. Burton was a friend of Applicant who testified at his original trial. Mr. Burton had been a teenager when Mr. Lindsey was a child. Mr. Burton served as a lifeguard at a local pool and developed a relationship with Mr. Lindsey through his

interaction with him at the local pool. Mr. Burton had assumed a role of a mentor and friend to Mr. Lindsey through the years. Mr. Lindsey visited Mr. Burton's home and Mr. Burton helped him emotionally and financially at times during his life. Mr. Burton continued that relationship with him into adulthood and even helped Mr. Lindsey obtain employment as an adult.

Mr. Burton testified at the PCR hearing that prior to being called as a witness during the sentencing phase he had only had one short interaction with the defense team. Mr. Burton testified that he had attempted on several occasions to contact Mr. Mike Bartosh, the lead attorney for Mr. Lindsey's defense team, but was unable to reach him. Mr. Burton was interviewed and prepared for his testimony during the sentencing phase during a short meeting which included several potential witnesses for Mr. Lindsey. According to Mr. Burton, the preparation for trial amounted simply to a question by the defense team of "say what you know about Marion." Mr. Burton indicated that he left that group meeting, which occurred the day of his testimony or the day before, with an uneasy feeling and the general impression that the defense team and Mr. Lindsey's case in general were unorganized. Mr. Burton expressed his opinion during the PCR hearing that because of the lack of preparation he did not have the composure on the witness stand to adequately present his testimony in support of a life sentence to the jury.

Mrs. Burton

PCR Testimony – Transcript pages 316 - 326
Trial Testimony – Did not testify

Mrs. Burton is the mother of Bill Burton. She was a potential witness during the sentencing phase of Mr. Lindsey's original trial. Unfortunately, she was never contacted

by the original defense team or called as a witness during the sentencing phase of Mr. Lindsey's trial.

Mrs. Burton was a middle school science teacher who taught at two local schools, Spartanburg Day School (a local private school) and Dawkins Middle School (a local public school). She was not related to Mr. Lindsey by blood or marriage but yet she has known him since he was 6 or 7 years of age.

Mrs. Burton is a very polite lady who presents very well and is very likeable. Had she been presented by the original defense team she would have been able to humanize Mr. Lindsey through her stories about his childhood and growing up, and her appearance, demeanor, and personal history would have made her a very compelling witness to a jury in support of a life sentence for Mr. Lindsey.

In addition to the stories that she could tell about Mr. Lindsey to humanize him, Mrs. Burton specifically stated during the PCR hearing that if she had been given the opportunity to request mercy on Mr. Lindsey's behalf she would have done so. Again, given her appearance, demeanor, and personal history, a plea for mercy from Ms. Burton would have been compelling to a jury.

Family Members

Virginia Lindsey

PCR Testimony – Transcript pages 327 - 387
Trial Testimony – Transcript pages 1674 – 1677 and 2044 - 2061

Mrs. Virginia Lindsey is Applicant's mother. Mrs. Lindsey testified at both the original trial and during the PCR hearing. Mrs. Lindsey's testimony during these two proceedings was vastly different. Mrs. Lindsey's testimony during the original trial was very short and did not include detailed information about Mr. Lindsey's childhood, home

environment or the events leading up to the shooting. The details and information that were elicited from Mrs. Lindsey during the PCR hearing were the information that was necessary to humanize Applicant for the jury and to tell her story and also necessary to support the testimony of the mitigation expert that was presented at the PCR hearing.

During her testimony Mrs. Lindsey described the conditions which she faced growing up which included poverty, lack of education and a broken home.

Mrs. Lindsey also described the relationships she had as an adult which resulted in the birth of her children. Mrs. Lindsey described that she had children by three different men. The oldest two children were born as a result of her marriage but she eventually divorced her husband. Applicant was born as a result of a relationship with a man to whom she was not married. Her youngest child, Tim Sims, was born to another man who she lived with for many years. Mrs. Lindsey described how Applicant had little contact with his father while his siblings did have contact with their fathers. Of her four children, Applicant was the only one who did not have an ongoing relationship with his father. The two oldest children visited with her ex-husband and her youngest child, Tim, lived with and then continued to see his father. Applicant, by comparison, only saw his father on rare occasions. Mrs. Lindsey estimated that he might have seen his father approximately once a year.

Mrs. Lindsey also described the influence of the men that were around Applicant during his childhood. She described the activities of his uncles, Paul and Willie. Both of these men had alcohol problems and were violent men. They each had criminal histories which resulted from their alcohol use and their violent behavior. Their violence was not

only towards each other but also towards the women in their lives as well as others in the neighborhood and in the community.

Mrs. Lindsey described one especially traumatic event in Applicant's life when the uncles decided to throw his pet cat into the wood-burning stove and burn the cat alive. This event was horrific to the adults in the home and even more traumatic to Applicant who had to witness the event but was unable to do anything to protect his pet and then there was the reminder of that event that remained in the house for some period of time because of the smell from the cat being burned alive in the wood stove.

Mrs. Lindsey also described injuries that Applicant experienced during his lifetime. She described four major injuries to his head. The first injury was when his head was run over by an automobile when he was approximately a year old, then two serious falls which resulted in head trauma and the fourth was a car accident when Applicant was 16 years old in which he suffered head trauma which is still evidenced by facial scars. In addition to the head injuries, when Applicant was approximately 8 months old he ingested kerosene which required immediate medical attention.

Mrs. Lindsey testified about emotional problems Applicant has had during his life including a suicide attempt as a teenager. According to Mrs. Lindsey Applicant and one of his brothers got into a fight and after Mrs. Lindsey attempted to break up the fight she told Applicant that she no longer loved him. In response to the statements by his mother, Applicant took a large quantity of pills which resulted in his hospitalization and two weeks of inpatient treatment. Despite the suicide attempt and the inpatient treatment, Applicant's mother never sought additional follow-up treatment for his emotional problems.

Applicant also experienced difficulties in school growing up. According to Mrs. Lindsey he could not learn and was a D and an F student. As a result of his learning difficulties, Applicant dropped out of school at a young age.

After dropping out of school, Applicant eventually met and married Ruby Nell Lindsey. They had two sons together. Mrs. Lindsey testified that Applicant was very involved in the boys' lives, that he spent a great deal of time with them and loved them dearly.

There were marital problems between Applicant and his wife, Ruby Nell Lindsey and during the month leading up to the shooting Applicant and Ruby Nell were separated. It appears that Applicant was able to see his sons during part of their separation but during the weeks leading up to the shooting Ruby Nell Lindsey stopped letting Applicant see the boys. Mrs. Lindsey testified that she had attempted to intervene on Applicant's behalf so that he could see the children but that Ruby Nell Lindsey had made it very clear she was not going to allow him to see the children anymore.

The marital problems and his inability to see his children caused Applicant to become depressed. During the first week of September 2002, just shortly before the shooting, Mrs. Lindsey received a phone call from her youngest son, Tim, telling her that Applicant had threatened suicide. Mrs. Lindsey, her sister, Bessie, their brother, Steve, and Applicant's younger brother, Tim, all went to Applicant the night he threatened to commit suicide. They stayed with him for a few hours that evening. They gave him some medication in hopes that it would help him calm down but did not seek any professional help for him. That evening, Applicant gave to Mrs. Lindsey four suicide notes, one to herself, one to his younger brother, Tim, and the other two to his boys.

Much of the information provided by Mrs. Lindsey during the PCR hearing was not presented to the jury during the original trial. Mrs. Lindsey testified that in preparation for the original trial she spent one hour on a Saturday approximately two weeks prior to trial meeting with one of the attorneys and the mitigation investigator. Mrs. Lindsey stated that this meeting took place at her home and during that hour the attorney and mitigation investigator not only interviewed her but also her sister, Bessie. Mrs. Lindsey indicated that that was the only preparation for her testimony at trial. By comparison, she testified that she had spent approximately 20 hours preparing for the PCR hearing.

Mrs. Lindsey testified at the PCR hearing that one of the vital pieces of information that was not conveyed to the original defense team was that Dr. Henderson who had treated Applicant as a child was a potential witness during the sentencing phase of the original trial. Mrs. Lindsey told the original trial team about Dr. Henderson. She told them that Dr. Henderson knew Applicant not only because he was Applicant's doctor but also because his children played together with Applicant. Dr. Henderson would have been a good non-family witness to describe who Applicant was and what type of person he was. Dr. Henderson was alive at the time of the original trial but had unfortunately passed away prior to the PCR hearing. Mrs. Lindsey felt that Dr. Henderson would have been an asset and a help to Applicant during the sentencing phase of the trial.

One of the other deficiencies that Mrs. Lindsey testified about was that she was directed by the original defense team not to ask the jury for mercy for her son. She did testify very briefly during the original trial about her desire for the jury to have mercy on her son and to give him a life sentence. However she testified at the PCR hearing that

she was not prepared to adequately make that request of the jury and that had she been prepared she would have testified differently and in her mind more effectively in requesting mercy for her son. Although the defense team did discuss with Mrs. Lindsey her ability to request that the jury have mercy on her son and her opportunity to do so during the trial she did not feel that she was adequately prepared to make that request. Mrs. Lindsey indicated that she would have testified differently about her desire for the jury to have mercy on her son and give him a life sentence had she been better prepared by the original defense team.

Bessie Smith

PCR Testimony – Transcript pages 388 – 425
Trial Testimony – Transcript pages 2080 – 2082

Mrs. Bessie Smith is Applicant's maternal aunt and Virginia Lindsey's younger sister. Mrs. Smith testified both in the original trial and also at the PCR hearing. Like Mrs. Virginia Lindsey there was a significant difference between the testimony that was elicited at the original trial and the testimony that she provided during the PCR hearing.

During the PCR hearing Mrs. Smith gave background information which was needed to support and illustrate the findings of the mitigation expert. Some of the information that she provided included a description of the environment she and Virginia Lindsey grew up in in Inman, South Carolina. There were a total of nine siblings growing up in that home. School was something they only did occasionally as they were growing up. Mrs. Smith testified that she dropped out of school in the seventh grade to begin working. It was necessary for her and all of her siblings to work to provide food and basic necessities of life because of the poverty that they lived in. She also described the violence and dysfunctional behavior which Applicant observed from his uncles and

his Aunt Robin while he was growing up. She described altercations and the violent behavior these men exhibited. In particular, one example she gave was that his Uncle Paul always carried around a Hawk Build knife and was quick to brandish that knife and use it if necessary when he was threatened in any way.

Mrs. Smith also described events and the environment that existed when Applicant was growing up. For example, she described the depressed state that Applicant's mother Virginia Lindsey experienced. Mrs. Smith indicated that Virginia Lindsey was devastated after the death of her daughter and became very depressed. That depression then led to drinking and ultimately to much of the parenting of Applicant being left to his grandmother and other relatives including his uncles Paul and Willy and his Aunt Robin who had exhibited the violent behavior and alcohol abuse when he was younger.

Mrs. Smith was also able to describe the difference between the environment that Applicant grew up in and what the majority of society experiences during their formative years. Mrs. Smith testified that as she grew older she was able to get married, obtain a GED, and move away from Virginia Lindsey and her family. She described the differences between the environments that Applicant grew up in and the environment her boys grew up in. She also described what a difference that made in her boys as adults and Applicant as an adult.

Mrs. Smith also testified at length about the weeks and events leading up to the shooting of Ruby Nell Lindsey at the Inman Police Department. She described the suicide attempt that Applicant threatened just weeks before the shooting took place. She testified that the evening Applicant threatened to commit suicide, she observed him in a

depressed state. She indicated that the family went to the home to spend time with him and talk to him. They prayed with him, gave him some medication to help him calm down, but did not seek professional help for him. He was not taken to the hospital and eventually the family decided that he was okay and left him alone.

Mrs. Smith also talked to Applicant the day immediately before the shooting and a few hours before the shooting took place. During the phone call the day before she described Applicant as being upset and crying. She tried to explain to him that things were going to work out and everything would be okay. During that phone call he calmed down and by the time they hung up he indicated that he felt much better about his situation. The following day Applicant called Mrs. Smith again. He was upset and depressed once again. During this phone call she tried to talk to him again in hopes of cheering him up. She indicated that somebody else called her phone during that conversation. She put Applicant on hold to talk to the other individual and by the time she came back Applicant had hung up. Unfortunately this conversation took place a matter of hours before the shooting and she never had the opportunity again to try and talk him out of doing anything irrational.

Finally Mrs. Smith described her preparation for the testimony during Applicant's original trial. She indicated that she had one meeting with the defense team a few days or weeks before the trial. She indicated that this meeting lasted 30 to 45 minutes and that she was only able to give some brief information about Applicant during that meeting. Mrs. Smith indicated that she did not meet with the attorneys again nor did she have the opportunity to practice her testimony prior to being put on the witness stand during the original trial in Applicant's case. It was also clear from her testimony that the defense

team asked her additional questions about family history which she refused to answer and that the defense team apparently either did not attempt to or did a very poor job of explaining to her why that information was needed for Applicant's defense. She concluded that her direct examination by acknowledging that she had no contact from the defense team from the time of the shooting until a matter of weeks before the trial began in May 2004.

Steve Pilgrim

PCR Testimony – Transcript pages 426 - 453
Trial Testimony – Transcript pages 2078 - 2080

Mr. Steve Pilgrim is Applicant's maternal uncle. Mr. Pilgrim like Virginia Lindsey and Bessie Smith also testified at both the original trial and the PCR hearing and like the other two witnesses his testimony at the original trial was truncated and not fully developed. At the PCR hearing Mr. Pilgrim was allowed to testify about family history and events that were important for a jury to hear to understand who Applicant was but also to support the conclusions of the mitigation expert who testified at the conclusion of the hearing.

Mr. Pilgrim began his testimony by describing suicidal behavior of some of Applicant's family members. In particular he described suicidal behavior by Applicant's mother, Virginia Lindsey, his maternal aunt, Bessie Smith, and another maternal aunt, Robin.

Mr. Pilgrim also testified about the living conditions that Applicant experienced during his childhood and adolescence. For example Mr. Pilgrim described the home that Applicant spent his first ten years in. It was a four-room house which had no indoor plumbing and was heated only by coal or wood during the winter. In addition to the

poverty that Applicant experienced he was also exposed to violence by his uncles and his Aunt Robin who lived in the home with him. That violence was not only towards family members and loved ones but also towards others in the community.

Mr. Pilgrim also described his first-hand knowledge of injuries that Applicant had experienced during his childhood. In particular he described in detail the incident where Applicant's head was run over by an automobile when he was just an infant. Mr. Pilgrim also described other head traumas which Applicant experienced during his life.

Mr. Pilgrim was also one of those individuals who had contact with Applicant during the weeks immediately preceding the shooting of Ruby Nell Lindsey. Mr. Pilgrim was one of the family members who attended to Applicant just weeks before the shooting when he threatened to commit suicide. Mr. Pilgrim described Applicant's demeanor that night as very depressed. He testified that Applicant was crying heavily and that that was the first time he had seen Applicant cry as an adult. According to Mr. Pilgrim Applicant was suicidal because he wanted to see his children but was unable to do so. Mr. Pilgrim confirmed that the family spent only a couple of hours with Mr. Lindsey that evening and then left him alone. They also did not seek any professional help or treatment for Mr. Lindsey as a result of this incident.

Mr. Pilgrim gave additional details about those weeks. One of those details was that Applicant had indicated that he wanted to have a gun and shortly thereafter someone broke into Mr. Pilgrim's home apparently looking for a firearm but they were unable to locate and take Mr. Pilgrim's firearm from his home. Mr. Pilgrim also testified about helping Applicant financially and that Applicant wanted the money so that he could attempt to do things to help put his marriage back together.

Mr. Pilgrim concluded his testimony by testifying about the preparation that he had for his testimony at the original trial. Mr. Pilgrim testified that he met with Mr. Lindsey's trial team on only one occasion and that was the day before the trial began. Mr. Pilgrim met for 20 to 30 minutes in a group meeting. Lenora Topp, Mr. Bartosh, and Mr. Brannon were present for the defense team. Mr. Pilgrim, Virginia Lindsey, Betsy Smith and Bill Burton were there as witnesses. The defense team talked to the potential witnesses as a group for no more than half an hour. Mr. Pilgrim indicated that he did not feel like he was adequately prepared to testify at the original trial on behalf of Mr. Lindsey.

In addition to the very brief preparation described by Mr. Pilgrim he also indicated that he was told during the preparation meeting that he was not allowed to ask the jury for mercy on behalf of Mr. Lindsey. As a result of those instructions from the defense team Mr. Pilgrim did not ask the jury to have mercy on Applicant . Mr. Pilgrim did indicate that had he been given that opportunity he would have requested that the jury have mercy on Applicant.

Tim Sims

PCR Testimony – Transcript pages 453 - 480
Trial Testimony – Did not testify

Tim Sims is Applicant's younger brother. He was not called as a witness during the original trial of this case.

During his testimony at the PCR hearing, Mr. Sims testified about growing up with Applicant. Mr. Lindsey and Mr. Sims had different fathers but they grew up together in the same house. Mr. Sims' father lived in the house with the boys until Mr. Sims was about 11 years of age at which point Mr. Sims' father left because of an illness

and Applicant took over the role of raising Mr. Sims. Mr. Sims testified that Applicant raised him from the age of 11 until the shooting incident occurred approximately eight years later and that Applicant always treated him as a son.

The close relationship between Applicant and Tim Sims continued as they grew older. According to Mr. Sims, he and Applicant saw each other on almost a daily basis up until the time of the shooting. There were even times when Mr. Sims lived in the home with Applicant and his wife Ruby Nell Lindsey.

Because he lived with Applicant and Ruby Nell Lindsey, Mr. Sims was able to testify about their relationship. According to Mr. Sims, Applicant did everything he could for his wife. He never saw Applicant hit or hurt his wife. He indicated that they had verbal arguments but he never saw any violence between them.

Mr. Sims testified that Applicant worked during his teenage and adult years. He indicated that he knew Applicant had worked painting cars, that he had worked at Milliken and Company but that eventually he got into selling drugs because he and the family needed money. According to Mr. Sims, Applicant sold the drugs out of necessity and the need for money and that any money that he made was used to help family members.

Because of their close relationship and their daily contact, Mr. Sims was able to testify about Applicant's state of mind and activities in the weeks leading up to the shooting of Ruby Nell Lindsey. Mr. Sims described an event that took place about three weeks before the shooting when Applicant took the entire family including Mr. Sims and his children out to eat dinner one night. According to Mr. Sims, Applicant and Ruby Nell Lindsey were together both before and after the dinner.

Mr. Sims was also able to testify about the night Mr. Lindsey threatened to commit suicide. Mr. Sims is the one that received the phone call from Applicant about his desire to commit suicide. Mr. Sims stated that Applicant was nervous and crying that night and that he had never seen Applicant behave that way before. In fact, Mr. Sims testified that he had only seen Applicant cry on two prior occasions. The first was the night he threatened suicide and the second was the night of the shooting. Because of the way Applicant behaved during the telephone call, Mr. Sims got family members together to go visit with him. The family members arrived to speak to Mr. Lindsey about 30 minutes after the telephone call and they stayed for a couple of hours. One of the family members gave Applicant some medication to help him calm down but they did not seek any professional treatment or help that evening. Mr. Sims remembered the suicide notes that Applicant wrote that eveningand gave them to his family.

Mr. Sims testified that after that evening Applicant never really acted like his normal self again. At one point after that night , Applicant asked Mr. Sims to see if his wife Ruby Nell Lindsey had another man at her house. Mr. Sims did as Applicant requested and he saw another man's car located at Ms. Lindsey's house but because of Mr. Lindsey's mental condition at that time Mr. Sims lied to him and told him he did not see the boyfriend's car because he did not want to upset him any more.

Mr. Sims testified that in the days leading up to the shooting Ruby Nell Lindsey would not talk to Applicant. In order to facilitate some communication between them, Mr. Sims arranged for a three-way phone call between Applicant and Ruby Nell Lindsey. The three-way phone call had to be made because Ruby Nell Lindsey would only answer phone calls coming from Virginia Lindsey's phone and she would not answer any phone

calls coming directly from Applicant. Mr. Sims remained on the telephone during the conversation between Applicant and Ruby Nell Lindsey. He heard Ms. Lindsey tell Mr. Lindsey that he was not going to get to see his children anymore and during the call one of the boys said he wanted to see Applicant but Ruby Nell responded to the child that Applicant was not his father any more. Both Mr. Sims and Mr. Lindsey overheard this exchange.

Just hours before the shooting took place Applicant learned from another woman about Ruby Nell's boyfriend. This woman was able to confirm Ruby Nell's relationship with the boyfriend and as a result of this information Applicant was extremely upset. Mr. Sims was concerned because of how upset that information about the boyfriend had made Applicant. In order to attempt to get Applicant to calm down, Mr. Sims asked Applicant to meet him at a relative's house. Mr. Lindsey agreed to meet at the relative's home. Unfortunately, Mr. Lindsey apparently left his home for the meeting and in the process had to drive through the neighborhood where he saw the car Ruby Nell was eventually shot in.

Mr. Lindsey concluded his testimony by describing his availability to testify on behalf of his brother. According to Ms. Sims, none of the defense team ever talked to him prior to the original trial in Mr. Lindsey's case. Mr. Sims was available to help. From the time of the shooting until the time of the trial he was living in the area and available to the defense team. All of the relatives counsel had spoken to knew where to find him and how to reach him. Mr. Sims indicated that he wanted to help. In fact he approached one of the defense team members, Mr. Doug Brannon, at the trial and asked

to be allowed to testify. He would have been able to testify at the original trial about the same facts that he presented during the PCR hearing.

Mr. Sims also indicated that in addition to the factual information that he provided during the PCR hearing, had he been given the opportunity he would have asked the jury to have mercy on his brother.

Expert Witnesses

James Aiken

PCR Testimony – Transcript pages 200 – 228
Trial Testimony – Did not testify

James Aiken was the prison adaptability expert presented by Applicant during the post-conviction relief hearing.

After testifying about his extensive education and work history Mr. Aiken was asked to provide an opinion about Applicant's ability to adapt to prison life. Mr. Aiken's opinion was based on his education, his experience and his review of the records from the Spartanburg County Detention Facility and the South Carolina Department of Corrections which existed at time of the original trial in this case.

Mr. Aiken testified that in his opinion Mr. Lindsey was able to adapt to prison life and that the South Carolina Department of Corrections had the capacity to managed Mr. Lindsey for the remainder of his life without causing unreasonable risk of harm to staff, inmates or the general community. In explaining his opinion, Mr. Aiken cited two factors in support of his opinion. The first was that Mr. Lindsey had successfully completed a prior incarceration and secondly that the South Carolina Department of Corrections had at its disposal the necessary staff equipment, expertise and knowledge necessary to classify, evaluate and manage Mr. Lindsey. Additionally Mr. Aiken pointed

out that Mr. Lindsey does not have any ties to groups which pose a security threat within the prison system or to any gangs.

Mr. Aiken also indicated during his testimony that he would have told a jury that a sentence of life without parole was in his opinion a very severe sentence. Mr. Aiken described the redundancy and repetitiveness of prison life for an individual sentenced to life without the possibility of parole in support of this opinion. Finally Mr. Aiken testified that he was an individual capable of providing an opinion about Mr. Lindsey's capacity for rehabilitation and adaptability to prison as suggested by the ABA guidelines but that to his knowledge no lay witness would have been able to provide that same information.

Tora Brawley

PCR Testimony – Transcript pages 70 – 96
Trial Testimony – Did not testify

Dr. Tora Brawley was admitted as an expert in the field of clinical psychology with a specialty in neuropsychology.

Dr. Brawley originally became involved with Applicant approximately one month prior to the original trial in this case. On April 12, 2004, she received a telephone call from Mr. Lindsey's lead attorney Michael Bartosh. Initially Dr. Brawley indicated that she would not be able to work with Mr. Lindsey on such short notice, however she had a cancellation and was able to see him on April 27, 2004 just a matter of weeks prior to the trial.

At the time she met with, interviewed and tested Applicant she had no written documentation available to her. The only information that she had was provided to her verbally by Mr. Bartosh during a short telephone call.

Armed with the limited information she had, Dr. Brawley conducted an interview and neuropsychological testing of Mr. Lindsey. Dr. Brawley testified that as a result of her interviews and her testing she identified scattered neuropsychological deficits and she made recommendations to the defense team that they obtain medical records, school records and interview collateral sources of information to further investigate the reasons for her findings.

During her testimony Dr. Brawley discussed three areas that she had identified that caused her concern about Mr. Lindsey's neurological functioning. The first area were head traumas that he had experienced throughout his life. She indicated that she had received reports from Mr. Lindsey of multiple falls with head injuries, being run over by a car as an infant and multiple automobile and motorcycle wrecks. Secondly, she indicated that his educational history caused some concern. He reported repeating multiple grades and being involved in special education classes for speech therapy and learning disabilities and eventually dropping out of school after completing the ninth grade. Third, Mr. Lindsey informed Dr. Brawley of his three suicide attempts prior to the shooting in September 2002.

Dr. Brawley testified about several areas of impairment which were disclosed through her neuropsychological testing. Mr. Lindsey's impairments included severely impaired speed of mental tracking, below average accuracy of mental tracking, severely impaired verbal fluency, severely impaired confrontation at naming (the ability to name objects), below average manual dexterity and speed, below average immediate verbal memory, delayed visual memory, severely impaired verbal learning ability, impaired

ability to copy and recall a complex figure. In all of these areas Mr. Lindsey fell below the average range of scoring.

Dr. Brawley also performed an IQ test on Mr. Lindsey. Her IQ test showed a full scale IQ of 85, a verbal IQ of 80 and a performance IQ of 92.

Dr. Brawley also performed two objective tests for malingering and both tests showed no indication that Mr. Lindsey was malingering. He was within normal limits for both tests. Additionally there were no indications of malingering by Mr. Lindsey during Dr. Brawley's clinical interview of him.

Following the conclusion of her interview and testing Dr. Brawley provided her results to Dr. Melikian and recommended that the defense team obtain medical records, school records and interview other sources of information. Dr. Brawley suggested this course of action as a follow up to her interview and testing.

Dr. Brawley did not produce a written report because she was told by the defense team that she would not be testifying.

In preparation for the post conviction relief hearing Dr. Brawley was provided with records which she did not have during her first interaction with Mr. Lindsey. For the post conviction relief hearing Dr. Brawley was provided with school records, a report from the William S. Hall Institute, and the raw data from the psychological testing performed at the William S. Hall Institute.

Dr. Brawley indicated that from her review of this information, which she did not have in 2002, there would have been two additional areas she could have provided information on. The first was depression and the second was malingering. With regard to the depression Dr. Brawley indicated that there was a discrepancy between the IQ

score which she received when she tested Mr. Lindsey in 2004 and the IQ score revealed in the William S. Hall Institute testing approximately a year prior to Dr. Brawley's testing. Dr. Brawley testified that depression on the part of Mr. Lindsey could have explained the differences between the two scores. In particular, if Mr. Lindsey was experiencing depression when he took the initial examination which was given closer in time to the shooting in September 2002, that would have negatively impacted his IQ scores. In particular, there were two sub scores which were particularly different between the two tests and both of those sub tests were affected by attention, concentration and abstract reasoning which are all frontal lobe functions and directly affected by depression. Secondly Dr. Brawley would have been able to confirm at the original trial that the objective tests performed at the William S. Hall Institute in 2003 showed no objective basis for a finding of malingering.

Dr. Margaret Melikian

PCR Testimony – Transcript pages 594 - 640
Trial Testimony – Transcript pages 2000 - 2044

Dr. Margaret Melikian was qualified as an expert in forensic psychiatry. She was called by the Defendant in the trial of the case. She was the only expert called by the Defense. Dr. Melikian saw Mr. Lindsey on May 4, 2004. Dr. Melikian is board certified in both forensic and general psychiatry. Dr. Melikian testified that she was contacted by public defender Bartosh on April 6, 2004, approximately six weeks before trial. She did not receive any medical records to review until April 28, 2004. Before appearing in Spartanburg to testify on May 23, 2004, Dr. Melikian had seven hours and forty-five minutes in the case. Of those seven hours and forty-five minutes, two hours and thirty minutes were spent with Mr. Lindsey on May 4, 2004. This was Dr. Melikian's first death

penalty case. She stated that due to her lack of experience at the time, she accepted the case thinking that, if all the mitigation was done, she could be prepared in that amount of time. She stated that mitigation had barely just begun at that time and there really wasn't a way they could be prepared for trial. (See PCR Transcript page 600)

Dr. Melikian sought an opinion letter from Dr. Tora Brawley since Dr. Brawley had seen Mr. Lindsey. Dr. Melikian was informed by the Defense team that Dr. Brawley would not be testifying and that Dr. Melikian would be putting her information into the record in testimony. She didn't feel comfortable doing that so she requested a written report from Dr. Brawley which was given to her on May 20, 2004, three days after the trial had started. (See PCR Transcript page 602)

With regards to the records that Dr. Melikian reviewed prior to the trial in comparison to the records that she reviewed for PCR preparation, Dr. Melikian stated that the records she received prior to trial were approximately three to four inches thick. In preparation for the PCR hearing, the records presented to her were six to seven times that amount of information. (See PCR Transcript page 603)

Dr. Melikian was asked whether there were records or items that she did not see in the trial that she has now reviewed that may have impacted her view of the case. The following would have been important for her to review:

1. The suicide notes.

2. Complete file from Mental Heath records, Mr. Lindsey's medical records, the Department of Corrections' records. She did not have the incident report or all of the rest of the file information.

3. Interview with Rod Tullis.

4. Complete Family history.

This is relevant in that, in a forensic setting, she is addressing legal matters and needs to know the truth of the matter. Records are needed to corroborate and expand on what a patient or defendant has told you. (See PCR Transcript page 604)

Dr. Melikian testified that had she seen the records, documents and other items presented in the PCR case, her diagnosis would have changed. She did not understand the seriousness of Mr. Lindsey's depression at the time of the incident. She didn't understand the level of depression that Mr. Lindsey was showing at the time of her evaluation and it would have changed the way she looked at his cognitions in terms of the test results that were low.

Dr. Melikian would have explained the severity of his depression and that he was genuinely suicidal at the time of the incident of September 2002.

In addition, she had been provided in the first trial with information that Mr. Lindsey had been charged with Criminal Domestic Violence charges. She only had general information about the charges and not the factual basis for the charges. She didn't know at the time that most of the CDV charges had been dismissed.

Dr. Melikian indicated that all of those things go to paint a more accurate picture of who this person is as opposed to just to list that he did bad in school, his IQ was low, and he's had these charges in the past. (See PCR Transcript page 607) Dr. Melikian testified that she was not prepared to testify in the first trial to the extent that she called Judge Few to ask for a continuance. She contacted Judge Few by phone. (See PCR Transcript page 608) However, there was no record made of her request for continuance.

With regards to the malingering issue, she did not agree with the William S. Hall report. William S. Hall examiners gave him a diagnosis of malingering based on atypical symptoms, but by objective testing, he didn't meet the criteria for malingering. (See PCR Transcript page 610). Further, she was not made aware of "Jimmy." Dr. Melikian would have wanted to know about this imaginary person so that she could have had time to discuss this issue with Mr. Lindsey. In the testimony of Doug Brannon, he testified that when he went to the jail to meet with Applicant, he saw him pull up a chair and have Jimmy sit with him. Dr. Melikian was not informed about Jimmy from the attorney. She was told about this only during cross-examination, which did not give her a chance to develop or respond to this issue, which is critical on the issue of malingering.

Dr. Melikian testified that "Jimmy" would have been the focus of her evaluation on May 4th instead of trying to gather as much information as she could and accepting that as an imaginary friend and going on. (See PCR Transcript page 615)

Dr. Melikian never saw pictures showing Mr. Lindsey had hit his head against the wall at the jail while being charged with this offense. This would have given some corroboration to the extent of his suicide attempts. Dr. Melikian indicated that, in her opinion after fifteen to twenty death penalty cases, this was the least amount of time she had ever spent on a death penalty case. Further, she testified this case has bothered her since that day and that she recalled, on the day of her testimony, wondering if it was her ethical duty to refuse to testify, because she felt so unprepared. (See PCR Transcript page 620)

Janet Vogelsang

PCR Testimony – Transcript pages 481 – 594
Trial Testimony – Did not testify

Janet Vogelsang was qualified as a clinical social worker with expertise in conducting bio-psycho-social assessments and in giving opinions based on those findings. Trial counsel did not have a clinical social worker as part of the Defense team. Ms. Vogelsang interviewed eleven individuals, including Dr. Tora Brawley and Dr. Margaret Melikian. She also reviewed numerous records including mental health records of those family members who had mental health records, including Bessie Smith, Steve Pilgrim and Robin Pilgrim. Ms. Vogelsang also reviewed the William S. Hall records, the social work history that was done at Hall, the reports of Dr. Narayan and Dr. Musick to see if they had collected any family history prior to the trial. Ms. Vogelsang also visited the community and created visual aids to demonstrate her findings. She also created a family tree that demonstrates Applicant's family. Ms. Vogelsang indicated that the family tree can show patterns of behavior that can be passed down from generation to generation as well as patterns of behavior in the family.

Ms. Vogelsang then discussed the social history the jury did not hear in the trial.

Findings of Fact and Conclusions of Law

Trial counsel failed to adequately prepare Applicant for the pre-trial mental health evaluation.

A criminal defense attorney has a duty to consult with his client and to advise the client on the various aspects of the client's case. South Carolina Rules of Professional Conduct Rule 1.4.

In the context of death penalty litigation, the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003) highlight that duty and give particular guidance on the need for and scope of the defense

attorney's relationship with his client. The ABA guideline addressing the defense attorney's relationship with his client reads as follows:

GUIDELINE 10.5—RELATIONSHIP WITH THE CLIENT

A. Counsel at all stages of the case should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client.

B. 1. Barring exceptional circumstances, an interview of the client should be conducted within 24 hours of initial counsel's entry into the case.

2. Promptly upon entry into the case, initial counsel should communicate in an appropriate manner with both the client and the government regarding the protection of the client's rights against self-incrimination, to the effective assistance of counsel, and to preservation of the attorney-client privilege and similar safeguards.

3. Counsel at all stages of the case should re-advise the client and the government regarding these matters as appropriate.

C. Counsel at all stages of the case should engage in a continuing interactive dialogue with the client concerning all matters that might reasonably be expected to have a material impact on the case, such as:

1. the progress of and prospects for the factual investigation, and what assistance the client might provide to it;

2. current or potential legal issues;

3. the development of a defense theory;

4. presentation of the defense case;

5. potential agreed-upon dispositions of the case;

6. litigation deadlines and the projected schedule of case-related events; and

7. relevant aspects of the client's relationship with correctional, parole or other governmental agents (e.g., prison medical providers or state psychiatrists).

The attorney's obligation to develop a relationship with the client is emphasized by the ABA guidelines because this relationship is the key to open communication between the defendant and his attorneys. Without this communication, the defendant is left unaware of the progress of his case, the strategies and defenses being pursued and the expectations of him held by the criminal justice system in general and by his defense team in particular. Without this communication, the attorneys do not acquire information which is only available from their client and they are unable guide him in ways that are necessary for him to help himself and to prevent him from causing harm to his defense. *See* Comments to ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.5 – Relationship with Client.

In particular, the ABA guidelines state that when the defendant is to be interviewed by a witness associated with the government, such as Dr. Naryan, defense counsel should be present. If the prosecution is granted leave at any stage of the case to have the client interviewed by witnesses associated with the government, defense counsel "should carefully consider what legal challenges may appropriately be made to the interview or the conditions surrounding it, and the legal and strategic issues implicated by

the client's co-operation or non-cooperation; insure that the client understands the significance of any statements made during such an interview; and attend the interview." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

Applicant's defense team failed to develop and maintain a relationship with him that would have allowed for the open discussion of Mr. Lindsey's decision to create his imaginary friend "Jimmy" at the suggestion of another inmate. Additionally, they failed to properly prepare Applicant for his psychological evaluation and, specifically, failed to address Mr. Lindsey's intention to feign mental illness through the introduction of "Jimmy." There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not failed to develop and maintain a relationship with Mr. Lindsey and to adequately prepare him for his psychological evaluation.

Trial counsel failed to adequately present the issue of malingering to the jury during the penalty phase.

The defense team in a capital case has an obligation to present any available evidence which would tend to convince a jury to impose a life sentence instead of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

The duty to present evidence in support of a life sentence includes the obligation to discover and present affirmative evidence but also to discover and present evidence which may negate the assertions of the State in support of a sentence of death. *Rompilla v. Beard*, 545 U.S. 374, 377 (2005) (Counsel ineffective in capital sentencing for failing "to make reasonable efforts to obtain and review material that counsel [knew] the

prosecution [would] probably rely on as evidence of aggravation at the sentencing phase of the trial," which would have led to significant mitigation); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

Applicant's defense team did retain Dr. Brawley to evaluate his mental condition. But, they failed to follow-up on her evaluation and as a result they failed to discover both the evidence she could have presented which would have affirmatively supported a life sentence and the evidence she could have presented refuting the State's allegations that Mr. Lindsey was a malingerer.

There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had consulted with Dr. Brawley after her evaluation and presented both the affirmative evidence available to her and the evidence refuting the State's allegations of malingering.

Trial counsel failed to adequately present requests for mercy to the jury during the sentencing phase of the trial.

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 (S.C. 1991) (quoting Childs v. State, 257 Ga. 243, 357 S.E.2d 48 (1987)). A defendant may not present witnesses who testify about "their religious or philosophical attitudes about the death penalty . . . Nor is a defendant entitled to present the opinion of a witness about what verdict the jury 'ought' to reach." Childs at 51.

It is incumbent upon defense counsel to locate, interview and prepare witnesses who know the defendant, care for the defendant and are willing to ask for mercy on his behalf. Once those witnesses have been identified and prepared, the defense attorney has an obligation to properly present that evidence to the jury. *See* Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2008); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty.

If the Court does not allow the witnesses to request mercy from the jury, then the defense attorney has the obligation to preserve that issue for appeal. The ABA guidelines correctly assume that all available avenues of post-conviction relief including a direct appeal should be anticipated and prepared for by trial counsel. *See* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.8 – The Duty to Assert Legal Claims and the associated Comments.

There is a reasonable likelihood that if the family members and friends of Applicant had been allowed to request mercy of the jury the outcome of the sentencing phase of the trial would have been different.

Even if the Court had refused to allow the testimony in the original trial, there is a reasonable probability based on existing case law that if the issue had been reserved for appeal Applicant's death sentence would have been reversed and the issue remanded for a second sentencing hearing.

Trial counsel failed to provide sufficient information to Dr. Margaret Melikian to allow her to properly evaluate Applicant and to testify on his behalf during the penalty phase of the trial.

In any death penalty proceeding, the defense team has an obligation to both identify potential expert witnesses and to provide the experts with sufficient information to perform their role in support of the defendant's mitigation case. The defense team is required to properly investigate the defendant's background and to provide the expert witnesses with sufficient information. Failure to perform an adequate investigation and to provide the information obtained to the defense experts constitutes ineffective assistance of counsel. ; Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2008); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (S.C. 2004).

Dr. Melikian needed information and documents related to Applicant's history in order to properly evaluate him and present her testimony during the sentencing phase of the trial. The defense team failed to perform a proper investigation to identify and locate the information needed by Dr. Melikian. Further, they failed to provide Dr. Melikian with the limited information they did have available to them.

The defense team's failure to investigate Mr. Lindsey's background and to provide the information obtained to Dr. Melikian constituted ineffective assistance of counsel. There is a reasonable probability that the outcome of the sentencing phase of the trial would have been different if the defense team had not committed this error.

Trial counsel failed to adequately present to the jury the history of mental illness and impairment in Applicant's family and the relevance of that information to the jury's decision on the issue of sentencing.

The U.S. Supreme Court has stated that it is essential that the jury be allowed to consider the individual characteristics of the defendant in a capital murder case when

deciding whether to impose the death penalty. Lockett v. Ohio, 438 U.S. 586 (1978). A few years later, the Court affirmed its decision in Lockett and said "the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Eddings v. Oklahoma, 455 U.S. 104 (1982) (quoting Woodson v. North Carolina, 428 U.S. 280 (1976)).

"A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings . . ." Woodson at 304 (quoted in Eddings at Footnote 7).

Because of this requirement that the jury be allowed to consider the character and record of the defendant, the defense team is required to investigate and then present evidence of this type during the sentencing phase of a capital case. Failure to investigate and present evidence of this nature can, depending on the individual facts of the case, result in ineffective assistance of counsel which requires that the defendant's death sentence be set aside and new sentencing proceedings be conducted. Cases illustrating the requirement that the defense team investigate and present evidence of the defendant's character, record and life history include Sears v. Upton, 130 S. Ct. 3259 (2010); Wiggins v. Smith, 539 U.S. 510 (2003); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (S.C. 2008) and Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (S.C. 2004)..

Applicant's defense team failed to identify and present evidence of mental illness and impairment in Mr. Lindsey's family.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team had identified and presented the available evidence regarding the mental illness and impairment in Mr. Lindsey's family.

Trial counsel failed to retain and present a prison adaptability expert during the penalty phase of the trial to testify about Applicant's ability to adapt to prison life without undue risk to others and the relevance of that information to the jury's sentencing decision.

The U.S. Supreme Court has ruled on multiple occasions that evidence of prison adaptability is relevant and admissible in the sentencing phase of a death penalty case. "[E]vidence that a defendant would in the future pose a danger to the community if he were not executed may be treated as establishing an 'aggravating factor' for purposes of capital sentencing. Likewise, evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating. Under *Eddings*, such evidence may not be excluded from the sentencer's consideration." Skipper v. South Carolina, 476 U.S. 1 (1986).

In light of the admissibility of prison adaptability evidence, defense counsel should consider presenting "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." ABA Guidelines

for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty. See also Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (S.C. 2006)

Applicant's defense team failed to retain and present a prison adaptability expert during the mitigation phase of his trial.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team had retained a prison adaptability expert such as Jim Aiken and presented his testimony to the jury during the penalty phase of his trial.

Trial counsel failed to retain and present a mitigation expert during the penalty phase of the trial to testify regarding the psycho-social history of Applicant and the relevance of that information to the jury's sentencing decision.

The defense team in a capital case has an obligation to present any available evidence which would tend to convince a jury to impose a life sentence instead of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

The Court in Eddings specifically stated that evidence related to the defendant's character and record is admissible and a necessary consideration for the jury. Eddings at 110. Accordingly, the ABA guidelines specifically states that defense counsel should consider presenting "expert and lay witnesses along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases

(2003), Section 10.11 – The Defense Case Concerning Penalty. See also Wiggins; Council.

Applicant's defense team failed to retain and present an expert witness to discuss the Mr. Lindsey's psycho-social history to the jury during the mitigation phase of his trial.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team had presented an expert witness to the jury to testify regarding Mr. Lindsey's psycho-social history and its relevance in deciding the appropriate sentence for Mr. Lindsey.

Trial counsel failed to elicit testimony from the EMS workers, Joseph Stewart and Vincent Bell, regarding Applicant's desire to commit suicide immediately after the death of his Ruby Nell Lindsey.

The defense team in a capital case has an obligation to present any available evidence which would tend to convince a jury to impose a life sentence instead of the death penalty. *See* Eddings v. Oklahoma, 455 U.S. 104 (1982).

The Court in Eddings specifically stated that evidence related to the circumstances surrounding the crime are admissible and a necessary consideration for the jury. Eddings at 110.

Applicant's defense team failed to present evidence of his state of mind at the time of the shooting to the jury. The EMS workers' testimony, had it been presented and developed appropriately, would have given the jury an indication of Mr. Lindsey's state of mind at the time of the commission of this crime.

There is a reasonable probability that the outcome of the sentencing phase would have been different if Mr. Lindsey's defense team had presented and adequately developed the testimony of the EMS workers during the penalty phase of the trial.

Trial counsel failed to commit sufficient time to perform an adequate investigation for the sentencing phase of the trial and to adequately prepare for the presentation a case in support of mitigation during the sentencing phase of the trial.

In every capital case, the defense team is obligated to perform an adequate investigation for the sentencing phase of trial. Wiggins v. State, 539 U.S. 510 (2003) (citing Strickland v. Washington, 466 U.S. 668, 690-691 (1984)); *see also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.7 - Investigation.

In both Wiggins and Strickland, the U.S. Supreme Court has cited the ABA guidelines as an appropriate guide in determining whether the defense team provided effective assistance of counsel. Wiggins at 522; Strickland at 688. The defense team's investigation "into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigation evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'" Wiggins at 524 (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C) (1989) (emphasis in original).

The comments to Section 10.7 of the ABA Guidelines entitled "Investigation" have this to say about the defense team's obligation to perform an adequate investigation:

> "Because the sentencer in a capital case must consider in mitigation, "anything in the life of a defendant which might militate

against the appropriateness of the death penalty for that defendant,""penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history." At least in the case of the client, this begins with the moment of conception. Counsel needs to explore:

(1) Medical history (including hospitalizations, mental and physical illness or injury, alcohol and drug use, pre-natal and birth trauma, malnutrition, developmental delays, and neurological damage);

(2) Family and social history (including physical, sexual, or emotional abuse; family history of mental illness, cognitive impairments, substance abuse, or domestic violence; poverty, familial instability, neighborhood environment, and peer influence); other traumatic events such as exposure to criminal violence, the loss of a loved one, or a natural disaster; experiences of racism or other social or ethnic bias; cultural or religious influences; failures of government or social intervention (e.g., failure to intervene or provide necessary services, placement in poor quality foster care or juvenile detention facilities);

(3) Educational history (including achievement, performance, behavior, and activities), special educational needs (including cognitive limitations and learning disabilities) and opportunity or lack thereof, and activities;

(4) Military service, (including length and type of service, conduct, special training, combat exposure, health and mental health services);

(5) Employment and training history (including skills and performance, and barriers to employability);

(6) Prior juvenile and adult correctional experience (including conduct while under supervision, in institutions of education or training, and regarding clinical services);

The mitigation investigation should begin as quickly as possible, because it may affect the investigation of first phase defenses (e.g., by suggesting additional areas for questioning police officers or other witnesses), decisions about the need for expert evaluations (including competency, mental retardation, or insanity), motion practice, and plea negotiations."

ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Comments to Section 10.7 – Investigation.

When the defense team does not perform an investigation or limits the scope of their investigation, their decision "must be directly assessed for reasonableness in all the circumstances." Wiggins at 533 (citing Strickland at 691). In performing this assessment, "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." Wiggins at 527.

The ABA guidelines recognize that in order to perform the necessary investigation and to prepare for trial, the defense team must make adjust their workload and other work-related obligations. In the comments to Section 6.1 of the ABA guidelines entitled "Workload" the authors note that it is estimated that a capital murder case requires twelve (12) times the amount of time to investigate and prepare that a non-capital case requires. One study conducted between 1991 and 1997 cited by the authors, indicated that the average time required by the defense attorneys in capital cases which went to trial was 1,889 hours per case. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 6.1 – Workload.

Applicant's defense team failed to devote the necessary time to perform an adequate investigation for the mitigation phase of his trial. Applicant's defense team failed to devote adequate time to properly prepare for the mitigation phase of his trial. Council.

There is a reasonable probability that the outcome of the penalty phase of Mr. Lindsey's trial would have been different if his defense team has devoted the time necessary to adequately investigate and prepare for the penalty phase of his trial.

Trial counsel failed to adequately argue against the statutory aggravating factors alleged by the state.

The Sixth Amendment requires that a criminal defendant receive the assistance of counsel. The right to counsel "is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution'" to which they are entitled. Strickland v. Washington, 466 U.S. 668 (1984).

Part of meeting the case of the prosecution involves addressing the aggravating factors asserted by the State in support of their request for the death penalty. Rompilla v. Beard, 545 U.S. 374 (2005); ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Section 10.11 – The Defense Case Concerning Penalty (specifically sections (H), (I), and (L).

The only aggravating factor asserted by the State in support of a sentence of death was S.C. Code §16-3-20(C)(a)(3): "The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person."

Defense counsel failed to adequately argue the inapplicability of the sole aggravating circumstances and why that factor should not support a sentence of death. While defense counsel did argue against the sole aggravating factor, his attempt to persuade the court and the jury fell below the level required to constitute effective assistance of counsel.

There is a reasonable probability that the outcome of the sentencing phase would have been different if defense counsel had asserted a constitutionally adequate argument against the sole aggravating factor alleged by the State.

Summary of Court's Decision

As in all death penalty cases, the jury is to consider aggravating factors and weigh the aggravating factors and mitigating factors to determine an appropriate penalty. It is undisputed that the only aggravating factor in this case is the fact that the shots that killed Applicant's wife were fired "in a public place." Had this tragedy occurred in someone's

private home, with the children sitting beside the deceased, the death penalty could not have been sought. The aggravating factor requires the following:

1) The act of murder knowingly created a great risk of death to more than one person;

2) In a public place;

3) By means of a weapon or device which normally would be hazardous to the lives of more than one person. (section 16-3-20(c)(a)(3) of the Code of Laws of South Carolina (1976) as amended.)

As outlined above, the mitigating factors are numerous. Many of the mitigating factors were never brought to the attention of the jury through testimony, which includes, but is not limited to, Jim Aiken's testimony, Dr. Tora Brawley's testimony and Jan Vogelsang's testimony. In addition, Dr. Melikian would have not only had corroboration by way of Dr. Brawley's testimony, but would have had a much greater understanding of Applicant's history and suicidal tendencies that would have been brought to the jury's attention for consideration.

When evaluating Sixth Amendment ineffectiveness, the first inquiry is whether counsel's representation "fell below an objective standard of reasonableness" (See Strickland v. Washington, 466 U.S. 668 (1984).

As stated in Sears v. Upton, and Porter v. McCollum, 130 S.Ct. 447 (2009), in considering the probability of a different outcome under Strickland, this Court must consider the totality of the available mitigation evidence – both that adduced at trial and

that adduced in the post-conviction proceedings – and reweigh it against the evidence in aggravation.

In considering the totality of the mitigation, this Court is satisfied that the representation provided by Applicant's trial team fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This failure by Applicant's trial team resulted in the denial of his Sixth Amendment right to effective assistance of counsel.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that:

1. Applicant Marion Alexander Lindsey's sentence of death entered on May 24, 2004 is hereby vacated.
2. A new trial shall be held to determine the appropriate sentence for Applicant Marion Alexander Lindsey's conviction for murder.

IT IS SO ORDERED!

Date: _____
Darlington, South Carolina

_____
Paul M. Burch, Jr.
Presiding Circuit Court Judge