ORIGINAL

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

May 28, 2013

RECEIVED
MAY 28 2013
S.C. Supreme Court

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Marion Alexander Lindsey v. State of South Carolina (Capital Case)
Appellate Case No. 2012-206087

Dear Mr. Shearouse:

Enclosed for the Court's convenience are courtesy copies of two circuit court orders cited in Petitioner's Reply to the Return to the Petition for Writ of Certiorari. These orders are:

1. Charles O. Shuler v. State, CA No. 2003-CP-38-0359, Order filed Jan. 9, 2013, Denying Rule 59 SCRCP/Motion to Alter or Amend Judgment.

2. Sammie Louis Stokes v. State, CA No. 2001-CP-38-1240, Order filed Feb. 19, 2013, Denying Rule 59 Motion and Denying Motion to Appoint New Counsel

Should the Court need anything further, please do not hesitate to contact me. By copy of this letter, we are serving opposing counsel with same.

Sincerely,

David Alexander
Appellate Defender

cc: Donald J. Zelenka, Esquire
Robert M. Dudek, Esquire

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | |
| COUNTY OF ORANGEBURG | ) | IN THE COURT OF COMMON PLEAS |
| | ) | |
| CHARLES O. SHULER, | ) | C.A. No. 03-CP-38-0359 |
| Applicant, | ) | |
| | ) | ORDER DENYING RULE 59, SCRCP/MOTION TO ALTER OR AMEND JUDGMENT |
| -vs- | ) | |
| | ) | |
| STATE OF SOUTH CAROLINA | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

This is a capital post-conviction relief ("PCR") case. Applicant was previously convicted of three (3) murders and burglary in the 1st degree by an Orangeburg County jury and sentenced to death for murder. His convictions and sentences were affirmed by the South Carolina Supreme Court.[1] Applicant subsequently filed a PCR application in the Orangeburg County Court of Common Pleas, and this Court conducted an evidentiary hearing regarding the same beginning on July 25, 2006 and concluding on July 27, 2006.[2] This Court issued an Order of Dismissal on May 24, 2011 denying and dismissing the above entitled PCR application with prejudice. This matter is currently before this Court by way of a Rule 59, SCRCP, Motion to Alter or Amend Judgment dated

---

[1] State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003).

[2] The record was allowed to remain open solely for the following reasons: (1) to take the testimony of applicant's appellate counsel Joseph Savitz on an issue of ineffective assistance of appellate counsel, which was taken a few weeks after the merits hearing; (2) for collateral counsel to submit a medical record or note, which was never submitted, and (3) for the State to submit the Solicitor's file to this Court to review for any potential Brady violation. Subsequently, Mr. Savitz' testimony could not be located and by agreement of the parties this Court reconvened solely for purpose of taking Mr. Savitz' testimony on the issue of ineffective assistance of counsel.

July 8, 2011 filed by applicant Charles O. Shuler ("Shuler" or "applicant"). In the Motion to Alter or Amend, applicant raised numerous objections to this Court's Order of Dismissal issued May 24, 2011.

A Rule 59 hearing was conducted by this Court on November 22, 2011 at the Richland County Courthouse. Present at the hearing were applicant, his collateral counsel, Jim Brown, Esquire *and* Melissa Armstrong, Esquire, Assistant Deputy Attorney General Don Zelenka, and Assistant Attorney General Anthony Mabry. At the Rule 59 hearing, applicant argued only the issue that he should be allowed to amend his PCR application, five (5) years post-trial, to assert a claim the Solicitor *allegedly* violated the South Carolina Supreme Court's holding in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing general conditions of confinement, and a claim of ineffective assistance of counsel with regard to failing to object to the Solicitor arguing general conditions of confinement *allegedly* in violation of the South Carolina Supreme Court's holding in Burkhart, which was handed down several years after this capital case was tried.

For the reasons set forth in this Order, this Court denies the Rule 59 Motion to Alter or Amend Judgment in its entirety. Additionally, for the reasons set forth in this Order, this Court also denies applicant's request for a late amendment to his PCR application. This Court also finds the proposed amendment lacks any substantive merit.

***Applicant's Written Objections***

In applicant's Rule 59/Motion to Alter or Amend, applicant raises numerous objections to this Court's Order of Dismissal denying and dismissing his PCR application. This Court denies each of these objections because they have no merit.

Applicant alleges this Court inappropriately issued its Order of Dismissal without informing

applicant which proposed Order it was going to adopt so applicant could file objections before the Court issued its Order of Dismissal. This Court would note it requested both applicant Shuler and Respondent to submit proposed Orders in January of 2011. Both applicant and Respondent knew this Court had previously been directed by the South Carolina Supreme Court to issue an Order in this case as soon as reasonably possible. Both applicant and Respondent submitted proposed Orders on January 12th of 2011 and provided a copy of their proposed Orders to respective opposing counsel at that time. This Court did not issue its Order of Dismissal in this case until May 24, 2011. Applicant had five (5) months to file any written objections to the State's proposed Order and did not do so. *See* Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992). Respondent filed no objection to applicant Shuler's proposed Order either. This Court carefully reviewed both proposed Orders in that five (5) month period of time, along with the record and exhibits in this case, and did not issue its Order of Dismissal until May 24 of 2011 finding the findings of fact and conclusions of law in Respondent's proposed Order which it adopted in its Order of Dismissal were appropriate and supported by the credible evidence and also making its own additional findings of fact and conclusions of law. This Court would also note it made changes to Respondent's proposed Order in drafting and issuing its Order of Dismissal. Therefore, this Court's Order of Dismissal is in compliance with and consistent with Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). *See also* Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992). Furthermore, collateral counsel has filed a Rule 59 Motion to Alter or Amend Judgment pursuant to the S.C. Rules of Civil Procedure, *See* Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992), raising its objections to this Court's Order of Dismissal, and this Court is addressing each of these objections in this Order. Therefore, this specific objection raised in the Rule 59 Motion has no merit and is denied.

Applicant alleges the drafting of a "proposed" Order by the Assistant Attorney General assigned to the case was improper because he did not participate in the PCR merits hearing.[3] This objection is merit-less for several reasons. First, applicant raised no objection to the drafting of the "proposed" Order by the Attorney General until after its submission.[4] Second, both Respondent and applicant Shuler submitted "proposed" Orders to this Court, and that is exactly what they were, "Proposed" Orders.[5] Third, and more importantly, this ground has no merit as this Court's *Order of Dismissal*, issued May 24, 2011, contains the findings of fact and conclusions of law *of this Court*, which did conduct the PCR merits hearing and did observe the testimony of each witness and make a credibility assessment accordingly. As a result, this objection is without merit and is denied.

Applicant also asserts this Court adopted "wholesale" the Proposed Order of the Respondent. This assertion is incorrect as this Court carefully and independently reviewed both proposed orders and adopted the findings it deemed appropriate and made its own findings of fact and conclusions of law in drafting and entering the Order of Dismissal filed in this case. This objection is therefore

---

[3]Assistant Attorney General Derrick McFarland handled the case for Respondent at the PCR merits hearing. Mr. McFarland subsequently left the Attorney General's Office and was replaced by Assistant Attorney General Anthony Mabry. Mr. Mabry prepared the Proposed Order which was submitted to this Court on behalf of the State. Collateral counsel also submitted a Proposed Order to this Court.

[4]This Court directed counsel for both the State and the applicant Shuler to submit proposed Orders with proposed findings of fact and conclusions of law. Applicant raised no objection to Assistant Attorney General Mabry drafting a "proposed" Order even though collateral counsel knew Mr. Mabry did not participate in the merit's hearing when this Court asked both sides to submit proposed orders. Applicant did not raise an objection until after the State submitted its proposed Order.

[5]This Court notes, if applicant's reasoning were accepted, it would be impossible for the State to submit a proposed Order where counsel who handled the merits hearing had left the Attorney General's Office to accept other employment. This objection is simply unreasonable and unworkable.

denied.

Applicant also objects to the Order of Dismissal on the grounds that allegedly this Court resolved every factual assertion against the applicant and given the voluminous record in this case, "it is incredible that every factual dispute was resolved against applicant." As a result, applicant alleges this Court did not participate in the creation of the Order of Dismissal but adopted wholesale the State's Proposed Order. This objection has no basis in fact, as this Court independently reviewed both proposed orders and adopted the findings it deemed appropriate and supported by the record and this Court's own credibility determinations and made its own findings of fact and conclusions of law in drafting and entering the Order of Dismissal which was filed in this case. To the extent every factual dispute was resolved against applicant, it was because the credible evidence and/or law controlled the decisions against applicant. This objection is therefore denied.

Applicant also objects on the basis that in the Order of Dismissal the Court made findings of fact which have no citation to the record. Applicant attached a chart with his Motion alleging this chart sets forth these alleged failings of the Court. This Court finds this objection has no merit. It is not necessary that this Court cite every record citation applicable to its findings of fact or conclusions of law, so long as the Court's findings are supported by the record itself. After carefully reviewing applicant's chart, this Court finds its findings of fact and conclusions of law with regard to the claims raised by applicant are supported by the record, though a specific record citation may not be indicated for each factual finding or conclusion of law.[6] This objection to the Order of

---

[6]This Court would note it did make one clerical error in its Order of Dismissal. The Order states a deposition of the victim's husband was taken by collateral counsel. (Order, p. 92). The deposition was actually taken by civil attorneys. This clerical error did not effect this Court's decision of the issue involved because this Court accepted that the deposition of the witness was taken. Who took the deposition of the victim's husband was irrelevant to this Court's decision

Dismissal is without merit and is denied.

In the Motion to Alter or Amend, applicant Shuler took most issue with this Court's denial of his *late* Motion to Amend his PCR Application. As previously discussed, this issue was the only issue raised and argued at the Rule 59 hearing before this Court. At the Rule 59 hearing, this Court heard argument from collateral counsel James "Jim" Brown and Assistant Attorney General Mabry and Assistant Deputy Attorney General Donald Zelenka.

Applicant alleges this Court should have allowed him to amend his PCR application several years after trial to assert *the Solicitor* violated the South Carolina Supreme Court's holding in Burkhart, and he also alleges he intended to raise a claim of ineffective assistance in this regard, and the Court should have allowed him to amend his application several years after trial to include this late claim as well. This Court finds this objection has no merit for the following reasons:

***Background of the Late Amendment***

Approximately one (1) year after the PCR merits hearing, applicant's collateral counsel James Brown forwarded a letter to this Court notifying the Court that applicant intended to amend his application and allege *the Solicitor* violated the South Carolina Supreme Court's recent holding in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) by arguing prison conditions.[7] However, subsequent to this letter, applicant did not file a Motion to Amend his Application, seeking leave of this Court to file any amendment, and did not file a Proposed Amended Application, *or* an Amended

---

on the issue involved.

[7]The letter dated July 11, 2007 makes no mention of any claim of ineffective assistance of counsel. The letter only notified the Court that applicant intended to file an amended application asserting the Solicitor in the present case violated the Court's holding in Burkhart.

Application asserting this new ground *until* he submitted his proposed order in this case in 2011.[8]

The merits hearing was conducted in this matter in July 2006. This case has now been pending over five (5) years since the completion of the merits hearing, except for the taking of appellate counsel Joseph Savitz' testimony on an unrelated issue, and this Court at no point granted leave to amend the application to include a ground the Solicitor violated Burkhart or that counsel was ineffective in failing to raise an objection the Solicitor violated Burkhart.

*Denial of the proposed Amendment*

This Court, in its discretion, declined to grant the late amendment under these circumstances.[9] Grombach v. Oerlikon Tool & Arms Corp., 276 F.2d 155 (4th Cir. 1960); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973). Furthermore, the issues raised by this claim were not addressed by any testimony at the PCR hearing, but was a completely new claim. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)(applicant should have been allowed to amend pleadings given there was testimony on the subject at the PCR hearing); Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 843 (1992)(amendments must conform to evidence presented at trial, not raise new claims): There was no testimony on either the direct appeal Burkhart claim or the ineffective assistance of counsel issue at the PCR merits hearing.

Under South Carolina law, a motion to amend is addressed to the sound discretion of the trial judge. Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 607 S.E.2d 711 (2005). Leave

---

[8]The first attempted assertion of a claim of ineffective assistance in this regard was not raised until applicant submitted an Amended Application with his proposed Order in 2011.

[9]In this Court's Order of Dismissal, this Court declined to grant the late amendment raising the direct appeal claim. This Court also found in the alternative that the direct appeal claim had no merit given this record. (See Order of Dismissal/Proposed Ground O).

to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201 493 S.E.2d 826 (1997). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004), *quoting* Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998); Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999). The party opposing the amendment has the burden of establishing prejudice. Foggle v. CSX Transp., Inc. 315 S.C. 17, 431 S.E.2d 587 1993).

This Court finds Respondent has met its burden of proof of showing prejudice under Rule 15, SCRCP. Clearly, since the trial of this case has been over for five (5) years, except for the taking of testimony of Mr. Joseph Savitz on a completely unrelated issue of ineffective assistance of appellate counsel, and solely because the transcript of his previous testimony could not be located on that unrelated issue, there was a complete lack of notice that this issue was going to be tried. There was no testimony taken on this claim or claims at the PCR hearing. Furthermore, at this point, Respondent is limited to the record of the criminal trial itself in refuting this alleged claim, since no further testimony can be taken unless this Court re-opens the record three (5) years after the fact.

Furthermore, this Court would note and find, the State did not consent to the trial of this issue. *See* Simpson v. Moore (finding allowing amendment was proper where State consented to trial of issue). The direct appeal issue was not raised by applicant until approximately one (1) year after the merits hearing. The ineffective assistance issue was not raised by applicant until he submitted his proposed Order. Therefore, under all of these circumstances, this Court finds, in its discretion, that the late amendment should not be allowed. As a result, this Court declines to alter

or amend its judgment to grant the late amendment as either a direct appeal claim or as a claim of ineffective assistance of counsel.

*The direct appeal claim is not cognizable in PCR*

Even if this Court were to grant the late amendment, allowing a direct appeal claim alleging the Solicitor violated Burkhart, this claim is not cognizable in post-conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975). This issue, as applicant framed it in his 2007 letter, and in a chambers conference with this Court at a status conference on this case in 2009/2010, was a direct appeal issue that was not preserved at trial and not raised on appeal to the South Carolina Supreme Court.[10]

Applicant did not raise any allegation at his criminal trial and sentencing proceeding regarding the Solicitor improperly arguing or introducing prison conditions nor did he raise such an issue in his final brief to the South Carolina Supreme Court. Similarly, the South Carolina Supreme Court previously found that an appellant's similar claim that the Solicitor's cross-examination and closing argument were prejudicial error was procedurally barred on direct appeal because trial counsel failed to make "any meaningful objection to this line of cross-examination, and we cannot review it." State v. Gardner, 332 S.C. at 393-94, 505 S.E.2d at 339-40. The decision in Gardner was handed down several years before applicant's case was tried before a jury. Likewise in State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005), decided several years after this case was tried, the Court found a similar claim procedurally barred on direct appeal due to the lack of a

[10]At an in-chambers conference with the attorneys on August 19, 2009, collateral counsel made clear that he did not wish to raise a claim of ineffective assistance of counsel in this regard. His claim was solely that the Solicitor violated the South Carolina Supreme Court's holding in Burkhart. The State objected to any late amendment.

proper objection by the appellant. The claim applicant sought to raise by late amendment in his letter of 2007 and at a chambers conference on August 19, 2009, was a direct appeal issue, and is clearly procedurally barred at this point and was waived and abandoned by applicant at trial. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Applicant now seeks to raise this direct appeal issue in his State collateral PCR proceeding.[11] Even if this Court were to allow the late amendment of applicant's PCR application to include this direct appeal ground, this Court would be forced to dismiss this ground as it is not cognizable in post-conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975). Therefore, the interests of justice do not require or dictate that late amendment should be allowed.

*Respondent has shown Rule 15 prejudice*

With regard to the new claim of ineffective assistance of counsel, Respondent has shown prejudice under Rule 15, SCRCP. Respondent did not consent to the trial of this issue. In fact, Respondent objected to any late amendment at the in-chambers conference with this Court on August 19, 2009. At that in-chambers conference, collateral counsel represented to this Court that it did not wish to amend its PCR application to include a claim of ineffective assistance in this regard but

---

[11]Applicant cites Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) for the proposition that a direct appeal claim can be asserted in PCR; however, Riddle involved the assertion of a Brady claim and related due process claim where the evidence was discovered after the applicant's capital trial and sentencing proceedings. These type of claims are routinely allowed in PCR. However, the direct appeal claim applicant wishes to raise here is not cognizable based on numerous cases decided by our state Supreme Court. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981) ; Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), *also referencing* Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973).

strictly a claim the Solicitor violated the holding in Burkhart. Collateral counsel argued that as a result, no new testimony need be taken regarding this issue.

This Court specifically notes that no testimony was offered regarding this issue at the PCR merits hearing. Trial counsel was not asked why they did not object to the Solicitor's cross-examination of expert James Aiken or the Solicitor's closing argument. The reason being that this issue was not raised in any PCR application filed by applicant Shuler or at the PCR merits hearing. As a result, there was no testimony on this issue from trial counsel regarding why they did not object to the alleged Burkhart violation. Therefore, Respondent has been specifically prejudiced by the late proposed amendment of an ineffective assistance claim in this regard.

Furthermore, applicant has mis-characterized the record in his Rule 59 Motion. The record of the PCR merits hearing was allowed to remain open for only three (3) reasons, to take the testimony of appellate counsel Joseph Savitz on an unrelated issue of ineffective assistance of appellate counsel raised by applicant in his PCR application, to submit a medical record or note on another issue, which was never submitted by applicant, and for Respondent to submit the Solicitor's file to this Court to review for any possible Brady violation. The testimony of Mr. Savitz was taken just a few weeks after the merits hearing. Subsequently, the transcript of Mr. Savitz' testimony could not be located, and the parties agreed to take Mr. Savitz' testimony again at a later date. This later hearing was conducted solely for the purpose of taking Mr. Savitz' testimony again, not to introduce new evidence regarding any other claims. Additionally, applicant did not file any amended application before that hearing. Applicant did not file an amended application asserting ineffective assistance of counsel for failing to object to the Solicitor's alleged violation of Burkhart until applicant submitted his proposed Order in this case. As a result, Respondent was clearly prejudiced

by the late proposed amendment where Respondent did not have the opportunity to elicit testimony from counsel on a claim alleging ineffective assistance of counsel.

Additionally, this Court finds Respondent has established Rule 15, SCRCP prejudice with regard to any direct appeal claim that the Solicitor violated Burkhart in this case. Because Petitioner did not raise this issue at the PCR merits hearing, the State was not able to elicit any testimony from the Solicitor, Walter Bailey, on this issue. As a result, Respondent would be prejudiced by this Court allowing any late amendment of the PCR application to allow this claim.

Essentially, what collateral counsel is asking this Court to do is to allow him to file late amendments to his PCR application alleging claims that the State has not had an opportunity to rebut, respond to, or explain by sworn testimony in the record. While this could certainly be advantageous to applicant, it would not be fair or just. As a result of the above, this Court finds Respondent has established Rule 15, SCRCP prejudice with regard to the proposed late amendment of both claims and therefore denies the late amendment.

*There is no merit to this proposed ground*

Furthermore, even if this Court were to grant such a late amendment, and even if this Court were to ignore the fact that the direct appeal claim is not cognizable in post-conviction relief, and even if this Court were to ignore the prejudice to Respondent from granting a late amendment of the direct appeal claim and the ineffective assistance of counsel claim, there is no merit to this proposed ground either as a direct appeal claim or as a claim of ineffective assistance of counsel. As a result, the interests of justice to not require or demand that this Court allow the proposed amendment in its original form (as a direct appeal claim) or in its later form (as an IAC claim).

. . . During applicant's trial, the State did not offer any lay witness or expert witness in the guilt

phase to testify to general conditions of confinement of an inmate sentenced to life without parole. During applicant's trial, the State did not offer any lay witness or expert witness in the penalty phase to testify to general conditions of confinement of an inmate sentenced to life without parole. Furthermore, the State did not offer any lay or expert witness on prison conditions at all.

During the penalty phase of applicant's trial, *applicant called* James Aiken, former warden of C.C.I., to testify as an expert in prisons and corrections specifically with regard to prison classification and facility management. (R. p. 2794, ll. 8-10). *Applicant elicited* from Mr. Aiken *on direct examination* the privileges that are accorded to inmates in a maximum security prison. Mr. Aiken testified on direct examination to general or good conditions of confinement in a maximum security prison. Mr. Aiken testified to the fact that prisoners are allowed to worship, recreate, look at television, converse, read, seek legal advice, work, receive wages, and to have visitation. (R. p. 2797, ll. 4-22). Mr. Aiken testified on direct examination that these good or favorable conditions are mandated by law.

Applicant also elicited on direct examination from Mr. Aiken bad prison conditions for those who violate prison rules and regulations. Mr. Aiken testified these inmates are in very maximum security environments, in continuous lock-up, in continual visual contact with guards, and have very limited interaction with staff and other prisoners. (R. p. 2798).

Mr. Aiken also testified to other bad conditions of confinement on direct examination. Mr. Aiken testified to how other inmates informally classify each other, from the highest ranking inmate which would be a bank robber or safe-cracker to the lowest being a child-killer, such as applicant. (R. p. 2800). Mr. Aiken testified that child-killer's like applicant are not liked even by inmates and are subject to attack and victimization and have no control over other people. (R. p. 2800-2801).

On direct examination, Mr. Aiken testified to other general conditions of confinement such as supervision of an inmate's daily routine including what time the inmate gets up, what time they go to work, who they may call, what time they eat, and what time they worship. (R. p. 2795). Mr. Aiken also testified to the fact that prison officials are always looking for weapons and always looking for gang activity. (R. p. 2796). Aiken testified on direct that in prison, unlike in society, there are rules and regulations for everything, including cleaning up your room, and a violation of the rules results in consequences to the inmate. (R. p. 2796-2798). Aiken also testified inmates are required to be constructively engaged in some fashion, such as work, unless their behavior is such that they cannot be constructively engaged. (R. p. 2797). Aiken testified that there is a prison within a prison for those who repeatedly disobey rules. Aiken also testified on direct examination that "prisons are very dangerous places. You have very aggressive people and very violent people,.." **(R. p. 2800, ll. 16-17).** Aiken also testified that based applicant's conviction as a child killer, he would not be liked by other inmates and would probably be subject to victimization. **(R. pp. 2800-2801).** The record shows this testimony of general prison conditions, both good and bad, was elicited *by applicant* for his benefit *on direct examination* of Mr. Aiken. The record also shows that Aiken's direct examination testimony portrayed prison as a dark and dangerous place and a life sentence as severe or harsh, and was not merely offered to show adaptability to prison. **(R. pp. 2789-2801).**

On cross-examination, the Solicitor delved into matters which applicant had clearly opened the door to and which Mr. Aiken had testified to on direct examination. **(R. pp. 2801-2821).** The Solicitor clarified the separate classification systems in the prison system and exactly what classification system applicant would be under. **(R. pp. 2801-2822).** The Solicitor also inquired

about and clarified the privileges or good conditions that applicant, serving a life sentence without parole for murder, would have available to him. (R. pp. 2801-2821). The Solicitor also showed that contrary to Mr. Aiken's implication during his direct examination that the prison system could control prisoners, and Petitioner would not be a danger to himself or others since Mr. Aiken never lost a prison guard during his tenure, that Mr. Aiken had lost eleven (11) prisoners to death during his tenure. (R. pp. 2801-2821).

On re-direct examination, Mr. Aiken testified that going to prison is a traumatic experience. (R. p. 2816). Mr. Aiken also testified that living in a prison environment is "stressful from the standpoint, yeah, you can go to recreation, but you're recreating with some people that will kill you without any reason and you're constantly having to watch your back.." (R. p. 2817, ll. 11-15). Aiken testified on re-direct examination that the fact that he had lost approximately a dozen prisoners during his tenure showed the dangerous nature of the prison environment. (R. p. 2817). Aiken also testified on re-direct examination that "[p]risons are very dangerous with predatorial, violent people." (R., p. 2817, ll. 22-23). Aiken also testified that work and privileges are used to establish a structure for the prisoner to obey the rules and regulations applicable in prison, and if they could not do that, the prison system had a way of managing that misbehavior. (R. p. 2817-1818). Mr. Aiken also testified that living in prison was like "sitting in a house full of rattlesnakes, and one can attack you without provocation, and you can never leave that house." (R. p. 2819, ll. 16-18). Aiken also stated that "[n]o matter how good you may be or how bad you may be, you're around people that are more dangerous than you are and people that are wanting to make a name by inflicting violence against you, especially as it relates to the nature of your offense." (R. p. 2819, ll. 18-23). It is clear from Aiken's direct and redirect testimony, that applicant sought not only to show that he

was adaptable to prison, but that a life sentence would be harsh and severe punishment. (R. pp. 2789-2801, 2816-2820).

Applicant was tried, convicted, and sentenced to death in March of 2001. At the time applicant's criminal case was tried, State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) was the controlling authority on the issue he raises here. In Plath, our Supreme Court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" - which our Supreme court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment." On cross-examination, the State asked about another inmate's escape, which the Court ultimately held was permissible:

> Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626. The Plath Court also held the State's challenged questioning was *only a proper response* to what that Court considered, at the time, to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

> In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (*emphasis added*). *See also* State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison). The Plath Court additionally found there was no prejudice to the defendant.

The facts of this case are no different, and in fact are more favorable to the State. At trial, through his expert Mr. Aiken, applicant repeatedly attempted to portray a life sentence just as the defendants' expert did in Plath. Additionally, applicant elicited testimony of general prisons conditions, *both good* and bad, on direct examination. Pursuant to Plath, and just as in Plath, the Solicitor was entitled to respond through cross-examination. The Solicitor was entitled to demonstrate or remind the jurors that life imprisonment was not the "total abyss" and "was by no means as hopeless" as applicant would have it believed. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. Furthermore, applicant *opened the door* to cross-examination on the subject of prison conditions, both good and bad, by the testimony he, applicant, elicited on direct examination. **(See Record citations above).** There is no merit to this ground either as a direct appeal claim or as a claim of ineffective assistance of counsel for failing to object to the Solicitor's cross-examination or argument.

The inescapable conclusion is that applicant wanted to offer both adaptability evidence and general conditions evidence. Given that general conditions evidence was intentionally elicited by applicant on direct, for applicant's benefit in portraying a life sentence as a harsh punishment, the Solicitor was entitled to cross-examine the witness on the conditions issue. *See* State v. Taylor. Moreover, the lack of prejudicial error under such circumstances was acknowledged in well established precedent. State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628, *cert. denied* 467

U.S. 1, 106 S.Ct. 1669 (1984). *See also* State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982)(evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

It must also be remembered that applicant is not attempting to raise a claim here that his counsel was ineffective for opening the door to cross-examination on this subject by introducing testimony of general prison conditions on direct examination and attempting through his expert to portray a life sentence as harsh to applicant's advantage. Applicant is now attempting to raise a claim that the Solicitor violated the holdings in Burkhart and a claim that his counsel was ineffective in failing to object to the Solicitor violating Burkhart. The record shows applicant introduced the issue of prison conditions, both good and bad, into this case, not the Solicitor. And, he did so for his own benefit. This Court cannot ignore the fact that Plath was decided approximately nineteen (19) years before the trial of this case, and applicant chose to introduce this testimony for his benefit despite the holding in Plath. The Solicitor's cross-examination was clearly proper under Plath. And, counsel was not ineffective in failing to object to the Solicitor's cross-examination because it was entirely proper.

Nor did the Solicitor's closing argument constitute reversible error. Since applicant introduced general prison conditions into this trial through the testimony of his expert on direct examination, the Solicitor was entitled to argue matters in evidence, including those matters properly brought up on direct examination, cross-examination, and on re-direct examination by applicant. The State did not characterize the conditions of confinement as aggravating evidence, and it did not suggest that applicant would not be punished if sentenced to life imprisonment. Instead of attempting to pressure the jury, the Solicitor simply addressed the nature of the sentence that applicant's

attorneys sought and argued and that it was not an appropriate punishment in light of the facts. Thus, the State's evidence and argument were merely explanatory; and the Solicitor based his argument on the record and the reasonable inferences therefrom, as he is required to do as the representative for the people of the State of South Carolina. *See* State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). *See also* Bell v. Evatt, 72 F.3d 421, 437 (4th Cir.1995) (holding that remarks that "were consistent with the record and ... rationally inferred from the ... evidence" were not improper). Furthermore, given the fact that applicant introduced this testimony, the Solicitor was entitled to anticipate that applicant would argue the same evidence in his closing argument, and he in fact did. (See R. p. 2953, ln. 11- 2954, ln. 1 & R. p. 2954, ll. 12-25). The Solicitor's closing argument was not improper. Therefore, counsel was not ineffective in failing to object to the Solicitor's closing argument in this regard. Any, such objection would have been overruled by the trial judge.

Here, as in Plath, and without the guidance specifically given in the later cases of Bowman (November 2005 Opinion) and Burkhart (January 2007 Opinion), and Bryant, applicant (at the 2001 trial) voluntarily elicited the testimony as part and parcel of their case in the penalty phase. The State merely succinctly and fairly responded. Moreover, since the evidence was in the record, and both defense and the State argued prison conditions based on the evidence, the record based responsive argument cannot support proof of error, as there could be no reasonable basis for an objection. *See* State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999)("solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony"). Respondent's arguments as to conditions, again under Plath, were not prejudicial as such arguments were succinct and confined to the evidence elicited in fair response. The Solicitor did not violate Burkhart and counsel was not ineffective in failing to object.

Additionally, the fact remains that the Solicitor could not have violated the South Carolina Supreme Court's holding in Burkhart, because Burkhart was decided long after this case was tried. This case [applicant's case] was tried in 2001. The decision in Burkhart was handed down in 2007.[12] At the time this case was tried, Plath had been decided and State v. Gardner, 332 S.C. 389, 505 S.E.2d (1998). In Gardner, the appellant raised on appeal the Solicitor's cross-examination of his prison expert on general conditions of confinement in the prison setting. The South Carolina Supreme Court held the issue was not preserved for appellate review by an appropriate objection. Gardner, *supra*. However, in conducting its statutory proportionality review, the Court found that "the sentence was not the result of passion, prejudice or any other *arbitrary factor*, and is neither excessive nor disproportionate." Gardner, 332 S.C. at 394, 505 S.E.2d at 340 (*emphasis added*). Additionally, in 1989, our Supreme Court decided State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). In Patterson, the appellant claimed the Solicitor's closing argument trivialized a life sentence in violation of State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987)(wherein the Court disapproved the solicitor's reference to "those bad life sentences.") The Court held the Solicitor's comments were not improper because the thrust of the Solicitor's comment was to distinguish life on death row, where the appellant had been residing, from life in the general prison population where appellant would be placed if given a life sentence. The Court further found the Solicitor was "directly quoting

[12]The decision in State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005) and State v. Bryant, 372 S.C. 305, 642 S.E.2d 582, 589 (2007) were also handed down long after applicant's criminal trial.

appellant's own witness" and was "clearly within the record as required." Patterson, 299 S.C. at 282, *citing* State v. Reed, *supra*. [13]

Furthermore, Burkhart is distinguishable from the present case. In the present case, the State did not call an expert to testify to general conditions of prison confinement or favorable conditions of confinement in its case in chief in the penalty phase, which the State did in Burkhart. Nor did the State call an expert witness in reply on this subject. Here, as in Plath, *applicant* voluntarily elicited the testimony as part and parcel of *his* case in the penalty phase. The State simply succinctly and fairly responded to the evidence *introduced by applicant* through cross-examination and closing argument. This is a major distinction from Burkhart where the defense objected to the evidence from the State, and had not put in such evidence, but merely "attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life...." Burkhart, 371 S.C. at 488, 640 S.E.2d at 453. In the present case, applicant has failed to show error or prejudice in the Solicitor's questions or his closing argument in light of his direct examination on prison conditions. He has also failed to show counsel was deficient or prejudice from the failure to object. There is no merit to this ground as a direct appeal claim or as a claim of ineffective assistance of counsel.[14]

---

[13]Nor did the Court find that the comment undermined the requirement that life imprisonment be understood in its plain and ordinary meaning, or that the defendant be allowed to present evidence in mitigation of death. Patterson, 299 S.C. at 282, *other citations omitted.*

[14]This Court would also note that the Solicitor's cross-examination clarified for the jury exactly what custody status *applicant* would be under or could advance to in the Department of Corrections given *his offenses* and what possible institutions *he* would be could be placed in. The Solicitor's cross-examination also clarified what favorable conditions of confinement would be available *to applicant* given his particular offenses. Such testimony would be in compliance with language from the subsequent decisions in Bowman and Bryant that conditions of confinement must be tied to the particular defendant on trial. Furthermore, given this clarification, there was no danger the jury would be confused about what conditions applicant would be confined under. Since applicant introduced the issue of prison conditions through his

Therefore, the interests of justice do not require granting the late amendment either as a direct appeal ground or as a claim of ineffective assistance of counsel.

Furthermore, the holding in Burkhart would not be applicable to actions which took place in this case tried in 2001. This case is on collateral review. Retroactive application of this decision on applicant's claim would violate Teague v. Lane, 489 U.S. 288, 309 (1989) and State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994), because Burkhart established a new rule of law that cannot be applied retroactively to this case since this case became final almost six (6) years before that rule was announced. *See also* Talley v. State, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity").[15] Old rules of constitutional law are those that were "dictated by precedent existing at the time the defendant's conviction became final." *See* Teague, 489 U.S. at 301. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the

---

expert by portraying life in prison as harsh and severe and additionally introduced testimony through his expert of adaptability to prison, there can be no prejudice from the cross-examination testimony or the Solicitor's closing argument referencing the same. This ground has no merit as a claim against the Solicitor or against counsel.

[15] The United States Supreme Court has explained that the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment). Further, "[i]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, *cf.* Younger v. Harris, 401 U.S. 37, 43-54 ... (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." Teague, 489 U.S. at 310.

time the defendant's conviction became final." Id. at 301 (internal citations omitted) (emphasis in original).

As the United States Supreme Court has explained, a rule is not dictated by precedent - and is therefore a new rule of constitutional law - if, prior to its announcement, its existence was "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990). In other words, a rule is an old rule of constitutional law only if all reasonable jurists would have agreed that it existed prior to its announcement. This definition of a new rule is meant to "validate[ ] reasonable, good?faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." O'Dell v. Netherland, 521 U.S. 151, 156 (1997).

It cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in Burkhart existed before it was decided. In Burkhart, the Court held for the first time, since its decision in Plath, that the admission of evidence regarding general prison conditions constituted reversible error. Although *dicta* in Bowman, which also was not decided until this case was in collateral review, indicated that it was error to admit evidence regarding general prison conditions, the Court did not disturb the death sentence in Bowman. The Court likewise did not disturb the death sentence on direct appeal in Gardner. Rather, the Burkhart decision is the first time the Court concluded that the State's examination of a witness about general prison conditions constituted reversible error.

Further, Plath's holding, that the defense could not present evidence of adaptability to life imprisonment, had been overruled by the United States Supreme Court's Opinion in Skipper; and the type of evidence found to be reversible in Burkhart was raised in at least three cases: Bryant, Bowman and Gardner, without the Court disturbing the death sentences in any of those cases. As

a result, Respondent alternatively submits that the Court should deny relief because the rule in Burkhart was a new rule that cannot be applied retroactively under Teague, and the current proposed amendment should be rejected on that basis. This Court agrees.

It is also *res judicata* that the sentence in this case was not the result of an "arbitrary factor." State v. Shuler, 353 S.C. 176, 189, 577 S.E.2d 438 (2003)("After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the.."). "'*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.'" Duckett v. Goforth, 374 S.C. 446, 464-65, 649 S.E.2d 72, 81-82 (Ct. App. 2007) [citing Nelson v. QHG of S. C., Inc., 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct.App.2003) (quoting James F. Flanagan, *South Carolina Civil Procedure* 642 (2d ed.1996)), *rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005)].

"*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Under the doctrine of *res judicata*, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). A party seeking to preclude litigation on the grounds of *res judicata* must show: (1) a final, valid judgment on the merits; (2) identity of parties; and (3) the second action must involve matters properly included in

the first suit. Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006); Plum Creek Dev. Co., 334 S.C. at 34, 512 S.E.2d at 109.

Also, the South Carolina Supreme Court has previously applied *res judicata* in capital criminal cases. *See* State v. Gilbert, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) ("Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore res judicata"). In the present case, all three elements for application are met. Further, the Court's finding that "the sentence in this case is not the result of passion, prejudice or any other arbitrary factor" in Shuler, was not predicated upon a procedural bar and that doctrine bars re-litigation of the issue now attempted to be raised on P.C.R.

In Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991), the Court admonished inmates that "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice." *Cf.* Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (recognizing that the doctrine of *res judicata* flows from the principle that public interest requires an end to litigation); Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956) ("[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be some end to litigation"). The United States Supreme Court has also emphasized the importance of finality in our criminal justice system. *E.g.*, Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting

in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").[16] Again, applicant seeks to re-litigate an issue that has already been resolved adversely to him, which would frustrate the concept of finality, since the system has not simply failed [applicant] and denial of relief without further review would not, for the reasons set forth herein, "amount to a gross miscarriage of justice," as envisioned in Aice. Therefore, denial of relief on the direct appeal allegation is appropriate.

Finally, this Court finds that the record rebuts any allegation of a due process violation in the presentation of this evidence. A prosecutor's improper closing argument may constitute a denial of due process only if it renders the proceeding "fundamentally unfair." Bennett v. Angelone, 92 F.3d 1336, 1345 (4th Cir.1996) (internal quotation marks omitted); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). *See also* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (same). In determining whether a defendant's due process rights were violated by a prosecutor's closing argument, a reviewing court must first determine whether the remarks were, in fact, improper. *See* United States v. Morsley, 64 F.3d 907, 913 (4th Cir.1995). If so, the court then must decide whether the improper remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial."

---

[16] "The fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 150 (1970)." Teague, 489 U.S. at 309 (emphasis added by Court); Bator, "*Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*," 76 Harv.L.Rev. 441, 450-451 (1963) ("[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality") (emphasis omitted).

Id. "This determination requires the court to look to the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Boyd, 147 F.3d at 329 (internal quotation marks omitted).

The record shows the State did not affirmatively present evidence about the conditions of life in the general population as part of it case-in-chief or in reply. Rather, it merely responded to trial counsel's presentation through cross-examination and argument. Further, the challenged portion of the Solicitor's argument was merely a brief point in a lengthy argument. *See* App. pp. 4755-4802. Also, the facts of this case, as set forth in the Court's decision in State v. Shuler, show overwhelming and conclusive proof that applicant committed three exceptionally aggravated murders while in the commission of burglary, and physical torture. Thus, there is no reasonable probability that applicant would not have been sentenced to death but for the Solicitor's cross-examination and argument. Wong v. Belmontes, 130 S.Ct. 383 (2009). *See* Gardner v. Ozmint, 511 F.3d at 430-31 ("given the abundant and damaging evidence presented at Gardner's trial," trial counsel's error in introducing evidence of racial motive for murder was not prejudicial); Jones, *supra*. *See also* Plath, 281 S.C. at 9-10, 313 S.E.2d at 624 (Court unanimously affirmed death sentence because erroneous admission of prison condition evidence was not accompanied by any demonstration of prejudice). *Cf.* Burkhart, 371 S.C. at 493-95, 640 S.E.2d at 454-57 (Toal, C.J., dissenting).

There is nothing that applicant was not allowed to address or rebut; rather, there was a level playing field for all parties - - the very goal of due process. *See generally* Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197 (1977)(finding a due process violation where "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or

explain"). Applicant introduced this evidence into the trial of this case on direct examination, rebutted the Solicitor's cross-examination on re-cross examination of his witness and argued the evidence introduced through his witness in his closing argument. It is clear from the record applicant wished to elicit testimony about the harshness of prison life. He used the same in his closing argument to the jury. Part of the reason Mr. Aiken was called was to establish that applicant would most likely be a victim in SCDC, which, was not adaptability evidence. It is clear, from the trial court record, that the harsh and miserable conditions of living a life without parole sentence was part and parcel of the defense case. Moreover, applicant wanted to show that good prison conditions or privileges were mandated by law. It is difficult to see any prejudice, much less a reasonable probability that but for admission of the evidence that the result of the proceeding would have been different, especially where applicant presented and argued the evidence to his benefit. Wong v. Belmontes, 130 S.Ct. 383 (2009); Jones v. State, 322 S.C. 329, 504 S.E.2d 822 (1998).

*Conclusion to this Issue*

In sum, applicant has failed to show error and prejudice where applicant essentially received what was requested, that is to introduce evidence (of his own choosing and though a defense witness as opposed to a prosecution witness), and to argue that the punishment of life imprisonment was an extraordinarily harsh sentence, and the State merely cross-examined the defense witness on same. Not only was this case tried without the benefit of Burkhart, it is also specifically distinguishable from Burkhart in the major respect of who offered the evidence, when, and whether there is fair response. Moreover, the record demonstrates that the balance of evidence on each side fails to

support a finding of prejudice on this record.[17] Lastly, given the overwhelming evidence of aggravating circumstances, and the mitigation evidence, there could be no "reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Jones, 332 S. C. at 340, 504 S.E.2d at 829. There is overwhelmingly strong evidence in aggravation, including the finding of torture, burglary first degree, and the murder of not one but two adult victims and one child victim in a vicious shooting with a shotgun, the victims having been surprised in their own home. Applicant has not established error on these particular facts, however, if error could be shown, he has not established prejudice such that would entitle him to a new proceeding. Applicant is not entitled to any relief on this issue. As a result, this Court did not err in declining the late amendment whether as a direct appeal claim or as a claim of ineffective assistance of counsel. Therefore, this Court declines to alter or amend its judgment.

## CONCLUSION

For the above stated reasons, applicant's Rule 59 motion to alter or amend the Court's judgment and his objections set forth in the same are denied. The application for post-conviction

---

[17] *See* John Richard Wood v. State of South Carolina, C/A 2005-CP-23-4737, wherein the PCR judge declined to find prejudice in similar circumstances: "Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State's evidence on this issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State's and defense's evidence of conditions of confinement does not establish Strickland prejudice." Order of Dismissal with Prejudice, filed December 19, 2007. *See also* Brad Sigmon v. State of South Carolina, C/A 2006-CP-23-6547, wherein the PCR judge reached a similar result.

relief is denied in its entirety for the reasons set forth in this Court's Order of Dismissal issued May 24, 2011.

IT IS SO ORDERED.

The Honorable L. Casey Manning
Circuit Court Judge
Fifth Judicial Circuit

Jan. 7, 2013

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF ORANGEBURG | ) | IN THE COURT OF COMMON PLEAS |
| SAMMIE LOUIS STOKES, #5069<br>Applicant,<br>vs.<br>STATE OF SOUTH CAROLINA,<br>Respondent. | ) | C/A No. 01-CP-38-1240<br>ORDER DENYING<br>RULE 59 MOTION AND DENYING<br>MOTION TO APPOINT NEW COUNSEL |



This matter comes before this Court pursuant to a November 15, 2010 Motion to After or Amend filed by Applicant. This Rule 59 motion arises from the Order of Dismissal dated October 21, 2010 and filed October 22, 2010. The Respondent made a "Respondent's Response in Opposition to Rule 59 Motion" on November 29, 2011. A hearing on the motion was held in Richland County on December 8, 2011. At the December 8, 2011hearing, the Applicant was not present and his attendance had been waived by his counsel. Appearing on behalf of Applicant Stokes were court-appointed counsel Keir Weyble and Robert Lominack. The Respondent was represented by Assistant Deputy Attorney General Donald J. Zelenka and Assistant Attorney General Melody J. Brown. No testimony was taken at the hearing. The Court gave both counsel until January 27, 2012 to prepare a post-Rule 59 hearing memorandum, after counsel for Applicant rejected a revised request to provide either a proposed or corrected Order. The memorandums were timely submitted by both parties..

After throughly reviewing the memorandum and pleadings submitted by both parties, on

February 28, 2012, this Court held a brief status conference in chambers with Applicant's counsel Robert Lominack and Respondent's counsel Donald J. Zelenka. During the conference, this Court noted that he had concerns about the fact that the Applicant had not been called at the PCR hearing as a witness and then after the hearing an attempt was made to submit the Applicant's affidavit after the evidentiary record was complete. This Court stated that he intended to deny the consideration of the submitted affidavit when Stokes could have been called as a witness. At the status conference, Respondent's counsel was asked by the Court to provide the Court and opposing counsel with a proposed order denying the Rule 59 motion. The Court allowed opposing counsel 10 days to provide objections to the proposed order. Respondent's counsel provided this Court and opposing counsel an initial proposed order denying the Rule 59 motion on March 27, 2012.

On March 30, 2012, Applicant's counsel expressed by an email a concern whether the proposed order was responsive to the Court's intent from the chambers conference. On April 9, 2012, this Court, in an email through his law clerk, advised counsel of his intent to sign the March 28, 2012 proposed order and gave counsel further opportunity to place objections in the record.

On April 12, 2012, counsel for the Applicant filed objections to the adoption of the proposed order and an additional request to appoint counsel due to the recent decision in Martinez v. Ryan, _ U.S _, 2012 Westlaw 912950 (March 20, 2012) in a pleading dated April 10, 2012. In the April 12, 2012 objections, the Applicant incorporates his earlier assertions in the November 15, 2010 pleading. In addition, he contends that appointment of new counsel is necessary because current PCR counsel erred in failing to call Applicant Stokes at the time of the

evidentiary hearing and belatedly attempting to supplement the record with an affidavit which the Court rejected. He contends that an intervening decision in the U.S. Supreme Court, Martinez v. Ryan, _ U.S _, 2012 Westlaw 912950 (March 20, 2012), should allow for the replacement of current counsel at this stage to investigate and formulate whether current PCR counsel was ineffective in their unsuccessful strategic decision in failing to call Stokes as a witness.

After reviewing the recent pleadings, including the April 10, 2012 objections to the adoption of the proposed order, this Court then requested the counsel for the Respondent to submit a revised proposed order supplementing it with the additional case history and a denial of the objections and motion to appoint new counsel. On April 19, 2012, the Respondent submitted a revised proposed order. This Order follows and denies the Rule 59 motion in its entirety and the motion to appoint new PCR counsel.

I.

ORDER PREPARATION.

In his Rule 59 motion and argument before this Court, Stokes initially claims that the Court erred in signing a proposed order provided by Respondent's counsel consistent with the Respondent's post-hearing memorandum of law that had not been specifically requested by the Court. The Supreme Court of South Carolina initially gave this Court a deadline of September 1, 2010 to enter a final order in this matter. On August 29, 2010, Respondent's counsel - who was going to be unavailable during the remainder of the period - provided this Court (and opposing counsel) with a proposed order of dismissal by email.[1] The basis for the State providing the

[1]In the August 29, 2010 email to this court, counsel for Respondent stated:
"To: Honorable L Casey Manning
CC: Robert Lominack, Keir Weyble

unsolicited proposed order was explained to the Court and opposing counsel in the email that date. The Court subsequently requested opposing counsel on Applicant's behalf to also provide a proposed order to the Court which was done on October 1, 2010. The Court signed an Order of Dismissal generally consistent with the Respondent's submission on October 21, 2010.

The Applicant's initial broad complaint against the order is unclear other than the fact the court relied extensively on a proposed order supplied by Respondent and ruled against their position. Applicant relies upon Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). However, in Hall, the Court the Supreme Court did not preclude a PCR hearing court's from requesting proposed orders from counsel and confirming them after review, but stated:

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge that in all

---

Re: Respondent's Proposed Order - Order Deadline - September 1, 2010

Dear Judge Manning:

I am aware of the September 1, 2010 Order deadline entered by the South Carolina Supreme Court in this matter. As of this date, I have not received any specific request from you or direction concerning this matter concerning the preparation of a proposed order. I am similarly not aware of any request made of the opposing party. Out of an abundance of caution, I have prepared the following proposed Order of Dismissal consistent with the positions the Respondent made in its post-hearing memorandum on February 16, 2010. I will be out of town this week at a conference and was concerned that if you wished to have the State prepare an order consistent with our earlier position, I would have been unable to provide it to you by the Wednesday deadline currently set by the Supreme Court.

Of course, if this is not consistent with your wishes an/or a continuance from the Supreme Court deadline order is sought, please ignore the attached proposals.

By copy of this email with attachments in pdf and Word and Wordperfect, I am advising opposing counsel of this communication. "

other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it. . . .

Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (S.C.2004).

Stokes contends that the apparent adoption of the state's unsolicited proposed order was error because it rejected his position concerning the existence of a conflict of interest and a waiver of the conflict of interest arising from defense counsel Thomas Sims prosecution in 1991 and representation in 1999. He also suggests this error in the adoption of the portions of the proposed order arises from the failure on the part of the order to specifically cite federal constitutional cases concerning knowing and voluntary waivers, such as Boykin v. Alabama, 395 U.S. 238 (1969), Glasser v. U.S., 315 U.S. 60 (1942) and Johnson v. Zerbst, 304 U.S. 458 (1938). *Motion to Alter*, p. 5-6.

However, Stokes ignores the conclusions by this Court that implicitly acknowledges this constitutional waiver standard in the following findings and conclusions:

This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that **Stokes knowing[ly] and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial.** Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

Order, p. 25. (emphasis added).

This Court concludes as a matter of law that Thomas Sims's prior prosecution of Stokes does not create an actual conflict of interest and/or require a new trial. First, this Court finds as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the

earlier prosecution and **Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter. Further, this Court finds credible evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter.**

Order, p. 30-31. (emphasis added). "This Court alternately finds that there was a knowing waiver of a conflict of interest." Order , p. 39.

This Court further relied upon SCACR Rule 407, Rule 1.7 (b). The hearing court specifically found: "[H]ere, Stokes was aware that Sims had prosecuted him in 1990-1991. He was aware - based upon the credible testimony of Virgin Johnson that he could have somebody else represent him and he stated no. This Court finds that the Applicant waived his right to have counsel other than Thomas Sims represent him. The claims otherwise must be dismissed." Order, p. 45.

The Applicant's objection is one of form, not of substance. It is evident that this Court was specifically addressing the issues of a knowing and intelligent waiver of a Sixth Amendment right, even though the court did not expressly cite bedrock law of Boykin or Zerbst in the written analysis of the issue. As to this claim, the motion to alter and amend should be denied.

Further, it is clear that this Court performed acceptable procedures in preparation of the order under Hall v Catoe ("In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it."). The post-hearing memorandums were received by the Court by February 2010. Both parties provided the Court with proposed orders consistent with their positions in the post-hearing briefing. Respondent provided a proposed order consistent with the Respondent memorandum on August 29, 2010 - albeit unsolicited due to the imposed order deadline by the South Carolina Supreme

Court. The Applicant provided its proposed order - solicited upon information and belief from opposing counsel - on October 1, 2010. The Order dismissing the case was signed October 21, 2010 - almost two months after receipt of the respondent's proposed order, nearly one month after receipt of Applicants order, and more than seven months after posthearing briefing had been completed. The motion to alter which suggests an entirely new order should be entered must be denied.

II.

THE REJECTION OF THE AFFIDAVIT FROM SAMMIE STOKES

In the second portion of the motion to alter, Stokes complains that his post-hearing personal affidavit was not included in consideration. *Motion to Alter*, p. 6-8. The Applicant submitted the affidavit on August 18, 2009 from Applicant Sammie Stokes after the evidentiary hearing was closed on August 5, 2009. At that hearing, testimony was taken from various witnesses and the Applicant was present throughout the hearing. However, the Applicant's counsel failed to call the Applicant in support of his claims either during the Applicant's case or in reply after state witnesses testified. PCR Tr.p. 48, l. 5-7. At the close of the state's case, the Applicant's counsel advised the court that there would be no further witnesses. PCR Tr.p. 107, l. 22. No request was made to leave the record open for any further evidence - particularly when the Applicant was present at the entire hearing, heard the evidence presented and could have testified and been subjected to cross-examination. The only matters remaining were the briefing and the decision of the Court.

The Applicant acknowledges that the affidavit was submitted two weeks after the hearing

concluded along with a Memorandum Clarifying Ground 9(d). The Applicant attempts in his motion to take the State to task during the intervening months prior to the entry of the October 21, 2010 order for failing to seek procedures to cross-examine the Applicant concerning the averments made in the belated affidavit. The Applicant admits that the State voiced objections to the affidavit in a November 12, 2009 email and in the February 16, 2010 Post-Hearing Memorandum, p. 44. In his August 18, 2009 Memorandum Clarifying Ground 9(d), the Applicant stated that the submission was made because "immediately after the hearing, respondent's counsel Don Zelenka, remarked that he was surprised Stokes had not been called to testify. Undersigned counsel interpret Mr. Zelenka's remark as an indication that respondent's arguments from this point forward - most immediately the arguments likely to appear in its post-hearing briefing - will feature the absence of testimony from Stokes as a basis for denying post-conviction relief . . . " Applicant's Memorandum Clarifying Ground 9(d), p. 1. (August 18, 2009). Respondent's counsel confirmed in an earlier pleading that the Applicant correctly stated that Respondent's counsel's response when asked what he thought the Judge was going to do, and pointed out that they had not contradicted any of the testimony of either Mr. Sims or Mr. Johnson by Applicant's failure to testify at the hearing. This Court had found that it was evident at that time that the Applicant had not presented any evidence to contradict the representations made by either counsel or in the original trial record concerning the discussions and desire to have Mr. Sims represent him in this trial, as well as the subsequent trials. The burden of proof in the collateral proceeding was upon the Applicant.

This Court finds that the Applicant's affidavit submitted on August 18, 2009, which he now purports to merely corroborate what his trial counsel had already acknowledged was

properly rejected under S.C. Code § 17-27-80 within the original *Order of Dismissal* at p. 45, ft. 11. Under § 17-27-80, the Act states that "the court *may* receive proof by affidavits . . . and may order that applicant brought before it for hearing." Id. It does not require this Court or any court to automatically admit any affidavit (at any time prior to decision) as Applicant now suggests. Importantly, the Applicant was present at the August 5, 2009 hearing and there was certainly time available on that date. At the conclusion of the Applicant's case in chief, counsel Lominack stated: "that concludes our testimony portion of the case." Tr.p. 49, l. 5-6. After Mr. Sims and Mr. Johnson had testified in the Respondent's case in chief and the Respondent had rested its case, what is most important, this Court offered the opportunity to have the Applicant called at that hearing when he asked counsel if they wanted "anything further" and the response by the counsel was "nothing further." PCR Tr.p. 107, l. 18-22. At that point, the Court inquired about making arguments then, in addition to a proffer for a submission of proposed orders. Plainly, it was strategic decision by the Applicant to not present the testimony of Sammie Stokes at that time - when the Court and opposing counsel were present and prepared to receive proof.

The Applicant suggests that the affidavit does not present new information and merely corroborates the testimony of Mr. Sims and Mr. Johnson. However, that is not an accurate characterization of the affidavit. In the affidavit at paragraph six, Stokes states: "[I]f I had known that Mr. Sims handled my whole trial for the prosecution in 1991, that the 1991 conviction would be used against me at the 1999 trial, and that Audrey Smith would testify and be cross-examined by Mr. Sims, I would have asked to have a different lawyer." Affidavit, Sammie Stokes, p. 2, ¶ 6 (August 17, 2009). To the contrary, the broadly worded affidavit does attempt to contradict the testimony of Virgin Johnson and Thomas Sims concerning the substance of the discussions and

his decision and Stokes' desire to be continually represented by Mr. Sims, even after the entire trial. At the PCR hearing, former counsel Sims stated that they had discussed with Stokes his role, who he was, "and what my role had been in the previous matter with him." PCR Tr.p. 55, l. 15-19. In complete contradiction of Stokes belated affidavit, counsel Sims testified at the hearing that after the trial, after all the information had come out, that Stokes called him and wanted him to continue to be his lawyer in the second case. PCR Tr.p. 56, l. 23-p. 57, l. 9. This testimony repudiates the substance of Stokes' later averments.

This Court finds that this one-sided and limited affidavit presentation did more than Stokes has suggested - it prevented the State from cross-examining Stokes in an already closed record about the discussions that both trial counsel had with him - matters that were uncontradicted at the time of the hearing, including whether his prior convictions could be used against him at trial and his knowledge about whom the prosecutor was at his initial trial. The belated affidavit presentation also did not include any information about the fact that after the trial Stokes sought and did have Sims continue to represent him in his subsequent potential capital trial after he was aware of the prior prosecution and the cross-examination by Sims of Audrey Smith - evidence that again wholly contradicts the affidavit of Stokes. Further, counsel Sims testified that he and Stokes talked about evidence of the Audrey Smith incident and that Sims knew it would come in. PCR Tr.p. 60, l. 2-18. Also, PCR Tr.p. 87, l. 9-17; Tr.p. 88, l. 15-p. 89, l. 2; p. 98, l. 1-17. Contrary to the Stokes affidavit, counsel Johnson also testified about the fact that after the trial, Stokes continued to be desirous of having Thomas Sims represent him the second capital trial and he asked if the trial was overturned and we had to try it again that he wanted Thomas Sims to represent him again. Tr.p. 102, l. 1-24. ("I know he wanted Thomas

back."). Counsel Johnson also testified that they had discussions that the evidence of the prior conviction could be presented at the trial and that Stokes did not request then for Sims to be removed. PCR Tr.p. 103, l. 15-24.

In asserting in the belated affidavit that he was not aware that Sims had prosecuted him previously, it also varies from the testimony of Sims and Johnson. It does not corroborate their testimony or confirm it - it disputes it. Further, while the affidavit does state that "he was not in the courtroom during the trial," the record of the March 12, 1991 trial reveals that although the Applicant refused to come into the courtroom during the testimony, he did enter the courtroom at the outset of the trial proceedings and was present when then Solicitor Sims provided the judge with the indictment while Stokes made a personal plea for a continuance. March 12, 1991 Tr.p. 6-14.

This Court is constrained to conclude that the post-hearing submission of the affidavit was a blatant attempt to avoid the pitfalls of cross-examination and subjecting the Applicant to the adversarial process. This Court had made available the hearing process by securing a reasonable length of time for the evidentiary hearing and provided the opportunity for each side to fully present their case at the hearing.

Simply put the credibility of the Applicant, as well as the completeness of his affidavit to the claims before the court, were plainly at issue. In the State's post-hearing memorandum, the State urged this Court to strike the affidavit from consideration as it was not newly discovered evidence, but was evidence sought to be shielded from the adversarial process where the Applicant would have opened himself up to impeachment and further testimony concerning the

issues. *Respondent's Post-Hearing Memorandum*, p. 44, n. 11.[2] This Court must agree with that assessment.

In the Order of Dismissal, this Court addressed the belated submission after the record was closed with appropriate rejection by acknowledging that the Applicant did not testify at the post-conviction hearing. Order of Dismissal, p. 2. In rejecting the affidavit's belated submission, this Court stated:

> This Court again notes that the Applicant - subsequent to the hearing and the closing of the evidentiary record - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. This was not newly discovered evidence. Stokes was present at the hearing, heard the testimony of counsel and could have testified before the evidentiary record was closed. The Court set aside the term solely for this hearing and the hearing was completed with the record not being left open for further evidentiary matters. The Court concludes the belated presentation of the affidavit should be struck as the record was closed. At the hearing the Applicant was presented with the opportunity to testify and be subject to cross-examination and impeachment before and after counsel testified before the evidentiary record closed. He waived his opportunity to do so at that time by his inaction with the timely opportunity to present evidence. The Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson.

*Order of Dismissal*, p. 45, n. 11.

There is no basis to alter or amend this conclusion which struck the one-sided affidavit from the record. The record was closed after the Applicant was given the opportunity to testify in

---

[2]In the State's Posthearing memorandum, the Respondent asserted:

> *"Respondents note that the Applicant - subsequent to the hearing - proffered an affidavit from Sammie Stokes which attempts to contradict the testimony of both Sims and Johnson. The Respondent submit that the belated presentation should be struck as the record was closed. Further, the Applicant failed in his burden of proof at the time of the hearing by seeking to contradict the testimony of counsel Sims and Johnson."*

their case in chief and on reply. Contrary to the assertions and characterization of counsel, he does seek to contradict the combined testimony of Mr. Sims and Mr. Johnson about their discussions with Stokes, the knowledge of Stokes concerning Sims prior prosecution and Stokes's desire with the knowledge of the prior involvement to have Sims continue as defense counsel.

Why Stokes was not called to testify in the normal course of the hearing is subject to speculation, but it is clear it was an attempt to avoid contemporaneous cross-examination at the hearing. The fact that this Court reasonably decided to reject the post-hearing gamesmanship of belatedly inserting an affidavit which states some matters inconsistent with testimony presented - testimony which had been subjected to adversarial testing before the fact-finder - was a proper rejection. The full opportunity to have Applicant testify at the hearing was made before the evidentiary record was closed.

The motion to alter concerning the exclusion of Stokes August 17, 2009 affidavit must be denied.

III.

THE FINDING OF CREDIBILITY OF THOMAS SIMS.

In the final assertion of his motion to alter or amend, the Applicant asserts that this Court mischaracterized the testimony of Jeffrey Bloom. There was a contested issue of fact concerning the existence of alleged conversations between Mr. Bloom and counsel Thomas Sims concerning the prior prosecution of Stokes and particular steps to take, as well as the basis of Mr. Bloom's further non-involvement in the case. Mr. Bloom testified that certain matters happened and

specific subjects were discussed and Mr. Sims - who had been sequestered upon the Applicant's motion during Mr. Bloom's testimony - testified that he had no recollection of the alleged discussions and directions about conflict of interest ever occurring. Compare Tr.p. 43-48 (Bloom testimony) with Tr.p. 57-58, 84-85 (Sims testimony). The Court concluded in the Order of Dismissal that Mr. Sims was credible in his testimony that he had no recollection of any discussion with Bloom about a conflict of interest issue. *Order of Dismissal*, p. 35, footnote 10. See also *Order of Dismissal*, p. 32, footnote 8. These differences in the testimony of each witness were significant on the critical points.

While Mr. Sims was sequestered upon Applicant's request by the Court [PCR Tr.p. 19], Mr. Bloom testified that he had a face to face meeting with Mr. Sims in Orangeburg to discuss potential involvement in creating a juror profile, he stated that during the meeting a second issue came up about a potential conflict of interest that Bloom was very concerned about because Sims had previously prosecuted Mr. Stokes. PCR Tr.p. 43, l. 12-15. Mr. Bloom testified that he thought it was a "substantial and serious issue" and was trying to impress upon Mr. Sims that if he had prosecuted him it would be an issue in a capital sentencing proceeding. "I don't think he fully understood how or why that would be. But I kept emphasizing that conviction is going to become in play at the capital sentencing proceeding, and he did not seem as concerned about the conflict issue." PCR Tr.p. 43, l. 19 - p. 44, l. 1. Bloom testified that he stressed to Sims from his own capital experience that Sims had to have an ex parte hearing in front of a judge requested in writing so that the solicitor would not be present because it was an attorney client issue. However, Bloom reported that Sims kept saying don't worry about it and that Stokes had already waived it. Bloom testified that he stated that the hearing was necessary because of the other

consequences and that "it may even be that you absent yourself from the hearing so that Mr. Stokes is free to tell the judge about the prior prosecutor/defendant relationship. PCR Tr.p. 44, l. 2-19. Bloom stated he "very much so" related this information to Sims, although he contended that meeting was under an hour and that it was that he could not help him with the jury profiling request and his concern over the conflict issue. Bloom testified that Sims did not seem to appreciate the nature of the conflict issue. PCR tr.p. 44-45. Bloom reported that he followed-up about his demand for a motion hearing to Mr. Sims at a later time during a telephone call that also involved jury profiling. Bloom stated :

> I again asked him, have you filed any kind of written motion on this potential conflict of interest issue we discussed or had a hearing and he indicated no. And he still didn't seemed concerned about it. And I told him that really needed to be something that was settled on the record long before trial . . . I concluded by telling him , well there's really not much I can do for you, one because he continued to want jury profiling, which I didn't do and two he didn't seem at all top appreciate the gravity of the conflict of interest issue. *And I concluded that I just needed to sever any professional relationship to the case because –and I don't mean this rudely, but I didn't want to work with an attorney who failed to appreciate the gravity of the issue.*

PCR Tr.p. 45, l. 15- p. 46, l. 12 *(emphasis added)*. On cross-examination, Mr. Bloom thought the discussion had occurred after April 15 and could have been either in May or June and the telephone call happened within 30 days from the meeting. PCR Tr. P. 47, l. 1-9.

This Court was faced with making a credibility determination concerning the existence of a discussion between counsel Sims and Mr. Bloom about a conflict hearing and waiver issue which was seen as one of substance - not one of memory. The Court recognized this factual dispute during the PCR hearing when the Court specifically questioned Mr. Bloom concerning the specifics about the two communications he had with Mr. Sims:

Q. Did you specifically indicate to Mr. Sims there was a case or rule that he was in direct conflict with in representing Mr. Stokes?

A. I –

Q. I really understand your concern.

A. Yes, sir.

Q. And you offered him an opinion. Did you offer him an opinion or a case or a rule?

A. I didn't provide a case. I know I discussed the conflict of interest rules generally. I *may* have cited a specific rule at the time. I *probably would not* have cited a rule in our meeting. I *may* have in the phone conversation because I learned of the conflict through Mr. Johns, I believe on the ride up here or right before our meetings. So after that I had an opportunity to go back and look at the rules. So *probably* in the phone call I *may* have told him my main concern was the rule whatsoever, at the time.

PCR Tr.p. 47, l. 22- p. 48, l. 7 (*emphasis added*). Subsequent to the presentation of testimony, the Court inquired of Applicant's counsel about whether Mr. Bloom ever wrote Sims a letter telling him that there was a conflict - which applicant's counsel conceded that there was no letter and that it was just verbal, a question that this Court had intended to ask Mr. Bloom. Tr.p. 108, l. 3-8.

Thomas Sims recollections concerning his conversations with Mr. Bloom was different in a number of significant aspects. Sims testified that in the early stages of his representation that he had a discussion with Mr. Bloom about doing jury work for the defense and that Mr. Bloom provided him with some rudimentary information. Sims testified that his understanding was that he did not assist him at trial because Mr. Bloom was involved in a major trial in Aiken. PCR Tr.p. 57, l. 12-25. Counsel Sims testified:

Q. Do you recall having a discussion with Mr. Bloom specifically about the conflict

of interest based upon your prior prosecution?

A. I don't.

Q. You don't have any recollection?

A. I don't have any recollection of that.

Q. Do you have any recollection of Mr. Bloom calling you and asking you if you'd yet had an ex parte hearing with the judge about the conflict issue?

A. I - -I- - This has been over ten years ago, ands I can't say as I recall that. No, I don't recall that.

PCR Tr.p. 58, l. 1-11. The Applicant emphasizes the portion of cross-examination where the following occurs:

Q. . . . Mr. Zelenka asked you about a meeting with Jeff Bloom, and you said you didn't remember meeting with him or talking about a perceived conflict of interest. You're not saying that didn't happen, you just don't recall it 10 years later, right?

A. Yes, That's what I'm saying.

PCR Tr.p. 84, l. 18-22.

The stark difference in the testimony between Mr. Bloom and Mr. Sims required resolution by the Court. In doing so, this Court was able to assess the particular credibility of the witnesses, including the fact that Mr. Sims was sequestered during Mr. Bloom's testimony and had no apparent knowledge of it substance prior to his own testimony, and Mr. Sims credible demeanor on the witness stand when he claimed he had no recollection of any conversation with Bloom concerning the conflict issue. The Court had to make a call as to what occurred [and what

did not occur] between two lawyers. In making the assessment, the Court concluded:

> In the PCR hearing, the Applicant called Richland County attorney Jeff Bloom to testify. Mr. Bloom described being asked to assist in the case preparation concerning jury matters. PCR 41-43. However, unlike Sims testimony, Mr. Bloom suggested that he recalled a discussion about a potential conflict of interest which Bloom was concerned about based upon the prior prosecution. PCR 43. Bloom stated that he tried to emphasize this to Mr. Sims who Bloom contended did not fully understand why it would be a problem. Bloom contended that he told Sims that at a minimum he must request a hearing before a judge on the issue in an ex parte setting and allow Stokes to express his desires to the court. PCR 44. Bloom stated that in his next telephone contact with Sims that he learned that Sims had not followed through with Bloom's suggestions. PCR 46. He stated that because of this he had to sever his professional relationship with him. PCR 46.
>
> As stated above, counsel Sims did not recall any discussion with Bloom concerning any potential conflict of interest issue. **This Court has determined that Mr. Sims testimony is credible.**

*Order of Dismissal*, p. 35, n.10. (Emphasis added). See also, Order, p.32, n. 8.

This Court had a basis in the record to support the credibility determination made by the PCR court concerning the alleged conversations between Mr. Bloom and Mr. Sims related to the conflict of interest issue. The motion to alter should be denied.

## IV.

## CONFLICT OF INTEREST AND WAIVER

During the Rule 59 motion hearing, counsel for Stokes additionally argued that the fact that counsel Sims had researched an argument to exclude the admission of evidence of the prior bad acts, including the conviction involving the Audrey Smith incident supported their showing that Sims did not appreciate and therefore did not fully discuss with Stokes the possibility that the Smith matter would be introduced by the State at the trial. While it is true that counsel Sims stated that he knew the evidence of the prior bad acts was going to come in. PCR Tr.p. 60, l. 18.

Further, the record did reflect that counsel conducted research on the admissibility of prior bad acts in the penalty phase of the trial. PCR Tr.p. 69 -70. [The trial transcript of the October 25, 1999 trial shows counsel Sims argued at the outset of the penalty phase that the evidence of the prior acts should be excluded in the penalty phase pursuant to State v. Lyle 125 S.C. 406, 118 S.E. 803 (1923) and S.C.R.E. Rule 404(b). The Solicitor correctly argued that the very recent decision in State v. Hughes (Mar-Reece), 336 S.C. 585, 521 S.E.2d 500 (Oct. 4, 1999), which rejected a similar theory, defeated Sims's argument and the trial court agreed. ROA Tr.p. 1088-1090].[3] Sims's argument at trial was essentially whether crimes over 10 years old were too remote to be considered, whether the prior crimes were felonies versus misdemeanors which was crafted from Evidence Rule 609 concerning impeachment use of convictions. PCR Tr.p. 77-78. Although this argument was inadequate under Hughes, supra., its lack of a sound basis in the law at the time of the trial had no effect on the conflict issue because Sims' actual expectation was that the evidence would be admitted, albeit over his objection.

At the PCR hearing, counsel Sims testified that he was aware of the state's intent to use the Audrey Smith indictment and conviction in the penalty phase. PCR Tr.p. 89-90. He stated that he had researched the matter and felt that they could probably try to keep it out, mainly because it was beyond the 10 year limit. However, he stated that he did not think that the

---

[3]At the October 14, 1999 pre-trial motion hearing, counsel Sims made a similar argument. The Solicitor had indicated his intent to present prior bad acts not limited to convictions into the penalty phase. ROA 1606. The judge deferred the ruling until the penalty phase. ROA 1607-08. Further, at the same motion hearing, counsel Sims indicated a concern about his name appearing on the ABHAN indictment involving his wife. Counsel Sims again brought up a concern about whether the crimes were misdemeanors at the time of conviction and its use depending on certain provisions of the evidence code under Lyle or Rule 609. Counsel Sims stated that he wanted to do more research on that matter. ROA 1637-1638.

evidence would be kept out, but he wanted it kept out. PCR Tr.p. 93, l. 4-9. Mr. Sims denied that he would have told Stokes that the evidence would not be admitted. To the contrary, he said he probably would have told him that most judges would not make the call to keep it out. PCR Tr.p. 93-94. To clarify, Sims stated that he fought to keep the evidence out, but agreed that he anticipated that the judge would let the evidence in. PCR Tr.p. 98, l. 3-12.

The Applicant's present argument to alter and amend suggests that counsel Sims did not perceive a potential conflict of interest because he believed that the evidence of the Audrey Smith incident and conviction could never be admitted. This is a misreading of the record. Counsel Sims clarified that he thought he had a viable argument to keep the evidence out, but that he expected the judge to still admit the evidence. Further, Sims was cognizant at least two weeks before the trial that his own name was on the prior indictments and wanted to have his name removed before the indictments would be introduced. Contrary to the claim suggested by Applicant, Sims was not ignoring the potential admissibility of the evidence or the potential of Audrey Smith testifying about the incident and the letters that Stokes had sent to her in his assessment of his ability to represent Stokes. He had notice and anticipated the introduction of the evidence.

The Court in its order concluded that:

> This Court finds as a fact, based upon the credible testimony of both Virgin Johnson and Thomas Sims, that Stokes knowing and voluntarily waived a conflict of interest and with full knowledge of the conflict and ability to have a different lawyer desired to have Thomas Sims continue to represent him in the trial. Applicant failed in their burden of proof at the PCR hearing and failed to timely call the Applicant to contradict the testimony of either Mr. Johnson or Mr. Sims. The belated presentation of a statement of Applicant after the hearing is insufficient to satisfy their burden of proof under these discrete circumstances.

*Order of Dismissal*, p. 25. The Court further found "as a fact based upon credible evidence presented at the hearing that counsel Sims and counsel Johnson had discussions with the Applicant about his right to have new counsel other than Sims because of the earlier prosecution and Stokes advised them then and since that he desired to have Mr. Sims represent him in the matter." *Order of Dismissal*, p. 30-31.

There is evidence at the PCR hearing to support this finding. PCR Tr.p. 55-57, 88-90, 101-103. Counsel Virgin Johnson recalled that Stokes was told prior to trial that evidence of the prior conviction that Sims had prosecuted could possibly be presented. PCR Tr.p. 102. In its order, the Court found the evidence that Stokes, aware of the prior involvement of Sims in the Smith prosecution wanted to have Sims continue to represent him in this matter and never requested to have Sims removed was credible. *Order of Dismissal*, p. 31. Evidence supported this conclusion. PCR Tr.p. 55-57, 59-60, 88-90, 102-105. See also State v. Abernathy, 289 Ga. 603, 715 S.E.2d 48 (2011) (defense attorney's previous employment as a prosecutor where he handled citations against the defendant did not create a conflict of interest where he no involvement in the homicide case).

The motion to alter and amend should be denied.

**DENIAL OF MOTION TO APPOINT NEW PCR COUNSEL.**

In his April 10, 2012 pleading, current appointed PCR counsel Keir Weyble and Robert Lominack seek an order relieving their appointment at this time and allow for appointment of new counsel. Current PCR counsel contend that the recent decision in Martinez v. Ryan, _ U.S _, 2012 Westlaw 912950 (March 20, 2012) supports them being relieved as counsel in this setting

to allow for newly appointed counsel to investigate whether current PCR counsel was ineffective, particularly related to their decision to not call Stokes to testify at the PCR hearing. This Court has considered whether Martinez requires this new appointment within a state PCR action brought pursuant to S.C. Code Ann. §17-27-10, 160. Stokes current counsel seem to assert that the recent decision of the United States Supreme Court in Martinez, creates a new and independent cause of action for ineffective assistance of collateral counsel in our state courts PCR system. While the decision in Martinez does contain expansive language, a proper analysis reveals that the Supreme Court specifically declined to address the issue of whether a constitutional right to effective assistance of collateral counsel exists:

> While petitioner frames the question in this case as a constitutional one, a more narrow, but still dispositive, formulation is whether a federal habeas court may excuse a procedural default of an ineffective-assistance [trial] claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding.

Id. at *3. Even Justice Scalia in his dissent acknowledged that the majority chose to evade this issue. See id. at *16 (Scalia, J., dissenting) (noting that the reframing of the issue "avoid[ed] the Court's need to confront the established rule that there is no right to counsel in collateral proceedings"). It appears that Martinez is only directed toward federal habeas proceedings brought pursuant to 28 U.S.C. § 2254 and is designed and intended to address issues that arise in that context. Further, it does not overrule the precedent of the South Carolina Supreme Court in Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (holding that an allegation that prior PCR counsel was ineffective is not per se a sufficient reason allowing for a successive PCR application). See e.g., Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) (recognizing that the

constitutional right to counsel does not extend to discretionary appeals on collateral attack, but allowing a PCR applicant to receive a belated appeal from the denial of his initial PCR application where first PCR counsel failed to file a notice of appeal); Washington v. State, 324 S.C. 232, 478 S.E.2d 833 (1996) (granting PCR where the defendant alleged ineffective assistance of PCR counsel due to so many procedural irregularities).

More importantly, Martinez does not require any state to hold a collateral PCR action within a PCR action with a double appointment of PCR counsel. This Court, under the discrete circumstances presented after the initial judgment was already entered, denies this extraordinary request to relieve current appointed PCR counsel and appoint new counsel.

**CONCLUSION**

For all the foregoing reasons, it is ORDERED

1. The Rule 59 motion to alter and/or amend is denied in its entirety.

2. The Motion to Relieve Current PCR counsel is DENIED.

3. The Motion to Appoint New PCR counsel is denied.

**AND IT IS SO ORDERED** this 13 day of February, 2012.

**L. CASEY MANNING**
Presiding Judge

Columbia, South Carolina.