STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY

James L. Barber, III, Circuit Court Judge

JOHNNY OLANDIS BENNETT

PETITIONER,

V.

STATE OF SOUTH CAROLINA

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS PRESENTED

1. Mr. Bennett was entitled to twelve impartial jurors. But one juror admitted that after sitting through the trial, he regarded Mr. Bennett as "just a dumb nigger." Yet the PCR court found that this juror had used a "poor choice of words" and did not "view African-Americans as inferior to whites" during the time of the sentencing trial. Is this conclusion supported by the evidence?

2. A capital trial should focus on the character of the defendant and the circumstances of the crime for which he is being sentenced. Yet at Mr. Bennett's capital sentencing the state presented the testimony of five witnesses to recount a 12-year-old cross-racial assault. One witness described a racially-loaded dream, which he connected with the assault. Trial counsel objected to this evidence. Should appellate counsel have raised this issue on direct appeal?

3. Prosecutors are prohibited from employing arguments designed to appeal to jurors' passions or prejudices. Here, the prosecutor (1) repeatedly referenced Mr. Bennett or the evidence using racially suggestive phrases, (2) injected his personal opinion of the appropriate sentence, and; (3) implied that jurors should be afraid of Mr. Bennett during the trial. Yet the PCR court found that the prosecutor's comments were "fair" in light of the evidence presented. Did the PCR court err?

4. Because of the unique opportunity for racial prejudice to affect a capital juror, a defendant has the right to explore potential jurors' racial bias under certain circumstances. Here, the prosecution focused its case on Mr. Bennett's prior conviction stemming from a cross-racial assault. The PCR court - ignoring the cross-racial assault evidence – ruled that there was no right to question the jurors because the victim was black. Did the PCR court err?

5. Capital jurors are prohibited from considering parole when determining the appropriate sentence. Here, in response to a jury note, the trial court implied that Mr. Bennett was eligible for parole. Trial counsel objected but appellate counsel did not raise the issue on direct appeal. The PCR court found that the court's instruction as a whole was not objectionable and, therefore, appellate counsel was not deficient. Did the PCR court err?

6. Capital jurors' sense of responsibility should not be diminished by the suggestion that their verdict will be reviewed by some other court. Yet during Mr. Bennett's trial the court twice advised the jury that a higher court would review its rulings. Trial counsel did not object to these instructions but the PCR court ruled that this failure was neither unreasonable nor prejudicial. Did the PCR court err?

7. A capital jury cannot be prohibited from considering any aspect of a defendant's character as a basis for a life sentence. However, at Mr. Bennett's trial the court defined "character evidence" only in the context of aggravation.

Trial counsel failed to object and the PCR court ruled that the court's penalty phase instructions as a whole were not objectionable. Did the PCR court err?

8. At Mr. Bennett's first trial he was convicted of kidnapping, which resulted in an automatic sexual offender registration requirement despite the fact that there was no element or claim that sexual conduct was involved in the crime. Subsequently the sexual offender registration statute was amended to include an exception to the automatic registration requirement. The PCR court ruled that it was powerless to make the appropriate statutory finding that would exempt Mr. Bennett from the registration requirement. Did the PCR court err?

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the PCR Court erred in denying Petitioner's claim that Juror Humphrey had a racial bias against Petitioner when the only evidence to support the claim was Humphrey's use of a racial epithet in a conversation with PCR counsel seven years after Petitioner's trial?

2. Whether the PCR Court erred in denying Petitioner's claim of ineffective assistance of appellate counsel for failure to argue on appeal that the evidence relating to the injuries of the victims of Petitioner's prior convictions for ABHAN was irrelevant?

3. Whether the PCR Court erred in denying relief upon Petitioner's ineffective assistance of trial counsel claims for failure to object to comments made by the solicitor in his opening statement and closing argument?

4. Whether the PCR Court erred in denying relief upon Petitioner's claim of ineffective assistance of trial counsel for failing to request the trial court ask jurors about possible racial prejudice during voir dire when there was no legal authority requiring such questioning be allowed, and there was no evidence that questioning jurors about racial prejudice would have resulted in a member of Petitioner's jury being dismissed from jury service?

5. Whether the PCR Court erred in denying relief upon Petitioner's claim of ineffective assistance of appellate counsel for not asserting the trial court erred in responding to a jury question regarding the consideration of parole eligibility when the trial court's instruction, when viewed as a whole, was a correct statement of law in response to the question?

6. Whether the PCR Court erred in denying relief upon Petitioner's claim of ineffective assistance of trial counsel for failing to object to the trial court's statements to the jury that the trial judge's error may be subject to review when the statements at issue would not lead the jury to believe the ultimate determination of Petitioner's fate rested elsewhere, the statements were a correct statement of appellate review in South Carolina, and any prejudice was resolved

by a supplemental instruction given in response to a jury question regarding consideration of appellate review?

7. Whether the PCR Court erred in denying relief upon Petitioner's claim of ineffective assistance of trial counsel for failing to object to the trial court's jury instructions regarding the treatment of character evidence presented by the State when the instructions did not preclude the jury from considering good character evidence in mitigation?

8. Whether the PCR Court erred in denying Petitioner's request that the PCR Court find his kidnapping conviction did not involve sexual misconduct for the purposes of registration with the South Carolina Sex Offender Registry?

STATEMENT OF THE CASE

Petitioner, Johnny Olandis Bennett ("Bennett"), is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC) as the result of his Lexington County convictions and death sentence for the murder, armed robbery, kidnapping, and grand larceny of Benton Smith. The Lexington County Grand Jury originally indicted Bennett during the March 1991 Term of Court. That indictment was nolle prossed by the State due to errors contained in the indictment. Bennett was subsequently re-indicted during the September 1993 term of court for murder, kidnapping, armed robbery, and grand larceny (1993-GS-32-2354). In March 1993, the State served Bennett with a Notice of Intent to Seek the Death Penalty and Notice of Evidence in Aggravation.

On October 9-18, 1995, Bennett received a jury trial before the Honorable Ralph King Anderson, Jr. At trial, Petitioner was represented by Wayne Floyd, Esquire, and Pat McWhirter, Esquire. The jury convicted him on all charges and imposed a death sentence following a separate sentencing proceeding.

A timely Notice of Appeal was served and filed. On appeal, Daniel T. Stacey, Esquire, Chief Attorney of the South Carolina Office of Appellate Defense, represented Bennett in his first appeal. (See App. 2832-33). Senior Assistant Attorney General William Edgar Salter, III, Esquire, represented the State. Id. On August 4, 1997, Applicant filed his Final Brief of Appellant. Respondent also filed its Final Brief of Respondent on August 4, 1997. (See App. 2834). Oral arguments were heard on October 7, 1997. (See App. 2834).

The South Carolina Supreme Court affirmed Bennett's convictions, but reversed his death sentence and ordered a new sentencing trial in a published Opinion. State v. Bennett, 328 SC 251, 493 S.E.2d 845 (1997) (Bennett I).

Following motions hearings on June 30, 2000, Applicant received a new sentencing proceeding before the Honorable Marc H. Westbrook and a jury on July 10 –16, 2000. (App. 1-2160). Wayne Floyd and Hervery B.O. Young represented Bennett at trial. Eleventh Circuit Solicitor Donald V. Myers, Deputy Solicitor Dayton Riddle, and Assistant Solicitor Shawn Graham prosecuted the case.

The jury found the statutory aggravating circumstances that the murder was committed while in commission of a robbery while armed with a deadly weapon; that the murder was committed while in the commission of larceny while armed with a deadly weapon; that the murder was committed while in the commission of kidnapping; and that the murder was committed while in the commission of physical torture. S.C. Code Ann. §16-3-20(C)(a)(1)(b), (d)-(e) & (h) (Supp. 2005). (App. 2148-51). The jury recommended the death penalty, and Judge Westbrook sentenced Bennett to death for murder. (App. 2148-51, 2157-58). Judge Westbrook imposed a thirty year concurrent sentence for the armed robbery conviction; a five year concurrent sentence for the grand larceny of a motor vehicle conviction; and a thirty-year sentence for kidnapping, which was subsumed by the murder conviction. (App. 2158).

Bennett timely served and filed a Notice of Appeal. Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Bennett before the

South Carolina Supreme Court. (App. 2455-2503, 2562-72). On January 30, 2006, Bennett filed a Final Brief of Appellant. (App. 2455-2503). Respondent filed the Final Brief of Respondent on January 10, 2006. (App. 2504-2561). Bennett also filed a Final Reply Brief of Appellant on January 30, 2006. (App. 2562-72).

Following oral arguments, this Court affirmed Bennett's death sentence in a published Opinion filed on June 26, 2006. State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006). The Court also conducted the proportionality review required by S.C. Code Ann. § 16-3-25 (2003) and concluded that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor.

Bennett then filed a Petition for Stay of Execution, pursuant to In re Stays of Execution in Capital Cases, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could file a Petition for Writ of Certiorari in the United States Supreme Court. Respondent filed a July 11, 2006 letter in lieu of a Return to the Petition for Stay. The Remittitur was sent to the Lexington County Clerk of Court on July 12, 2006; and the South Carolina Supreme Court granted a stay of execution in an Order filed on July 20, 2006. (See App. 2837).

Assistant Appellate Defenders Robert M. Dudek and Aileen P. Clare represented Bennett in the United States Supreme Court. Bennett filed a Petition for Writ of Certiorari on September 22, 2006 (Docket No. 06-6780). (App. 2588-2652). Respondent filed a Brief in Opposition on October 27, 2006. (App. 2653-2702). The United States Supreme Court denied certiorari on November 27, 2006. Bennett v. South Carolina, 549 U.S. 1061 (2006). (App. 2703). Bennett

also filed his initial Application for Post-Conviction Relief (PCR) on September 7, 2006. (App. 2704-11).

On October 19, 2006, Respondent made a Return to the Application filed on September 7, 2006. (App. 2712-2762). On April 1, 2008, Bennett filed his First Amended Application for Post-Conviction Relief. (App. 2818-24). Bennett thereafter filed his Second Amended Application for Post-Conviction Relief (PCR) dated April 4, 2008. (App. 2825-31). Respondent made its Return thereto on May 1, 2008. (App. 2832-2942).

Evidentiary hearings were held before the Honorable James R. Barber, III, Circuit Court Judge on May 27, 2008, and July 11, 2008. (App. 2987-3109). Bennett was present at the first hearing, and he waived his presence at the second hearing. Id. During his post-conviction relief action, Bennett was represented by Robert Lominack and Derek Enderlin. Senior Assistant Attorney General William Edgar Salter, III and Assistant Attorney General Alphonso Simon Jr. represented Respondent. After the evidentiary hearing, Petitioner submitted a post-trial memorandum, and Respondent submitted a proposed order. (App. 3161-3361). Post-hearing arguments were heard by Judge Barber on February 17, 2009. (App. 3110-3160). Subsequent to the arguments on the briefing, Petitioner submitted a proposed order. (App. 3517-49). On April 3, 2009, the PCR Court filed its Order of Dismissal. (App. 2550-3706).

Petitioner filed a Motion to Alter or Amend Judgment on April 17, 2009. (App. 3707-17). Respondent filed a Return to the Motion. (App. 3718-30). The PCR Court filed its Order Denying Applicant's Motion to Alter or Amend

Judgment on October 1, 2009. (App. 3905-16). On that same date, the PCR Court also filed its Amended Order of Dismissal. (App. 3750-3904).

Petitioner timely filed a Notice of Appeal. Respondent now makes Return to the Petition for Writ of Certiorari filed by Petitioner on October 7, 2010.

ARGUMENT

"This court gives great deference to the post-conviction relief (PCR) court's findings of fact and conclusions of law." Marlar v. State, 373 S.C. 275, 279, 644 S.E.2d 769, 771 (Ct.App.2007) (citing Dempsey v. State, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005)); McCray v. State, 317 S.C. 557, 455 S.E.2d 686 (1995). An appellate court must affirm the PCR court's decision when its findings are supported by any evidence of probative value. Custodio v. State, 373 S.C. 4, 9, 644 S.E.2d 36, 38 (2007); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). However, an appellate court will not affirm the decision when it is not supported by any probative evidence. Edmond v. State, 341 S.C. 340, 347, 534 S.E.2d 682, 686 (2000); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996).

This Court should deny certiorari on Petitioner's first claim: the PCR Court's findings that Petitioner did not meet his burden in establishing that Juror Humphrey was actually biased against Petitioner is supported by the record.

Relevant facts

Mr. Humphrey was initially an alternate juror in Petitioner's trial. When Juror Thomas Brown was released, he became a juror in Petitioner's trial. (App. 883, 894).

At the PCR evidentiary hearing, Juror Humphrey admitted that in his conversation with PCR counsel, he indicated that he thought Petitioner was "just a dumb nigger." (App. 2995).

Humphrey testified that Petitioner's race did not play any part in his decision. (App. 3001). He further noted that he did not think African-Americans were morally inferior to whites, and that he was not prejudiced. (App. 3001). He testified it would not have mattered what race Petitioner was. (App. 3001). To Humphrey, Petitioner "was not a good person for what he did with no remorse." (App. 3002). Humphrey testified that he had used the racial epithet before the day he spoke with PCR counsel. (App. 3005). He indicated that he had used it to describe one of his best friends, and it was just a word. (App. 3005). Humphrey noted that he had used the word to describe an African-American before the day he spoke with PCR counsel, and he had probably used the adjective dumb before the word as well. (App. 3006).

The PCR Court found Petitioner had failed to establish that Juror Humphrey was actually biased when he was a member of the jury in Petitioner's resentencing trial. (App. 3790). The PCR Court found that the testimony of Juror Humphrey was not sufficient to establish that he was actually biased against Petitioner. (App. 3790). Humphrey's testimony did not indicate if his statement about Petitioner was a reflection of his views on race before or during Petitioner's sentencing trial. (App. 3790). The PCR Court further found Petitioner presented no other evidence supporting his claim of that Humphrey was racially biased at the time of Petitioner's trial. (App. 3791). The PCR Court found Juror

Humphrey's testimony that race was not something he considered during the trial and that he did not believe Blacks were inferior to Whites was credible. (App. 3791). In light of those findings, and the lack of other supporting evidence that Humphrey was racially biased at Petitioner's sentencing trial, Petitioner failed to meet his burden of showing that Humphrey was partial as the result of an actual bias. (App. 3792).

Discussion

This Court should deny certiorari on Petitioner's first issue because the PCR Court's findings are supported by the record. Jurors are presumed to be impartial, absent indications to the contrary. Wells v. Murray, 831 F.2d 468, 472 (4th Cir. 1987); see Irvin v. Dowd, 366 U.S. 717, 723, 81 S.Ct. 1639, 1642-43 (1961). "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation.... Due process means a jury capable and willing to decide the case solely on the evidence before it ...." Smith v. Phillips, 455 U.S. 209, 217 (1982). A juror must be able to "lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." Irvin, 366 U .S. at 723.

A biased juror, in the usual sense, "is one who has a predisposition against or in favor of the defendant. In a more limited sense, a biased juror is one who cannot 'conscientiously apply the law and find the facts.'" Franklin v. Anderson, 434 F.3d 412, 422 (6th Cir. 2006) (quoting Wainwright v. Witt, 469 U.S. 412, 423 (1985)). "If an impaneled juror was actually biased, the conviction must be set aside." Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001). "[A]

criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature." State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct.App. 1993)). In cases where a juror's partiality is questioned after trial, it is appropriate to conduct a hearing in which the defendant has the opportunity to prove actual juror bias. Bryant, 354 S.C. at 395, 581 S.E.2d at 160 (citing Smith v. Phillips, 455 U.S. 209 (1982) and Remmer v. United States, 347 U.S. 227 (1954)). At a hearing on the juror's partiality, the defendant bears the burden of proving the juror was actually biased. Bryant, 354 S.C. at 395.

This Court should deny certiorari upon this issue because the PCR Court's denial of relief upon this claim is supported by the record. While Juror Humphrey admitted that he did use the racial epithet when describing Petitioner to Petitioner's PCR counsel, there was no testimony that clearly indicated he had used the epithet either before or during Petitioner's resentencing trial. Further, Petitioner presented no other evidence to establish Humphrey was actually biased against African-Americans when he served on Petitioner's jury. Humphrey's testimony is vague as to when he may have used the epithet in the past. Thus, from Humphrey's testimony alone, it cannot be concluded that he was actually biased at the time of Petitioner's trial. Furthermore, Respondent submits that the Humphrey's admission that he used a racial epithet is not

enough to establish he was actually biased. See Rower v. State, 219 Ga.App. 865, 868, 466 S.E.2d 897, 900 (Ga. Ct. App. 1995)(noting that use of racial epithet at some time does not render juror incapable of impartiality as a matter of law).

The PCR Court found Humphrey was credible when he stated he did not think African-Americans were morally inferior to whites, and that he was not a prejudiced individual. Appellate courts "give great deference to a judge's findings when matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Solomon v. State, 313 S.C. 526, 529, 443 S.E.2d 540, 542 (1994)(citing Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993)).

In all, the PCR Court's denied relief upon this claim because Petitioner did not meet his burden of establishing by a preponderance of the evidence that Juror Humphrey was actually biased against Petitioner because of his allegedly racist views. This determination is supported by the record. As a result, this Court should deny certiorari upon this claim.

This Court should deny certiorari on Petitioner's second claim: the PCR Court correctly found appellate counsel was not ineffective for not challenging the state's introduction of evidence regarding Petitioner's prior convictions for assault and battery of a high and aggravated nature.

Relevant facts

At Petitioner's resentencing trial, the State presented testimony and evidence regarding Petitioner's prior convictions for the assaults and batteries of a high and aggravated nature of Shannon Gilbert and Aaron McGough. William "Mark" Dubose testified that on March 4, 1988, he observed two white males lying on their backs in the parking lot of the Pizza Hut in Lexington. (App. 987,

989). He saw a large black male standing over one of the victims, stomping on that victim's head with his foot. (App. 987, 989). He noted that they were not moving, and there was a good bit of blood around both of them. (App. 990).

Another witness, Rhonda Smith, testified that on that evening, she observed a black male dragging a white male from the Pizza Hut by his hair. (App. 998). She described the black male as being very large. (App. 998). After he stopped dragging the guy, Smith indicated the male kneeled down and beat the white male in the face with his fists and kicked and stomped the victim. (App. 998-999). She further noted that the white male was motionless and not doing anything. (App. 999). She watched the perpetrator hit the victim in the face five to six times. (App. 1000). Then he kicked the victim in the head three to four times. (App. 1000). That was followed by three to four stomps on the victim's head. (App. 1000-01). Then, Smith testified that the perpetrator got into a truck that pulled up to the scene, and the truck drove away. (App. 1001-02).

Sharon Brady, the mother of Shannon Gilbert (one of the victims in the Pizza Hut assault), testified that she recalled receiving the phone calls informing her that her son was taken to Lexington County Hospital, and then to Richland Memorial Hospital. (App. 1013). She indicated that she had difficulties recognizing her son because of the "beatings, the bruises, cuts on his face and head." (App. 1013). Shannon Gilbert was unconscious in the intensive care unit for thirteen days. (App. 1014). A picture taken of Gilbert two days after the beating was introduced into evidence. (App. 1014-16). Gilbert remained in the hospital for approximately three and one-half weeks. (App. 1017). After

spending five days at home, Gilbert was taken to the Rebound Head Trauma Center in Lancaster, SC. (App. 1017-18). Gilbert remained there for approximately two and one-half months. (App. 1018-19).

After Gilbert returned home from rehabilitation, he required more treatment with a speech therapist and a physical therapist. (App. 1019). Brady testified that Gilbert continued having difficulty walking with his left leg and moving his left arm as a result of the beating. (App. 1020).

Shannon Gilbert testified that on March 4, 1988, he was working at the Pizza Hut in Lexington. (App. 1021). He recalled that after he got off work, he went outside to use the pay phone to call a friend. (App. 1021). While there, he recalled there was a black male who indicated he was waiting to use the telephone. (App. 1021-22). The last thing Gilbert remembered was telling his friend to call Gilbert back inside the Pizza Hut. (App. 1022). His next memory was of waking up in the hospital. (App. 1022). Gilbert indicated that he was not able to talk or walk when he woke up in the hospital. (App. 1022). Gilbert recalled staying in the hospital for approximately three and one-half weeks. (App. 1023). Other than friends and family visits, he did not recall much about his stay in the hospital. (App. 1023). He noted that after staying at home for a few days, he stayed in Lancaster for approximately two and one-half months. (App. 1024-25). Gilbert testified he needed speech therapy because he had a really bad slur after the beating. (App. 1025). He also needed physical therapy on the left hand and left leg due to a lack of coordination in each one. (App. 1025-26). Gilbert also indicated that he had no short term memory, and he still

had problems with coordination with his left hand. (App. 1026). Gilbert also recounted a dream he had in the hospital:

> I remember the dream. I woke up and I remember being really afraid. And, of course, there were several in the room. I'm not sure who it was, nurses, maybe my mother. I'm not sure who all was there, but to calm me down. And I remember telling them what it was about. It was – Indians were chasing me trying to kill me, and the thing that I thought was they were black. And later on -- or after years have gone by I've maybe even thought, well, there might have been a link. You know, that I was remembering something about trying to get away from someone.

(App. 1028). Prior to telling his account of the dream, trial counsel objected to the testimony, asserting it was not relevant. (App. 1027). The trial court overruled the objection. (App. 1028). After Gilbert's testimony regarding the dream, counsel renewed his objection, and moved to strike the testimony. (App. 1028). Again, the trial court denied the objection and the motion to strike. (App. 1028).

The last witness to testify about the assault was Helen McGough, the mother of Aaron McGough. She testified that she received a phone call from the Pizza Hut on the night of the beating. (App. 1032). As a result of the phone call, she went to Richland Memorial Hospital. (App. 1032). She testified that when she saw her son, his face "was just - - it was all cut up. His eyes were just little slits. His nose and his mouth was just -- it was just all one. His forehead was all cut up. And if I hadn't of known it was him I wouldn't have recognized him." (App. 1033). She also noted that Aaron had a U-shape in his forehead. (App. 1034). The State introduced into evidence a photograph of Aaron McGough that was taken four days after the assault. (App. 1036). Mrs. McGough testified that

Aaron stayed in ICU for four days, and then spent one week in a regular hospital room. (App. 1037). After his release from the hospital, Aaron stayed at home for another six weeks. (App. 1037).

After the jury was released for the evening, the trial court and counsel put two bench conferences taken up earlier in the day on the record. (App. 1038-40). The second bench conference was in reference to the objection made by counsel before Mrs. Brady testified. (App. 1039). The trial court noted that the objection was overruled at that time. The trial court stated:

> I want to be sure to note that for the record, Mr. Floyd, so the record is clear that prior to her testimony, prior to her being called you did object to that. The objection was based on relevance as to her being able to testify as to the extent of her son's injuries and the reaction. I ruled that my understanding of the Supreme Court rulings is that that is appropriate to be introduced.

(App. 1039).

To clarify the record, trial counsel stated that they objected to "any testimony about the extent of the injuries suffered by the boys in the Pizza Hut incident as being inappropriate, victim impact type of information and having nothing to do with the particular crime that Mr. Bennett is on trial for now." (App. 1039). Counsel also noted that they indicated they wanted to renew the objection when Ms. McGough testified. (App. 1039-40). The trial court then reiterated that it believed it was appropriate to allow the testimony as to the extent of the beatings.

In the appeal, appellate counsel argued the testimony from the two victims' mothers was inadmissible because it was irrelevant victim impact testimony under Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991).

(App. 2464-73). Counsel further contended the photographs should also not have been allowed into evidence because they were irrelevant and constituted inadmissible victim impact evidence under Payne. (App. 2474-75). Finally, counsel argued that Shannon Gilbert's testimony about his dream was improperly admitted because it constituted irrelevant victim impact testimony. (App. 2476-79). The South Carolina Supreme Court rejected Petitioner's argument on appeal. (App. 2578-80). The Court specifically found the testimony and evidence in question did not constitute victim impact evidence. (App. 2578-80). The Court also noted that in the appeal, Petitioner did not "couch these objections in terms of relevance or a Rule 403 analysis." (App. 2579). The dissent did find the evidence should not have been introduced into evidence because it was not victim impact evidence, and it was irrelevant. (App. 2585-87).

At the PCR hearing, appellate counsel, Robert M. Dudek, Esquire, testified he argued it was impermissible victim impact evidence under Payne v. Tennessee. He noted that he argued it was impermissible because Payne "only allowed a glimpse of the life that the defendant chose to extinguish." (App. 3063-64). Dudek further testified that he argued it was impermissible victim impact evidence for that reason. He indicated the South Carolina Supreme Court said it could not be victim impact evidence because it did not pertain to the decedent in Petitioner's case. (App. 3064). Dudek testified his recollection was the Supreme Court indicated the correct argument was relevance and Rule 403. (App. 3064, 3065).

Dudek testified that the State has every right to introduce other bad acts and crimes in the sentencing phase because that phase is about the character of the defendant and the circumstances of the crime. (App. 3065). He asserted that once you get into introducing photographs of young men in hospital beds and discussions about dreams of black Indians, that was impermissible. He noted that his argument was that it was impermissible victim impact evidence. (App. 3065). He asserted that either under his victim impact evidence theory or under relevance and Rule 403, the evidence was not admissible in his opinion. (App. 3066).

The PCR Court denied relief upon this claim of ineffective assistance of appellate counsel. The PCR Court found appellate counsel was not deficient in failing to raise the issues using the relevance argument because the issue was not preserved for appeal. (App. 3902, n. 56). Further, in its discussion of the related ineffective assistance of trial counsel claim, the PCR Court noted that "[a]lthough trial counsel did preserve a relevancy objection, a general objection such as relevancy is generally insufficient to preserve an issue for review on appeal." (App. 3841). The PCR Court then explained that trial counsel was not ineffective in not properly arguing the objections to the testimony and evidence because it was relevant and admissible. (App. 3841-46).

This Court should deny certiorari on this issue because the PCR Court's finding that the issue was not preserved for appellate review is supported by the record. As already noted, at the only instance where trial counsel explained the nature of his relevancy objection, he stated they were objecting to "any testimony

about the extent of the injuries suffered by the boys in the Pizza Hut incident as being inappropriate, victim impact type of information and having nothing to do with the particular crime that Mr. Bennett is on trial for now." (App. 1039). At no point during any of the discussions regarding the objections did trial counsel argue the evidence was irrelevant under Rule 403, SCACR. Further, the only argument regarding relevance was that the testimony at issue was "inappropriate victim impact type of information." (App. 1039).

"[A]ppellate counsel is not ineffective for failing to raise on appeal an issue that was not preserved for review." Gilchrist v. State, 364 S.C. 173, 178, 612 S.E.2d 702, 705 (2005)(citing Legge v. State, 349 S.C. 222, 562 S.E.2d 618 (2002)). The arguments that Petitioner now asserts should have been raised by appellate counsel were not preserved for appellate review. Because Jarrell failed to make these arguments at trial, this issue is not preserved for our review. See State v. Jarrell, 350 S.C. 90, 105, 564 S.E.2d 362, 371 (Ct.App.2002)(citing State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 877 (1998) (stating an objection which does not specify the particular ground on which the objection is based is insufficient to preserve the question for appellate review); Holy Loch Distrib., Inc., v. Hitchcock, 340 S.C. 20, 24, 531 S.E.2d 282, 284 (2000)).

Furthermore, even if these issues were preserved for appellate review, the appellate claims are without merit. The trial court was correct in allowing the testimony and evidence to be presented. The conduct of a trial, including the admission and rejection of proffered evidence, is left largely to the sound discretion of the trial judge. His exercise of such will not be disturbed on appeal

unless the appellant can demonstrate that there has been an abuse of discretion or commission of legal error in its exercise, and that the rights of the appellant have been prejudiced. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981). S.C. Code Ann. § 16-3-20(B) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1979).

Evidence of other crimes is admissible at sentencing phase of capital trial, including photographs of a victim. E.g., Ray v. State, 330 S.C. 184, 498 S.E.2d 640 (1998)(evidence of other crimes, including "gory photos" of victim, is admissible at sentencing phase of capital trial); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985)(details of defendant's prior murder convictions, including photographs of prior murder victims, were properly allowed into evidence in sentencing phase); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (information concerning the details of prior offenses can be introduced during the penalty phase); State v. Skipper, 285 S.C. 42, 328 S.E.2d 58 (1985). Cf State v. Bell, 302 S.C. 18, 32, 393 S.E.2d 364, 371-72 (1990). The evidence here concerned two similar crimes (ABHAN) to the murder conviction for which Petitioner was being sentenced. "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and

predisposition to commit similar crimes." State v. Green, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted).

Also, this evidence, along with other evidence of his behavior while incarcerated, showed Petitioner's extremely violent .nature and future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. Dawson v. Delaware, 503 U.S. 159 (1992). Moreover, the trial judge gave a limiting instruction that required the jury to find that the State had proved the evidence of Petitioner's bad character beyond a reasonable doubt before considering it. Finally, Shannon Gilbert's testimony was admissible as a circumstance of the prior crime bearing on Petitioner's culpability.

Furthermore, even if the evidence was improperly admitted, Petitioner was not prejudiced as a result of the testimony. There cannot be any prejudice from introduction of the photos because they are merely cumulative to the testimony from each mother concerning the extent of her son's injuries and his appearance. Furthermore, the limiting charge given by the judge prevented the jury from considering this evidence as proof of an aggravating circumstance(s). Also, the State was obligated to prove the ABHANs beyond a reasonable doubt, and this evidence helped meet that burden. The testimony of the mothers was largely cumulative to the testimony of Shannon Gilbert and there is no challenge to his testimony in this regard. The challenged testimony paled in comparison to testimony of the extent of the injuries Petitioner inflicted upon Benton Smith during the commission of the murder, as well as the testimony from the two eyewitnesses to the Pizza Hut attacks, William Mark DuBose and Rhonda Smith.

Finally, there was overwhelming evidence establishing the statutory aggravating circumstances found by the jury. See State v. Gaskins, 284 S.C. 105, 127, 326 S.E.2d 132, 145 (1985) (erroneous admission of evidence in sentencing phase reviewed for harmless error).

Similarly, Shannon Gilbert's testimony about the dream was not prejudicial. The dream was only mentioned once by Shannon. It was never mentioned again by the State in closing argument. Thus, the challenged evidence only constituted thirteen lines of testimony in a transcript that was 2,159 pages long. The challenged testimony was not a blatant racial reference. It was merely Shannon's impression of his own dream. Third, the testimony concerning Shannon's dream was far less prejudicial than testimony about the extent of the injuries Petitioner inflicted upon Benton during the commission of the murder.

Since the testimony was properly admitted, and any improper admission would not have been prejudicial, appellate review of these allegations in Petitioner's direct appeal would have been without merit. Thus, Petitioner failed to establish in PCR that appellate counsel was deficient in this regard. Further, Petitioner failed to establish he was prejudiced as a result. Since the PCR Court's findings are supported by the record, this Court should deny certiorari upon this issue on appeal.

This Court should deny certiorari on Petitioner's third claim; the PCR Court's findings that trial counsel was not ineffective for not objecting to "prejudicial and improper statements by the prosecution during the opening statement and closing argument of the sentencing phase" of Petitioner's trial are supported by the record.

Relevant facts

At the PCR evidentiary hearing, Mr. Floyd testified that he did not have a strategic reason for objecting to several of the statements now challenged by Petitioner in this claim. (App. 3016-18). Floyd noted that "there were times you couldn't hear what was being said. Whether that was during those times or not, I couldn't tell you." (App. 3018). He noted during cross-examination that he did not object to the closing argument. (App. 3041-42). He agreed that a number of the comments concerned references to Petitioner's size. (App. 3042). He noted that Petitioner was approximately 6'5", and weighed approximately 250 pounds. (App. 3042). He noted there was a size disparity between Petitioner and the victim, and the victim was slightly built. (App. 3042). Floyd also testified he thought the State's theory was that Petitioner struck the victim three times in the jaw. (App. 3042-43).

Floyd could not specifically remember in there was evidence presented that there was a cemetery near Petitioner's sister residence. (App. 3043-44). He recalled the victim's body was located near Petitioner's sister's house. (App. 3044). Floyd also testified that the State tried to use some evidence to show Petitioner was manipulative. (App. 3044-45). He also noted Petitioner had been convicted of murder. (App. 3045).

The PCR Court found that many of the comments were challenged and rejected in Petitioner's direct appeal. Thus, the PCR Court found that the law of the case was that the State's remarks did not deprive Petitioner of a fundamentally fair trial. (App. 3848). Many of the comments at issue were both challenged and addressed in Petitioner's direct appeal. (App. 3848). The PCR

Court further found that the comments did not so infect the trial with unfairness as to make the resulting conviction a denial of Petitioner's due process under Donelly v. DeChristoforo, 416 U.S. 637 (1974). After recounting some of the evidence and testimony presented at Petitioner's resentencing trial, the PCR Court noted that it was in light of the evidence that the solicitor made the comments now challenged. (App. 3849-53). Some of the comments were challenged in the fifth argument on appeal. (App. 3854-55). This Court reviewed the comments on appeal, even though trial counsel did not object to the statements. (App. 3854-56). Since the due process claim was presented to and rejected by this Court, the PCR Court found that this Court's finding of no due process violation was law of the case. (App. 3856).

Further, in applying the Strickland standard to Petitioner's claims, the PCR Court found he could not establish he was prejudiced because this Court did not find the argument raised on appeal was barred as a result of counsel's failure to object to the comments. (App. 3856-57). The PCR Court also found that Petitioner could not show he was prejudiced because he could not establish that any of the statements so infected his trial with unfairness as to render it a due process violation. (App. 3857). The PCR Court then noted that the statements challenged were comments based upon the facts of the case, and not calculated to produce a sentence based on passion or prejudice. (App. 3858).

Discussion

"[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." Delaware v. Van Arsdall, 475 U.S. 673, 681

(1986) (citing United States v. Nobles, 422 U.S. 225 (1975)). "To this end it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another." United States v. Robinson, 485 U.S. 25, 33 (1988). The United States Supreme Court has made clear that a petitioner is not entitled to relief based upon the closing argument of a prosecutor, unless that argument so infected the trial with unfairness as to make the resulting conviction a denial of due process. Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

The standard in Donnelly is a very high standard for a defendant to meet. "'[I]t is not enough that the remarks were undesirable or even universally condemned.' Darden v. Wainwright, 477 U.S. 168, 181 (1986)." State v. Tubbs, 333 S.C. 316, 321, 509 S.E.2d 815, 818 (1999). "In order to make an appropriate assessment, the reviewing court must not only weigh the impact of the prosecutor's remarks, but must also take into account defense counsel's opening salvo." United States v. Young, 470 U.S. 1, 12 (1985). Furthermore, "a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Donnelly, 416 U.S. at 647.

Petitioner failed to establish trial counsel was ineffective in not objecting to the comments during the opening and closing statements that he alleges injected race into Petitioner's trial. First, as correctly noted by the PCR Court, Petitioner cannot establish he was prejudiced by counsel not objecting to the comments

because this Court reviewed the argument challenging statements made in the opening statement and closing argument despite the lack of a contemporaneous objection. (See App. 3856-7). This Court reviewed the comments challenged by appellate counsel in the Final Brief of Appellant. Since these other comments could have been reviewed if raised in the appeal, Petitioner cannot show that he was prejudiced by trial counsel's failure to object.

Second, Petitioner could not establish he was prejudiced by any failure of counsel to object because the solicitor's comments in the opening statement and closing argument did not so infect the trial with unfairness as to deprive Petitioner of a fair trial. The solicitor's various comments about Petitioner's "brute monster size," the reference to his being a "bear of a fellow," and having a "big old bear of a fist." in opening statement were fair comments in light of the testimony presented in regards to Petitioner's size (a life-long friend testified Petitioner was approximately 6' 5" or 6' 6" tall and weighed 300 pounds, and other witnesses described Petitioner as very big). Similarly, the references to Petitioner as "tiger," "monster," and "mountain man" were similar references to Petitioner's size in comparison to the victim, Benton Smith, and Benton's father. (See App. 2067, 2068, 2070). For example, in describing the fight between Petitioner and the victim, the solicitor described Benton as "the little lamb" who "was no match for a big old tiger." (App. 2067).

Trial counsel was not ineffective for not objecting to the solicitor's comment during opening statement that "folks, you know about 25 feet away from you in your presence is a murderer. I hope you never have to live through

this after this week, being that close to a murderer." (App. 909). The PCR Court correctly found the statement did not so infect the trial with unfairness as to deprive Petitioner of a fair trial. (App. 3857). The comment was not improper. It was merely a reference to the fact that Petitioner was a murderer. He was already convicted of murder. The purpose of the resentencing trail was solely to determine the appropriate sentence. See State v. Southerland, 316, S.C. 377, 447 S.E. 2d 862 (1994) (residual doubts of guilt are not a mitigating factor in sentencing).

Trial counsel was not ineffective for not objecting to objecting to the following statement by the solicitor in closing argument: "Now you see. Now you see why I'm asking for the death penalty. It's warranted. It's appropriate. It's the punishment that fits this crime and that callous murder." (App. 2081; see also App. 2054). Contrary to Petitioner's assertions, State v. Northcutt, 372 S.C. 207, 223, 641 S.E.2d 873, 881 (2007) did not warrant relief in this case. As was noted by this Court in Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008), in Northcutt, the Court "did not hold that the solicitor's comments regarding 'expecting' the death penalty constituted a denial of fundamental fairness shocking to the universal sense of justice. Rather, we held that the solicitor's closing argument as a whole infused the sentencing proceeding with 'passion and prejudice' in violation of S.C. Code § 16-3-25(C)(1) (2003)." Williams, 380 S.C. at 478, 671 S.E.2d at 602.

While the comments here are similar to the comments made in Northcutt, the two cases are distinguishable. First, the issue in Northcutt was raised on

direct appeal, whereas Petitioner's claim here was raised within the context of ineffective assistance of counsel. Thus, Northcutt is not dispositive on this issue on its face. Second, when viewed in the context of the entire closing argument, the solicitor's limited statements in this case squarely addressed the fact that the decision still rested with the jury and that it had not been made for them. The solicitor told jurors to disregard an alleged statutory aggravating circumstance if it found that the State had not proved any of the four he urged existed, and he reminded jurors "that's your decision." He also generally referenced the jurors' promise to base their verdict on the testimony and the exhibits and the law presented, and he told the jury that the evidence proved that death was the appropriate sentence and that "the punishment that fits the crime." He also told jurors that the trial judge would instruct them that "[y]ou can give the defendant life for any reason or no reason at all. You just give him life, if that's justice, if that fits the crime, if that fits the character of Johnny Bennett. That is for you to decide." (App. 2059). This was much unlike the situation in Northcutt, where the State presented a funeral procession in the courtroom for the victim, and the solicitor declared that a life sentence would be "open season on babies."

Furthermore, these comments were similar to statements made in closing arguments in other cases where the sentence was upheld. For instance, in State v. Bell, 302 S.C. 18, 33-34, 393 S.E.2d 364, 372-73 (1998), the solicitors' argued in closing that if "'this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none.' On direct appeal, this

Court concluded that the Solicitor's argument in Bell's case had not injected his personal opinion concerning the death penalty into the proceedings; and that he had not "comment[ed] on his involvement in deciding whether or not to prosecute for the death penalty." Bell, 302 S.C. at 34, 393 S.E.2d at 373. See also State v. Johnson, 306 S.C. 119, 133, 410 S.E.2d 547, 555 (2000) (finding no reversible error in solicitor's comment that "Ya'll do what's right. I feel that it would have to be and would hope that you would agree a verdict of death by electrocution."); State v. Plath, 281 S.C. 1, 17, 313 S.E.2d 619, 628 (1984)(finding no prejudice when solicitor told jurors to have the "guts to do your job."); see also State v. Elmore, 300 S.C. 130, 386 S.E.2d 769 (1989).

Also, unlike the closing arguments in State v. Sloan, 278 S.C. 435, 298 S.E.2d 92 (1982). Thompson v. Aiken, 281 S.C. 239, 315 S.E.2d 110 (1984), and State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982) (argument that he had to make the decision to seek death and that he had made the decision and that if he could do it, the jurors could do it was error), the solicitor here did not go into detail the process he utilized in deciding to seek the death penalty. In each of those cases, the prosecution went extensively over the death penalty decision-making process and who had to make the decisions. Such review of the decision-making process did not occur here.

Altogether, the PCR Court's findings that Petitioner failed to establish counsel was ineffective in not objecting to these comments by the solicitor are supported by the record. As a result, this Court should deny certiorari upon all of the claims in Petitioner's third argument in the Petition for Writ of Certiorari.

This Court should deny certiorari on Petitioner's fourth claim: the PCR Court correctly found trial counsel did not have a legal right to question jurors about racial prejudice, and Petitioner was not prejudiced by counsel not doing so.

Relevant facts

During jury selection, trial counsel did not request any questions regarding racial prejudice be asked during the voir dire. The initial jury selected was comprised of eight white females, three white males, and one black male. (App. 831-38). Both alternates were white males. (App. 838-40). During a break, Juror Brown, the sole African-American on the jury, indicated to the court that he discovered during a break that he recognized some of the victim's family in the courtroom. (App. 868-9). As a result, he did not know if he could serve as a fair and impartial member of the jury. (App. 872). As a result, Juror Brown was dismissed from the jury. (App. 878).

Shortly thereafter, Petitioner's trial counsel requested the case be continued and a new jury selected because of potential race-related concerns. (App. 879-82). The motion was denied. (App. 882). Then, trial counsel requested additional voir dire of the jury on their racial attitudes. (App. 882). That motion was also denied. (App. 883).

At the PCR hearing, Wayne Floyd testified that he recalled asking to question the jurors about potential racial prejudices. (App. 3022). He believed the request was made before testimony began. The trial court denied the request. Floyd indicated he believed he could have made the request sooner. He also testified that he did not have a strategic reason for not making the request during the normal voir dire of the jury. (App. 3022).

Floyd testified they had ten to fifteen members of the community assist them during the jury selection process. (App. 3029). Those community members would grade the members of the jury venire on their attitude towards the death penalty. Floyd testified that he was concerned about race as an issue in the case because the case was being tried in Lexington County. (App. 3029). He was aware the evidence of the Pizza Hut incident would be presented at trial. (App. 3029-30). He was aware of the United States Supreme Court decision in Turner v. Murray. (App. 3030). He was aware that he could have asked questions if he wanted. Floyd also acknowledged it was a delicate area of inquiry. He indicated that he was not sure people are always honest about that question, and that one has to be careful not to offend others with the question. (App. 3030). Floyd also noted that you do not want to interject the race issue when it is not present in the case. (App. 3030-31). He testified that he never had a non-capital case in which he was allowed to ask jurors about their views on race when the defendant and the victim were of the same race. (App. 3032).

Hervery Young testified he did not recall having a conversation with Floyd about asking jurors about race before jury selection. (App. 3081-82). He was aware they could make an inquiry. (App. 3082). Young testified he did not make it a priority because it was a case with a black victim and a black defendant. While the concern did come up, he did not recall raising any concern with Floyd. Young did note that he was concerned because the case was being tried in Lexington County, and he believed Lexington County was harsher on defendants

of color. (App. 3082-83). In all, it was not an issue at the top of Young's list of concerns. (App. 3083).

The PCR Court found Petitioner's allegation was without merit. (App. 3885-86). Specifically, the PCR Court found Petitioner did not present any credible evidence of prejudice. (App. 3886). After recounting the testimony of counsel at the PCR evidentiary hearing, the PCR Court found that Petitioner failed to show deficient performance. (App. 3887-88). A review of the record and counsel's PCR testimony demonstrated counsel was aware of the potential for racial prejudice. (App. 3888). The PCR Court also noted that while Mr. Floyd indicated he had not made a strategic decision in not requesting voir dire questions regarding racial bias, the transcript of one of the pre-trial hearings indicated he was both cognizant and expressed concerns about matters relating to racial prejudice being raised by the jury questionnaire. (App. 3889). The PCR Court also noted that counsel's actions subsequent to the dismissal of Juror Brown reflected awareness and concern about the possible injection of race into Petitioner's re-sentencing trial. (App. 3889). The PCR Court stated that Petitioner's case did not present the typical situation where questions about juror views on race were raised because Petitioner and the victim were of the same race. The PCR Court found Petitioner had not presented the PCR Court with any authority that required the trial judge to permit an inquiry into the potential racial biases of jurors. Thus, the PCR Court found Petitioner failed to show counsel was deficient in this regard. (App. 3889).

The PCR Court also found Petitioner failed to establish he was prejudiced. The PCR Court noted that it had rejected Petitioner's contention that Juror Humphrey's decision was governed by considerations of race, and Petitioner presented no other evidence that an inquiry on the juror's views on race would have resulted in discovery of a racially prejudiced juror. (App. 3890).

Discussion

This Court should deny certiorari on this claim. The PCR Court's denial of relief upon this claim is supported by the record. "Counsel is also accorded particular deference when conducting voir dire. An attorney's actions during voir dire are considered to be matters of trial strategy." Hughes v. United States, 258 F.3d 453, 457 (6th Cir. 2001)(citing Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir.1997) (citing Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir.1995))). "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." Nguyen, supra.

Both the trial record and trial counsel's testimony at the PCR evidentiary hearing reflect they were aware and concerned about potential racial prejudice. It can be inferred from counsel's testimony and counsel's argument for a continuance and for the late additional voir dire that counsel wanted to avoid potentially alienating the jury pool by asking about potential racial prejudice when it did not appear those concerns would be present.[1] Thus, the PCR Court was reasonable in finding counsel was not deficient in this regard. Furthermore,

[1] Floyd noted in his argument for the motion for a continuance that they did not believe they would have to broach the issue because it appeared to them that at least one minority would have been seated on the jury. (See App. 879-80).

Petitioner never presented any authority that required a trial court to allow a voir dire inquiry into racial prejudice when the victim and defendant are of the same race. See Goins v. Angelone, 226 F.3d 312, 323 abrogated on other grounds by Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) ("[t]here is no constitutional presumption of juror bias for or against members of any particular racial or ethnic group, presumably even when a jury pool is predominantly white."). As the Fourth Circuit Court of Appeals explained in Sexton v. French, 163 F.3d 874, 886 (4th Cir.1998) :

> Although the Supreme Court held in Turner v. Murray, 476 U.S. 28 (1986), that "a capital defendant accused of an interracial capital crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias," id. at 36-37, 106 S.Ct. 1683, the Court noted that a defendant may not complain about the failure to question prospective jurors on racial bias unless he has specifically requested such an inquiry. See id. The Court made clear that the decision to question prospective jurors about racial bias is best left in the hands of trial counsel. See id.; see also Spencer v. Murray, 18 F.3d 229, 234 n. 6 (4th Cir.1994). In light of Turner, we believe that Sexton's trial counsels' decision not to question prospective jurors about racial bias was binding on Sexton and, therefore, trial counsel were not constitutionally ineffective for allegedly failing to secure Sexton's consent.

See also Spencer, 18 F.3d at 234 & n. 6.

The PCR Court's finding that Petitioner failed to establish he was prejudiced is also supported by the record. As already noted in response to Petitioner's first argument, Juror Humphrey's testimony at the PCR hearing does not establish that voir dire questions regarding race would have resulted in the discovery of a racially prejudiced juror. Petitioner also did not present any evidence that such an inquiry would have led to the discovery of any other alleged racially prejudiced juror(s). In light of Petitioner's failure to establish that

such an inquiry would have led to the exclusion of any juror in Petitioner's trial, the PCR Court was reasonable in finding Petitioner had not shown he was prejudiced. As a result, this Court should deny certiorari upon this issue.

This Court should deny certiorari on Petitioner's fifth claim: appellate counsel was not ineffective in not contesting on appeal whether the trial court's supplemental instruction in response to a jury question regarding parole eligibility when the instruction as a whole properly stated the law on the issue.

Relevant Facts

During the jury charge, the trial court instructed the jury as follows: "Now, jurors, the terms life imprisonment and death penalty should be understood in their ordinary and plain meaning by you. As I've said, you simply accept these two, life imprisonment and death penalty, and understand them in their plain and ordinary meaning." (App. 2138). After the jury began deliberations, it sent the judge a note with the following question: "[I]f we decide life imprisonment does that mean life without parole at any time or life with possible parole, or is this decision left up to the Judge?" (App. 2142).

In response to the first question, the trial court indicated to the attorneys that he believed he could only give instruct the jury using the charge outlined by State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985). The State indicated that it would have no objection to the charge if requested by the defense. Trial counsel stated it had no objection, "as long as it's the brief form that you use in your original charge." (App. 2143).

Subsequently, the trial court instructed the jury as follows:

> Let me tell you that the only thing I'm allowed to comment on that -- and you understand that there are all sorts of varieties in this thing

> and it's something that I can't get into with you directly. All I can do is basically give to you the charge that I gave you earlier. And let me just give you that charge again. And I know it is kind of general, but you have to take this into account.
>
> The terms life imprisonment and death penalty should be understood in their ordinary and plain meaning. You simply accept these, life imprisonment and death penalty, and understand them in their ordinary and plain meaning. So when you make these determinations you have to consider life imprisonment the term life imprisonment and death penalty, and you have to consider those in their plain and ordinary meaning.

(App. 2144-45).

After the jury returned to the jury room, trial counsel objected to the wording in the charge regarding varieties: "Your Honor, the only, I guess objection we'd make to the charge, was Your Honor's mention of -- and I forgot the exact wording, something about there are lots of varieties of this." (App. 2146). The trial court overruled the objection. The trial court indicated its basic point was that the jury needed to only look at the plain and ordinary meaning of the terms. (App. 2146). The Court also noted that the jury appeared to get the message, and they indicated they understood the instruction. (App. 2147).

At the PCR evidentiary hearing, appellate counsel testified that he chose not to raise the issue: he did not think "it was going to go anywhere as an issue and certainly wasn't going to win the case." (App. 3069). Further, appellate counsel indicated that an issue was not preserved because counsel never asked for some other relief. (App. 3071). As a result, he could not see where an argument could be raised. (App. 3071).

The PCR Court denied relief upon Petitioner's claim of ineffective assistance of appellate counsel. (App. 3902). It found that a specific objection

was not made to the trial judge's comments that he could not discuss parole eligibility with the jury. (App. 3902). As a result, the issue was not preserved for appellate review, and appellate counsel could not be found deficient. (App. 3902). Furthermore, the PCR Court found that the charge given by the trial court was appropriate as given, and thus Petitioner was not prejudiced. (App. 3902).

Discussion

This Court should deny certiorari on this claim because the PCR Court's findings are supported by the record. To the extent Petitioner asserts appellate counsel should have challenged the trial court's statements that he could not discuss parole eligibility with the jury, the PCR Court properly found appellate counsel was not deficient because the claim was not preserved for appellate review. At trial, counsel only objected to the court's mention of "varieties of things," and not the trial court's statements regarding his inability to discuss parole eligibility with the jury. Since no specific objection was made to those particular statements, the issue was not preserved for appellate review. State v. Patterson, 324 S.C. 5, 17, 482 S.E.2d 760, 766 (1997)("[A] general objection which does not specify the particular ground on which the objection is based is insufficient to preserve a question for review.")(citation omitted). Since the objection was not preserved for appellate review, appellate counsel was not deficient in raising the issue on appeal. Legge v. State, 349 S.C. 222, 225, 562 S.E.2d 618, 620 (2002).

To the extent Petitioner asserts appellate counsel was ineffective for not raising the argument that was preserved for appellate review, the PCR Court

correctly found the claim was without merit. A defendant is entitled to effective assistance of appellate counsel. Southerland v. State, 337 S.C. 610, 615, 524 S.E.2d 833, 836 (1999). Although appellate counsel is required to provide effective assistance of counsel, "appellate counsel is not required to raise every nonfrivolous issue that is presented by the record." Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523, 526 (1990) (citing Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). "For judges to second-guess reasonable professional judgments and impose on ... counsel a duty to raise every 'colorable' claim suggested by a client would disserve the very goal of vigorous and effective advocacy...." Jones, 463 U.S. at 754, 103 S.Ct. 3308.

Here, appellate counsel testified he did not raise the issue argued at trial because he did not believe it was meritorious. Counsel's decision not to raise the issue was thus a strategic decision. Petitioner failed to show this decision was unreasonable. When reviewed as a whole, the instruction given by the trial judge was a correct statement of the law and a proper response to the jurors' inquiry. State v. Simpson, 325 S.C. 37, 45, 479 S.E.2d 57, 61 (1996) (where second prong of the Simmons test was not because the appellant was parole eligible, "the trial judge properly charged the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning"); State v. Byram, 326 S.C. 107, 115, 485 S.E.2d 360, 364 (1997) ("Since appellant was eligible for parole if a life sentence was imposed, he was not entitled to a charge on parole eligibility"); State v. Tucker, 319 S.C. 425, 427, 462 S.E.2d 263, 264 (1995) (the trial judge properly denied appellant's request to charge the jury that,

if he were sentenced to life and an aggravating circumstance was found, he would not be eligible for parole for thirty years).

Contrary to Petitioner's assertions, the instruction given by the trial court is not analogous to the mistake made in State v. Blassingame, 271 S.C. 44, 244 S.E.2d 528 (1978). Here, the instruction given by the trial judge did not contain any erroneous statement of law. Since the instruction given by the trial court in response to the jury's question, when read as a whole, was a correct statement of law, an appeal based upon the issue would have been without merit. Thus, Petitioner could not establish appellate counsel was deficient, or that he was prejudiced by appellate counsel not raising the claim on appeal. As a result, this Court should deny certiorari on this claim.

This court should deny certiorari for Petitioner's sixth claim; trial counsel was not ineffective for not objecting to the trial court's statements in passing that errors made by the judge could be reviewed: counsel was not deficient because the statements were an accurate reflection of South Carolina law on appellate review, the statements would not lead the jury to believe the ultimate determination of Petitioner's fate rested elsewhere, and Petitioner was not prejudiced because any confusion caused by the statements were resolved by the trial court's supplemental instruction in response to a jury question regarding appellate review.

Relevant facts

In this claim, Petitioner asserts trial counsel was ineffective in not objecting to two statements made by the trial court regarding appellate review in Petitioner's case. In giving the opening instructions of Petitioner's sentencing trial, the trial court stated:

> Now remember that I told you that you have very wide discretion when it comes to the facts. You do not have that discretion when it comes to the law. You must accept the law as I give it to you strictly and accept it as such.

> Now, if I'm wrong there is a time and place for it to be corrected, but for today's purposes you must accept it as correct. And it is not what you think the law should be but it is, in fact, what I tell you that the law is.

(App. 899). In giving the jury charge after closing arguments, the trial court made a similar statement in giving the instruction to the jury:

> Now, the same constitution and laws which make you the finders of fact make me the judge or the instructor of the law. You must accept as correct the law as I give it to you. Now, if I'm wrong there is another time and place for it to corrected. But for the today's purposes, you must accept it as correct. And I charge you that you should not be concerned about what you think the law ought to be but rather what I charge you that the law is.

(App. 2112-13).

During the jury deliberations, the jury sent the judge a question, asking "if we decide death penalty, when would it be put into effect, and if there were to be an appeal how many appeals do they allow?" (App. 2142). In response, the trial judge instructed the jury as follows:

> Now, this is a matter that a jury is not allowed to go into. Again, it's something that I really couldn't answer for you anyway. As you understand, there's nothing in the record about something like this.
>
> And remember, as I told you earlier at the very start, that you must decide this based only on the evidence that has come into the courtroom, and there's been nothing in the record about this. So be sure you stay within the record, okay, within what was in the courtroom. And, again, this is an area that you cannot go into. Okay.

(App. 2145).

At the PCR hearing, Mr. Floyd testified that he did not that he did not have a strategic reason for not objecting to the two initial instructions now challenged by Petitioner. He stated it was just something that he did not catch. (App. 3011).

During cross-examination, Floyd noted that looking at the instruction now, it appeared to him to emphasize that the judge was giving the jury an out if there was an error because it would be taken care of on appeal. Floyd also testified he thought the intent of the instruction was to emphasize to the jury the importance of them listening to the judge's instruction on the law. (App. 3033). Floyd also noted the jury had asked the judge about Petitioner's appellate rights, and the judge gave them an instruction that they were not allowed to go into that issue. (App. 3033-35). Mr. Young testified that he did not specifically recall the trial judge making the statement in the opening statements to the jury, but he was familiar enough with the judge's instruction to know that he always made such a comment. (App. 3085-86). Young also testified that in hindsight, he thought the comment was objectionable, but he did not know if he thought it was at the time it was made at trial. (App. 3086).

The PCR Court found the trial judge's comments in question "do not approach the direct statements of unfettered appellate review found within the prosecutors' remarks" in cases where such statements were found to be error. (App. 3799). The PCR Court found that when viewed as a whole, there was no reasonable likelihood that the jury would have understood the remarks as implying the appellate court had unfettered review of the jury's verdict. (App. 3799). Instead, the trial judge was just emphasizing the jury had to accept the law as he instructed them. (App. 3799). Further, the PCR Court noted the trial court did not make any statements from which the jury could interpret that an appellate court could factually review the jury's sentencing determination with

unfettered discretion. (App. 3799). The trial court's statements were not an inaccurate account of appellate review in this state. (App. 3799). Thus, counsel could not be found deficient because an objection would not have been meritorious. (App. 3800).

Second, the PCR Court found Petitioner failed to prove he was prejudiced by any error of counsel in this regard. Specifically, the PCR Court noted that the jury was specifically instructed that appellate review of Petitioner's case was not a matter the jury was allowed to go into, and that the jury was to decide Petitioner's sentence based only on the evidence that was presented in the courtroom. The trial court further instructed the jury that nothing about Petitioner's appellate rights was presented in the courtroom, and ended by charging the jurors again that it was an area they could not go into. (App. 3800-01). Based on this charge, the PCR Court found Petitioner could not prove he was prejudiced. Further, the PCR Court found he could not show prejudice because the overwhelming evidence of aggravating factors rendered any speculative prejudice from the trial judge's remarks harmless. (App. 3801).

Discussion

This Court should deny certiorari upon this issue because the PCR Court's findings are supported by evidence in the record. First, the transcript of the jury charge clearly reflects the trial judge only indicated to the jury that if he made a mistake in instructing the law, his mistake could be reviewed. The trial court's statements did not constitute a Caldwell violation. Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633 (1985).

> "[I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29, 105 S.Ct. at 2639-40. Nevertheless, "if the challenged instructions accurately described the role of the jury under state law, there is no basis for a Caldwell claim. To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 1215, 103 L.Ed.2d 435 (1989).

Gaskins v. McKellar, 916 F.2d 941, 953 (4th Cir. 1990)

At no point during the instructions now challenged by Petitioner did the trial court indicate the jury's decision was subject to appellate review, or that the jury's findings would not be followed. The judge's statements were an accurate reflection of South Carolina law on appellate review. At no point during the now challenged statements did the trial court state or infer that the jury's decision was reviewable on appeal. In fact, the statements clearly limited appellate review to errors made by the judge. Thus, the trial court's statements were not in error. Since there was no error to challenge, counsel was not deficient in not objecting to the judge's statements. See generally United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994)("Counsel is not deficient for, and prejudice does not issue from, failure to raise a legally meritless claim.")(quoting Smith v. Puckett, 907 F.2d 581, 585 n. 6 (5th Cir.1990), cert. denied, 498 U.S. 1033, 111 S.Ct. 694, 112 L.Ed.2d 685 (1991)).

Furthermore, the PCR Court correctly found Petitioner failed to establish he was prejudiced by the statements he now challenges. "In determining whether a defendant was prejudiced by improper jury instructions, the court must

find that, viewing the charge in its entirety and not in isolation, there is a reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)(citing Todd v. State, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003)). To the extent any juror may have been confused about whether the jury's determination on Petitioner's sentence was subject to appellate approval, any such thought was clearly refuted by the trial court's instruction in response to the question from the jury regarding appellate review. The trial court clearly informed the jury that appellate review was not a matter for the jury to consider. Since, when viewed as a whole, the trial court's comments and instructions could not have led the jury to believe the responsibility for determining Petitioner's sentence rested elsewhere, the PCR Court's denial of this claim is supported by the record. As a result, the request for certiorari on this issue should be denied.

Certiorari should be denied upon Petitioner's seventh allegation of error. The PCR Court did not err in finding trial counsel was not ineffective in not objecting to the jury charge; the jury was not precluded from considering evidence of Petitioner's good character as mitigating evidence.

Relevant facts:

Petitioner asserts the following instruction by the trial court was improper:

> Now, as I told you a moment ago, you will consider at this time the appropriate sentence to give to the defendant. Now, in arriving at your sentence there are four classifications of evidence, and I mentioned this earlier, there are four classifications you will consider.
>
> Now, you may consider two types of evidence introduced by the State; statutory aggravating circumstances and character evidence. Now, these statutory and aggravating circumstances and character evidence must be proven by the State beyond a reasonable doubt. Secondly, you must consider the two types of evidence introduced

> by the defense, and those are statutory mitigating circumstances and any general mitigating circumstances of any nature whatsoever as shown by the evidence.

(App. 2113). The trial court went on to further instruct the jury that they could only consider those statutory aggravating circumstances that the State had proved beyond a reasonable doubt and he defined the term "statutory aggravating circumstances" for the jury. He also instructed jurors that they could not consider imposing the death penalty, unless they first unanimously found beyond a reasonable doubt that at least one of the alleged statutory aggravating circumstances existed; he listed the four statutory aggravating circumstances relied upon by the State and he defined "while in the commission of" for the jury. (App. 2113-16).

Later, the trial judge instructed jurors that:

> Now, in this case the State has also presented other aggravating circumstances. We've talked about statutory aggravating circumstances, but as I indicated, the State must also prove beyond a reasonable doubt any general aggravating circumstances. These are sometimes called character evidence. And, in essence, these are presented through evidence of crimes or bad acts or rules infractions.
>
> Now, you must understand this, and please understand this right away. Give me your close attention on this. These crimes or bad acts or rules infractions may not be used to prove a statutory aggravating circumstance. Again, these crimes or bad acts or rules infractions may not be used to prove a statutory aggravating circumstance.
>
> The evidence of other crimes or bad acts or rules infractions should be considered as evidence of an aggravating circumstance, but if you are convinced beyond a reasonable doubt that the defendant committed these other crimes or bad acts or rules infractions then you may consider them as evidence of the defendant's character and characteristics as they bear relevance to the crime.

(App. 2123). Then, the judge charged jurors that they could consider this character evidence, along with the other evidence in the case; and that they could give it whatever weight they felt was appropriate under the circumstance of the case. (App. 2123-24).

The trial judge explained that the statutory aggravating circumstances that the jury was allowed to consider had been typed on a sheet entitled statutory instructions, which the jury would have during deliberations. He reiterated that the jury "would be authorized" but not "required" to impose the death penalty if the jury unanimously found that the State had established at least one statutory aggravating circumstance beyond a reasonable doubt. He also charged them that "you're never required to give the death penalty;" and that if the jury did not find beyond a reasonable doubt that an alleged statutory aggravating circumstance existed at the time the murder occurred, then jurors would not be authorized to impose a death sentence and their sentence must be life imprisonment. (App. 2124-26).

The trial judge also instructed jurors on the relevant statutory mitigating circumstances and any mitigating circumstances supported by the record, as follows:

> Now, in addition to considering – and I've discussed here statutory aggravating circumstances, you are also required by law, you must consider statutory mitigating circumstances. Well, what are statutory mitigating circumstances? A statutory mitigating circumstance is a fact, a detail, an incident or an occurrence which the general assembly of this State had said or declared would render the murder less severe. In other words, it would mitigate the offense of murder when the fact, detail, incident or occurrence accompanies the act of murder.

Now, a statutory mitigating circumstance is one recognized by the statute and by the law as a circumstance which in fairness and mercy would be considered as extenuating or as reducing the degree of moral culpability for the commission of the act of murder.

Now, you must note, this does not constitute justification or excuse for the offense in question. It does not constitute justification or excuse for the offense in question, it simply lessens one's guilt. In other words, makes him less blameworthy or less culpable.

Now, you are required to consider any mitigating circumstance regardless of whether it is a statutory mitigating circumstance of any nature that is supported by the evidence in addition to the statutory mitigating circumstances.

In other words, there are statutory mitigating circumstances and general mitigating circumstances, which I will discuss in a moment, you are required by law to consider any of these. And by this, I mean that you, as the jury, are required to consider not only statutory mitigating circumstances but mitigating circumstances of any nature whatsoever supported by the evidence.

So what is a general mitigating circumstance, In other words, a nonstatutory mitigating circumstance? Well, it is a circumstance which is recognized as one which in fairness and in mercy may be considered to be extenuating. Again, as I told you, a mitigating circumstance is never considered to be justification or excuse for the murder. It similarly lessens the severity of its existence. And you are required to consider any circumstance of any nature whatsoever as a reason for not imposing the death penalty. Any factor may be taken into account as the reason for not imposing the death sentence.

Now, I charge you that you may not consider the statutory aggravating circumstance unless – as alleged by the State, unless all 12 of you found that a statutory aggravating circumstance has been proven beyond a reasonable doubt. Again, remember, if you do not find that it's been proven beyond a reasonable doubt you may not consider a statutory aggravating circumstance.

Now, listen to me on this. This is not true for a statutory mitigating circumstance or any mitigating circumstance. In the case of a mitigating circumstance you need not unanimously agree on the existence of any mitigating circumstance nor does the defendant have to prove any mitigating circumstance to you in any way before you may consider it. Rather, each member of the jury may consider

any mitigating circumstance which he or she feels is supported by the evidence.

Before you can impose a life sentence it is not necessary – I repeat, it is not necessary for you to find the existence of a statutory mitigating circumstance or any mitigating circumstance of any nature. There is no burden on the defendant to prove a mitigating circumstance. Rather, the burden is upon the State to prove aggravating circumstances.

The burden is upon you, as the jury, to consider the evidence submitted and determine whether any mitigating factor or factors exist, and if so, the significance and weight to be given to any mitigating circumstance. And, again, I will repeat for the sake of emphasis, there is no burden upon the defendant to prove a mitigating circumstance or any mitigating circumstances.

While it is necessary for you to find beyond every reasonable doubt the existence of a statutory aggravating circumstance before you can give a sentence to death it is not required that a mitigating or statutory mitigating circumstance be proven in order to decide that the defendant be given a sentence of life imprisonment. Now, I've instructed you that any finding that a statutory aggravating circumstance has been proven must be made unanimously and beyond a reasonable doubt. No such requirement exists for consideration of mitigating circumstances. Rather, in deciding the appropriate punishment in this case each individual juror must consider each mitigating circumstance which you find is supported by the evidence.

It is not necessary that the entire jury unanimously agree on the existence of any mitigating factor before you, as jurors, can consider it. Rather, the existence of mitigating circumstances and the weight to be given to them are matters which each juror must determine for himself or herself.

Now, as I told you a moment ago, it is not necessary for the existence of any mitigating circumstance to be proven beyond a reasonable doubt before you may consider it. The defendant has no burden of proof. He does not have to prove mitigating circumstances. Rather, you are to consider each and every mitigating circumstance in which you find to be supported by the evidence.

(App. 2126-30).

The trial judge further instructed jurors that "you may decide that the defendant receive a life sentence irrespective of whether you find in evidence, statutory or nonstatutory mitigating circumstance or not. In other words, you may choose to [impose] life imprisonment as an act of mercy." He then reiterated and defined the three statutory mitigators requested by trial counsel and reiterated many of the points covered elsewhere in his charge. (App. 2130-33).

At the PCR evidentiary hearing, Mr. Floyd testified that he would not have had a strategic reason for not objecting to an instruction that would have limited the definition of character evidence. (App. 3019). Floyd also testified that if the record reflected it, he did request three statutory mitigating circumstances and fourteen different nonstatutory mitigating circumstances. (App. 3045).

The PCR Court found the allegations asserted by Petitioner in this claim did not take into account the remaining portions of the jury charge. (App. 3868). The PCR Court further found that when viewed as a whole, there was no reasonable likelihood the jury would have understood the jury instructions as not allowing the jury to consider any relevant aspect of Petitioner's character in mitigation. (App. 3872). The instructions stated the State had the overall burden of proof, and Petitioner had no burden. Further, the PCR Court found that the portion of the charge challenged by Petitioner only sought to differentiate between evidence relating only to Petitioner's bad character from evidence of a statutory aggravating circumstance. (App. 3872).

Discussion

This Court should deny certiorari upon this allegation. The PCR Court's denial of relief upon this claim is supported by the record. As correctly noted by the PCR Court, when viewed as a whole the jury instructions did not preclude the jury from taking into consideration evidence of Petitioner's good character. Since the jury charge did not preclude the jury from considering evidence of Petitioner's good character as proper mitigation evidence, trial counsel could not have been found deficient in not objecting to the jury instruction because such an instruction would have been denied by the trial court. Similarly, Petitioner cannot show that he was prejudiced by trial counsel not objecting to the jury charge because the jury was not precluded from considering evidence of Petitioner's good character in mitigation.

"[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65 (1978)(footnotes omitted). In analyzing a challenge to a jury charge as raised by Petitioner, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 494 U.S. 370, 380, 110 S. Ct. 1190, 1198 (1990). "In determining whether a defendant was prejudiced by improper jury instructions, the court must find that, viewing the charge in its entirety and not in isolation, there is a

reasonable likelihood that the jury applied the improper instruction in way that violates the Constitution." Battle v. State, 382 S.C. 197, 203, 675 S.E.2d 736, 739 (2009)(citing Todd v. State, 355 S.C. 396, 399, 585 S.E.2d 305, 306 (2003)).

Here, the PCR Court correctly found the trial court's jury instructions, when viewed as a whole, did not preclude the jury from considering evidence of Petitioner's good character as mitigation evidence. The jury was specifically instructed that it must consider any mitigating circumstance, whether it was statutory or not. (App. 2127-28). The jury was also instructed that a general mitigating circumstance was anything that could be considered to be extenuating. (App. 2128). The trial court instructed the jury they were required to consider any circumstance of any nature as a reason to not impose the death penalty. (App. 2128). The trial court noted that "[a]ny factor may be taken into account as the reason for not imposing the death sentence." (App. 2128). These instructions clearly instructed the jury that they were required to consider all possible mitigating evidence.

The instruction specifically challenged by Petitioner did not preclude the jury from considering evidence of Petitioner's good character in mitigation. Instead, the challenged instruction only sought to differentiate between evidence of bad character and evidence of statutory aggravating circumstances. The trial court differentiated the evidence presented by the State into two categories; evidence of aggravating circumstances and character evidence. As was correctly noted later in the jury instructions, the evidence of Petitioner's bad character could not be used by the jury to find one of the statutory aggravating

circumstances. (App. 2123). The instructions regarding the treatment of character evidence was clearly limited to the character evidence presented by the State. No such limits were placed upon the evidence presented by Petitioner at trial. Instead, the trial court did not make a distinction between good character evidence and other mitigating evidence presented by Petitioner. Such a distinction was unnecessary because the jury was required to consider all mitigating evidence, and there were no limitations on how the jury could use good character evidence.

In all, Petitioner failed to show that trial counsel was deficient in not objecting to the court's instructions regarding character evidence. When viewed as a whole, the jury instructions did not preclude the jury from considering evidence of Petitioner's good character. Furthermore, Petitioner failed to show that he was prejudiced by counsel not objecting to the instructions. As a result, this Court should deny certiorari upon this claim in the Petition for Writ of Certiorari.

This Court should deny certiorari because Bennett's claim that he was entitled to a finding that his kidnapping conviction did not involve sexual misconduct was properly deemed without merit by the PCR Court.

Relevant Facts

Petitioner was convicted of kidnapping in his first trial in October 1995. He was sentenced to thirty years confinement during his re-sentencing trial. (App. 2158). This sentence was subsumed by the death sentence for Petitioner's murder conviction. (App. 2158).

In his post-conviction relief action, Petitioner requested the PCR Court make a finding that his kidnapping conviction did not involve sexual misconduct requiring registration with the sex offender registry. (App. 2829-30). The PCR Court denied the request, finding Petitioner is properly required to register because S.C. Code Ann. § 23-3-430(8) (Supp.1995), which was in effect at the time of Petitioner's conviction, required registration. (App. 3903). The PCR Court noted that once the sentencing judge's order became final, the sentence could not be altered. (App. 3903-04). Further, in the alternative, the PCR Court found the determination that Petitioner be registered as a sex offender was consistent with the mandatory requirement of S.C. Code Ann. § 23-3-430(8) that was in effect when Petitioner was sentenced. (App. 3904).

Discussion

This Court should deny certiorari to review this claim. First, the PCR Court's findings are supported by the record. When Petitioner was convicted of kidnapping in 1995, S.C. Code Ann. § 23-3-430(8) stated as follows:

> Any person, regardless of age, residing in the State of South Carolina who has been convicted in this State, or who has been convicted in any comparable court in the United States, or who has been convicted in the United States federal courts, of the offenses described below or of similar offenses in other jurisdictions shall be required to register pursuant to the provisions of this Article. For purposes of this article, a person convicted of any of these offenses shall be referred to as an offender.
>
> (8) kidnapping (Section 16-3-910).

Under the statute, Petitioner was automatically to be registered as a sex offender as a result of his kidnapping conviction.

The PCR Court correctly found that Hazel v. State, 377 S.C. 60, 659 S.E.2d 137 (2008), does not apply to Petitioner's case. In Hazel, the defendant was convicted of kidnapping in 1979, long before S.C. Code Ann. § 23-3-430 was enacted. Hazel, 377 S.C. at 63, 659 S.E.2d at 139. Thus, at issue in Hazel was which version of S.C. Code Ann. § 23-3-430 applied to the defendant. This Court found that the 1999 version of S.C. Code Ann. § 23-3-430, which was in place when the defendant was released from prison in 2002, applied. Id. at 64-5, 659 S.E.2d at 139-40. Since the 1999 version of the statute provided an exception to registry "when the court makes a finding on the record that the offense did not include a criminal sexual offense or an attempted criminal sexual offense," the Court found that the defendant in Hazel properly sought declaratory judgment for a finding that his kidnapping conviction did not involve sexual misconduct. Id. at 65, 659 S.E.2d at 140.

Petitioner's case is distinguishable from Hazel in that Petitioner was convicted when a version of S.C. Code Ann. § 23-3-430 was in effect. Thus, unlike Hazel, Petitioner was required to register in accordance with the statute in place at the time of his conviction. As a result, the PCR Court's findings were supported by the record.

As an additional sustaining ground, Respondent would submit that Petitioner's post-conviction relief action was not the proper forum by which Petitioner's requested relief could be sought. In this claim, Petitioner is seeking a declaration from the PCR court that his kidnapping conviction did not involve sexual misconduct. This request was beyond the purview of the jurisdiction

granted the PCR Court by the Uniform Post-Conviction Relief Act. "[A]side from two non-collateral matters specifically listed in the PCR Act, PCR is a proper avenue of relief only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence as authorized by Section 17-27-20(a)." Al-Shabazz v. State, 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000). Since registration is not part of Petitioner's criminal sentence, the request made in this claim in Petitioner's PCR action was not cognizable. Respondent submits this Court recognized as much in Hazel. In Hazel, the Court of Common Pleas initially designated Petitioner's request for declaratory judgment a post-conviction relief application. However, upon further review, the Court removed the case from its PCR docket and transferred it to its non-jury docket. Hazel, 377 S.C. at 62, 659 S.E.2d at 138. Respondent submits that implicit in this Court's finding in Hazel that the Court of Common Pleas properly handled this matter was a finding that this was not a matter that could be raised in a post-conviction relief action.

As another additional sustaining ground, Respondent submits that if Hazel applies, Petitioner is still not entitled to relief. As noted by this Court in Hazel, the version of the S.C. Code Ann. § 23-3-430 that would apply to Petitioner would be the version in place at the time of Petitioner's release. Hazel, 377 S.C. at 64-5, 659 S.E.2d at 139-40. Here, Petitioner has not been released. Thus, the registration requirements are not yet applicable to Petitioner. As a result, he is not entitled to the relief sought in this claim.

In all, the PCR Court did not err in denying the request for a finding that his kidnapping conviction did not involve sexual misconduct. As a result, certiorari should be denied upon this claim for relief.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Bennett's Petition for Writ of Certiorari.

Respectfully submitted,

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January 18, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Lexington County
Court of Common Pleas
Honorable James R. Barber, III, Circuit Court Judge

Case No. 2006-CP-32-3221

JOHNNY O. BENNETT,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 18th day of January, 2010, two copies of the Return to Petition for Writ of Certiorari was served on counsel for the Petitioner, Robert E. Lominack, Esq., Law Offices of Robert E. Lominack, P.C., P.O. Box 5508, Columbia, SC 29250.

ALPHONSO SIMON, JR.

January 18, 2010