IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

No. 12-

BRAD KEITH SIGMON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent

A P P E N D I X

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brad Keith Sigmon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ON WRIT OF CERTIORARI

Appeal from Greenville County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27233
Submitted October 15, 2012 – Filed March 20, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, and William H. Ehlies, II, of Greenville, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Jane Brown, all of Columbia for Respondent.

JUSTICE HEARN: A jury convicted Brad Keith Sigmon of two counts of murder and burglary in the first degree, and it subsequently sentenced him to death. His convictions and sentences were affirmed on direct appeal in *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). We granted certiorari to review the circuit court's dismissal of Sigmon's application for post-conviction relief (PCR) and now affirm.

FACTUAL/PROCEDURAL BACKGROUND

Sigmon and Rebecca "Becky" Larke were in an intimate relationship for approximately three years. They were living together in her trailer when she informed Sigmon she did not want to see him anymore. Becky's parents, Gladys and David Larke, lived next door to them in a trailer on the same property. David also informed Sigmon that Becky wanted him to move out and served him with eviction papers, stating Sigmon had to leave within two weeks. Becky subsequently moved in with her parents. Sigmon believed she had begun a new relationship and although he pleaded with her to come back, she refused. Sigmon became increasingly obsessed with Becky, stalking her in an attempt to verify she was seeing another man.

About a week after Becky asked him to leave, Sigmon was drinking and smoking crack cocaine with his friend, Eugene Strube, in Becky's trailer. At some point in the evening, Sigmon decided he would go to the Larkes' home the following morning after Becky left to take her children to school and tie up Becky's parents. When Becky returned home, Sigmon intended to kidnap her and disappear with her, but he did not want her parents to be able to call the authorities. Sigmon and Strube eventually ran out of crack and Strube fell asleep.

In the morning, after they saw Becky leave, Strube and Sigmon exited the trailer. However, Strube changed his mind about helping Sigmon and left. Sigmon grabbed a baseball bat from beneath his trailer and entered the Larkes' trailer. Upon seeing Sigmon, David told his wife to bring him his gun, and Sigmon hit him in the back of the head several times with the bat. Sigmon then saw Gladys, ran after her into the living room, and hit her several times in the head. He returned to the kitchen where David lay and hit him several more times with the bat because he was still moving. He then went back to Gladys, saw that she was still moving, and hit her several more times.

Sigmon retrieved David's gun and waited for Becky to return home. When Becky arrived, Sigmon brandished the gun, took her car keys, and forced her in her

car. He intended to pick up his own car and drive to North Carolina with Becky. However, she managed to jump out of the car and tried to run away. Sigmon pulled over and chased after her, shooting her several times. When he realized he was out of bullets, he got back in her car and fled. Although Becky was injured, she survived the assault and told the witnesses who came to her aid that Sigmon told her he had either tied up or killed her parents. Police officers were dispatched to the Larkes' home where the bodies were discovered.

A manhunt ensued and Sigmon was eventually captured in Gatlinburg, Tennessee after he called his mother, who was assisting the police in locating him. He was arrested without incident and taken into custody by the Gatlinburg police department where he confessed to murdering the Larkes and kidnapping and shooting Becky. He admitted that he intended to kill Becky and then kill himself. Officers from Greenville arrived to transfer him back to Greenville, but, at Sigmon's request, they took his statement before leaving Tennessee. He again confessed to his crimes and stated his plan had been to kill Becky and himself.

Sigmon was indicted for two counts of murder; assault and battery with intent to kill; kidnapping and possession of a firearm during the commission of a violent crime; first degree burglary; and grand larceny. The case proceeded to trial only on the murder and first degree burglary charges. Sigmon conceded guilt and presented no evidence in his defense. The State presented expert testimony that both of the Larkes died as a result of blunt force trauma to the head, describing the severity of their wounds. Both sustained nine lacerations to the head, causing hemorrhaging and filling the sinuses with blood, so that they were breathing in blood as they died. It was estimated that both lived for three to five minutes before dying from their wounds. Additionally, both sustained defensive wounds to their forearms. The jury ultimately found Sigmon guilty.

During the penalty phase, the defense presented testimony regarding Sigmon's mental state, such as his issues with childhood abandonment and neglect that affected the development of his social mores and overall judgment, as well as evidence of an extensive history of drug use stemming from his "recurrent major depressive disorder" or his "chemical dependency disorders." Sigmon additionally presented evidence that he was adapting to prison life and that he was not a problematic or difficult prisoner. Sigmon testified he was sorry for the crimes and admitted he probably deserved to die.

The court charged the jury to consider three factors in aggravation: that two or more persons were killed, that the murder was committed during the

commission of a burglary, and that the murder was committed with physical torture. It also charged the jury to consider four statutory mitigating circumstances: that the defendant had no prior history of criminal convictions involving the use of violence against another person; the murder was committed while the defendant was under the influence of emotional or mental disturbance; the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the law was substantially impaired; and the defendant was provoked by the victim. Although Sigmon requested a charge on the statutory mitigating circumstance of age or mentality, the judge declined to give that charge, noting mental state would be covered by the other mitigating circumstances he charged.

The jury ultimately sentenced Sigmon to death. On direct appeal, this Court affirmed Sigmon's convictions and sentences. *Sigmon*, 366 S.C. 552, 623 S.E.2d 648. Sigmon subsequently filed an application for PCR. The State filed a return and motion to dismiss, and Sigmon amended his application, arguing his counsel provided ineffective assistance in failing to properly preserve various issues for appellate review, failing to adequately present evidence of his mental state, and attempting to blame the victims for the crimes. Sigmon moved for summary judgment, submitting depositions of his trial attorneys. At the hearing, the PCR court ultimately dismissed Sigmon's application. We granted Sigmon's petition for a writ of certiorari on the following issues:

I. Did the PCR court err in failing to find trial counsel ineffective when they failed to object to the solicitor's reference to his own opinion of the death penalty during his closing statement?

II. Did the PCR court err in finding trial counsel was not ineffective for failing to argue that the trial court was required to charge the jury on the statutory mitigating factor of the age and mentality of the defendant at the time of the crime under Section 16-3-20(C)(b)(7) of the South Carolina Code (2003) because evidence in the record showed Sigmon was intoxicated during the commission of the crimes?

III. Did the PCR court err in failing to find trial counsel ineffective for failing to object to the trial court's charge on non-statutory mitigation?

STANDARD OF REVIEW

To prevail in a PCR action, an applicant must satisfy a two prong test: he must first show his counsel's performance fell below an objective standard of reasonableness, and he is then required to prove he suffered prejudice as a result of counsel's deficient performance. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). "However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

When a defendant challenges a death sentence, prejudice is established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Rhodes v. State*, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

The applicant in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). We will uphold the PCR court's findings if supported by evidence of probative value within the record and we will only reverse where there is an error of law. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

LAW/ANALYSIS

I. CLOSING ARGUMENT

Sigmon argues the trial court erred in not finding his counsel ineffective for failing to object to the State's closing arguments because the Solicitor expressed his own opinion as to why the death penalty was the appropriate punishment and thereby injected an arbitrary factor into the proceedings in violation of the Eighth Amendment and Section 16-3-25(C)(1) of the South Carolina Code (2003). We disagree.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself

evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor . . . ." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 338, 503 S.E.2d at 166-67.

During his closing argument, the solicitor stated:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
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> ....
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> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

(emphasis added). Trial counsel did not object.

When deposed for the PCR hearing, counsel stated he considered this personal reference inappropriate, and it was his understanding that such statements would be inadmissible. He further noted that if he had not objected to it, it was either because he "missed it or was oblivious." Nevertheless, the PCR court

concluded that the statements would not justify an objection because they did not diminish the role of the jury in rendering a death sentence nor were they inflammatory. Instead, it found the closing argument was overall tailored to the facts within the record regarding the specific crimes at issue.

Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument. Sigmon relies on *Woomer* in arguing that the comments were inadmissible. In *Woomer*, we reversed a death sentence on direct appeal where the solicitor's argument plainly attempted to minimize the jurors' sense of responsibility in choosing death. *Woomer*, 277 S.C. at 175, 284 S.E.2d at 360. We held the solicitor's statements were inadmissible because he repeatedly stated that he himself had undertaken the same difficult process. Specifically, he stated:

> [T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

Id. at 175, 284 S.E.2d at 359. Unlike the statements in that case, we do not find the solicitor's comments here diminished the role of the jury in sentencing Sigmon to death. Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence. His statements were not designed to diminish the jury's role and therefore, did not result in the prejudice identified in *Woomer*.

Instead, we find the statements more akin to those we upheld on direct appeal in *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990), where the solicitor told the jury 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." *Id.* at 33, 393 S.E.2d at 372 (alterations in original). He further implored the jury to "do what is right," stating "if it was not right in this case, it was never right." We held that these statements were easily distinguishable from the statements in *Woomer*, noting they did not lessen the role of the jury in sentencing death by mentioning the solicitor's role in the process and did not contain the solicitor's personal opinions. As *Bell*

illustrates, the solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury.

Furthermore, examining the closing argument as a whole, we find the solicitor often emphasized the important role the jury played in determining the appropriate sentence. He acknowledged that this was a "tough decision for [it] to have to make" but that it was "a responsibility that the government places upon its citizens." Although Sigmon makes much of the solicitor's frequent references to the fact that he represented the State, we fail to discern the error. The jurors were aware the State brought the charges against Sigmon and knew the State was asking for the death penalty. It is reasonable to assume that the jury therefore inferred that the solicitor believed death was the appropriate sentence.

II. STATUTORY MITIGATING CIRCUMSTANCES

Sigmon also argues his trial counsel were ineffective in failing to obtain a charge on the statutory mitigating circumstance of age or mentality because evidence at trial established he was intoxicated at the time of the murders. We disagree.

We have held that where there is evidence that the defendant was intoxicated at the time the crime was committed, the trial judge is *required* to submit the mitigating circumstances in section 16-3-20(C)(b)(2), (6), and (7). *State v. Vasquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Sigmon contends evidence in the record clearly demonstrates he was intoxicated at the time of the murders and his trial attorneys were ineffective for not making this argument to obtain the charge of statutory mitigation for age or mentality. However, we find there is evidence of probative value supporting the PCR court's finding that Sigmon was not intoxicated at the time of the murders.

During the penalty phase, counsel requested a charge pursuant to section 16-3-20(C)(b)(7) on "the age or mentality of the defendant at the time of the crime" based on the evidence presented as to Sigmon's mental state at the time of the murders. This mitigating circumstance would be in addition to the other mitigating circumstances the court charged under section 16-3-20(C)(b): that (1) "[t]he

defendant has no significant history of prior criminal conviction involving the use of violence against another person;" that (2) "[t]he murder was committed while defendant was under the influence of mental or emotional disturbance;" (6) that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" and that (8) "[t]he defendant was provoked by the victim into committing the murder." The trial court declined to charge (7), concluding any inference from mental state was encapsulated in (6).

In his deposition for Sigmon's PCR hearing, trial counsel admitted that upon reading the statute anew, it did appear that subsection (7) was substantively different from subsection (6), but also stated he had "no knowledge or memory of distinction on these issues then or now." He further stated that at trial he thought "the facts were the thing that would carry the day, not any charge [the court] happened to give about mitigation." The PCR court ultimately found there was insufficient evidence of intoxication at the time of the crime to require charges pursuant to section 16-3-20(C)(b)(2), (6), and (7) and thus found that it was not ineffective assistance to only obtain charges on (2) and (6).

Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes. At trial, Sigmon presented evidence through testimony of Strube and Dr. Morton that the night before he committed the crimes he smoked crack cocaine and consumed alcohol. Dr. Morton testified that given Sigmon's history of drug use, the effect of the substances could last up to twenty-eight days. However, his testimony focused on Sigmon's other mental instabilities, such as his recurrent major depressive disorder and his chemical dependency disorders, and their psychological effects; it did not pertain to whether Sigmon was intoxicated at the time of the crime. Furthermore, Strube testified that on the night before the murders, he and Sigmon were smoking crack cocaine and drinking beer, but ran out of crack at some point in the evening, and Strube went to sleep. Although this supports the conclusion that Sigmon ingested crack and alcohol in the evening and possibly into the early morning, it does not necessarily indicate Sigmon was still intoxicated when he entered the Larkes' home the next morning.

Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed

this crime." When asked whether he considered the drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication . . . I don't remember ever thinking he was drunk."

Thus, the record supports the PCR court's finding that Sigmon was not intoxicated at the time of the murders, and therefore his attorneys were not ineffective for failing to argue that his intoxication warranted the charge of mitigating factor (7).

III. NON-STATUTORY MITIGATING FACTORS CHARGE

Sigmon finally argues trial counsel was ineffective for failing to object to the trial court's instructions on non-statutory mitigating circumstances because the charge disparaged the legitimacy of this type of evidence. We disagree.

"A jury instruction must be viewed in the context of the overall charge." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991). "The sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death." *Id.* at 19, 406 S.E.2d at 170.

During the sentencing phase of the trial, the court charged the jury to consider non-statutory factors of mitigation as follows:

> [A] mitigating circumstance is neither a justification or [sic] an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable.
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> ....
>
> A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.

Sigmon argues the instructions improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes.

However, Sigmon analyzes this language in isolation. The court's overall charge to the jury included the instruction that the jury could consider:

> whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all . . . . In other words you may choose a sentence of life imprisonment if you find a statutory or non-statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

Thus, the court clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider *any* reason in deciding whether to sentence Sigmon to death. We further disagree with Sigmon's contention that the charge effectively reduced the weight of non-statutory circumstances. The court did not describe those circumstances as "not provided for by law," as Sigmon contends, but instead simply distinguished them from the statutory circumstances by stating they were "not provided for by statute." The qualification seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances. We therefore find trial counsel were not ineffective for not objecting to the charge.

CONCLUSION

We find Sigmon has not presented evidence that he was afforded ineffective assistance of counsel. In light of this conclusion, it is not necessary for us to reach the second prong of prejudice in analyzing Sigmon's entitlement to PCR. Accordingly, we affirm the PCR court's dismissal of Sigmon's application for post-conviction relief.

TOAL, C.J., BEATTY AND KITTREDGE, JJ, concur. PLEICONES, J., concurring in result only.

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2009-136506

Appeal from Greenville County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

Opinion No. 27233

PETITION FOR REHEARING

Petitioner seeks rehearing pursuant to Rule 221(a), SCACR because this Court may have overlooked the fact that Petitioner Sigmon raised the following State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005) and State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 452-453 (2007) prison conditions issue, as issue one, in his petition for a writ of certiorari that was filed with this Court on April 21, 2010:

Whether defense counsel provided ineffective representation, in derogation of petitioner's rights under the Sixth and Fourteenth Amendments, by failing to object to the improper cross-examination of James Aiken on daily prison conditions evidence and the state's closing argument

on life imprisonment being "like a small town with a restaurant" based on that evidence since this Court has repeatedly held such evidence is improper and inadmissible, and counsel here clearly did not understand the issue and they therefore could not have had a strategic reason not to object to the evidence and argument?

Sigmon certiorari petition at p. 1.

In its order dated December 16, 2011 this Court denied the petition for writ of certiorari on this issue for Petitioner Sigmon, but did grant certiorari on unrelated issues 3-5. Petitioner later filed his brief of Petitioner on issues 3-5 on April 12, 2012. This Court issued its opinion in State v. Brad Sigmon, Op. No. 27233, Shearouse's Adv. Sh. # 13 at pp. 14-25 (March 20, 2013) which affirmed Petitioner's convictions and death sentence.

This Court issued an order granting certiorari in John Edward Weik v. State, Appellate Case No. 2007-060700, the following day on March 21, 2013. The first issue in the Weik certiorari petition was the same State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005) and State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 452-453 (2007) prison conditions issue raised in the Sigmon certiorari petition where certiorari was denied on the issue:

> Whether petitioner was denied his Sixth Amendment right to the effective assistance of counsel during the penalty phase where trial counsel did not object to a portion of the solicitor's cross-examination of petitioner's expert, Dr. Augustus Rodgers, and to the solicitor's argument that petitioner would have a job in prison, have canteen privileges, recreational facilities and other amenities since this evidence and argument invited the jury to speculate about irrelevant matters beyond petitioner's control and injected an arbitrary factor into the sentencing proceeding?

Weik certiorari petition at p. 1.

The original certiorari petition in John Edward Weik v. State, Appellate Case No. 2007-060700, was filed on October 24, 2008. An amended certiorari petition raising this identical issue

was filed following reconstruction of the partially missing post-conviction relief hearing on October 14, 2009. Because of the passage of time Petitioner Sigmon submits this Court may have overlooked the fact that it denied certiorari on this identical issue for him, that it has now granted certiorari on for Petitioner Weik.

In State v. Burkhart, 371 S.C. 482 640 S.E.2d 450 (2007), this Court held that the introduction of evidence or argument on alleged specifics of prison conditions evidence introduces an impermissible arbitrary factor into the sentencing trial in violation of S.C. Code §16-3-25(C)(1). Since undersigned counsel wrote, or strongly participated in writing, the prison condition argument in Brad Sigmon v. State, and in John Edward Weik v. State, Appellate Case No. 2007-060700, and because he was appellate counsel in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) wherein this Court warned of the inadmissibility of this prison conditions evidence, he is able to assert to the Court that the inadmissibility argument involving prison conditions evidence and argument was the same in all three cases.

Petitioner Sigmon had the right to have the sentencing jury consider the sentences of life imprisonment without parole or death without the introduction of an arbitrary statutory or Constitutional arbitrary factor into the sentencing trial. S.C. Code §16-3-25(C)(1); State v. Burkhart, 371 S.C. 482 640 S.E.2d 450 (2007). In Hicks v. Oklahoma, 447 U.S. 343, 345 (1980), the United States Supreme Court considered a statute that dictated upon the conviction of the defendant, a twice previously convicted felon, that the jury impose a 40-year sentence pursuant to instructions that it do so under a provision of the state habitual offender statute mandating such a sentence. Subsequently, "this provision was declared unconstitutional by the Oklahoma Court of Criminal Appeals in another case, but that court nevertheless affirmed petitioner's conviction and sentence, holding that he was not prejudiced by the impact of the invalid statute

because his sentence was within the range of punishment that could have been imposed in any event." The United States Supreme Court held the due process protections attached to state procedural law apply in connection with the imposition of punishment:

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion. . .

Id. at 346.

See, also, Buchanan v. Angelone, 103 F.3d 344, 348 (4th Cir. 1996), *aff'd on other grounds*, 522 U.S. 269 (1998) (this Court has recognized that "at least in the context of discretionary sentencing by a jury, . . . denial of a state procedural right may rise to the level of a federal due process violation").

Petitioner Sigmon raises the present due process issue on rehearing because this is the first opportunity to raise it following the published opinion in this case given these highly unusual circumstances which involve the grant of certiorari on the same issue in the John Edward Weik, Appellate Case No. 2007-060700, death penalty case the day after the opinion in this case was filed. Further, while Rule 221, SCACR provides that a petition for rehearing may not lie from the denial of a petition for writ of certiorari from the Court of Appeals to this Court under Rule 242, SCACR it does not similarly state that a petition for rehearing may not be heard from the denial of certiorari in a post-conviction relief case. *Inclusio unis est exclusio alterius.* Moreover, jurisdiction is still with this Court, and now, on rehearing, is the proper time to raise this procedure and substantive due process issue based on disparate treatment. See Green v.

Catoe, 220 F.3d 220, 223-224 (4th Cir. 2000) [1]*citing* Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686, 687 (1973).

While there are always some minor differences in the evidence or argument raising the same legal issue in two different cases, it seems apparent that this Court did not deny certiorari on this prison conditions issue in the present case on a harmless error basis because it granted certiorari on three other issues. Petitioner has attached as Exhibit A the argument on the prison conditions issue -- issue one in his certiorari petition in this case -- to compare with the John Edward Weik, Appellate Case No. 2007-060700 certiorari petition which raised the same issue as issue one. The certiorari petition on this issue in Weik is attached as Exhibit B. Petitioner Sigmon respectfully requests that this Court grant rehearing to consider this issue; or, in the alternative hold this case in abeyance pending disposition of John Edward Weik v. State, Appellate Case No. 2007-060700 case.

The prison conditions evidence, as seen below, was virtually identical in theme and content, in both cases.

In Sigmon the prison conditions evidence was:

- Prisoners had the right to visitation but that it was within the "purview of the Department of Corrections, whether it's a weekend or not." Sigmon Certiorari Petition at 8; App. 2022, ll. 7 – 13.

[1] Green v. Catoe generates a Red Flag upon a Westlaw Search. This leads to the unreported opinion of Judge Duffy of the United States District Court for South Carolina in a civil case filed by a *pro se* "frequent flier". The "red flagged" case has no bearing on the principle cited in Green v. Catoe.

- Prisoners could "watch television, have recreation . . . various things provided by the Department of Corrections" as well as the right to "check out books and read books" from the library. Sigmon Certiorari Petition at 8; App. 2022, l. 14 - 2023, l. 24.
- Prisoners had access to the telephone and to "call home, call friends, call whoever he wanted to call as long as it was a collect call." Sigmon Certiorari Petition at 8; App. 2023, ll. 5– 18.
- Prisoners could purchases items from the canteen by "debit card where he has credit in there." Sigmon Certiorari Petition at 9; App. 2023, l. 19 – 24.
- Prisoners could shower. Sigmon Certiorari Petition at 9; App. 2023, l. 25 – 2024, l. 11.
- Prisoners had the right to take "educational classes" in prison and they could receive mail, magazines, "Sports Illustrated, whatever he wants." Sigmon Certiorari Petition at 9; App. 2024, l. 15 – 2025, l. 7.
- Prisoners were also allowed to go to church. Sigmon Certiorari Petition at 9; App. 2025, l. 3 – 2026, l. 2.
- Prisoners could have contact visitation or non-contact visitation at the discretion of the administration. Sigmon Certiorari Petition at 9; App. 2025, l. 3 – 2026, l. 2.

In <u>Weik</u>, the prisons conditions evidence was:

- Prisoners serving a life sentence have educational opportunities, and they are able to work and at times get paid for their work. Weik Certiorari Petition at 7; App. 1947, l. 21 – 1949, l. 1.
- Prisoners got paid for their work but not all of them were paid, App. 1949, ll. 6 – 9, Commissioner Michael Moore had said he was going to discontinue paying inmates,

but defense witness Augustus Rodgers said he did not know if that in fact occurred. Weik Certiorari Petition at 7; App. 1947, l. 21 – 1949, l. 1.

- Prisoners "have canteens there where they can buy Coca-Colas, candy bars, popcorn, things like that with the money they make . . ." Weik Certiorari Petition at 7; App. 1949, l. 10 – 1950, l. 14.
- Prisoners had "job skill training related to the various activities that they would have to perform on a day-to-day basis." Weik Certiorari Petition at 7. App. 1949, l. 10 – 1950, l. 14.
- Prisoners generally had the privilege of getting a GED. Weik Certiorari Petition at 7; App. 1949, l. 10 – 1950, l. 14.
- Prisoners generally could work on college courses. Weik Certiorari Petition at 7-8; App. 1949, l. 10 – 1950, l. 14.
- Prisoners were fed "three square meals a day." Weik Certiorari Petition at 8; App. 1951, l. 8 – 1952, l. 24.
- Prisoners were provided clothing and necessary medical care. Weik Certiorari Petition at 8; App. 1951, l. 8 – 1952, l. 24.
- Prisoners (some of them) were allowed to have radios, and Dr. Rogers admitted he had seen television sets in inmate's cells, and he acknowledged that he understood they could watch movies or network television at times. Weik Certiorari Petition at 8; App. 1953, l. 6 – 1954, l. 15.

In his closing argument in Sigmon, the solicitor told the jury:

> And you may think life imprisonment is serious business, but you still have your **visitation with your family**. You still have **your mail. You still have your TV**. You still eat **three meals a day**. Somebody **washes and takes care of your clothes**. You get all the

> benefits of **health care, and recreation.** All of those things are provided for you.
>
> Sure, your life is limited. Your life is limited to a smaller confinement in that you don't have the freedom to move about. Life in prison **carries a lot of benefits with it and that's why it's not proper in this case. He would still have the freedom to see his children,** something that **these children of Gladys and David Larke will never have the opportunity to do.**

Sigmon Certiorari Petition at 9; App. 2067, l. 10 – 2068, l. 3. (emphasis added).

In his closing argument in Weik, the solicitor told the jury:

> "[T]o 'look at life imprisonment.' App. 2135, ll. 11 – 21. The solicitor said petitioner would be "given a **prison job,** according to that witness sometimes **they'll pay them some money, he's got canteen where they buy stuff, Cokes, candy bars,** that kind of stuff, **television to watch in their cells.** In the meantime, **Susan Karsae is dead and in her grave.** And I ask you if life imprisonment is an acceptable alternative to somebody who's done what he's done. That's a choice you all are going to have to make." Weik Certiorari Petition at 9; App. 2136, ll. 10 – 20. (emphasis added).

As stated, the solicitors in both Sigmon and Weik followed the same script on getting this prison condition evidence before the jury, and effectively capitalizing on it in closing argument. As was argued in the certiorari petitions in both Sigmon and Weik this Court long ago warned both the defense bar and that state that evidence about the method of execution or the conditions of daily life behind the prison walls are both impermissible considerations for the sentencing jury. State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). Note the solicitor here in Sigmon argued: "Life in prison carries a lot of benefits with it and **that's why it's not proper in this case."** (emphasis added). The solicitor thus made prison conditions an invited express grounds for execution, while defense counsel sat by silently. As this Court held in 1984: "It should not be necessary in the future for this Court to remind the bench and bar *of the strict focus to be maintained*

in the course of a capital trial." State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). As this Court said in another context in State v. Stephen Christopher Stanko, 2013 WL 696816 at p. 4: "It is unclear what this court have included . . . to better indicate . . ." that prison condition evidence and argument is inadmissible.

In the present case, Petitioner Sigmon filed a pre-hearing trial brief. App. 2484-2498. Petitioner noted that "when counsel's conduct is based on an erroneous understanding of the law 'counsel made no tactical choice.'" Luchenburg v. Smith, 79 F.2d 388, 392-393 (4th Cir. 1996). App. 2485. Petitioner stated that counsel had failed to object "to the state's improper evidence and argument concerning the day to day circumstances of prison life and the solicitor's personal opinions concerning the appropriateness of the death penalty." App. 2486.

As petitioner pointed out in his petition for writ of certiorari to this Court, defense counsel John Abdalla acknowledged he had never served as counsel in any capacity in a death penalty case prior to Petitioner Sigmon's case. App. 2587, ll. 3–12. This was also the first death penalty case in any capacity for co-counsel Frank Eppes. App. 2646, ll. 4–7.

Counsel Eppes recalled, "when we took the case I told Abdalla that any disagreements we had, even if he was lead counsel, that I was going to be the final word on it. And he thought I was joking. I wasn't." App. 2646, ll. 4–16.

It became apparent during the trial, the post-conviction depositions that were entered into evidence, and during the post-conviction relief hearing that neither counsel Abdalla or counsel Eppes understood the law pertaining to the inadmissibility of daily prison conditions evidence dating back to State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) and State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970). App. 2486 – 2490. The following exchange occurred

with counsel Eppes at his deposition concerning his pre-trial motion to exclude the evidence of Department of Corrections Administrator James Sligh:

> Q. Okay. And the motion itself is limited to his comments *about death row.*
>
> A. Uh-huh. Yes.
>
> Q. And was that your intent?
>
> A. I - - - yeah. *Yes*, I read the transcript today as well, our argument about this motion in the transcript. And it refreshed my recollection that my concern was with the contrast of the two conditions, conditions on death row vis-a-vis conditions, you know, of a prison life without parole, and *I can tell you categorically that I had no clue at the time that there was way to exclude evidence of the living conditions in a penitentiary.*

App. 2659, ll. 2 – 17. (emphasis added).

Eppes admitted, "[O]bviously [that] shows that I didn't know that it [daily prison conditions evidence] wasn't admissible." App. 2659, ll. 23 – 24. Eppes added,"I wish I could tell you what I was thinking at the time." App. 2662, ll. 13 – 18. See Exhibit A; Petition for writ of certiorari in Brad Sigmon v. State, at pp. 5-6.

Petitioner argued that the state asserted its intent to have James Sligh testify concerning the daily life of a prisoner and "what advantages this individual has." App. 2486. Petitioner recounted how the solicitor even categorized prison, in his argument on the admissibility of this testimony, as "nothing more than a little town that's got a restaurant and all that." App. 2486-2487. Petitioner argued that the prison conditions evidence and argument was admitted in direct violation of this Court's holding in State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) where this Court held that determination as to the "time, place, manner and conditions of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury. The

jury's sole function is a capital sentencing proceeding is individual selection of either the death penalty or life imprisonment based upon the circumstances of the crime and the characteristics of the individual defendant." App. 2488. Petitioner also noted that this court reiterated this principle in State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005) and State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 452-453 (2007).

Petitioner argued that this type of evidence is extremely prejudicial and requires reversal because the entire subject matter injects "an arbitrary factor into the jury sentencing considerations" in violation of S.C. Code §16-3-25 (C)(1). See State v. Burkhart, 371 S.C. at 488-489, 640 S.E.2d at 453. Petitioner also argued this evidence violated the Eighth Amendment's prohibition against cruel and unusual punishment when a death sentence, as here, is predicated on mere "caprice" or "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Citing* Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 884-885, 887 n. 24 (1983). Petitioner stated that defense counsel was ineffective for failing to be familiar with the longstanding rule that evidence in a capital sentencing trial must be relevant to the character of the defendant or the circumstances of the crime. *Citing* State v. Plath and State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111 (112) (1970) *quoting* State v. White, 142 A.2d 65, 68 (N.J. 1958). See Exhibit A; Petition for writ of certiorari in Brad Sigmon v. State at pp. 10-12.

When the United States Supreme Court held the death penalty unconstitutional in 1972 in Furman v. Georgia, 408 U.S. 238, 293 (1972), it noted the type of disparate treatment between similarly situated individuals which made imposition of the death penalty, as Justice Douglas stated in his concurrence: "freakish." Most respectfully, this petition presents this Court with the opportunity to prevent petitioner from suffering disparate treatment that would violate his right

to substantive and procedural due process of law. Petitioner respectfully requests that this Court grant rehearing given these highly unusual circumstances, or hold this case in abeyance pending the disposition of John Edward Weik v. State, Appellate Case No. 2007-060700.

Statutory mitigating circumstances

Petitioner also seeks rehearing because this Court may have respectfully overlooked the fact that by any objective standard petitioner was intoxicated when he committed the crime. The murders of Gladys and David Larke occurred around 8:00 am on April 27th, 2001. His employer told the police on April 25, 2001: "[B]rad came to work and said he had been drinking since 8:00 a.m." App. 1616, ll. 13-18.

On April 26, 2001, petitioner reported that he had used approximately fifty dollars worth of crack cocaine and drank two mixed drinks and a half-bottle of Peppermint Schnapps. App. 1981, ll. 2-20. Dr. Alex Morton, an expert in psychopharmacology and addictions, testified that petitioner's "continuing drug use" would effect his continuing "mental functioning and psychological functioning." App. 1974, ll. 11-20; app. 1981, ll. 14-20.

Around 9:00 p.m. that evening before the crimes petitioner and Eugene Strube bought some beer at a gas station, and brought the beer to petitioner's former home, which was next door to the victims' trailer. App. 1578, l. 1 - 1579, l. 7. According to Strube, petitioner "drank a six-pack" of beer, and the two men smoked "a good bit of crack." App. 1593, ll. 6 – 1694, l. 5.

While Strube got sick off "the first hit," they each smoked **"a couple hundred dollars worth" of crack**, "through the evening" until they ran out. App. 1589, l. 1 - 1594, l. 5. Strube went to sleep around 1:00 a.m. while petitioner remained awake throughout the night, and "he [petitioner] was strolling back and forth." App. 1582, ll. 14-22; App. 1593, ll. 6-24.

Early that morning Strube abandoned his agreement to assist petitioner. "We got to the back of that – the other trailer, and I said, man, I can't do this, you know, this isn't right, and he said, good, get the hell out of here." Strube said he "got the hell out of there," and when he quickly left petitioner was "heading towards the other trailer," where petitioner entered the victims' home **prior to 8:30 a.m. and the crimes ensued.** App. 1582, l. 12 – 1583, l. 9.

Dr. Alexander Morton, Jr. whose area of specialty is "drugs that affect the human brain. [He] specialize[s] specifically in substances of abuse and any psychiatric medications" testified:

> [H]is actions are consistent with a significant number of people that have used large amounts of cocaine, both during and after—after their use, and that is violent behavior. That is behavior that doesn't make sense, of agitation, impulsive type behavior.

App. 1997, ll. 6-11.

> The use of drugs and alcohol would certainly impair his ability to think clearly, whether he's using at the time or going through some of the withdrawal, so it would [affect] his ability to make good decisions, problem solve, make sense out of his world.

App. 1998, ll. 1-5.

> Q: [W]hen Brad went in there and was hitting the Larkes with the baseball bat, you know about that?
>
> A: Yes, I saw—I saw the crime photos of that.
>
> Q: Eight to nine times in the head. Is there anything that is consistent there with your theories of depression of any other theories you have?
>
> A: It's more consistent with a symptom **we see with cocaine use**, in that people do repetitive behaviors. From my understanding, he hit both of those people number—a number of times, more than he needed to.
>
> Q: Right.
>
> A: And so it's almost like once he started, he did not stop, and that is something you see with animals that are being studied with

> cocaine. You see it with patients **that have taken too much cocaine**, not violence, but I have also seen it in three patients that I've worked with that have stabbed people. They didn't stab them once or twice, but they stabbed them over 100 times. So they—once they started they did not stop.

App. 2000, l. 16- 2001, l. 12. (emphasis added).

S.C. Code Ann. §16-3-20(C)(b) provides for the mitigating circumstances which may be charged to the jury if the evidence warrants. As this Court is aware, the judge charged the following:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person; (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance; (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements was substantially impaired; and, (8) The defendant was provoked by the victim into committing the murder.

The judge *refused to charge*: (7) The age or mentality of the defendant at the time of the crime. App. 2108, ll. 10-21.

During discussion with the trial court regarding which statutory mitigating factors to charge the jury, trial counsel sought a charge on "[t]he age or mentality of the defendant at the time of the crime," based on "testimony about his mental state." App. 2053. See S.C. Code §16-3-20(7). The court determined however, that this was adequately covered by S.C. Code §16-3-20(C)(b)(6): "[T]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired."

In other words, the judge refused to provide both statutory mitigators (6) and (7) to the jury because, as he explained, "[he] always thought mentality would be like *education level, or*

mental retardation, or something like that." App. 2053, ll. 20-21. (emphasis added). Trial counsel *did not correct this misapprehension of the law, nor point out that mental retardation is encompassed by statutory mitigator (10).*

> MR. EPPES: His age is not a mitigating factor, Your Honor. Mentality was there because there's been testimony about his mental state.
>
> THE COURT: Okay. **That would be covered by four. I've always thought mentality would be like education level, or mental retardation,** or something like that.
>
> MR. EPPES: *Yes, Your Honor, I understand. That's fine.*

App. 2053, ll. 16-23. (emphasis added).

The trial court did not otherwise charge the jury that voluntary intoxication could be considered mitigating. *Cf.* State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (1988). The judge charged the jury with the following mitigators:

> "One, the defendant has no significant history of criminal—prior criminal convictions involving the use of violence against another person. Two, the murder was committed while the defendant was under the influence of a mental or emotional disturbance. Three, the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the requirements of law was substantially impaired. And fourth, the defendant was provoked by the victim into committing the murder. You must also consider any non-statutory mitigating circumstances."

App. 2108, ll. 10-21.

This Court wrote that "the record supports the PCR court's finding that Sigmon was not intoxicated at the time of the murders, and therefore his attorneys were not ineffective for failing to argue that his intoxication warranted the charge of mitigating factor (7)." State v. Brad Keith Sigmon, Op. No. 27233, Shearouse's Adv. Sh #13 at p. 23 (filed March 20, 2013).

This Court also wrote:

> Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed this crime." When asked whether he considered the drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication . . . I don't remember ever thinking he was drunk."

State v. Brad Keith Sigmon, Op. No. 27233, Shearouse's Adv. Sh #13 at p. 23 (filed March 20, 2013).

However, and respectfully given the entire context of counsel's PCR testimony, including that infra, it reveals that counsel did not understand this mitigating circumstance which was probably attributable to the fact this was his first death penalty trial, or he simply failed to challenge the judge's misunderstanding this statutory mitigating circumstance. App. 2587, ll. 3–12. App. 2646, ll. 4–7. Further, even the quote above respectfully does inspire any confidence in defense counsel's performance on this issue. Counsel simply let the trial judge's erroneous misunderstanding of this statutory mitigating circumstance carry the day without challenge.

Counsel rendered ineffective assistance of counsel for failing to correct the judge's misunderstanding of the law and obtain the instruction or, alternatively, to preserve the issue for appeal because evidence of voluntary intoxication requires the giving of statutory mitigating factors 2, 6, and 7. State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986); State v. Stone, 350 S.C. 442, 449, 567 S.E.2d 244, 248 (2002) ("*We have specifically rejected the contention that a charge on one mitigator is sufficient to cover the others.*"); (emphasis added). State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) ("We have recently held that where there is evidence the defendant was intoxicated at the time of the crime, the trial judge *is required* to submit the statutory mitigating circumstances in §16-3-20(C)(b)(2), (6) and (7)") (emphasis in

original). See State v. Plemmons, supra. ("We hold statutory mitigating circumstances (2), (6), and (7) are required when there is evidence of intoxication only in the absence of a specific charge regarding intoxication as a mitigating circumstance.").

Trial counsel did not offer a strategic reason for the failure to correct the judge's misunderstanding, or otherwise preserve the issue for appellate review:

> Q: [S]o, if you would accept my statement that you did, in fact, offer and request a charge on number seven, and the judge talked to you about that, and he offered to you that six embraced seven—take a look at six and tell me if you see a distinguishing feature if you—in your legal capacity?
>
> A: Oh, yeah.
>
> Q: Okay.
>
> A: *I see a difference.*
>
> *Q: Do you know why you didn't argue with the judge about that? About there being a difference, and that you can't agree as to his reading of the law?*
>
> *A: I do not. . . .*
>
> *A: I definitely see a distinction between six and seven, and I have no memory of raising Cain about it or at the time I thought it was important to raise Cain about it.*

App. 2675, l. 19 - 2676, l. 22. (emphasis added).

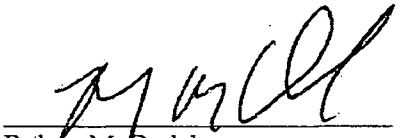
The other trial counsel, John Abdalla, at the time of the PCR hearing, was unaware of the law regarding the submission of these statutory mitigators to the jury. App. 2604, l. 21 - 2608, l. 1.

It was critical that the jury understand petitioner's intoxication fit within this statutory mitigating circumstance. The fact that crack cocaine had altered petitioner's judgment in his intoxicated state was very important because it largely explained why petitioner, not otherwise a

violent man, committed these crimes. The judge made an error of law by thinking S.C. Code §16-3-20(C)(b)(6): "[T]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired," was the only necessary mitigating circumstance on this subject. It also shows the incoherence of the handling of this issue in the trial court, and defense counsel's deficient performance -- to petitioner's significant prejudice -- regarding this mitigating circumstance the judge mistakenly refused to charge. Strickland v. Washington, 466 U.S. 668 (1984).

Petitioner respectfully request that this Court grant rehearing on these two issues for the reasons argued above. In the alternative petitioner requests that this Court hold its ruling in abeyance pending the disposition of John Edward Weik v. State, Appellate Case No. 2007-060700.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

April 4, 2013

Exhibit A

ARGUMENT

1.

Defense counsel provided ineffective representation, in violation of petitioner's rights under the Sixth and Fourteenth Amendments, by failing to object to the improper cross-examination of James Aiken on daily prison conditions evidence and the closing argument on life imprisonment being "like a small town with a restaurant" based on that evidence, since this Court has repeatedly held such evidence is improper and inadmissible, and counsel here clearly did not understand the issue and they therefore could not have had a strategic reason not to object to the evidence and argument.

Relevant Facts

John P. Abdalla acknowledged he had never served as counsel in any capacity in a death penalty case prior to appellant's case. App. 2587, ll. 3–12. This was also the first death penalty case in any capacity for co-counsel Frank Eppes. App. 2646, ll. 4–7. Counsel Eppes recalled, "when we took the case I told Abdalla that any disagreements we had, even if he was lead counsel, that I was going to be the final word on it. And he thought I was joking. I wasn't." App. 2646, ll. 4–16.

As will be seen infra, it became apparent during the trial, the post-conviction depositions that were entered into evidence, and during the post-conviction relief hearing that neither counsel Abdalla or counsel Eppes understood the law pertaining to the inadmissibility of daily prison conditions evidence dating back to State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) and State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970). App. 2486 – 2490. The following exchange occurred with counsel Eppes at his

deposition concerning his pre-trial motion to exclude the evidence of Department of Corrections Administrator James Sligh:

> Q. Okay. And the motion itself is limited to his comments *about death row*.
>
> A. Uh-huh. Yes.
>
> Q. And was that your intent?
>
> A. I - - - yeah. *Yes*, I read the transcript today as well, our argument about this motion in the transcript. And it refreshed my recollection that my concern was with the contrast of the two conditions, conditions on death row vis-a-vis conditions, you know, of a prison life without parole, and *I can tell you categorically that I had no clue at the time that there was way to exclude evidence of the living conditions in a penitentiary.*

App. 2659, ll. 2 – 17. (emphasis added).

Eppes admitted, "[O]bviously [that] shows that I didn't know that it [daily prison conditions evidence] wasn't admissible." App. 2659, ll. 23 – 24. Eppes added,"I wish I could tell you what I was thinking at the time." App. 2662, ll. 13 – 18.

Abdalla stated his memory of the Sligh motion was that "Sligh was going to testify to, as I recall, was the (sic) country club nature of the prison and we were trying to stay away from anything that made it sound like it was going to be an easy time." App. 2599, l. 4 – 2600, l. 1. Abdalla said he did not think evidence about prison conditions "should come in." App. 2599 -2601. Abdalla acknowledged he was "lead counsel" in this case. App. 2602, ll. 10 – 11. However, see the forceful remarks of Eppes supra that he had the final say on all matters, which Abdalla did not contradict.

During the penalty stage of the trial the defense called James Aiken as a witness. Aiken is president of J.E. Aiken and Associates. App. 2005, ll. 6 – 21.

Aiken testified after reviewing the applicable records on petitioner that his "assessment of him [petitioner] as a prison inmate is that he can be incarcerated in a prison setting for the remainder of his life without causing an undue risk of harm to staff, inmates, as well as to the general community." App. 2010, l. 13 – 2017, l. 23.

It is important to know that the proposed testimony of Jimmy Sligh was discussed earlier during the penalty phase. Solicitor Ariail argued the defense, "[h]ammered this jury in its venire - - I mean its voir dire over and over again, this is life without parole, life without parole. He's coming out in a pine box one way or another, yatta yatta yatta, but I want to show them where he's living, *because this is nothing more than a small town that's got a restaurant and all that.*" App. 1722, ll. 1 – 25. (emphasis added).

The following exchange occurred between the judge and the solicitor:

> The Court: They don't have any objection to the life without parole [evidence].
>
> Mr. Ariail: Well, I thought that's what we were arguing about.
>
> The Court: No, they said they did not. Their objection is to then saying what life is like on death row.
>
> Mr. Ariail: Well, I wasted all that argument. I thought they were objecting to that.
>
> The Court: No.
>
> Mr. Ariail: I thought you asking me why I needed to justify it.
>
> The Court: No. Their objection is to - - to telling them about life on death row.
>
> Mr. Ariail: Well, if you've got a right to tell them about life on - - -

> The Court: *I'm not saying you have a right to tell them about that, but they're not objecting to it,* so we're not - - -
>
> Mr. Ariail: Well, I hadn't thought about that aspect of it.
>
> The Court: Okay. Well, I have always been under the impression that aggravating circumstances are limited to statutory aggravating circumstances with the addition of character of the defendant, with the addition of victim impact. And I have never known, you know, a category of other non-statutory aggravating circumstances.
>
> Mr. Ariail: Okay.
>
> The Court: All right. *So I'm going to limit you to - - Mr. Sligh's testimony to life - - a day in the life of a life sentence.* All right. Anything else?

App. 1723, l. 1 – 1724, l. 7. (Emphasis added).

The colloquy then changed to other evidentiary matters. App. 1724, l. 8 – 1725, l. 3.

The state got the daily prison conditions evidence before the jury during the cross-examination of James Aiken. The solicitor established that Aiken was last with the South Carolina Department of Corrections in 1989. App. 2022, ll. 1 – 6. The solicitor then immediately launched into his daily prison conditions presentation by asking Aiken if a prisoner would have "visitation available to him every weekend." Aiken confirmed that prisoner's had the right to visitation but that it was within the "purview of the Department of Corrections, whether it's a weekend or not." App. 2022, ll. 7 – 13. Aiken also confirmed that a prisoner could "watch television, have recreation . . . various things provided by the Department of Corrections" as well as the right to "check out books and read books" from the library. App. 2022, l. 14 - 2023, l. 24.

The solicitor also had Aiken agree that prisoners had access to the telephone and to "call home, call friends, call whoever he wanted to, call as long as it was a collect call."

App. 2023, ll. 5– 18. Aiken also said that inmates could purchases items from the canteen by "debit card where he has credit in there." App. 2023, l. 19 – 24. The solicitor also discussed with Aiken how many times in a week an inmate could shower. App. 2023, l. 25 – 2024, l. 11. Aiken also confirmed that prisoners had the right to take "educational classes" in prison and they could receive mail, magazines, "Sports Illustrated, whatever he wants." App. 2024, l. 15 – 2025, l. 7. Prisoners were also allowed to go to church. In addition prisoners could have contact visitation or non-contact visitation at the discretion of the administration. App. 2025, l. 3 – 2026, l. 2.

The solicitor told the jurors in closing:

> And you may think life imprisonment is serious business, but you still have your visitation with your family. You still have your mail. You still have your TV. You still eat three meals a day. Somebody washes and takes care of your clothes. You get all the benefits of health care, and recreation. All of those things are provided for you.
>
> Sure, your life is limited. Your life is limited to a smaller confinement in that you don't have the freedom to move about. Life in prison carries a lot of benefits with it and that's why it's not proper in this case. He would still have the freedom to see his children, something that these children of Gladys and David Larke will never have the opportunity to do.
>
> And I said to you earlier and this is serious business for serious people. And it's serious consideration time for serious punishment. And the state has asked you and I told you in the beginning we were going to ask you to impose the death penalty.

App. 2067, l. 10 – 2068, l. 3.

In his amended application for post-conviction relief filed June 4, 2008, petitioner argued the failure to object to the improper cross-examination of James Aiken about the day to day circumstances of prison life constituted ineffective assistance of counsel in violation

of South Carolina Law and the Sixth and Fourteenth Amendments to the United States Constitution. App. 2478 – 2479.

The petitioner filed a pre-hearing trial brief with the court on June 20, 2008. App. 2484-2498. Petitioner noted that "when counsel's conduct is based on an erroneous understanding of the law `counsel made no tactical choice.'" Luchenburg v. Smith, 79 F.2d 388, 392-393 (4th Cir. 1996). App. 2485. Petitioner stated that counsel had failed to object "to the state's improper evidence and argument concerning the day to day circumstances of prison life and the solicitor's personal opinions concerning the appropriateness of the death penalty." App. 2486.

Petitioner argued that the state asserted its intent to have James Sligh testify concerning the daily life of a prisoner and "what advantages this individual has." App. 2486. Petitioner recounted how the solicitor even categorized prison, in his argument on the admissibility of this testimony, as "nothing more than a little town that's got a restaurant and all that." App. 2486-2487. While the judge expressed doubt about the admissibility of this testimony, the judge ultimately stated that defense counsel "were not objecting to it" and the "court restricted only the intended evidence about the day to day conditions on death row." App. 2487.

Petitioner argued that the prison conditions evidence and argument was admitted in direct violation of this Court's holding in State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) where this Court held that determination as to the "time, place, manner and conditions of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury. The jury's sole function is a capital sentencing proceeding is individual selection of either the death penalty or life imprisonment based upon the

circumstances of the crime and the characteristics of the individual defendant." App. 2488. Petitioner also noted that this court reiterated this principle in State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005) and State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 452-453 (2007).

As will be seen infra, petitioner argued that this type of evidence is extremely prejudicial and requires reversal because the entire subject matter injects "an arbitrary factor into the jury sentencing considerations" in violation of S.C. Code §16-3-25 (C)(1). See State v. Burkhart, 371 S.C. at 488-489, 640 S.E.2d at 453. Petitioner also argued this evidence violated the Eighth Amendment's prohibition against cruel and unusual punishment when a death sentence, as here, is predicated on mere "caprice" or "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." *Citing* Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 884-885, 887 n. 24 (1983). Petitioner stated that defense counsel was ineffective for failing to be familiar with the longstanding rule that evidence in a capital sentencing trial must be relevant to the character of the defendant or the circumstances of the crime. *Citing* State v. Plath and State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111 (112) (1970) *quoting* State v. White, 142 A.2d 65, 68 (N.J. 1958)

> The legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is of no concern of theirs.

App. 2488 - 2490.

In the deposition of defense counsel Eppes, he stated that he had re-read the prison conditions testimony and he stated: "I can say almost categorically that I had no idea that I should object to that at the time . . . I thought it was admissible. Obviously, since then the Supreme Court has explained itself very clearly . . . and my response to that today would be much different than it was then." App. 2667, ll. 2 - 14. Eppes later admitted: "I still have no knowledge of what the law was then. But at that time the solicitor was surely talking about what a country club Lee County and other maximum security ones are, and they're just not. *They're hellish places and I wanted to convey that to the jury.* That this is not a person who would have a pleasant life. They would just be alive." App. 2712, ll. 10 - 19. (emphasis added).

Discussion

It is apparent that defense counsel did not know the law on this subject. Counsel thought he had to get involved in a contest with the solicitor about whether life in prison was like a small town with a restaurant or whether it was "a hellish place." This Court long ago in State v. Plath and State v. Atkinson supra ruled that this is not a legitimate consideration for the jury.

This was the first death penalty case for both trial attorneys. They still had the responsibility for knowing the applicable law, and it is clear they did not understand that the evidence of day to day conditions of incarceration was not admissible as this court held in State v. Plath and State v. Adkinson and reiterated in State v. Bowman and State v. Burkhart. In fact, as seen, the attorneys had the argument backwards. They wanted to exclude evidence about the day to day conditions on death row.

While defense counsel Abdalla testified in his deposition, which was admitted into evidence, that he thought such evidence should not have "come in," neither counsel Abdalla or counsel Eppes objected to the cross-examination of James Aiken or the solicitor's closing argument based on that evidence. App. 2599, l. 16 – 2601, l. 14.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), this Court clearly stated that the Department of Corrections controls the conditions of imprisonment and not the defendant. As PCR counsel argued "such determination as to time, place, manner and condition of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury." This Court also wrote it was highly improper for the defense to paint a picture of life imprisonment as slavery and capital punishment as "an ineffective instrument of deterrence, a crude device for expressing social approval, and even a

counter-productive approach to control of crime." State v. Plath, 313 S.E.2d at 626. This ship sailed long ago.

This Court also stated that "a jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison]." State v. Plath, 313 S.E.2d at 627. Here, PCR counsel for the state candidly acknowledged what she had to, that the solicitor did present such evidence and argument to the jury. App. 2744, l. 24- 2745, l. 4. The state was therefore left to argue that State v. Bowman and State v. Burkhart announced a new rule of law for the first time, and to argue that defense counsel therefore was not ineffective. That is simply wrong but petitioner understands it is the only argument the state can make here.

Moreover, defense counsel Eppes acknowledged he wanted to counter the state's evidence of prison as a "country club Lee county" by trying to paint prison as a "hellish place." It is clear this is exactly what this Court forbade in State v. Plath. It is clear that both defense attorneys in this case were not aware of the law that during a capital sentencing proceeding the evidence and argument must be about the character of the defendant and the circumstances of the crime. Counsel here wanted evidence about life on death row excluded and they could not be said to have made a tactical choice to allow this evidence before the jury where it is clear they had an erroneous understanding of the law. Luchenburg v. Smith, 79 F.3rd 388, 392-393 (4th Cir. 1996).

Defense counsel here were ineffective in violation of appellant's rights under the Sixth and Fourteenth amendments to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

As defense counsel argued below:

"A finding of prejudice under Strickland requires that an applicant 'must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Strickland, 466 U.S. at 694. Strickland defined 'reasonable probability' as a 'probability sufficient to undermine confidence in the outcome' of the proceeding. Id. at 692. This test is not, however, an outcome determinative inquiry. In other words '[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Id. at 694. Thus, 'a defendant need *not* show that counsel's deficient conduct more likely than not altered the outcome in the case.' Id. at 693 (emphasis added). To the contrary, prejudice is established if 'there is a reasonable probability that *at least one juror* would have struck a different balance' but for counsel's errors. Wiggins v. Smith, 539 U.S. 510, 537 (2003) (emphasis added)." App. 2485 - 2586. The PCR court wrote that:

> "[A]pplicant's argument that the failure to object was not based on strategy because defense counsel stated in depositions that they did not think the evidence of prison conditions was objectionable, (Applicant's Motion for Summary Judgment, App. 2507; App. 2735), similarly misses the mark. While the statements relied upon are referenced in the deposition, so are the statements that defense counsel *wished to elicit testimony about the harshness of prison life*. Mr. Eppes clearly stated at his deposition that he wanted to show, through his own witness, Mr. Aiken, that Applicant would not be a predator in prison, and did not offer that testimony simply as evidence of adaptability. App. 2659 - 2661. Further, Mr. Eppes stated that he wanted to portray prison life in harsh reality, and "[t]hat this is not a person who would have a pleasant life." App. 2710 - 2712. He used same in his closing argument to the jury. App. 2711; App. 2206 - 2207. During the hearing, Mr. Eppes testified similarly that

> part of the reason he called Mr. Aiken was to establish that Applicant would most likely be a victim in SCDC, which, he admitted, again, was not adaptability evidence." App. 2804.

App. 2871. (emphasis added).

The PCR court incorrectly found that "under settled precedent at that time," defense counsel was not ineffective for failing to object to the daily prison conditions evidence and argument based on that evidence. App. 2873 - 2874. The PCR judge accepted the state's flawed argument that the state can "respond" to prison adaptability evidence with evidence of the privileges and amenities that a prisoner has while incarcerated. This was wrong on several levels.

First, the Supreme Court in Skipper v. South Carolina, 476 U.S. 1 (1986) held that the sentencing judge or jury cannot be precluded from considering any relevant mitigating evidence. In Skipper that excluded evidence was the testimony of jailers and a regular visitor regarding Skipper's good behavior and adaptability to prison. See, also Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982). In Skipper, the trial court ruled that such prison adaptability evidence was irrelevant under State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). Consequently, it is clear that prison adaptability -- as in this case by way of James Aiken -- is constitutionally mandated if available.

Further, the PCR court's ruling fails to recognize that this Court in State v. Plath and State v. Adkinson held that day to day prison conditions evidence is of no concern to the jury and inadmissible. The jury should be focused on the character of the defendant and the circumstances of the crime when deciding between life and death. Thus, it was

error for the PCR court to conclude that it was permissible for the defense to try and portray to the jury the "hellish" conditions of day to day prison life.

It is clear counsel in this case did not object to the cross-examination of James Aiken about prison conditions out of the ignorance of the law, and such ignorance can never be a permissible strategy. See Wiggins v. Smith, supra. Petitioner should be granted a new sentencing trial.

Exhibit B

ARGUMENT

1.

The PCR court erred by ruling petitioner was not denied the Sixth Amendment right to effective assistance of counsel where counsel failed to object to evidence and argument on the amenities and privileges petitioner would allegedly enjoy in prison. This evidence and argument were irrelevant, and the prison conditions were beyond petitioner's control. This injected an arbitrary factor into the sentencing proceeding. The PCR court erroneously ruled that trial counsel in 1999 had no reason to object to such evidence and closing argument on prison conditions. This was error since this Court, as early as *State v. Plath (Plath II)*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), had held such evidence and argument is irrelevant and improper. (Issues 1 and 2).

Relevant Facts

During the penalty phase the defense called Dr. Augustus Rodgers as a witness. Rodgers had a master's degree in social work from New York University, and a Ph.D in counseling services from the University of South Carolina. He also had a master of Divinity degree from the Lutheran Theological Seminary. App. 1925, l. 18 – 1926, l. 25.

Rodgers was qualified as an expert in social work over Solicitor Walter Bailey's objection that this was not a recognized expertise. App. 1928, l. 15 – 1929, l. 24.

Rodgers testified he had extensive experience as a consultant with the prison system. App. 1939, l. 25 – 1940, l. 4. Rodgers had also done training and teaching of inmates, and he testified that petitioner would "make a satisfactory adjustment to prison life . . ." App. 1939, l. 21 – 1940, l. 25.

On cross-examination, Solicitor Bailey would return to his common theme about prison conditions. Solicitor Bailey elicited from Dr. Rodgers that inmates serving a life sentence have educational opportunities, and they are able to work and at times get paid for their work. Tr. 1947, l. 21 – 1949, l. 1.

Rodgers noted that Commissioner Michael Moore had said he was going to discontinue paying inmates, but Rodgers admitted he did not know if that in fact occurred. Tr. 1947, l. 21 – 1949, l. 1. Rodgers observed that in the past some inmates got paid for their work but not all of them were paid. App. 1949, ll. 6 – 9.

The following exchange then occurred between Solicitor Bailey and Dr. Rodgers:

> Q. And they have canteens there where they can buy Coca-Colas, candy bars, popcorn, things like that with the money they make; do they not?
>
> A. Those inmates who have privileges do have access to those kinds of facilities.
>
> Q. All right. And as far as training, what type of training would be available for an inmate serving a life sentence?
>
> A. It would be job skill training related to the various activities that they would have to perform on a day-to-day basis.
>
> Q. They can get their GED, can't they?
>
> A. There again, now, I'm not really sure about that. That is a policy that has fluctuated somewhat in South Carolina from time to time.
>
> Q. All right.
>
> A. Generally that privilege may be afforded.
>
> Q. All right. And from time to time they can work on college courses, too, can't they?

A. Generally that privilege has been afforded in the past.

App. 1949, l. 10 – 1950, l. 14.

Solicitor Bailey also elicited that the inmates were fed "three square meals a day," and they were provided clothing and necessary medical care. App. 1951, l. 8 – 1952, l. 24. Dr. Rodgers also acknowledged that some inmates were allowed to have radios, and that there was a visitation area. Dr. Rodgers admitted he had seen television sets in inmate's cells, and he acknowledged that he understood they could watch movies or network television at times. App. 1953, l. 6 – 1954, l. 15. Defense counsel did not object to this cross-examination, or attempt any redirect examination.

Closing Argument

In his closing argument the solicitor argued petitioner "committed a cold-blooded murder." He then asked the jurors to "look at life imprisonment." App. 2135, ll. 11 – 21. The solicitor said petitioner would be "given a prison job, according to that witness sometimes they'll pay them some money, he's got canteen where they buy stuff, Cokes, candy bars, that kind of stuff, television to watch in their cells. In the meantime, Susan Karsae is dead and in her grave. And I ask you if life imprisonment is an acceptable alternative to somebody who's done what he's done. That's a choice you all are going to have to make." App. 2136, ll. 10 – 20. There was no objection to this argument.

At the conclusion of the PCR hearing the judge noted that the entire trial transcript was a part of the post-conviction record. PCR counsel O'Connell responded that in the proposed order the judge was requesting: "I will point out parts of the transcript that didn't get specifically referred to at this hearing . . ." Tr. 3145, l. 2 – 3146, l. 20.

The post-conviction relief hearing concluded on September 21, 2006. The PCR judge also left the record open for further testimony from Jeffrey Bloom regarding the *voir dire* issues. The judge noted he had already an opportunity to see Jeffrey Bloom testify live and to judge his credibility. However, the judge also he would be happy to see Bloom testify live again if that is what the parties desired. App. 3139, l. 5 – 3145, l. 12.

Following the post-conviction hearing petitioner, on February 8, 2007, filed a motion to amend his petition a fifth time. He amended to the add the present prison conditions issue. Petitioner noted that at the conclusion of the testimony he moved to amend the fourth time to add claims about ineffective assistance provided by trial counsel during jury selection. "The respondents did not object." App. 2385 – 2387.

In the proposed order requested by the PCR judge petitioner noted Dr. Rodgers' trial testimony regarding prison conditions and he cited specifically to the record. App. 3606. PCR counsel also referenced the solicitor's closing argument on the good prison conditions issue. App. 3908 – 3909.

PCR counsel argued that trial counsel failed to provide effective assistance of counsel "when they failed to object to the portion of the solicitor's cross-examination of Dr. Augustus Rodgers when he had Dr. Rodgers admit that inmates at the S.C. Department of Corrections have certain privileges and when they failed to object to the portion of the solicitor's closing argument in which he urged the jury to consider the same privileges as a reason to sentence Applicant to death and compared his life as an inmate at the Department of Corrections to the victim in her grave." App. 3939 – 3941.

The proposed order concluded with a request that petitioner's death sentence be vacated on this improper prison condition evidence and argument also.

The state's proposed order recognized that this issue was being raised by petitioner. App. 3955 – 3956; App. 4017 – 4022. The state wrote that the prison conditions amendment being raised by petitioner on February 6, 2007 was based on the intervening case of State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) which was decided on January 8, 2007. The state argued that this Court in State v. Burkhart was reiterating its admonition in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), where the prison conditions issue was procedurally barred, that this prison conditions evidence was inadmissible. The proposed order, for the first time, also stated the state opposed this additional amendment. The state also contended that "the record and amendments had been closed at the conclusion of the hearing on September 21, 2006." App. 4018.

However, as seen above, the record was left open for a potential deposition or further testimony of jury consultant Jeffrey Bloom, and PCR counsel also stated his intention with no objection by the state "to refer to parts of the transcript that didn't get specifically referred to at this hearing . . ." Tr. 3145, l. 2 – 3146, l. 20.

The state then urged that if the amendment was allowed the state maintained that petitioner had failed to show "that in 1999 a reasonable counsel was constitutionally required to object to this evidence and argument, particularly after Ivey[1] and the fact that the court in 2005 thought it needed to caution both parties about the use of such evidence of real prison life. He has failed to show deficient performance." App. 4021.

[1] State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997).

In the order of dismissal the court accepted the position of the state in its proposed order that the amendment was untimely. App. 4097 – 4098. The PCR court wrote alternatively on the merits "that if the amendment was allowed the failure to object in this case was distinguishable (from Bowman)." App. 4098.

The PCR court ruled that this Court had rejected a similar argument in State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) where Ivey argued the court erred by preventing the defense from ensuring the jury had a correct understanding of the term "life imprisonment," where the solicitor introduced considerations of early release and "misled the jury about Ivey's future dangerousness to society, *while depicting life imprisonment as a luxury vacation.*" App. 4098. (PCR court's emphasis). The PCR court wrote that defense counsel was not ineffective "for failing to forecast changes in the law." App. 4101.

To this order, petitioner filed a Rule 59(e), SCRCP motion. App. 4103 – 4110. This motion noted that motions to amend were governed by SCRCP 15(a) & (b), SCRCP. "None of the reasons of the Court gives as reasons for denying the amendment are mentioned in the Rule and are, therefore, irrelevant to whether the amendment should be allowed." App. 4104.

The motion also noted that: SCRCP 15(a) provides that leave to amend "shall be freely given when justice so requires and does not prejudice any other party."

> "This Court also failed to make finding as to why allowing the proposed amendment would not be required by justice. *It is impossible to conceive of a case where justice is more required.* This is not a contractual dispute between two parties of equal stature when the worst that will happen is that of them would pay damages to the other. The consequences for Applicant are far beyond a contractual dispute because he is a death sentenced prisoner. As the

> U.S. Supreme Court has said in several cases, 'death is different.'" App. 4104-4105.
>
> The Court also failed to make a finding as to how the Respondents would be prejudiced by allowing the amendment. Of course, the Respondents would not be prejudiced by allowing the amendment for three reasons: First, the Respondents did not make a finding of prejudice in their proposed order so they did not even think they were prejudiced. Second, all of the evidence supporting the claim, i.e., the improper cross-examination of Dr. Rodgers by the Solicitor and the Solicitor's improper closing argument had been in the record since the first day of the PCR when the Court declared with the assent of the Respondent that the 1999 trial transcript was (and still is) a part of the PCR record. The Respondents, therefore, did not have to deal with new facts they had never heard previously. Third, the legal argument in support of the claim is not complicated so there cannot be nor is there a claim of prejudicial surprise. In fact, the Respondents dealt with the proposed amendment to their apparent satisfaction in their proposed order. The Respondents did not bother to file a Return or ask this Court to extend the time to submit the proposed orders because they needed time to deal with the Motion to Amend in their proposed order.

App. 4105.

> There is no prejudice to the Respondents and justice requires the Court to allow the amendment. Therefore, this Court should pursuant to SCRCP 15(a) allow the amendment."

App. 4104 – 4105.

Petitioner also argued in his Rule 59(e), SCRCP motion that under SCRCP 15(b) that the state had agreed the 1999 trial transcript was part of the PCR record and that constituted the state's implied consent to litigate the issue in the proposed amendment. App. 4106. Defense counsel also noted that the reasoning that conditions of incarceration or execution are improper matters for evidence or argument went back to 1984 and State v. Plath (Plath II), 381 S.C. 1, 313 S.E.2d 619, 627 (1984). App. 4109.

Defense counsel wrote that this Court had held that Bowman was consistent with the Court's long standing rule that evidence in sentencing phase of capital trial must be relevant to the character of the defendant or the circumstances of the crime. This Court also stated that any prison conditions evidence must be narrowly tailored to demonstrate *the defendant's personal behavior and not prison conditions in general.* App. 4109 – 4112.

In the judge's order denying Rule 59(e), SCRCP relief the PCR court wrote that the prison conditions ground that was addressed in the order or motion to amend was implicitly denied. The court noted that the record had been closed "for a lengthy amount of time . . . this matter was under advisement at the time the Applicant requested another amendment to the application." The PCR court wrote that it was not persuaded to change its mind. App. 4011 – 4012.

Discussion

This Court in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), as PCR counsel correctly noted, wrote that it had "long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime." State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). The jury's sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). "Such determinations as to the time, place, manner, and conditions of execution **or incarceration . . .** are reserved . . . to agencies other than the jury." State v. Plath (Plath II), 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). (emphasis added).

Further, as PCR counsel also argued, the state consented to an amendment regarding Jeffrey Bloom, the jury consultant. However, the state did not consent to the prison conditions amendment because it was apparent it would lead to petitioner's death sentence being vacated since there can be no strategic reason for failing to object to this prison conditions evidence which has been disapproved of since 1984.

In State v. Bowman, 326 S.C. 485, 623 S.E.2d 378 (2005), this Court procedurally barred the defendant's challenge on appeal to the admission of evidence regarding general prison conditions. This Court noted that in State v. Burkhart, although Burkhart was tried before the decision in Bowman, that this was not a new holding. This Court stated "because it is consistent with our long-standing rule that evidence in the sentencing phase the capital trial must be relevant to the character of the defendant or circumstances of the crime." State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). Therefore, since the defendant does not set prison rules and regulations, prison conditions are not relevant unless the state can directly link a prison condition to the defendant's behavior.

The state attempts to blur the distinction between evidence allowed under Skipper v. South Carolina, 476 U.S. 1 (1986) in response to the earlier State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), ban on evidence of adaptability to prison, by attempting to argue that if the defendant offers evidence of his adaptability to prison that prison conditions in general are fair game. That is simply not true, and the state knows better.

In Skipper v. South Carolina the United States Supreme Court held that Skipper had a right to present evidence that he made a good adjustment to prison. State v. Koon had earlier held that such evidence was irrelevant and hence inadmissible. The Court in

Skipper v. South Carolina held that exclusion of evidence of a defendant's adaptability to prison violated his right to present mitigating evidence "as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In short, if the state can – and it does – offer evidence of a defendant's bad behavior, a defendant is entitled to offer evidence he can adapt to prison if the jury spares his life.

In State v. Plath II, in 1984, this Court clearly sent word to the bench and bar that evidence of the horrors of execution or the conditions of imprisonment are *equally inadmissible*. Neither the horrors of execution or the conditions of execution are relevant to the individual character of the defendant or the circumstances of the crime.

Here, further, the PCR judge's reliance on State v. Ivey, 331 S.C. 118, 502 S.E.2d 92 (1998) is misguided. In State v. Ivey, on direct appeal, appellate counsel tried to combine an argument on the jury not understanding Ivey would be sentenced to life imprisonment without parole, with an argument that the judge impermissibly admitted evidence and argument on good prison conditions. The obvious problem was there was not an objection in the trial court to the good prison conditions evidence and argument of Solicitor Bailey, and therefore the issue was procedurally barred and it was never reached on the merits by this Court.

When Ivey reached PCR, the prison conditions issue was overlooked by PCR counsel, and it was not raised as a PCR issue. Ivey does not stand for anything on the merits because the good prison conditions issue was never properly raised, either on direct appeal, or on PCR.

There cannot be any legitimate reason under Strickland v. Washington, 466 U.S. 668 (1984) for failing to object to this good prison condition evidence. Evidence that petitioner can work and get paid in prison, could go to school in prison, have recreational activities in prison, get three "square meals a day" in prison, and have canteen privileges in prison, was extremely prejudicial and irrelevant to the jury's task at hand. The evidence and closing argument on good prison conditions was clearly intended to have the jury conclude that petitioner would have some of the pleasures of life behind the prison walls while the victim was forever dead in her grave.

Petitioner did not – and does not -- have any control over those prison conditions. In fact, as Dr. Rodgers noted, prison conditions are subject to change by the Commissioner of the South Carolina Department of Corrections. He specifically cited Michael Moore in that regard. Much of what Commissioner Moore did policy-wise has changed. However, no one can predict today what South Carolina Department of Corrections policies will be a year or ten years from now, and petitioner is not in any condition or place to set policies for the prison system.

The salient point was and is that petitioner has no control over the prison conditions under which he lives, and, as such, evidence of the "good prison conditions" was not in response to petitioner's specific behavior or his actions. Defense counsel was blatantly ineffective for failing to object to this evidence and argument, and petitioner is entitled to relief.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 3rd day of April, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 3rd day
of April, 2013.

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

The Supreme Court of South Carolina

Brad Keith Sigmon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ORDER

The petition for rehearing is denied. The attached opinion is, however, substituted for the opinion previously filed in this matter.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
May 8, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Brad Keith Sigmon, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ON WRIT OF CERTIORARI

Appeal from Greenville County
J.C. Nicholson, Jr., Circuit Court Judge

Opinion No. 27233
Submitted October 15, 2012 –Refiled May 8, 2013

AFFIRMED

Chief Appellate Defender Robert M. Dudek, of Columbia, and William H. Ehlies, II, of Greenville, for Petitioner.

Attorney General Alan M. Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Assistant Deputy Attorney General Donald J. Zelenka, and Assistant Attorney General Melody Jane Brown, all of Columbia, for Respondent.

JUSTICE HEARN: A jury convicted Brad Keith Sigmon of two counts of murder and burglary in the first degree, and it subsequently sentenced him to death. His convictions and sentences were affirmed on direct appeal in *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005). We granted certiorari to review the circuit court's dismissal of Sigmon's application for post-conviction relief (PCR) and now affirm.

FACTUAL/PROCEDURAL BACKGROUND

Sigmon and Rebecca "Becky" Larke were in an intimate relationship for approximately three years. They were living together in her trailer when she informed Sigmon she did not want to see him anymore. Becky's parents, Gladys and David Larke, lived next door to them in a trailer on the same property. David also informed Sigmon that Becky wanted him to move out and served him with eviction papers, stating Sigmon had to leave within two weeks. Becky subsequently moved in with her parents. Sigmon believed she had begun a new relationship and although he pleaded with her to come back, she refused. Sigmon became increasingly obsessed with Becky, stalking her in an attempt to verify she was seeing another man.

About a week after Becky asked him to leave, Sigmon was drinking and smoking crack cocaine with his friend, Eugene Strube, in Becky's trailer. At some point in the evening, Sigmon decided he would go to the Larkes' home the following morning after Becky left to take her children to school and tie up Becky's parents. When Becky returned home, Sigmon intended to kidnap her and disappear with her, but he did not want her parents to be able to call the authorities. Sigmon and Strube eventually ran out of crack and Strube fell asleep.

In the morning, after they saw Becky leave, Strube and Sigmon exited the trailer. However, Strube changed his mind about helping Sigmon and left. Sigmon grabbed a baseball bat from beneath his trailer and entered the Larkes' trailer. Upon seeing Sigmon, David told his wife to bring him his gun, and Sigmon hit him in the back of the head several times with the bat. Sigmon then saw Gladys, ran after her into the living room, and hit her several times in the head. He returned to the kitchen where David lay and hit him several more times with the bat because he was still moving. He then went back to Gladys, saw that she was still moving, and hit her several more times.

Sigmon retrieved David's gun and waited for Becky to return home. When Becky arrived, Sigmon brandished the gun, took her car keys, and forced her in her

car. He intended to pick up his own car and drive to North Carolina with Becky. However, she managed to jump out of the car and tried to run away. Sigmon pulled over and chased after her, shooting her several times. When he realized he was out of bullets, he got back in her car and fled. Although Becky was injured, she survived the assault and told the witnesses who came to her aid that Sigmon told her he had either tied up or killed her parents. Police officers were dispatched to the Larkes' home where the bodies were discovered.

A manhunt ensued and Sigmon was eventually captured in Gatlinburg, Tennessee after he called his mother, who was assisting the police in locating him. He was arrested without incident and taken into custody by the Gatlinburg police department where he confessed to murdering the Larkes and kidnapping and shooting Becky. He admitted that he intended to kill Becky and then kill himself. Officers from Greenville arrived to transfer him back to Greenville, but, at Sigmon's request, they took his statement before leaving Tennessee. He again confessed to his crimes and stated his plan had been to kill Becky and himself.

Sigmon was indicted for two counts of murder; assault and battery with intent to kill; kidnapping and possession of a firearm during the commission of a violent crime; first degree burglary; and grand larceny. The case proceeded to trial only on the murder and first degree burglary charges. Sigmon conceded guilt and presented no evidence in his defense. The State presented expert testimony that both of the Larkes died as a result of blunt force trauma to the head, describing the severity of their wounds. Both sustained nine lacerations to the head, causing hemorrhaging and filling the sinuses with blood, so that they were breathing in blood as they died. It was estimated that both lived for three to five minutes before dying from their wounds. Additionally, both sustained defensive wounds to their forearms. The jury ultimately found Sigmon guilty.

During the penalty phase, the defense presented testimony regarding Sigmon's mental state, such as his issues with childhood abandonment and neglect that affected the development of his social mores and overall judgment, as well as evidence of an extensive history of drug use stemming from his "recurrent major depressive disorder" or his "chemical dependency disorders." Sigmon additionally presented evidence that he was adapting to prison life and that he was not a problematic or difficult prisoner. Sigmon testified he was sorry for the crimes and admitted he probably deserved to die.

The court charged the jury to consider three factors in aggravation: that two or more persons were killed, that the murder was committed during the

commission of a burglary, and that the murder was committed with physical torture. It also charged the jury to consider four statutory mitigating circumstances: that the defendant had no prior history of criminal convictions involving the use of violence against another person; the murder was committed while the defendant was under the influence of emotional or mental disturbance; the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the law was substantially impaired; and the defendant was provoked by the victim. Although Sigmon requested a charge on the statutory mitigating circumstance of age or mentality, the judge declined to give that charge, noting mental state would be covered by the other mitigating circumstances he charged.

The jury ultimately sentenced Sigmon to death. On direct appeal, this Court affirmed Sigmon's convictions and sentences. *Sigmon*, 366 S.C. 552, 623 S.E.2d 648. Sigmon subsequently filed an application for PCR. The State filed a return and motion to dismiss, and Sigmon amended his application, arguing his counsel provided ineffective assistance in failing to properly preserve various issues for appellate review, failing to adequately present evidence of his mental state, and attempting to blame the victims for the crimes. Sigmon moved for summary judgment, submitting depositions of his trial attorneys. At the hearing, the PCR court ultimately dismissed Sigmon's application. We granted Sigmon's petition for a writ of certiorari on the following issues:

I. Did the PCR court err in failing to find trial counsel ineffective when they failed to object to the solicitor's reference to his own opinion of the death penalty during his closing statement?

II. Did the PCR court err in finding trial counsel was not ineffective for failing to argue that the trial court was required to charge the jury on the statutory mitigating factor of the age and mentality of the defendant at the time of the crime under Section 16-3-20(C)(b)(7) of the South Carolina Code (2003) because evidence in the record showed Sigmon was intoxicated during the commission of the crimes?

III. Did the PCR court err in failing to find trial counsel ineffective for failing to object to the trial court's charge on non-statutory mitigation?

STANDARD OF REVIEW

To prevail in a PCR action, an applicant must satisfy a two prong test: he must first show his counsel's performance fell below an objective standard of reasonableness, and he is then required to prove he suffered prejudice as a result of counsel's deficient performance. *Franklin v. Catoe*, 346 S.C. 563, 570-71, 552 S.E.2d 718, 722-23 (2001) (citing *Strickland v. Washington,* 466 U.S. 668, 687 (1984)). "However, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case." *Edwards v. State*, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011) (internal quotation omitted).

When a defendant challenges a death sentence, prejudice is established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." *Rhodes v. State*, 349 S.C. 25, 31, 561 S.E.2d 606, 609 (2002).

The applicant in a PCR hearing bears the burden of establishing his entitlement to relief. *Suber v. State*, 371 S.C. 554, 558, 640 S.E.2d 884, 886 (2007). We will uphold the PCR court's findings if supported by evidence of probative value within the record and we will only reverse where there is an error of law. *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008).

LAW/ANALYSIS

I. CLOSING ARGUMENT

Sigmon argues the trial court erred in not finding his counsel ineffective for failing to object to the State's closing arguments because the Solicitor expressed his own opinion as to why the death penalty was the appropriate punishment and thereby injected an arbitrary factor into the proceedings in violation of the Eighth Amendment and Section 16-3-25(C)(1) of the South Carolina Code (2003). We disagree.

"A solicitor's closing argument must not appeal to the personal biases of the jurors nor be calculated to arouse the jurors' passions or prejudices, and its content should stay within the record and reasonable inferences to it." *Humphries v. State*,

351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002). "When a solicitor's personal opinion is explicitly injected into the jury's deliberations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor . . . ." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981). However, "[i]mproper comments do not automatically require reversal if they are not prejudicial to the defendant." *Simmons v. State*, 331 S.C. 333, 338, 503 S.E.2d 164, 166 (1998). "The relevant question is whether the solicitor's comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* at 338, 503 S.E.2d at 166-67.

During his closing argument, the solicitor stated:

> Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, *Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're* [sic] *are mean and evil people who live in this world, who do not deserve to continue to live with the rest of us, regardless of how confined they are.* And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us.
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> ....
>
> And there are people, there are people who will argue that the death penalty is not a deterrent. But *my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State.* And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

(emphasis added). Trial counsel did not object.

When deposed for the PCR hearing, counsel stated he considered this personal reference inappropriate, and it was his understanding that such statements

would be inadmissible. He further noted that if he had not objected to it, it was either because he "missed it or was oblivious." Nevertheless, the PCR court concluded that the statements would not justify an objection because they did not diminish the role of the jury in rendering a death sentence nor were they inflammatory. Instead, it found the closing argument was overall tailored to the facts within the record regarding the specific crimes at issue.

Although within this portion of the closing the solicitor appears to be asking the jurors to accord some weight to his determination of the appropriateness of the death penalty, we do not believe the statements are objectionable within the context of his entire argument. Sigmon relies on *Woomer* in arguing that the comments were inadmissible. In *Woomer*, we reversed a death sentence on direct appeal where the solicitor's argument plainly attempted to minimize the jurors' sense of responsibility in choosing death. *Woomer*, 277 S.C. at 175, 284 S.E.2d at 360. We held the solicitor's statements were inadmissible because he repeatedly stated that he himself had undertaken the same difficult process. Specifically, he stated:

> [T]he initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. . . . I had to make this same decision, so I have had to go through the same identical thing that you all do. It is not easy.

Id. at 175, 284 S.E.2d at 359. Unlike the statements in that case, we do not find the solicitor's comments here diminished the role of the jury in sentencing Sigmon to death. Although the solicitor mentioned his own considerations, he did not go so far as to compare his undertaking in requesting the death penalty to the jury's decision to ultimately impose a death sentence. His statements were not designed to diminish the jury's role and therefore, did not result in the prejudice identified in *Woomer*.

Instead, we find the statements more akin to those we upheld on direct appeal in *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990), where the solicitor told the jury 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." *Id.* at 33, 393 S.E.2d at 372 (alterations in original). He further implored the jury to "do what is right," stating "if it was not right in this case, it was never right." We held that these statements were easily distinguishable from the statements in *Woomer*, noting they

did not lessen the role of the jury in sentencing death by mentioning the solicitor's role in the process and did not contain the solicitor's personal opinions. As *Bell* illustrates, the solicitor has some leeway in referencing the State's decision to request death, provided he does not go so far as to equate his initial determination with the jury's ultimate task of sentencing the defendant. Although the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury.

Furthermore, examining the closing argument as a whole, we find the solicitor often emphasized the important role the jury played in determining the appropriate sentence. He acknowledged that this was a "tough decision for [it] to have to make" but that it was "a responsibility that the government places upon its citizens." Although Sigmon makes much of the solicitor's frequent references to the fact that he represented the State, we fail to discern the error. The jurors were aware the State brought the charges against Sigmon and knew the State was asking for the death penalty. It is reasonable to assume that the jury therefore inferred that the solicitor believed death was the appropriate sentence. We therefore find trial counsel were not deficient for not objecting to the State's closing argument.

II. STATUTORY MITIGATING CIRCUMSTANCES

Sigmon also argues his trial counsel were ineffective in failing to obtain a charge on the statutory mitigating circumstance of age or mentality because evidence at trial established he was intoxicated at the time of the murders. We disagree.

We have held that where there is evidence that the defendant was intoxicated at the time the crime was committed, the trial judge is *required* to submit the mitigating circumstances in section 16-3-20(C)(b)(2), (6), and (7). *State v. Vasquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on other grounds by State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006). Sigmon contends evidence in the record clearly demonstrates he was intoxicated at the time of the murders and his trial attorneys were ineffective for not making this argument to obtain the charge of statutory mitigation for age or mentality. However, we find there is evidence of probative value supporting the PCR court's finding that Sigmon was not intoxicated at the time of the murders.

During the penalty phase, counsel requested a charge pursuant to section 16-3-20(C)(b)(7) on "the age or mentality of the defendant at the time of the crime" based on the evidence presented as to Sigmon's mental state at the time of the murders. This mitigating circumstance would be in addition to the other mitigating circumstances the court charged under section 16-3-20(C)(b): that (1) "[t]he defendant has no significant history of prior criminal conviction involving the use of violence against another person;" that (2) "[t]he murder was committed while defendant was under the influence of mental or emotional disturbance;" (6) that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;" and that (8) "[t]he defendant was provoked by the victim into committing the murder." The trial court declined to charge (7), concluding any inference from mental state was encapsulated in (6).

In his deposition for Sigmon's PCR hearing, trial counsel admitted that upon reading the statute anew, it did appear that subsection (7) was substantively different from subsection (6), but also stated he had "no knowledge or memory of distinction on these issues then or now." He further stated that at trial he thought "the facts were the thing that would carry the day, not any charge [the court] happened to give about mitigation." The PCR court ultimately found there was insufficient evidence of intoxication at the time of the crime to require charges pursuant to section 16-3-20(C)(b)(2), (6), and (7) and thus found that it was not ineffective assistance to only obtain charges on (2) and (6).

Although the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders, it does not establish he was intoxicated when he committed the crimes. At trial, Sigmon presented evidence through testimony of Strube and Dr. Morton that the night before he committed the crimes he smoked crack cocaine and consumed alcohol. Dr. Morton testified that given Sigmon's history of drug use, the effect of the substances could last up to twenty-eight days. However, his testimony focused on Sigmon's other mental instabilities, such as his recurrent major depressive disorder and his chemical dependency disorders, and their psychological effects; it did not pertain to whether Sigmon was intoxicated at the time of the crime. Furthermore, Strube testified that on the night before the murders, he and Sigmon were smoking crack cocaine and drinking beer, but ran out of crack at some point in the evening, and Strube went to sleep. Although this supports the conclusion that Sigmon ingested crack and alcohol in the evening and possibly into the early morning, it does not necessarily indicate Sigmon was still intoxicated when he entered the Larkes' home the next morning.

Additionally, trial counsel stated in his deposition that he did not attribute Sigmon's behavior to intoxication, but to psychological problems. He noted Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up, stating Sigmon was "wound up like a top when he committed this crime." When asked whether he considered the drug and alcohol use as evidence of Sigmon's intoxication at the time the crimes were committed, counsel responded, "I absolutely cannot tell you whether we considered intoxication . . . I don't remember ever thinking he was drunk."

Thus, the record supports the PCR court's finding that Sigmon was not intoxicated at the time of the murders, and therefore his attorneys were not deficient for failing to argue that his intoxication warranted the charge of mitigating factor (7).

III. NON-STATUTORY MITIGATING FACTORS CHARGE

Sigmon finally argues trial counsel was ineffective for failing to object to the trial court's instructions on non-statutory mitigating circumstances because the charge disparaged the legitimacy of this type of evidence. We disagree.

"A jury instruction must be viewed in the context of the overall charge." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." *State v. Bell*, 305 S.C. 11, 16, 406 S.E.2d 165, 168 (1991). "The sentencing jury in a capital case may not be precluded from considering as mitigating evidence any aspect of the defendant's character or record and any circumstances of the crime that may serve as a basis for a sentence less than death." *Id.* at 19, 406 S.E.2d at 170.

During the sentencing phase of the trial, the court charged the jury to consider non-statutory factors of mitigation as follows:

> [A] mitigating circumstance is neither a justification or [sic] an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable.
>
> ....

> A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims serves the same purpose. That is to reduce the degree of his guilt in the offense.

Sigmon argues the instructions improperly narrowed the evidence the jury would consider in mitigation to factors relating specifically to the crime, to the exclusion of other evidence presented, such as Sigmon's adaptability to prison life, acceptance of responsibility for his actions, and remorse for the crimes.

However, Sigmon analyzes this language in isolation. The court's overall charge to the jury included the instruction that the jury could consider:

> whether the defendant should be sentenced to life imprisonment for any reason, or for no reason at all . . . . In other words you may choose a sentence of life imprisonment if you find a statutory or non-statutory mitigating circumstance, or you may choose a sentence of life imprisonment as an act of mercy.

Thus, the court clearly indicated the jury's power to consider any circumstance in mitigation, and a reasonable juror would have known he could consider *any* reason in deciding whether to sentence Sigmon to death. We further disagree with Sigmon's contention that the charge effectively reduced the weight of non-statutory circumstances. The court did not describe those circumstances as "not provided for by law," as Sigmon contends, but instead simply distinguished them from the statutory circumstances by stating they were "not provided for by statute." The qualification seems to have been added for clarity, not to inject a hierarchy into mitigating circumstances. We therefore find trial counsel were not deficient for not objecting to the charge.

CONCLUSION

We find Sigmon has not presented evidence that trial counsel were deficient. In light of this conclusion, it is not necessary for us to reach the second prong of prejudice in analyzing Sigmon's claim of ineffective assistance of counsel. Accordingly, we affirm the PCR court's dismissal of Sigmon's application for post-conviction relief.

TOAL, C.J., BEATTY, and KITTREDGE, JJ., concur. PLEICONES, J., concurring in result only.

Effective: June 11, 2010

Code of Laws of South Carolina 1976 Annotated Currentness
Title 16. Crimes and Offenses
Chapter 3. Offenses Against the Person
Article 1. Homicide
➡➡ § 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years to life pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years to life required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14, Article IV of the Constitution of South Carolina, 1895, the commutee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the

State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.

(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) trafficking in persons;

(d) burglary in any degree;

(e) robbery while armed with a deadly weapon;

(f) larceny with use of a deadly weapon;

(g) killing by poison;

(h) drug trafficking as defined in Section 44-53-370(c), 44-53-375(B), 44-53-440, or 44-53-445;

(i) physical torture;

(j) dismemberment of a person; or

(k) arson in the first degree as defined in Section 16-11-110(A).

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to Section 44-48-120.

(b) Mitigating circumstances:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence

against another person.

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a participant in the defendant's conduct or consented to the act.

(4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The age or mentality of the defendant at the time of the crime.

(8) The defendant was provoked by the victim into committing the murder.

(9) The defendant was below the age of eighteen at the time of the crime.

(10) The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

The statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In non-jury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of

death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. No person sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of Section 14-7-1020, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

CREDIT(S)

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1; 1985 Act No. 104, § 1; 1986 Act No. 462, § 27; 1990 Act No. 604, § 15; 1992 Act No. 488, § 1; 1995 Act No. 83, § 10; 1996 Act No. 317, § 1; 2002 Act No. 224, § 1, eff May 1, 2002 (applicable to offenses committed on or after that date); 2002 Act No. 278, § 1, eff May 28, 2002; 2006 Act No. 342, § 2, eff July 1, 2006; 2007 Act No. 101, § 1, eff June 18, 2007; 2010 Act No. 273, § 21, eff June 2, 2010; 2010 Act No. 289, § 4, eff June 11, 2010.

CODE COMMISSIONER'S NOTE

2011 Act No. 47, § 14(B), provided for the substitution of "intellectual disability" for "mental retardation" in the 1976 Code of Laws. At the Code Commissioner's discretion, the phrase "mental retardation" has been retained, as this phrase is specifically defined in this section.