

No. 13-6379

IN THE SUPREME COURT OF THE UNITED STATES

BRAD KEITH SIGMON, PETITIONER

v.

STATE OF SOUTH CAROLINA, RESPONDENT

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA*

BRIEF FOR THE STATE OF SOUTH CAROLINA
IN OPPOSITION

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S.C. SUPREME COURT

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CAPITAL CASE

PETITIONER'S QUESTIONS PRESENTED

1.

Whether the South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth Amendment and Fourteenth Amendment rights, for failing to object to the solicitor's closing argument, that in his personal opinion "as the solicitor of this circuit" he sought the death penalty because some people are so "mean and evil" they did not deserve to live, and that the jury should send a message that "this type of conduct will not be tolerated in Greenville County" since this argument injected an arbitrary factor into the case in violation of the Eighth and Fourteenth Amendment to the United States Constitution?

2.

Whether the South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to request a charge on the statutory mitigating circumstance of age or mentality, when the evidence established that petitioner was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand?

3.

Whether the South Carolina Supreme Court erred by holding defense counsel was not ineffective, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstances was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence?

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1.

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2.

The Supreme Court of South Carolina reasonably rejected Petitioner's allegation counsel was ineffective in failing to secure a general statutory mitigating circumstance charge on "age or mentality" based on evidence of "extreme intoxication" when the facts of record did not support that Petitioner was "extremely intoxicated" at the time he murdered his two victims. Even so, the trial judge charged two other statutory mitigating circumstances for consideration of mental state which allowed consideration of the evidence presented. 22

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Capital Case: Execution Stayed by District Court

CITATION TO OPINION BELOW

The Supreme Court of South Carolina affirmed the denial of Petitioner's application for post-conviction relief ("PCR") by opinion filed March 20, 2013. *Sigmon v. State of South Carolina*, Opinion No. 27233 (S.C.Sup.Ct. Filed March 20, 2013). The Supreme Court of South Carolina filed an amended opinion on May 8, 2013. *Sigmon v. State of South Carolina*, Opinion No. 27233 (S.C.Sup.Ct. Re-filed May 8, 2013). The amended opinion, which is controlling, is provided in the Appendix to the Petition for Writ of Certiorari, at A58, and is reported at 403 S.C. 120, 742 S.E.2d 394 (2013).

JURISDICTION

The Supreme Court of South Carolina issued its original opinion on March 20, 2013, and a timely petition for rehearing was denied on May 8, 2013. Petitioner contends this Court has jurisdiction over the questions presented pursuant to 28 U.S.C. § 1257, in that he asserted in the state court and asserts in the petition to this Court a deprivation of rights secured by the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that this case involves the Sixth Amendment (effective assistance of counsel); the Eighth Amendment (prohibiting cruel and unusual punishment); and the Fourteenth Amendment (due process). (Petition, p. 2).

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Brad Keith Sigmon, is presently incarcerated as a safekeeper at Lieber Correctional Institution pursuant to a sentence of death and orders of commitment from the Clerk of Court for Greenville County South Carolina. After a jury trial, he was convicted on July 19, 2002 of burglary first degree and the murders of David Larke and Gladys Larke. The penalty phase began on July 20, 2002. On July 21, 2002, the jury found beyond a reasonable doubt, the presence of three (3) statutory aggravating circumstances:

- 1) two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct;
- 2) the murder was committed while in the commission of burglary;
- 3) the murder was committed while in the commission of physical torture.

(PCR App. p. 2118, lines 9-18).

The jury recommended death. (PCR App. p. 2118, lines 18-24). The trial judge sentenced Petitioner to thirty (30) years imprisonment for burglary, first degree, and imposed a sentence of death for the two murders. (PCR App. p. 2124, lines 5-25). Petitioner filed a timely notice of intent to appeal.

Direct Appeal

After full briefing and oral argument, the Supreme Court of South Carolina issued an opinion affirming the conviction and sentence on December 19, 2005. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2006). Petitioner

sought review by this Court which was denied on June 26, 2006. *Sigmon v. South Carolina*, 548 U.S. 909 (2006).

Post-Conviction Relief Action

On October 13, 2006, Petitioner filed a state application for post-conviction relief ("PCR"). (PCR App. pp. 2435-2441). On November 8, 2006, the PCR judge appointed William H. Ehliens, Esq., and Teresa L. Norris, Esq. to represent Petitioner in the action. On June 4, 2008, counsel filed an amended application, which included, in relevant part:

9(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

(10)(b) During the trial and sentencing phase, Applicant's counsel failed to adequately preserve various issues for appellate review, including, but not limited to, the following:

...

(ii) Counsel failed to object to the Solicitor's improper closing arguments expressing his personal opinions as an elected official on why he believed death was the appropriate punishment. *See* ROA 2188.

(iii) Counsel failed to adequately request a charge on the statutory mitigating circumstances of age or mentality, based on the evidence of drugs and alcohol at the time of the offenses, or to properly address the trial court's erroneous understanding that "mentality" referred only to evidence of mental retardation or limited intellectual abilities. *See* ROA 2177, 2232.

(iv) Counsel failed to object to the trial court's instructions defining mitigating circumstances as evidence that "simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable, ROA 2232, which improperly narrowed the mitigation evidence to exclude evidence of Applicant's adaptability to confinement and other mitigation.

...

Counsel's omissions were both unreasonable and prejudicial. *Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984).

...

(PCR App. pp. 2478-2481).

On July 22, 2008, Petitioner moved for summary judgment. (PCR App. pp. 2500-2517). Respondent made a response in opposition on August 1, 2008, filed August 5, 2008. (PCR App. pp. 2518-2542). An evidentiary hearing was convened on August 4, 2008. (See PCR App. p. 2718). Petitioner's motion for summary judgment was denied and the evidentiary hearing held. (PCR App. p. 2757, lines 17-23). Petitioner immediately rested on the depositions and the arguments presented in the summary judgment motion, and did not present any witnesses or evidence.¹ (PCR App. p. 2758, line 11 - p. 2761, line 19). Respondent moved for a directed verdict which was denied. (PCR App. p. 2761, line 22 - p. 2762, line 14). Respondent called Frank L. Eppes, Esq., former trial counsel for Petitioner. On July 14, 2009, the PCR judge issued a written Order of Dismissal, filed July 20, 2009. (PCR App. pp. 2846-2893). Petitioner appealed.

Petitioner filed a petition for writ of certiorari in Supreme Court of South Carolina on April 21, 2010. The State filed a return to the petition on June 21, 2010. Petitioner filed a reply on August 9, 2010. On December 16, 2011, the

¹ Respondent objected to the admission of depositions as Petitioner used discovery depositions not intended for use as a substitute for trial testimony. (See PCR App. pp. 2758-2761). Accord Federal Practice & Procedure § 2142 (April 2012 Update) ("The restrictions imposed by Rule 32 make it clear that the federal rules have not changed the long-established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person."). Both counsel were present for the hearing and Mr. Eppes testified. (See PCR App. pp. 2762 and 2805).

Supreme Court of South Carolina granted the petition as to Issues 3, 4, and 5 of the petition, which were as follows:

3. Whether defense counsel was ineffective, in derogation of petitioner's Sixth Amendment and Fourteenth Amendment rights, for failing to object to the solicitor's improper closing argument wherein the solicitor told the jury that in his personal opinion "as the solicitor of this circuit" that he sought the death penalty because some people are so "mean and evil" they did not deserve to live, and that the jury should sent a message that "this type of conduct will not be tolerated in Greenville County" since this argument injected an arbitrary factor in violation of South Carolina Code § 16-3-25-(C)(1) and the Eight and Fourteenth Amendment to the United States Constitution?

4. Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendments rights, for failing to request a charge on the statutory mitigating circumstance of age or mentality, when evidence presented at trial established that petitioner was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand?

5. Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence?

(Petition for Writ of Certiorari, pp. 1-2).

After full briefing on the issues, the Supreme Court of South Carolina, without oral argument, affirmed the denial of relief by opinion filed March 20, 2013. *Sigmon v. State of South Carolina*, Opinion No. 27233 (S.C.Sup.Ct. Filed March 20, 2013). On April 3, 2013, Petitioner filed a petition for rehearing which the Supreme Court of South Carolina denied on May 8, 2013. The Supreme Court of South Carolina, however, submitted an amended opinion

making minor additions to the text.² *Sigmon v. State of South Carolina*, Opinion No. 27233 (S.C.Sup.Ct. Re-filed May 8, 2013).

On August 21, 2013, Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. (C/A No. 8:13-cv-01399-RBH-JDA). The basis for the claims in this petition are also raised as allegations of ineffective assistance of counsel in the District Court filing as follows:

- III. Trial counsel rendered ineffective assistance of counsel, in derogation of Sigmon's Sixth and Fourteenth Amendment rights, for failing to object to the solicitor's improper closing arguments wherein the solicitor gave his personal opinions that death was the appropriate punishment and made improper "send a message" arguments.
- IV. Trial counsel rendered ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments for failing to request a charge on the statutory mitigating circumstance of age or mentality, when evidence presented at trial established that Sigmon was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand.
- V. Trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the

² At the end of Section I, the Court added, "We therefore find trial counsel were not deficient for not objecting to the State's closing argument," and also revised the conclusion in the opinion to read, "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."

legitimacy of non-statutory mitigating evidence under the Eighth and Fourteenth Amendments.

(C/A 8:13-cv-01399-RBH-JDA, ECF #42, pp. 5 -8).

By Order dated August 21, 2013, the District Court stayed the execution in this capital case during the pendency of the federal habeas action. Petitioner is presently scheduled to file a memorandum in support of his allegations on October 21, 2013. Respondent is scheduled to file a return and any dispositive motions on or before December 10, 2013.

STATEMENT OF FACTS

On April 27, 2001, at approximately 8:00 a.m., Petitioner entered the home of sixty-two (62) year old David Larke, surprised Mr. Larke in his kitchen, and struck him repeatedly with a baseball bat. Petitioner then saw Mr. Larke's fifty-nine (59) year old wife enter the kitchen. Petitioner chased her back into her living room where he repeatedly struck her with the same baseball bat. He returned to the kitchen and continued beating Mr. Larke. He then went back to the living room and continued beating Mrs. Larke. (PCR App. p. 1516, line 14 - p. 1517, line 17). Mr. Larke sustained a total of nine (9) crushing blows to the skull, and bruising on his ears, left shoulder, and a defense wound on the back of his right hand. His "skull was basically almost broken in two." (PCR App. p. 1634, lines 9-12). Mrs. Larke also received nine (9) injuries to her skull and had defensive wounds to her forearms, wrists, and elbows. She had also inhaled blood into her lungs. The forensic pathologist called at trial testified that both victims would have died in approximately three (3) to five (5) minutes from the severity of the beatings. (PCR App. p. 1627, line 3 - p. 1649, line 2).

Petitioner had been in a relationship with the Larke's daughter, Becky Barbare. Petitioner planned the murder in a scheme to get the daughter. After killing Mr. and Mrs. Larke, he waited for Becky to return. He captured her and forced her back into her white Nissan Pathfinder. When she tried to escape, he shot at her. (PCR App. p. 1516, line 6 - p. 1520, line 11). She survived and told the witnesses that Petitioner told her he had "tied up" or had killed her parents. (PCR App. p. 1278, lines 21-25; p. 1285, lines 4-10). Officers were dispatched to the Larke home and found their dead bodies. (PCR App. p. 1325, line 1 - p. 1326, line 22). Petitioner fled and was later in a campground in Tennessee. (PCR App. p. 1389, line 8 - p. 1390, line 19). Petitioner confessed to both Tennessee officers and Greenville County, South Carolina detectives. (PCR App. p. 1459, line 5 - p. 1474, line 19; State's Exhibit 11; p. 1495, line 17 - p. 1529, line 24; State's Exhibit 15).³

In addition to his full, and repeated, confessions, Petitioner also indicated that "Geno" was supposed to have helped him but ran out on him before Petitioner had entered the Larke home. (PCR App. p. 1516, lines 1-21). Eugene Strube testified at trial that the night before the murders, he and Petitioner stayed in the adjoining trailer. (PCR App. p. 1577, line 14 - p. 1580, line 19; p. 1583, lines 14-19). Petitioner and Strube drank beer and smoked crack cocaine.

³ The full tape of the Tennessee interview was admitted in the PCR hearing. (PCR App. p. 2795; p. 2890). The tape contains multiple confessions to the double murder and Petitioner's clearly expressed continued infatuation with victim Becky Barbare, often in sexual terms.

(PCR App. p. 1580, line 21 - p. 1663, line 1).⁴ Petitioner asserted that “he was going to get Becky for leaving him the way she did;” that he would “tied her parents up;” and, that he was going to “take care of Becky’s parents, so he can get ahold of Becky....” (PCR App. p. 1581, lines 4-9; p. 1582, lines 20-22).

At trial, Petitioner did not contest his guilt. Defense counsel advised the jury in opening statements: “You’re going to find Brad Sigmon guilty... he confessed to it. He confessed to it more than one time...[your] job is to reach the ultimate decision in this case, whether Brad Sigmon lives or dies... you may wonder, well, why are we here? Well, I’ll tell you... Because if Brad Sigmon were to plead guilty, he wouldn’t have a right to a jury determine his sentence.” (PCR App. p. 1255, line 12 - p. 1256, line 23). Petitioner addressed the jury at the close of the guilt phase: “Ladies and gentlemen of the jury, I am guilty.” (PCR App. p. 1683, lines 11-15).

⁴ Petitioner begins his recitation of relevant facts in discussion of the first issue by referencing the Supreme Court of South Carolina’s description of Petitioner’s “drug crazed obsession for” Becky Barbare.. (Petition, p. 5). This is incorrect. The Supreme Court of South Carolina found, and the record supports, that Petitioner was *not* intoxicated at the time of the crime, and there is no support in the record of a “drug crazed obsession.”

WHY THE PETITION SHOULD BE DENIED

The three issues presented for this Court's review involved simple application of the well-established *Strickland* test.⁵ Petitioner's arguments do not contest the application of law; rather, his arguments simply ask this Court to re-evaluate the factual record that two state courts have found does not show deficient performance by defense counsel. The petition for writ of certiorari should be denied.

I.

The South Carolina Supreme Court reasonably affirmed the denial of post-conviction relief on the allegation counsel was ineffective in failing to object to the solicitor's closing argument because the solicitor referenced himself "as the solicitor of this circuit," argued that some people are so "mean and evil" they did not deserve to live, and also requested the jury send a message that "this type of conduct will not be tolerated in Greenville County" as, in context, the arguments are not improper.

Petitioner claims trial counsel should have objected to the solicitor's closing arguments as impermissible personal thoughts and opinion on the correct sentence that diminished the jury's sense of responsibility.⁶ (Petition, p. 11). *See generally Caldwell v. Mississippi*, 472 U.S. 320, 333, (1985) ("the uncorrected suggestion that the responsibility for any ultimate determination

⁵ To obtain relief, Petitioner was obligated to show that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

⁶ To the extent Petitioner asserts within the petition that counsel were inexperienced in capital matters, (see Petition, 3), Respondent notes that Petitioner is not asserting counsel lacked the qualifications to have been appointed for the trial of a capital case.

of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role”),⁷ *modification recognized by Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (“we have since read *Caldwell* as ‘relevant only to certain types of comment—those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.’ Thus, “[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.”) (internal citation omitted). Further, Petitioner apparently claims *Strickland* prejudice is established because, in his view, the two comments injected an arbitrary factor in violation of the Eight and Fourteenth Amendments to the United States Constitution and S.C. Code § 16-3-25 (C)(1).⁸ (Petition, p. 7). See

⁷ In South Carolina, the jury determines the sentence. *State v. Linder*, 276 S.C. 304, 309, 278 S.E.2d 335, 338 (1981). Further, South Carolina courts must instruct “the jury in the sentencing phase of a capital trial ... that its sentencing recommendation will be followed.” *State v. Davis*, 306 S.C. 246, 411 S.E.2d 220 (1991). The trial judge in Petitioner’s trial instructed it was the jury’s responsibility to determine the sentence he would impose. (PCR App. p. 2097, lines 8-18 (“it now becomes your duty to decide what sentence that this Court shall impose upon the defendant”).

⁸ S.C. Code § 16-3-25 (C)(1) is part of the mandatory statutory proportionality review required on direct appeal:

- (C) With regard to the sentence, the court shall determine:
- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and
 - (2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16-3-20, and

generally *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974) (“the claim is only that a prosecutor’s remark about respondent’s expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process”). The record does not support his arguments. The Supreme Court of South Carolina properly affirmed the denial of relief because the comments were not objectionable.

The Solicitor’s Arguments at Issue

The solicitor’s entire argument spans less than twelve (12) full pages in the two thousand, two hundred and fifty (2250) page transcript. (See PCR App. pp. 2058-2070). (See Attachment to Brief in Opp., A-1). Petitioner essentially complains of two comments within that limited argument. The first is within the solicitor’s argument on appropriateness of the punishment. The solicitor argued: “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 appropriate in this case?” (PCR App. p. 2063, line 25 - p. 2064, line 3). The solicitor commented that he had once been advised “by a juror in another case on voir dire,” in connection with that juror’s thoughts on the death penalty, that “they’re mean and evil people that live in the world that do not

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

The mandatory review was previously accomplished on direct appeal pursuant to the statutory terms. *State v. Sigmon, supra*. (See also PCR App. pp. 2432-2433).

deserve to continue to live with us, regardless of how confined they are.” (PCR App. p. 2064, lines 1-10). He continued immediately thereafter to state: “*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.” (PCR App. p. 2064, lines 10-13) (emphasis added). The solicitor also argued for “accountability.” (PCR App. p. 2064, lines 14-23).⁹

The second comment at issue rests in the solicitor’s request, in his position as solicitor, for the jury “to send a message.” Again, context is important. In context, the argument reads as follows:

It is a function of our government, and you have been entrusted with that, and your decision will ring like a bell in this community as what is the standard for appropriate conduct and when the death penalty is proper. 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.

(PCR App. p. 2070, lines 1-15).

⁹ The solicitor had already advised the jury of the gravity of the decision and referenced factors to consider in granting mercy or sentencing a defendant to death. (PCR App. pp. 2059-2061). The solicitor, in turning to the consideration of punishment, stated, “the State has asked for the death penalty and we think its appropriate in this case.” (PCR App. p. 2060, lines 17-18). Further, the solicitor had, prior to this argument, clearly underscored the jury’s role: “The government has entrusted you, through legislation and judicial decisions to make this decision. ... said in their wisdom that the best people to make this decision are the citizens of the local community. And that is you.” (PCR App. p. 2061, lines 2-8). He acknowledged that the process of making that decision is “tough,” but the “responsibility” was one “the government places upon its citizens.” (PCR App. p. 2062, lines 7-11).

The PCR Action Ruling

The PCR judge reviewed these comments in context and found that neither of these comments would justify an objection. (PCR App. pp. 2876-2877). He found “neither comment suggested ‘the solicitor attempted to minimize the jurors’ own sense of responsibility for appellant’s fate by stressing that he had himself already made the same decision that he was now asking them to make.’ *State v. Woomer....*” (PCR App. p. 2877).

The Supreme Court of South Carolina also found that when reviewed in context, the argument was not improper:

...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*.¹⁰

Sigmon v. State, 403 S.C. 120, 130, 742 S.E.2d 394, 399 (2013).

The Court reasoned “[a]lthough the solicitor here articulated why he chose to request the death penalty, he did not equate his role with that of the jury,” and “often emphasized the important role the jury played in determining the appropriate sentence.” *Id.*, 403 S.C. at 130-131, 742 S.E.2d at 400. The Court further reasoned:

¹⁰ The PCR judge’s Order and the Supreme Court of South Carolina’s decision rest on state law interpreting and comparing similar arguments. These state cases, though, harken back to the accepted “due process” test as approved in *Donnelly v. DeChristoforo*. See *Sigmon*, 403 S.C. at 128, 742 S.E.2d at 399 (quoting state case, “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.”).

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.

Id.

Thus, the Court reasonably concluded, given that the comments were not improper, "trial counsel were not deficient for not objecting to the State's closing argument." *Id.*

Discussion

The Supreme Court of South Carolina has found: "When a solicitor's personal opinion is explicitly injected into the jury's determinations 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 as required by S.C. Code Ann. § 16-3-25(C)(1), and the Eighth Amendment to the United States Constitution." *State v. Butler*, 277 S.C. 543, 546, 290 S.E.2d 420, 421 (1982), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359-360 (1981) (same).¹¹ It has also found, however, that a simple comment on the solicitor's involvement in the process does not cross that line. *State v. Bell*, 302 S.C. 18, 393 S.E.2d 364 (1990). The harm to avoid is an argument that "attempt[s] to minimize the jury's sense of responsibility for appellate's fate by stressing that

¹¹ The Supreme Court of South Carolina's opinion, and Petitioner's discussion in his petition to this Court, rely upon state precedent as the state precedent provided a factual template. This underscores the issue is one of factual interpretation, not legal precedent.

[the solicitor] himself had already made the same decision he was asking them to make." *Butler*, 277 S.C. at 545, 290 S.E.2d at 421.

Petitioner's continued reliance on the interpretation of comments in the state cases of *Butler* and *Woomer*, (see Petition, pp. 10, 11, and 13), is misplaced. In *Butler* and *Woomer*, the solicitors' comments at issue were more than mere acknowledgment of the solicitor's part in the process. The solicitors in those cases pointedly told the jurors that they had already made the decision, based on a review of all the evidence. *Butler*, 277 S.C. at 546, 290 S.E.2d at 421 (comments improper where solicitor stated "I first had to make that decision, you see, and I have in my opinion, based upon the evidence in this case, overall, decided that if we are going to have a death penalty law on the books that if there were any facts that could ever justify it this case justifies it, justifies it."); *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359 ("the 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 mean I had the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair").

In contrast, the arguments found to be proper in *Bell* are distinctly different. The solicitor in *Bell*, though he argued vigorously for the death penalty, left the decision to the jury. 302 S.C. at 33, 393 S.E.2d at 372 ("He stated that if 'it was not right in this case, it was never right.'"). The Supreme Court of South Carolina found no error in the *Bell* argument:

...the Solicitor did not inject his personal opinion concerning the death penalty into the proceedings. Nor did the Solicitor comment on his involvement in deciding whether or not to prosecute for the death penalty. The Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus, we hold that the argument was proper.

Bell, 302 S.C. at 34, 393 S.E.2d at 373.

Again, using the arguments in *Butler* and *Woomer* as templates to demonstrate improper arguments, the Supreme Court of South Carolina logically resolved the fact-based issue fairly. Additionally, the record reflects the solicitor repeatedly reminded the jury of their duty to determine the appropriate sentence. (See, for example, PCR App. p. 2061, lines 2-4 ("The government has entrusted you ... to make this decision"); p. 2061, lines 9-14 ("in sentencing ... you carry out the function of the judge"); p. 2062, lines 9-10 ("it is a responsibility that the government places upon its citizens"); p. 2068, lines 1-5 ("And the State has asked you and I told you in the beginning we were going to ask you to impose the death penalty. And we think that is an individualized assessment of this crime."); p. 2069, lines 15-22 (in determining appropriateness of a death sentence, "It can only be applied by you, through a consensus of talking, and reasoning, and listening, and thinking and putting on record what you believe is the appropriate punishment for each crime."): And, as previously noted, the trial judge also instructed the jury that it was their responsibility to determine the sentence the court would impose. (PCR App. p. 2097, lines 8-18 ("it now becomes your duty to decide what sentence that this Court shall impose upon the defendant").

Even so, Petitioner complains that the solicitor's comments were improper, in part, because they were made in connection with statements acknowledging he represented the State. However, the Supreme Court of South Carolina logically found that this jury was well aware that the solicitor represented the State, and they would have been equally well aware the State was seeking a death sentence. But, importantly, they were reminded and instructed that the decision on sentencing was a jury decision.¹² If mere reference to a solicitor's involvement in the proceedings at all would be considered error, such a holding would essentially have the effect of disallowing any argument from the solicitor as solicitors are always tasked with bringing the charge and requesting capital proceedings. A prosecutor has the important right to make arguments to the jury as would any advocate. *See generally Herring v. New York*, 422 U.S. 853, 862 (1975) ("In a criminal trial, which is in the end basically a factfinding process, no aspect of such advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."). It is not (and could not be) error for the solicitor to argue that the case presented – the case in which the State is without question seeking a death sentence – supports imposition of this most

¹² It is of no little consideration that the PCR judge noted defense counsel's comments on the solicitor's closing at trial conveyed that he considered the solicitor was requesting the death penalty. (See, for example, PCR App. p. 2070, lines 22-25, "Now the Solicitor has asked if you its [sic] appropriate. He said that the government trusts you to be judge and jury."). Again, when read (and also apparently when heard) in context, the comments do not support that the solicitor voiced a personal opinion that would diminish the jury's sense of responsibility – the responsibility the State of South Carolina places squarely on the jury.

serious penalty. The argument was not improper and there was no cause to object.¹³

As to the “send a message” argument, in state practice, such a comment may be allowed as to deterrence when connected to the appropriateness of the penalty on the facts of the case. *See State v. Cain*, 297 S.C. 497, 508-509, 377 S.E.2d 556, 562 (1988) (finding no error where the solicitor informed the jury that a death penalty verdict would send a message to surrounding counties that “[y]ou don’t do that [murder] in Chesterfield County without paying the price.” which was “no more than recommendation[] by the solicitor as to the appropriateness of the death penalty based on evidence adduced at trial.”). *See also State v. Shuler*, 353 S.C. 176, 188-189, 577 S.E.2d 438, 444 (2003) (acknowledging “[g]eneral deterrence arguments are admissible” and finding the argument that if death imposed it may “cause somebody else thinking of murder not to do it,”

¹³ Petitioner argues trial counsel’s admitted lack of knowledge of the law in this area in an effort to show deficiency. Whether counsel knew or not is immaterial in these circumstances as the argument is not objectionable. Respondent points out, however, that Petitioner misquotes counsel’s response to questions in a discovery deposition. On page 8 of the petition, the following passage is incorrect:

Defense counsel said he hoped he knew this argument was improper during the trial but stated “*I can’t remember ever knowing that.*”

(Cert. Petition, p. 8) (emphasis added).

Counsel indicated he did have an understanding that personal opinion was not proper, and “would hope” that was his understanding at the 2002 trial, stating: “*I can’t remember ever not knowing that....*” (PCR App. p. 2603) (emphasis added). The page is provided as an attachment to the brief in opposition at A-2.

found not to inject “an arbitrary factor (fear or personal responsibility)”. There is no inconsistency with federal law. *See generally Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (recognizing “the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes”) (*quoting Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). *See also Irick v. Bell*, 565 F.3d 315, 325 (6th Cir. 2009), *cert. denied* 132 S.Ct. 575 (2011) (acknowledging at time of trial “the United States Supreme Court had never held that appeals to general deterrence are impermissible in sentencing arguments” and that “several of our sister circuits had explicitly held otherwise”). In light of the arguments approved in *Bell* and *Cain*, the argument at issue here on the appropriateness of the death penalty in these circumstances to “send a message” was not unfair or improper. Thus, the PCR judge properly found no deficiency in representation, (PCR App. pp. 2877-2878), and the Supreme Court of South Carolina reasonably and logically affirmed based on detailed review of the facts of this case. Simply, there was no cause to object.

Lastly, the comment referencing “mean evil people” and the death penalty again goes to the jury’s process of determining the appropriate sentence, and it was directly tied to same in the solicitor’s argument. (PCR App. p. 2063, line 25 - p. 2064, line 25, “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 explaining not only that some “do not deserve to continue to live” and that the death sentence is about “accountability” again tying the facts of the case in

directly). There is nothing inherently improper in using the term “evil.” See *Kinder v. Bowersox*, 272 F.3d 532, 552 (8th Cir. 2001) (finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, “ *Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*” but found “the statements were proper argument because they addressed [the individual defendant’s] character and the appropriate punishment for his crime.”) (emphasis in original). See also *State v. Anderson*, 306 S.W.3d 529, 543 (Mo. 2010) (upholding use of quote, “ The only thing necessary for evil to triumph is for good men to do nothing.”); *State v. Gregory*, 147 P.3d 1201, 1255 (Wash. 2006) (reviewing solicitor’s characterization of defendant (“evil” and “menace to society”) and finding no error: “the prosecutor is entitled to draw inferences from the evidence and these inferences could have been justified given Gregory’s criminal history and the facts of this case”); *People v. Wilson*, 628 N.E.2d 472, 485 (Ill. Ct. App. 1 Dist. 1993) (“The prosecutor may also refer to the defendant as an evil man and comment on the particularly brutal nature of a crime if his statements are supported by the evidence.”). Again, the argument was not objectionable.

In sum, the PCR judge found, and the record fully supports, that there was no improper personal opinion (*i.e.*, lessening the duty or responsibility of the jury) or even demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment. See *State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982), *overruled on other grounds State*

v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (cautioning such comments must be case specific and defendant specific). The Supreme Court of South Carolina properly found no deficient performance. Consequently, Petitioner was not deprived of a right secured by the Constitution and the petition should be denied.

II.

The Supreme Court of South Carolina reasonably rejected Petitioner's allegation counsel was ineffective in failing to secure a general statutory mitigating circumstance charge on "age or mentality" based on evidence of "extreme intoxication" when the facts of record did not support that Petitioner was "extremely intoxicated" at the time he murdered his two victims. Even so, the trial judge charged two other statutory mitigating circumstances for consideration of mental state which allowed consideration of the evidence presented.

Petitioner contends that counsel were ineffective in failing to request a particular state statutory mitigating circumstance regarding age or mentality as, in his view of the facts, the record supports Petitioner was "extremely intoxicated at the time of the murders...." (Petition, p. 14). He claims the lack of "all appropriate instructions" precluded consideration of all the evidence in violation of federal law. *See, e.g., McKoy v. North Carolina*, 494 U.S. 433 (1990); *Skipper v. South Carolina*, 476 U.S. 1 (1986). The record does not support his assertion of error as it fails to support the factual assertion of intoxication, and the jury was otherwise instructed – through two other statutory mitigating circumstances – to consider Petitioner's mental state and his use of drugs and alcohol.

The trial judge charged the jury on two separate mental-state statutory mitigating circumstances, along with two other statutory mitigating circumstances on criminal history and provocation:

... you must also consider the following mitigating circumstances. 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.

(PCR App. p. 2108, lines 9-19).¹⁴

The judge did not charge a third mental-state statutory mitigating circumstance, “the age or mentality of the defendant at the time of the crime,” pursuant to S.C. Code § 16-3-20 (C)(b)(7). Under state precedent, all three are required where the evidence supports intoxication at the time of the crime. *Sigmon*, 403 S.C. at 131, 742 S.E.2d at 400 (citing *State v. Vazsquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on different grounds State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006)). The record shows the trial judge, though, did consider whether to charge the “age and mentality” statutory mitigating circumstance as found in S.C. Code § 16-3-20 (C)(b)(7). (See also PCR App. p. 2053, lines 11-23). He declined, reasoning the circumstance to be more in line with evidence demonstrating “education level, or mental retardation, or something like that.” (PCR App. p. 2053, lines 19-21). Defense counsel did not

¹⁴ The trial judge also instructed the jury: “You must also consider any non-statutory mitigating circumstances.” (PCR App. p. 2108, lines 19-21).

offer any argument in response. In short, intoxication was not pressed as a reason for all three charges to be given, nor considered as a reason in support of the charge by the trial judge.

As an initial observation, Respondent notes that because Petitioner premises his argument on the suggestion of intoxication, he appears to concede the "age" part of the charge was not an issue to consider. Thus, "mentality" is his only focus which at the outset reduces the significance of the charge to these facts.

At any rate, in the PCR action, Petitioner claimed he was entitled to also have the "age and mentality" mitigating circumstance charged due to evidence of intoxication at the time of the murder. (See PCR App. pp. 2491-2493). The PCR judge found that Petitioner lacked factual support for the charge. (PCR App. p. 2879). In the PCR appeal, Petitioner complained the record did not support the PCR judge's factual conclusion that there was no evidence of intoxication at the time of the crime to warrant the additional general charge. (BOP, p. 20).

The Supreme Court of South Carolina found that "the record supports the conclusion Sigmon ingested drugs and alcohol prior to the murders" but did "not establish he was intoxicated when he committed the crimes." *Sigmon v. State*, 403 S.C. 120, 132, 742 S.E.2d 394, 401 (2013). As the facts of record dictate the

relevant instructions to be given at trial,¹⁵ the Court reviewed the testimony regarding intoxication:

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.

Id.

The Court also found persuasive that trial counsel admitted "that he did not attribute Sigmon's behavior to intoxication, but to psychological problems" in particular "Sigmon's issues with abandonment, which were exacerbated by Becky's behavior during the break-up...." *Id.* 403 S.C. at 133, 742 S.E.2d at 401.

The Supreme Court of South Carolina has held "when 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)." *Sigmon*, 403 S.C. at 131, 742 S.E.2d at 400 (*citing State*

¹⁵ See *State v. Hughey*, 339 S.C. 439, 455, 529 S.E.2d 721, 729 (2000), *overruled on other grounds* *Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). See also *State v. Caldwell*, 300 S.C. 494, 388 S.E.2d 816 (1990). It is not error to decline to give a charge that is not supported by the evidence. *Hughey*, 339 S.C. at 456, 388 S.E.2d at 730. Thus, like the first issue, this issue is heavily dependent on factual interpretation.

v. Vazsquez, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on different grounds State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006))(emphasis in original). The Supreme Court of South Carolina agreed with the PCR judge that evidence of intoxication *at the time of the crime* is absent from the record; therefore, counsel did not render deficient representation in failing to object.

Without doubt, the record reflects drug use and drinking *prior* to the murders, the night before the crime, (See PCR App. p. 1578, line 6 - p. 1582, line 22, Strube Testimony that they drank beer and smoked crack cocaine the night before the murders¹⁶; p. 1996, line 4 - p. 2004, line 12, Dr. Morton's testimony on the "after effects" of cocaine use),¹⁷ but does not support an allegation of intoxication during the crime. *See Vazsquez*, 364 S.C. at 301, 613 S.E.2d at 363 ("the evidence indicated that Appellant may have had drinks, but this is not enough to warrant a charge to the jury for the mitigating factors outlined in § 16-3-20(C)(b)(2), (6), and (7)."). *See also Evans*, 371 S.C. at 31, 637 S.E.2d at 315 (drawing evidentiary distinction: "Although there is some evidence of drinking

¹⁶ Petitioner characterizes Strube's testimony as indicating Petitioner stayed awake all night. (Petition, p. 15). The testimony does not reflect such a statement. Strube indicates that Petitioner was up as he awoke, but there is no statement that Petitioner was awake the entire night, and no statement that Petitioner used more drugs or drank without Strube. To the contrary, a logical inference from the testimony is that Petitioner was the more sober of the two and was biding his time to attack the two victims.

¹⁷ Petitioner was not prevented from presenting this evidence, nor the jury prevented from considering the evidence of alcohol and drug use. In short, nothing prevented the jury from considering the extent of his alcohol and drug use on his mental state.

in the days leading up to the incident, intoxication at the time of murders is not at issue here.”).

Further, as the Supreme Court of South Carolina correctly noted, counsel did not “attribute Sigmon’s behavior to intoxication, but to psychological problems.” 403 S.C. at 132, 742 S.E.2d at 401. In fact, counsel did not argue “at the time of crime intoxication” in closing to the jury, but argued that Petitioner was simply under mental and emotional distress. (PCR. p. 2079, line 11-p. 2080, line 2080, line 3). Moreover, Defense Counsel Eppes testified at the PCR hearing that counsel “talked about drugs that Mr. Sigmon had been using and drinking,” but could not recall discussion on intoxication. (PCR App. p. 2772, lines 1-2). Again, as the Supreme Court of South Carolina correctly found, counsel testified clearly that he did not recall “ever thinking that [Petitioner] was drunk.” 403 S.C. at 133, 742 S.E.2d at 401. (See also PCR App. p. 2772, lines 5-8).¹⁸

In sum, the nub of the issue is whether there was evidence of intoxication at the time of the crime as that would trigger a state precedent requirement that the charge be given. There was not. The record well and fully supports the decision of the Supreme Court of South Carolina. Petitioner cannot show an impairment of any right guaranteed by the Constitution and the petition should be denied.

¹⁸ Further still, though not noted in the opinion at issue, the PCR judge noted that the Tennessee tape showed Petitioner “stated he was straight, sober, thinking properly by his own admission, and that he was not on drugs.” (PCR App. pp. 2879-2880). (See also Exhibit 1-A, Tennessee Tape).

III.

The Supreme Court of South Carolina reasonably rejected Petitioner's assertion that counsel was ineffective in not objecting to the trial judge's instruction that a "non-statutory mitigating circumstance is one the defendant 'claims' lessens his culpability" as, when reviewed in context, the charge as a whole, was complete and without error.

Petitioner complains the wording of the trial judge's charge in explanation of non-statutory mitigating circumstances "improperly diluted the significance of mitigation evidence...." (Petition, p. 22). *See generally Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) ("the sentencer in capital cases must be permitted to consider any relevant mitigating factor."). However, the phrasing at issue was one of explanation not limitation. The Supreme Court of South Carolina correctly found there was no error and trial counsel were not deficient in their representation by failing to object.

The record reflects the trial judge charged the jury that they could consider both statutory and non-statutory mitigating circumstances, and could, for any reason, recommend a life sentence. (PCR App. p. 2107, lines 1-13; p. 2109, line 23 - p. 2110, line 10). Moreover, the judge specifically charged:

... a mitigating circumstance is neither a justification or 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...

(PCR App. p. 2108, lines 1-4). The trial judge instructed as to a non-statutory mitigating circumstance:

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

(PCR App. p. 2108, line 23 - p. 2109, line 1). The judge also instructed, as to burden of proof:

... it is not necessary for you to find the existence of a statutory or non-statutory mitigating circumstance beyond a reasonable doubt. In other words, the reasonable doubt burden does not apply to the defense mitigating circumstances, either statutory or non-statutory....

(PCR App. p. 2109, lines 4-10). (See also p. 2111, lines 10-13, "You may also consider any other factor in mitigation of the offense and you can impose a sentence of life imprisonment again for no reason at all.").

The PCR judge found:

...when considered as a whole, as the charges must be, and in light of the explicit instruction introducing the concept of mitigating circumstances (both statutory and non-statutory and including the concept of the rejection of a death sentence "for any reason"), there simply is no expectation that a reasonable juror would restrict consideration of the mitigating evidence to only evidence of non-guilt issues (i.e. "less culpable"), or somehow limit consideration of any factor not listed in the statute. ...

(PCR App. pp. 2881-2882).

The Supreme Court of South Carolina agreed and found that Petitioner's argument rested on the tenuous practice of parsing and isolating portions of the charge. *Sigmon*, 403 S.C. at 134, 742 S.E.2d at 401. When reconnected, the charge appeared proper and complete. *Id.* At bottom, the Court found the trial judge had "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." *Id.* The Court also rejected Petitioner's argument the charge "reduced the weight" of the evidence:

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.

Id.

"A jury instruction must be viewed in the context of the overall charge."

Sigmon, 403 S.C. at 133, 742 S.E.2d at 401 (quoting *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998)).¹⁹ "The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." *Id.*

Petitioner complains the "instructions impinged upon the jury's ability to properly consider all mitigating evidence offered by petitioner by erroneously suggesting that only circumstances directly related to the offense, such as petitioner's mental status at the time of the offense, were relevant to the jury's sentencing calculus." (Petition, p. 22). This very argument on the same phrasing was rejected in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), *cert. denied*, *Hughey v. South Carolina*, 531 U.S. 946 (2000).²⁰

¹⁹ Again, the state court relied state precedent in the opinion; however, *Hicks* cites to *Cupp v. Naughten*, 414 U.S. 141, 147 (1973), which provides: "... we accept at the outset the well established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Thus, *Hicks* follows federal law. See also *Boyde v. California*, 494 U.S. 370, 380-83 (1990) ("the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence").

²⁰ *Hughey* was overruled on other grounds (specifically, the phrasing of "no reason other than an act of mercy," which the court found could result in a the jury not considering "evidence" of mercy) by the later state case of *Rosemond*

In *Hughey*, the appellant “argue[d] the jury charge was confusing to a reasonable juror because it implies that non-statutory mitigating circumstances are not circumstances the law *requires* a jury to consider.” *Id.* The trial judge in *Hughey* gave the following definition in his charge:

A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Hughey, 339 S.C. at 458, 529 S.E.2d at 731. That is almost the exact definition given by the trial judge in this case:

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

(PCR App. p. 2108, line 23 - p. 2109, line 1).

The Supreme Court of South Carolina’s opinion in *Hughey* is persuasive in its reasoning that the following additional instructions aided in properly guiding the jury, particularly that the jury may recommend life regardless of whether the jury finds the existence of a statutory or nonstatutory mitigating circumstance, and that life may be recommended for “any reason or no reason all.” 339 S.C. at 458-59, 529 S.E.2d at 731. Again, the reviewing court in *Hughey*, considering the charge as a whole, found:

v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009), but not the instant charge. Further, as demonstrated in later argument, that now disapproved of phrasing was not at issue here.

... a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment. Hughey contends the trial judge's instruction was erroneous because the charge defined non-statutory circumstances as those "the defendant contends" the jury should consider, not what the law *authorizes* the jury to consider. The jury charge adequately apprised the jury of the function of non-statutory mitigating circumstances because it repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming a recommendation. In fact, the judge instructed the jury that they could recommend life imprisonment for "any reason or no reason at all." *See State v. Atkins*, 303 S.C. 214, 399 S.E.2d 760 (1990) (upholding a jury charge where the judge stressed the jury could recommend a life sentence "for any reason or non reason").

Moreover, the jury charge in the present case is similar to other charges of non-statutory mitigating circumstances upheld by this Court. The jury charge authorized the jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. Similar jury instructions have been found adequate by this Court. *See State v. Hicks*, 330 S.C. 207, 499 S.E.2d 209 (1998) (upholding a jury charge which permitted a jury to impose a life sentence even if they did not find mitigating circumstances); *State v. Sims*, 304 S.C. 409, 405 S.E.2d 377 (1991) (jury charge was found proper where it authorized jury to consider any mitigating evidence presented); *State v. Singleton*, 284 S.C. 388, 326 S.E.2d 153 (1985) (instruction proper where judge states the jury may consider "any mitigating circumstances ... which are supported by evidence.").

339 S.C. at 459-60, 529 S.E.2d at 732.

Thus, under state precedent, the definition was not improper, nor the instructions as a whole infirm. In fact, South Carolina instructions are more favorable in that this jurisdiction charges that a life sentence may be recommended as a simple act of mercy independent of the weight of the evidence. At any rate, this state precedent does not offend federal law; rather, the state precedent compliments federal law by approving language that allows

consideration of a multitude of evidence regardless of its labeled. *See generally Porter v. McCollum*, 558 U.S. 30, 42 (2009) (criticizing failure to consider evidence that, under state law, “does not rise to the level of establishing a statutory mitigating circumstance” as such “may nonetheless be considered” in sentencing).

Petitioner’s assertion the PCR judge’s order and the Supreme Court of South Carolina’s opinion are both “inaccurate” because of the finding “the instructions, taken as a whole, were sufficient,” (Petition, p. 25), simply cannot be squared with the record and relevant state and federal precedent as demonstrated above. Further, Petitioner’s reliance on *Cage v. Louisiana*, 498 U.S. 39 (1990), is wholly misplaced. (Petition, p. 26).

First and foremost, *Cage* has been overruled. Second, Petitioner’s argument relies specifically on the language of *Cage* (*i.e.* that a reasonable juror *could* have understood the charge in the way Petitioner suggests, see Petition, p. 26), that this Court disavowed in *Estelle v. McGuire*, 502 U.S. 62 (1991):

We acknowledge that language in the later cases of *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), might be read as endorsing a different standard of review for jury instructions. See *Cage, supra*, 498 U.S., at 41, 111 S.Ct., at 329 (“In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole”); *Yates, supra*, 500 U.S., at 401, 111 S.Ct., at 1892 (“We think a reasonable juror would have understood the [instruction] to mean ...”). In *Boyde*, however, we made it a point to settle on a single standard of review for jury instructions—the “reasonable likelihood” standard—after considering the many different phrasings that had previously been used by this Court. 494 U.S., at 379–380, 110 S.Ct., at 1197–1198 (considering and rejecting standards that required examination of either what a reasonable juror “could” have done or “would” have done). So that we may once again speak with one voice on this

issue, we now disapprove the standard of review language in *Cage* and *Yates*, and reaffirm the standard set out in *Boyd*.

502 U.S. at 72 n. 4. See also *Kornahrens v. Evatt*, 66 F.3d 1350, 1363 (4th Cir. 1995) (“we have since recognized that in conducting a *Cage* analysis, courts must look to the entire context of the jury charge and not just the offending language, reversing only if there is a ‘reasonable likelihood’ that the jury would have applied the instruction in an unconstitutional manner”). Petitioner’s argument should be rejected.

In sum, like *Hicks*, “the charge provided, even if it found a statutory aggravating circumstance, the jury could impose a life sentence” and “the jury was instructed it was authorized to impose a life sentence even if it did not find any mitigating circumstances.” *Hicks*, 303 S.C. at 218, 499 S.E.2d at 215. Further, the jury here was instructed it could vote for life “for no reason at all.” (PCR App. p. 2111, lines 10-13). This is an added charge that is not specifically required in state practice, *id*, nor constitutionally mandated, see *Kansas v. Marsh*, 548 U.S. 163, 165-166 (2006) (upholding state statute that provided that the death sentence must be imposed if “the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise”). Such a charge significantly reduces any possibility of *Strickland* error for failure to object to the wording of the trial judge’s definition of mitigating circumstances. The charge closely follows the instructions also reviewed and approved in *Hughey*. There would have been no cause to object, thus, no basis for finding deficient performance. Simply, when reviewed as a whole, there is not a “reasonable likelihood” that the jury would have understood the definition to have directed them to scale

back or reduce consideration and/or impact of any of the evidence in the mitigation case. Again, the Supreme Court of South Carolina's findings and conclusions are fully supported by the record and state and federal precedent. Petitioner has shown no deprivation of a right guaranteed by the Constitution and the petition should be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

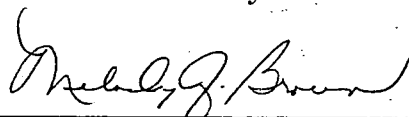
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ATTORNEYS FOR RESPONDENT

ATTACHMENT TO BRIEF IN OPPOSITION

A-1

1 gentlemen, you have heard all the testimony and received
2 all the evidence you are in this phase of this trial.
3 It's now time for the arguments by the attorneys. The
4 State will make the first argument, then the defense
5 will make an argument. Mr. Sigmon will also have an
6 opportunity to address you if he chooses. After that,
7 you will have my charge on the law, and then we will
8 begin deliberations tonight. Again, there is no set
9 hour to suspend, it really just depends on how y'all as
10 a group feel.

11 After the charge on this stage, I will segregate
12 the three alternates again, and this segregation will be
13 a little bit different in that you will have to ride in
14 separate cars from the rest of the jury. If you're at
15 breakfast, you'll have to sit at a separate table, so
16 don't anybody get their feelings hurt or anything like
17 that, but I will keep you completely segregated until a
18 sentence has been imposed in this case, but I do need to
19 keep you in case you're needed. So with that we'll have
20 the State's argument. Solicitor.

21 MR. ARIAIL: Thank you, Your Honor. We have now
22 come to the end of the evidence and the final stage of
23 this case. I moving this podium, because I did
24 something in my last argument that I have never done in
25 my entire career and that was to stand behind a podium,

1 and I want to address you a little bit differently at
2 this stage, because what we're talking about now is
3 dealing with the final appropriate punishment that ought
4 to be imposed in this case. And to do that, you need
5 some common sense guidelines about how to resolve what
6 is going to be an unusual issue and probably a very
7 difficult issue for you to deal with. I want to talk to
8 you about some common sense about how to go about it and
9 what we think is the proper resolution.

10 But first let me talk to you that Betty told you,
11 Ms. Strom told you in the beginning that the first step
12 is when you go back to your jury room, and the judge
13 will give you an appropriate paper to do this, but
14 before you can even talk about punishment, you have to
15 talk about and resolve the issue of the aggravating
16 circumstance. Because as you recall, when we went
17 through the voir dire, we talked about this in the
18 beginning, the law only allows the State to seek the
19 death penalty in those cases in which a jury finds an
20 appropriate aggravating circumstance. You will go back
21 and not talk about punishment, but the first thing you
22 need to talk about is, did the State prove the
23 aggravating circumstance, and there is one of three, and
24 actually you already found two of them. The first is
25 the aggravating circumstance of the murder of more than

1 one person. That will be an aggravating circumstance,
2 and by your previous verdict you have already found
3 that.

4 Secondly, the aggravating circumstances is that
5 there was a murder committed during a burglary. And you
6 have already found that by your previous verdict also.
7 The judge will submit to you a third one, and that is
8 that there was a murder and during the course of the
9 murder there was torture of the people involved, or the
10 victims. That will be the third. But any one of those,
11 finding of any one of those, or all of those, or two of
12 the three, whatever, that entitles you at that time to
13 then move forward to determine what is the appropriate
14 punishment in this case, life imprisonment without
15 parole, or the death penalty. And that's what this case
16 is about.

17 Now, the State has asked for the death penalty and
18 we think it's appropriate in this case. But I'll submit
19 to you that I believe that you will hear, before the
20 arguments after me by the defendant and by the defense
21 concludes, there will be words used in an effort to put
22 this decision in a context that will be bothersome to
23 you. I want to try to put you at ease a little bit
24 about this, because we are not killing someone. And we
25 are not doing anything that is wrong. What we are doing

1 is carrying out the lawful and constituted function of
2 our government. The government has entrusted you,
3 through legislation and judicial decisions to make this
4 decision. It is not only entrusted you, but it's thrust
5 it upon you. It is has said in its wisdom, the courts
6 and the Legislatures have said in their wisdom that the
7 best people to make this decision are the citizens of
8 the local community. And that is you.

9 So what you are doing is in essence becoming a
10 judge and you will sit where the judge normally sits in
11 sentencing. The judge is the person who normally
12 sentences in every other case in our law except the case
13 of the State seeking the death penalty. And in that
14 case you carry out the function of the judge. So if
15 someone suggests to you that we are doing something
16 wrong or that you're getting it on a personal basis, or
17 that you're killing someone, that's not what we're
18 doing. What we're doing is assessing under our law
19 whether or not it is an appropriate penalty to impose
20 the death penalty in this particular case. This
21 particular case only.

22 Now, the case that we are going talk about is also
23 not about Brad Sigmon living or dying. That's another
24 way it may be phrased to you. This case is about
25 appropriate punishment for the crime committed and the

1 person who committed it. This case is not about Brad
2 Sigmon. Brad Sigmon is the defendant, but it's not
3 about whether or not the individual Brad Sigmon should
4 live or die. It is about whether or not it is an
5 appropriate punishment for the crime that Brad Sigmon
6 committed in killing Gladys and David Larke.

7 Now, I understand that this will be a tough
8 decision for you to have to make. It's a tough decision
9 for juries to have to make, but as I told you, it is a
10 responsibility that the government places upon its
11 citizens. And you will fulfill that just as you're
12 entrusted to do so, just like you gave me your oath that
13 you would be able to carry it out in the beginning of
14 this case, and I trust that you will carry it out
15 through the rest of this process.

16 But every serious decision you make in life is
17 difficult. You make serious decisions and difficult
18 decisions and family life every day regarding children,
19 regarding your job, regarding a number of instances,
20 including those in your marriage. Those are serious and
21 difficult decisions and you make it in a very thoughtful
22 and honest way. And you go through it logically, and
23 you weigh the alternatives and give consideration, and
24 you do it lacking emotion for one side or the other,
25 and you make a decision that you think is best. And

1 the State of South Carolina, who is represented
2 through me and my staff, are certainly rest assured
3 that if you take the same deliberate course that you
4 make in your every day lives, making serious decisions
5 about your business, and apply it to making the
6 decision in this case, that you will reach the
7 appropriate decision.

8 And we'll talk a little bit about -- I want to talk
9 a little bit about the appropriate decision later. But
10 first I want to talk about mercy, because I can assure
11 you you will hear mercy. You will hear mercy being
12 begged and -- mercy to spare the life of Brad Sigmon.
13 Mercy to show mercy in this case, to give mercy, and
14 the law allows mercy, and mercy, and you will hear
15 mercy. The only thing that I remind you is when you hear
16 mercy, you remember that mercy belongs to those who
17 deserve it.

18 Now, I want you to remember that when the defendant
19 gets up here and asks you to give him mercy, ask him
20 back in your mind, what mercy did you show to Gladys and
21 David? What mercy do you deserve? What mercy have you
22 earned as a result of the acts you have committed?
23 Mercy is an appropriate human nature response, but mercy
24 belongs to those who deserve it.

25 Now, when we asked for the death penalty, it's a

1 fair and appropriate question for you to say back to me,
2 Solicitor Ariail, why do you think that the death
3 penalty is an appropriate punishment in this case? And
4 I can best summarize it by a response that I got from a
5 juror in another case on voir dire, and that juror said,
6 as to her response in her argument for the death
7 penalty, that they're are mean and evil people who live
8 in this world, who do not deserve to continue to live
9 with the rest of us, regardless of how confined they
10 are. And that's what the basis of our request for the
11 death penalty is. There are certain mean and evil
12 people that live in this world that do not deserve to
13 continue to live with us.

14 The death penalty is about accountability. It is
15 about accountability for bad choices. Brad Sigmon made
16 bad choices. Brad Sigmon, evidence through his bad
17 choices that he is an evil person. And Brad Sigmon
18 deserves the ultimate punishment in this case, because
19 he made those bad choices, and because he showed no
20 mercy, and because his crimes were so brutal, and that's
21 why the State is asking that you hold Brad Sigmon
22 accountable, and the death penalty is the proper
23 punishment.

24 Now, Brad Sigmon had opportunity to make a
25 different choice than what he made. And he made a

1 choice, an intelligent choice as to what he wanted to
2 do. And our punishment that we put forth in this case
3 should meet that -- that act that he made it out, and it
4 should hold him accountable for it.

5 Now, a number of you in the course of voir dire
6 expressed some reservation, which is a normal response,
7 about the imposition of the death penalty, particularly
8 in cases where you were not absolutely 100 percent
9 beyond a show of a doubt certain of the defendant's
10 guilt. That's no longer an issue in this case. This is
11 the perpetrator. This is the person. There is going to
12 be no DNA in years to come that says that Brad Sigmon
13 did not kill Gladys and David Larke. He's admitted
14 that. That's a guilt factor, and that no longer is an
15 issue in this case. He is guilty of these acts. There
16 are no excuses. There are no excuses for it.

17 There are no excuses put forward, even though Ms.
18 Furtick and Mr. Morton tried to say there were excuses,
19 or wanted to say there were excuses. I call that the
20 Flip Wilson. I don't know if any of you are old enough
21 to remember that comedian Flip Wilson. Flip's response
22 was always, the devil made me do it. The devil made me
23 do it. And I said that in my closing to you at the
24 guilt phase, that somewhere along the way you were going
25 to here somebody else was responsible. Was it going to

1 be the cocaine? Was it going to be the alcohol? What
2 was it going to be? Was it going to be his bad
3 parenting, or bad parents that brought him up, or his
4 bad upbringing? What was the excuse going to be to
5 justify or get some leniency out of you?

6 Well, I can tell you it was not his bad parents.
7 Because those two people got on this witness stand and
8 you could tell from his natural father, his natural
9 mother, and his step-father, that those are genuine good
10 people who are genuinely concerned about their son. And
11 they are sorry for what has happened. So it's not his
12 bad parents. His parents did not cause his problem,
13 like Ms. Furtick would want to suggest to you. And it
14 wasn't the cocaine. It wasn't the alcohol. It was a
15 mean and evil person who committed a heinous act.

16 This is not a case for life imprisonment. If you
17 wanted to simply give the easiest and most -- least
18 difficult decision, then life imprisonment is the way to
19 go. But that's not what this is about. Your role in
20 this function is to portion the appropriate sentence to
21 the crime and the individual who made -- or committed
22 it.

23 Let me tell you why life imprisonment is not the
24 appropriate sentence in this case. Brad Sigmon is a
25 manipulator. I said that in my earlier statement. I

1 knew that Ms. Tomberlin was going to testify in this
2 portion of the case. I knew what she was going to say.
3 I knew what his whole life was about. He's a
4 manipulator. He's a controller. He's an intimidator.
5 He's a smoozer, and that's why he doesn't deserve life
6 imprisonment. He would simply become a part of the
7 power structure. He would become the inmate's advisor,
8 their lawyer. He would become that person in the prison
9 setting that would be a leader.

10 And we may think life imprisonment is serious
11 business, but you still have your visitation with your
12 family. You still have your mail. You still have your
13 TV. You still eat three meals a day. Somebody washes
14 and takes care of your clothes. You get all the
15 benefits of health care, and recreation. All of those
16 things are provided for you.

17 Sure, your life is limited. Your life is limited
18 to a smaller confinement in that you don't have the
19 freedom to move about. Life in prison carries a lot of
20 benefits with it and that's why it's not proper in this
21 case. He would still have the freedom to see his
22 children, something that these children of Gladys and
23 David Larke will never have the opportunity to do.

24 And I said to you earlier that this is serious
25 business for serious people. And it's serious

1 consideration time for serious punishment. And the
2 State has asked you and I told you in the beginning we
3 were going to ask you to impose the death penalty. And
4 we think that is the result of an individualized
5 assessment of this crime. Brad Sigmon has been
6 controlling, intimidating, beating, and working his way
7 through intimidation and manipulation through life as
8 his ex-wife testified throughout. And now is the time
9 to stop him. It's time for this to be over.

10 Gladys and David Larke were brutally murdered. As
11 I told you earlier, and I say this not in a bad way
12 because I got some criticism from my wife for saying
13 that they were elderly at 59 when I'm 55, and that we're
14 not far from 59. I didn't mean in that way. I meant it
15 in the sense that they were beyond a certain age that
16 entitles you to be and obtain a certain status where you
17 have certain privileges in life, and they had the
18 privilege of retirement. They had the privilege of
19 enjoying their retirement, even though Gladys was still
20 working during the night, sitting and taking care of an
21 elderly lady.

22 But they were two people living and breathing human
23 beings who underwent what had to be the most horrific
24 death that I could ever imagine, of seeing someone
25 coming at you with a baseball bat. And it keeps going

1 back, and I mentioned it in my earlier statement, that
2 Gladys went to that chair security, that Lazy-boy
3 recliner in that living room, where she sat and watched
4 TV, and put her hands over her head, probably begged for
5 mercy, and was brutally assaulted with a baseball bat.
6 And you saw the pictures, and you understand the force
7 that had to be used, and the smashing, and the sounds
8 that went on throughout that entire event, had to be
9 beyond human belief as to the brutality of what took
10 place, to kill those two people, and move back and
11 forth, and then to leave them. Cover them for dead, and
12 leave them. Leave them and run and hide. That's why he
13 deserved the ultimate punishment. He was malicious, and
14 he deserves that punishment.

15 Now, Ms. Strom told you this yesterday morning,
16 that it is your responsibility as the voice of this
17 community, and that's what this process is about,
18 bringing together 12 people who are the consensus, or to
19 draw the consensus of the community as to what is the
20 appropriate case in which to apply the death penalty.
21 And this is the only way it can be applied. It can
22 only be applied by you, through a consensus of talking,
23 and reasoning, and listening, and thinking, and
24 putting on record what you believe is the appropriate
25 punishment for each crime. And it is a function of

1 government.

2 It is a function of our government, and you have
3 been entrusted with that, and your decision will ring
4 like a bell in this community as what is the standard
5 for appropriate conduct and when the death penalty is
6 proper. And there are people, there are people who will
7 argue that the death penalty is not a deterrent. But my
8 response as the Solicitor of this circuit is, it is a
9 deterrent to this individual and that is what we are
10 asking, is to deter Brad Sigmon and send the message
11 that this type of conduct will not be tolerated in
12 Greenville County, or anywhere in this State. And let
13 that decision that you reach ring like a bell from this
14 courthouse, that people will understand that we will not
15 accept brutal behavior such as this. Thank you.

16 THE COURT: Mr. Eppes?

17 MR. EPPES: Let me get a drink of water. Excuse
18 me. Is death necessary? Ms. Strom asked you when we
19 started (inaudible).

20 COURT REPORTER: I cannot hear you, Mr. Eppes.

21 MR. EPPES: I'm sorry. Is this death necessary,
22 that's what Ms. Strom asked you when we started this
23 portion of the case. Now the Solicitor has asked if you
24 it's appropriate. He said that the government trusts
25 you to be judge and jury. The only way Brad Sigmon dies

ATTACHMENT TO BRIEF IN OPPOSITION

A-2

1 appropriate argument?

2 A. Wait? What kind of argument? You said
3 personal comments? Personal comments
4 aren't allowed, but I don't know ---

5 Q. An argument to suggest to the jury that
6 he feels personally that the death
7 penalty is the correct --- is the
8 correct sentence in the case?

9 A. That would be improper.

10 Q. Okay.

11 A. And it's not important what he thinks.

12 Q. Okay.

13 A. Or it shouldn't be.

14 Q. Would it be inadmissible?

15 A. It should be, yes. My understanding is
16 it would be inadmissible.

17 Q. Correct. And was that your
18 understanding in 2002?

19 A. I would hope it was. I can't remember
20 ever not knowing that, but.

21 Q. And if that was happening would it have
22 been your responsibility to either
23 object or let Mr. Eppes know to object?

24 A. Certainly.

25 Q. There was another major work initially,

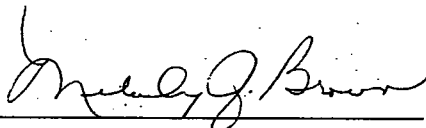
CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, certifies she has this date served Respondent's *Brief in Opposition* on Petitioner by depositing one copy of the same in the United States mail, first class postage prepaid, addressed to his attorney of record as follows:

Robert M. Dudek, Chief Appellate Defender
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With a courtesy copy e-mailed to counsel this same day.

This 17th day of October, 2013.



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