

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Perry M. Buckner, Circuit Court Judge

RECEIVED

JAN 10 2014

S.C. Supreme Court

JOHN EDWARD WEIK,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case # 2007-060700

REPLY BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

INDEX

INDEX	i
TABLE OF AUTHORITIES	ii
ARGUMENT IN REPLY	1
CONCLUSION	5

TABLE OF AUTHORITIES

Cases

Ivey v. Catoe, 36 Fed. Appx. 718, Un. Op. No. 01-11 (4th Cir.2002)..... 2, 3

Martinez v. Ryan, 566 U.S. 1 (2012)..... 3

State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005) 1

State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007)..... 4

State v. Ivey, 325, S.C. 137, 481 S.E.2d 125 (1997)..... 1, 2, 3

State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)..... 1, 2

State v. Burkhardt, 640 S.E.2d 450 (2007)..... 1

Statutes

S.C. Code § 16-3-25 (C)(1)..... 1

ARGUMENT IN REPLY

What occurred in *State v. Ivey* 325, S.C. 137, 481 S.E.2d 125 (1997), and thereafter in federal court does not support the state's erroneous position that evidence depicting life in prison as an easy existence is proper. The state rode the procedural bar of the failure of Ivey's lawyers to object to this evidence until the end. Proper evidence in mitigation does not "open the door" to evidence ruled improper in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984) and continuously thereafter. (Issues one and two).

The state continues to run from the fact that this Court in 1984, in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), held unequivocally "such determinations as the time, place, manner, and conditions of *execution or incarceration*, as well as the matter of parole, are reserved by statute and our cases to agencies other than the jury." *State v. Plath* 281 S.C. 14-15, 313 S.E.2d 627. (emphasis added). See Respondent's brief 34-38. Thus, evidence about the conditions of incarceration or execution has been inadmissible since 1984. Yet, defense counsel in this case failed to object to this evidence that prison was not a bad place to live as detailed in the brief of petitioner.

In *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), present appellate counsel raised this conditions of incarceration issue, but this Court held that trial counsel did not properly object to the prison conditions evidence at trial, and therefore the issue was procedurally barred. Nonetheless, this Court again reiterated what it held in *State v. Plath*, that this evidence of incarceration is not admissible. This Court in *State v. Burkhardt*, 640 S.E.2d 450 (2007), where the issue was preserved, again held that such incarceration evidence is not only inadmissible but it injected an impermissible arbitrary factor into the sentencing proceedings in violation of S.C. Code Section 16-3-25 (C)(1).

What occurred in State. v. Ivey 325, S.C. 137, 481 S.E.2d 125 (1997), does not provide any support for the state's erroneous position that this evidence of incarceration evidence is admissible. The state capitalized on the fact that Ivey's inept PCR counsel failed to raise this evidence of incarceration issue, and it was procedurally defaulted. This Court can take judicial notice of the fact that present appellate counsel raised the total incompetence of defense counsel in State v. Ivey regarding this evidence of incarceration evidence in a petition for writ of habeas corpus in the original jurisdiction of this Court. Counsel requested that this Court block Ivey's imminent execution given the grossly incompetent representation by an unethical appointed counsel. See petition for writ of habeas corpus in Ivey v. Ozmint at pp. 2-3.

In State v. Ivey, 325, S.C. 137, 481 S.E.2d 125 (1997), on direct appeal this Court held that the trial judge did not abuse his discretion by refusing to allow counsel to probe the jury during *voir dire* on their conceptions of life in prison. This was again **consistent** with this Court's opinion in State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) that prison conditions evidence was not a proper consideration for jurors. Further, the state has mischaracterized what occurred in Ivey before it finally concluded with this Court voting 2-2 on the motion for a stay of execution. On May 6, 2009 this Court issued an order stating "since the Court is equally divided, the petition for a stay of execution has been denied."

The state now argues that Ivey raised a "strikingly similar claim before the Fourth Circuit that was rejected." The state writes that the Fourth Circuit, in Ivey v. Catoe, 36 Fed. Appx. 718, Unpublished Op. No. 01-11 (4th Cir.2002), wrote that the "prosecutor's remarks regarding prison guards testimony as to *unobjected to* conditions at correctional facility were fair comment on the evidence, and thus permissible and a stay [was] not warranted to litigate in state PCR action counsel's failure to object to prison conditions evidence." Respondent's brief at 33, n. 5. (emphasis

added). The Fourth Circuit also wrote that, “having *defaulted* his challenge to the admission of Hudson’s *testimony regarding prison conditions*, Ivey cannot now complain that *the State’s comments were improper* on the basis that the testimony to which the State referred was *inadmissible*.” Ivey v. Catoe, 36 Fed. Appx. 718, 731-732, Unpublished Op. No. 01-11 (4th Cir.2002). (emphasis added). This is hardly a ringing endorsement of seeking a fair result in this capital PCR case where the incarceration evidence ineffectiveness issue is so apparent from the record. If Martinez v. Ryan, 566 U.S. 1 (2012), had been decided at the time the Fourth Circuit decided Ivey v. Catoe, the result would have been different since Ivey would have been able to show cause and prejudice based on his PCR attorneys bungling of this issue.

In the end the prison conditions evidence issue was procedurally defaulted on direct appeal for Ivey, and trial counsel stated during the PCR hearing that there was not any basis to object to the solicitor’s argument based on it. Incompetent PCR counsel for Ivey was later disbarred, and was apologetic for even mentioning the winning prison conditions issue in passing at the PCR hearing. Ivey App. at 4348. This Court then denied certiorari, not surprisingly, because the issue was essentially not raised at PCR.

When Ivey attempted to raise the issue again in federal habeas, the state answered that the issue had not been properly presented in state court and raised “issue preclusion” as a defense. Ivey’s attempt to return to state court to exhaust the issue was denied. Ivey App. 4638- 4664; 4677-4678.

State v. Ivey does not assist the state in any manner other than to show that it successfully fought Ivey from ever securing a ruling on this prison conditions issue because it was not preserved at trial or properly raised as a PCR issue, and it was defaulted in Federal Court also. Contrary to the

state's assertion fundamental fairness dictates that this substantial ineffectiveness issue be decided, and the state cannot demonstrate any prejudice to it.

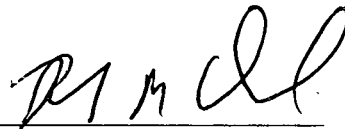
The state also cites to State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007), as it relates to this issue. Respondent's brief at 34. Bryant also supports petitioner's position because this Court held that evidence that an expert thought death was a more merciful punishment than life imprisonment was inadmissible. Again, evidence about the alleged conditions of prison life -- good or bad -- is not admissible.

Here, it's manifestly obvious the prison conditions evidence was improperly admitted, and that defense counsel was deficient in failing to object to it. This Court has granted certiorari on the issue with a vote of all five members of this Court. Justice dictates that this substantial PCR issue be decided, and the state is not prejudiced by its resolution.

CONCLUSION

By reason of the arguments in the brief of petitioner, and this reply brief, the order of the PCR court should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R M Dudek", written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 10th day of January, 2014

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Dorchester County

Perry M. Buckner, Circuit Court Judge

JOHN EDWARD WEIK,

PETITIONER,

V.

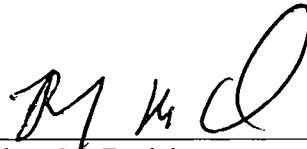
STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case # 2007-060700

CERTIFICATE OF SERVICE

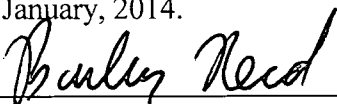
I certify that a true copy of the reply brief of petitioner in this case has been served on Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 10th day of January, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 10th day
of January, 2014.

 _____ (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021