

 ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

APPELLATE CASE NO. 2013-000518

RECEIVED

MAR 28 2014

S.C. Supreme Court

STEPHEN COREY BRYANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

SUSAN B. HACKETT
Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

MILES E. COLEMAN
Nelson, Mullins, Riley & Scarborough, LLP
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

ATTORNEYS FOR PETITIONER

I N D E X

INDEX 1

ISSUES PRESENTED 4

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 8

ARGUMENT 11

 I. Trial counsel rendered ineffective assistance in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by providing inaccurate advice to Petitioner regarding the supposed advantages of pleading guilty, including the erroneous advice that a guilty plea would lessen the probability that Petitioner would be sentenced to death.....11

 A. Relevant Facts 11

 B. Discussion..... 12

 II. Petitioner was denied the effective assistance of counsel in violation of the United States Constitution and South Carolina statutory law by being deprived of two attorneys during a critical stage of his prosecution, namely the discussions of whether he should plead guilty and his resulting decision to plead guilty.....17

 A. Relevant Facts 17

 B. Discussion..... 20

 III. Trial counsel rendered ineffective assistance in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by failing to object to the solicitor’s request in closing argument that the trial judge “send a message” by sentencing Petitioner to death.....23

 A. Relevant Facts 23

 B. Discussion..... 24

 IV. In violation of Petitioner’s rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, trial

counsel provided ineffective assistance by failing to object to the trial court allowing the prosecutor to present additional evidence in aggravation of punishment – inadmissible and prejudicial victim impact evidence unrelated to the capital crime - after both sides had rested, which prevented Petitioner from confronting the additional evidence.....26

A. Relevant Facts26

1. Facts produced at the guilty plea.....26
2. Facts produced during the Sentencing proceeding.....26
3. Facts produced after the Sentencing proceeding.....32
4. Facts produced at the PCR hearing.....34
5. Order denying relief.....36
6. Rule 59(e) motion.....37
7. Order denying Rule 59(e) motion.....38

B. Discussion.....39

V. In violation of Petitioner’s rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, trial counsel provided ineffective assistance by failing to proffer or otherwise preserve for review the trial judge’s refusal to allow Petitioner to present testimony from Edward Gause, of whom the defense learned only after completing the case in mitigation. In the alternative, assuming the issue was preserved for review, appellate counsel provided ineffective assistance by failing to raise the issue on direct appeal violating Petitioner’s rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law.....44

A. Relevant Facts.....44

1. Facts produced at trial.....44
2. Direct appeal.....47
3. Facts produced at the PCR hearing.....48
4. Order denying relief.....51
5. Rule 59(e) motion.....52
6. Order denying Rule 59(e) motion.....53

B. Discussion.....53

VI. Petitioner’s due process rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and under state law were violated when the prosecution failed to release the complete computer analysis performed by law enforcement, which was relevant to Petitioner’s case in mitigation of punishment because it corroborated Petitioner’s statement regarding the

<u>circumstances surrounding Tietjen’s death and supported medical evidence of Petitioner’s mental illness</u>	61
A. Relevant Facts.....	61
1. Facts produced at trial.....	61
2. Facts produced at the PCR hearing.....	64
3. Order denying relief.....	71
4. Rule 59(e) Motion.....	72
5. Order denying Rule 59(e) motion.....	73
B. Discussion.....	73
VII. <u>Petitioner’s rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court’s wholesale adoption of the state’s proposed order</u>	78
A. Relevant Facts.....	78
B. Discussion.....	79
CONCLUSION.....	82

ISSUES PRESENTED

- I. Did trial counsel render ineffective assistance in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by providing inaccurate advice to Petitioner regarding the supposed advantages of pleading guilty, including the erroneous advice that a guilty plea would lessen the probability that Petitioner would be sentenced to death?
- II. Was Petitioner denied the effective assistance of counsel in violation of the United States Constitution and South Carolina statutory law by being deprived of two attorneys during a critical stage of his prosecution, namely the discussions of whether he should plead guilty and his resulting decision to plead guilty?
- III. Did trial counsel render ineffective assistance in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by failing to object to the solicitor's improper request in closing argument that the trial judge send a "message" by sentencing Petitioner to death?
- IV. Did trial counsel provide ineffective assistance, in violation of Petitioner's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, by failing to object to the trial court allowing the prosecutor to present additional evidence in aggravation of punishment — victim impact evidence — after both sides had rested?
- V. Did trial counsel provide ineffective assistance, in violation of Petitioner's rights pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, by failing to preserve for review the trial judge's refusal to allow Petitioner to present testimony from Edward Gause, about whom the defense learned only after completing the case in mitigation? In the alternative, assuming the issue were preserved for review, did appellate counsel provide ineffective assistance, in violation of Petitioner's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, by failing to raise the issue on direct appeal?
- VI. Was Petitioner denied due process under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and under state law when the prosecution failed to release the complete computer analysis performed by law enforcement, which was relevant to Petitioner's case in mitigation of punishment because it corroborated Petitioner's statements and supported medical evidence of Petitioner's mental illness?
- VII. Were Petitioner's rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and under state law violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order?

STATEMENT OF THE CASE

This petition for certiorari arises from the ineffective assistance of counsel, denials of due process, and denials of a fair trial that occurred during the prosecution, sentencing, conviction, and direct appeal of Stephen Corey Bryant. On July 20, 2006, in Sumter County, Bryant was indicted on charges of burglary in the second degree, two counts of burglary in the first degree, arson in the second degree, possession of a stolen handgun, three counts of murder, armed robbery, assault and battery with intent to kill, and threatening the life of a public employee.¹ App. 2650-2651; 2653-2654; 2656-2657; 2661-2662; 2666-2667; 2669-2670; 2672-2673. He was separately indicted for assault and battery with intent to kill in Richland County on December 15, 2004. App. 2675-2676. The state had filed a notice of intent to seek the death penalty, stating that the murder of Willard Tietjen was committed during the commission of a robbery while armed with a deadly weapon. On August 18, 2008, Bryant pled guilty to all of the foregoing offenses. App. 1378-81; see also App. 2328-36.

In light of the death notice, on September 2, 2008, a sentencing proceeding began in which the state presented evidence in aggravation, App. 28-95; App. 105-704, and the defense presented evidence in mitigation, App. 730-999. The Honorable Thomas A. Russo presided. C. Kelly Jackson and Dudley Saleeby, Jr., prosecuted Petitioner. Jack D. Howle, Jr., and John D. Clark represented Petitioner. App. 1. On September 11, 2008, Judge Russo sentenced Petitioner to death by electrocution or lethal injection and

¹ The final two indictments relate to incidents occurring while Petitioner was incarcerated and awaiting trial.

imposed twelve additional sentences of incarceration, including several concurrent life sentences. App. 1047-1051.

Petitioner timely appealed, and Joseph Savitz represented Petitioner. The brief presented a single issue: Whether the trial judge erred in refusing to allow Petitioner's aunt to testify that she too had been sexually abused by Petitioner's grandfather. See State v. Bryant, 390 S.C. 638, 642, 704 S.E.2d 344, 346 (2011). This Court, finding the trial judge did not abuse his discretion, affirmed Petitioner's convictions and sentences. Id. at 642-43, 704 S.E.2d at 346.

Petitioner promptly moved for a stay of execution and for the appointment of a post-conviction relief ("PCR") judge. App. 1464-1467. On March 3, 2011, this Court issued its stay order. App. 1475-1476. Melissa Armstrong and Heath Taylor were then appointed as PCR counsel and, on May 3, 2011, moved for a continuance of the PCR trial because Petitioner's forensic psychiatrist, Dr. Donna Schwartz-Watts had opined he was legally incompetent. App. 1528-1531. Petitioner's counsel filed his initial application for PCR, App. 1483-1485, and later filed an amended application for PCR, App. 1532-1536. The PCR court held a competency hearing on June 11, 2012, at which Petitioner's psychiatrist indicated that he was not at that time competent but with proper medication could be competent within thirty days. App. 1537-1570. Petitioner's counsel filed a second amended application for PCR on September 29, 2011, App. 1632-1638, and the PCR court held a three-day PCR hearing from October 1-3, 2012, App. 1639-2169.

The PCR court denied Petitioner's application for relief in an order dated December 4, 2012. App. 2572-2625. Petitioner objected to the order and moved for

reconsideration pursuant to Rule 59(e). App. 2626-33. The PCR court denied the motion. App. 2634-46. This petition for certiorari follows.

STATEMENT OF FACTS

Petitioner was raised in a troubled home. As a child, he was physically and sexually abused by his mother, father, grandfather, uncle, and an older half-brother. App. 774, lines 20-25; App. 789, line 25 – App. 790, line 13; App. 814, line 22 – App. 815, line 1; App. 891, line 21 – App. 892, line 4; App. 2399, line 15 – App. 2402, line 6. His absences from school required him to repeat the first grade, and by fourth grade he had received a number of psychological evaluations and was involved with school counselors. App. 815, lines 18-25. IQ tests indicated he had below average intelligence, and he had an early history of attention deficit disorder. App. 816, lines 1-7. At age eight, he learned to smoke marijuana from his parents, App. 884, lines 9-15, and at age fourteen, he was found to have developmental delays and problems with socialization, App. 832, lines 10-17. At age fifteen, he was diagnosed with chronic depression and was prescribed Prozac. App. 819, lines 20-23.

Perhaps not surprisingly, Petitioner's troubled youth led him to act out in nonviolent, but sometimes criminal, ways. He was first institutionalized in the Department of Juvenile Justice at age eleven, and was physically assaulted during his time there. App. 818, line 24 – App. 819, line 9. As a seventeen-year-old, he was indicted for a nonviolent burglary and was sentenced to probation. App. 172, line 21 – App. 173, line 5. Later that year, he was again indicted for another nonviolent burglary second degree and was incarcerated for nearly four years. App. 175, line 1 App. 176, line 4.

After his release, Petitioner completed a year of probation, attending his scheduled appointments, passing all his drug tests, maintaining employment, and making payments

toward restitution. App. 753-758. In August or September of 2004, his parole officer noticed his increasingly unusual behavior during their visits, and Petitioner asked her where he could receive counseling. App. 766, lines 5-25. On the evening of September 30, 2004, Petitioner was attacked and injured while walking down a road. App. 762, lines 3-13; App. 818, lines 3-10. The police later saw him and inquired what happened, and when he reported the incident to his probation officer he stated, “they had better do something or I will.” App. 762, lines 3-13. Days later, on October 5, 2004, Petitioner embarked on an eight-day course of conduct culminating in his arrest and eventual guilty plea to the indictments enumerated above.²

Several of the facts prior to and during Petitioner’s trial and sentencing are notable here, and are explained in greater detail in the argument section below. First, in preparing for trial, Petitioner’s counsel erroneously advised him there were advantages to pleading guilty, namely a lesser chance of receiving the death penalty and a limit on the state’s ability to introduce inflammatory evidence. This advice was premised in part on supposed statistical evidence and on trial counsel’s inaccurate belief regarding the rules of evidence applicable to trial as opposed to a guilty plea sentencing. Furthermore, despite the statutory guarantee that Petitioner be advised and represented by two attorneys, his lead trial counsel was unable to participate in the course of this crucial decision-making phase.

² The facts surrounding Petitioner’s crimes are summarized in this Court’s opinion on his direct appeal and are detailed in the PCR Court’s Order. See Bryant, 390 S.C. at 639-40, 704 S.E.2d at 344-45; App. 2576-2584.

At the conclusion of the sentencing phase, the solicitor, in his closing argument, asked the trial judge to “send a message” with the sentence imposed. App. 1027. Petitioner’s counsel sat silent, failing to object to the solicitor’s impermissible appeal. Likewise, his trial counsel failed to object when the court allowed the State to introduce additional testimony, but refused to allow Petitioner to introduce newly-discovered testimony regarding his mental health. Similarly, his trial counsel failed to object when the trial court refused to provide testimony from a potential witness, and his appellate counsel failed to raise the issue on appeal.

Finally, Petitioner was denied his constitutionally guaranteed right to a fair trial by the state’s failure to disclose two significant pieces of information. The solicitor failed to disclose the existence of a potential witness who had observed Petitioner’s mental state shortly before the murders and who had alerted a police officer to the potential danger. In addition, the state failed to disclose forensic computer evidence from one of the victim’s homes that would have corroborated the testimony of Petitioner’s witnesses. As explained more fully below, each of these failures or concealments deprived Petitioner of his constitutionally and statutorily guaranteed right to effective assistance of counsel, due process of law, and a fair trial.

ARGUMENT

I. Trial counsel rendered ineffective assistance in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by providing inaccurate advice to Petitioner regarding the supposed advantages of pleading guilty, including the erroneous advice that a guilty plea would lessen the probability that Petitioner would be sentenced to death.

Relevant facts

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984). Here, however, Petitioner's trial counsel was ineffective by inaccurately advising and persuading him, based on supposed statistics, that he was more likely to avoid a death sentence if he pled guilty, and by telling him that the state would be prevented from introducing inflammatory evidence if he pled guilty. First, Petitioner was incorrectly advised by his counsel that if he pled guilty he was more likely to avoid a death sentence and to instead receive a life sentence. App. 1806, lines 7-24; App. 1909; App. 2100, lines 4-13. Indeed, each of the three written guilty pleas states:

Upon the basis of the empirical and statistical evidence which exists I understand that should I plead innocent, but then be found guilty by a jury, there exists an increased chance (*i.e.* a statistically significant correlation) that I would more likely be subjected to a sentence of death by that jury than I would if my request to plead guilty and have my sentence determined by the jury be granted.

App. 2317; 2324; 2326; 2333; 2335. Petitioner's counsel stated that this advice and the supposed statistics upon which it was premised were based on information obtained from other lawyers. App. 1908, lines 9-21; App. 1910, lines 2-3. The supposed source of this advice, Teresa Norris, however, has expressly disclaimed it and testified at the PCR

hearing that Petitioner's counsel misunderstood and misrepresented the statistics and that the language quoted above was "misleading at best." Indeed, she stated she was "positive" she had "NEVER advised any attorney in a capital case to advise their client to plead guilty and waive a jury sentencing without a pretrial agreement." App. 2371 at ¶¶ 9-13.

In addition, his counsel advised him that if he were to go to trial and concede his guilt, it would permit the State to play "fast and loose" with the facts, because no evidentiary errors would be preserved for appellate review. App. 2100, lines 14-19; see also App. 1807-1808; App. 2326. Yet again, this advice was incorrect and was actually contradicted by the attorney with whom Petitioner's counsel consulted. App. 2372 at ¶¶ 18-19.

Based on this advice, which turned out to be incorrect or "misleading at best," Petitioner chose to forego his right to a jury trial and chose to plead guilty instead. App. 2121, lines 5-10 (Q: "[I]f it weren't for their advice to plead guilty and your decision to follow that advice, would you have insisted on going to trial?" A: "That's what I planned on doing from the beginning."). Because his counsel failed to render reasonably effective assistance and the deficient performance prejudiced his case, Petitioner can demonstrate ineffective assistance of counsel and this Court should grant certiorari.

Discussion

"Where allegations of ineffective assistance of counsel are made, the question becomes, 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting Strickland, 466

U.S. at 686). “In order to establish a claim of ineffective assistance of counsel, a PCR applicant must prove: (1) that counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) that the deficient performance prejudiced the applicant’s case.” Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006).

As to the first prong, “In the context of a guilty plea, . . . [the] inquiry turns on whether the plea was voluntarily, knowingly, and intelligently entered.” Taylor v. State, 404 S.C. 350, 360, 745 S.E.2d 97, 102 (2013) (citations omitted).³ “The second, or “prejudice,” requirement . . . focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process.” Id. (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). Stated differently, to demonstrate prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill, 474 U.S. at 59.

Other courts have held a defendant’s counsel was deficient when counsel wrongly advised the defendant that if he pled guilty, the state would be limited in the evidence it could present during the sentencing phase regarding the details of the murders. See Leatherwood v. State, 539 So.2d 1378, 1382-84 (Miss. 1989) (finding in PCR appeal that defendant’s counsel’s advice leading to guilty plea was erroneous, and thus vacating guilty plea and remanding). Similarly, numerous courts—both in South Carolina and

³ The Due Process Clause of the Fourteenth Amendment requires that a defendant knowingly and voluntarily enter a plea of guilty. Boykin v. Alabama, 395 U.S. 238, 242 (1969). The Supreme Court has expressly held that the actions of defense counsel may render a plea involuntary and thus violate of due process. Hill v. Lockhart, 474 U.S. 52, 56 (1985). “A plea may be involuntary when an attorney materially misinforms the defendant of the consequences of the plea.” United States v. Rhodes, 913 F.2d 839, 843 (10th Cir. 1990).

elsewhere—have held that if a criminal defendant’s attorney incorrectly or misleadingly advises him regarding the probability of a more favorable sentencing after a guilty plea, the defendant’s plea is not voluntary and/or is based on the ineffective assistance of counsel. See, e.g., Dover v. State, 304 S.C. 433, 405 S.E.2d 391 (1991) (holding defendant’s guilty plea was not voluntarily and understandingly made because he was never made aware that he could be sentenced to as much as 200 years but rather was led to believe that he would not get more than ten years); Brown v. State, 306 S.C. 381, 412 S.E.2d 399 (1991) (remanding for new trial where defendant’s guilty plea was not made knowingly and voluntarily because the trial judge had misinformed defendant at guilty plea hearing that he would be eligible for parole after serving one third of his sentence, when in fact defendant was ineligible for parole); see also Meyers v. Gillis, 142 F.3d 664 (3rd Cir. 1998) (granting prisoner’s petition for habeas corpus, holding he was denied the effective assistance of counsel when his attorneys inaccurately advised him, based on a “misleading” and “ambiguous” report and statistics, that a guilty plea would result in a life sentence with the possibility of parole); Hammond v. United States, 528 F.2d 15, 18 (4th Cir. 1975) (holding that defense counsel’s misrepresentation of possible sentence supported claim of ineffective assistance of counsel to defendant who accepted plea agreement); State v. Ysea, 956 P.2d 499 (Ariz. 1998) (setting aside guilty plea and finding ineffective assistance of counsel where the defendant’s trial attorney had wrongly advised him of the availability of the death penalty should he not plead guilty).

Other authorities likewise indicate that the advice provided by Petitioner’s counsel constituted ineffective assistance. The Supreme Court has explicitly approved using the American Bar Association Guidelines on attorney performance in effect at the time of a

defendant's trial as "guides to determining what is reasonable" performance by counsel. See, e.g., Padilla v. Kentucky, 559 U.S. 356, 366 (2010) (citing Strickland, 466 U.S. 688). The ABA Guidelines advise that "[i]f no written guarantee can be obtained that death will not be imposed following a plea of guilty, counsel should be extremely reluctant to participate in a waiver of the client's trial rights." See ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases § 10.9.2 cmt (2003).⁴ Indeed, the Supreme Court itself has noted that a defendant has little to gain from pleading guilty in a capital case, even when the evidence of guilt is overwhelming: "[P]leading guilty without a guarantee that the prosecution will recommend a life sentence holds little if any benefit for the defendant." Florida v. Nixon, 543 U.S. 175, 191 n.6 (2004) (citing ABA Guidelines § 10.9.2 cmt.).

Here, contrary to the advice and assurances of his counsel, Petitioner received no benefit whatsoever from his guilty plea. The PCR court, however, nevertheless concluded that the incorrect and prejudicial advice Petitioner received from his counsel was "reasonable advice." App. 2589. This conclusion stands in stark contrast to the authority noted above—including the ABA Guidelines, courts of other jurisdictions, and the expert advice upon which Petitioner's counsel relied—all of which indicate that a decision to plead guilty with no resulting benefit is patently *unreasonable*. Indeed, the PCR court failed to consider any authority or analogous cases, such as those cited above, to determine whether the furnishing of incorrect and misleading advice leading to a guilty

⁴ Available at http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf (last visited March 24, 2014).

plea constitutes the ineffective assistance of counsel. Furthermore, while other factors might have weighed in favor of a guilty plea, the PCR court ignored the fact that the erroneous advice of counsel was the sole dispositive factor impelling Petitioner's fateful decision to plead guilty.⁵ App. 2121, lines 5-10 (testifying that but for his counsel's erroneous advice, he would not have pled guilty). This Court should grant certiorari to correct the PCR court's errors of law.

⁵ If the PCR court's reasoning here were applied elsewhere, it would lead to plainly absurd results. For example, if a defendant unwisely chose to testify at trial solely because his counsel incorrectly advised him that his guilt could be presumed from his silence, the PCR court's reasoning would conclude that this prejudicial misstatement of the law was not an error because there was some other conceivable reason it might be advantageous to testify.

II. Petitioner was denied the effective assistance of counsel in violation of the United States Constitution and South Carolina statutory law by being deprived of two attorneys during a critical stage of his prosecution, namely the discussions of whether he should plead guilty and his resulting decision to plead guilty.

Relevant facts

Petitioner was denied the statutorily guaranteed representation by two attorneys during a critical phase of his prosecution, namely his decision to plead guilty. Shortly after Petitioner's arrest, Jack Howle—the chief public defender for the Third Circuit—was appointed as his counsel. App. 1793-1794. Howle was the sole attorney for Petitioner at his preliminary hearing on December 21, 2004, App. 1054-1075, and at the subsequent hearing for Petitioner's post-incarceration indictment, App. 1077-1084. Only after the state gave notice of intent to seek the death penalty on April 27, 2007, App. 1086-1089, was a second attorney, James Babb, appointed as lead counsel. See App. 1111-1122. Babb remained as lead counsel until July 18, 2008, when he was relieved for medical reasons. App. 1889, lines 11-16; App. 1914, lines 14-17.

During his time as lead counsel, Babb was Petitioner's chief advisor and the primary architect of the strategy and decision to plead guilty. See generally App. 1800, lines 4-12 (noting that Babb “was the primary decision maker” and “had a good relationship with Mr. Bryant as far as just talking, better than [Howle] had”). Petitioner's first Tender of Guilty Plea and the two subsequent amended versions) were drafted by Babb and presented by him to Petitioner. App. 2313-2318; App. 2319-2336; App. 1801, lines 11-22; App. 1830, lines 8-15 (stating the guilty plea “was Jim [Babb's] work product” and that Babb “certainly talked with him more than I had in regard to everything that's contained within that document”); App. 1906, line 25 – App. 1907, line 2.

A significant reason Babb advocated for the plea strategy was his belief that after the guilty plea a jury would or should impose the sentence. See App. 1898, lines 11-17 (noting that immediately after Babb was appointed lead counsel, he attended a national conference on capital litigation and “[o]ne of the issues that came up was the constitutionality of the death penalty statute,” particularly because South Carolina “required that you waive your right to have a jury to determine on the sentence as a condition of pleading guilty”). Accordingly, the first Tender of Guilty Plea prepared by Babb and signed by Petitioner expressly stated it was “Reserving Right to Jury Determination of Sentence.” App. 2313. That plea further stated:

[U]pon advice of counsel, I maintain that the State of South Carolina can not require that I forfeit my right to be sentenced by a jury, should I desire, as I do, to enter a plea of guilty while maintaining and insisting upon exercising my right to have a jury determine all and such additional facts as may affect, impact, or determine my ultimate sentence in this case.

App. 2317. Sometime after drafting the first guilty plea and advising Petitioner about it, Babb filed a writ of certiorari to this Court seeking a ruling that the statute was unconstitutional in its requirement that a defendant pleading guilty must waive his right to being sentenced by a jury.⁶ App. 1902, line 22 – App. 1903, line 15. Ultimately, this Court denied the writ. App. 1904, lines 23-24. This ruling critically altered the guilty plea strategy Babb had devised, and Babb—who was Petitioner’s lead counsel and primary advisor—*had no subsequent conversations with Petitioner and never again discussed with him the merits of a guilty plea:*

⁶ This Court addressed this issue in the direct appeal of Jerry Buck Inman. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011).

I wasn't on the case much after that. I honestly do not recall that I had any subsequent conversations with Mr. Bryant after the South Carolina Supreme Court rejected the petition for the writ. . . . And him pleading guilty, I don't think I had any discussions with him in that intervening [time]. In other words, from the time that was [sic] ruling was made until I was relieved from the case, I do not recall having any discussions with Mr. Bryant about what the next step would be vis-à-vis him pleading guilty.

App. 1905, line 22 – App. 1906, line 9. Babb's sudden absence came about because in May of 2008, he was hospitalized and, at the advice of his doctor, promptly retired from the practice of law. App. 1890, lines 2-19. He was not relieved and replaced as lead counsel, however, until July 18, 2008. App. 1889, lines 11-19. Accordingly, from May through mid-July—critical months before trial—Petitioner had no contact with his lead attorney and effectively had only one attorney. See App. 1889, lines 13-15 (“I was hospitalized in May. And, you know, after that, I really had really very little to do with the case.”).

This gap in the statutorily required assistance of two attorneys manifested itself in a pernicious way. Specifically, the two guilty pleas Petitioner signed on the eve of trial expressly conceded the right to be sentenced by a jury. See App. 2319; 2327; 2328; 2336. This, of course, is the *opposite* of the key component of Babb's strategy. App. 1910, line 21 – App. 1911, line 1 (“That's the opposite of my plea tender.”). The decision to plead guilty had been made prior to Babb's sickness, and was critically altered during his absence, and the replacement counsel that was appointed had little or no discussion with Petitioner about this change. See App. 2004, lines 4-9 (testimony of replacement counsel, John Clark, that when he “was pulled in . . . I was advised that they had come to the conclusion that along with Mr. Bryant, that he would plead guilty.”); App. 2005, lines 1-

4 (noting that in Clark's interactions with Petitioner, "he didn't say much"). Indeed, when shown the Tender of Guilty Pleas signed by Petitioner, the replacement counsel did not specifically remember them and stated he did not have a role in preparing the document. App. 2007, lines 5-22. Likewise, the replacement counsel could not specifically recall any conversations with Petitioner about the decision to plead guilty, and what few discussions they had were "very, very limited" due to the eleventh-hour replacement. App. 2020, line 18 – App. 2021, line 24.

In sum, Petitioner was advised and persuaded to plead guilty by Babb as part of a strategy based on a particular theory; Babb subsequently retired from the practice of law; during the following months, while Petitioner was effectively represented by only one attorney, this Court determined Babb's prior strategy to be incorrect and/or unavailable; and replacement counsel was then appointed who had no or "very limited" discussions with Petitioner prior to Petitioner's guilty plea. In essence, although Petitioner appeared "on paper" to be represented by two attorneys at all times, he was effectively represented by only one attorney (who was not his lead attorney and trusted advisor) at the time when a significant change to the strategy occurred and at the time he signed the guilty plea.

Discussion

In South Carolina, section 16-3-26(B)(1) of the South Carolina Code provides that indigent defendants facing a capital trial must receive at least two court-appointed attorneys. This statute is the "exclusive procedure for the appointment of counsel for indigent defendants charged with capital murder." State v. Brown, 289 S.C. 581, 585, 347 S.E.2d 882, 884 (1986). A trial court's failure to comply with the mandates of this statutory guarantee denies a defendant a fair trial. State v. Diddlemeyer, 296 S.C. 235,

239, 371 S.E.2d 793, 795 (1988) (“We conclude that the trial court's failure to follow the mandates of Section 16-3-26(B) denied appellant a fair trial.”), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The decision to plead guilty is among the critical stages in a criminal case. See Missouri v. Frye, ___ U.S. ___, ___, 132 S. Ct. 1399, 1405 (2012) (“It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. . . . Critical stages include . . . the entry of a guilty plea.”) (citations omitted); Iowa v. Tovar, 541 U.S. 77, 81 (2004) (“The entry of a guilty plea . . . ranks as a ‘critical stage’ at which the right to counsel adheres.”) (citation omitted). As noted above, in South Carolina, section 16-3-26(B)(1) of the Code requires that indigent defendants facing a capital trial must receive at least two court-appointed attorneys, and a trial court’s failure to comply with the mandates of this statutory guarantee denies a defendant a fair trial. State v. Diddlemeyer, 296 S.C. 235, 239, 371 S.E.2d 793, 795 (1988), overruled on other grounds by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The sole South Carolina case dealing with this requirement is inapplicable. In State v. Howard, 295 S.C. 462, 471, 369 S.E.2d 132, 137 (1988), one of the two attorneys in a capital case learned midway through trial that he had failed to file his annual CLE compliance report. He corrected this administrative oversight within a day and a half and the trial was never interrupted nor was his license ever suspended. Here, in contrast, during the many months after Babb had effectively (though not yet technically) withdrawn and before replacement counsel was appointed, things did not continue without a hitch. As explained above, there was a substantial change in the theory underlying the defense’s strategy and this change was never explained to Petitioner.

The prejudicial effect this had on Petitioner's case may be presumed. The United States Code imposes a similar rule in federal capital cases, see 18 U.S.C. § 3005, and the failure to appoint second counsel pursuant to that statute "gives rise to an irrebuttable presumption of prejudice." United States v. Williams, 544 F.2d 1215, 1218 (4th Cir. 1976) (citation omitted). Here, the PCR court failed to look beyond the paper record, which indicated that two attorneys were assigned at all times, to discern the actual underlying facts, namely that Petitioner was not in actuality being represented and advised by two attorneys regarding a crucial stage of his prosecution.

III. Trial counsel rendered ineffective assistance in derogation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by failing to object to the solicitor's request in closing argument that the trial judge "send a message" by sentencing Petitioner to death.

Relevant facts

Petitioner's counsel rendered ineffective assistance during the sentencing phase of his trial when they failed to object to the solicitor's request that the judge "send a message" with his sentence. Specifically, in the solicitor's closing argument, he stated:

You represent our community in the trial and it's the function of a capital sentencing jury to express the conscience of the community on the ultimate question of life or death. And let there be no doubt, Stephen Corey Bryant through his attorneys going [sic] to present himself to the Court the [sic] most pathetic manner that he possibly can. And one more time, Judge, he's gonna say, sir, would you help me please. *And I ask you to send a message as a representative of our community to Stephen Corey Bryant with what you now know. Judge, tell him no.*

App. 1027, lines 2-11 emphasis added. In the PCR hearing, Petitioner's former trial counsel acknowledged that this sort of plea in a closing argument is objectionable:

Q. [D]o you remember . . . in his closing, Solicitor Jackson imploring the judge to send a community message?

A. Yes, sir.

Q. Did you object?

A. I did not.

Q. Okay. And you're aware that South Carolina Courts generally don't favor that type of closing argument in a capital case?

A. Oh, without a question. If this had been argued before the jury, there is no question I would have jumped up and checked it.

App. 1811, line 23 – App. 1812, line 11. The PCR court held that this error was harmless because the solicitor's plea was for the judge to send a message to Petitioner, not to the

community. See App. 2598. Even assuming *arguendo* that the message was to be sent to Petitioner, the solicitor's request was nevertheless impermissible, and trial counsel's failure to object to it was deficient representation.

Discussion

South Carolina's appellate courts have previously frowned upon requests in closing argument to send a message to the defendant. See, e.g., Brinkley v. S.C. Dept. of Corr., 386 S.C. 182, 687 S.E.2d 54 (Ct. App. 2009) (affirming trial court's grant of new trial where "Brinkley's counsel came close in his closing statement to asking the jury to 'send a message' to Department when calculating any damages award").⁷ Similarly, the courts of other jurisdictions have urged restraint in making requests to the sentencing body to "send a message" as the "conscience of the community." See, e.g., State v. Pulliam, 950 S.W.2d 360, 368 (Tenn. Crim. App. 1996) (noting that "[a]rguments concerning deterrence and appeals to the jury to act as the community conscience are not necessarily impermissible" but "prosecutors should exercise extreme caution when making any statement referring to the community interests of the jurors." (quoting United States v. Solivan, 937 F.2d 1146, 1154 (6th Cir. 1991))); Maercks v. Birchansky, 549 So. 2d 199, 199 (Fla. Ct. App. 1989) ("We have stated repeatedly that we will not condone such arguments as were made in closing where counsel for plaintiff three times

⁷ In addition, this Court has noted that a jury *charge* stating the jury is acting for the community is not impermissible *per se*, but such a charge is dangerous. State v. Daniels, 401 S.C. 251, 258 n.2, 737 S.E.2d 473, 477 n.2 (2012) (Toal, C.J. concurring and joined by majority of the Court). This 2012 opinion supersedes (or at least casts some doubt) on an older opinion in which this Court affirmed a sentence despite the solicitor's closing argument urging the jury to "send a message." State v. Cain, 297 S.C. 497, 508-509, 377 S.E.2d 556, 562 (1988).

asked the jury as the ‘conscience of the community’ to ‘send a message with its verdict.’”).

In sum, trial counsel’s failure to object to the impermissible and dangerous appeal constitutes the ineffective assistance of counsel, and this Court should grant certiorari to correct the PCR’s court’s failure to so hold.

IV. In violation of Petitioner's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, trial counsel provided ineffective assistance by failing to object to the trial court allowing the prosecutor to present additional evidence in aggravation of punishment — inadmissible and prejudicial victim impact evidence unrelated to the capital crime — after both sides had rested, which prevented Petitioner from confronting the additional evidence.

Relevant facts

Facts produced at the guilty plea

On August 18, 2008, Appellant entered a guilty plea to capital murder, two counts of non-capital murder, two counts of assault and battery with intent to kill, one count of armed robbery, two counts of burglary in the first degree, burglary in the second degree, arson in the second degree, possession of a stolen handgun, and threatening the life of a public employee. App. 1326, lines 11-16. The solicitor placed a factual basis for the guilty pleas on the record. App. 1348, line 18 – App. 1378, line 22. Relevant to this issue, the solicitor informed the plea judge of the facts surrounding the burglary of James Ammons' home, the death of Cliff Gainey, and the death of Christopher Burgess. App. 1343, line 21 – App. 1357, line 19; App. 1360, line 29 – App. 1365, line 22; App. 1371, line 17 – App. 1375, line 11. Ammons, Gainey's family, and Burgess' family, including Robbie Burgess, were present for the guilty plea, but they did not address the court. App. 1353, line 23; App. 1360, lines 21-22; App. 1371, lines 17-25.

Facts produced during the sentencing proceeding

During the state's case-in-chief at the penalty phase, the pathologist testified regarding the autopsies of Tietjen, Gainey, and Burgess even though the state was seeking

death only as to the death of Tietjen.⁸ Additionally, Ammons testified regarding the burglary of his home while he was out running errands. When Ammons returned, he discovered a handgun and a box of bullets were missing. Ammons identified the handgun and bullets, which were recovered from Petitioner's truck, as the items stolen from his home. App. 202, line 11 – App. 210, line 4.

The prosecution called seventeen-year old Christopher Gainey to testify regarding the death of his father, Clifton Gainey. Christopher was spending the weekend with his mother. App. 307, lines 4-12. When Christopher went to his father's on Saturday evening, he discovered the couch was on fire. App. 309, lines 1-7. The fire department extinguished the fire. App. 310, lines 10-16. Christopher's father was not in the residence. When Christopher returned to the house late Saturday night, he discovered electronics were missing. App. 310, line 25 – App. 311, line 13. On Sunday afternoon, Christopher's mother reported Clifton missing to the police. App. 315, lines 9-13. Early Monday morning, Christopher learned his father was dead. App. 315, lines 14-18. Christopher explained that his father and Petitioner were friends. App. 316, lines 4-19. Additionally, Christopher identified items recovered from Petitioner's home as items belonging to his father. App. 317, lines 4-23.

The solicitor presented victim impact evidence regarding the death of Tietjen. George Summers was in the Air Force with Tietjen, and the two were stationed at Hahn

⁸ Regarding Gainey, the pathologist detailed his three gunshot wounds, the injuries resulting from those gunshot wounds, and the cause and manner of death. App. 121, line 21 – App. 129, line 12. Next, the pathologist described his findings resulting from his autopsy of Burgess. In exhaustive detail, the pathologist related the two gunshots Burgess suffered, their trajectory through his body, including the organs injured, and his opinion as to the order of the shots. App. 129, line 13 – App. 135, line 12.

Air Force Base in Germany in the 1980s. Tietjen had received one of the highest ratings for personal readiness when the pair met. As a result, Summers asked Tietjen to volunteer to help others. Tietjen later received a meritorious medal, which was added to his dozens of commendations, for his service assisting Summers. Later, the two were transferred to Shaw Air Force Base. Summers fondly recalled Tietjen's "willingness to take on stuff that wasn't in his job description." When Tietjen died, Summers assisted the family with obtaining a special military coin for his burial. App. 651, line 10 – App. 657, line 23.

Nora Davis met the deceased and his family through the Shriners in the early 1990s. Tietjen was active in the charitable works of the Shriners. She described learning of his death on October 11, 2004 and the loss she experienced as a result. She recalled Tietjen's friendly personality and selflessness concerning the children helped by the Shriners' fundraising efforts. App. 616, line 22 – App. 622, line 18. Bob Summers also met Tietjen through the Shriners – in fact, the two were initiated at the same time. Their wives quickly became friends as well. Summers described Tietjen as someone "who was loved" and "loved." He was a wonderful husband, father, and grandfather. Tietjen loved telling jokes and experimenting in the kitchen. When Tietjen died, Summers "lost a true friend." App. 632, line 7 – App. 637, line 17.

William Cockerill and Troy Baker met the deceased through the Shriners. The three men were involved in the "streakers," which was the group who drove mini cars in parades. Tietjen had been a leader in the Shriners due to his outstanding recordkeeping and organizational skills, but he was also a fun-loving jokester. Tietjen helped the "streakers" switch from go-karts to dune buggies by assisting others in finding parts and

in some cases paying for the parts. Tietjen was “[a] man of great character, a man of conviction.” Having served in the military for twenty-three years, he was a patriot. He was also a “[g]reat family man.” He was a loving father and grandfather. Baker admired how Tietjen handled his dementia as he aged. Tietjen used sticky notes to remind himself to do things such as checking the oven or dryer. Baker’s admiration of Tietjen’s struggle was so great that he modeled his behavior after Tietjen to be a better husband. Baker spoke to Tietjen on the morning of his death regarding the Shriner’s Christmas party. In fact, Tietjen gave a task to do that day to prepare for the party. According to Baker, Tietjen “had a wonderful ability to get somebody to volunteer to do something that they did not want to do, and make it — and make you thank him after it was over with.” To Baker, Tietjen “was just a wonderful person.” When Tietjen died, Baker “lost a good friend” and confidante. With Tietjen’s passing, their Shrine unit fell apart as Tietjen “was the glue that held it together.” App. 624, line 14 – App. 631, line 19; App. 638, line 22 – App. 649, line 25.

Judy Russell worked with Tietjen’s wife. She recalled Tietjen as “always laughing” and having a story to share. He was always jovial. When she visited in their home, Tietjen showed her the caterpillars he was growing to become butterflies. Russell was with Tietjen’s wife when she learned of his death. According to Russell, it was a beautiful Indian summer day on the Tietjen’s wooded property with the wind blowing. “It should have been a nice day for [Tietjen’s wife], and it never will be a nice day when there’s an Indian summer day with that wind blowing in her face.” App. 658, line 19 – App. 662, line 24.

Kimberly Dees was very close with her father, the deceased. He taught her how to fish, hunt, and play ball. The two would camp together. He instilled in her a love of nature. Due to Tietjen's military involvement, they lived all over the world. In 1975, the family moved from Oregon to Florida. Tietjen insisted they make a cross-country trip to see the country. They went whitewater rafting down the Snake River and stopped at historical sites along the way. Tietjen supported Kimberly's involvement in sports, including volleyball, swimming, and basketball. Tietjen taught Kimberly the value of life — "that all life has value." She recalled breaking a branch from an oak tree as a child and her father showing her the sap running out of the tree, which he called the tree's life blood. Kimberly had to apologize to the tree and promise to never do that again. As an adult, Kimberly apologized to her bushes when she trimmed them due to her father's lessons. App. 664, line 13 – App. 669, line 4.

When Kimberly got her first car, he taught her how to do basic car maintenance. As she became a young woman, he taught her basic household maintenance, including plumbing and electrical work. Tietjen was very patriotic, which he passed on to his children and grandchildren. Tietjen had a special relationship with Kimberly's daughter, Anna, which fully developed when Kimberly and her husband divorced. Tietjen taught Anna to shoot, just as he had Kimberly. Andrew, Kimberly's son, was especially enamored of Tietjen. He planned to join the military in honor of his grandfather. App. 669, line 5 – App. 672, line 7.

Kimberly was frantic when she was unable to reach Tietjen by phone on October 11, 2004. When a male answered her father's phone and informed her he had been killed, she was very upset. Tietjen's death greatly affected Kimberly's son. He was fearful and

thought that all people who died were murdered. He told Kimberly that he would always be with her so that no one could ever murder her. He also told her what he wanted her to do with his toys and clothes the day he was murdered. As he grew older and she explained death to him, he was less fearful. Anna was “very distraught” when Tietjen died. She was particularly hurt that he had not been able to attend her violin concert. Kimberly lost her best friend, mentor, and confidante when her father died. She vividly recalled their long talks over coffee after his retirement. To remember her father, Kimberly always carried a military coin engraved “my daughter, my friend” given to her by Tietjen. App. 676, line 9 – App. 686, line 1.

Mildred Tietjen, the wife of the deceased, described how the pair met on a blind date in 1964 and the life they shared during the deceased’s military deployments. Both were actively involved in the Shriners, taking three or four trips to the Shriner’s Hospital to visit with the children. On one of the visits, a little girl “fell in love” with Tietjen when he played with her by the pool and told her she had magic feet as she kicked a beach ball with him. Tietjen was a good provider for their family. When he retired, he helped around the house and took over the cooking duties while Mildred worked. People often gave Tietjen gag gifts, such as the box of grits his mother sent to him, because he had such a zest for life. App. 686, line 19 – App. 695, line 21.

Mildred recalled the day of Tietjen’s death as she tried repeatedly to reach him by phone. A man answered Tietjen’s phone claiming to have killed Tietjen. Initially, she thought it was a joke. She and Tietjen were “very, very close.” After his death, Friday afternoons were the hardest for her because the two used that time as their special time. App. 696, line 21 – App. 703, line 25.

After both sides rested their cases, Judge Russo indicated his desire to take the afternoon of September 10, 2008 and the early morning of the following day to review the evidence and arrive at his sentencing decision. App. 1035, lines 8-15; App. 1036, lines 17-25.

Facts produced after the sentencing proceeding

Prior to the judge sentencing Petitioner on any of the charges, including capital murder, the judge heard unsworn victim impact evidence on the non-capital crimes. Petitioner had no opportunity to confront or rebut those witnesses; however, trial counsel failed to object to the introduction of additional evidence.

James Ammons gave a lengthy soliloquy regarding how the burglary of his home had devastated his life. Ammons began by saying his life had “been changed forever” and continued this refrain throughout his remarks. He was especially distraught because everyone knew his weapon was used in the murders. Ammons’ home had been “paradise” before the burglary, but now there was fear. Due to his heightened fear, Ammons tried to find “a gun, rifle, something” whenever he saw people. Although he had left his daughter home alone previously, he was too scared to do so after the burglary. He claimed he had many sleepless nights and was scared to enter his home at night alone. Ammons continued to explain how he previously welcomed strangers to his home to ride horses, but after the burglary he was “scared of the unknown.” App. 1042, line 15 – App. 1043, line 2; App. 1043, lines 8-12.

After his gun was stolen and the first shooting occurred, Ammons “got down on [his] knees and wept praying that it was not [his] weapon. And the next one, then the next one.” Additionally, Ammons had prayed for the court, the victims’ families, and for

those “on the other side.” The only way he could handle the situation was to “put it in the Lord’s hands.” Due to the burglaries and murders, he hugged his children tighter, despite their adulthood, because he may not see them again. His experience “scarred him for life” because he would “never get over” it. App. 1043, line 5 – App. 1044, line 2. Judge Russo thanked Ammons for being there. App. 1044, lines 3-4.

Next, the victim advocate spoke on behalf of Christopher Gainey, the son of Cliff Gainey. When his father and mother separated, Christopher’s relationship with Cliff suffered. However, Christopher later reconnected with his father. Christopher even moved in with his father. The two enjoyed fishing and watching television and movies. Christopher’s parents were working on their relationship as well. After the death of his father, Christopher no longer wanted to watch movies because something was missing from his life. App. 1044, lines 8-19. Christopher said he would cherish the few memories he had of his father. App. 1044, lines 20-23. Judge Russo expressed his condolences for his loss and thanked him for being there. App. 1044, lines 24-25.

Finally, Robbie Burgess, the brother of Christopher Burgess, spoke to the court. He read a letter prepared by their mother, Christine Burgess. In the letter, she expressed her grave loss over the death of her child. She expressed her devastation at having outlived her child, something unimaginable. “[A] father was taken away from his son and his family.” Burgess would “never be able to do all of things a father and son would do together.” She had a hole in her heart where Burgess had been. She thought of him every day and missed him “tremendously.” “The pain and suffering” of her family over the loss would never leave. Burgess was “the pride and joy” of their family, who could never be replaced. She asked Judge Russo for justice on that date, noting the family had

“waited patiently,” but that the wait was over. Attending the court proceeding was “very hard and painful.” She hoped the court proceedings would close the matter for herself and the other families involved. All of the families were counting on the justice system “to come through and make the proper decision today.” App. 1045, line 5 – App. 1046, line 4. Judge Russo thanked Robbie and expressed his sympathies for their loss. App. 1046, lines 5-6.

Thereafter, the prosecutor informed the court he had no additional evidence to present. App. 1046, lines 7-8. Judge Russo then asked if the defense had any further presentation on sentencing. App. 1046, lines 10-12. Howle explained that Petitioner’s family was not present in the courtroom due to the emotional nature of the imposition of sentence. Then he said simply, “Your Honor, we would just reiterate mitigation we think has established through the testimony.” App. 1046, lines 13-17. Howle further stated that Petitioner did not want to speak, but what Howle thought Petitioner “would say if he could is pretty much spelled out in the letter he wrote the Tietjen family which is in evidence, Your Honor.” App. 1047, lines 1-5. Judge Russo still gave Petitioner an opportunity to speak, but he declined. App. 1047, lines 8-9.

After considering the additional victim impact evidence, Judge Russo sentenced Petitioner beginning with the non-capital offenses. The last sentence imposed by Judge Russo was for death concerning the murder of Tietjen. App. 1047, line 13 – App. 1051, line 7.

Facts produced at the PCR hearing

At the PCR hearing Howle recalled Judge Russo receiving and considering victim impact evidence from Ammons, Burgess, and a victim’s advocate prior to sentencing.

Howle did not object to the presentation of the witnesses and did not cross-examine them. App. 1812, line 23 – App. 1813, line 17. Howle considered the procedure to be the equivalent of what would happen during a regular guilty plea during which the victims may address the court. He testified that “at the time it did not seem as significant to [him] as maybe it does when you look at it later.” App. 1813, line 18 – App. 1814, line 7; App. 1836, lines 4-17.

The offenses involving the challenged victim impact evidence did not involve the capital murder. The defense team “did not view them . . . mak[ing] statements about the burglary or whatever else [to have] that kind of impact on his sentence.” App. 1836, line 25 – App. 1837, line 9. Although Howle testified that if the witnesses had wanted to go into the murders, then he thought “that would have been much more objectionable,” he was forced to admit that Burgess’s victim impact statement concerned one of the murders in the case.⁹ He never considered requesting cross-examination of the witnesses. App. 1837, lines 10-19; App. 1839, line 21 – App. 1840, line 3.

Solicitor Kelly Jackson admitted that he did not think “it was a good idea for victim impact testimony on the other five crimes to be mixed in with the victim impact statement testimony of the death penalty case.” Therefore, the victim impact evidence on the non-capital cases was not presented during the guilty plea hearing or state’s case-in-chief at the penalty phase. This evidence, oddly, was presented after the closing arguments during the sentencing proceeding, but before Judge Russo pronounced the sentence on the capital murder charge. App. 1984, lines 5 – App. 1985, line 1.

⁹ It is obvious from the record that Christopher Gainey’s statement and the statement by the victim advocate on his behalf also concerned a murder.

During closing argument, Petitioner, while admitting he had no way of knowing if the additional victim impact evidence influenced Judge Russo's decision to impose the ultimate punishment, argued the trial judge improperly considered the victim impact evidence of the non-capital crimes in making his decision regarding the capital sentence.¹⁰ As Petitioner noted, "there could have been a different sentencing proceeding for those crimes." App. 2132, lines 16-25; App. 2133, lines 1-8. Trial counsel failed to object to the judge entertaining additional victim impact evidence and the procedure employed failed to provide Petitioner with an opportunity to cross-examine the witnesses or rebut the evidence offered. App. 2133, line 19 – App. 2134, line 1.

Order denying relief

The PCR judge found Petitioner had "failed to prove a factual basis for his claim." App. 2602. The PCR order construed this claim for relief as follows: "[Petitioner] contends that it was a denial of due process and ineffective assistance of counsel for the failure of the trial court to prevent the admission after the conclusion of arguments for and against the death penalty of victim impact evidence from non-capital crime victims prior to the sentencing for the non-capital crimes." App. 2603. The PCR order recognized that the evidence offered by Ammons, Gainey, and Burgess was victim impact evidence produced by the solicitor. App. 2603. The order further noted that after the

¹⁰ This Court noted "the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to a sentencing jury." State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). Further, "[f]air administration of justice demands that the judge will not act on surmise or suspicion but will impose sentences with insight and understanding." Therefore, "the judge is required to listen and give serious consideration to any information material to punishment." State v. Franklin, 267 S.C. 240, 245-246, 226 S.E.2d 896, 897 (1976).

presentation by the witnesses, and no objection by trial counsel, the trial judge asked if the defense had “any further presentation . . . regarding sentencing,” and asked Petitioner personally if he had anything to add. App. 2603-2604.

In rejecting this claim, the PCR court found the procedure used by the trial judge was consistent with the Victim Bill of Rights and the use of victim impact evidence for non-capital crimes. App. 2603. The PCR court quoted the statutory provision providing for victims to be heard concerning the impact of the crime on their lives, emphasizing the part of the statute requiring the court to allow the defense an opportunity to respond to the statement. App. 2604.

The PCR court determined there was no error because the victim impact evidence relating to the non-capital crimes could have been presented at the time the plea was entered or during the penalty phase.¹¹ However, the court found that nothing required the state to present the victim impact evidence regarding the non-capital crimes during the penalty phase. App. 2605. The judge further found Petitioner “had the opportunity to confront the impact witnesses prior to the sentence in their non-capital cases. No request was made to examine them which is authorized under state law.” App. 2605. Thus, the court found plea counsel was not ineffective for failing to make an objection to the entry of the evidence.

Rule 59(e) motion

In his motion to alter or amend pursuant to Rule 59(e), SCACR, Petitioner detailed five specific objections to the PCR court’s ruling. Specifically, Petitioner

¹¹ The PCR judge very clearly found “this evidence was not related to the sentencing for the capital crime, but for the non-capital crimes.” App. 2605.

challenged the PCR court's reliance on the Victim Bill of Rights to allow the prosecution to present victim impact evidence under these circumstances, and explained the Victim Bill of Rights did not trump his protections under the Eighth Amendment to the United States Constitution. Petitioner noted the unfairness of the trial judge's refusal to reopen the record to permit Petitioner to present additional evidence of mitigation, see Issue V, infra, but the judge allowing the solicitor to present additional aggravating evidence in the form of victim impact statements. Next, Petitioner objected to the PCR judge's conclusion that Petitioner had an opportunity to confront the witnesses by pointing out the witnesses were not under oath and not subject to cross-examination. Finally, Petitioner objected to the PCR court's misapprehension of the rules and safeguards required in capital sentencing proceedings and the court's failure to address the claim as presented under Gardner v. Florida, 430 U.S. 349 (1977). App. 2629.

Order denying Rule 59(e) motion

Rejecting each of Petitioner's objections, the PCR court found as an initial matter that Judge Russo followed both the Victim's Bill of Rights and the Eighth Amendment. The PCR court was unmoved by any appearance of unfairness in the trial judge's allowance of the solicitor present additional victim impact evidence, combined with his refusal to re-open the case to permit recently discovered evidence in mitigation. Further, the PCR court disputed Petitioner's claim that he was not permitted to confront the additional victim impact witnesses because the statute provided the defense with an opportunity to respond, which satisfied the requirements of Gardner, supra. App. 2641.

Discussion

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, “the defendant must show that counsel’s performance was deficient” and “that the deficient performance prejudiced the defense.” Id. “When a convicted defendant complains of the ineffectiveness of counsel’s assistance, the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” Id. at 687-688. “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” Id. at 688. Concerning prejudice, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Rather, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 694. “When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” Id. at 695.

In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that victim impact evidence was not per se inadmissible. The Court noted “the assessment of harm caused by the defendant as a result of the crime charged has understandably been an important concern of the criminal law, both in determining the elements of offense and in

determining the appropriate punishment.” Id. at 819. “Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities.” Id. at 825. “A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.” Id. at 827. The victim’s death represented a unique loss to society and in particular to his family. Id. at 825. Although victim impact evidence is admissible, a capital defendant must be afforded the opportunity to confront the evidence. The United States Supreme Court held that the due process clause forbade a trial judge from imposing a death sentence where the judge had reviewed portions of a pre-sentence report that were not made available to the defense. Gardner, 430 U.S. at 362. Due process required that the capital defendant be afforded the opportunity to deny or explain the evidence against him in capital sentencing proceedings. Id.

In State v. Stewart, 283 S.C. 104, 107-108, 320 S.E.2d 447, 450 (1984), this Court held that evidence of the defendant’s prior crimes was admissible during the penalty phase of a capital trial. However, the jury must be instructed that these prior crimes may not be used as proof of a statutory aggravating circumstance, but may only be considered as they reflected upon the defendant’s character. Id.; see also Woodson v. North Carolina, 428 U.S., 280, 304 (1976); State v. Plath, 313 S.E.2d 619, 623 (1984). Clearly, victim impact evidence regarding prior crimes is not admissible.

It is clear the Court in Payne only authorized victim impact evidence as it pertained to the life of the victim for whose death the solicitor sought the death penalty. There is no language in Payne authorizing victim impact evidence on unrelated crime victims, and clear

language that victim impact evidence only pertains to the murder victim for whom the defendant is on trial. This Court was not required to answer the question of whether the solicitor may introduce victim impact evidence unrelated to the victim for whose murder the solicitor sought the death penalty in State v. Bennett, 369 S.C. 219, 632 S.E.2d 281 (2006) because a majority of this Court found the challenged evidence was not victim impact evidence. Id. at 228, 632 S.E.2d at 286. Nevertheless, this Court promised, when asked to do so, to “consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding” consistent with “the delicate balancing [of] the duty to conduct a sentencing inquiry broad in scope against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant’s prior crimes.” Id. at 229-230, 632 S.E.2d at 287.

Other states have properly found that victim impact evidence of other offenses is not admissible. See Andrews v. Commonwealth, 699 S.E.2d 237, 271-272 (Va. 2010), overruled on other grounds by John Craine, Inc. v. Hardick, 722 S.E.2d 610 (Va. 2012) (holding the admission of victim impact testimony by a witness regarding a prior crime violated state law); Lindsay v. State, 102 S.W.3d 223, 228 (Tex. App. – Houston 2003) (finding the trial judge’s admission of testimony by the capital defendant’s father and stepmother regarding the impact of the defendant’s prior indecency with his stepsister on their family was impermissible victim impact evidence); People v. Dunlap, 975 P.2d 723, 744-45 (Colo. 1999) (holding “[e]vidence regarding the impact of a capital defendant’s prior crimes on the victims of those crimes, however, is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he

is being sentenced”); People v. Hope, 702 N.E.2d 1282, 1287-89 (Ill. 1998) (explaining there is not “any language in Payne which would suggest that victim impact evidence stemming from a defendant’s other, unrelated crimes is admissible at his capital sentencing”); Sherman v. State, 965 P.2d 903, 914 (Nev. 1998) (concluding “that the impact of a prior murder is not relevant to the sentencing decision in a current case and is therefore inadmissible” although evidence of the existence of the prior murder would be admissible to prove an aggravating circumstance); Cantu v. State, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997)(holding “Payne does not contemplate admission of such evidence as permissible under the Eighth Amendment”).

The PCR court erred in failing to find trial counsel’s failure to object to the admission and consideration of victim impact evidence from Ammons, Gainey, and Burgess was deficient performance prejudicing Petitioner. The PCR court based its ruling on its incorrect view that the trial judge had complied with the Eighth Amendment and the Victim Bill of Rights by permitting individuals to give victim impact evidence concerning non-capital crimes after the conclusion of the sentencing proceeding. The PCR court erroneously determined there was no error because the victim impact evidence relating to the non-capital crimes could have been presented at the time the plea was entered or during the penalty phase. As an initial matter, the introduction of victim impact evidence concerning non-capital crimes is not admissible under Payne. Further, this evidence was used during the sentencing proceeding for the capital crime. It makes no difference that Petitioner had waived his right to a jury by pleading guilty, and as a result, Judge Russo was the fact-finder. The victim impact evidence on the non-capital crimes would have never been presented to a jury.

Even if victim impact evidence concerning the non-capital crimes were admissible for consideration of capital sentencing, the procedure employed by the judge in learning of that evidence prohibited Petitioner from confronting the evidence against him. The witnesses were not sworn and their statements were not limited to responses to questions carefully tailored to elicit specific responses regarding victim impact. Here, the witnesses were permitted to speak to the judge freely and openly with no restrictions. Due to the unrestrictive nature of their statements, Ammons and Burgess went beyond the impact of the crimes committed against them by Petitioner and told the judge of the impact of the capital murder on their lives. Burgess read a letter from his mother, which would not have been allowed had he taken the stand and his testimony subject to the rules of evidence, including the rule against hearsay. The provision of the Victim Bill of Rights allowing a defendant an opportunity to respond to a victim's statement is not a substitute for the constitutional protections afforded a defendant during a capital murder trial, including the right of confrontation and to have the witnesses take an oath to tell the truth.

Trial counsel's failure to object was deficient performance in light of the clear mandate in Payne and this Court's ruling in Bennett, which was decided two years before Petitioner's trial, which would have alerted trial counsel to the objectionable and improper evidence. Counsel's deficient performance prejudiced Petitioner because the trial judge considered improper and unsworn victim impact evidence when deciding on the ultimate penalty. The victims of the non-capital crimes offered very emotional and gut-wrenching narratives of the impact of Petitioner's crimes on their lives, but Petitioner had no opportunity or ability to rebut their unsworn statements.

V. In violation of Petitioner's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law, trial counsel provided ineffective assistance by failing to proffer or otherwise preserve for review the trial judge's refusal to allow Petitioner to present testimony from Edward Gause, of whom the defense learned only after completing the case in mitigation. In the alternative, assuming the issue was preserved for review, appellate counsel provided ineffective assistance by failing to raise the issue on direct appeal violating Petitioner's rights pursuant to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and state law.

Relevant facts

Facts produced at trial

After the presentation of evidence during the sentencing proceeding concluded, Judge Russo took an overnight recess to make a determination regarding capital sentencing. App. 1035, lines 8-17; App. 1036, lines 17-24. When the parties reconvened, Howle announced that when he returned to his office that morning he had a message "from someone who indicated that they had some information they thought was really important and wanted to talk to us." App. 1037, lines 2-19.¹² Howle informed the court of the following:

[Edward Gause] was the individual who when we called the number the person who answered said she was Mrs. [Gause]. Said he – the police officer drove up. He went over to Mr. [Gause], talked to him, said this guy come up to me, he's kind of rambling, he says he needs help, doesn't know what he's going to do. The officer – don't know the officer name, wife did not know. She said Mr. [Gause] would call back and tell me. But talking to the officer the officer went over to talk to Stephen, came back and said he just – I don't think, he's just kind of rambling, I don't see anything. Fellow didn't pay anymore attention and then apparently through seeing some of the pictures in the paper or whatever, left this message last night on the answering machine and we didn't see it till this morning. I have certainly not talked with him. I did not talk with the wife. So I can't verify all that, but obviously if he had contacted us earlier and

¹² Gause spoke with Judge Russo's wife the previous night, indicating it was urgent he speak with the judge about Petitioner's case. Judge Russo did not return the call. App. 1038, line 20 – App. 1039, line 8.

realized the incident I feel certain we would have called him as a witness and present the mitigation because I think it was material what he said. It would certainly go to state of mind to mental condition before these offenses happened. And to that extent, Your Honor, I guess we move to reopen to allow that person to testify. And like I say, I haven't had the opportunity to talk with him. I didn't even know his name until this morning and have not been able to contact him, only had that conversation with his wife.

App. 1037, line 21 - App. 1038, line 19. Trial counsel made clear that Gause offered evidence going to mitigation of punishment, including Petitioner's seeking help to cope with his mental illness. App. 1039, line 21 – App. 1040, line 1. Trial counsel did not ask to call Gause and proffer his testimony.

Denying Petitioner's motion to re-open, Judge Russo stated that while he appreciated the defense position that the evidence was "just recently discovered," the case had been "going on for some time" and that "[b]oth sides have had ample opportunity to present the evidence." App. 1039, lines 13-20.

Important for analyzing this issue is the cross-examination of Dr. Schwartz-Watts by the state. After Dr. Schwartz-Watts testified regarding her diagnosis of Petitioner with post-traumatic stress disorder (PTSD), arising from severe childhood sexual abuse and the symptoms exhibited by Petitioner consistent with her diagnosis, the solicitor questioned what percentage of the diagnosis was based upon "statements that he and he alone self-reported." Dr. Schwartz-Watts admitted that some of the diagnosis rested upon information gleaned only from Petitioner, which was not unusual in PTSD cases. The solicitor continued to press the doctor on this point:

Q. And when you get somebody with his history then it becomes that much more important for you to have to corroborate or verify what they say because they are inherently not credible for whatever reason.

- A. I can't say that. In a forensic evaluation it's important to get as much history as you can, and I think what makes somebody – I wouldn't say that they're not credible, but they have reasons not to tell the truth. They have legal consequences and that sort of thing.

App. 847, line 21 – App. 848, line 15. Concerning Petitioner's reporting of sexual abuse by his paternal grandfather, the solicitor asked if there were any "independent corroboration of that whatsoever." When Dr. Schwartz-Watts responded that she relied upon Petitioner's aunt having been abused by the same perpetrator, the solicitor questioned if she had corroborated the aunt's abuse, to which Dr. Schwartz-Watts answered, "Only with Ms. Caulder [the aunt]." App. 853, lines 3-19; App. 853, line 20 – App. 854, line 1.

The solicitor continued his attack on the diagnosis based upon Petitioner's claim of physical abuse by his father and an aunt and sexual abuse by his mother, brother, and an uncle:

- Q. Have you corroborated that Aunt Vickie knocked him around or not?
- A. No.
- Q. Corroborated that his brother assaulted him or not?
- A. Other than just his reports and, no.
- Q. That's self-reported?
- A. Correct.
- Q. His uncle is self-reported?
- A. Correct.
- Q. His father is self-reported?

A. Correct.

App. 854, lines 1-21. The solicitor also questioned Dr. Schwartz-Watts on Petitioner's reporting of drug use, which "[h]e and he alone" reported with no corroborating blood tests or urinalysis. App. 849, lines 20-22; App. 850, lines 16-18.

Direct appeal

Joseph L. Savitz, III represented Petitioner in his direct appeal and raised one issue:

The sentencing judge committed reversible error by excluding testimony that Bryant's aunt had been sexually abused by her father (Bryant's paternal grandfather), who the defense alleged also began abusing Bryant at the age of seven, as this evidence was both relevant under Rules 401 and 404, SCRE, and mitigating under the Eighth and Fourteenth Amendments to the United States Constitution.

App. 1393 – App. 1408. The state argued the testimony of Petitioner's aunt about her personal sexual abuse was not relevant, and the exclusion of the testimony was harmless because two defense experts testified regarding the aunt's abuse. App. 1409 – 1451.¹³ On January 7, 2011, this Court affirmed Petitioner's convictions and death sentence finding Petitioner was not prejudiced by the exclusion of the testimony because his experts were permitted to testify about his aunt's abuse to establish intrafamilial sexual abuse. App. 1452 - 1458; State v. Bryant, 390 S.C. 638, 704 S.E.2d 344 (2011).

¹³ Dr. Schwartz-Watts testified that she interviewed Petitioner's paternal grandmother and paternal aunt as part of her evaluation. She learned from them that Petitioner's paternal grandfather also sexually abused Petitioner's aunt. App. 816, line 20 – App. 817, line 7; App. 852, line 24 – App. 853, line 19. Dr. Marti Loring also testified that Petitioner's aunt was sexually abused. App. 954, lines 19-21.

Facts produced at the PCR hearing

When Edward Gause saw Petitioner's photograph in the newspaper during the sentencing proceeding, he realized he had had an encounter with Petitioner approximately one month before the murders. Gause saw Petitioner, with no shirt and no shoes, sitting on the side of the road playing in the sand.¹⁴ While Gause was at a store, Petitioner, who was "wild-eyed" and agitated, approached him. Petitioner pleaded with Gause: "I need some help. I am messed up. . . . I am having all kind of weird thoughts. . . . I am screwed up." App. 1850, line 3 – App. 1852, line 4; App. 1852, lines 21-24; App. 1856, lines 6-7; App. 1857, lines 3-9. Petitioner "made several statements in a drug-induced manner about crazy thoughts going through his head; he was going to do something. And he said I think I need help." Gause emphasized Petitioner's plea for help. App. 1815, lines 20-23; App. 1827, lines 5-15. Petitioner was not aggressive and had no weapon. App. 1857, lines 3-22.

Gause saw Tripp Mays, a police officer, at the door of the store. Gause escorted Petitioner to Mays, and then walked into the store. When Gause was leaving the store, he saw Petitioner walking away. Gause asked Mays what he was going to do, and Mays responded simply that Petitioner was "all screwed up in his mind." App. 1852, lines 5-20.

¹⁴ Although Petitioner was shirtless, Gause did not notice any tattoos or distinguishing marks on him. App. 1859, lines 10-18. Dr. Schwartz-Watts indicated that Petitioner had a tattoo on his chest; however, she was unable to say when Petitioner got the tattoo. App. 2073, line 21 – App. 2074, line 22. Petitioner also testified he had a star tattoo on his chest at the time of his arrest; however, he was uncertain if he had the tattoo a month prior to his arrest. App. 2113, line 13 – App. 2114, line 2.

Gause did not think about the encounter again until he saw Petitioner's photograph in the newspaper. When Gause saw Mays again, he asked if Mays remembered talking to Petitioner at the store. Mays responded that he did, and the two discussed that Petitioner was being tried for multiple murders. App. 1853, lines 1-8. Gause attempted to contact Judge Russo and the public defender office because he "felt like [he] needed to do something" because Petitioner had asked for help. The encounter weighed "heavy on [his] heart because [he] didn't help him." App. 1853, line 9 – App. 1854, line 3.

Howle viewed Gause's testimony as critical to the case in mitigation because he was an independent witness who was so concerned about Petitioner's mental well-being after a brief encounter at a store that he approached a police officer to intervene. App. 1815, lines 5-13; App. 1816, line 25 – App. 1817, line 4. Gause's testimony would impact the case in mitigation significantly because he had observed Petitioner "in a bizarre mental state" prior to the murders. App. 1815, lines 14-20; App. 1815, line 25 - App. 1816, line 4. Gause's observations would have shown Petitioner's "frame of mind," that he "was not very coherent," "was saying some things that were really very odd," and "was acting very irrational" about a month before Tietjen's death. App. 1817, lines 6-7; App. 1817, lines 15-22. According to Howle, the information about pornography on Tietjen's computer, discussed infra, coupled with Gause's account of Petitioner's decompensating mental health "may all work together to show a personality that was more inclined to be considered in mitigation." App. 1800, lines 15-20.

Howle was uncertain whether he had proffered the testimony, but he noted that when he raised the issue to the trial judge, neither he nor co-counsel had spoken to Gause.

If anything, they were proffering what they thought Gause would say. App. 1816, lines 8-19. Howle obtained Gause's statement after the sentencing proceeding because he believed it could be used on appeal; however, the statement was not presented to the trial judge or made a part of the trial record. App. 1826, line 25 – App. 1827, line 4.

Dr. Schwartz-Watts testified at the PCR hearing that she would have used Gause's observations of Petitioner a month before the crimes by in her diagnosis of Petitioner and in her testimony regarding Petitioner's mental health. She did not "have a lot of data points" regarding Petitioner prior to the charges; therefore, Gause's statements would have filled a gap in Petitioner's history. Gause's observations established Petitioner's mental health when "[t]here [was] no reason for him to be . . . fabricat[ing] symptoms" from the perspective of a neutral observer. App. 2059, line 15 – App. 2060, line 14. Importantly, Gause's observations corroborated what she learned from other sources, corroborated her diagnosis of Petitioner, and bolstered the credibility of Petitioner's statements and Dr. Schwartz-Watt's testimony. Corroboration was extremely important because "this was a case where he didn't have a lot of corroborating evidence to show that he had been abused," and during the cross-examination of Dr. Schwartz-Watts at trial, the solicitor repeatedly exploited the lack of corroboration. App. 2060, line 15 – App. 2061, line 3; App. 2061, lines 4-14.

Appellate counsel never considered raising on appeal the trial judge's refusal to re-open the record to permit the defense to present testimony from Gause. Although appellate counsel had no memory of what he thought of the claim at the time he was preparing Petitioner's brief, he had reviewed the transcript in preparation for his testimony at the PCR hearing and found it to be "somewhat vague and unconnected to the

actual incident itself that was being appealed.” However, appellate counsel very clearly and repeatedly stated that he did not abandon the issue as a matter of strategy. App. 2043, line 11 – App. 2044, line 13; App. 2047, lines 7-18. Appellate counsel further testified that “if [he] had to do it over again, [he] would probably raise it.” In short, it was “a great issue” that he failed to raise. App. 2045, lines 6-15.

Order denying relief

The PCR court found that Petitioner “failed to show that trial counsel was ineffective in his handling of the late information from Mr. Gause” because trial counsel “promptly brought the matter to the court’s attention and requested the ability to present Mr. Gause.” Trial counsel explained “that the testimony was expected to go to [Petitioner]’s mental state which was a major portion of the mitigation case.” Thus, the PCR court concluded Petitioner failed to show ineffective assistance of trial counsel concerning this claim for relief. App. 2609.

Turning to the alternative ground, the PCR court held Petitioner “failed to show that appellate counsel was ineffective in his decision not to raise the issue in the direct appeal.” Regarding appellate counsel’s testimony that he should have raised the issue, the PCR court characterized the response as “a classic case of hindsight reasoning” that provided no support for relief. App. 2610. The court found no evidence of neglect or inadvertence where appellate counsel, who was experienced in capital appeals, “made his professional review of the record and determined not to raise the issue.” App. 2610. Additionally, the court was persuaded that Petitioner “failed to show this issue was a ‘stronger’ issue than the one raised.” App. 2611. Although the PCR court found no error in trial counsel’s preservation of the issue, the court credited appellate counsel’s

testimony that the proffer at the trial was “vague and not clearly connected to any of the crimes.” App. 2611. The PCR court also found evidence in the record demonstrating that Petitioner “had reported issues to his probation officer and family prior to the trial, and even had sought counseling and help before the crimes.” App. 2611.

Although the court found neither trial counsel nor appellate counsel performed deficiently, the court also examined whether any prejudice resulted. The PCR court found Gause’s testimony could not be given any significant weight because Gause admitted that his “memory was somewhat faulty in some respects” and he was “not sure on the time.” App. 2611. Finally, the PCR court found there was “no indication that having [Gause’s] vague report would have affected any mitigation strategy or diagnosis.” App. 2612.

Rule 59(e) motion

In his motion pursuant to Rule 59(e), SCACR, Petitioner objected to the PCR court’s finding that appellate counsel’s view that the issue was “vague” was a reasonable strategic basis for failing to raise it and noted appellate counsel’s testimony that he should have raised the issue. Additionally, Petitioner argued that prejudice was established because Gause’s testimony bolstered the mitigation case. By corroborating Dr. Schwartz-Watts’ diagnosis, Gause’s testimony would have allowed her to answer the solicitor’s attack on cross-examination. Petitioner further objected that the PCR court’s reliance on Petitioner having tattoos to challenge Gause’s credibility was misplaced because the record failed to establish when Petitioner got the tattoos. Finally, Petitioner objected to the PCR court’s failure to address State v. Owens, 346 S.C. 637, 552 S.E.2d 745 (2001), overruled on other grounds by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005),

where a death sentence was reversed because the trial judge erred in failing to grant a continuance to permit the defendant to investigate evidence surrounding a murder that occurred after the guilt phase, but prior to the sentencing phase for which Petitioner had been charged and the state sought to introduce as character evidence. App. 2630.

Order denying Rule 59(e) motion

The PCR court affirmed its decision that not raising an issue because it was “vague” was a reasonable strategic basis. Further, the PCR court was not persuaded by appellate counsel’s testimony that he should have raised the issue because the court considered the testimony to be “hindsight reasoning” not amounting to ineffective assistance of counsel. App. 2462. The PCR court rejected Petitioner’s contention that this issue was similar to the one raised in Owens, because Gause’s testimony was unrelated to any of the crimes for which Petitioner had been charged and was not “highly prejudicial” as the evidence in Owens had been. The PCR court was unconvinced that Gause’s testimony, which would have shown Petitioner’s mental condition before the offenses, would have assisted Petitioner because his mental health was clear from his behavior during the trial and PCR hearing. App. 2643.

Regarding the presence or absence of a tattoo on Petitioner, the PCR court claimed to have noticed a tattoo on Petitioner’s chest and that Petitioner admitted to having a tattoo; however, the PCR court failed to address the timing issue. App. 2462.

Discussion

The PCR court’s ruling is inconsistent because either trial counsel was ineffective due to an insufficient proffer or appellate counsel was ineffective for failing to raise the

preserved issue, but it cannot be both. Therefore, the decision on this issue hinges on the prejudice analysis.

In order to prove ineffective assistance of counsel, Petitioner must show that counsel rendered deficient performance resulting in prejudice to him. Strickland, *supra*. Counsel's performance is measured for reasonableness against prevailing professional norms. Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Additionally, all criminal defendants are entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398 (1985). Courts review claims of ineffective assistance of appellate counsel using the test announced in Strickland, *supra*. Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). Appellate counsel is not required to raise all non-frivolous claims, but may exercise sound professional judgment in selecting the appropriate grounds for a direct appeal in order to maximize the likelihood of a favorable result. Smith v. Robbins, 528 U.S. 259, 288 (2000).

Turning first to the issue of ineffective assistance of trial counsel, the record demonstrates that trial counsel failed to make a sufficient proffer to preserve the issue for appellate review. He only informed the trial judge about the message on his office's answering machine from Gause briefly describing his previous encounter with Petitioner. He never spoke to Gause or even issued a subpoena to Gause. He did not even get an affidavit from Gause. To preserve an issue for review, our appellate courts require "the

questions presented for its decision must first have been fairly and properly raised in the lower court and passed upon by that court.” Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939). Additionally, “[a]n alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in the absence of an adequate proffer of evidence in the court below.” Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990)(citing Raleigh & C.R. Co. v. Jones, 104 S.C. 332, 88 S.E. 896 (1916); Vause v. Mikell by Solomon, 290 S.C. 65, 348 S.E.2d 187 (Ct. App. 1986)); see also, Gold Kist, Inc. v. Citizens and Southern Nat. Bank of South Carolina, 286 S.C. 272, 333 S.E.2d 67 (Ct. App. 1985).

Trial counsel’s interaction with the court on this point required only a few pages of transcript. He was unable to provide sufficient detail to result in an issue preserved for review. He did not tell the trial judge that Petitioner approached Gause asking for help. Nor did he tell the judge that Gause was so concerned he sought out a police officer. At a minimum, the proffer was vague on these points, which was exactly the point made by appellate counsel. Trial counsel obtained a statement from Gause after the judge imposed a death sentence, but failed to file any motion or request review of the statement by the trial judge so that it would be a part of the record for appellate review. This left the trial judge with the ability to review and rule upon only what trial counsel had informed the court the witness would say, which was very limited. Preservation requires an “adequate” proffer, which was lacking in this case. Therefore, trial counsel performed deficiently in failing ensure the record contained an adequate proffer to permit appellate review resulting in prejudice to Petitioner. Had the issue been properly preserved, appellate

counsel could have raised the meritorious issue to this Court and obtained a favorable ruling.

Turning to the issue of appellate counsel, the PCR court found that Petitioner had failed to show this issue was stronger than the one raised and that appellate counsel exercised sound reasonable strategy by deciding to raise the issue due to its vagueness. The PCR court erred on both counts.

Even if the court countenances a weighing of the merits of the issues, the PCR court's calculation is incorrect. The question is not whether the issue was stronger. The question is whether it was a winning issue. This comparison is a legally invalid basis on which to make a decision. Furthermore, this is not a case where Appellate counsel raised multiple issues and was weighing the addition of another weaker issue and whether it would detract from what was being presented. Appellate counsel raised one issue in a capital appeal. Certainly, there can be no weighing when the decision is whether to add a second issue.

The issue raised by appellate counsel concerned the exclusion of testimony regarding the sexual abuse of Petitioner's aunt; however, the record disclosed that this evidence was presented to the fact finder through the testimony of two expert witnesses. Thus, the issue raised was very weak. On the other hand, the issue relating to Gause was considerably stronger because Gause was an independent witness who observed Petitioner's mental health decompensation firsthand shortly before the murders. This was not an example of Petitioner seeking help from his family or probation officer; rather, this was an example of a member of the community seeing Petitioner in distress and trying to get him help from the police. Gause's observations would have corroborated Petitioner's

PTSD diagnosis and gutted the solicitor's cross-examination of Dr. Schwartz-Watts. Therefore, appellate counsel failed to raise the stronger appellate issue.

No valid strategic reason existed for appellate counsel's failure to raise the Gause issue. In fact, appellate counsel testified unequivocally that he had no strategic reason for failing to brief the issue. If trial counsel articulates a valid reason for employing certain strategy, then the conduct is not ineffective assistance of counsel. Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992). In Stokes, this Court determined trial counsel employed a valid strategy in not calling witnesses that he believed lacked credibility. Id. Similarly, this Court found counsel's trial strategy reasonable in Drayton v. Evatt, 312 S.C. 4, 10-11, 430 S.E.2d 517, 521 (1993) where trial counsel did not present evidence of the defendant's future adaptability because to do so would have allowed the introduction of negative psychiatric and discipline reports. On the other hand, this Court found counsel deficient in Gilchrist v. State, 350 S.C. 221, 228 n.2, 565 S.E.2d 281, 285 n.2 (2002) for failing to object to the state's vouching for the credibility of a witness where counsel stated he decided not to object based upon a strategy, but never articulated that strategy. In Sanchez v. State, 351 S.C. 270, 276, 569 S.E.2d 363, 366 (2002), this Court determined trial counsel's reason for not objecting to an officer's hearsay testimony of the alleged assault on a child victim, which was that the testimony would help show the allegations were vague, was unreasonable because the hearsay corroborated the victim's testimony.

The PCR court found that appellate counsel chose not to raise the issue due to its vagueness; however, the record before the court did not support the court's rationale. Appellate counsel had no recollection of what he thought of the issue at the time of

briefing, but thought the issue was “somewhat vague” at the time of the PCR. He further testified that if he had the case again, he would brief the Gause issue. The appellate record contained an offer of evidence and a ruling by the trial judge, which was all that was required to preserve the issue for review. See Chandler v. People’s Nat. Bank of Greenville, 140 S.C. 433, 138 S.E. 888, 890 (1927)(reviewing proposed testimony from a member of the bar in good standing as to what he proposed to prove by the witness). Nor could, in a single-issue brief in a capital case, there be a valid strategic reason for failing to raise a winning issue as the second issue.

Both rulings by the PCR court cannot be valid. The ruling cannot be that trial counsel properly preserved the issue **and** appellate counsel failed to raise it due to vagueness. Either the issue was properly preserved and appellate counsel should have raised it or trial counsel was ineffective for failing to preserve it. In this case, no strategic reason existed for failing to raise the issue as demonstrated by a review of the case law, and appellate counsel stated unambiguously that he had no strategic reason.

Turning to the merits of the Gause issue, there is a reasonable probability that the outcome of the appeal would have been different because the trial judge erred in failing to reopen the record. In State v. Wren, 470 S.E.2d 111, 112-113 (Ct. App. 1996), the Court of Appeals affirmed a trial judge’s decision to reopen the record to allow the prosecution to introduce into evidence at Wren’s criminal trial for drug trafficking. The Court explained that a motion to reopen is left to the sound discretion of the trial judge and will be reversed when the trial judge abused his discretion. Id. at 112. Further, relying on Rule 103, SCRE, the Wren Court held that reversible error exists when a judge admits or excludes evidence and a substantial right of a party is affected. The jury heard extensive

testimony about the search of Wren's luggage, the seizure of the cocaine, Wren's arrest, the chain of custody, and the chemical testing of the cocaine. Therefore, the Court surmised, the additional evidence of the drugs did not affect a substantial right. Id. at 113. Likewise, this Court affirmed a trial court allowing the state to reopen the case and prove the value of property taken in a grand larceny case after the defendant had moved for a directed verdict. State v. Humphrey, 276 S.C. 42, 43, 274 S.E.2d 918, 918 (1981). However, in Wright v. Strickland, 306 S.C. 187, 188, 410 S.E.2d 596, 597 (Ct. App. 1991), the Court of Appeals found a trial judge's refusal to reopen the record was not an abuse of discretion where the moving party neither proffered the testimony he sought to present nor represented that the testimony would establish a relevant fact in the case. Thus, "he made no showing that additional testimony would make any difference in the outcome of the case." Id.

Although this Court was not confronted with a motion to reopen in Owens, supra, the facts and applicable legal analysis are remarkably similar to the instant matter. This Court reversed a death sentence where the trial court failed to grant a continuance to allow the defense to investigate an alleged murder committed by Owens after the guilt phase, but before the sentencing phase. The jury returned guilty verdicts on Monday evening and court reconvened on Wednesday for the sentencing phase. The state sought to introduce evidence of the defendant's future dangerousness and inability to adapt to prison based upon his alleged involvement in the death of a fellow inmate on the day after the jury returned its guilty verdict at the detention center. Id. at 653, 552 S.E.2d at 754. This Court held that although defense counsel was aware of Owens' confession to the murder, defense counsel "had little, if any, meaningful opportunity to investigate the

circumstances” surrounding the inmate’s death. Due process necessitated a continuance to allow defense counsel the opportunity to interview the inmates and personnel at the detention center. The lack of opportunity to counter the brutal details of his alleged confession was “highly prejudicial” to Owens. Id. at 664-665, 552 S.E.2d at 759.

The trial judge abused his discretion by refusing to reopen the record to allow Gause to testify. The stated reason — that the case had been “going on for some time” and that “[b]oth sides have had ample opportunity to present the evidence” — bespoke an abuse of discretion as it failed to consider the nature of the evidence offered, which could not have been discovered by Petitioner no matter how long the case had been going on. This evidence was recently discovered, just as the aggravating evidence in Owens was recently discovered. The fact that the evidence was helpful to Petitioner, not harmful as it was in Owens, does not control the outcome. Gause’s testimony went to a matter at issue because it concerned Petitioner’s mental status around the time of the offenses. Gause’s observations would have assisted Dr. Schwartz-Watts with her diagnosis, and most importantly, his testimony would have undercut the solicitor’s cross examination by corroborating the expert. A single judge determined Petitioner’s fate; therefore reopening the record would not have inconvenienced or confused a jury. The proposed evidence affected multiple substantial rights, including due process, the right to present a defense, and the right to a fair trial. Petitioner suffered prejudice as a result of appellate counsel’s deficient performance because there is a reasonable probability that the outcome of the appeal would have been different. See Simpkins v. State, 303 S.C. 364, 401 S.E.2d 142 (1991)(holding that appellate counsel’s failure to raise a meritorious issue that would have entitled the defendant to relief was ineffective assistance).

VI. Petitioner's due process rights under the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and under state law were violated when the prosecution failed to release the complete computer analysis performed by law enforcement, which was relevant to Petitioner's case in mitigation of punishment because it corroborated Petitioner's statement regarding the circumstances surrounding Tietjen's death and supported medical evidence of Petitioner's mental illness.

Relevant facts

Facts produced at trial

Petitioner went to his grandmother and aunt on August 19, 2004 asking for help dealing with the physical and sexual abuse he suffered as a child. Petitioner confided that he had been sexually molested by his grandfather, uncle, and brother. While relating the abuse he suffered, Petitioner was “[v]ery nervous, upset, worried, shaking.” “He looked like he was being tortured.” Petitioner’s aunt called the police asking for help. Based upon the police’s recommendation, Petitioner was connected to a counseling center via a sexual abuse hotline and Petitioner continued to look for help. App. 773, line 16 – App. 776, line 18; App. 789, line 16 – App. 793, line 11. At the end of August, Petitioner asked his probation agent for help because “he had been unable to sleep due to some problems as a child.” The agent referred him to the same counseling center he consulted through the hotline, but Petitioner was unable to afford the services. App. 736, line 12 – App. 737, line 12. Shortly thereafter, on September 30, 2004, Petitioner went to the emergency room after two men assaulted him. App. 818, lines 3-10. In early October 2004, the murders started.

On October 11, 2004, police found Tietjen murdered in his home. Near Tietjen’s body, police found a handwritten note on a table that read: “No more sick computer porn for this sick fucker. By the way, just keeping my promise to all. P.S. Good luck finding

me.” App. 515, line 7 – App. 516, line 13.¹⁵ Petitioner told police he went to Tietjen’s house seeking assistance with his disabled truck. As the two talked, Tietjen told Petitioner “he wishe[d] he were young like [Petitioner] because he liked young girls.” Tietjen also talked about “some web sites he looked up” in relation to his desires. At some point, Petitioner looked at Tietjen’s computer and saw pornography, including “a young girl with a horse in her.” He examined the computer’s internet history and found “more sites than [he could] count of nude young girls.” While discussing the murder of Tietjen and the pornography, Petitioner told the police he thought he “poked his eyes out.” App. 609, lines 8-11; App. 609, lines 18-19; App. 610, line 2 – App. 613, line 24.¹⁶

At trial, Dr. Schwartz-Watts detailed how Petitioner was repeatedly sexually abused by multiple members of his family.¹⁷ Additionally, Petitioner was involved with the criminal justice system starting at the age of eleven. He was brutalized by his peers in DJJ. App. 815, lines 4-12. His scholastic performance was very poor due to his low average intelligence and attention deficit disorder, requiring his placement in emotionally handicapped classes. App. 815, line 17 – App. 816, line 7. Unsurprisingly, Petitioner had been diagnosed with chronic depression at an unusually young age. App. 891, lines 20-21. After a thorough review of Petitioner’s medical, mental health, and social history,

¹⁵ The state’s DNA analyst identified semen on the swab collected from Tietjen’s penis, but no further testing was conducted. App. 596, lines 3-17.

¹⁶ Petitioner reported to Dr. Schwartz-Watts that he looked on Tietjen’s computer and saw upsetting pornographic images. Petitioner believed he had poked out or burned Tietjen’s eyes relative to this discovery. App. 834, lines 11-14; App. 834, lines 18-22.

¹⁷ Dr. Schwartz-Watts’ report was made an exhibit at the PCR hearing. App. 2353-2369.

Dr. Schwartz-Watts diagnosed Petitioner with severe PTSD. App. 814, line 21 – App. 815, line 1; App. 827, lines 8-9.

Dr. Schwartz-Watts obtained the counseling records where Petitioner sought help in 2004 to deal with the sexual abuse he suffered. The records showed Petitioner was experiencing flashbacks of the childhood sexual abuse he suffered. App. 821, line 21 – App. 823, line 12. A security video from McDonald’s showed Petitioner on the date of one of the murders exhibiting behavior, such as hypervigilance, consistent with the PTSD diagnosis. App. 825, lines 4-19; App. 870, lines 3-20. Dr. Schwartz-Watts opined that the murders were related to his PTSD because Petitioner felt threatened. The lack of evidence of any of the individuals acting in a threatening way was part and parcel of Petitioner’s mental illness. App. 833, lines 21- App. 833, line 2. Petitioner felt sexually threatened by these males due to his prior sexual abuse and the misperceptions caused with his mental illness. App. 835, lines 16-17; App. 867, lines 3-8.

As discussed in Issue V, supra, the solicitor vigorously cross-examined Dr. Schwartz-Watts on the lack of corroboration to support her diagnosis and Petitioner’s statements to police. Additionally, the solicitor used the fact that two individuals were urinating at the time of their deaths to argue they were not in a threatening position. Dr. Schwartz-Watts disputed this characterization - Petitioner would consider unzipped pants and exposed genitals as sexually threatening due to his mental illness and history of sexual abuse. App. 859, line 24 – App. 860, line 16.

The solicitor argued in closing that Petitioner’s conduct was not “impulsive behavior” and had “[n]othing to do with trauma from sex abuse.” App. 1009, lines 16-17. Instead, Petitioner was a “pathological liar” in the eyes of the solicitor. App. 1021, line 3.

He claimed the two men who were urinating on the side of the road when killed were vulnerable and “not a threat in the world.” App. 1013, line 25 – App. 1014, line 2. The solicitor called Petitioner “sadistic” for burning Tietjen’s eyes. App. 1019, lines 14-16. **Petitioner added to the indignity of the death when “[h]e got on their computer and began to visit porn sites by his choosing, not sites from T.J. [Tietjen] and Mildred.” App. 1020, lines 7-9.**

Facts produced at the PCR hearing

SLED Agent David Givens analyzed Tietjen’s computers. App. 1703, line 22 - App. 1704, line 16. Givens’ case management history showed that he and SLED Agent Durwood Barton met on October 20, 2004 to discuss the case. Barton advised Givens that “the following [was] needed from Tietjen’s computer: Internet Hx (to possibly determine if the suspect may have used the computer after the murder and the existence of porno and if possible what type of porn, i.e. child, animal, etc.” App. 1718, lines 12-17; App. 2234.

On October 21, 2004, Givens initiated Encase analysis on Tietjen’s computer. He “[l]ocated adult porn in Temp Internet files,” and pornographic movies, but found “[n]o child or bestiality photos.” He recovered all photos from the computer and conducted an inventory of the computer’s internet history. App. 1705, lines 1-21; App. 1719, lines 10-14; App. 2234. Givens and Barton reviewed the Encase analysis on October 28, 2004. App. 2225. Givens produced an electronic report, including the computer’s internet history, which was burned onto a disk.¹⁸ App. 1706, line 23 – App. 1707, line 25.

¹⁸ This disk was admitted as Petitioner’s Exhibit #8 at the PCR hearing and is on file with this Court.

Givens placed the internet history and the hyperlinks on the disk for review “[b]y anybody that wanted it.” App. 1732, lines 19-25. He was unsure if this electronic report had been provided to Barton or the solicitor.¹⁹ App. 1707, lines 1-7; App. 1713, lines 4-6. What was provided to Barton and the solicitor was Givens’ investigative report dated March 15, 2005 indicating nothing of evidentiary value was found. App. 1714, lines 3-16; App. 1713, lines 7-17; App. 2206-2207.

Tietjen’s internet history revealed countless web addresses with names clearly denoting pornographic materials. On October 11, 2004, the date of Tietjen’s death, his computer showed someone had accessed multiple websites for pornography. App. 1738, line 14 – App. 1740, line 8.²⁰ As revealed through the testimony, the website addresses

¹⁹ Although Solicitor Jackson claimed he had no conversations with Givens, the records indicated the two talked by phone on October 25, 2004. App. 1958, line 13 – App. 1959, line 5; App. 1959, lines 6-17. Jackson claimed that SLED never provided him with the pornography discovered by Givens. App. 1967, lines 7-12; App. 1969, lines 5-11; App. 1980, lines 9-15. Jackson was aware prior to trial “there was an issue as to whether pornography was on the computer, or pornography was seen at some time by the defendant.” App. 1971, lines 9-14. However, he denied making “an intentional decision not to disclose information about the computer.” App. 1971, lines 15-20. Jackson’s co-counsel, Dudley Saleeby, also testified that he never received the report indicating pornography was found. App. 2087, lines 16-20. On this point, the PCR court found the evidence was in the possession of the state and not disclosed and this ruling was not challenged.

²⁰ Givens believed Tietjen’s computer “appear[ed] to be on the 24 hour format” leading Givens to conclude the computer was thirteen hours fast. He drafted a timeline, but explained “[t]here [was] no certainty with regard to all the activities but a general consensus was reached.” He recovered two dates from the internet history, and “[i]t appear[ed] that Date #2 column will coincide with actual file access dates/times.” App. 1747, lines 7-8; App. 2225; App. 2234. Accordingly, Givens asserted that the websites that appeared to have been viewed on October 11th were actually viewed on October 10, 2004. App. 1752, lines 22-24. However, despite being aware of the claimed thirteen-hour difference, Tietjen’s computer was not searched for activity after October 11. App. 1756, lines 7-20.

included various forms of “teen” in the names, such as “Fresh Teens,” “Teen Blow Job Auditions,” and “Euro Teens Triple X.” App. 1741, lines 1-21. The records showed Tietjen’s computer accessed many pornographic websites, such as www.twoinherbutt.com, www.hotnaughtywives.com, and www.boobielovers.com, in September 2004 prior to any contact between Petitioner and Tietjen. App. 2239-2240. On September 30, 2004, Tietjen’s computer accessed web addresses, such as www.xxxsororities.com, www.xratedgangbang.com, www2.dicksontits.com, and www.girlslickgirls.com. App. 2283 – 2286. Additionally, the records showed Tietjen’s computer continued to access pornographic websites on October 10, 2004 through October 11, 2004. Those websites included www.fetishhell.com, www.fetishmovies.com, www.suckmebitch.com, www.freshteens.com, www.euroteensxxx.com, and www.teenblowjobauditions.com. App. 2257-2263. At the time of the PCR hearing, the randomly selected websites from the internet history viewed displayed pornography. App. 1730, line 19 – App. 1732, line 18; App. 1734, line 20 – App. 1736, line 14.

Defense counsel Howle filed motions requesting discovery prior to trial. App. 1794, lines 7-17.²¹ One of the items he received in discovery was called “computer

²¹ On November 23, 2004, counsel moved for discovery in the case pursuant to Rule 5, S.C. Crim. P. and Brady v. Maryland, 378 U.S. 83 (1963). App. 2308-2309. On May 7, 2007, the solicitor provided multiple items including a computer exam. App. 2310-2312. On May 29, 2007, trial counsel moved for an order of discovery. App. 2338-2344. On October 30, 2007, Judge Russo issued an order of discovery directing all law enforcement agencies to make known to the solicitor any and all information and materials relevant to any pending or prior charges against the defendant or the sentence sought to be imposed. **The order further directed that any information that the prosecution concluded was not discoverable was to be made available to the court for an in camera review and independent determination of disclosure.** App. 2345-2347.

exam” in reference to Tietjen. App. 1795, line 14 – App. 1796, line 4. Although he received what the prosecutor represented was the “computer exam” of Tietjen’s computer, Howle did not receive the internet history for the computer. App. 1796, line 14 – App. 1797, line 12; App. 1797, lines 17-22. Without question, the defense team was pursuing evidence of pornography on Tietjen’s computer. In fact, Howle’s investigator contacted SLED requesting an explanation of the computer analysis that was received; however, SLED refused to answer his questions. App. 1834, line 15 – App. 1836, line 3; App. 2376.²²

At the time of trial, Howle was unaware that SLED’s computer analysis revealed pornography on Tietjen’s computer. App. 1797, line 23 – App. 1798, line 4. According to Howle, not having the complete report prejudiced Petitioner because the defense experts would have used it for their evaluations. App. 1800, lines 2-10. When discussing his trial strategy, Howle testified that he relied upon an argument between Petitioner and Tietjen concerning the Masons as the triggering event of Tietjen’s death. He further explained that the defense relied heavily upon this argument because they “did not really have all the information in regard to properly put forth an argument with the pornography that was there.” App. 1817, lines 6-14. According to Howle, he did not see an extensive amount of pornography on the computer at the time of the trial, but if he had known of the pornography, he would have changed defense’s tactics. App. 1820, lines 15-19.

²² Carlisle McNair, the fact investigator in the case, prepared a memorandum dated February 27, 2008 regarding his attempted interview of Billie Crumpton at SLED’s computer lab. App. 1916, line 23 – App. 1917, line 6. McNair initially tried to talk to Givens, but was referred to his supervisor, Crumpton. McNair asked Crumpton to explain the computer exam report. Crumpton refused without the permission of the Sumter County Sheriff’s Office. App. 1918, line 10 – App. 1919, line 8; App. 2376.

Further, the confusion regarding the time of the viewing of the pornography on Tietjen's computer would not have deterred Howle from pursuing the use of the computer analysis. App. 1820, line 20 – App. 1821, line 5.

James Babb, who represented Petitioner until one month before his guilty plea, was very interested in obtaining the computer analysis because Petitioner had informed him that the pornography was “part and parcel of his interchanges leading up to the death of Mr. Tietjen.” App. 1880, lines 8-14; App. 1891, lines 1-7. In fact, the defense hired a computer forensics expert in anticipation of SLED's computer analysis. App. 1882, lines 13-15. Babb was looking for any evidence of pornography. App. 1884, lines 18-20. Had he received the evidence of pornography on Tietjen's computer as required under the discovery rules, he would have discussed the evidence with Petitioner, at a minimum. App. 1884, line 21 – App. 1885, line 16. Additionally, he would have informed the psychiatrists of the evidence. App. 1886, lines 2-5; App. 1894, lines 7-12. In fact, Babb would have hired additional more specialized experts to determine how the pornography related to the other evidence in the case, including the victims' pants being unzipped and Petitioner's childhood sexual abuse. App. 1887, lines 13-25; App. 1896, lines 11-21. Babb recalled that Petitioner had mutilated the body in connection with the pornography. App. 1927, lines 23-25. Babb wanted the information regarding pornography to address “the mental health aspects, the psychological implications.” App. 1928, lines 8-12. Babb decided not to question Tietjen's family regarding the pornography on his computer because he had no corroboration of its existence. App. 1888, line 2 – App. 1889, line 1. Without question, the pornography on Tietjen's computer was a material issue in the case.

App. 1897, lines 11-13; App. 1926, lines 16-19; App. 1927, lines 1-3; App. 1944, line 22 – App. 1945, line 4; App. 1947, lines 11-15.

Babb disputed the state’s contention that evidence of pornography on Tietjen’s computer, which would corroborate Petitioner’s confessions, would have been simply more evidence against Petitioner. Babb explained, “It would have given the doctors who were trying to diagnose him and figure out what was going on in his head, you know, more to work with. So no, that would not have been counterproductive to the defense at all.” App. 1934, lines 10-18.

Dudley Saleeby, another prosecutor on the case, testified that had he received the report indicating pornography was found on the computer, he would have “forward[ed] this to the defense attorneys.” App. 2090, lines 10-20; App. 2091, lines 15-16; App. 2093, lines 7-9. He agreed the report had “evidentiary value” and was “something that would have needed to be turned over.” App. 2093, lines 13-15. Saleeby testified that the internet histories would have been “[u]seful, for sure” for the defense. App. 2094, lines 15-19.

During the PCR proceedings, Dr. Schwartz-Watts testified that she and Petitioner discussed pornography during her evaluations. Additionally, she was familiar with Petitioner’s statements to police indicating he saw pornography on Tietjen’s computer. However, she never received any corroboration of Petitioner’s claims. Prior to the trial, she “begged” for corroboration on the pornography aspect. Her diagnosis and expert opinion depended upon corroboration of what Petitioner was telling her. App. 2055, line 3 – App. 2056, line 20; App. 2079, lines 17-20. “Clearly, pornography had a role in this

crime” based upon Petitioner’s statements to Dr. Pam Crawford and to Dr. Schwartz-Watts.

Pornography “explained the mutilation of Mr. Tietjen’s body,” most importantly, the burning of his eyes. Petitioner told Dr. Crawford “if the eyes go astray, poke them out”²³ relative to him burning Tietjen’s eyes.²⁴ The pornography “clearly explain[ed] the things that were particularly heinous about this crime.” App. 2057, lines 5-21; App. 2489, lines 12-16; App. 2079, lines 1-16. Dr. Schwartz-Watts opined that the murder “had some sexual motivation” to it, and the discussion with Tietjen about “pornography, sex with younger children ... was a trigger for him.” App. 2057, line 22 – App. 2059, line 1. The timing of Petitioner viewing the pornography on the computer was not dispositive of its relevance. The fact that the computer actually had pornography on it “gave some credibility to his accounts” and “explained the mutilation of [Tietjen’s] body.” Pornography on Tietjen’s computer was “crucial.” App. 2059, lines 2-14.

Not having the evidence of pornography on the computer “really opened [her] up on cross.” Not only would the evidence corroborate Petitioner’s version of events, it would have corroborated the fact that the murders were of a sexual nature and consistent with his symptoms of PTSD. App. 2080, lines 12-24. Dr. Schwartz-Watts explained that

²³ “But I say unto you, that whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart. And if thy right eye offend thee, pluck it out, and cast it from thee: for it is profitable for thee that one of thy members should perish, and not that thy whole body should be cast into hell. And if thy right hand offend thee, cut it off, and cast it from thee: for it is profitable for thee that one of thy members should perish, and not that thy whole body should be cast into hell.” Matthew 5:28-30 (King James).

²⁴ A transcript of Dr. Crawford’s interrogation of Petitioner was made an exhibit at the PCR hearing. App. 2385-2512.

she had little corroboration of Petitioner's sex abuse, which was exploited on cross-examination and in closing by the solicitor saying Petitioner had lied about all of it. If she had the evidence of pornography on Tietjen's computer, it would have shown Petitioner was being truthful, which would have given credibility to his revelations about sexual abuse as well. App. 2081, lines 2-15

Order denying relief

The PCR judge found that while it was undisputed that "a complete report of SLED Agent Givens' analysis on the Tietjen computer which revealed the internet history from the prior day and the existence of adult pornography on the computer was not provided to defense prior to the sentencing proceedings" and that the defense requested all exculpatory and mitigating evidence, Petitioner had failed to show a reasonable probability that the result of the proceeding would have been different had the prosecution disclosed to the defense the complete report of Agent Givens. In other words, the PCR court found that Petitioner had failed to prove the complete record of the computer analysis was material. App. 2622.

The PCR court erroneously evaluated the materiality of the porn found on Tietjen's computer based upon whether the porn on the computer was a trigger for Tietjen's murder. The court found it was "uncontested in the statements and the evidence presented" that Petitioner "did not claim to have viewed any images on the victim's computer until after he had killed Mr. Tietjen." App. 2622 (emphasis in original). Thus, the court declared "the existence or non-existence of internet porn on the computer was not a 'trigger' to the death of Mr. Tietjen." App. 2622. The court found it "difficult to connect" the "mere existence of prior internet browsing the previous day by someone on

Tietjen's computer" as corroborative of Petitioner's statement. App. 2622. Rather, the Court concluded the internet browsing history "merely" supported that Tietjen may have had discussions with Petitioner about it. App. 2622.

The court was not persuaded that the information would have impacted Petitioner's mitigation case because "Dr. Schwartz-Watts had information from numerous statements and her own interview about the impact of the discussions [Petitioner] had with Mr. Tietjen, including when and what he claimed to see on the computer." App. 2623. The PCR judge made this ruling despite acknowledging Dr. Schwartz-Watts' testimony that the additional information would have corroborated her conclusions. App. 2623.

Next, the PCR court concluded the evidence was not material to Petitioner's post-mortem abuse of Tietjen's eyes because "this theory was fully presented within his statements to Dr. Crawford and was given to the defense and their experts." "The fact of the presence on the computer of some images, but not the particular images he had described of child pornography or bestiality and their non-disclosure does not mandate a new sentencing proceeding." Incongruously, the PCR court agreed with Petitioner that the evidence "should have been disclosed and provided" to the defense prior to trial but found the evidence was not material. App. 2624.

Rule 59(e) Motion

Petitioner objected that the PCR judge "ignored Dr. Watts' testimony during the PCR [hearing] that her diagnosis of pornography as a trigger was based on the topic, not the fact of when visual images were first seen." The testimony revealed that "[t]he mere topic of pornography and sex with minors was enough to 'trigger' [Petitioner] to respond

with violence, become paranoid, and attack Tietjen.” App. 2632. Petitioner objected that the PCR court’s findings of fact and conclusions of law were “conflicting and inconsistent” because the court found the porn would corroborate Dr. Schwartz-Watts’ testimony, but held the porn on Tietjen’s computer was nonetheless immaterial. App. 2632. Additionally, Petitioner objected to the PCR court’s reliance on the state’s “continued misconstruing of the porn as not being a ‘trigger’ based upon when it was viewed” and ignoring trial counsel’s testimony that the case was damaged by the non-disclosure. App. 2632. Finally, Petitioner objected to the PCR court’s adoption of the state’s “argument that porn evidence was a ‘double edged’ sword because it would prove [Petitioner] was present at the scene” as “nonsensical” because no one ever disputed Petitioner’s presence at the Tietjen home.” App. 2632.

Order denying Rule 59(e) Motion

The PCR court denied ignoring the testimony of Dr. Schwartz-Watts and denied ignoring the testimony regarding the topic of porn as a trigger, not the actual computer images. Concerning any inconsistency in the court’s ruling regarding the existence of pornography, the court relied upon Dr. Schwartz-Watts’ statement that her diagnosis of Petitioner would not have changed. Additionally, despite the solicitor branding Petitioner a liar and faulting Dr. Schwartz-Watts’ opinion for lack of corroboration, the court claimed “no corroboration was needed for the mental health of [Petitioner] because of [Petitioner]’s behavior during the trial and PCR hearing.” App. 2645.

Discussion

In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held “the suppression by the [state] of evidence favorable to an accused upon request

violates due process where the evidence is material either to guilt or punishment.” See also Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012). Consequently, an individual asserting a Brady violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused’s guilt or innocence or was impeaching. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Brady evidence includes both exculpatory and impeachment evidence. United States v. Bagley, 473 U.S. 667, 676 (1985).

For determining materiality, “[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” Kyles v. Whitley, 514 U.S. 419, 434 (1995). “A ‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” Id. (quoting Bagley, 473 U.S. at 678); see also Riddle v. Ozmint, 369 S.C. 39, 45, 631 S.E.2d 70, 73 (2006). A defendant shows a Brady violation “by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Id. at 435.

“Our judicial system relies upon the integrity of the participants. Riddle, 369 S.C. at 46, 631 S.E.2d at 74 (citing State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000)).

The overriding theme of the Brady cases is the emphasis the Supreme Court has placed on the prosecutor’s responsibility for fair play. In close cases, “the prudent prosecutor will resolve doubtful questions in favor of

disclosure. This is as it should be. Such disclosures will serve to justify trust in the prosecutor as the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done. And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.

Id., 369 S.C. at 46, 631 S.E.2d at 74 (quoting Kyles, 514 U.S. at 438-440).

In this case, this Court need not address two of Brady's four prongs. The state has not challenged the PCR court's finding that the state was in possession of the evidence and did not disclose it to the defense. Therefore, this Court's analysis will turn on whether the evidence was favorable to Petitioner and material to punishment. The computer analysis revealing pornography on Tietjen's computer was favorable to Petitioner because it corroborated his statement, which lent credibility to his revelations of childhood sex abuse.

The PCR court erred by evaluating the materiality of the porn found on Tietjen's computer through a single lens, which was proposed by the state, not Petitioner — whether the porn on the computer was a trigger for Tietjen's murder. Without explanation, the court found it “difficult to connect” the “mere existence of prior internet browsing the previous day by someone on Tietjen's computer” as corroborative of Petitioner's statement. Rather, the court concluded the internet browsing history “merely” supported that Tietjen may have had discussions with Petitioner about it. The PCR court completely ignored the readily apparent evidence in the record that the pornography in the internet history of Tietjen's computer fully corroborated Petitioner's statement that he viewed pornography on Tietjen's computer by viewing the internet history. The computer analysis would have prevented — or at the very least, allowed the

defense to rebut — the solicitor’s closing argument in which he claimed Petitioner looked at pornography on Tietjen’s computer of his own choosing causing further indignity and suffering for the Tietjen family.

The PCR court also concluded the evidence was not material to Petitioner’s post-mortem abuse of Tietjen’s eyes because “this theory was fully presented within his statements to Dr. Crawford and was given to the defense and their experts.” This was error. Petitioner’s defense was unable to develop and present the mitigating evidence of pornography on the computer to explain this due to a lack of corroboration to support the theory.

When looking at the materiality of the suppressed evidence with respect to punishment includes an examination of the mitigating factors presented. See Cone v. Bell, 556 U.S. 449, 473 (2009). Further, the materiality analysis must encompass this Court’s warning that “the evaluation of the consequences of an error in the sentencing phase of a capital case are more difficult because of the discretion that is given to a sentencing jury.” State v. McClure, 342 S.C. 403, 537 S.E.2d 273 (2000). The suppressed evidence in the instant matter went to the heart of two of the statutory mitigating factors: (1) the murders were committed while Petitioner was under the influence of mental disorder, and (2) the capacity of Petitioner to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Schwartz-Watts testified the pornography was crucial to her diagnosis of Petitioner and her explanation of what happened when Tietjen died. The pornography illustrated the sexual motivation for the crime and the post mortem abuse. Quite clearly, the evidence went directly to two statutory mitigating factors, which the

sentencer was required to consider. Therefore, there is a reasonable probability that the result of the sentencing proceeding would have been different had the prosecution revealed the full computer analysis to Petitioner.

VII. Petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and under state law were violated because the trial judge failed to properly consider his application as evidenced by the PCR court's wholesale adoption of the state's proposed order.

Relevant facts

After the PCR hearing, the state submitted a proposed order denying Petitioner relief. App. 2516-2571. On December 4, 2012, Judge Cothran signed an order denying Petitioner relief. App. 2572-2646. The order signed by Judge Cothran is almost identical to the proposed order submitted by the state showing he made almost no changes to the state's proposed order prior to signing it. Compare App. 2516-2571 with App. 2572-2646. What changes were made were entirely cosmetic — not substantive. The court only corrected typographical and grammatical errors in the proposed order. For example, he changed “lap” to “laptop” in reference to items stolen from Robert Dennis on October 5, 2004, compare App. 2520 with App. 2576, changed a noun to its possessive form to show ownership of a cell phone, compare App. 2524 with App. 2580, and corrected multiple grammatical errors involving shifting verb tense, compare App. 2525 with App. 2581.²⁵ However, Judge Cothran did not alter the typographical error wherein the state's

²⁵ Judge Cothran changed a verb tense from the present tense, “comes,” to the past tense, “came.” Compare App. 2522 with App. 2577. He also corrected the verb tense when explaining that Petitioner remained in Tietjen's home after the alleged murder. Compare App. 2524 and 2580. He corrected another typographical error by noting an encounter had been “recorded” instead of “record” as stated in the proposed order. Compare App. 2522 with App. 2578. The judge changed the sentence order, but not the meaning, when referring to how Tietjen spent his day on October 11, 2004 prior to encountering Petitioner. Compare App. 2523 (On October 11th, Tietjen spoke around 11:00 a.m. with a friend, Robert Summers) with App. 2579 (Around 11:00 a.m. on October 11, 2004 Tietjen spoke with a friend, Robert Summers). Judge Cothran changed the order to reflect that Petitioner's DNA had been matched to a pair of socks, rather than the single ankle sock referenced in the state's proposed order. Compare App. 2525 with App. 2580.

proposed order stated Petitioner “shots” Tietjen nine times. Compare App. 2524 and App. 2579.

In his Rule 59(e) motion, Petitioner objected to the PCR court’s “almost complete reliance on the Respondent’s proposed Order denying relief, which, after a few minor and cosmetic changes, was proclaimed the ruling of [the] court.” Petitioner cited statutory and case law authority to support the objection. App. 2626. The PCR court’s order denying the Rule 59(e) motion makes no reference to this particular objection.

Discussion

On two occasions, this Court has warned PCR judges against wholesale adoption of proposed orders — whether the proposed order is submitted by the applicant’s attorney or by the state. In Pruitt v. State, the Court stated:

We take this opportunity to express our concern with the increasing number of orders in PCR proceedings that fail to address the merits of the issues raised by the applicant. . . . Counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of the PCR judge prior to the issuance of the order, and the PCR judge should carefully review the order prior to signing it.

310 S.C. 254, 255-56, 423 S.E.2d 127, 128 (1992). The practice of wholesale adoption of proposed orders continued indicating this Court’s warning went unheeded. Not surprisingly, this Court was forced to address this issue again in Hall v. Catoe, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). This Court stated:

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

He added an omitted word, “before,” to the state’s proposed order. Compare App. 2533 with App. 2589.

that in all other cases, it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency.

Id.

South Carolina is not alone in its stance against trial courts' adopting proposed orders verbatim in capital cases. The Pennsylvania Supreme Court held: "We cannot . . . in this post-conviction case involving a review of the propriety of a death sentence, condone the wholesale adoption by the post-conviction court of an advocate's brief." Commonwealth v. Williams, 732 A.2d 1167, 1176 (Pa. 1999). Alabama and Minnesota have criticized the practice as well. See also Dobyne v. State, 805 So.2d 733, 741 (Ala. Crim. App. 2000); Dukes v. State, 621 N.W.2d 246, 258-59 (Minn. 2001).

Recently, the United States Supreme Court also considered the wholesale adoption of proposed orders in capital cases. The High Court explained this practice raised serious questions about the fairness of the process and the trial court's factual findings. Jefferson v. Upton, 560 U.S. 284, 293-294 (2010). In Jefferson, the state submitted a proposed order ex parte. The PCR court adopted the proposed order verbatim. Id. at 292. The Supreme Court explained that the practice of trial courts of adopting the proposed orders of one side had been criticized for decades. Id. at 293-294 (stating "Although we have stated that a court's 'verbatim adoption of findings of fact prepared by the prevailing parties' should be treated as findings of the court, we have also criticized that practice.") (quoting Anderson v. Bessemer City, 470 U.S. 564, 572 (1985)). The Supreme Court remanded the case for a determination of whether the state court's factual findings warranted a presumption of correctness in light of the state PCR court's adoption of the ex parte proposed order as its final order disposing of Jefferson's claims.

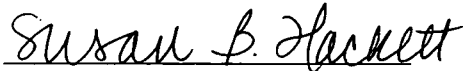
Id. at 293-294. In a companion case decided during the same term as Jefferson, the Supreme Court explained that a state PCR court must engage in a “probing and fact-specific analysis” in capital cases. Sears v. Upton, ___ U.S. ___, 130 S.Ct. 3259, 3266 (2010). In light of this requirement concerning how the state PCR court must review capital cases, it is no surprise that wholesale adoption of one side’s proposed order falls far short of demonstrating the trial judge engaged in an independent probing and fact-specific analysis of a capital defendant’s claims.

Despite this Court’s repeated admonitions to not adopt proposed orders in toto in capital PCR cases, the lower courts continue this practice unabated. The verbatim adoption of the state’s proposed order demonstrates Petitioner did not receive a full and fair PCR hearing as required by the Eighth and Fourteenth Amendments. To remedy this error, this Court should review the evidence *de novo* or remand for a new PCR hearing. The Court should not apply the deferential “any evidence” standard normally used in PCR cases because the factual findings and analysis in the final order are not the product of an independent review of the facts presented and an application of the governing case law to those facts. Rather, the final order is the product of the state’s view of the facts and its cherry-picked citation of authority. Therefore, Petitioner respectfully requests this Court to review the evidence de novo or remand for a new PCR hearing.

CONCLUSION

Petitioner respectfully requests this Court grant the petition for writ of certiorari and order full briefing on the issues presented. As to Issue VII, Petitioner respectfully requests this Court review his case de novo or remand the matter for a new PCR hearing due to the PCR judge's wholesale adoption of the state's proposed order. As to Issues I and II, Petitioner respectfully requests this Court vacate his guilty plea and remand the matter for a new trial. As to Issues III, IV, V, and VI, Petitioner respectfully requests this Court reverse his death sentence and remand the matter for a new sentencing proceeding.

Respectfully submitted,



Susan B. Hackett
1330 Lady Street, Suite 401
Columbia, South Carolina 29201
(803) 734-1330

Miles E. Coleman
Nelson Mullins Riley & Scarborough, LLP
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
(803) 799-2000

ATTORNEYS FOR PETITIONER

This 28th day of March, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Sumter County
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

APPELLATE CASE NO. 2013-000518

STEPHEN COREY BRYANT,

PETITIONER,

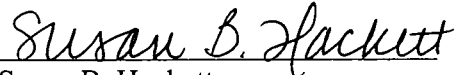
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

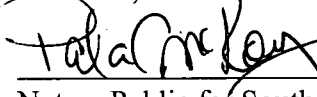
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Melody J. Brown, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Stephen Corey Bryant #5252, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 28th day of March, 2014.


Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day
of March, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.