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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Sumter County
R. Ferrell Cothran, Jr., Circuit Court Judge

STEPHEN COREY BRYANT,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2013-000518

THIRD SUPPLEMENTAL APPENDIX

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APPLICANT'S PROPOSED ORDER GRANTING POST-CONVICTION RELIEF1

<p>STATE OF SOUTH CAROLINA</p> <p>COUNTY OF SUMTER</p> <p>Stephen Corey Bryant,</p> <p>Applicant,</p> <p>v.</p> <p>State of South Carolina,</p> <p>Respondent.</p>	<p>IN THE COURT OF COMMON PLEAS</p> <p>C/A No.: 11-CP-43-901</p> <p>Final Order Granting Post-Conviction Relief</p>
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Factual Background

This case arose from a series of incidents that arose in Richland and Sumter Counties. (04-GS-40-10096; 06-GS-43-696 thru 702). Three people—Clarence Burgess, Willard Tietjen, and Clifton Gainey, (hereinafter “Burgess,” “Tietjen,” and “Gainey,” respectively) were killed. Stephen Corey Bryant (hereinafter “Bryant”) was arrested October 13, 2004, and charged with three homicides and other related offenses, include a burglary during which Bryant stole a handgun from James Ammons (hereinafter “Ammons”), later used in the commission of the three homicides.

Bryant was indicted in both Richland and Sumter Counties. The facts that gave rise to Bryant’s questioning and arrest are as follows. Bryant had been interviewed on October 12, 2004, concerning an incident in which he was the victim of an assault. The interview occurred at Bryant’s residence, a mobile home located in Sumter County that he shared with his girlfriend, Judy Justice. During the interview, Turner noticed Bryant’s vehicle in the driveway. Turner

noted a pair of tennis shoes and a 20 ounce Pepsi bottle in Bryant's truck, and that the tire tread on one wheel was worn down.

Bryant's October 12, 2004, interview was conducted by Sumter County Investigator James Turner. After the discovery of Burgess' body on October 13, 2004, Investigator Turner was called to the crime scene and recognized two items—a 20 ounce soda bottle and a pair of tennis shoes—that were identical to items he had seen laying in Bryant's truck floorboard the previous day, and he noted tire tracks at the scene that appeared consistent with the tires he had seen on Bryant's truck. (Record on Appeal, hereinafter "ROA," at p. 36). Turner's recognition of items at the crime scene matching those he saw in and on Bryant's vehicle the prior afternoon, coupled with the fact that ballistics evidence, consisting of two .40 caliber shells found at the scene, were "consistent with the two other recent murders in Sumter County," (ROA, p. 36, lines 17-18), were the basis for a search warrant of Bryant's home and vehicle. (ROA at p. 37).

October 13, 2004, search warrants were executed as to Bryant's home and his truck. Items were found that met the description of items reported stolen from prior burglaries and in connection with the three recent Sumter County homicides. Bryant was arrested immediately, and transported to the Sumter County Detention Center. Bryant was interviewed, waived his right to a lawyer, and gave incriminating statements, later reduced to signed documents, and relied upon by the state during trial. (ROA at p. 155; State's Exhibits 55 and 56).

Dr. Pamela Crawford, a South Carolina Law Enforcement Division (hereinafter "SLED") forensic psychiatrist was called in to assist in conducting Bryant's post-arrest interviews. Dr. Crawford discussed Bryant's sexual abuse by family members, to include his grandfather,

mother and an Uncle, who later died from AIDS. (ROA, p. 867) Bryant told Crawford of his effort to seek “help,” and how his poverty prevented him from receiving mental health “help” for his traumatic experiences of being sexually abused.

Bryant, upon his arrest, was found to be indigent and was appointed two attorneys. Attorneys James Babb and Jack Howle (hereinafter Babb” and “Howle,” respectively) were appointed, and Babb developed a close attorney-client relationship with Bryant. The State’s case was prosecuted by Solicitor Kelly Jackson and Dudley Saleeby (hereinafter “Jackson” and “Saleeby,” respectively).

During his tenure as lead defense counsel, Babb became ill with a severe neurologic condition and was forced to retire from the practice of law altogether, to include being relieved as lead trial counsel for Bryant. On July 18, 2008, the Honorable Thomas Russo (hereinafter “Judge Russo”), appointed trial judge for Bryant’s capital case, relieved Babb as lead counsel and appointed Attorney John Clarke (hereinafter “Clarke”) as the new lead counsel.

The decision to plead guilty or go to trial had been discussed prior to Clarke’s appointment as lead counsel. Three “plea tender” documents, two of them dated within days of Bryant’s pleading guilty, were presented to and Bryant, and he signed all of them. The last plea tender was dated August 9, 2008 (nine (9) days prior to Bryant’s entry of a plea of guilty). There are material differences in the different versions of the “plea tender” documents; however, the third and final plea tender, dated August 9, 2008, outlined the final legal advice given to Bryant and relied upon by him as his basis for pleading guilty.

August 18, 2008, nine days after signing a third plea tender document, and one month after appointment of new lead counsel Clarke, Bryant, along with Howle, appeared before Judge Russo for the purpose of Bryant pleading guilty "straight up" to three counts of murder, numerous related, though less serious, felony charges, and the state seeking a sentence of death. The August 9, 2008, plea tender was never introduced into evidence, nor was the information provided to Bryant entered into the record during the guilty plea proceeding.

On September 2, 2008, Bryant's sentencing phase trial began. Judge Russo presided over testimony from both the state and the defense, which lasted until September 9, 2008, when Judge Russo began considering the evidence and deliberating on whether to impose life without parole or execution as Bryant's sentence. During the week of testimony presented, the record reveals that the focus of Bryant's mitigation was on his sexual abuse by incestuous family members, including his mother, grandfather, and an uncle. Bryant, other than one inappropriate outburst, did not testify or wish to make a statement to the Court. Bryant's mitigation was brought forth through experts in trauma, psychiatry, prison adaptability, and addiction, as well as lay testimony from family members, who wanted to corroborate Bryant's harrowing account of his sexual abuse as a child. The state presented numerous witnesses to include law enforcement, a pathologist, and lay witnesses who testified as to the impact that Bryant's crimes had on their lives.

September 11, 2008, Judge Russo reconvened court to announce his sentence. Prior to announcing Bryant's sentence, two things happened that are of note to this Court and in issue on Bryant's PCR. First, on the evening of September 10, 2008, a man named Edwin Goss

(hereinafter "Goss"), made frantic calls to both the public defender's office and Judge Russo's home. In brief, Goss recognized Bryant's photo shortly after Bryant was arrested and his photo was plastered on the front page of the local newspaper. Goss remembered meeting Bryant shortly prior to Bryant's crimes occurred. Goss saw Bryant half naked, with no shoes sitting along the side of a road in Sumter County. Goss recalled Bryant asking for "help" for his weird thoughts, that Officer Tripp Mayes pulled into a parking lot, that Goss attempted to enlist Mayes' assistance to deal with Bryant's bizarre behavior and demeanor, and that Bryant eventually walked away with a couple of women who led Bryant away.

Howle brought the newly discovered evidence to Judge Russo's attention and sought "to reopen [the penalty phase case] to allow that person [Goss] to testify." (ROA at p. 1037, line 2-p. 1038, line 19). Judge Russo informed the attorneys and Bryant that Goss had called the Russo home, spoke to Mrs. Russo, but that he had not spoken to Goss. (ROA at p. 1038, line 20-p. 1039, line 9). Judge Russo then ruled "...this case has been going on for some time. Both sides have had ample opportunity to present the evidence...But at this stage we don't even know if it's evidence. We don't know if it will be anything that's admissible. We don't even know what it is. And I'm going to deny that request to reopen the case and certainly would note any exceptions that you would have to that ruling." (ROA at p. 1039, lines 12-19).

Immediately after denying Howle's motion to reopen, Judge Russo stated "At this time, Solicitor, if there's any further presentation by the State regarding sentencing if there's any individuals who wish to be heard I'll be happy to hear from them at this time." (ROA at p. 1041, line 25-p. 1042, line 3).

Jackson presented additional victim impact testimony from James Ammons (hereinafter "Ammons"), whose handgun Bryant stole during a burglary of Ammons' residence. Ammons told Judge Russo that Bryant's actions had "changed [his life] forever," that he was "scared," and that Bryant "has scarred me for life." (ROA at p. 1042, line 15-p. 1044, line 2). An unidentified "Victim Advocate" next spoke on behalf of Christopher Gainey, whose father, Clifton Gainey, was one of the murder victims, and, as a result of his father's murder, Christopher's life has been damaged, that his parents had been trying to reunite prior to Gainey's murder, and, as a result of the murder, Christopher "said he's lost." (ROA at p. 1044, lines 8-19). Christopher Gainey then spoke briefly about the fact that he was told he physically resembled his father. (ROA at 1044, lines 20-23).

Jackson next presented Robbie Burgess, who spoke on behalf of Christine Burgess and "my family." (ROA at p. 1045, line 2- p. 1046, line 4). Clarence Burgess was the third of the three homicide victims in Bryant's case. Robbie was Clarence's brother, and Christine was Clarence's mother. Robbie Burgess read a letter, drafted by Christine Burgess, the contents of which expressed unending sorrow for the loss of her son, the impact of Burgess' death on the entire Burgess family, and that "[t]he pain and suffering of this family will never go away," and the Burgess family "want to see justice served today, September 11, 2008." (ROA at p. 1045, lines 5-22).

Bryant did not wish to offer a statement to the Court. Judge Russo then proceeded to sentence Bryant to death. Court was ended. Bryant appealed to the South Carolina Supreme Court. Bryant's direct appeal was denied. Bryant, by and through appointed attorneys Melissa Armstrong and Heath P. Taylor, filed an action for post-conviction relief, and later an amended application, followed by a second amended application. The Attorney General filed a Return. A

hearing was convened before this Court on October 1, 2012. Testimony and evidence were presented by and on behalf of Applicant and Respondent.

Summation of Issues/ Claims for Relief Raised by Applicant during Post-Conviction Relief

- A. Ineffective Assistance of Counsel based on erroneous advice of trial counsel, as set out in the plea tender documents.
- B. Ineffective Assistance of Counsel based on a denial of advice from two attorneys on the issue of whether to plead guilty or go to trial.
- C. Ineffective Assistance of Counsel based on failure to object to the Solicitor's prejudicial "send a message" to the community argument during closing argument.
- D. Ineffective Assistance of Counsel for failure to object to unsworn victim impact evidence after the close of evidence.
- E. Ineffective Assistance of either trial or appellate Counsel based on failure to preserve and/or present the issue of Judge Russo's denial of counsel's motion to reopen based on after-discovered evidence consisting of Edwin Goss's testimony concerning Applicant's impaired mental functioning prior to the crimes for which he was convicted.
- F. Denial of Due Process and a fair trial due to failure of the State to provide the defense with evidence known to Deputy Tripp Mayes, who was involved in the encounter between Goss and Bryant, and had a duty to disclose this mitigating evidence of Applicant's deranged mental state observed prior to the crimes in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).
- G. Denial of Due Process and a fair trial due to failure of the State to provide the defense with pornography discovered by SLED, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), when this evidence was material to the defendant's case in mitigation.

Evidence Presented during Post-Conviction Relief

On October 1, 2012, the Applicant began this case by calling SLED Agent "Bo" Barton (hereinafter "Barton") as the first witness. Barton was involved in the Bryant case investigation. Barton is a member of the behavioral unit at SLED. Barton's work involves developing profiles of suspected serial criminals. Bryant's case involved multiple homicides. Barton was provided four computer terminals for analysis. Two computers were from the Tietjen residence, one computer was from Bryant's residence, and the last computer (to which Bryant had access) was from the home of one of Bryant's relatives.

Barton contacted fellow SLED Agent David Givens (hereinafter "Givens"). Barton testified he told Givens that the computers needed to be forensically analyzed. Barton told Givens to search for two things: evidence of an internet connection between Bryant and Tietjen and/or evidence of child pornography.

Barton testified he never received a diskette from Givens. Barton testified he was told that no evidence of a prior connection between Bryant and Tietjen was found, nor was any evidence of child pornography ever found. Barton could not say whether other inquiries may have been made by other people as to the computer analysis. Barton testified he did not know why an "internet history" was never provided to the Solicitor or Defense Counsel. Barton, because he is trained in profiling, agreed that cigarette burns to Tietjen's eyes could have been "symbolic" to the perpetrator.

On cross-examination, Barton said SLED is an "assisting agency." Barton said Bryant reported "flashbacks" after Tietjen's murder, not before. Barton said he gave everything SLED had in its possession to the AG's office, upon request during this proceeding.

On re-direct, Barton was questioned about the "teen" porn sites found on Tietjen's computer history. Barton did not consider this to be "child porn." This concluded Barton's testimony in this case.

The next witness called by Bryant was SLED agent Givens. Givens said he was provided with four computers, as set forth above by Barton. Givens performed a forensic analysis on all four computers. Givens testified he performed various tasks in analyzing the computers. Givens reviewed an "image gallery" from the Tietjen Gateway computer. Givens also ran an "Encase program" on all four computers. Givens generated a "final report" on April 14, 2005.

Givens testified he discovered pornography on the Tietjen Gateway computer. The internet histories showed pornography on the Tietjen Gateway computer, dating back to June, 2004. Givens said he did not know whether the diskette, containing the internet history information and websites viewed on the computers were given to either the State or Defense. Givens also testified he had no idea whether the Solicitor's Office ever received his hand-written notes, which indicated a voluminous amount of pornography was found on the Tietjen Gateway computer.

Givens was questioned as to the results of the Encase program, internet histories, etc., which were contained on the diskette. The diskette was shown to this Court via a television monitor. The diskette revealed Givens found pornography on the Tietjen Gateway computer on 10/20/2004. Further, pornographic videos were located on 10/21/2004. On 11/2/2004, Givens' notes reflect that pornography was not found on Bryant's computer or the one belonging to his relative. Givens said he can usually retrieve even deleted files, so long as the computer has not been "over-ridden," in which case deleted files may be irretrievable.

Numerous exhibits were admitted into evidence documenting the case histories and other data proving the existence of pornography on the Tietjen Gateway computer dating back to June, 2004.

On cross-examination, Givens testified it is possible that pornography had once existed on Bryant's computer, but could have been over-ridden, and thereby undetected by a later forensic analysis. Givens also testified that the time/date of images was "off" by thirteen hours. Based on the erroneous date/time of the computer clock/ calendar, there is no evidence that pornography was "surfed" on the day of the homicide, October 11, 2004.

On re-direct, Givens said it would have been possible for Bryant and/or Tietjen to review "stored" images of pornography. Givens said that the "browser history" could have been "clicked on" to view pornography that was previously "downloaded" and stored. This concluded Givens' testimony in this case.

The next witness called was attorney Howle. Howle is the Chief Public Defender for Sumter County. Howle testified he represented Bryant, along with Babb, and, later, Clarke. Howle testified he asked for discovery from the State and filed appropriate pre-trial motions to get discovery.

Howle testified he never received anything from SLED documenting the existence of pornography on the Tietjen Gateway computer. Howle never received a diskette from Givens, nor did he receive anything related to the internet history of the Tietjen Gateway computer. Howle said he and Babb wanted evidence of pornography, to establish pornography was a "trigger" for the Tietjen homicide.

Howle testified that they may have been prejudiced with their experts by not receiving the evidence of pornography found by SLED. Howle said he had hired private investigator

Carlisle McNair to contact SLED about the computer evidence, and Carlisle came back empty-handed.

Especially when combined with Goss' un-admitted testimony concerning Bryant's deranged state of mind prior to the crime, the pornography evidence was something Howle and Babb would have wanted, and could have made a difference. Howle testified he was unaware that Sumter County Officer Tripp Mayes was a witness to the incident involving Bryant and Goss. Howle never received anything documenting the prior incident until Goss called his office on September 10, 2008.

Howle testified concerning the decision to advise Bryant to plead guilty. Howle said he let Babb do the research and draft the "plea tender" documents. Howle believed a finding of Bryant's guilt was a foregone conclusion. Howle said Babb drafted the "plea tenders" to insure Bryant knew what "he was giving up" by pleading guilty. Howle relied on Babb to do the "statistical research" for purposes of advising Bryant on his decision to plead guilty.

Howle affirmed he told Bryant that going to a jury trial on guilt was fraught with significant risks. Howle told Bryant that pleading "not guilty" would afford the Solicitor with an opportunity to ignore procedural rules. The essence of this advice was Howle's belief that anything the Solicitor did during a jury trial on guilt would be deemed "harmless error" on appeal, so, basically, the rules, even if ignored, were no protection against the Solicitor's abuse of established trial procedures and evidentiary safeguards.

Howle testified that Babb was lead counsel until his dismissal from the case on July 18, 2008. Despite Babb being the author of the "plea tender" documents, Howle said Babb did not make attorney decisions after July 18, 2008. The final "plea tender" is dated August 9, 2008, or twenty-two days after Babb was relieved and Clarke appointed in Babb's stead as lead counsel.

Howle testified he had no recollection of ever discussing with Clarke the decision to advise Bryant to plead guilty. Howle testified the decision for Bryant to enter a guilty plea was made **prior to** Clarke becoming lead counsel. Howle did not recollect Clarke objecting to the decision to advise Bryant to plead guilty. Howle testified he thought Clarke was very professional and had a good relationship with Bryant.

Howle testified he did not object to the Solicitor's "send a message" final argument during the penalty phase because the case was being decided by a judge, rather than a jury. Howle acknowledged he failed to object to the additional victim impact evidence admitted after the close of evidence in the case, despite the fact that the judge refused the defense's request to introduce additional mitigation from Goss. On cross-examination, Howle said the additional victim-impact evidence offered from the state was not as objectionable because it was not related to a murder charge, so it was not as "serious." On re-direct, Howle acknowledged that the additional victim evidence was, with the lone exception of Ammons' statement, from the victims of the two non-capital homicides involving Gainey and Burgess.

Howle said he thought the objection made about the judge's "Goss ruling" was sufficient to preserve this error for direct appeal. Howle said he assumed appellate counsel would raise the issue. Howle appeared surprised the Goss issue was never raised on direct appeal.

On October 2, 2012, Bryant called Edwin Goss to testify. Goss recalled meeting Bryant shortly before Bryant's various crimes were committed. Goss said he was in a gas station/convenience store parking lot when Bryant approached him. Bryant said he was having "weird thoughts," and needed "some help." Goss described Bryant as being "wild eyed," "agitated" and "upset." Bryant was not armed with a weapon when he met Goss, nor did Bryant threaten Goss. Goss did not detect an odor of alcohol, though Bryant's behavior was completely deranged.

Goss saw Officer Tripp Mayes pull into the parking lot. Goss took Bryant to Mayes and told Mayes Bryant needed "help." Goss then resumed getting gas. Goss saw Bryant walking away with a group of women, one of whom he recalls "slapped" Bryant. Goss followed-up with Mayes, who told Goss that Bryant was just messed up. Goss went home and forgot about the incident.

Shortly after his encounter with Bryant in the gas-station parking lot, Goss recognized Bryant as the barefoot, shirtless "boy" by the side of the road asking for "help," after Bryant's photo was printed in the local Sumter newspaper. Goss said he knew Officer Tripp Mayes, who is a Sumter County Deputy, because Goss worked for Sumter County for fifteen years and, consequently, knew many of the officers. After Bryant's arrest, Goss saw Mayes and reminded him of the fact that the "boy" at the gas station was the same one charged with the killings in Sumter County.

On cross-examination, Goss testified he did not recall seeing a tattoo on Bryant's chest, though Bryant was shirtless. Goss said he thinks Bryant was "clean shaven," though this detail was not what he recalled. Goss said he remembers "faces," of the people he meets. It was dark the night Goss met Bryant, though there was lighting enough for Goss to recall Bryant's face. Goss could not recall when he first saw Bryant's photo in the paper; however, when he read the local paper and it mentioned a sentencing was to occur September, 10, 2012, Goss tried to call both Judge Russo and Bryant's attorney.

Goss said he called Judge Russo and Bryant's attorney because he wanted to tell the judge what he saw. Goss regretted he was unable to get Bryant "help" before the crimes were committed. Goss is not opposed to the death penalty. Goss is not a relative to the Bryant family, nor is he a friend to anyone connected to Bryant and/or his defense attorneys. Goss said he

simply felt he had a personal, moral obligation to inform the sentencing judge of what he knew, so that Bryant's bewildered state on mind prior to the crimes would be taken into account in sentencing him.

The next witness called was attorney Clarke. Clarke was appointed as lead counsel for Bryant on July 18, 2008. The hearing appointing Clarke and relieving Babb was held in Lexington County by Judge Russo. Clarke received discovery and began work. Clarke had one month to prepare Bryant's case for trial. Trial was scheduled to begin August 18, 2008. Clarke testified the decision for Bryant to plead guilty had been made prior to his appointment, though he recalls a discussion with Bryant about pleading guilty. Clarke thought the plea discussion he and Bryant occurred at the Clarke Law Office.

Clarke said he did not participate in drafting any of the "plea tender" documents presented to and signed by Bryant. Clarke could not recall any specifics of plea discussions with Bryant. Clarke said it was difficult to assume the helm as lead counsel "in the fourth quarter," so to speak, with only thirty-one (31) days' time in which to prepare for a multi-count indictment, involving triple homicides, and a capital sentencing. Clarke said he wasn't as involved in the plea as he would have been under *other circumstances*." Clarke does not recall Babb having any role as an attorney in Bryant's case after Clarke's appointment and Babb's removal on July 18, 2008.

Clarke did not recall the Solicitor's argument to Judge Russo, urging Judge Russo speak on behalf of the "community," when he sentenced Bryant. Unlike Howle, Clarke did not say he failed to object because sentencing was done by a judge, rather than a jury. Clarke did not have a strategic reason for failing to object to this argument.

Dr. Donna Schwartz-Watts (hereinafter "Dr. Watts"), a forensic psychiatrist, testified she was retained, prior to trial in 2008, to evaluate Bryant. Dr. Watts testified Bryant suffers from post-traumatic stress disorder (hereinafter "PTSD") and other mental health problems. Dr. Watts said the root cause of Bryant's mental illness and health problems is childhood sex trauma Bryant suffered at the hands of several relatives. Dr. Watts said Bryant will have flashbacks.

Dr. Watts testified pornography was an issue in the Tietjen homicide. Dr. Watts said the topic of pornography was discussed prior to Tietjen's killing, and that the discussion between Bryant and Tietjen concerning pornography and Tietjen's comments on being sexually attracted to young girls was a "trigger." Dr. Watts testified it was irrelevant whether Bryant actually viewed pornography on Tietjen's computer before or after Tietjen's killing, as the topic of pornography, standing alone, was enough to "trigger" a response by Bryant, whose impaired mental capacity and his paranoia about Masons—a group to which Tietjen was associated—and continuing PTSD was "one of the most severe cases" she had ever seen.

Dr. Watts testified she wanted corroboration of Bryant's statements that pornography was connected with Tietjen's killing. Dr. Watts said she was grilled by the prosecution because many of her findings were based on what Bryant told her, rather than more objective evidence. Objective evidence in support of Bryant's statements would have assisted Dr. Watts in her testimony before Judge Russo, and Dr. Watts testified she believed SLED's failure to provide the evidence of computer pornography to the defense was very prejudicial.

Dr. Watts said the post-mortem mutilation of Tietjen's eyes was directly related to the fact that Tietjen discussed pornography with Bryant. Dr. Watts believes the burning of Tietjen's eyes was a symbolic act. A note Bryant left at the Tietjen crime scene made specific reference to the fact that Tietjen would no longer be able to look at pornography. Dr. Watts said she asked

for pornography early on and always believed Bryant's accounts, though she realized he was not always consistent in what he recalled from various incidents. Evidence of pornography was, therefore, part and parcel to the defense efforts to show mitigation.

This Court takes note of the fact that Dr. Watts was retained by PCR counsel. Dr. Watts was retained when Bryant became, according to the SCDC prison physician, "psychotic." Dr. Watts was compensated for her assistance in what she described as "helping to restore" Bryant's competence to assist counsel during PCR. Dr. Watts was not, however, compensated for her participation in the PCR hearing, as she was called as a fact witness as to her involvement in Bryant's trial.

Applicant called former Appellate Defender Joseph L. Savitz, III (hereinafter "Savitz"). Savitz testified he handled Bryant's direct appeal. Savitz said he raised only one issue, and it was not the "Goss issue." Savitz reviewed the transcript prior to taking the witness stand and he said he might have failed to raise the issue due to the fact that Goss' encounter with Bryant was too "attenuated," time-wise. Savitz was familiar with the South Carolina Supreme Court ruling in *State v. Owens*, 346 S.C. 637 (2001), wherein the defendant's sentence was reversed based upon the trial court's failure to grant defense counsel an opportunity to investigate newly-discovered evidence. Savitz said if he missed a meritorious issue, then it was not by any intentional strategic maneuver on his part. If he missed a meritorious issue, then Savitz conceded he would have provided ineffective assistance of counsel.

Applicant called attorney James Babb as a witness. Babb was initially appointed as lead counsel for Bryant. Babb developed a close relationship with Bryant. Babb sought advice from Columbia death penalty counsel Teresa Norris and/or Robert Lominack. Babb testified he relied on what he learned from the Columbia attorneys, as well as what he learned from a seminar in

California for purposes of drafting the plea tender document(s). Babb testified he thought the "statistical" information referenced in his plea tender document was accurate. If the information was inaccurate, it was not an intentional act on Babb's part.

Babb testified he wanted any evidence of pornography related to the Tietjen homicide. Babb believed Bryant's account of the details related to the Tietjen killing. Babb believed the failure of SLED to provide the evidence of pornography from Tietjen's Gateway computer was a very significant lapse in compliance with the requirements of Rule 5, *Brady v. Maryland*, 373 U.S. 83 (1963) and *Kyles v. Whitley*, 514 U.S. 419 (1995). Babb believes the non-disclosure of pornography by SLED was prejudicial to Bryant. Bryant's entire case in mitigation was based on his mental illness stemming from the effects of childhood sexual abuse and trauma, resulting in PTSD. Any evidence corroborative of Bryant's account that he killed Tietjen because of a "trigger" based on discussing and/or viewing pornography with Tietjen would have been of immense importance to the defense, as Jackson hammered defense witnesses for lacking "corroboration" for their opinions. Further, the burning of Tietjen's eyes was a very inflammatory fact and pornography would have demonstrated that the burning of Tietjen's eyes was symbolic, and related to Bryant's mental illness and sexual abuse history, rather than an act of gratuitous, post-mortem mutilation.

Former Third Circuit Solicitor Jackson testified he was lead counsel for the state for purposes of prosecuting Bryant. Jackson said he requested a forensic analysis of the four (4) computers described previously by Barton and Givens. Jackson said he never received a diskette from SLED. Jackson was never told Givens discovered adult pornography on the Tietjen Gateway computer. Jackson said if evidence was not turned over to the defense then it was by inadvertence or mistake, not by intent. Jackson said he gave the defense everything he got from

SLED, and withheld nothing. However, Jackson said that, if evidence subject to discovery was not turned over to the defense, then he—Jackson--would be responsible under *Brady v. Maryland* because he was the chief prosecutor on Bryant's case.

Assistant Solicitor Dudley Saleeby testified he was Jackson's co-prosecutor in Bryant's case. Saleeby testified he never got anything documenting pornography was found on Tietjen's Gateway computer by Givens/ SLED. Saleeby was told no pornography was found. Givens told Saleeby he found "nothing of evidentiary value." Saleeby agreed with Bryant's counsel that pornography, whether child or adult, was certainly "of evidentiary value" in the Tietjen murder case. Saleeby said the only "evidence" of pornography known to him prior to Bryant's plea and sentencing was based on Bryant's statements. Saleeby said he knew of no evidence corroborating Bryant's statements about the existence of pornography on Tietjen's Gateway computer.

Stephen Corey Bryant testified on his own behalf. Bryant said he pled guilty because he was given advice set out in a "plea tender." Bryant said he was told he was "statistically" more likely to get a life sentence if he pleaded guilty and was sentenced by Judge Russo. Bryant trusted Babb and believed his lawyers when they advised him on the issue of whether to plead guilty or proceed with a jury trial. Bryant testified that, but for the advice given him in the plea tenders, he would have insisted on going forward with a jury trial.

Bryant recalled meeting with Clarke at Clarke Law Office. Bryant did not recall what he discussed with Clarke. Bryant said he was never promised anything in exchange for pleading guilty, but simply advised of the information contained in the plea tender(s). Bryant was aware the State was seeking death and that his charges were "serious."

On cross-examination, Bryant was asked whether he thought he “deserved” a life sentence. Bryant answered that, regardless of whether he is executed or given a prison term of life imprisonment, he has still has a “life” sentence. Either way Bryant will die in prison. Bryant was questioned about his letter to the Tietjen family. Bryant wrote an apologetic letter to the Tietjen family. The letter was sent to the Tietjen family prior to his guilty plea and sentencing. Bryant said he wrote the letter because he wanted the Tietjen family to understand he, too, understood losing a loved one. Bryant’s grandfather, to whom Bryant was emotionally close, died shortly before the crimes began. Bryant’s testimony was then concluded.

By consent of the parties to this action, two affidavits were admitted into evidence. Applicant submitted an Affidavit from Teresa Norris concerning her consultation with Babb about Bryant pleading guilty versus going to trial. Respondent submitted an Affidavit from Sumter County Officer Tripp Mayes concerning his inability to recall ever seeing Bryant prior to the crimes and/or the incident testified to by Goss.

Findings of Relevant Facts and Conclusions of Law:

Applicant’s Issues “A” and “B”:

Babb and Howle were lead and co-counsel, respectively, for Bryant. Babb became medically disabled and was relieved as lead counsel on July 18, 2008. Clarke was appointed lead counsel on the same day as Babb was relieved as lead counsel. Clarke had thirty-one days to prepare for Bryant’s entry of a plea of guilty or go to trial on charges of capital murder.

Bryant was provided three “plea tender” documents. The “plea tender” documents outlined the advice given Bryant as a basis for his decision to plead guilty. Testimony from Howle, Babb, Clarke and Bryant has been considered by this Court. All testified that the “plea tender” was the advice Bryant received and relied upon for purposes of deciding to plead guilty.

Babb said he relied on advice he got from attorneys in Columbia, like Teresa Norris or Robert Lominack, when he drafted his plea tender advice for Bryant. Attorney Teresa Norris, who is Director of the Columbia law firm devoted to providing capital litigation defense attorneys with advice on representing clients in death penalty cases, provided an Affidavit to this Court outlining the numerous ways in which the plea tender document signed by Bryant contained erroneous, misleading and simply bad advice on why Bryant should plead guilty, the potential pitfalls of going to trial/pleading "not guilty," and the rules of evidence being virtually irrelevant and unenforceable in a trial situation. Norris' Affidavit identified three main areas of deficient advice given to Bryant, as discussed above.

There is not a dispute as to the facts relevant to issues A and B. This Court finds credible the testimonies of Babb, Howle, Clarke, and Norris. Likewise Bryant's testimony is uncontradicted as to why he chose to plead guilty and is consistent with the testimonies of Howle, Clarke, and Babb. This Court makes special note of the legal analysis provided in the Norris Affidavit. It is clear Bryant was provided erroneous legal advice. Equally clear to this Court is the fact Bryant relied on the advice of counsel, as contained in the plea tender of August 9, 2008, when he decided to plead guilty.

The specific areas of defective advice Bryant received are as follows:

- 1) Bryant was advised to plead guilty without any consideration or agreement of any kind, and this is the kind of advice that is routinely raised as being ineffective on appeal and is discouraged by American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty (2003); (Norris Affidavit, Paragraph #9)

- 2) Bryant was provided misleading advice concerning the statistical research concerning pleading not guilty and going to trial versus pleading guilty; This Court relies specifically on the Norris Affidavit, paragraph's 11-13, outlining the inaccuracy of the advice provided to Bryant in the various plea tender documents;
- 3) Bryant was given wrong legal advice concerning the rules of evidence and how they would not serve to protect him from prosecutorial over-reaching; This Court Relies specifically on the Norris Affidavit, paragraph's 18 and 19; Moreover, *Florida v. Nixon*, 125 S.Ct. 551 (2004), specifically prohibits the type of rules violations discussed in the plea tender information Bryant relied upon;

Erroneous legal advice that leads a client to plead guilty does not comply with the requirements of the Sixth Amendment to the United States Constitution, South Carolina Constitution, state and federal laws. *Strickland v. Washington*, 466 U.S. 684 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985); *Florida v. Nixon*, 543 U.S. 175. Bryant was given erroneous advice. Bryant testified he relied on the erroneous advice, but for which Bryant would have insisted on going forward with a jury trial. Under these facts, Bryant's guilty plea is hereby found to be involuntary, and his convictions must be reversed. It is so Ordered.

Bryant alleged Clarke was a "functionally absent" lawyer for purposes of advising Bryant on the choice of whether to plead guilty or proceed with a jury trial. *United States v. Cronin*, 466 U.S. 648 (1984). Clarke's testimony supports this claim. Clarke acknowledged he was brought on as lead counsel during the "fourth quarter" of trial/plea preparation and that the decision for Bryant to plead guilty had already been made before he was even appointed, and Clarke had no involvement whatsoever in drafting the plea tender. Based on these facts, it is clear to this Court that Bryant's guilty plea must be vacated. Clarke was lead counsel, but had virtually no

involvement in making one of the most important decisions of the entire case—whether to plead guilty or go before a jury and plead not guilty. This type of scenario, in which serious felony cases are fast-tracked to court without providing counsel adequate time to prepare and consider the facts of the case, is regrettable and unfortunate for all parties involved—the state, defendant, victims, and the Court system. However, a conviction based upon a denial of the right to effective counsel is a wrong with only one remedy: vacation of the guilty plea. It is so Ordered.

Applicant's Issue "C":

Solicitor Jackson urged Judge Russo to send a “community message” by sentencing Bryant to death. Jackson implored Judge Russo to “express the conscience of the community on the ultimate question of life or death...and I ask you to send a message as a representative of our community to Stephen Corey Bryant with what you now know.” (ROA at p. 1027, lines 2-11). Jackson’s penalty phase closing argument was made without objection. Howle said he assumed a more relaxed posture given that the penalty phase was in front of a judge, rather than a jury, as his reason for not objecting to Jackson’s argument. Clarke offered no reason for not objecting.

This Court finds Jackson’s closing argument exceeded the proper scope of argument in the penalty phase of a capital trial. Capital cases require the sentencing body to focus very narrowly on those issues relevant to determining whether a defendant shall be executed or allowed to live. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Romano v. Oklahoma*, 512 U.S. 1 (1994); *State v. Reese*, 359 S.C. 260 (2005). Jackson’s argument amounted to asking Judge Russo to abdicate his judicial role in favor of assuming the pulpit on behalf of Sumter County, proclaiming by his sentence of death the condemnation of the body politic.

Failure to object to a prejudicial and inflammatory closing summation is unreasonable, and amounts to ineffective assistance of counsel. *Strickland v. Washington*. In this case, the

error was prejudicial. Jackson's closing argument, when read as a whole, focuses on the community sentiment, fear and panic over the Bryant series of crimes. Jackson's argument was very specific on this point, that to give Bryant a life sentence would amount to a miscarriage of justice.

Howle said he decided not to object to Jackson's argument because of the fact that Bryant opted for a bench trial. Howle's reason for not objecting to Jackson's argument does not amount to a type of strategy. Jackson testified he treated the Bryant trial just as if it were being held before a jury. It is unreasonable to take a casual posture during any portion of a capital case. Death is different, and the process by which life versus death is to be determined must be attended to by counsel, with the utmost attention to detail and to ensure the defendant's right to a fair trial are not violated.

Relying on our state Supreme Court's prior rulings, it is clear that counsel's failure to object to such an inflammatory closing argument cannot be deemed harmless in Bryant's case. *State v. Koon*, 278 S.C. 528 (1982), *State v. Butler*, 290 S.E.2d 420 (S.C. 1982); *State v. Woomer*, 284 S.E.2d 357 (S.C. 1981). Simply put, our Supreme Court has held Solicitors may not argue the death penalty is required on the basis of community sentiment and when this occurs the death sentence must be reversed. It is so ordered.

Applicant's Issue "D":

After the close of the penalty phase, the Solicitor was allowed to present additional evidence of victim impact to Judge Russo. Four additional witnesses, three of whom testified about the impact as to the two non-capital murder charges against Bryant (Burgess and Gainey), were allowed to testify prior to the imposition of sentencing. Neither Howle nor Clarke objected

to the additional victim impact evidence. Neither trial counsel for Bryant had a strategic reason for failing to object.

Victim impact evidence is admissible in a capital sentencing proceeding. *Payne v. Tennessee*, 501 U.S. 808 (1991). Victim impact testimony must be sworn testimony and be subject to cross-examination “and contrary evidence by the opposing party.” *Id.*, 501 U.S. at 823. In this case, Bryant was not allowed to confront, cross-examine or present contrary evidence to the additional victim impact allowed into the evidence by Judge Russo.

Bryant’s Confrontation Clause rights were violated in this case because Bryant never had an opportunity to cross-examine the additional witnesses who gave victim impact testimony against him. *See State v. Nance*, 393 S.C. 289, 294 (2011). The Confrontation Clause applies to capital sentencing trial proceedings. *See State v. Hurt*, 702 S.E.2d 82 (N.C. Ct. App. 2010); *Stringer v. State*, 241 S.W.3d 52 (Tex. Crim. App. 2007); *Wall v. State*, 184 S.W.3d 730 (Tex. Crim. App. 2006); *Rousseau v. State*, 171 S.W.3d 871 (Tex. Crim. App. 2005). Further, Due Process of Law is denied when a defendant is sentenced to death, at least in part, on the basis of information the defendant had no opportunity to rebut, explain, or deny. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

The admission of additional unsworn victim impact evidence was error. Bryant’s counsel failed to object. In this case, Counsel’s failure to object was prejudicial and resulted in a denial of Due Process of Law, the Confrontation Clause, and the Eighth Amendment’s guarantee that no cruel or unusual punishment shall be inflicted. Bryant’s death sentence must be reversed on this ground. It is so Ordered.

Applicant's Issue "E":

After the close of evidence and prior to sentencing, Edwin Goss made a frantic attempt to contact Judge Russo and defense counsel for Bryant. As discussed above, Edwin Goss made himself known because he had an encounter with Bryant, and he believed the judge needed to know what he had observed to be Bryant's confused and bizarre state of mind. Judge Russo refused to reopen the case. This issue was preserved for direct appellate review. Savitz did not raise the "Goss issue" on direct appeal.

Dr. Watts, along with Clarke and Howle, testified Goss' statement was important, corroborative evidence in mitigation. The trial record reveals Dr. Watts was repeatedly undermined by Jackson because she could not "corroborate" the basis of her diagnosis and findings, all of which were based upon Bryant's impaired mental health.

The United States Constitution requires that the sentence in a capital case "must be permitted to consider any mitigating factor." *Porter v. McCollum*, 558 U.S. 30 (2009). The South Carolina Supreme Court has ruled a motion to reopen is subject to appeal if the refusal to do so amounts to "an abuse of discretion." *Brenco v. S.C. Dept. of Transp.*, 377 S.C. 124, 127 (2008). In a strikingly similar case, the South Carolina Supreme Court reversed a death sentence when a capital defendant was denied a continuance.

In *State v. Owens*, 346 S.C. 637 (2001), our Supreme Court reversed a death sentence for Freddie Owens. After the end of his guilt phase and prior to the beginning of sentencing, Owens killed a fellow detention center inmate. Owens gave an incriminating statement about the event. The state advised defense counsel they intended to introduce this as additional evidence in aggravation. Owens' counsel moved for a continuance, arguing they needed time to investigate what had happened between Owens and the dead inmate. Owens' counsel was denied a

continuance. On appeal, the sentence was reversed. The abuse of discretion standard was applied. The Court ruled “[b]ecause of the capital nature of the proceeding and given the timing of appellant’s statement, we find due process necessitated a brief, perhaps twenty-four hour continuance to allow defense counsel the opportunity to interview the inmates and personnel at the detention center.” *Id.*, 346 S.C. at 664.

Bryant’s case is strikingly similar to *Owens*, with the only difference being that the newly discovered evidence was mitigating, rather than aggravating. Bryant’s counsel and Dr. Watts testified Goss’ observations would have bolstered their case in mitigation. Goss clearly emerged as a potential witness after the close of the case, but before sentencing, and the delay in his emerging as a witness was not due to some stratagem of defense counsel.

As in *Owens*, this Court finds Due Process was denied Bryant by the earlier trial court error. This issue, had it been raised, would have met the requirements under the *Owens* case in that denial of defense counsel’s motion to reopen the case was an “abuse of discretion.” This Court finds that Bryant is entitled to vacation of his death sentence based upon this error. It is so Ordered.

Applicant’s Issues “F” and “G”:

This Court finds the facts in this case are uncontested as to Bryant’s claim that evidence of pornography was discovered on the Tietjen Gateway computer by SLED, but never provided to either the Solicitor or Defense Counsel. This Court further finds that the state’s failure to provide the SLED evidence was not intentional. Based on the evidence before this Court, it is clear the failure to disclose was a negligent act, not a volitional one.

The Constitutional mandates set forth in *Brady v. Maryland*, and *Kyles v. Whitley*, do not require a showing of intentional non-disclosure by the State in order to grant relief. The non-

disclosure, whether intentional or not, is the starting point of this Court's analysis. The second prong of the analysis is whether the non-disclosed evidence was "material," to either guilt or innocence. *Simpson v. Moore*, 367 S.C. 587, 600 (2006). Our Supreme Court has held that "if a *Brady* violation occurred, PCR must be granted." *Riddle v. Ozmint*, 369 S.C. 39, 44 (2006).

This Court finds that the SLED evidence proving the existence of pornography on the Tietjen Gateway computer was both undisclosed and material to Bryant's case in mitigation. Materiality of the SLED evidence is found based on the following factors:

- 1) Pornographic evidence on the Tietjen computer corroborated Bryant's statements;
- 2) Pornographic evidence on the Tietjen Gateway computer refuted allegations or implications that the post-mortem mutilation of Tietjen's eyes was a simply callous act, but rather proved, according to Dr. Watts, that the post-mortem mutilation was symbolic and connected with Bryant's mental illness and PTSD;
- 3) Pornographic evidence on the Tietjen Gateway computer disproved the State's theory that Bryant on his own began surfing pornography, as the pre-existing pornography on the computer proved Bryant only viewed images previously stored on the Tietjen computer prior to Tietjen's killing.

Both the defense counsel for Bryant and Jackson and Saleeby testified they never received the SLED diskette containing the encase and internet histories from the Tietjen computer. Dr. Watts unequivocally stated that pornographic evidence weakened Bryant's case in mitigation, and her testimony in particular.

This Court finds that the SLED evidence was both undisclosed and material. The existence of the pornography corroborated Bryant's account of what happened at the Tietjen home and corroborated Dr. Watts testimony about Bryant experiencing a "triggering" event.

leading to Tietjen's homicide. Applicant has clearly established a *Brady v. Maryland* violation occurred in his case and was prejudicial to his case in mitigation. Bryant has established a *Brady* violation and he is entitled to vacation of his death sentence. It is so Ordered.

Conclusion

This Court finds that, based upon the facts of this case, evidence presented, and relevant legal principles applicable to Bryant's claims that Bryant's guilty plea and death sentence must be reversed and vacated. It is so Ordered.

This ___ day of _____, 2012.

Honorable Ralph F. Cothran, Jr.
Presiding Judge