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S.C. Supreme Court

STATE OF SOUTH CAROLINA
In The Supreme Court

On Petition for Writ of Certiorari to Sumter County

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
(Capital PCR Action)
R. Ferrell Cothran, Jr., Circuit Court Judge

Stephen Corey Bryant, Petitioner,

vs.

State of South Carolina, Respondent.

Appellate Case No.: 2013-000518

RETURN TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S QUESTIONS 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 this application as evidenced by the PCR court's wholesale adoption of the state's proposed order?

RESPONDENT'S STATEMENT OF THE CASE

Petitioner, Stephen Corey Bryant, was indicted by Sumter County and Richland County grand juries on multiple charges including three counts of murder. The State sought the death penalty for the murder of Mr. Tietjen in Sumter County. Petitioner was initially represented by Jack D. Howle, Jr., Esq., and James H. Babb, Esq. Prior to resolution, Mr. Babb was removed due to an incapacitating medical condition and replaced, on July 18, 2008, by John D. Clarke, Esq. (App. pp. 1309-1314).

On August 18, 2008, Applicant entered guilty pleas to the following crimes: burglary second degree [2006-GS-43-696]; burglary first degree [2006-GS-43-697]; assault and battery with intent to kill [2004-GS-40-10096]; three (3) counts of murder [2006-GS-43-698, 699, 700]; assault and battery with intent to kill [2006-GS-43-701]; threatening the life of a public employee [2006-GS-43-702]; armed robbery [2006-GS-43-699]; possession of stolen handgun [2006-GS-43-699]; another count of burglary first degree [2006.GS-43-698]; and, arson, second degree [2006-GS-43-698]. (App. pp. 1334-38). Judge Russo deferred sentencing. (App. p. 1384). The sentencing proceeding for the murder of Mr. Tietjen began on September 2, 2008. On September 11, 2008, Judge Russo imposed sentence on all non-capital convictions,[1] and also found beyond a reasonable doubt the existence of the aggravating circumstance –"the defendant committed the murder while in the commission of a robbery while armed with a deadly weapon" – and sentenced Petitioner to "death by electrocution or lethal injection" for Mr. Tietjen's murder. (App. pp. 1047-1051). Petitioner appealed.

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[1] Thirty (30) days, (threatening public employee); twenty (20) years,(ABIK); twenty (20) years,(ABIK); life, (murder); life, (burglary first degree); fifteen (15) years, (burglary second degree); twenty-five (25) years, (arson second degree); life (burglary first degree); life, (murder), five (5) years, (possession of stolen handgun); thirty (30) years, (armed robbery); and life (murder).

Senior Appellate Defender Joseph L. Savitz represented Petitioner on appeal. Counsel presented one issue challenging the exclusion of "testimony that Bryant's aunt had been sexually abused by her father (Bryant's paternal grandfather)...." (App. p. 1396). This Court heard oral argument on November 30, 2010, and, on January 7, 2011, issued its opinion affirming the convictions and sentences. (App. pp. 1452-1457).[2] On January 24, 2011, Petitioner filed a petition for rehearing. (App. pp. 1458-1459). On February 2, 2011, the court denied the petition and issued the remittitur. (App. p. 1461 and p. 1463). Petitioner did not seek further review from the Supreme Court of the United States.

After obtaining a stay from this Court on March 3, 2011, to seek post-conviction relief, (App. pp. 1475-1475), Petitioner filed an initial application on May 10, 2011, (App. pp. 1483-1485), followed by amendments filed May 21, 2012, (App. pp. 1532-1536), and October 1, 2012, (App. pp. 1632-1638). Melissa J. Armstrong, Esq., and Heath P. Taylor, Esq., represented Petitioner in the action. (App. pp. 1477-1481). An evidentiary hearing was held October 1-3, 2012, before the Honorable R. Ferrell Cothran. (App. p. 1639). At the conclusion of the hearing, Judge Cothran heard summation arguments and took the matter under advisement. (App. pp. 2122-2169). Judge Cothran also accepted proposed orders from both parties. (App. p.2516-2571; Third Supplemental Appendix). By Order dated December 4, 2012, Judge Cothran denied relief and dismissed the application. (App. pp. 2572-2625). Petitioner moved to alter or amend. (App. pp. 2626-2633). By Order dated February 14, 2013, Judge Cothran denied the motion. (App. pp. 2634-2646). Petitioner appealed the denial of relief.

On March 28, 2014, Petitioner filed a petition for writ of certiorari with this Court. This return follows.

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[2] *State v. Bryant*, Op. No. 26906 (S.C.Sup.Ct. filed January 7, 2011), reported at 390 S.C. 638, 704 S.E.2d 344 (2011).

STATEMENT OF FACTS

This Court has previously set out the general facts of the case as follows:

> Appellant began a crime spree with a first degree burglary on October 5, 2004. By the time the spree ended eight days later, appellant had committed three murders, assault and battery with intent to kill (ABIK), two more burglaries, and arson. While incarcerated awaiting trial, appellant threatened a correctional officer and subsequently attacked and seriously injured another.
>
> Appellant "cased" isolated rural homes looking for vulnerable victims. He would appear midday at homes, claiming to be looking for someone or having car trouble. Appellant burglarized Dennis's home office a day after visiting Dennis's home. He next broke into Ammons' home while no one was there, cutting the phone wires and stealing a pistol and ammunition. Later that same day he shot victim Brown, who was fishing along the Wateree River, in the back.
>
> On October 9, appellant killed an acquaintance (victim Gainey), leaving his body on a rural road, then stole electronics and an aquarium from Mr. Gainey's trailer before setting it on fire. Two days later, appellant went to victim Tietjen's home, shot him nine times, and looted the house. Appellant answered several calls made to Mr. Tietjen's cell phone by Mr. Tietjen's wife and daughter, telling both of them that he was the "prowler" and that Mr. Tietjen was dead. He burned Mr. Tietjen's face and eyes with a cigarette. Appellant left two notes on paper and scrawled a message on the wall: "victim number four in two weeks, catch me if you can." On another wall the word "catch" and some letters were written in blood.
>
> Two days later appellant met victim Burgess at a convenience store around 4:30 am. They left together, and less than two hours later, a hunter found Mr. Burgess dead from gunshot wounds on a road bed in a rural area.

State v. Bryant, 390 S.C. 638, 639-640, 704 S.E.2d 344, 344 - 345 (2011).

The PCR Order has an expanded recitation of facts which demonstrates, in much greater detail, the malice and connectivity of the other crimes which is only briefly referenced above. (See App. pp. 2576-2584). For brevity's sake, however, that expanded recitation of facts is incorporated by reference in this return.

RELEVANT LAW

"On certiorari in a PCR action, the Court applies the 'any evidence' standard of review." *Terry v. State*, 394 S.C. 62, 66, 714 S.E.2d 326, 328 (2011) (quoting *Cherry v. State,* 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989)). This "Court will affirm if any evidence of probative value in the record exists to support the findings of the PCR court." *Id. See also Holden v. State*, 393 S.C. 565, 573, 713 S.E.2d 611, 615 (2011) ("In reviewing the PCR judge's decision, an appellate court is concerned only with whether any evidence of probative value exists to support that decision.").

A valid guilty plea[3] greatly limits the ability to contest and litigate purported error. One who pleads guilty may generally "only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was incompetent. *Tollett v. Henderson*, 411 U.S. 258, 267, 93 S.Ct. 1602, 1608 (1973). The oft repeated standard in *Strickland v. Washington*, 466 U.S. 668, 694 (1984) applies. *Stalk v. State*, 383 S.C. 559, 561-562, 681 S.E.2d 592, 594 (2009) (quoting *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366 (1985)). Specifically "[i]n the context of a guilty plea, the petitioner must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness and '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.'" *Burket v. Angelone*, 208 F.3d 172, 189 (4th Cir. 2000) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366 (1985)). "A reasonable probability is a probability sufficient to undermine

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[3] It is beyond dispute that a guilty plea must be both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 29 (1992). See also *Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("a guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'"). What is key to the analysis in reviewing the plea for voluntariness is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Raley*, 506 U.S. at 29, quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

confidence in the outcome" of the proceeding. *Strickland*, 466 U.S. at 694. See also *Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 723 (2001) ("applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different."). "The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence." Rule 71.1 (e), SCRCP. See also *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). "Although appellate courts frequently 'short-hand' the prejudice prong in a guilty plea ineffective assistance claim as 'but for the deficient performance is there a reasonable probability that the defendant would not have pleaded guilty but would have insisted on going to trial,' *Hill* makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial." *Stalk*, 383 S.C. at 563, 681 S.E.2d at 594-595.

In order to prove deficient performance, the convicted defendant must "show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, ___ U.S. ___, ___, 131 S.Ct. 770, 787 (2011) (quoting *Strickland*, 466 U.S. at 687). Further, "[t]he standard for judging counsel's representation is a most deferential one." *Harrington*, 131 S.Ct. at 788. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." *Strickland*, 466 U.S. at 689. *Holden,* 393 S.C. at 572, 713 S.E.2d at 615 ("There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case.") (quoting *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007)). "[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the

circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Butler v. State*, 286 S.C. 441, 445, 334 S.E.2d 813, 815 (1985) (quoting *Strickland*, [466 U.S. at 690]).

In order to prove "prejudice" in regard to sentencing phase error, an applicant must show "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998) (quoting *Strickland*, 466 U.S. at 695). See also *Sigmon v. State*, 403 S.C. 120, 127, 747 S.E.2d 394, 398 (2013) (same). Further, prejudice is evaluated by consideration of the prior evidence along with the PCR evidence, compared to the aggravating circumstances evidence. *Wong v. Belmontes*, 558 U.S. 15, 26, 130 S.Ct. 383, 389-390 (2009). "The likelihood of a different result must be substantial, not just conceivable." *Harrington*, 131 S.Ct. at 792 (citing *Strickland*, 466 U.S. at 693). "[W]hile in some instances 'even an isolated error' can support an ineffective-assistance claim if it is 'sufficiently egregious and prejudicial,' *Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986), it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." *Harrington v. Richter*, 131 S.Ct. at 791.

When the questions presented in the petition are analyzed within this legal framework, and in light of the record before the PCR court, the record well supports relief was not warranted. Certiorari is likewise not warranted. Petitioner shows neither an error of law nor an absence of probative facts. Further, he fails to show error in the adoption of the State's proposed order, especially where Petitioner was allowed to present his own proposed order and request reconsideration of the findings. The petition should be denied.

ARGUMENT

I.
Counsel's Advice on Advantages of Guilty Plea

Petitioner complains the PCR judge erred in finding counsel did not provide deficient representation in his advice concerning a possible advantage to having a judge decide sentencing. In particular, Petitioner challenges the existence of "statistics" which would support that he may stand an increased chance at a life sentence if sentenced by a judge rather than a jury. (Petition, p. 11). He also complains counsel erred in misadvising him in regard to a relaxation of the rules of evidence should he opt to proceed to trial while admitting guilt. (Petition, p. 11). Neither of these arguments can support relief on appeal. The record supports the PCR judge's findings in regard to the first, and the second is not only procedurally barred from review but also similarly fails factually.

At the PCR hearing, Mr. Howle testified that he and Mr. Babb had advised Petitioner that Petitioner would be more likely to receive life if the judge would hear the facts of the case as opposed to a jury. (App. pp. 1805-1806; pp. 1822-1823). Mr. Babb testified that he was aware some evidence of remorse would likely decrease the possibility of a death sentence. (App. pp. 1899-1900). Mr. Clark underscored the thought a judge would not be so shocked or outraged as certain members of the community in general. (App. pp. 2022-2023). Mr. Clark similarly shared the thought that the plea may show some remorse which may have benefitted him at sentencing. (App. pp. 2008-2009). Further, Petitioner testified at the PCR hearing that it was "the plan" to go to trial, but that he made the decision to plead guilty on advice of counsel. (App. pp. 2105-2106; p. 2112). Thus, Petitioner concurred in counsel's strategy and further, opted to plead guilty in hopes – not upon a guarantee – of obtaining a life sentence. (See also App. pp. 1943-1944, Mr. Babb's testimony that though statistics referenced, no guarantee was made as to sentencing).

Finally, the record is replete with references that counsel was available to discuss any and all aspects or concerns about the choice to plead guilty, and, that the decision making process extended for a significant period before entry of the plea on August 18, 2008. (See App. p. 1805; p. 1911; p. 2009; 2020; pp. 2313-2336; pp. 2374-2375).

As to the statistics at issue, the PCR judge found that Petitioner "and counsel considered the whole of the case in deciding to plead guilty" and the "statistics are but part of the counsel's consideration." (App. p. 2537). The PCR judge noted Petitioner's own testimony that he knew he would found guilty, and also knew, as to Mr. Tietjen's murder, that the only sentencing possibilities would be life without parole or death. (App. p. 2592). (See also App. pp. 1347-1377 (admitting facts at plea); pp. 1378-1379 (plea); p. 1336 (plea); p. 1344 (plea); pp. 2105-2106 (PCR); p. 2112 (PCR)). Further, the PCR judge noted that "the facts of Mr. Tietjen's murder, the mutilation of the body, the bloody and obscene notes, would likely be very difficult for a jury to hear." (App. p. 2593). (See also App. pp. 1805-1806 and p. 1822, counsel (Mr. Howle) testifying he thought it better that a jury not hear all the evidence and certainly not hear all the evidence twice for two phases; pp. 2022-2023, counsel (Mr. Clark) recounting the hope a judge would not be as shocked by the heinous details as the average juror; pp. 1899-1900, counsel (Mr. Babb) testifying that plea "at least shows some amount of remorse" and a showing of remorse critical where facts show "cold blooded killing"). Placing the statistics challenge in context of the whole of the advice given, the PCR judge found:

> Mr. Howle testified those statistics were gathered by Mr. Babb, but independent of those statistics, Mr. Howle believed that [Petitioner's] best opportunity would be before a more neutral figure – a judge rather than jury. Mr. Clark also testified that that was his belief as well – especially here where particularly heinous facts would be presented. Mr. Babb was convinced that Applicant needed to demonstrate as much remorse as possible to have hope of avoiding a death sentence. Thus, the record supports that all counsel – Mr. Howle, Mr. Babb, and Mr. Clark – agreed

> with the reasoning of entering the plea in this particular case. Further, the record shows that Applicant agreed that allowing the judge to hear the case was in his best interest, and, particularly, that counsel significantly consulted with Applicant, covering varied and specific aspects of pleading guilty.
>
> Simply, the best hope does not equate to a guarantee of securing a desired result[]. The advice of counsel in this case constituted well-reasoned strategy, not solely based on statistics, but on experience and knowledge of the community jurors. The plea was knowingly and voluntarily given with reasonable advice of well-experience[d] counsel. Applicant failed in in his burden of proof.

(App. p. 2593).[4]

The record fully and fairly supports the PCR judge's factual findings and his conclusions of law. In his petition seeking appellate review, though, Petitioner attacks very little of the PCR judge's detailed and comprehensive ruling on this issue. Rather, Petitioner focuses his argument on perceived tension between the affidavit of Ms. Teresa L. Norris, Esq., and counsel's (Mr. Babb's) PCR hearing testimony. (Petition, pp. 11-12). Petitioner overlooks that Ms. Norris avers she did not speak with counsel regarding the plea tender and statistics. (App. p. 2371-2372).[5] Counsel, Mr. Babb, testified *either* he spoke to Ms. Norris *or* Mr. Lominack. (App. p. 1908; pp. 1943-1944). Petitioner did not call Mr. Lominack. There is no direct tension in the record.

Even so, as the PCR judge found, the "statistical" basis is but one facet of a complex analysis. (App. p. 2593). Petitioner does not contest Mr. Howle's or Mr. Clark's

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[4] Respondent notes that the proposed orders and final order were drafted before receipt of the transcript of the PCR evidentiary hearing and do not contain specific cites to the PCR testimony.

[5] Further, though the exact statistical study at issue here has not been identified, there is reference in out of state precedent to a statistical study to support the general correlations Mr. Babb referenced. *See State v. Post*, 513 N.E.2d 754, 768 (Ohio 1987) ("Appellant also introduced statistics establishing that at the time of his conviction only one defendant had been sentenced to death of the twenty non contest or guilty pleas entered for aggravated murder."). However, the statistics referenced were merely part of the general determination of the better course based on the facts and a global assessment of the case.

consistent opinion that Petitioner would stand a better chance before a judge rather than a jury. (See App. pp. 1805-1806; pp. 2022-2023).[6] This is strategy repeatedly found reasonable under the *Strickland* standard.[7] See, e.g., *United States v. Fulks*, 683 F.3d 512, 519 (4th Cir. 2012) (*cert. denied* 134 S.Ct. 52 (2013)) ("given the unpalatable hand the defense team was dealt, having Fulks speak to the authorities and then plead guilty were reasonable litigation tactics, though Blume obtained no palpable quid pro quo from the government")[8]; *Thacker v. Workman*, 678 F.3d 820, 846 (10th Cir. 2012) (*cert. denied*, 133 S.Ct. 878 (2013)) (finding no *Strickland* error where "trial counsel considered all of the available strategic options for defending Thacker and concluded, in the end, that the best strategy was to have Thacker enter a blind guilty plea and be sentenced by the state trial judge rather than the jury"); *State v. Ketterer*, 855 N.E.2d 48, 63 (Ohio 2006) (*cert. denied*

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[6] This is not a case where there was an acknowledged basis to contest guilt. In their PCR testimony, all counsel recognized that conviction was likely. (See App. pp. 1804 and 1822 (Howle); pp. 1923 and 1934 (Babb); pp. 2019-2020 (Clark)).

[7] The cases cited in the petition for this argument appear to relate only to incorrect advice on sentencing. Petitioner clearly testified he was not promised any sentence, and understood he could be sentenced either to life without parole or death. (See App. pp. 1943-1944). Thus, the cases are not directly on point. The only case Petitioner cites regarding statistics is a Third Circuit case, *Meyers v. Gillis*, 142 F.3d 664 (3rd Cir. 1998). (Petition, p. 14). However, relief in that case was not based on error in statistical information alone. In *Meyers*, counsel advised client as to early release on an offense that carried mandatory life without parole. Client had actually testified he understood he would be parole eligible after seven years. Counsel testified client "clearly misunderstood [the] discussions...." 142 F.3d at 665. The federal court of appeals in habeas review of the state conviction agreed with the district court that "defense counsels' stewardship fell below that required by the Sixth Amendment," in part, because the statistics on early release went to commutations by the old governor, not the then acting governor. 142 F.3d at 668. That case presents much greater tension in advice and relevancy of the statistics than is evident here.

[8] Of note, Mr. Blume is Ms. Norris' law partner. (See App. p. 2370). This makes the categorical statements of error based in part on the affidavit rather suspect when compared to actual practice even within the same firm. However, most any assertion of *per se* deficiency in advice will be suspect. Accord *Strickland,* 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

550 U.S. 942, 127 S.Ct. 2266 (2007)) (rejecting claim that counsel "are per se ineffective" to advise a plea in a capital case "without first securing an agreement" for a life sentence, assuming counsel so advised, "[c]ounsel may have reasonably believed that a guilty plea could minimize the effect of gruesome facts and a brutal murder, especially before a three-judge panel"); *Braun v. State*, 909 P.2d 783 (Okla.Crim.App. 1995) (*cert. denied*, 517 U.S. 1144, 116 S.Ct.1438 (1996)) ("Petitioner admitted he elected to plead [without a deal for a life sentence] in front of the judge because he thought he had a better chance of receiving life without parole. Under the circumstances, this seems a sound strategic choice.").[9] *See also Shaw v. Martin*, 733 F.2d 304, 316 (4th Cir.) (*cert. denied* 469 U.S. 873, 105 S.Ct. 230 (1984)) (pre-*Strickland* case: "The record shows that the advice and decision of trial counsel to recommend that Shaw plead guilty followed a careful and

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[9] Petitioner's reference to the ABA Guidelines for the proposition it is "patently unreasonable" to allow a client to plead guilty without an agreement, (see Petition, p. 15), stands in stark contrast to these cases and the affidavit which indicates hesitancy is expressed in the guidelines, not *per se* deficiency performance. (See App. p. 2371). *See also Florida v. Nixon*, 543 U.S. 175, 191, 125 S.Ct. 551, 562-563 n. 6 (2004) (referencing guidelines from 2003 reflect "counsel should be extremely reluctant" where no agreement is reached). However, the contrast with practice may be resolved by placing the guidelines in their proper place as merely guidelines. The guidelines do not express a checklist of commandments that each and every defense attorney in a capital case must follow to meet constitutional demands. *See Bobby v. Van Hook*, 558 U.S. 4, 9, 130 S.Ct. 13, 17 (2009) (Supreme Court does not recognize guidelines as mandatory or dispositve as to constitutionally sound representation). *State v. Blakely*, 402 S.C. 650, 663, 742 S.E.2d 29, 36 (Ct.App. 2013) ("these standards are only guides and do not establish the constitutional baseline"). *See also Hodges v. Colson*, 727 F.3d 517, 536-537 (6th Cir. 2013) (*petition for certiorari filed* June 14, 2014) (finding in capital case on deferential review in federal habeas that ABA Guidelines requiring counsel not to advise client to plead guilty without securing an agreement of less than death not dispositive and resolving "there is a reasonable argument that counsel satisfied *Strickland's* deferential standard"); *Dunlap v. State*, 106 P.3d 376, 387 (Idaho 2004) (*cert. denied*, 546 U.S. 979, 126 S.Ct. 546 (2005)) (rejecting argument that counsel was ineffective where ABA Guidelines "require[d] counsel to ensure that death is not a possible punishment before advising a client to plead guilty," where "Dunlap's attorneys evaluated the evidence and determined the State had overwhelming evidence against Dunlap" and "[i]n their view, the best way to avoid the death penalty was to accept responsibility and attempt to reduce the details the court would be presented with.").

thorough investigation, and was the product of their sound deliberation and judgment that Shaw's prospects were better with the sentencing judge than with a jury, especially considering the brutal and utterly sadistic facts of the case.").

In sum, the record fully and fairly supports the PCR judge's ruling on this issue regarding statistics. Certiorari review should be denied.

As to the remaining portion of Issue One – whether counsel misadvised on the adherence to evidentiary rules in sentencing, (Petition, p. 12) – that issue was not ruled upon by the PCR judge. Further, Petitioner did not request a ruling on such an argument in the Rule 59 motion. (App. p. 2627). Consequently, Petitioner's second argument within this issue is procedurally barred from review. *Marlar v. State*, 375 S.C. 407, 410, 653 S.E.2d 266, 267 (2007) ("Because respondent did not make a Rule 59(e) motion asking the PCR judge to make specific findings of fact and conclusions of law on his allegations, the issues were not preserved for appellate review"). Even so, Mr. Howle's testimony shows that the post-trial interpretation of the advice has been misconstrued.

Mr. Howle testified that he advised that there was little to contest or subsequently successfully appeal once guilt was admitted. (App. pp. 1807-1808). This is consistent with the language referenced from the plea tender. (See App. p. 2335).[10] Moreover, it is consistent with harmless error analysis. See, e.g., *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991) ("Error in a criminal prosecution is harmless when it could not

[10] The relevant portion reads: "I have been informed that lawyers for the State of South Carolina have argued I could have a jury trial and just tell the jury that I am in-fact guilty. The problem with that argument, as I understand it, is that under the standard of appellate review employed by the South Carolina Supreme Court, then any errors committed by the prosecution or by the Court, would be considered harmless error. It would essentially grant the prosecution a license to do things during my trial they would otherwise be prohibited from doing – all of which could certainly further prejudice the jury against me, destroying any advantage I might have gained in the first place by telling them I am guilty and remorseful for what I have done." (App. pp. 2335-2336).

reasonably have affected the result of the trial"); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result"). Even considering the interpretation that Petitioner now assigns the advice, such advice would be largely consistent with recognized strategic concerns. See generally *Florida v. Nixon*, 543 U.S. 175, 191, 125 S.Ct. 551, 562 n. 6 (2004) ("Pleading guilty not only relinquishes trial rights, it increases the likelihood that the State will introduce aggressive evidence of guilt during the sentencing phase, so that the gruesome details of the crime are fresh in the jurors' minds as they deliberate on the sentence.").[11] Such interpretation, though, does not fit comfortably with Petitioner's agreement with counsel's question that he was advised "the state could sort of play fast and loose with the rules." (See App. pp. 2100). That appears to be an "evidence rule relaxation" question which Respondent submits would be separate and unsupported by the plea tender language and plea counsel's testimony. However, either way, there was no error in the advice. But again, the particular argument raised was not ruled upon and is procedurally barred from review. *Marlar, supra.* Certiorari review should be denied.

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[11] Moreover, the advice in the instant case should be considered in context of the litigation Petitioner previously engaged in – attempting to secure a plea and jury sentencing, which our jurisdiction does not allow. See S.C. Code § 16-3-20 (B) ("... if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge"). See also *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011) (noting similar challenge to statute decided "against" appellant) (citing *State v. Allen*, 386 S.C. 93, 102, 687 S.E.2d 21, 25 (2009)). The advice and conversations at issue in the instant matter should be considered in light of the fact that some of the discussed options were limited by that lost litigation. (See App. p. 1805; pp. 1822-1823).

II.
Allegation of Deprivation of Two Attorneys Prior to Plea

Petitioner complains he was denied two attorneys during his discussions leading to the guilty plea, and the denial violated his Sixth Amendment right to counsel and his statutory right under state law of the assistance of two attorneys in his capital case. (Petition, p. 17, pp. 20-21). The PCR judge rejected the Sixth Amendment claim finding Mr. Howle had consistently been representing Petitioner "since the charges were initially brought against him." (App. pp. 2594-2595). Further, the PCR judge found the record supported Mr. Babb spent "tremendous time and resources in preparing the case, along with Mr. Howle, prior to his disability preventing further representation." (App. pp. 2596-2597). Further still, the PCR judge found that while "Mr. Clark admittedly had limited time to be involved in the case," the record supported that "he was given all the discovery, meet with the client, and, while he testified his conversations were not so detailed and diverse as they would have been had he had years on the case instead of months, he nonetheless confirmed that he engaged in discussion, agreed with the rationale of the plea, and actively prepared and participated in the sentencing proceedings." (App. p. 2597).[12]

Petitioner has shown no violation of either his Sixth Amendment right or his statutory right. Petitioner does not question the wealth of work accomplished before Mr.

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[12] Petitioner complained in his Rule 59 motion that the PCR judge misconstrued the record, and Mr. Clark did not have "months" in regard to the plea, but only thirty (30) days. (App. p. 2628). The PCR judge explained the use of the term "months" in his comparison: "The record reflects that Mr. Clarke was appointed on July 18, 2008 to replace Mr. Babb. The guilty plea was held August 18, 2008 and the sentencing phase was September 2, 2008. Therefore, Clarke had a month to prepare for the guilt phase and about 6 weeks to prepare for the sentencing phase. The use of "months" may have been an oversight in the Order denying the PCR Application, the error was de minimus and the record shows Mr. Clark represented Applicant longer than a month before the plea and sentencing phases ended." (App. p. 2639). The PCR judge was clearly aware of and considered the precise dates involved.

Babb was unable to continue due to medical issues. However, Petitioner appears to overlook that this was not a blunt cessation of representation. At the July 18, 2008 hearing formally appointing counsel, Mr. Howle stated: "Mr. Bryant is aware of this and signed a consent on July 11th." (App. p. 1312). Further the plea judge confirmed at that same hearing that the case was then scheduled to be heard "the weeks of September 1st and September 8th" and that neither Mr. Howle nor Mr. Clark saw any reason or cause that the schedule could not be maintained. (App. p. 1314). Mr. Howle confirmed that Mr. Clark had been given a disc the day before the hearing with "everything on it. " (App. p. 1316). The trial judge allowed Mr. Clark time to review the materials asked, "if any issue does arise for you review of those materials, [to] notify the Court as soon as possible." (App. p. 1316). Mr. Clark agreed to do so. (App. p. 1317). Additionally, both Mr. Howle and Mr. Clark confirmed that the pre-trial hearings the week of August 25th would not pose a problem. (App. pp. 1318-1320).

As Petitioner correctly states, the decision to plead guilty has been held to be a critical stage in a criminal case. *See, e.g., Missouri v. Frye*, ___ U.S. ___, ___, 132 S.Ct. 1399, 1405 (2012) ("Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea."); *Iowa v. Tovar*, 541 U.S. 77, 81 (2004) ("The entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres."). (See Petition, p. 21). However, the record does not show that Applicant was ever deprived of his Sixth Amendment right to counsel during the decision to plead guilty, especially with the continuity of representation in regard to Mr. Howle. Further, the record does not show that Petitioner was deprived of his statutory right to two attorneys for his capital proceedings.

S.C. Code § 16-3-26 (B)(1), provides for the appointment of two attorneys to

represent an indigent capital defendant. The record shows that Mr. Howle was careful in including Petitioner in the transfer of attorneys and that Mr. Clark neither sought nor needed additional time to prepare. In fact, Mr. Clark testified at the PCR hearing, though he agreed with the decision to plead guilty, that decision has essentially been made before he was asked to assume formal representation. (App. pp. 2007-2009; pp. 2019-2022). As Petitioner does not contest the fact of representation of two qualified attorneys during the prior discussions (though he does question the quality of the advice, see Issue I), the factual basis for the instant claim is questionable.

Even so, the requirement of appointing two attorneys in the capital setting derives from state statute, not the Constitution. Thus, to the extent the replacement of counsel process caused a brief infringement upon the statutory right, such situation did not convert the statutory infringement to an error of Constitutional magnitude. Accord *United States v. Shepperson*, 739 F.3d 176, 180 (4th Cir.) (*cert. denied* 134 S.Ct. 2314 (2014) (in capital-eligible offense case, "[b]ecause the right to additional counsel under § 3005 is solely statutory, we hold that the district court was not required to call it to the attention of Shepperson"); *United States v. Blankenship*, 548 F.2d 1118, 1121 (4th Cir.) (*cert. denied* 425 U.S. 978, 96 S.Ct. 2182 (1976)) (distinguishing statutory right to counsel from constitutional right: "Nothing in section 3005 indicates that the constitutional requirement that a defendant be afforded effective assistance of counsel may not be satisfied in a capital case by the appointment of a single attorney; that section merely provides authority for the court to assign additional counsel when necessary in a capital case.").

Petitioner argues, however, that *State v. Diddlemeyer*, 296 S.C. 235, 239, 371 S.E.2d 793, 795 (1988), supports that he was denied a fair trial for a violation of the statute. (Petition, pp. 20-21). *Diddlemeyer* did not speak in terms of the Sixth Amendment. This

Court, in fact, declined to "decide whether or not the nature of the violation is constitutional or statutory." 296 S.C. at 238, 371 S.E.2d at 795. Further, this Court's reasoning was based in large part on the finding of actual errors: "The record is replete with instances of improper testimony and unpreserved exceptions; therefore, it is unnecessary to decide whether or not the nature of the violation is constitutional or statutory" as the result was the failure to secure a fair trial. *Id.* Of note, *neither* of the two attorneys in *Diddlemeyer* met the statutory qualifications. 296 S.C. at 238, 371 S.E.2d at 794. That is clearly not the case here. *Diddlemeyer* does not support that any relief is warranted on the instant record.

Again, Applicant has failed to show a deprivation of constitutionally guaranteed counsel. As the record fully and fairly supports the PCR judge's decision, certiorari review should be denied.

III.

Allegation Counsel Failed to Objection to Solicitor's Send a Message Argument

Petitioner complains counsel was ineffective in failing to object to that portion of the Solicitor's closing requesting the judge "send a message." (Petition, p. 23). He apparently relies on the following portion of the solicitor's closing for that argument:

> Judge Russo, I don't envy the position you're in one bit; but as James Aiken said, you have to make hard decisions and live with them and it takes moral courage. 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 [is] going to present himself to the Court [in] the 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. Thank you.

(R. pp. 1026-1027 (emphasis added)). (See Petition, p. 23).

The PCR judge rejected Petitioner's argument as his argument was based on sending to the community, but the argument referenced sending a message *to Petitioner*. (App. p. 2598). In short, the PCR judge found no basis for objection. The argument at issue, when viewed in context, reflects the solicitor alluded to Petitioner's *modus operandi* to "ask for help" in seeking access to homes in order to commit burglary and/or murder. *See generally State v. Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 ("We must review the argument in the context of the entire record."). The "message" was merely to tell Petitioner "no," *i.e.,* to reject the claims in mitigation and sentence him to death for his heinous crimes. Thus, the comment – squarely tied to Petitioner – was not in the least improper. *See generally State v. Allen*, 386 S.C. at 99-100, 687 S.E.2d at 24 ("We do not find the trial court's imposition of the death sentence in this case to be the result of any arbitrary factor. In reading the entirety of the court's colloquy, it is clear that the sentence was premised primarily on retribution to this particular defendant, and the fact that the murders were

deliberate, premeditated and cruel."). Consequently, the record well supports the PCR judge's ruling. Certiorari should be denied.

Further, to the extent Petitioner contends the solicitor's request to act for the community, *i.e.*, "I ask you to send a message as a representative of our community," (see Petition, pp. 24-25), that request is not improper either. It is a simple acknowledgment of the exercise of the community conscience – a permissible argument even in jury settings. *See United States v. Ebron*, 683 F.3d 105, 145-146 (5th Cir. 2012) (referencing "permissible task of acting as the conscience of the community on the question of the appropriate sentence"); *United States v. Davis*, 609 F.3d 663, 688 (5th Cir. 2012) (quoting *Jackson v. Johnson*, 194 F.3d 641, 655 & nn. 54-56 (5th Cir. 1999)) ("[a]lthough the prosecution may not appeal to the jury's passions and prejudices, the prosecution may appeal to the jury to act as the conscience of the community."); *United States v. Solivan*, 937 F.2d 1146, 1155 (6th Cir. 1991) ("mere innocuous reference to the community or societal need to convict guilty people" not improper argument). The United States Supreme Court has recognized that "[t]he State has in a capital sentencing proceeding a strong interest in having the jury 'express the conscience of the community on the ultimate question of life or death.'" *Lowenfield v. Phelps*, 484 U.S. 231, 238 (1988) (quoting *Witherspoon v. Illinois,* 391 U.S. 510, 519 (1968)). Moreover, this Court has found "[g]eneral deterrence arguments are admissible in the penalty phase...." *State v. Shuler*, 353 S.C. 176, 189, 577 S.E.2d 438, 444 (2003). Thus, the argument was not improper in this sense either, and objection not warranted.[13] However, the PCR judge correctly reasoned the argument was tailored to Petitioner. Certiorari review should be denied.

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[13] The PCR judge also correctly found that Petitioner is not entitled to relief based on the overwhelming evidence of guilt and aggravation. (App. pp. 2601-2602).

IV.

Allegation Counsel Failed to Objection to Additional Victim Impact Testimony

Petitioner complains that counsel was ineffective in failing to object to the plea judge's decision to allow "victim impact evidence on unrelated crime victims," (see Petition, p. 40), similar to his argument below contesting the plea judge's decision "to allow the state to introduce additional victim impact testimony" by allowing victims of all crimes to speak at sentencing, (App. p. 1634; pp. 2133-2135; Third Supp. App. pp. 23-24 (Applicant's proposed order granting relief). The PCR judge correctly found Petitioner failed to prove a factual basis for his claim. (App. p. 2602).

As noted above, the plea judge deferred sentencing after acceptance of the guilty pleas on August 18, 2008. The judge noted in concluding the hearing, "the purpose of today's hearing was simply to allow Mr. Bryant to enter his plea and there was no, never any intention to take any testimony today, that it was just simply for the matter of entering a plea." (App. p. 1384). The record reflects that the presentation of statements from the victims was simply reserved for presentation at sentencing.

Petitioner confuses victim impact testimony with the right of victims to address the court at sentencing. The PCR judge correctly found no *Strickland* error in that the procedure used by the plea judge was consistent with the Victim Bill of Rights and use of victim impact evidence for non-capital crimes. S.C. Code Ann. Section 16-3-1550 (C). (App. pp. 2603-2604).

The information at issue was received after the sentencing phase and argument on the capital charge. (See App. pp. 1040). The judge then asked if there were other individuals to be heard, and the solicitor indicated individuals from the other crimes would like to speak. Mr. Ammons, whose home had been broken into made a short statement, (App. pp. 1042-1044); as did Chris Gainey, son of assault victim Cliff Gainey, (App. p.

1044); and, Robbie Burgess, brother of victim Chris Burgess also spoke, (App. pp. 1045-46). No objection was made to any of the statements nor was any request for cross-examination made by the defense. Mr. Howle stated he had spoken with Petitioner's family and the family indicated they could not emotionally stand to be present, but they would reiterate the mitigation previously presented on Petitioner's behalf. (App. p. 1046). Counsel also stated that Petitioner did not wish to speak, but drew the court's attention to the letter that he wrote to the victim's family in the Tietjen case. (App. p. 1047).

In the PCR hearing, Mr. Howle testified that he drew the distinction between the capital proceedings and the statements involving the other crimes and other murders. (App. pp. 1813-1814; p. 1837). The solicitor testified at the PCR hearing that the statements from victims on the non-capital counts were intentionally kept back until after presentation of the capital count sentencing phase evidence, and it was his belief that all parties understood that division which was adhered to during sentencing. (App. pp. 1984-1985).

South Carolina law provides in S.C. Code § 16-3-1550 (F) that the court "must hear or review any victim impact statement, whether written or oral, before sentencing." Further, "the court must allow the defense an opportunity to respond to the statement." Id. Contrary to Petitioner's argument, the "additional" evidence at issue was not related to the sentencing for the capital crime, but for the non-capital crimes. The PCR judge correctly found Petitioner failed to show a factual basis for his argument.

As the record fully and fairly supports the PCR judge's ruling, certiorari review should be denied.

V.

Allegation Counsel Failed to Properly Preserve the Gause Issue for Appeal; or, Alternatively, Appellate Counsel Failed to Present the Issue on Appeal.

Petitioner complains that counsel failed to proffer testimony from Edward Gause, or alternatively, that appellate counsel was ineffective for failing to present the issue. (Petition, p. 44). In denying the application on these grounds, the PCR judge carefully reviewed how the issue was handled at the end of the plea and sentencing proceedings, what, if anything was preserved for appeal, and whether the testimony received from Mr. Gause during the PCR hearing along without other evidence adduced at the PCR hearing, would show prejudice in its absence from the sentencing proceeding. The record well supports his decision denying relief on this issue.

Toward the end of the sentencing proceedings, Mr. Howle brought the matter to the court's attention:

> Your Honor, before we begin, one thing I did want to address the Court about. When I came in this morning to my office there was a message on the answering machine from someone who indicated that they had some information they thought was really important and wanted to talk to us. Ms. Spivey, my office manager, called that number that was left and the man who left the message was not there, it was his wife. And she related some things. I won't say what they were yet other than I guess the message, you can call it after-discovered testimony. I don't know why they waited till last night to call. But also related that apparently she had called your home and spoken to your wife. I'm not even – I don't know if you're aware of that, Your Honor. But your wife indicated well obviously I cannot talk to the judge about anything you want to tell me. The circumstances of what the individual related was involved in meeting him before these murders happened and coming up and just want to talk to him, said he needed help, ...
>
> Edwin Goss was the individual who when we called the number the person who answered said she was Mrs. Goss. Said he - - the police officer drove up. He went over to Mr. Goss, 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. Goss 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 king 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 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. pp. 1037-1038).

The plea judge acknowledged that the witness had called his home, had spoken to his wife, and left a message that he lived in Sumter and that it was "very urgent that he speak" to the judge about Applicant. (App. pp. 1038-1039). The judge noted he "was going to share that with you this morning ... not knowing that apparently he called your office as well." (App. p. 1039). However, the judge found that there had been fully opportunity to present evidence. (App. p. 1039). He acknowledged the defense "position that this is evidence that was just recently discovered," but found:

> ... 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 the request to reopen the case and certainly would note any exceptions that you would have to that ruling....

(App. p. 1039).

Mr. Howle added:

> Your Honor, I would just ask you note the objection because, like I said, specifically what was related to me from the wife talking to - - Ms. Spivey who then talked to me was that he was seeking help when he did that and I just felt that was testimony we certainly would have presented had we known it.

(App. pp. 1039-1040).

At the PCR evidentiary hearing, Mr. Howle testified that he could not recall precisely his actions in regard to the information, but recalled the information went to

Applicant's acting irrationally approximately one month before the murders. A statement was obtained after the hearing but apparently nothing further was done at that point. (App. pp. 1815-1817; pp. 1825-1827).

Appellate counsel, Joseph L. Savitz, Esq., testified that he was the former chief attorney at Appellate Defense, and had also worked as a Senior Appellate Defender with the agency. He testified that the record appeared to indicate that Mr. Gause's expected testimony was "somewhat vague and unconnected" to the incident. (App. p. 2044). He testified the record reflected a situation "too vague for me to do a whole lot with I thought." (App. p. 2047). Mr. Savitz testified that the failure to raise the issue was not from neglect, or from failure to review the transcript – he simply didn't think it was an issue that should be raised. (App. pp. 2047-2048).

Mr. Edward Gause testified at the PCR hearing. Mr. Gause testified that he saw a shirtless young man "playing in the sand" at a Young's convenience store approximately one month before the murders. The young man indicated he was to see someone and also indicated he was having "weird thoughts." Mr. Gause testified he attempted to help by advising the young man to pray and referring him to Sgt. Tripp Mays, who Mr. Gause testified was also at the convenience store. (App. pp. 1850-1852). According to Mr. Gause, he then spoke to Sgt. Mays about the incident. (App. p. 1852). At some point after, and due to media coverage, Mr. Gause identified the young man as Applicant. (App. p. 1853). Mr. Gause testified that he later talked to Sgt. Mays who agreed that "they" had seen Applicant. (App. p. 1853). Mr. Gause did not recall a visible tattoo. (App. p. 1859).

The PCR court also received the affidavit of Sgt. Mays. Sgt. Mays averred that he knows Mr. Gause, but has no recollection of such an event taking place. Sgt. Mays averred that he searched his call records around the month before the murders and the month after

the October 2004 murders. Sgt. Mays averred he found no call records to support "any interaction with Mr. Gause regarding a report of a young man in distress at a Young's convenience on Old Manning Road" in Sumter. (App. pp. 2514-2515).

Having reviewed the record, the PCR hearing testimony and Sgt. May's affidavit, the PCR judge found no error. He noted "Mr. Howle promptly brought the matter to the Court's attention and requested the ability to present Mr. Gause." (App. p. 2609). He also found Mr. Howle "underscored that the testimony was expected to go to Applicant's mental state which was a major portion of the mitigation case," but had no other information to proffer as he had not yet spoken to Mr. Gause. (App. p. 2609). The PCR judge found no *Strickland* error as to trial counsel in these discrete circumstances. (App. p. 2609).

The PCR judge also found Petitioner failed to show Mr. Savitz was ineffective in failing to raise the issue during the direct appeal. In particular, the PCR judge found "Mr. Savitz, an experience attorney particularly in capital appeals, made his professional review of the record and determined not to raise the issue. There is no indication of neglect or inadvertence." (App. p. 2610). The PCR judge agreed with Mr. Savitz's testimony that "the proffer of testimony was vague and not clearly connected to any of the crimes." (App. p. 2611). Further, the PCR judge rejected the assertion of prejudice as, upon assessment of Mr. Gause testimony, the PCR judge declined to give the testimony "any significant weight," for the following reasons:

- On cross-examination, Mr. Gause admitted that his memory was somewhat faulty in some respects, that he was "not sure on the time," and even testified at one point that he may have spoken to Sgt. Mays after sentencing;

- He also, at another point, testified that he did not connect the young man to Applicant until the day of sentencing.

- Further, Mr. Gause was unclear as to when he identified Applicant or why he waited from the initial media coverage (around 2004) to the sentencing (in September 2008) to contact the defense.

- Mr. Gause did not recall any tattoos or other identifying marks. Applicant has a very visible on his left chest that was clearly obvious at the PCR hearing from the neck opening of Applicant's prison issued jumpsuit (a fact Applicant conceded in his own testimony at the PCR hearing).

- Mr. Gause did not recall a blue truck (such as the one Applicant used in his crimes) anywhere near the convenience store, or any other identifying aspect independent of the facial recognition.

(App. pp. 2611).

"This Court gives great deference to a PCR judge's findings where matters of credibility are involved." *Simuel v. State*, 390 S.C. 267, 270, 701 S.E.2d 738, 739 (S.C. 2010). The PCR judge, in addition to observing the testimony, carefully reviewed the substance of Mr. Gause's testimony, and, for the detailed reasons above, found the testimony would not carry significant weight. His decision should be afford great deference here. And, in further lack of prejudice, the PCR judge found "while Dr. Schwartz-Watts testified at the PCR hearing that, essentially, any corroborating evidence is evidence she would like to have, there is no indication that having his vague report would have affected any mitigation strategy or diagnosis." (App. pp. 2611-2612). In fact, Dr. Scwhartz-Watts' testimony regarding such a report was that it would have been "consistent" with other history received and other reports regarding mental health concerns round the time of the crimes – it perhaps could "bolster[] the credibility," but the report (presumed correct for the question) was not decidedly different from other history. (App. pp. 2060-2061). In short, it would not have made a significant impact. Thus, the record fully and fairly supports the PCR judge's ruling. Certiorari should be denied.

VI.
Allegation of Denial of Due Process and Fair Trial Due to State's Non-Disclosure of Evidence in Discovery

Petitioner contends he suffered prejudice from non-disclosure of evidence concerning the computer analysis by the South Carolina Law Enforcement Division ("SLED"). In particular, he contends the information obtained from the Tietjen computer corroborated his statements to police – that Mr. Tietjen (or whoever had access) had been browsing/visiting pornography sites as early as June 2004 according to the computer's internet history. In turn, such pornography "explained" the mutilation of the eyes; and "lent credibility to his revelations of childhood sexual abuse" in his statement if his assertion of seeing pornography on the Teitjen computer (also in the statement) may have been true. (Petition, pp. 69-70; p. 75). The history was apparently not provided in discovery, but the history did not show anything from the day of the murder. Further, Petitioner's own statements reflected that he did not view the pornography until *after* the murder. Further still, the history tended to disprove Petitioner's statements of the type of pornography he claimed to have viewed on the Teitjen computer. Thus, the failure to disclose was not material and was not prejudicial. In line with these facts, the PCR judge found:

> It is undisputed in the record 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.

(App. p. 2622) (emphasis added).

However, Petitioner failed to prove the evidence was material under *Brady v. Maryland*,[14] and that he was prejudice in that the result of the sentencing would have been

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[14] 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "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." *Brady*, 373 U.S. at 87, 83 S.Ct. 1194. In South Carolina, an individual asserting a *Brady* violation must demonstrate that the

different. "Evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375 (1985). Thus, as the PCR judge correctly found, Petitioner was not entitled to any relief. (App. p. 2622). The record supports his findings and conclusions.

While it is undisputed the complete report of SLED Agent Givens' analysis of the Tietjen computer – which revealed the internet history from the prior day and the existence of adult pornography or that adult pornography sites had been accessed on the computer – was not provided to defense prior to the sentencing proceedings, Petitioner cannot show a reasonable probability that the result of the proceeding would have been different had the complete report been released. Of particular relevance in the inquiry of materiality are Petitioner's own statements which reflect he did not claim to have viewed any pornography on the Tietjen computer under *after* the murder. In fact, Petitioner asserted he had to turn on the computer using the password. (See App. p. 613). Therefore, the existence or non-existence of internet porn on the computer was not a "trigger" to the murder. Further, the record is full of evidence from Petitioner's statements about his discussions with Mr. Tietjen concerning girls, and, in particular, his assertion of seeing on the computer (after the murder, after he used the password to obtain access) an image of a young girl with a

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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. *Riddle v. Ozmint*, 369 S.C. 39, 44, 631 S.E.2d 70, 73 (2006). Likewise, under Rule 5, SCRCrimP, defendants, upon request, are entitled to disclosure of their statements, criminal records, and any documents or tangible objects material to the preparation of their defense or intended for use by the prosecution. Rule 5(a)(1), SCRCrimP. For purposes of Rule 5, "material" is used in the same context as it is in a Brady analysis. *State v. Kennerly*, 331 S.C. 442, 453, 503 S.E.2d 214, 220 (Ct.App.1998). Once there is a Rule 5 violation, a court will only reverse "where the defendant suffered prejudice as a result of the violation." Id. 331 S.C. at 453–54, 503 S.E.2d at 220.

horse. (See App. p. 613). The history did *not* corroborate Petitioner's comment about seeing bestiality because Agent Givens could not locate any such images. However, to the extent the mere existence of prior internet browsing the previous day by someone on the Tietjen computer (other than Bryant) corroborates his version, it does not do so easily or completely. At most, it merely supports that Mr. Tietjen may have had discussions with Petitioner about it. However, it is just as likely that Petitioner –with knowledge of temporary internet files and being use to navigating computer pornography according to his girlfriend (App. p. 1933) (see also App. p. 2071, Dr. Schwartz-Watts recognizing Petitioner computer savvy at that time) – could have browsed those histories himself after the murder. The record fully and fairly supports the PCR judge's rejection of this claim for failure to show *Brady* materiality.

Dr. Donna Schwartz-Watts noted Petitioner's account of Mr. Tietjen's murder in her report compiled before the plea proceedings. Petitioner stated to her "Mr. Tietjen became agitated with him because of [Petitioner's] knowledge of the Masons" and that he became "agitated with Mr. Tietjen because he had made sexual innuendos about younger girls." (App. pp. 2366-2367). Petitioner indicated to Dr. Schwartz-Watts that he was going to walk to the bathroom, "Mr. Tietjan struck him in the back of the head with mason ring. After killing him, Mr. Bryant reports he cried, smoked another joint, lit some candles and that one candle slipped and caught his beard on fire." (App. p. 2367). The report continued, "while in the home" Petitioner looked at the computer and "found pornographic images of a young girl being molested by an animal. He states he then remembers doing something to his eyes and writing a note." (App. p. 2367). In fact, during mitigation testimony at the sentencing proceeding, Dr. Watts testified that: "after he shot him, while looking on a computer that he found some images that upset him on the computer." (App.

p. 834). Also at sentencing, testimony was presented that the perpetrator left a note at the Tietjen crime scene that reflected: "no more sick computer porn for this sick f–r. By the way just keeping my promise to all." (App. p. 516).

SLED Agent Barton testified at the PCR hearing about the series of statements Petitioner made concerning whether he had viewed the Tietjen computer and the timing of any such viewing. Agent Barton noted that according to Petitioner's statements, the pornography at issue concerned "a young girl and a horse," and no such child pornography was found. (App. p. 1665; p. 1702). Further, Petitioner indicated he looked at the computer *after* the murder. (App. p. 1668). (See also App. pp. 1674-5-1681). Agent Barton clarified that there was a mistake in his investigative report that Petitioner and the murder victim "had been looking at pornography on Tietjen's computer...." (App. pp. 1681-1682). He stated that after reviewing the actual statements his report was incorrect, although there is information about Bryant and Tietjen talking about it. (App. pp. 1681-1682). Agent Barton also confirmed that in the search warrant, there was information that they had received from Petitioner's girlfriend, Judy Justice, who had reported she had problems with his use of internet porn which had led to a rift in their relationship. She also stated Petitioner would erase his internet history. (App. pp. 1682-1684). Agent Barton stated that he never received the CD from Givens and did not provide it to the Solicitor's Office. He stated he was not aware of the existence of the internet history at that time. (App. p. 1672).

Former Third Circuit Solicitor Kelly Jackson testified that he had contacts with SLED and the law enforcement agencies prior to the trial. He testified the report that he received from SLED indicated on Tietjen's computer and Bryant's computer, "nothing of evidentiary value was identified. In addition no evidence was identified that would have suggested Bryant had prior contact with any of the victims." (App. pp. 1968, 1972 and

2207). However, the solicitor stated he never received the disc from SLED Agent Givens which included the Encase Reports and other data from the computer analysis. He testified that he provided the defense everything he received from SLED. (App. pp. 1986, 1971-1972, 1977 and 1980).

Then Deputy Solicitor Saleeby testified similarly that they never received the Givens disc with the computer analysis. (App. pp. 2084-2087). Upon reviewing the materials for the PCR evidentiary hearing, Mr. Saleeby stated if they had received them, he would have forwarded same to the defense team. (App. pp. 2089-2092). He stated there was no reason not to send it. (App. p. 2092). He noted, however, that the information tended to "cut[] both ways" – the report, contrary to Petitioner's assertions in his statements, reflected no child pornography or bestiality images found, and corroborated the fact Petitioner was on the scene. (See App. pp. 2091 and 2093-2094). Mr. Saleeby's only recollection about the computers, though, was that he was advised that there was nothing of evidentiary value. (App. pp. 2092, 2094 and 2097).

SLED Agent Givens testified that he performed an analysis on the Tietjen computer and created an image gallery and ran an Encase report which he placed on a disc. He confirmed that on October 21, 2004, he reported after reviewing the images, "[l]ocated adult porn in the temporary internet files. No child porn or bestiality photos located," and "[l]ocated several pornography movies within the program files." (App. pp. 1771-1775). It was developed, contrary to the initial assertion by Petitioner in the PCR proceedings, that the browsing history in the report reflected possible internet pornography sites were visited the day before the incident, not contemporaneous with the incident, based upon the computers clock compared to real time. (App. p. 1752).

Dr. Donna Schwartz-Watts, in testimony before the PCR Court, confirmed that Petitioner had reported that he looked at the computer *after* the killing. (App. pp. 2064-2066). Moreover, as noted above, the bestiality image Petitioner referenced was not found on the computer. Even so, according to Dr. Schwartz-Watts at the PCR evidentiary hearing, the case history would have corroborated her conclusions, perhaps "insulate" her on cross-examination to an extent, though she did indicate any change in her opinion, and she did not appear to address the tension in the statement compared to the actual history. (See App. pp. 2080).

Counsel Howle testified the defense was interested in the existence of evidence of pornography, possibly to establish pornography was a "trigger" for the Tietjen homicide. However, Mr. Howle could not explain how the presence of pornography on the victim's computer which did not include the images Petitioner described in his statements would have corroborated the defense. Similarly, he could not explain how the claimed viewing after the death would be a trigger for the death. (See App. pp. 1797-1799; 1820-1823).

Counsel Babb claimed the non-disclosure of pornography by SLED was prejudicial because their mitigation was based on his mental illness from childhood sexual abuse and trauma, that resulted in Post-Traumatic Stress Disorder. He claimed that the pornography would corroborate Bryant's account that he killed Tietjen because of a "trigger" based on discussing and/or viewing pornography with Tietjen, but failed to account for the fact the so-called trigger would only have happened after the death. (See App. pp. 1891-1896; 1920-1929). He also failed to acknowledge that the computer assessment does not fully corroborate Petitioner's statements because it did not support the existence of either child pornography or bestiality.

Further, Petitioner testified at the PCR hearing and did not present any evidence that he viewed the internet history or other particular images on the computer.

As to any claimed tie in to the mutilation of Mr. Tietjen's eyes, the record supports such a theory was fully presented within his statements to Dr. Crawford and was given to the defense and their experts. (See App. pp. 834-835; p. 2068; p. 2488). 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 the non-disclosure of same does not warrant a new sentencing proceeding. The failure to disclose the report simply does not undermine confidence in the sentencing.

In sum, the triggering event in the victim's death, according to Petitioner's statements was connected to discussion about the Masons. (App. p. 834). The pornography issue (if an "issue" at all") is a two-edge sword, confirming his presence but questioning his report of the pornography that upset him. Moreover, other evidence in the record would challenge a "disgust" or outraged leveled at his victim for watching pornography of for pornography in general as Petitioner's prior girlfriend reported he also viewed pornography. At any rate, Petitioner's mental health experts were aware of his statements to the police and to them concerning the purported discussions with Mr. Tietjen. Even so, nothing in the computer history the day before the murder mitigates the extreme malice of this murder. Petitioner failed to show a reasonable probability that had the images been disclosed that the result of the proceeding would have been different and resulted in a life sentence. Petitioner simply failed in his burden of proof.

Because the record fully and fairly supports the PCR judge's decision, certiorari should be denied.

VII.

Adoption with Modifications of Respondent's Proposed Order

Petitioner complains of error in the "wholesale" adoption of the State's proposed order. Respondent first notes that Petitioner did not object to the proposed order procedure used below. In fact, Petitioner submitted his own proposed order with his own proposed findings of facts and his own proposed conclusions of law. (Third Supplemental Appendix, pp. 1-28). Any objection to the proposed order procedure was waived with the consent to the procedure and the filing of Petitioner's own proposed order. See *Erickson v. Jones Street Publishers, L.L.C.*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("a party may not complain on appeal of error or object to a trial procedure which his own conduct has induced"). See generally *State v. Smart*, 278 S.C. 515, 521, 299 S.E.2d 686, 690 (1982) (*overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)) (noting the failure to object to a procedure known and accepted by participants in rejecting claim of error). It is of no little note that in the objections to the final order, Petitioner requested relief for the reasons offered in his objections, allegations, and *his own proposed order*. (App. p. 2633). Even so, Petitioner's allegation of error is without merit.

As a first point, Petitioner's argument actually proves the detailed review and multiple changes made by the PCR judge. (See Petition, pp. 78-79). These changes were not only grammatical but also substantive in part. Further, comparison shows a rejection of a portion of the analysis as to Mr. Gause's testimony. (Compare App. p. 2556 with App.pp. 2611-2612). This is not a case where it may be credibly argued the PCR judge did not review the proposed order in detail. Further, the PCR judge issued a detailed Order Denying Applicant's Rule 59(E) Motion which addressed, again, the reasons for his decision and addressed the concerns raised in Petitioner's motion. (App. pp. 2634-2646).

Nothing in this record supports the PCR judge failed to exercise his independent judgment.

Petitioner's reliance on *Hall v. Catoe*, 360 S.C. 353, 601 S.E.2d 335 (2004), to argue the procedure was unfair is misplaced. This Court in *Hall* did not prevent the practice or submitting proposed order (which is routinely used in non-capital cases):

> Although we strongly encourage PCR judges to draft their own findings of fact and conclusions of law in death penalty cases, we also acknowledge 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. In the present case, the evidence sufficiently indicates that the PCR judge spent an adequate amount of time reviewing the order before adopting it.

360 S.C. at 365, 601 S.E.2d at 341.

At any rate, as was the case in *Hall*, the record here reflects the PCR judge spent an adequate amount of time reviewing the order before adopting it after various modifications and changes as noted above and in the petition. Again, there is no indication that the PCR judge failed to exercise his independent judgment.

Likewise, Petitioner's reliance upon *Jefferson v. Upton*, 560 U.S. 284, 130 S.Ct. 2217 (2010), is similarly misplaced. In *Jefferson*, unlike this case, the collateral (PCR) judge contacted the State's counsel *ex parte* and no similar request was made of the defendant's counsel and the proposed order included statements by individuals who did not testify or otherwise participate in the case. *Jefferson*, 560 U.S. at 287-288, 130 S.Ct. 2219-20. In this case, both parties were allowed to present proposed orders and exchange proposed orders at the time the orders were submitted. At any rate, in *Jefferson*, the Court did not vacate the state court order, but remanded it to the district court in a federal habeas corpus proceeding to determine the nature and extent of the *ex parte* contact and "whether the state court's factual findings warrant a presumption of correctness...." 560 U.S. at 294, 130 S.Ct. at 2223. Here, Respondent's proposed order was not solicited *ex parte*, Petitioner's counsel was provided the opportunity to review the proposed order, and the

order did not include reference to material and evidence not submitted at the hearing. Further, in *Jefferson*, the Supreme Court acknowledged that it had held that "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court though it had "also criticized that practice." *Jefferson*, 560 U.S. at 293-294, 130 S.Ct. 2223, citing *Anderson v. Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504 (1985). Thus, Petitioner's reliance upon those cases for the relief he requests is misplaced.[15]

Respondent submits that the PCR Court's signing of the State's proposed Order, which was provided at the PCR Court's request, with notice to Petitioner and after Petitioner's own submission of his proposed order, does not warrant the relief requested by Petitioner. The procedure used by the PCR Court was lawful, and the record reflects that the concerns that were raised (and rejected) in *Hall* and those raised in *Jefferson* were not present here. Certiorari should therefore be denied.

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[15] Respondent would also note that the adoption of the proposed order by a state court has been held to not deny due process of law in many similar situations. Subsequent to *Jefferson*, the Missouri Court upheld the practice (but found the actual issue not preserved for review) in *Prince v. State*, 390 S.W.3d 225, 239 (Mo. App. 2013). In like fashion, the Alabama Court found no due process violation in the submission and adoption of the proposed order in *Miller v. State*, 99 So.3d 349, 354-359 (Ala.Crim. App. 2011).

CONCLUSION

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

Respectfully submitted,

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July 28, 2014.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUL 30 2014
S.C. Supreme Court

On Petition for Writ of Certiorari to Sumter County

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
(Capital PCR Action)
R. Ferrell Cothran, Jr., Circuit Court Judge

Stephen Corey Bryant, Petitioner,

vs.

State of South Carolina, Respondent.

Appellate Case No.: 2013-000518

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the *Return to Petition for Writ of Certiorari* on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorney of record as follows:

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