No. _____

In the Supreme Court of the United States

STEPHEN COREY BRYANT, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUMTER COUNTY COURT OF COMMON PLEAS

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. Whether trial counsel provided ineffective assistance by failing to object to the state exceeding the limits of victim impact evidence as defined in *Payne v. Tennesee*, 501 U.S. 808 (1991), by introducing victim impact evidence concerning victims of non-capital offenses during Petitioner's capital sentencing trial?

II. Whether the prosecution deprived Petitioner of his due process rights and violated the duty imposed by *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose the existence of evidence known only to the State that would have been of great significance to Petitioner's case in mitigation of capital punishment?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the South Carolina Supreme Court were Petitioner Stephen Corey Bryant and Respondent State of South Carolina.

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PETITION FOR WRIT OF CERTIORARI

Stephen Corey Bryant respectfully petitions for a writ of certiorari to review his claims of ineffective assistance of counsel.

OPINION BELOW

The Sumter County Court of Common Pleas denied Petitioner post-conviction relief in an unpublished order. App. A1.[1] The South Carolina Supreme Court denied Petitioner's petition for writ of certiorari in an unpublished order. App. A55. On March 19, 2015, Petitioner filed a petition for rehearing, which was denied by the Court on May 6, 2015. App. A56.

JURISDICTION

The South Carolina Supreme Court issued its unpublished order on March 4, 2015 denying the petition for writ of certiorari. On March 19, 2015, Petitioner filed a petition for rehearing. On May 6, 2015, the state supreme court denied the petition for rehearing.[2] This Court has jurisdiction pursuant to 28 U.S.C §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law." The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy

[1] The abbreviation App. A refers to the Appendix filed with this Court accompanying the petition for writ of certiorari. The abbreviation App. refers to the appendix filed in the state supreme court.

[2] This Court granted Petitioner an extension until September 3, 2015 to file his petition for writ of certiorari.

the right to a speedy and public trial, by an impartial jury." The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition for certiorari arises from the ineffective assistance of counsel, denials of due process, and denials of a fair trial that occurred during the sentencing phase of Stephen Corey Bryant's capital trial.

Procedural history

On July 20, 2006, in Sumter County, Petitioner was indicted on charges of burglary in the second degree, two counts of burglary in the first degree, arson in the second degree, possession of a stolen handgun, three counts of murder, armed robbery, assault and battery with intent to kill, and threatening the life of a public employee.[3] App. 2650-2673. He was separately indicted for assault and battery with intent to kill in Richland County on December 15, 2004. App. 2675-2676. The state filed a notice of intent to seek the death penalty, alleging that the murder of Willard Tietjen was committed during the commission of a robbery while armed with a deadly weapon. On August 18, 2008, Petitioner pled guilty to all of the

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

foregoing offenses. App. 1378-81; *see also* App. 2328-36.

In light of the death notice, on September 2, 2008, a sentencing proceeding began in which the state presented evidence in aggravation, App. 28-95; App. 105-704, and the defense presented evidence in mitigation, App. 730-999. On September 11, 2008, the judge sentenced Petitioner to death and imposed twelve additional sentences of incarceration, including several concurrent life sentences. App. 1047-1051. Petitioner timely appealed raising a single issue. The South Carolina Supreme Court affirmed his convictions and sentences. *See State v. Bryant*, 704 S.E.2d 344, 346 (S.C. 2011).

Petitioner filed his initial application for post-conviction relief (PCR), which he amended twice. App. 1483-1485; App. 1532-1536; App. 1632-1638. The PCR court held a three-day PCR hearing from October 1-3, 2012, App. 1639-2169.

The PCR court denied Petitioner's application for relief in an unpublished order dated December 4, 2012. App. A1; App. 2572-2625. On March 28, 2014, Petitioner filed a petition for writ of certiorari in the state supreme court. The South Carolina Supreme Court issued its unpublished order on March 4, 2015 denying the petition for writ of certiorari. App. A55. On March 19, 2015, Petitioner filed a petition for rehearing. On May 6, 2015, the state supreme court denied the petition for rehearing. App. A56.

Petitioner sought relief on both grounds raised in this petition during the PCR proceedings at the trial level and in his petition for a writ of certiorari. App.

A1; App. A55.

Facts Material to Consideration of the Questions Presented

Presentation of Victim Impact Evidence at Petitioner's Capital Trial

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

During the State's case-in-chief at the penalty phase, the State presented evidence of the facts and circumstances of the deaths of Tietjen, Gainey, and Burgess and the burglary of Ammons' home. App. 121, line 21 – App. 129, line 12; App. 129, line 13 – App. 135, line 12; App. 202, line 11 – App. 210, line 4; App. 307, lines 4-12; App. 309, lines 1-7; App. 310, lines 10-16; App. 310, line 25 – App. 311, line 13; App. 315, lines 9-13; App. 315, lines 14-18; App. 316, lines 4-19; App. 317,

lines 4-23. Additionally, the state presented victim impact evidence regarding the death of Tietjen, including testimony from his wife and daughter, testimony about his military service, and testimony about his community service through work with the Shriners. App. 651, line 10 – App. 657, line 23; App. 616, line 22 – App. 622, line 18; App. 632, line 7 – App. 637, line 17; App. 624, line 14 – App. 631, line 19; App. 638, line 22 – App. 649, line 25; App. 658, line 19 – App. 662, line 24; App. 664, line 13 – App. 669, line 4; App. 669, line 5 – App. 672, line 7; App. 676, line 9 – App. 686, line 1; App. 686, line 19 – App. 695, line 21; App. 696, line 21 – App. 703, line 25.

After both sides rested, the judge heard *unsworn* victim impact evidence ("VIE") on the non-capital crimes. Petitioner had no opportunity to confront or rebut those witnesses, and trial counsel failed to object to the introduction of the additional evidence.

James Ammons gave a lengthy soliloquy regarding how the burglary of his home had devasted his life. Ammons began by saying his life had "been changed forever" and continued this refrain throughout his remarks. He was especially distraught because everyone knew his weapon was used in the murders. Ammons' home had been "paradise" before the burglary, but now there was fear. Due to his heightened fear, Ammons tried to find "a gun, rifle, something" whenever he saw people. Although he had left his daughter home alone previously, he was too scared to do so after the burglary. He claimed he had many sleepless nights and was

scared to enter his home at night alone. Ammons continued to explain how he previously welcomed strangers to his home to ride horses, but after the burglary he was "scared of the unknown." App. 1042, line 15 – App. 1043, line 2; App. 1043, lines 8-12.

After his gun was stolen and the first shooting occurred, Ammons "got down on [his] knees and wept praying that it was not [his] weapon. And the next one, then the next one." Additionally, Ammons had prayed for the court, the victims' families, and for those "on the other side." The only way he could handle the situation was to "put it in the Lord's hands." Due to the burglaries and murders, he hugged his children tighter, despite their adulthood, because he may not see them again. His experience "scarred him for life" because he would "never get over" it. App. 1043, line 5 – App. 1044, line 2. The judge thanked Ammons for being there. App. 1044, lines 3-4.

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

23. The judge expressed his condolences for his loss and thanked him for being there. App. 1044, lines 24-25.

Finally, Robbie Burgess, the brother of Christopher Burgess, spoke to the court. He read a letter prepared by their mother, Christine Burgess. In the letter, she expressed her grave loss over the death of her child. She expressed her devastation at having outlived her child, something unimaginable. "[A] father was taken away from his son and his family." Burgess would "never be able to do all of things a father and son would do together." She had a hole in her heart where Burgess had been. She thought of him every day and missed him "tremendously." "The pain and suffering" of her family over the loss would never leave. Burgess was "the pride and joy" of their family, who could never be replaced. She asked the judge for justice on that date, noting the family had "waited patiently," but that the wait was over. Attending the court proceeding was "very hard and painful." She hoped the court proceedings would close the matter for herself and the other families involved. All of the families were counting on the justice system "to come through and make the proper decision today." App. 1045, line 5 – App. 1046, line 4. The judge thanked Robbie and expressed his sympathies for their loss. App. 1046, lines 5-6.

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

1051, line 7.

The State PCR Proceedings – Victim Impact Evidence

Concerning Petitioner's allegation of ineffective assistance regarding trial counsel's failure to object to the extraneous victim impact evidence, the PCR judge recognized (1) that the evidence offered by Ammons, Gainey, and Burgess was victim impact evidence produced by the state and (2) that trial counsel posed no objection or request to cross-examine the witnesses or rebut the evidence. App. 2603-2604.[4] However, the PCR court determined there was no error because the victim impact evidence relating to the non-capital crimes could have been presented *during the penalty phase.*[5] App. 2605. Thus, the PCR court found trial counsel was not ineffective for failing to make an objection to the entry and consideration of the extraneous evidence.

Relevant Facts – Undisclosed Evidence

Less than two months before the crimes giving rise to this appeal, Petitioner confided to his grandmother and aunt that he had been sexually abused as a child

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[4] The procedure employed by the judge in learning of the extraneous VIE prohibited Petitioner from confronting the evidence against him. *See Gardner v. Florida*, 430 U.S. 349 (1977). The witnesses were not sworn and their statements were not limited. Burgess read a letter from his mother, which would not have been allowed had he taken the stand and his testimony subject to the rules of evidence, including the rule against hearsay. The provision of the Victim Bill of Rights allowing a defendant an opportunity to respond to a victim's statement is not a substitute for the constitutional protections afforded a defendant during a capital murder trial, including the right of confrontation and to have the witnesses take an oath to tell the truth.

[5] The PCR judge very clearly found "this evidence was not related to the sentencing for the capital crime, but for the non-capital crimes." App. 2605.

by his grandfather, uncle, and brother. *See* App. 774, lines 4–25. While telling them of the abuse he suffered, Petitioner was "[v]ery nervous, upset, worried, shaking." App. 775, line 10. Petitioner's aunt called the police asking for help and, based on their recommendation, Petitioner was connected to a counseling center. App. 773, line 16 – 776, line 18; App. 789, line 16–793, line 11. A few days later, Petitioner asked his probation agent for help because "he had been unable to sleep due to some problems as a child." App. 736, line 10–15. The agent referred him to the same counseling center he consulted through the hotline, but Petitioner was unable to afford the services. App. 736, line 12 – 737, line 12. A month later, Petitioner was assaulted by two men and ended up the emergency room. App. 818, lines 3–10. A few days thereafter, the murders started.

Petitioner told police he went to Tietjen's house seeking assistance with his disabled truck. As the two talked, Tietjen told Petitioner "he wishe[d] he were young like [Petitioner] because he liked young girls." Tietjen also talked about "some web sites he looked up" in relation to his desires. At some point, Petitioner looked at Tietjen's computer and saw pornography. He examined the computer's internet history and found "more sites than [he could] count of nude young girls." Near Tietjen's body, police found a handwritten note on a table that read: "No more sick computer porn for this sick f----r. By the way, just keeping my promise to all. P.S. Good luck finding me." App. 515, line 7 – 516, line 13. In addition, while discussing the murder of Tietjen and the pornography with the police, Petitioner

stated he thought he "poked his eyes out." App. 609, lines 8–11; App. 609, lines 18–19; App. 610, line 2 – 613, line 24.[6]

At trial, Dr. Schwartz-Watts detailed Petitioner's sexual abuse by multiple family members, his involvement with the criminal justice system starting at the age of eleven, his poor academic performance due to his below average intelligence and attention deficit disorder, his placement in emotionally handicapped classes, and his diagnosis with chronic depression at an unusually young age. App. 815, line 4 – 816, line 7; App. 891, lines 20–21. After a thorough review of Petitioner's medical, mental health, and social history, Dr. Schwartz-Watts diagnosed Petitioner with severe PTSD. App. 814, line 21 – App. 815, line 1; App. 827, lines 8-9. She also discussed the counseling records where Petitioner sought help in 2004 to deal with the sexual abuse he suffered. The records showed Petitioner was experiencing flashbacks of the childhood sexual abuse he suffered. App. 821, line 21 – 823, line 12. Dr. Schwartz-Watts opined that the murders were related to his PTSD because Petitioner felt threatened. The lack of evidence of any of the murdered individuals acting in a threatening way was part and parcel of Petitioner's mental illness: Petitioner felt sexually threatened by these males due to his prior sexual abuse and the misperceptions caused with his mental illness. App. 833, line 21 – 833, line 2; App. 835, lines 16–17; App. 867, lines 3–8.

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[6] Petitioner told Dr. Schwartz-Watts that he saw upsetting pornographic images when he looked on Tietjen's computer. Petitioner had poked out or burned Tietjen's eyes relative to this discovery. App. 834, lines 11–14; App. 834, lines 18–22.

Dr. Schwartz-Watts and Petitioner discussed pornography during her evaluations. Additionally, she was familiar with Petitioner's statements to police indicating he saw pornography on Tietjen's computer. However, she never received any corroboration of Petitioner's claims. Prior to the trial, she "begged" for corroboration on the pornography aspect, but received none.

The prosecutor vigorously cross-examined Dr. Schwartz-Watts on the lack of corroboration to support her diagnosis and Petitioner's statements to police. Additionally, the prosecutor argued in closing that Petitioner's conduct was not "impulsive behavior" and had "[n]othing to do with trauma from sex abuse." App. 1009, lines 16–17. Instead, the prosecutor argued, Petitioner was a "pathological liar," was "sadistic" for burning Tietjen's eyes after his murder, and allegedly added to the indignity of the death when "[h]e got on their computer and began to visit porn sites by his choosing, not sites from [Tietjen]." App. 1019, lines 14–16; App. 1020, lines 7–9; App. 1021, line 3.

The undisclosed evidence

As part of the investigation of Tietjen's death, South Carolina Law Enforcement Division ("SLED") Agent David Givens analyzed Tietjen's computers. App. 1703, line 22 – App. 1704, line 16. Givens' case management history showed that he and another SLED Agent met on October 20, 2004 to discuss the case and that Givens was instructed that "the following [was] needed from Tietjen's computer: Internet Hx (to possibly determine if the suspect may have used the

computer after the murder and the existence of porno and if possible what type of porn, i.e. child, animal, etc." App. 1718, lines 12–17; App. 2234.

On October 21, 2004, Givens initiated Encase analysis on Tietjen's computer. He "[l]ocated adult porn in Temp Internet files," and pornographic movies, but found "[n]o child or bestiality photos." He recovered all photos from the computer and conducted an inventory of the computer's internet history. App. 1705, lines 1–21; App. 1719, lines 10–14; App. 2234. Givens reviewed the Encase analysis on October 28, 2004 and produced an electronic report, including the computer's internet history, which was burned onto a disk. App. 1706, line 23 – App. 1707, line 25; App. 2225. He placed the internet history and the hyperlinks on the disk for review "[b]y anybody that wanted it." App. 1732, lines 19-25. Givens' investigative report dated March 15, 2005 and provided to the prosecutor indicated nothing of evidentiary value was found. App. 1714, lines 3-16; App. 1713, lines 7-17; App. 2206-2207.

In fact, Givens' analysis of Tietjen's internet history revealed countless web addresses with names clearly denoting pornographic materials including many with various forms of "teen" in the names, such as "Fresh Teens," "Teen Blow Job Auditions," and "Euro Teens Triple X." App. 1741, lines 1-21. In addition, the investigation showed on the date of Tietjen's death—October 11, 2004—someone had accessed multiple websites for pornography. App. 1738, line 14 – App. 1740, line 8. The records showed Tietjen's computer accessed many pornographic

websites, in September 2004 prior to any contact between Petitioner and Tietjen. App. 2239–2240. Significantly, the records showed Tietjen's computer continued to access pornographic websites on the day prior to and the day of his death. App. 2257–63.

Defense counsel filed motions requesting discovery prior to trial. App. 1794, lines 7–17. One of the items he received in discovery was the Tietjen "computer exam." App. 1795, line 14 – App. 1796, line 4. This "computer exam," however, did *not* include the internet history for the computer. App. 1796, line 14 – App. 1797, line 12; App. 1797, lines 17–22. Without question, the defense team was pursuing evidence of pornography on Tietjen's computer. In fact, Petitioner's trial counsel's investigator contacted SLED requesting an explanation of the computer analysis that was received; however, SLED refused to answer his questions. App. 1834, line 15 – App. 1836, line 3; App. 2376.

The prejudicial effect of the undisclosed evidence

As explained above, Petitioner's counsel— Jack Howle—was unaware at the time of trial that SLED's computer analysis revealed pornography on Tietjen's computer. App. 1797, line 23 – App. 1798, line 4. According to Howle, not having the complete report prejudiced Petitioner because the defense experts would have used it for their evaluations. App. 1800, lines 2-10. When discussing his trial strategy, Howle testified that he relied upon an argument between Petitioner and Tietjen concerning the Masons as the triggering event of Tietjen's death. He further

explained that the defense relied heavily upon this argument because they "did not really have all the information in regard to properly put forth an argument with the pornography that was there." App. 1817, lines 6–14. According to Howle, he did not see an extensive amount of pornography on the computer at the time of the trial, but if he had known of the pornography, he would have changed defense's tactics. App. 1820, lines 15–19. Further, the confusion regarding the time of the viewing of the pornography on Tietjen's computer, *see* note 14, *supra*, would not have deterred Howle from pursuing the use of the computer analysis. App. 1820, line 20 – App. 1821, line 5.

Similarly, James Babb, who represented Petitioner until one month before his guilty plea, was very interested in obtaining the computer analysis because Petitioner had informed him that the pornography was "part and parcel of his interchanges leading up to the death of Mr. Tietjen." App. 1880, lines 8–14; App. 1891, lines 1–7. In fact, the defense hired a computer forensics expert in anticipation of SLED's computer analysis. App. 1882, lines 13–15. Babb was looking for any evidence of pornography. App. 1884, lines 18–20. Had he received the evidence of pornography on Tietjen's computer as required under the discovery rules, he would have discussed the evidence with Petitioner, at a minimum. App. 1884, line 21 – App. 1885, line 16. Additionally, he would have informed the psychiatrists of the evidence. App. 1886, lines 2-5; App. 1894, lines 7-12. In fact, Babb would have hired additional more specialized experts to determine how the

pornography related to the other evidence in the case, including the victims' pants being unzipped and Petitioner's childhood sexual abuse. App. 1887, lines 13–25; App. 1896, lines 11–21. Babb recalled that Petitioner had mutilated the body in connection with the pornography. App. 1927, lines 23–25. Babb wanted the information regarding pornography to address "the mental health aspects, the psychological implications." App. 1928, lines 8–12. Babb decided not to question other witnesses regarding the pornography on his computer because he had no corroboration of its existence. App. 1888, line 2 – App. 1889, line 1. Without question, the pornography on Tietjen's computer was a material issue in the case. App. 1897, lines 11-13; App. 1926, lines 16-19; App. 1927, lines 1-3; App. 1944, line 22 – App. 1945, line 4; App. 1947, lines 11-15.

Pornography "explained the mutilation of Mr. Tietjen's body," most importantly, the burning of his eyes. Petitioner told Dr. Pam Crawford "if the eyes go astray, poke them out"[7] relative to him burning Tietjen's eyes. The pornography "clearly explain[ed] the things that were particularly heinous about this crime." App. 2057, lines 5–21; App. 2489, lines 12–16; App. 2079, lines 1–16. Dr. Schwartz-Watts opined that the murder "had some sexual motivation" to it, and the discussion with Tietjen about "pornography, sex with younger children . . . was a

[7] "But I say unto you, that whosever looketh on a woman to lust after her hath committed adultery with her already in his heart. And if thy right eye offend thee, pluck it out, and cast it from thee: for it is profitable for thee that one of thy members should perish, and not that thy whole body should be cast into hell." *Matthew* 5:28–29 (King James Version).

trigger for him." App. 2057, line 22 – App. 2059, line 1. The timing of Petitioner viewing the pornography on the computer was not dispositive of its relevance. The fact that the computer actually had pornography on it "gave some credibility to his accounts" and "explained the mutilation of [Tietjen's] body." Pornography on Tietjen's computer was "crucial." App. 2059, lines 2–14.

The State's failure to disclose evidence of pornography on the computer allowed the prosecution to significantly undercut the Petitioner's medical experts on cross-examination Not only would the evidence corroborate Petitioner's version of events, it would have corroborated the fact that the murders were of a sexual nature and consistent with his symptoms of PTSD. App. 2080, lines 12–24. Dr. Schwartz-Watts explained that she had little corroboration of Petitioner's sex abuse, which was exploited on cross-examination and in closing by the solicitor saying Petitioner had lied about all of it. If she had the evidence of pornography on Tietjen's computer, it would have shown Petitioner was being truthful, which would have given credibility to his revelations about sexual abuse as well. App. 2081, lines 2–15.

REASONS FOR GRANTING THE PETITION

I. Despite clear language in *Payne v. Tennesee*, 501 U.S. 808 (1991) regarding the parameters of victim impact evidence, a conflict among the states exists concerning the admissibility of victim impact evidence from victims of a defendant's prior crimes. In the present case, trial counsel provided ineffective assistance by failing to object to such evidence.

Payne v. Tennesee, 501 U.S. 808 (1991)

Rounding out a trilogy of cases discussing "victim impact evidence" (VIE), in 1991, this Court decided *Payne v. Tennesee*, 501 U.S. 808 (1991), overruling *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989), to hold that VIE was not *per se* inadmissible. In the twenty-four years since *Payne*, this Court has not revisited the subject of VIE. Perhaps this Court's reluctance to return to the world of VIE is due to the seemingly clear language of *Payne* regarding what evidence was admissible as VIE. Specifically, *Payne* forbids VIE from other crimes. However, a conflict has arisen among the states regarding whether VIE concerning a defendant's prior crimes may be considered by the sentencer. This case presents an opportunity to settle this question.

The definition of what constitutes VIE appears clear in *Payne* where this Court held "[a] State may legitimately conclude that evidence about *the* victim and about the impact of *the* murder on *the* victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." *Payne*, 501 U.S. at 827 (emphasis added). In other words, the Eighth Amendment permits the sentencer to consider VIE as it pertains to *the* victim for whose death the State

seeks the death penalty. Language used by this Court throughout the opinion reinforces this view.

In *Payne*, this Court noted "the assessment of harm caused by the defendant as a result of *the crime charged* has understandably been an important concern of the criminal law, both in determining the elements of offense and in determining the appropriate punishment." *Id.* at 819 (emphasis added). According to the majority opinion, the categorical ban on VIE coupled with few restrictions placed on mitigation "unfairly weighted the scales in a capital trial." *Id.* at 822. "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by *the crime in question*, evidence of a general type long considered by sentencing authorities." *Id.* at 825 (emphasis added).

Thus, this Court lifted the categorical ban on VIE to permit states to offer "a quick glimpse of the life which a defendant chose to extinguish" or demonstrate "the loss to the victim's family and to society which has resulted from the defendant's homicide." *Id.* at 822 (internal citation and quotation omitted). VIE permits the State to show the sentencer how the victim's death represented "a unique loss to society and in particular to his family." *Id.* at 825.

It is clear this Court only authorizes VIE as it pertains to the life of the victim for whose death the State seeks the death penalty: "A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty

should be imposed." *Payne*, 501 U.S. at 827. There is no language in *Payne* authorizing VIE on unrelated crime victims.

Despite clear language that VIE only pertains to the murder victim for whom the defendant is on trial, the state courts are divided on the question of whether VIE from victims of a defendant's prior crimes may be considered by the sentencer during a capital trial. John H. Blume, *Ten Years of Payne: Victim Impact Evidence In Capital Cases*, 88 Cornell L. Rev. 257, 272 (Jan. 2003). This case presents an opportunity for this Court to answer the question and resolve the conflict among the states that has evolved in the twenty-four years since *Payne*.

States not permitting VIE relating to a defendant's prior crimes

Shortly after *Payne* was decided, the Illinois Supreme Court confronted the issue presented in this petition. *People v. Hope*, 702 N.E.2d 1282 (Ill. 1998). During Hope's capital sentencing proceeding, the prosecution presented VIE concerning Hope's involvement in a shooting at a McDonald's restaurant one month prior to the murders for which he faced the death penalty, including testimony from the widow of the deceased and a survivor of the shooting, who testified "as to the effects of the McDonald's shooting on them and their families." *Id.* at 1286. The court held the evidence was inadmissible, explaining there is not "any language in *Payne* which would suggest that victim impact evidence stemming from a defendant's other, unrelated crimes is admissible at his capital sentencing." *Id.* at 1287.

Quoting *Payne*'s definition of VIE as "'simply another form or method of

informing the sentencing authority about the specific harm caused by *the crime in question*,'" the court held that *Payne* "clearly contemplate[d] that victim impact evidence will come only from a survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which the defendant is being tried." *Id.* at 1288 (quoting *Payne*, 501 U.S. at 825) (emphasis in original). The court held that the "[w]hile details of prior crimes are considered relevant aggravation because they illuminate the character and record of a capital defendant, the unforeseen effects of those prior crimes on their victims are of no such assistance." *Id.* (internal citation omitted). Rejecting the state's contention that the VIE from prior crimes would assist the jury in determining Hope's moral culpability and blameworthiness, the court held that what the widow and her family suffered "does not make defendant more morally blameworthy in the murder" for which he faced the death penalty. *Id.* at 1289. Further, the court found that it was "clear from a close reading of *Payne* that the Court was examining how the 'harm caused by the defendant as a result of *the crime charged*' was relevant to a determination of the defendant's 'blameworthiness' in a capital sentencing decision." *Id.* (quoting *Payne*, 501 U.S. at 819)(emphasis in original).

The Texas Court of Criminal Appeals held evidence of the sexual assault, robbery, and murder of a victim was admissible during the penalty phase of a capital trial because it was part of the same transaction for which the defendant faced the death penalty; however, evidence of the victim's good character and the impact of her

death on her family was not relevant because the defendant was not on trial for her murder. *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997). The evidence could serve "no purpose other than to inflame the jury." *Id.* Recognizing this Court's holding that the Eighth Amendment did not bar the introduction of VIE because such evidence may be relevant to the jury's determination as to the imposition of the death penalty, the court explained that VIE is "designed to show the victim's 'uniqueness as a human being'" and allows the state to fulfill its legitimate interest "in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family.'" *Id.* (quoting *Payne*, 501 U.S. at 825). However, the court explained the evidence offered by the prosecution was "not the 'victim' for whose death [Cantu] ha[d] been indicted and tried, and *Payne* does not contemplate admission of such evidence as permissible under the Eighth Amendment." *Id.*

Further, the court explained that "[t]he danger of unfair prejudice to a defendant inherent in the introduction of 'victim impact' evidence with respect to a victim not named in the indictment on which he is being tried is unacceptably high." *Id.* According to the court, "[t]he admission of such evidence would open the door to admission of victim impact evidence arising from any extraneous offense committed by a defendant." *Id.*; *see also Haley v. State*, 173 S.W.3d 510, 518 (Tex. Crim. App. 2005)(finding error in admitting VIE relating to an extraneous offense of murder in

the punishment phase of a cocaine possession trial).[8]

The Nevada Supreme Court answered the question presented here in the negative in *Sherman v. State*, 965 P.2d 903, 914 (Nev. 1998). During Sherman's capital sentencing proceeding, the prosecution presented testimony as to the effect which Sherman's prior murder had on the community of the previous victim. *Id.* at 913. The court concluded that "the impact of a prior murder is not relevant to the sentencing decision in a current case," and therefore, the VIE regarding the prior murder was not admissible during the penalty phase of the trial. *Id.* at 914. The court explained that "evidence of the impact which a murder had on the victim's family is relevant to show the damage done by the murder," and "evidence of previous murders is relevant to show only that a statutory aggravating circumstance exists making the defendant death eligible." *Id.* Contrastively, "evidence of the impact which a previous murder had upon the previous victim is not relevant to show either of these facts." *Id.*

The Colorado Supreme Court held "[e]vidence regarding the impact of a capital

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[8] However, the Texas Court of Criminal Appeals paradoxically found the testimony of a victim of a robbery committed by the defendant years earlier as to the emotional impact that the robbery had on her life was *not* victim impact evidence and was, therefore, properly admitted at the defendant's capital sentencing proceeding. *Roberts v. State*, 220 S.W.3d 521, 531 (Tex. Crim. App. 2007). The court held the testimony was not VIE because it was evidence of the effect of a different offense on the victim, not evidence of the effect of an offense on people other than the victim. The court narrowly defined VIE as "evidence of the effect of an offense on people *other* than the victim." *Id.* (emphasis in original). Therefore, Texas would permit VIE regarding other crimes as long as the actual victim of the other crime provided the evidence.

defendant's prior crimes on the victims of those crimes . . . is not admissible because it is not relevant to the actual harm caused by the defendant as a result of the homicide for which he is being sentenced." *People v. Dunlap*, 975 P.2d 723, 745 (Colo. 1999). The court explained that "[p]ast victims' perceptions of Dunlap were not sufficiently tied to the jury's inquiry concerning the character, background, and history of the defendant, or to any of the aggravating or mitigating factors enumerated in [the state statute]." *Id.* Recognizing that the facts of Dunlap's prior crimes were admissible, the court held the impact of those crimes on the victims and their families was not admissible. *Id.*

The Supreme Court of Virginia held "victim impact testimony at a proceeding held in a capital murder trial to determine whether the defendant shall be sentenced to death or life imprisonment is limited to the testimony of the victims, as defined [by state statute] of the capital offense for which the defendant has been found guilty." *Andrews v. Commonwealth*, 699 S.E.2d 237, 272 (Va. 2010), *overruled on other grounds by John Craine, Inc. v. Hardick*, 722 S.E.2d 610 (Va. 2012). The court did not address the Eighth Amendment or the Due Process Clause because it found the state statute prohibited the testimony. *Id.*

The Supreme Court of Kentucky held that "[t]estimony from a victim of a crime for which the defendant is not being tried is not relevant to sentencing for the tried crime." *St. Clair v. Commonwealth*, 451 S.W.3d 597, 626 (Ky. 2014). As the court explained, "[i]f any victim of any crime committed by a defendant could testify, there

would functionally be no limit to victim-impact testimony." *Id.* at 625. "Proper victim-impact testimony is thus limited to that of victims of the crime for which the defendant is standing trial and has been convicted." *Id.* at 626. The court found the VIE from the wife of a prior murder victim violated the Eighth Amendment and due process. *Id.* at 629.

States permitting VIE relating to a defendant's prior crimes

The leading voice among the states admitting VIE relating to a defendant's prior crimes is California. The Supreme Court of California held that the impact of past crimes on victims of those past crimes was admissible because it was relevant to the defendant's prior violent crimes in *People v. Davis*, 208 P.3d 78, 138 (Cal. 2009). The Court explained it had "repeatedly held that the Eighth Amendment does not prohibit the admission of testimony by a defendant's prior victims concerning the impact of his violent crimes against them." *Id.* at 139. Specifically, the prosecution had introduced victim impact evidence of the defendant's 1976 assaults on three women, a 1976 burglary, and statements he made in 1977 and 1978 to court-appointed psychiatrists regarding these crimes. *Id.* at 127; *see also People v. Virgil*, 253 P.3d 553, 604 (Cal. 2011); *People v. Price*, 821 P.2d 610, 703 (Cal. 1991)(holding "the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts" in the penalty phase); *People v. Edwards*, 819 P.2d 436, 467 (Cal. 1991) (allowing "evidence and argument on the specific harm caused by the defendant, including the impact on the

family of the victim" regarding a defendant's prior crimes); *People v. Karis*, 758 P.2d 1189, 1205 (Cal. 1988)(finding live testimony by the actual victim of a capital defendant's prior crimes to prove those crimes admissible because the "impact of a capital defendant's crimes on the victims of those crimes is relevant to the penalty decision").

Additionally, North Carolina permits the introduction of victim impact evidence concerning a defendant's prior crimes. *State v. Robinson*, 451 S.E.2d 196, 204-205 (N.C. 1994). During the capital trial, the State introduced a judgment concerning the defendant's 1969 murder conviction in Colorado. *Id.* at 204. The judgment included an affidavit explaining that the murder victim's daughter witnessed the actual murder. *Id.* The state used this information in closing to argue that there were children in the world without mothers because of the defendant's conduct. *Id.* The court reasoned that victim impact evidence was admissible and the argument during closing "readily applie[d] to the motherless child" resulting from the capital murder. *Id.* at 205. Additionally, according to the Florida Supreme Court, victim impact evidence regarding a defendant's prior violent felony is admissible pursuant to a state statute. *Belcher v. State*, 961 So.2d 239, 257 (Fla. 2007).

The Supreme Court of Indiana held the admission into evidence of a statement by a victim from a prior crime of the defendant at a sentencing hearing in a non-capital case "did not affect the defendant's substantial rights" because the

trial court did not rely upon or refer to any of the information contained in the challenged statement from the prior victim in articulating the factors for sentencing. *Bowles v. State*, 737 N.E.2d 1150, 1154 (Ind. 2000).

Likewise, Pennsylvania permits the introduction of victim impact evidence concerning other crimes during capital sentencing proceedings. *Commonwealth v. Chmiel*, 30 A.3d 1111, 1179-1180 (Pa. 2011). A prosecutor testified regarding the defendant's prior rape conviction, including details of the rape and an alleged threat by the defendant to kill the rape victim. *Id.* at 1179. In closing argument, the State used the testimony about the prior rape to describe the defendant as "sick" and "depraved," to ask the jury to do what was right for the rape victim, and to ask the jury to show the defendant the same mercy he showed the rape victim. *Id.* at 1182. The Pennsylvania Supreme Court found no problem with the introduction of this evidence or the argument because the prosecutor was trying to prove an aggravating factor—the defendant's significant history of felony convictions involving the use or threat of violence. *Id.*

In *State v. Taylor*, 669 So.2d 364, 373 (La. 1996), the Louisiana Supreme Court affirmed the introduction of victim impact evidence during capital murder sentencing proceedings from the family member of a survivor. Taylor was accused of shooting two former co-workers. *Id.* at 367. One co-worker died and the State sought the death penalty. *Id.* The other co-worker survived. *Id.* In addition to testimony regarding the surviving co-worker's injuries and impairments, the surviving co-worker's wife

testified "of her feeling at the time of the shootings that she would never see him again." *Id.* at 373. The court held the evidence was relevant at sentencing to prove the aggravating circumstance that the defendant knowingly created a risk of death or great bodily harm to more than one person. *Id.*

In 2006, the South Carolina Supreme Court was presented with an opportunity to answer the question presented here in *State v. Bennett*, 632 S.E.2d 281 (S.C. 2006). However, the court refused to answer the question because a majority of the Court found the challenged evidence was *not* victim impact evidence. *Id.* at 228, 632 S.E.2d at 286.[9] Nevertheless, the court promised, when asked to do so, to "consider arguments regarding the types of evidence of prior crimes that should and should not be admissible in a capital sentencing proceeding" consistent with "the delicate balancing [of] the duty to conduct a sentencing inquiry broad in scope against the need to protect a capital defendant from unfair prejudice and prevent a capital sentencing proceeding from transmuting into a sentencing referendum on all of the defendant's prior crimes." *Id.* at 229-230, 632 S.E.2d at 287.

Petitioner presented the state supreme court with the opportunity it requested when he sought review. However, the court refused to review the matter. By declining review, the South Carolina Supreme Court sanctioned the introduction of victim impact evidence from victims of a defendant's prior crime during a capital

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[9] At least one other state, Utah, has refused to answer the question concerning the admissibility of VIE concerning prior crimes in a published opinion. *State v. Maestaes*, 299 P.3d 892, 977-979 (Utah 2012) (declining to answer the question presented based upon a finding that any potential error was harmless).

sentencing proceeding.

Presentation of VIE at Petitioner's Capital Trial

As explained, the State presented considerable VIE during the penalty phase concerning the death of Willard Tietjen, the victim for whose death the State sought the death penalty, and evidence concerning the facts and circumstances of Petitioner's prior crimes. App. 121, line 21 – App. 135, line 12; App. 202, line 11 – App. 210, line 4; App. 307, lines 4-12; App. 309, lines 1-7; App. 310, line 10 – App. 311, line 13; App. 315, lines 9-18; App. 316, lines 4-19; App. 317, lines 4-23; App. 616, line 22 – App. 622, line 18; App. 624, line 14 – App. 631, line 19; App. 632, line 7 – App. 637, line 17; App. 638, line 22 – App. 649, line 25; App. 651, line 10 – App. 657, line 23; App. 658, line 19 – App. 662, line 24; App. 664, line 13 – App. 669, line 4; App. 669, line 5 – App. 672, line 7; App. 676, line 9 – App. 686, line 1; App. 686, line 19 – App. 695, line 21; App. 696, line 21 – App. 703, line 25.

However, the judge heard unsworn VIE on the non-capital crimes after both sides rested. The victims were not called as witnesses and were not required to take an oath. The state called upon the victims to give VIE after both sides had rested and in an informal manner. In light of the victims not being called as witnesses, Petitioner was unable to confront them or rebut their statements. App. 1042, line 15 – App. 1046, line 6. Although VIE concerning non-capital crimes should not have been presented based on the clear dictates of *Payne* and Petitioner had no opportunity to confront or rebut those witnesses, trial counsel failed to object

to the introduction of the extremely prejudicial, heart-wrenching unsworn evidence.

The state PCR court erred in failing to find trial counsel's failure to object to the admission and consideration of VIE from the non-capital victims was deficient performance prejudicing Petitioner. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). The PCR court erroneously determined there was no error because the victim impact evidence relating to the non-capital crimes could have been presented at the time the plea was entered or during the penalty phase. The introduction of victim impact evidence concerning non-capital crimes is not admissible under the clear language of *Payne*. This evidence was used during the sentencing proceeding for the capital crime.

One judge has noted the particular power of VIE in capital sentencing proceedings. *United States v. Johnson*, 362 F.Supp.2d 1043, 1106 (N.D. Iowa 2005).[10] According to the VIE was "the most forceful, emotionally powerful, and emotionally draining evidence" that the United States District Judge had heard "in any kind of proceeding in any case, civil or criminal" in his entire career as a trial attorney and federal judge spanning nearly thirty years. *Id.* at 1107. He went on to wonder if *Payne* "would have been decided the same way if the Supreme Court Justices in the majority had ever sat as trial court judges in a federal death penalty case and had observed first hand, rather than through review of a cold record, the unsurpassed

[10] In his dissent from the denial of the petition for writ of certiorari in *Kelly v. California*, 555 U.S. 1020 (2008), Justice Stevens quoted this United States District Judge's observation. *Id.* at 1020 n.3. Justice Breyer also cited to and quoted from this District Judge's observation in his dissent from the denial of the writ of certiorari. *Id.*

emotional power of victim impact testimony on a jury." *Id.* Although it had been four months since the judge heard the testimony, the juror's sobbing still rung in his ears. *Id.* "To pretend that such evidence is not potentially unfairly prejudicial on issues to which it has little or no probative value is simply not realistic, even if the court were to give a careful limiting instruction." *Id.* Instead, the "potent, emotional evidence is a quintessential example of information likely to cause a jury to make a determination on an unrelated issue on the improper basis of inflamed emotion or bias-sympathetic or antipathetic, depending on whether one is considering the defendant or the victims' families." *Id.*

This Court should grant the writ of certiorari to address the conflict among the states regarding the parameters of permissible VIE pursuant to *Payne*. Despite this Court's clear language that the Eighth Amendment does not bar VIE to the extent it relates to the victim for whose death the State seeks the death penalty and the impact of the murder on that victim's family, several states have held that VIE regarding a defendant's prior crimes are admissible. This case presents an opportunity to settle this conflict with clear and unambiguous language.

II. A conflict exists among the lower courts whether the duty imposed by *Brady v. Maryland*, 373 U.S. 83 (1963) requires prosecutors to disclose exculpatory evidence known to the State prior to a defendant's guilty plea. In the present case, the courts below erred by failing to recognize and rectify the due process violation caused by the prosecution's failure to disclose significant evidence relevant to Petitioner's case in mitigation of capital punishment.

In *Brady*, this Court held that during trial the government is constitutionally obligated to disclose evidence favorable to the defense when the evidence is material to

either the guilt or punishment of the defendant. *Brady*, 373 U.S. at 87. This Court has yet to address, however, whether the due process clause requires the State to disclosure exculpatory evidence outside the context of a trial—namely, during plea negotiations—and the lower courts are divided on the issue.[11] *See, e.g., United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (noting circuit split and declining to reach issue of whether *Brady* may be invoked to challenge the voluntariness of the plea where a defendant's otherwise voluntary plea was given without knowledge of undisclosed exculpatory evidence); *Friedman v. Rehal*, 618 F.3d 142, 154, nn.4, 5 (2d Cir. 2010) (suggesting that *Ruiz* applies not only to impeachment evidence but also to exculpatory evidence because the Supreme Court "has consistently treated exculpatory and impeachment evidence in the same way for the purpose of defining the obligation of a prosecutor to provide *Brady* material prior to trial . . . and the reasoning underlying *Ruiz* could support a similar ruling for a prosecutor's obligations prior to a guilty plea."); *United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) ("[Petitioner] argues that the limitation of the Court's discussion [in *Ruiz*] to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea. *Ruiz* never makes such a distinction nor can this proposition be implied from its discussion."); *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) ("The Supreme Court's decision in *Ruiz* strongly suggests that a

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[11] This Court has, of course, held that "the Constitution does not require the Government to disclose material *impeachment* evidence prior to entering a plea agreement with a criminal defendant." *United States v. Ruiz*, 536 U.S. 622, 633 (2002) (emphasis added).

Brady-type disclosure might be required" in circumstances where the prosecution "ha[s] knowledge of a criminal defendant's factual innocence but fail[s] to disclose such information to a defendant before he enters into a guilty plea."); *Campbell v. Marshall*, 769 F.2d 314, 321 (6th Cir. 1985) (holding a defendant may argue that his plea was invalid because it was made in the absence of *Brady* material); *State v. Huebler*, 275 P.3d 91, 97-98 (Nev. 2012) (holding Brady required State to disclose exculpatory evidence prior to defendant's guilty plea).

Here, the South Carolina trial court and Supreme Court erred by failing to recognize and rectify the violation of Petitioner's due process rights under the Fifth, Eighth, and Fourteenth amendments to the United States Constitution arising from the prosecution's failure to disclose evidence prior to his guilty plea and sentencing. The undisclosed evidence would have corroborated Petitioner's account of the capital murder and supporting his medical evidence regarding his own mental illness. The evidence—the internet history of the computer in the home of one of Petitioner's victims—was critical to Petitioner's case in mitigation of the capital murder by supporting his argument regarding the psychological trigger leading to the murder and explaining Petitioner's subsequent treatment of the scene and the victim's corps, all of which were significant factors in the death penalty sentencing phase of trial. The lower courts' refusal to grant a new trial due to the State's withholding of that evidence runs directly against this Court's rulings, which recognize a defendant's right to introduce any relevant mitigating evidence available. *See, e.g., Eddings v.*

Oklahoma, 455 U.S. 104, 113-14 (1982) (allowing use of troubled childhood as mitigating evidence at sentencing); *Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (requiring certain mitigating evidence to be introduced); *Gregg v. Georgia*, 428 U.S. 153, 193 n.44 (1976) (listing mitigating circumstances including "[t]he murder was committed while the defendant was under the influence of extreme mental or emotional disturbance").

The State's failure to disclose evidence violated Petitioner's constitutional due process rights

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held "the suppression by the [state] of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment." Consequently, an individual asserting a *Brady* violation must demonstrate that the evidence: (1) was favorable to the accused; (2) was in the possession of or known by the prosecution; (3) was suppressed by the state; and (4) was material to the accused's guilt or innocence or was impeaching. As explained above, each of these factors was demonstrated here.

The only factor that could conceivably be disputed here is the final one: materiality. For determining materiality, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). "A 'reasonable probability' of a different result is accordingly shown when

the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985). A defendant shows a *Brady* violation "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.* at 435.

Here, the computer analysis revealing pornography on Tietjen's computer was favorable to Petitioner because it (a) corroborated Petitioner's statement, which lent credibility to his revelations of childhood sex abuse and (b) provided an explanation other than "sadistic" callousness for Petitioner's treatment of the crime scene and the corpse following the murder.

The PCR court, however, completely ignored the readily apparent evidence in the record that the pornography in the internet history of Tietjen's computer fully corroborated Petitioner's statement that he viewed pornography on Tietjen's computer by viewing the internet history. The computer analysis would have prevented—or at the very least, allowed the defense to rebut—the solicitor's closing argument in which he claimed Petitioner looked at pornography on Tietjen's computer of his own choosing causing further indignity and suffering for the Tietjen family.

The PCR court also concluded the evidence was not material to Petitioner's post-mortem abuse of Tietjen's eyes because "this theory was fully presented within his statements to Dr. Crawford and was given to the defense and their experts."

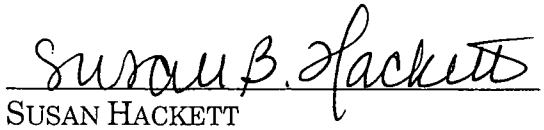
This was error. Petitioner's defense was unable to develop and present the mitigating evidence of pornography on the computer to explain this due to a lack of corroboration to support the theory.

When looking at the materiality of the suppressed evidence with respect to punishment includes an examination of the mitigating factors presented. *See Cone v. Bell,* 556 U.S. 449, 473 (2009). The suppressed evidence in the instant matter went to the heart of two of the statutory migrating factors: (1) the murders were committed while Petitioner was under the influence of mental disorder, and (2) the capacity of Petitioner to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Schwartz-Watts testified the pornography was crucial to her diagnosis of Petitioner and her explanation of what happened when Tietjen died. The pornography illustrated the sexual motivation for the crime and the post mortem abuse. Quite clearly, the evidence went directly to two statutory mitigating factors, which the sentencer was required to consider. Therefore, there is a reasonable probability that the result of the sentencing proceeding would have been different had the prosecution revealed the full computer analysis to Petitioner.

CONCLUSION

Petitioner respectfully requests this Court grant the writ of certiorari and permit briefing on the issues presented.

Respectfully submitted,



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ATTORNEYS FOR PETITIONER

September 18, 2015

No. _____

In the Supreme Court of the United States

STEPHEN COREY BRYANT, Petitioner,

v.

STATE OF SOUTH CAROLINA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE THE SUMTER COUNTY COURT OF COMMON PLEAS

CERTIFICATE OF SERVICE

I certify that copies of the petition for writ of certiorari and appendix in this case have been served upon opposing counsel for Respondent, the State of South Carolina, Melody J. Brown, by mailing copies in envelopes properly addressed with postage prepaid to the Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211 on this 18th day of September, 2015. Counsel is also today, September 18, 2015, sending a copy of the petition for writ of certiorari and appendix to opposing counsel by e-mail to: mbrown@scag.gov.

Susan B. Hackett

SUSAN B. HACKETT
Counsel of Record

SWORN TO BEFORE me this 18th day of September, 2015.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022.

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APPENDIX

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APPENDIX

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER)

Stephen Corey Bryant, #52[illegible]) C/A No. 2011-CP-43-901

Applicant,)

vs.) ORDER

The State of South Carolina,)

Respondent.)

This matter comes before the Court pursuant to the application for post-conviction relief filed May 10, 2011, as amended on May 21, 2012 and October 1, 2012. An evidentiary hearing on the allegations was held October 1-3, 2012 in the Sumter County Courthouse. Applicant was represented by Melissa J. Armstrong, Esq., and Heath P. Taylor, Esq. The State was represented by Senior Assistant Deputy Attorney General Donald J. Zelenka and Senior Assistant Attorney General Melody J. Brown. After having reviewed the pleadings, the appellate court briefs, the record on appeal and opinion from the direct appeal, and having heard and weighed the testimony and other evidence presented at the evidentiary hearing, this Court finds, for all the reasons set forth in the instant Order, that post-conviction relief must be denied.

I.

PROCEDURAL HISTORY

Applicant, Stephen Corey Bryant, was indicted by a Sumter County grand jury on multiple charges: burglary in the second degree; two (2) counts of burglary in the first degree; arson in the second degree; possession of a stolen handgun; three (3) counts of murder (Clifton Gainey,

Willard Tietjen, Clarence Burgess); armed robbery; assault and battery with intent to kill (Correctional Officer Larry Justice); threatening life of public employee (Correctional Officer Thornwell Jones). Applicant was also indicted by a Richland County grand jury for assault and battery with intent to kill (Clifton Brown). The State sought the death penalty for the Tietjen murder. Applicant 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. R. pp. 1309-1314.

On August 18, 2008 Applicant appeared before the Honorable Thomas A. Russo for a guilty plea. There were no plea negotiations as to sentence in the case. R. p. 1339; pp. 1345-46; pp. 1378-79. Applicant entered guilty pleas to the following crimes:

1. burglary in the second degree [2006-GS-43-696].
2. burglary in the first degree [2006-GS-43-697].
3. assault and battery with intent to kill [2004-GS-40-10096] [Richland County].
4. murder [2006-GS-43-698].
5. murder [2006-GS-43-699].
6. murder [2006-GS-43-700].
7. assault and battery with intent to kill [2006-GS-43-701].
8. threatening the life of a public employee [2006-GS-43-702].
9. armed robbery [2006-GS-43-699].
10. possession of stolen handgun [2006-GS-43-699].
11. burglary first degree [2006.GS-43-698].

12. arson, second degree [2006-GS-43-698].

R. pp. 1334-38.

The plea court determined that there was a sufficient factual basis for each of the guilty pleas. R. pp. 1348-1381. Applicant affirmed the State's factual basis as correct as to each crime. R. pp. 1353, 1357, 1360, 1365, 1368, 1374, 1376, 1377. Judge Russo deferred sentencing.

On September 2, 2008 the sentencing proceeding began before Judge Russo on indictment 2006-GS-43-699 involving the murder of Willard Tietjen. The State had filed and served the Notice of Intent to seek the death penalty asserting the condition precedent of the statutory aggravating circumstances "murder was committed while in the commission of a robbery while armed with a deadly weapon." The State presented its evidence in aggravation through September 8, 2008. R. pp. 1-730.

The defense presented its evidence in mitigation. R. pp. 734-1000. Applicant waived his right to testify. R. pp. 1002-1004. The State and defense made closing arguments to the Court. R. pp. 1005-1035.

Judge Russo sentenced Applicant on September 11, 2008. He sentenced Applicant to thirty (30) days on 2006-GS-43-702 (threatening life of a public employee); twenty (20) years on 2004-GS- 40-10096 (assault and battery with intent to kill); twenty (20) years on 2006-GS-43-701 (assault and battery with intent to kill); life imprisonment on 2006-GS-43-700 (murder); life imprisonment on 2006-GS-43-697 (burglary in the first degree); fifteen (15) years on 2006-GS-43-696 (burglary in the second degree); twenty-five (25) years on 2006-GS-43-698 (arson in the second degree); and life (burglary in the first degree); and life (murder); on 2006-GS-43-699, five (5) years (possession of stolen handgun); thirty (30) years (armed robbery); and life (murder). Judge Russo found beyond a reasonable doubt the existence of the statutory

aggravating circumstance of "the defendant committed the murder while in the commission of a robbery while armed with a deadly weapon." R. pp. 1049 - 1050. On the incident involving the death of Willard Tietjen, Judge Russo sentenced Bryant to "death by electrocution or lethal injection." R. p. 1051.

Applicant filed a timely Notice of Appeal on September 19, 2008. On March 23, 2010 an Initial Brief of Appellant was filed by Senior Appellate Defender Joseph L. Savitz, asserting the following issue on appeal:

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

Initial Brief of Appellant, p. 3.

Respondent made an Initial Brief of Respondent on August 6, 2010. Final Briefs were filed on September 16, 2010. Oral arguments were held before the South Carolina Supreme Court on November 30, 2010. On January 7, 2011 the South Carolina Supreme Court issued its opinion affirming the convictions and sentences. *State v. Bryant (Stephen Corey)*, Op. No. 26906, 390 S.C. 638, 704 S.E.2d 344 (January 7, 2011). Applicant petitioned for rehearing which was denied on February 2, 2011. Applicant did not seek certiorari in the United States Supreme Court in the direct appeal.

The Remittitur was issued on February 2, 2011. On February 4, 2011 appellate counsel made a motion for stay of execution and for the appointment of a post-conviction relief judge pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996). Respondents made a Return on February 7, 2011. On March 3, 2011 the South Carolina Supreme

Court issued its stay order. These post-conviction relief proceedings followed.

II.

STATEMENT OF FACTS

The pre-detention crimes in this case span a short time frame and demonstrate the inter-connectivity of the crimes, one to the other, by Applicant's own actions. The Court has considered the instant facts:

1. **The Burglary of the Residence of Robert Dennis on Tuesday, October 5, 2004.** It began on October 4, 2004.Applicant Applicant walked down the half mile dirt road to the Dennis home and told Mr. Dennis that his truck was stuck at the top of the driveway. Mr. Dennis offers help, and, although uneasy, takes him to the area and extracts the truck out of the bog. R. pp. 189-190. Bryant gives Mr. Dennis the name of "Carlos Bryan" and a false address. Mr. Dennis records a description of Applicant's truck as a 1990 GMC two-tone blue truck. R. pp. 1351-52, p. 191. The next day, Mr. Dennis left his home office at approximately 4:00 p.m., returning late that night. The day after that, he found that his home office had been burglarized. R. pp. 192-194. His laptop, briefcase, and "a zipper bag with quite a bit of checks, money orders, and some cash" were missing from his office. Entry was made through a window. R. pp. 192-193. A shoeprint was raised outside the window which was sent to SLED. A subsequent search warrant of Applicant's home found a right shoe that matched the shoeprint. In addition, Mr. Dennis identified Applicant as the visitor after seeing his picture in the newspaper and on television. R. pp. 195-196; pp. 1352-53.

2. **The Burglary of James Ammons on Friday, October 8, 2004.** James Ammons, like Mr. Dennis, lived in an isolated and remote area outside of Sumter. R. pp. 199-200. On the morning of October 8, 2004 Mr. Ammons took his daughter to school and

traveled into Sumter for errands. R. p. 204. Mr. Ammons had allowed a friend, T. J. Hansen, to go deer-hunting on his property. Mr. Hansen's truck became stuck in the mud. Mr. Hansen went to Mr. Ammons' home around 11:30 a.m. for help. He noticed the sliding door was open and entered. He attempted to use the telephone but the telephone was dead. He walked to a neighbor's house to use the phone and call Mr. Ammon's cell phone. R. pp. 204-205; pp. 211-216. Mr. Hanson sees Mr. Ammons driving down the road and waves him over. Then he and Mr. Ammons returned to Mr. Ammons' home around 1:30 p.m. R. p. 205. The phone wires had been cut. The sliding door was open, and the television was off rather than on as Mr. Ammons left it, and his daughter's radio was off. Mr. Ammons went into his bedroom and found that his .40 caliber Smith and Wesson pistol had been stolen along with ammunition and registration papers. He called 911. R. pp. 205-209; pp. 1354-55.

Subsequently, as a result of an October 13th search, the gun, case, ownership papers and box of ammunition were recovered from Applicant's house. R. p. 1355-56; pp. 207-210. Applicant gave a series of statements claiming the gun was found in a dumpster and then asserted he found it at a home in Pinewood where he stopped when he was low on gas, slid open the door, and took the gun. R. pp. 1355-56; pp. 216-17. In another statement, Applicant admitted to cutting the telephone wires before he entered the home. R. p. 1357; p. 217.

3. **Assault on Clinton Brown in Richland County on October 8, 2004.** Clinton Brown was fishing with an acquaintance at the Billy Tolar Boating Landing off the Wateree River. R. pp. 247-248. Applicant came up to them, spoke to them, and then left. The other fisherman left, as well. R. pp. 250-253. Applicant then returned, and came up behind Mr. Brown and shot him in the back. Applicant then left, having offered no assistance. R. pp. 254-255. Mr. Brown, bleeding, initially passed out. When he came to, he struggled up to his truck and drove to Tuomey

Hospital where he remained for over one week. R. pp. 1357-1360; pp. 254-56; pp. 259-262.

The bullet recovered from Mr. Brown ultimately matches the stolen Smith and Wesson. Applicant admitted the shooting to Roy Lee Lambert the day after the shooting. R. pp. 273-276. Mr. Lambert had bought a knife from Applicant, then saw the gun and offered to find a buyer. Applicant states, "It's got blood on it." R. p. 275.[1]

4. **The murder of Cliff Gainey on October 9, 2004.** Unlike the others, Applicant and Cliff Gainey knew each other. They were co-workers in construction, went fishing together and spent weekends with each other's family. R. p. 1362. On October 9, 2004 Applicant picked up Gainey from the mobile home he rented from his boss. They went to a convenience store to buy beer. The purchase is recorded on the store's camera. They drive off together and later arrive at a location on Bells Mill Road. Applicant shot Mr. Gainey three (3) times, left the body in the open, and drove off. A passerby, William Morton saw a truck with its lights on speed away, then he saw the body. After checking vitals he called 911. R. pp. 285-286. There was no identification on the body and Mr. Gainey remained unidentified for nearly two days. R. pp. 290-291; p. 301. After shooting Mr. Gainey, Applicant returned to the Gainey home. He stole a television, VCR, sound system and aquarium. R. p. 317. Upon leaving, he set fire to the couch. R. 1362-64.

At 8:30 p.m., Mr. Gainey's ex-wife Linda Coker, and son, Christopher, arrived at the home and called the fire department. The fire department determined the fire was not accidental and also determined it began prior to 8:25 p.m. due to the damage of a clock. R. pp. 323-330. The

[1] Bryant gave statements asserting that he pulled the trigger and the bullet hit him in the back. R. pp. 280-281. He stated the victim charged him so he fired back with a second shot, but claimed he did not know if it hit him. R. p. 281.

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family had been by previously at 7:30 p.m. R. pp. 307-311.

Connecting Applicant to the murder was the positive comparison of the shell casings at the scene, the convenience store video with Gainey, and the results of the search warrant of Applicant's home where the television, DVD, VCR, sound system and aquarium were found. R. pp. 336-337. Further, Applicant's girlfriend, Judy Justice, had been given a key from Applicant that was the key to Gainey's mobile home. R. pp. 337-338.

Applicant also gave a statement claiming he threw the wallet into a dumpster, showed a weapon to the victim, and took the items from the Gainey home.. R. pp. 1364-65; pp. 340-44. In his last statement, Applicant admitted shooting Mr. Gainey after Mr. Gainey urinated then turned toward him. He stated: "I started freaking out." R. p. 344.

5. The murder of Willard Tietjen on Monday, October 11, 2004. Between 11:00 a.m. and 5:30 p.m., Willard Tietjen, a disabled 62 year old, was murdered in his home. He lived with his wife, Mildred, in a remote and isolated ranch house. R. pp. 1366-67; pp. 44-45. Mr. Tietjen, suffering from a bad heart condition and early onset of Alzheimer's, was a man of habit who stayed around his home due to his conditions. R. pp. 426-427, 473. His wife after leaving for work after breakfast, would begin calling on him around 4:30 p.m. R. p. 1367; p. 432. Around 11:00 a.m. on October 11, 2004 Mr. Tietjen spoke with a friend, Robert Summers. R. p. 1368; pp. 433-434; pp. 484-486. Subsequently, without apparent forced entry, Applicant entered the Tietjen home. In Applicant's statement, he says he knocked on the door, asked for help because his truck had broken down, and Mr. Tietjen invited him inside. R. p. 1368. Ultimately, Applicant shots Mr. Tietjen nine (9) times. R. p. 1368. Applicant then went through Mr. Tietjen's wallet and took cash and some cards. R. p. 1368. He threw some cards around the living room floor, and pulled Mr. Tietjen's masonic ring off his finger. Applicant methodically

went through each room in the house looking for items to steal. R. pp. 1368-1369. He took power tools, a knife, a medallion, a jug of change, hand tools, a bag to carry them in, walkie-talkies, cell-phone, silver certificates, jewelry, an ammo box, and other items. R. p. 1369. Applicant also took a drink from the refrigerator, smoked cigarettes, and smoked a cigar. R. p. 1369. In addition, Applicant wrote a note[2] and went on Mr. Tietjen's computer. R. p. 1369. Applicant was still in the home when Mrs. Tietjen made her daily call to check on her husband. R. p. 435. She tried to reach Mr. Tietjen on the land line, then called his cell phone. Applicant answered the cell phone and stated, "T.J. is dead." and admitted to her that he had killed Mr. Tietjen. R. p. 1369; pp. 436-437. She terminates the call then calls 911. She called her husband's cell phone number again, and Applicant again answers. Applicant stated, "I told you T.J. is dead, and don't call again." R. p. 438; also Tr. pp. 659-660; p. 698. Mr. Tietjen's daughter, Kimberly Dees, also calls the cell phone and Applicant again admits killing her father. R. pp. 477-478. Kimberly's husband, Robert Dees, also calls, and the same sad inculpatory statement is given. R. p. 1369; pp. 481-482. These calls occur between 5:15 p.m. and 5:30 p.m. Law enforcement was called after.

Forensic testing connected the shell casings and bullets from the Tietjen scene with the stolen handgun. R. p. 1370. Applicant's DNA was found on cigarette material within the house – one sample was from a partially smoked cigarette retrieved from the right eye of the victim. R. pp. 594-595. His DNA is also matched to an ankle sock recovered from Mr. Tietjen's living room. R. p. 595. Handwriting analysis determines the note is consistent with Applicant's

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[2] The contents of the note/letter stated: "no more sick computer porn for this sick f___r. By the way, just keeping my promise to all. Good luck finding me. LMFAO." The note also stated "I find it funny, victim number five in two weeks." R. pp. 516-518.

writing. R. p. 1370; p. 583. A videotape from a local Bi-Lo store showed Applicant using the change machine. Id. R. pp. 562-563, 569. Items of stolen property were also recovered and connected to Applicant. R. pp. 546-552. Applicant sold the stolen knife to Roy Lambert – the same individual who heard Applicant admit to shooting Mr. Brown – and he turned the knife into the police. R. pp. 274-276; pp. 572-573.

Applicant also gave inculpatory statements. R. pp. 607-615. He admitted the Tietjen robbery and taking items while still armed. He described acts done within the house and laid claim as the sole perpetrator. He then carried law enforcement to locations where he had deposited items. He admitted having conversations with the Tietjen family. R. p. 1371.

Mrs. Tietjen testified that her husband told her Friday, October 8, 2004 that a man came by the house looking for Kimberly Smith. She said her husband tried to assist the person with the use of the telephone book. R. pp. 430-431. When she had returned home on the 8th, she saw a truck in the driveway that she had assumed was a deer-hunter's truck. She recalled it to be a GMC and similar color to a photograph of the truck identified as Applicant's. R. pp. 430-431.

Dr. Joel Sexton, the forensic pathologist, testified about the extensive injuries to Mr. Tietjen. R. p. 109. The victim had nine (9) gunshot wounds and burns to the eyes and his beard. R. pp. 108-113. Two of the shots to the head were fatal. R. p. 112, ll. 1-21.

6. **The murder of Christopher Burgess on Wednesday, October 13, 2004.** At approximately 1:30 a.m., thirty-five (35) year old Christopher Burgess rode a bicycle to the Foxville Road area in Manchester Forest. R. p. 1372. He came upon an Officer Benjamin Stiles and then continued toward the mall. R. pp. 345-348. Around 4:20 a.m., Mr. Burgess ended up at a convenience store, the Kangaroo Market Express, where he is seen on the surveillance video with Applicant. R. p. 353, Exhibit 103. Towanda Govan, an employee, knew both Burgess and Applicant by their coming into the store. R. p. 351. On that date, Govan recalled "Chris" coming in first and Applicant came in later. She saw them shake hands. R. p. 352. She recalled that it was around 4:20 a.m. R. pp. 354-355. Mr. Burgess left with Applicant after putting his bike into Applicant's truck. R. p. 1372. They eventually end up in the Foxville Road area. Similar to the Gainey incident, Applicant shot Mr. Burgess and left the unconcealed body in the road bed. Around 6:15 a.m., a deer hunter, Tony Jackson, saw the body in the roadway and called 911. R. pp. 358-360; p. 365.

Mr. Burgess had two (2) gunshot wounds - one through his left cheek that entered his brain and a second through his back that went through his heart and exited. R. p. 1373. The removed bullet and shell casing matched the stolen handgun. R. p. 1373. As noted, the videotape of the convenience store showed Applicant and Burgess together. Items that had been previously seen by law enforcement in Applicant's truck during an interview before this incident are found at the scene. R. pp. 1373-1374. Mr. Burgess' bicycle is recovered from the truck when the warrant is served. R. p. 1374

In Applicant's statements, he admitted shooting Mr. Burgess with the Smith and Wesson, knew the location of the shooting, and described Mr. Burgess' body. R. p. 1374; pp. 376-79. Applicant declared in his statements that Mr. Burgess started making demands where he wanted

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Applicant to take him which, he stated, "pissed me off." He also stated he feared victim would take his truck from him, so he reached under the seat, grabbed the gun and shot him. R. pp. 378 - 379.

Post-Detention Crimes

After incarceration for the above described crimes, Applicant continued to inflict injury and generally perpetuate his threats or acts of violence. The Court has considered the following additional facts:

7. Threatening the life of Correctional Officer Thornwell Joe Jones at the Sumter-Lee Regional Detention Center on March 9, 2005. On March 9, 2005 Correctional Officer Cpl. Thornwell Jones and a nurse were passing out food trays and medication to the inmates. R. p. 1375. When they arrived at Applicant's cell, Applicant declared: "I's coming out of my cell when you open the door and I'm going to F____ you up." R. p. 1373; p. 383.[3] They open the door and Applicant appeared - hands balled up and ready to fight. R. pp. 383-384. The officers took it seriously and Applicant finally stood down without striking the officer. R. pp. 1375-1376; pp. 383-384. Jones testified that he did not have problems with him after that date. R. p. 387.

8. The assault with intent to kill Correctional Officer Larry Justice on October 26, 2005. On October 26, 2005 Officer Larry Justice was in the process of retrieving dinner trays at the Sumter-Lee Regional Detention Center maximum security area. R. pp. 392-93. He approached Applicant's cell and Applicant placed his tray in the bag. R. p. 392. At that point Applicant sucker punched Justice multiple times. The officer's head is knocked against a wall

[3] During the hearing, he testified that Applicant stated when I open his door he was "going to come out and go to my f_____g ass because he ain't got nothing to lose." R. p. 383.

and he fell to the ground. R. p. 393; p. 413. Applicant kicked and beat Officer Justice on the face and chest. R. p. 1377; pp. 413-14. Another officer witnessed this and called for assistance. R. pp. 413-416. Applicant then withdrew and went into this cell. R. pp. 416-417. Officer Justice suffered a broken eye socket, broken nose, crushed sinus bones and a brain aneurysm. R. p. 1377; pp. 394-96. He has not worked since the incident. R. p. 401. He suffers headaches, nosebleeds, and he is required to walk with a cane to control his balance. R. p. 1377; pp. 395-96.

III.

ALLEGATIONS

Applicant filed an initial application on May 10, 2011, followed by amendments filed May 21, 2012 and October 1, 2012. The amendment filed October 1, 2012 represents Applicant's final amendment, and only the allegations reflected in that amendment are addressed herein. All prior allegations were withdrawn or abandoned, and are not addressed in this Order. The allegations from the final amendment are as follows:

A. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws. Counsel failed to provide accurate advice to Applicant insofar as the likelihood of his possible sentence if tried by jury versus pleading guilty and receiving a judge sentencing. Applicant was given various pieces of advice concerning his entering a guilty plea and signed three (3) separate plea agreements contained in trial counsel's file. Ultimately, Applicant pleaded guilty to three counts of murder and other related charges in exchange for no consideration from the state. In effect, Mr. Bryant pleaded "straight up" to capital murder. Counsel was ineffective in that they told Applicant there was an "advantage" to pleading guilty in that he was lessening his chances of receiving a death sentence, when in fact he received nothing of benefit from the plea. Moreover, Counsel erroneously advised Applicant as to "statistical" evidence supporting the advice to plead guilty, when no such evidence existed to support the advice given. Counsel further misadvised Applicant as to the rules of evidence if he went to trial versus pleaded guilty. Advising a client to plead guilty under these circumstances was clearly unreasonable. Counsel's inaccurate advice induced Applicant to plead guilty and, but for

this erroneous advice, Applicant would have not pled guilty but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52 (1985); *Strickland v. Washington*, 466 U.S. 684 (1984).

B. Constitutional violation of assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Lead counsel failed to participate in discussions with Applicant concerning whether Applicant should plead guilty. South Carolina law provides to capital defendants the right to two (2) counsel. Applicant was denied two counsel during a critical stage of his trial, that being the discussion and decision leading him to enter a plea of guilty. This error amounts to a denial of counsel as recognized in *United States v. Cronic*, 466 U.S. 648 (1984) or was ineffective under *Strickland v. Washington*, 466 U.S. 684 (1984).

C. Ineffective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendment to the United States Constitution, the South Carolina Constitution and law. Counsel failed to object to the solicitor's improper closing argument during the penalty phase of trial. The Solicitor implored the trial judge to sentence Applicant to death to send a community "message." These types of closing arguments have been condemned by the South Carolina courts and constitute reversible error. *Strickland v. Washington*, 466 U.S. 684 (1984).

D. Denial of Due Process, Effective Assistance of Counsel and Violation of Prohibition against cruel and unusual punishment in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution due to trial court's refusal to allow Applicant the opportunity to present after-discovered witness testimony relevant to his mental health and mitigation, while allowing the state to present additional evidence in aggravation of punishment after the state had rested its case in aggravation. Trial Counsel failed to object to the trial court's erroneous decision to allow the state to introduce additional victim impact testimony. The trial court's actions were improper, and required an objection from defense counsel. Failure to object was deficient and prejudicial, as capital defendants have an absolute right to confront and/or rebut the evidence against them offered in support of a sentence of death. The above errors and omissions were prejudicial and require that Applicant's death sentence be reversed and his case remanded for a new sentencing trial. *Strickland v. Washington*, 466 U.S. 669 (1984), *Gardner v. Florida,* 430 U.S. 349 (1977).

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E. Denial of Effective assistance of counsel in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, due to trial counsel's failure to proffer or otherwise preserve the issue of the trial court's denial of trial counsel's request to provide testimony from Edward Goss, who became known as a potential witness after the defense had completed the anticipated evidence in mitigation. Assuming, arguendo, that the above issue was preserved for appellate review, then Applicant was denied effective appellate counsel for appellate counsel's failure to raise this issue. *Strickland v. Washington*, 466 U.S. 669 (1984). Edward Goss's after-trial statement to law enforcement establishes the materiality of what he had to offer on behalf of Mr. Bryant at trial. The absence of Mr. Goss's testimony was prejudicial to Mr. Bryant. This Court should reverse Mr. Bryant's death sentence [and] remand this case for resentencing.

F. Denial of Due Process of Law and Right to a Fair Trial due to the State's failure to comply with the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963). Edward Goss was a witness to Applicant's mental derangement just prior to the time of the crimes. This fact was witnessed by Law Enforcement Office[r] Tripp Mayes, who saw Applicant in this state and had a conversation with Edward Goss. After Bryant's arrest, which was widely published in the Sumter area papers, but prior to Bryant's trial, Mr. Goss recalled a conversation with Officer Mayes, during which they discussed the fact of their being witnesses to Bryant's bizarre behavior just prior to the murders. Officer Mayes and/or the Solicitor's Office failed to disclose the information concerning Applicant's mental state and/or the existence of Edward Goss as a witness who could provide evidence favorable to the defense. *Brady v. Maryland, Id.* This failure was prejudicial, as the issue of Bryant's mental state was essentially the centerpiece of the defense case in mitigation. Given this fact, the state's failure to turn over this type of evidence cannot be held harmless. Prejudice is manifest and Applicant's sentence should be reversed.

G. Denial of Due Process of law and a fair trial due to the state's non-disclosure of evidence relevant to the Defense case in mitigation of punishment, evidence that was part and parcel of the circumstances of the crime related to the Tietjen Homicide, evidence that corroborated Mr. Bryant's statements to law enforcement concerning the facts leading up to the Tietjen homicide. *Brady v. Maryland*, 373 U.S. 83 (1963). The state was repeatedly asked for discovery and, in turn, the state repeatedly played a game of cat and mouse with the defense team, asking them what they – the defense – thought the state had not turned over. The state, it turns out, was in possession of forensic computer reports and evidence from SLED agent David Givens. Agent Givens' examination of Mr. Tietjen's home computer revealed a history of visits to teen (and various other) porn websites. This examination further revealed that Tietjen had been

"surfing" porn at least as early as June, 14, 2004. Agent Givens' casenotes reflect he had a discussion with the state about his investigation of Tietjen's computer on October 25, 2004. Defense counsel was never provided with any documentation about the pornography found on Tietjen's computer. The defense team scrambled to find this kind of evidence because Mr. Bryant told SLED forensic psychiatrist, Dr. Pam Crawford, that he saw pornography on Tiejen's computer on the day of the killing. (March 25, 2004 Transcript of Interview by Dr. Pam Crawford of Stephen Corey Bryant, at pp. 95-98). Mr. Bryant also told defense forensic psychiatrist, Dr. Donna Schwartz-Watts, that he had seen porn on the compupter and, due to his personal history of sex abuse by both male and female family members, felt sexually threatened during the time he committed each of the offenses, including hte one committed at the Teitjen home. (See Record on Appeal (hereinafter "ROA", p. 834, line 2-p. 835, line 23).

The prejudice to Bryant created by the state's failure to disclose evidence of pornography use by Tietjen was exacerbated by the state's cross-examination of defense witnesses Dr. Marti Loring and Dr. Donna Schwartz-Watts. The state repeatedly attacked the opinions rendered by both of these witnesses due to their having a lack of "corroboration" and having to rely on Mr. Bryant. Prejudice to Mr. Bryant is obvious in this situation.

Even after thoroughly attacking defense witnesses for their uncorroborated opinions, the state was not finished with making use of the evidence of pornography discovered on Tietjen's computer. And so, during closing arguments to the judge, the Solicitor remarked that Bryant "got on their computer and began to visit porn sites by his choosing, not sites from T.J. and Mildred." (ROA at 1020, lines 7-9). Based on Agent Givens' findings, the state knew, or should have known, that Tietjen, not Bryant, had an affinity for porn. Bryant's computer was examined and no evidence of pornography was ever found. Tietjen's computer had pornography on it dating back to June, 2004, which was approximately four (4) months prior to Bryant ever meeting Tietjen. The State knew, or should have known, the real facts and disclosed them to the defense. Yet, what actually happened was the state urged the Court to sentence Bryant to death based on the false allegation that Mr. Bryant, in an extreme act of indifference, surfed porn on the Teitjen's computer sometime after killing Mr. Tietjen. This is the type of misrepresentation of fact that, whether intentional or simply through negligence/ignorance of the facts, has been condemned by the United States Supreme Court as so egregious that reversal is required. *Napue v. Illinois*, 360 U.S. 264 (1959), *U.S. v. Giglio*, 405 U.S. 150 (1972).

Finally, the state's misuse of non-disclosed evidence of pornography denied

> Applicant his right of rebuttal, which is a fundamental due process protection to ensure no one is sentenced to death on the basis of information they could not confront and challenge. The state's *Brady*/Napue/Giglio violation led to this result and requires reversal of Applicant's death sentence. *Gardner v. Florida*, 430 U.S. 349 (1977).

Second Amended Applicant for Post-Conviction Relief, filed October 1, 2012, pp. 2-6.

IV.
DISCUSSION

This Court has had the opportunity to review the record and has heard the testimony and other evidence adduced at the post-conviction relief evidentiary hearing. This Court specifically notes that it has had the opportunity to observe the witnesses presented at the evidentiary hearing, closely pass upon their credibility, and weigh their testimony accordingly. Moreover, this Court heard closing argument at the conclusion of the evidentiary hearing and, additionally, requested, received and considered proposed order from both parties which further reflects the party's positions. After considering Applicant's and Respondents' arguments, the testimony at the evidentiary hearing, and reviewing the record, I find that I must deny the application for post-conviction relief. Set forth below are the relevant findings of fact and conclusions of law as required under S.C. Code § 17-27-80 (1985) as to each individual allegation:

A.

Allegation Counsel Failed to Provide Accurate Advice on Guilty Plea.

Applicant complains counsel failed to provide proper advice concerning "the likelihood of his possible sentence if tried by jury versus pleading guilty and receiving a judge sentencing." (Second Amended Application, filed October 1, 2012, p. 2). Applicant further complains that counsel failed to provide reasonable representation in advising Applicant to plead "'straight up' to capital murder," and that there was any "'advantage' to pleading guilty in that the was lessening

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his chances of receiving a death, when in fact he received nothing of benefit from the plea." (Second Amended Application, filed October 1, 2012, p. 2). Lastly, Applicant complains counsel misadvised him in regard to a relaxation of the "rules of evidence if he went to trial versus pleading." (Second Amended Application, filed October 1, 2012, p. 3). This Court finds that Applicant made a knowing and intelligent decision to plead guilty based on reasonable advice of counsel. Applicant is not entitled to any relief.

The possibility of entering a guilty plea was explored long before the guilty plea in this case, and well before Mr. Babb was relieved and Mr. Clark was appointed counsel. The record shows three proffers of tender of guilty plea were prepared. (See Applicant's 12, 13, and 14). Further, a transcript from April 3, 2008 reflects that a tender of guilty plea was offered in conjunction with the request "to permit the defendant to plead guilty and have a jury determine sentence." R. p. 1215. In particular, counsel argued: "Part of his defense and a great impact on the sentence he may receive is the presentation of this evidence in mitigation ... the right to tender that guilty plea is evidence of mitigation." R. p. 1217. Counsel further argued:

> ... Considerable attention is given - - and we've cited this in here various articles and cases with impact of a defendant pleading is show to be significant on a jury in rendering a sentence. Pleading guilty is in itself a major mitigating factor. It shows he takes responsibility for his actions. Because, Your Honor, a jury may well assume that the defendant is not talking such responsibility when he is forced to plead not guilty to retain his right to a jury trial. I mean, it's a conundrum. And beyond that, it does not deny he State from offering any evidence in regard to defendant's role in the crime at sentencing. ...

R. p. 1218.

At the PCR hearing, Mr. Howle testified that he and Mr. Babb had advised that Applicant would be more likely to receive life if a judge would hear the gruesome facts of the case as opposed to a jury. He recalled seeing the statistics which Mr. Babb had researched and obtained,

but maintained, simply from his own perspective, that they were right to advise Applicant he would have a more significant chance to receive life with the judge rather than a jury. Mr. Howle also testified that Mr. Clark was involved with the decision to plead guilty, and did not recall Mr. Clark questioning the decision. Mr. Babb testified that he was concerned that Applicant would not be able to show remorse which may affect the sentence.

Further, Mr. Babb testified at the PCR hearing that he was keenly aware of the constitutional challenge to the statute of giving up the right to a jury for sentencing when entering a plea. He litigated the issue until it was ultimately resolved against the defense in another unrelated case. Mr. Babb also testified that his professional opinion was that if Applicant could not show remorse, he was likely to get death. He underscored the importance of his challenge to the statute to allow Applicant the benefit of pleading guilty to show acceptance of responsibility, testifying that he stayed in touch with the lawyers in the *Inman* case where the issue was previously submitted. That issue was litigated but ultimately resolved against the defendant's position. *See State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011), *citing State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert denied*, __ U.S. ___, 130 S.Ct. 3329 (2010). Further, Mr. Babb testified that he requested and received statistics which he included in the proffer from either Robert Lominack, Esq., or Teresa Norris, Esq., both of whom are acknowledged capital defense attorneys, and the statistics supported that a defendant would be more likely to be sentenced to death by jury if maintained he was not guilty.

Mr. Clark testified at the PCR hearing that he meet with Applicant the day of the appointment, and also meet with him at Mr. Clark's office in discussing the possibility of the plea. Mr. Clark testified that the general thought was that it was highly unlikely that the defense would receive any plea offers from the State and Applicant's "gesture" of taking responsibility may be of

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benefit to him. Mr. Clark testified that the team was "leaning" toward a plea when he came on the case and that the rationale was explained to him, which he agreed with. Mr. Clark underscored the concern that the "nature of the crime" and the general circumstances would likely evoke great sympathy from a jury, but a judge is called upon to hear and deal with such circumstances on a regular basis and would not be "so shocked" or show outrage as certain members of the community may.

Applicant testified at the evidentiary hearing, as well. He testified that it was "the plan" to go to trial, but that he made the decision to plead guilty on advice of counsel. Applicant testified that counsel told him that the plea was the "best opportunity" to avoid death. He also testified that counsel advised him if he went to trial the State could "play fast and loose" with the rules of evidence. He also acknowledges signing the tender of guilty plea and sentencing sheets. Applicant testified that he fully understood if he pleaded guilty that Judge Russo would sentence him instead of a jury. Applicant testified that he discussed the plea option with all three counsel. Applicant testified that while he was not promised a sentence, he was promised "more likely than not" he would not receive a death sentence. He testified that he was aware there were no guarantees.

This Court also accepted an affidavit from Teresa Norris, Esq. Ms. Norris avers that she does not recall providing statistics to Mr. Babb and does not agree with the conclusions based on those statistics.

To establish ineffective counsel under the Sixth Amendment, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 694; *Simpson v. Moore*, 367 S.C. 587, 595-96,

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627 S.E.2d 701, 706 (2006). "In 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 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694. Relief will not be granted on showing of mere error. Prejudice must also be shown. *Strickland*, 466 U.S. at 687. The standard of "prejudice" differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove "prejudice" in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *Jones v. State*, the Court instructed that prejudice may be found in a capital sentencing proceeding when "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." 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998), quoting *Strickland v. Washington*, 466 U.S. at 695.

"Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'" *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480-81 (2010), quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970). This situation is somewhat unique in that there is no suggestion that a trial would have been an option for finding Applicant not guilty. Applicant testified that he knew either way he would be found guilty and would be sentenced either to life without the possibility of parole or death. Applicant repeatedly confessed, and had no basis to contest those multiple statements. Moreover, Applicant had the murder weapons and items stolen

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in the various break-ins. Further still, he was captured on video right before Mr. Gainey's murder, and again on video before Mr. Burgess' murder. Additionally, 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. Applicant and counsel considered the whole of the case in deciding to plead guilty. Though Applicant now contests the accuracy of the statistics counsel relief upon, those statistics are but part of the counsel's consideration. Mr. Howle testified those statistics were gathered by Mr. Babb, but, independent of those statistics, Mr. Howle believed that Applicant'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. See Respondent Exhibit 1.

Simply, the best hope does not equate to a guarantee of securing a desired resulted. 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 counsel. Applicant has failed in his burden of proof.

B.

Allegation of Denial of Counsel or Ineffective Assistance Based on Deprivation of Two Attorneys During a Critical Stage of Trial.

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Applicant complains he was denied two counsel, as required by state statute, during "the discussion and decision leading him to enter a plea of guilty." (Second Amended Application, filed October 1, 2012, p. 3). He alleges this failure resulted in deprivation of his Sixth Amendment right to counsel citing *United States v. Cronic*, 466 U.S. 648 (1984) and *Strickland v. Washington*, 466 U.S. 684 (1984). (Second Amended Application, filed October 1, 2012, p. 3). Applicant has failed to show any error.

"The Sixth and Fourteenth Amendments of the United States Constitution compel every State to provide counsel to indigent criminal defendants." *Bailey v. State*, 309 S.C. 455, 459, 424 S.E.2d 503, 506 (1992), *citing Gideon v. Wainwright*, 372 U.S. 335 (1963). The record firmly supports that Applicant was not deprived of his right to counsel under the Sixth Amendment. Mr. Howle consistently represented Applicant from before the filing of the notice of intent to seek the death penalty through the plea and filing of the notice of intent to appeal. Thus, Applicant has failed to show a deprivation of constitutionally guaranteed counsel. *See Cronic*, 466 U.S. at 659 (prejudice is presumed where there "is the complete denial of counsel"). Applicant does not appear to contest this fact at all; rather, he argues that his Sixth Amendment right to counsel should encompass the right to two counsel as provided by statute. This Court rejects such a suggestion.

S.C. Code § 16-3-26 (B) (1), upon which Applicant relies, (see Second Amended Application, filed October 1, 2012, p. 3, "South Carolina laws provides to capital defendants the right to two (2) counsel"), provides for the appointment of two attorneys to represent an indigent capital defendant. The requirement of appointment of two attorneys in the capital setting derives from statute, not the Constitution. *Id. Accord United States v. Blankenship*, 548 F.2d 1118, 1121 (4th Cir. 1976) (distinguishing statutory right to counsel from constitutional right: "Nothing in

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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."). Again, Applicant has failed to show a deprivation of constitutionally guaranteed counsel. Moreover, counsel had failed to show deprivation of his statutory right to counsel.

This Court has reviewed the transcript for the substitution of counsel hearing held July 18, 2008. See R. p. 1309. At the hearing, Mr. Howle confirmed that he had consistently represented Applicant "since the charges were initially brought against him," and, specifically, had continued representing him after notice that the State intended to seek the death penalty. R. p. 1311. (See also R. pp. 1054-1056, reflecting Mr. Howle's representation of Applicant at the December 21, 2004 preliminary hearing). Further, Mr. Howle advised the court that Mr. Babb had been appointed as second chair after the notice was served "and he has diligently worked on this case all that period of time." R. p. 1311. In fact, the record is replete with evidence of diligently pursuing discovery, experts and expert funding, and even preparing for trial in April 2008, before the trial was stayed pursuant to the Supreme Court of South Carolina to resolve a pending superceding action challenging the constitutionality of the statute requiring a waiver of jury sentencing to plead guilty. See R. pp. 1158-1202; pp. 1206-1214; pp. 1224-1230; pp. 1233-1307. Due to medical concerns, however, Mr. Babb was not able to continue his representation (though testimony at the PCR evidentiary hearing confirmed that he was available for consultation with counsel and to act as a general aid to Applicant due to their well-established relationship). R. p. 1312. At the July 18, 2008 hearing, Mr. Howle stated: "Mr. Bryant is aware of this and signed a consent on July 11th." R. p. 1312. The trial judge noted, "I appreciate the fact that Mr. Bryant has been consulted on that and that he has, in fact, submitted this consent for release, although I

don't know that that's required, but I do appreciate it." R. p. 1312. The trial judge directly addressed Applicant at the hearing and confirmed his understanding of the substitution, and that he had no "opposition to that." R. p. 1313. Further, the trial judge confirmed that Mr. Clark was "qualified and certified" to serve as counsel in a capital case, and that he was willing to accept the appointment. R. p. 1313. Further still, the trial judge confirmed at the July 18, 2008 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. R. p. 1314. Mr. Howle confirmed that Mr. Clark had been given a disc the day before the hearing with "everything on it." R. p. 1316. The trial judge allowed Mr. Clark time to review the materials and asked, "if any issue does arise from you review of those materials, [to] notify the Court as soon as possible." R. p. 1316. Mr. Clark agreed to do so. R. 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. R. pp. 1318-1320.

As Applicant 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."). The record does not show that Applicant was ever deprived of his right to counsel during the decision to plead guilty. In particular, this Court notes the continuity in counsel's representation – essentially, Mr. Howle provided the anchor to the representation, demonstrating Applicant was never without counsel during any of his capital proceedings. Moreover, Mr. Babb's testimony indicates that he committed tremendous time and resources in

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preparing the case, along with Mr. Howle, prior to his disability preventing further representation. Additionally, Mr. Clark admittedly had limited time to be involved in the case, but this Court notes that he was given all the discovery, met 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.

This Court notes that Applicant has not complained counsel was deficient in regard to plea negotiations or advice on a plea offer. *See Frye*, 132 S.Ct. at 1408 ("as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."); *Lafler v. Cooper*, ___ U.S. ___, 132 S.Ct. 1376, 1388 (2012) (acknowledging a defendant may show ineffective assistance where advice "has caused the rejection of a plea leading to a trial and a more severe sentence"). Indeed, Mr. Clark acknowledge that the possibility of any negotiations in this case were slim to none. Rather, Applicant has complained merely that two counsel were not appointed at a critical stage – the decision to enter the plea. In the plainest of terms, the record shows that Applicant was represented throughout the process. Further, counsel has been deemed effective in their advice on the guilty plea option. (See Issue A, supra). Applicant has failed to show a deprivation of counsel.

C.

Allegation Counsel Was Ineffective in Failing to Objection to Solicitor's Closing Argument Asking the Judge to Send a Message to the Community.

Applicant complains counsel was ineffective in failing to object to that portion of the Solicitor's closing requesting "the trial judge sentence Applicant to death to send a community

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'message.'" (Second Amended Application, filed October 1, 2012, p. 3). Applicant relies on the following portion of the solicitor's closing:

> 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).

Applicant's argument meets a first and insurmountable hurdle in that the argument was not to send a message to the "community," but a message to Applicant. The cases cited by Applicant in regard to sending a community message simply do not apply to the circumstance of this case. Applicant has failed to show any deficient performance in regard to the cited comment.

Without doubt, a solicitor's closing argument should be premised on seeking justice and he is "bound to [the] rules of fairness" in making his argument. *See State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). *See also Vasquez v. State*, 388 S.C. 447, 458, 698 S.E.2d 561, 566 (2010), quoting *Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 ("[s]olicitors are bound to the rules of fairness in their closing arguments"); *State v. Finklea*, 388 S.C. 379, 386, 697 S.E.2d 543, 547 (2010) ("While the solicitor should prosecute vigorously, his duty is not to convict a defendant but to see justice done."). "[T]he solicitor's closing argument must be carefully tailored so as not to appeal to the personal bias of the juror, nor be calculated to arouse his passion or prejudice." *Finklea*, 388 S.C. at 386, 697 S.E.2d at 547.

Mr. Howle testified at the PCR hearing that he was aware of cases criticizing the "send a

message to the community" requests and that the failure to object was not based upon lack of knowledge. This Court finds credible and reasonable Mr. Howle's testimony at the PCR hearing that the fact that a judge was hearing the closing arguments rather than a jury was a factor to consider in whether to object. As Mr. Howle indicated, it would seem unnecessary to ask the judge to disregard the comment. It is especially unnecessary here as there is no reasonable basis for an objection.

"The justifications supporting imposition of the death penalty are retribution and deterrence." *State v. Allen*, 386 S.C. 93, 99, 687 S.E.2d 21, 24 (2009), *citing Gregg v. Georgia*, 428 U.S. 153, 183 (1976). A solicitor must be allowed to argue that the case presented supports the penalty he seeks. *See, e.g., State v. Cain*, 297 S.C. 497, 509, 377 S.E.2d 556, 562 (1988) ("The ... challenged comments here, when viewed in the context of the entire summation, were no more than recommendations by the solicitor as to the appropriateness of the death penalty based on evidence adduced at trial. The 'send a message' argument here certainly did not rise to the level of arousing juror passion or prejudice."). The solicitor here tailored his argument to the specific facts of this case, the character of the defendant, and the facts supported by the record, as he was required to do:

> The State's closing arguments must be confined to evidence in the record and the reasonable inferences that may be drawn from the evidence. *Id.* "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." *Randall v. State*, 356 S.C. 639, 642, 591 S.E.2d 608, 610 (2004).

Vasquez, 388 S.C. at 458, 698 S.E.2d at 566.

The exact comment at issue here, when viewed in context, reflects the solicitor alluded to Applicant's shown propensity to "ask for help" in seeking access to homes in order to commit burglary and/or murder. *See State v. Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 ("We must

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review the argument in the context of the entire record."). The "message" was merely to tell the Applicant "no," *i.e.,* to reject the claims in mitigation and sentence him to death for his heinous crimes, not merely to send a message to the community in general. Thus, the comment – squarely tied to Applicant – 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.").

Further, to the extent Applicant 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," that request is not improper either. *See State v. Daniels*, ___ S.C. ___, ___ S.E.2d ___, 2012 WL 4801526 *2 (2012) ("A charge that the jury is acting for the community, however, is not similar to a Golden Rule argument in that it does not ask the jury to consider the victim's perspective."). Though the Supreme Court of South Carolina, by footnote in the concurring opinion in *Daniels*, cautioned that such a request to a jury may border on a "Golden Rule" argument as it "carries the same connotation and effect," *Id.* at *8 n. 2 (Toal, CJ. Concurring), as Mr. Howled noted, this argument was to the judge, not a jury. Further, the referenced comments in context show there was not an appeal to bias, prejudice or emotion, but an 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) ("The challenged arguments here were not clear appeals to the jury's passions and prejudices. Nor were they plainly intended to inflame the jury. Instead, these arguments appeared to have invited the jury to take on the permissible task of acting as the conscience of the community on the question of the appropriate sentence for Ebron."); *United*

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States v. Davis, 609 F.3d 663, 688 (5th Cir. 20120), 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."). 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, our State Supreme Court has even found that "[g]eneral deterrence arguments are admissible in the penalty phase of a capital trial." *State v. Shuler*, 353 S.C. 176, 189, 577 S.E.2d 438, 444 (2003). Upon careful review, this Court finds nothing of impropriety in the solicitor's comments. Further, if some impropriety could be found, Applicant is still not entitled to relief based on the overwhelming evidence of guilt and circumstances of aggravation. *Daniels, supra. See also Sinisterra v. United States*, 600 F.3d 900, 911 (8th Cir. 2010) (finding no reasonable probability of a different result where there was substantial evidence supporting the jury's findings the case warranted death).

To establish that counsel was ineffective under the Sixth Amendment, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. at 694; *Simpson v. Moore*, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). When "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, supra* at 333. Having conducted this reweighing of the evidence, this Court finds Applicant has again failed to carry his burden of

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proof. When compared to the evidence available for mitigation, especially the diagnosis of PTSD and reports of sexual abuse, though clearly evidence to consider, such evidence does not overtake the extraordinary level of malice and callousness, particularly the taunting of the Tietjen family members and the senseless shooting of Mr. Brown and the multiple murder victims.

In sum, viewing the comments in context, this Court finds Applicant has failed to show any basis for an objection. Consequently, he has failed to show deficient performance of his representation. Alternatively, if error should be found, such error, in context of the entire case, still fails to afford relief. *Jones, supra*. Applicant's allegation of error is without merit.

D.

Allegation Applicant Was Improperly Denied Right to Present Additional Evidence in Mitigation While the State Was Allowed to Present Additional Evidence in Aggravation.

Applicant complains that counsel was ineffective in failing to object to the plea judge's decision "to allow the state to introduce additional victim impact testimony" without affording an opportunity "to confront and/or rebut the evidence" thereby treating the state and defense differently to Applicant's detriment. (Second Amended Application, filed October 1, 2012, p. 3). Again, Applicant has failed to show he is entitled to relief.

Applicant has failed to prove a factual basis for his claim. The guilty plea to all the charges was August 18, 2008. R. p. 1323-1352; pp. 1334-1338. Sentencing was deferred on all charges until the capital sentencing proceeding was held. R. p. 1384. The judge noted for the record 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." R. p. 1384. The judge continued, "we're scheduled for the week of September 2nd and the following week should we need it. We will proceed with a

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trial on the sentencing phase and at that time, of course, the Court will take testimony and any motions or anything that we need to address at that time." R. p. 1384. The receipt of statements from the victims was simply reserved for presentation at sentencing.

In allegation D, Applicant contends that it was a denial of due process and ineffective assistance of counsel for the failure of the trial court to prevent the admission after the conclusion of arguments for and against the death penalty of victim impact evidence from non-capital crime victims prior to the sentencing for the non-capital crimes. R. pp. 1041- 1047. Respondent submits that the procedure used by Judge Russo 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). This Court agrees.

The record reveals that after the parties had completed the arguments on death penalty sentencing and addressing the information concerning the Gause issue, the trial judge then addressed the fact that they were proceeding to the sentencing phase of the case. R. p. 1040. He then inquired of the prosecution and the defense if they were ready and they stated that they were. Judge Russo next made inquiry with the state if there was any additional evidence regarding sentencing and individuals who wished to be heard. Solicitor Jackson stated individuals would like to speak on the particular cases that Applicant had pled. Without objection, Mr. Ammons, who home had been broken into made an impact statement. R. pp. 1042-1044. Chris Gainey, son of assault victim Cliff Gainey made a victim impact statement. R. p. 1044. Robbie Burgess, brother of victim Chris Burgess also made an impact statement. R. pp. 1045-46. No objection was made to any of the statements nor was any request for cross-examination made by the defense.

At that point, Judge Russo asked whether there was any further presentation by the defense regarding sentencing or if anyone wished to address the court on Applicant's behalf. R. pp.

1046-47. Counsel Howle stated he had spoken with the family before they had left and did not emotionally wish to be present that date. Counsel stated that they reiterate the mitigation previously presented. R. p. 1046. Lastly, inquiry was made of Applicant. After conferring, counsel stated that Applicant did not wish to speak, but reference was made to the letter that he wrote to the victim's family in the Tietjen case. R. p. 1047.

In the proceeding before this Court, the Solicitor's office asserted that it was not going to put up victim impact evidence at the time of the entry of the guilty plea, but was leaving the victim impact evidence in the crimes where the death penalty was not sought, until after the death penalty proceeding. He stated that this procedure was understood and agreed to by the parties and the Court. Plea counsel for Applicant stated that in hindsight, they should have objected. However, upon inquiry by this Court, it was unclear what the objection to the proceeding should have been in allowing the presentation of the victim impact evidence in open court, albeit after the conclusion of the argument in the death penalty case.

South Carolina law provides in Section 16-3-1550:

> F) The circuit or family court **must hear or review any victim impact statement, whether written or oral, before sentencing.** Within a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement **and the court must allow the defense an opportunity to respond to the statement.** However, the victim impact statement must not be provided to the defense until the defendant has been found guilty by a judge or jury. The victim impact statement and its contents are not admissible as evidence in any trial.

S.C. Code 1976 § 16-3-1550.

Here, while current counsel for Applicant asserts that there is a preference for hearing all victim impact evidence concerning crimes that the death penalty is not sought during the penalty phase proceeding, he has been unable to articulate how this was either error under state or federal

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law. To the contrary, this impact evidence could have been presented at the time the plea was entered, before the penalty had begun consistent with South Carolina law. Although the evidence could have been presented during the penalty phase, nothing requires it to have been done at that time for the non-capital crimes. There is no state law error.

Contrary to the claims of Applicant, this evidence was not related to the sentencing for the capital crime, but for the non-capital crimes. Here, Applicant had the opportunity to confront the impact witnesses prior to the sentence in their non-capital cases. No request was made to examine them which is authorized under state law. The victims had the statutory right to be heard and the defense had the right to respond. This Court is constrained to find that plea counsel was not ineffective for failing to make an objection to the entry of this evidence under either prong of *Strickland v. Washington, supra*. Further, there is no constitutional violation where there is an opportunity to be heard and confront the evidence prior to the sentencing for their crimes, independent of the capital case. Applicant has failed in his burden.

E.

Allegation of Ineffective Assistance of Counsel in Failing to Properly Proffer Evidence to Preserve the Gause Issue for Appeal; or, Alternatively, Ineffective Assistance of Appellate Counsel in Failing to Present the Issue on Appeal.

Applicant complains that counsel failed to "proffer or otherwise preserve the issue of the trial court's denial of trial counsel's request to provide testimony from Edward [Gause,][4] who became known as a potential witness after the defense had completed the anticipated evidence in mitigation." (Second Amended Application, filed October 1, 2012, p. 4). Alternatively,

[4] Mr. Gause testified at the hearing. His name is misspelled in the initial pleadings. The Court, in this discussion, will use the correct spelling "Gause" as opposed to "Goss." However, the Court is referring to the same individual.

Applicant complains that if the issue should be deemed preserved, appellate counsel was ineffective for failing to present the issue. (Second Amended Application, filed October 1, 2012, p. 4). Neither complaint has merit.

This Court has reviewed the guilty plea transcript where reference is made to Mr. Gause. Mr. Howle brought the matter to the sentencing judge's attention as soon as he received the information from Mr. Gause, and specifically requested time to investigate, all prior to the judge imposing sentence:

> 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.

R. pp. 1037-1038.

The 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. R. 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." R. p. 1039. However, the judge found that "this case has been going on for some time" and "[b]oth sides have had ample opportunity to present the evidence...." R. p. 1039. He acknowledged the defense's "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....

R. 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.

R. pp. 1039-1040.

Mr. Howle testified at the PCR hearing that after sentencing, he had an investigator take a statement from Mr. Gause. However, that statement was not offered in any post-trial motion.[5] Whether the judge abused his discretion in declining to reopen the defense case was not an issue raised on appeal.

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[5] In fact, such a statement was not offered at the PCR evidentiary hearing, and has not been reviewed or considered by this Court.

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. Appellate counsel, Joseph L. Savitz, Esq., testified that he was the former chief attorney at Appellate Defense[6] and had also worked as a Senior Appellate Defender with the agency. His practice and position required that he be assigned approximately half of all capital appeals that were handled by Appellant Defense. Mr. Savitz testified that he reviewed the entire transcript to determine which issues to raise in the appeal and decided to raise only the issue regarding excluding the defense testimony from Applicant's aunt that she had been sexually abused by her father. He testified that the record appeared to indicate that Mr. Gause's expected testimony was "somewhat vague and unconnected" to the incident. He testified the record reflected a situation "too vague for me to do anything." However, Mr. Savitz also testified that he would not have reason to abandon a meritorious issue, and, if he had the appeal again, we would raise the issue as the issue previously raised did not support relief. 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.

Applicant presented Mr. Edward Gause at the PCR hearing. Mr. Gause – a former Charleston City police office, and a Sumter County employee for approximately seventeen (17) years – testified that he saw a shirtless young man "playing in the sand" at a Young's convenience store approximately one month before the murders. When Mr. Gause stopped at the store, the young man approached him and asked if Mr. Gause was the "man he was supposed to see." The

[6] The Commission on Indigent Defense, Division of Appellate Defense – the State agency that is charged with the representation of indigent criminal defendants on appeal.

young man indicated he was having "weird thoughts," though he did not specify what the thoughts were. Mr. Gause attempted to help the young man by advising him to pray and referring him to an officer, Sgt. Tripp Mays, who Mr. Gause testified was at the convenience store. Later, Mr. Gause saw the young man walk off with several young girls "fussing" at him. According to Mr. Gause, he then spoke to Sgt. Mays about the incident. At some point after, and due to media coverage, Mr. Gause identified the young man as Applicant. Mr. Gause testified that he later talked to Sgt. Mays who agreed that "they" had seen Applicant.

This 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 – either at the store with the young man or a subsequent conversation about the young man being Applicant. 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. (Mays Affidavit, p. 2).

As first matter, this Court finds that Applicant has failed to show that trial counsel was ineffective in his handling of the late information from Mr. Gause. Mr. Howle promptly brought the matter to the Court's attention and requested the ability to present Mr. Gause. Mr. Howle underscored that the testimony was expected to go to Applicant's mental state which was a major portion of the mitigation case. Mr. Howle had no further information to give the Court to further bolster his request as Mr. Gause had only made a late disclosure to the defense. Applicant has failed to establish *Strickland* error.

As a second matter, this Court finds that Applicant has failed to show that appellate counsel was ineffective in his decision not to raise the issue in the direct appeal. A defendant is entitled to

a due process right of effective assistance in his first appeal. *Evitts v. Lucey,* 469 U.S. 387 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented...." *Smith v. Robbins*, 528 U.S. at 288, quoting *Gray v. Greer,* 800 F.2d 644, 646 (7th Cir. 1986). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003). Like Sixth Amendment counsel, to effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Butler v. State*, 286 S.C. 444-45, 334 S.E.2d 815 (1985).

This Court notes that Mr. Savitz was candid that, in hindsight, he would raise the issue simply because the one he did raise was not successful. However, that is a classic case of hindsight reasoning and does not support relief. Moreover, Mr. Savitz, an experienced 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. *Lawrence v. Branker*, 517 F.3d 700, 709 (4th Cir. 2008), *citing Bell v. Jarvis,* 236 F.3d 149, 164 (4th Cir.2000) (en banc) ("Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit...."); *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004) (rejecting conclusion of PCR judge that "Effective Appellate Counsel has an obligation to raise all

meritorious issues on appeal"). Moreover, Applicant has failed to show this issue was a "stronger" issue than the one raised. *Smith v. Robbins, supra*. As Mr. Savitz stated, the proffer of testimony was vague and not clearly connected to any of the crimes. Further, there was evidence in the record that Applicant had reported issues to his probation officer and family prior to the trial, and even had sought counseling and help before the crimes. See R. pp 145; 182; 762-763; 789-790; 821-824; 956. This was known to the defense, presented by the defense, and used by the defense psychiatrists in consideration of Applicant's mental state. See R. pp. 789-790; 821-824; 956.

Further, if Applicant could show deficient performance by counsel, he has not shown prejudice. This Court has considered the testimony of Mr. Gause and finds the testimony cannot be given any significant weight. 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. Of particular note, as to the identification itself, Mr. Gause did not recall any tattoos or other identifying marks. Applicant has a very visible tattoo 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). Further still, 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. Lastly, 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.

In sum, Applicant has failed to demonstrate deficient performance of counsel. However, even if deficient performance may be show, Applicant has failed to demonstrate *Strickland* prejudice. Consequently, Applicant is not entitled to any relief.

F.

Allegation of Brady Violation Concerning Edward Gause.

Applicant complains that the Gause information was known to law enforcement – specifically Officer Tripp Mays of the Sumter County Sheriff's Department – and should have been disclosed during discovery. (Second Amended Application, filed October 1, 2012, p. 4). Again, Applicant's case fails factually. Applicant has failed to show any material information regarding Mr. Gause was known to the prosecution and that there was a non-disclosure of such information.

"A *Brady* claim is based upon the requirement of due process" and "is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999), *citing Kyles v. Whitley*, 514 U.S. 419, 432-42 (1995); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). "*Brady* requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment." *State v. Von Dohlen*, 322 S.C. at 241, 471 S.E.2d at 693, *citing Pennsylvania v. Ritchie*, 480 U.S. 39 (1987); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). "Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed

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to the defense, the result of the proceeding would have been different." *Id citing United States v. Bagley,* 473 U.S. 667 (1985). At the PCR hearing, as noted above, Mr. Gause testified that he did not contact the solicitor or law enforcement at or about the time of the hearing, rather, he contacted only the defense and the judge. Moreover, this Court accepted the affidavit of Sgt. Mays. Sgt. Mays avers he has no record or independent recollection of ever speaking with Mr. Gause about Applicant. Further, Applicant produced no evidence that the solicitor had any indication of Mr. Gause's possible testimony. While knowledge may be imputed to the State in certain circumstances, *see Von Dohlen*, 322 S.C. at 241, 471 S.E.2d at 693, Applicant here has not established there was any knowledge to impute. Even so, Applicant has also failed to show the evidence would have made a difference if disclosed.

When considering a *Brady* violation in the context of a guilty plea, the relevant question for determining whether the information is material is whether "there is a reasonable probability that, but for the government's failure to disclose *Brady* evidence, the defendant would have refused to plead guilty and gone to trial." *Gibson v. State*, 334 S.C. at 525-526, 514 S.E.2d at 325. As noted above, Mr. Gause admitted in his testimony that his recollection was faulty in some respects and his identification of Applicant is suspect given that the shirtless individual Mr. Gause saw did not have any tattoos or identifying marks, while Applicant has very visible tattoos. Applicant has failed to show that had he known of the potential Gause testimony prior to his sentencing proceeding, that he would not have plead guilty. Further, there is nothing in the testimony that is exculpatory of the murders or any of the other crimes. Further still, the record shows that the defense carefully investigated Applicant's mental health and employed two psychiatrists – Dr. Donna Schwartz-Watts and Dr. Margaret Melikian – to evaluate Applicant. See R. pp. 1328-1331. Applicant has failed to show that a *Brady* violation occurred.

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G.

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

In allegation G, Applicant contends that there was non-disclosure of evidence concerning the computer analysis by the South Carolina Law Enforcement Division. In particular, he contended that information seized on the computer corroborated Applicant's statements to the police. In allegation G, as filed on October 1, 2012, he asserts that the non-disclosed computer analysis revealed that Mr. Tietjen (or whoever had access) had been browsing pornography sites as early as June 2004 according to the computer's internet history. Applicant claims that he had given statements that he saw pornography on Mr. Tietjen's computer that date. Applicant asserts in the allegation that he had told defense psychiatrist that with his history of sex abuse, he felt sexually threatened during the time of the offenses. They contend generally that had they known about this computer evidence, it would have impacted upon their case. For the reasons set forth below, this Court must conclude that Applicant did not meet his burden of proof.

The Statements About Computer Use

SLED Agent Barton testified at the PCR hearing about the series of statements Applicant made concerning whether he had viewed Mr. Tietjen's computer and the timing of the viewing. In particular, he confirmed the following:

> Statements by Applicant concerning Mr. Tietjen's computer:
>
> 1. October 13, 2004 - Bryant gave a statement that he had discussions about the Masons with Tietjen. He claimed the victim was showing him things about the Masons and bragging. Bryant stated that the victim was disturbed and threatened by what he knew about the Masons. Bryant stated that "I remember the man telling me he wishes he was

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young like me because he liked young girls. I remember looking at the man's computer and seeing pornography. I'm not sure, but I think I'm having flashbacks of being on the computer and seeing a young girl with a horse in her." Also ROA 609, l. 8-13.

2. On October 13, 2004, in Dr. Crawford's questioning of Bryant, Bryant stated:

Mr. Bryant: We talked for a couple hours. And somewhere along the lines, it seemed - - and I'm remembering - - something about some kind of pornography about how he likes them - - he was saying how he wished he was my age again because he likes them young.

Then he got to talking about the pornography and there's all kind of different web-sites on his computer, if I'm not mistaken. I'm not sure. I'm just now remembering this.

Dr. Crawford: That's fine. Just whatever comes to you. So, he started talking about some pornography web-sites he had?

Mr. Bryant: Yeah.

Dr. Crawford: Okay.

Mr. Bryant: And somehow I remember - - I'm thinking it was afterwards that he was there. That I had somehow gotten on his computer and actually seen it for myself what all there was.

Dr. Crawford: Okay.

Mr. Bryant: And there was actually a picture taken on his computer under saved history from where he looked at from where a girl was fucking a horse.

Dr. Crawford: Uh-huh.

Mr. Bryant: And that really disturbed me.

Dr. Crawford: uh-huh. That was after he was dead?

Mr. Bryant: If I'm not mistaken. I'm pretty sure it was.

Dr. Crawford: How long did you spend over there?

Mr. Bryant: We talked for a good two hours.

Crawford Interview, p. 95-96.

In the same interview he described that Tietjen got agitated about him knowing Masonic information and when Bryant went up to go to the bathroom, he was hit in the back of the head by Tietjen. (97). Bryant stated at that point, he turned around and reached for his gun. (98). He next recalled candles around the house for his spirit. Concerning writing something down, Bryant stated that the victim was not true to his brotherhood or himself "by having such lust or desires when it comes to his sexual side. He recalled writing something down about it base on what they had talked about, not because of what he later saw on the computer. He told Dr. Crawford that he may done something to the eyes."

Bryant stated that "I'm pretty sure he was dead when I looked on his computer. Crawford, p. 104, ll. 14-19. He recalled saying that he had to see the pictures for himself that Tietjen had talked about he looked on his computer." Id. 104. He stated: "eyes go stray, poke them out." See also Crawford, p. 108.

Bryant stated he had flashbacks after he killed him and described "it was like me just sitting there looking at the computer screen, seeing these f–ing pictures. And looking at him and thinking there's no way this man could be looking at stuff like that." Id. 109.

He stated the only flashback he had was after the killing. Crawford, p. 125.

3. In the October 15-16, 2004 Statement, Bryant

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stated:

> Also, during the time on Oct. 11th Tietjen was also talking about how he wished he was my age cause he liked young girls and everything, and he was talking about some websites he looked up, and later before I left his house I got on to his computer and noticed the password batteries and it came on and I looked under history to see if what he said was true and so it was, more sights than I can count of nude young girls, especially one with a horse inside her. . . .
>
> Oct. 15, 2004, p. 5. ROA 613, l. 13-24.

Agent Barton clarified that there was a mistake in his investigative report that "they had been looking at pornography on Tietjen's computer." Investigative Report, p. 9. He stated that after reviewing the actual statements this was incorrect, although there is information about Applicant and Mr. Tietjen talking about it.

Agent Barton also confirmed that the search warrant contained information provided by Applicant's girlfriend, Judy Justice. Ms. Justice reported that she had problems with Applicant's use of internet porn which had led to a rift in their relationship. She also stated Applicant would erase his internet history.

In Dr. Donna Schwartz-Watts evaluation, she described Applicant's account of the death of Mr. Tietjen stating that Mr. Tietjen became agitated with him because of his knowledge of the Masons and that Applicant was agitated with Mr. Tietjen because he had made sexual innuendos about younger girls. Then after being struck in the head with a Mason ring, he killed him, cried, lit candles and robbed Mr. Tietjen. Watts report, p. 12. She reported "while looking on his desk, [he] used his 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." Watts Report, p. 12-13. In his testimony before this Court, Dr. Watts confirmed that he reported that he

looked at the computer after the killing.

During his mitigation testimony before Judge Russo, Dr. Watts summarized her report concerning the Tietjen murder. ROA 833-834. She testified that: "after he shot him, while looking on a computer that he found some images that upset him on the computer." ROA p. 834, ll. 12-17.

Testimony was presented that the perpetrator left a note at the Tietjen crime scene. The note stated: "no more sick computer porn for this sick f–r." "By the way just keeping my promise to all."

The State's duty to disclose evidence favorable to the defendant is addressed by *Brady v. Maryland*, 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 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).[7] The court in Riddle recognized the United States Supreme Court's emphasis on the prosecutor's responsibility for fair play. *Riddle*, 369 S.C. at 46, 631 S.E.2d at 74. In describing this responsibility, the court stated:

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[7] Likewise, under Rule 5, SCRCP, 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), SCRCP. 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.

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

Id. (internal quotation marks and citation omitted). As such, it is imperative for prosecutors to abide by this rule as "[o]ur judicial system relies upon the integrity of the participants." *Id.* Whether the prosecutor's failure to reveal evidence pursuant to *Brady* is due to negligence or an intentional act is irrelevant because a court may find a *Brady* violation regardless of the good or bad faith of the prosecutor. *Gibson v. State*, 334 S.C. 515, 528, 514 S.E.2d 320, 327 (1999). Because *Brady* is founded upon a sense of fairness and justice, the focus in a *Brady* analysis should not be on the misconduct of the prosecutor, but rather on the fairness of the procedure. *Id.* As noted in *Brady*, "[t]he principle ... is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair[.]" *Id.* (quoting *Brady*, 373 U.S. at 87, 83 S.Ct. 1194). "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

Evidence considered favorable to the defendant includes both exculpatory and impeachment evidence and extends to evidence that is not in the actual possession of the prosecution, but also to evidence known by others acting on the government's behalf, including the police. Moreover, "evidence at issue 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, 87 L.Ed.2d 481 (1985);

accord *Kyles v. Whitley*, 514 U.S. 419, 433–34, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); see also *Riddle*, 369 S.C. at 45, 631 S.E.2d at 73 ("The question is not whether petitioner would more likely have been acquitted had this evidence been disclosed, but whether, without this impeachment evidence, he received a fair trial 'resulting in a verdict worthy of confidence.'" (quoting *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555)); *State v. Hill*, 368 S.C. 649, 661, 630 S.E.2d 274, 280–81(2006) (stating evidence is material if the cumulative effect of the suppressed evidence results in a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different); *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct.App.1997) ("A defendant shows a *Brady* violation by demonstrating that 'favorable evidence could [have been presented] to put the whole case in such a different light as to undermine confidence in the verdict.'").

In this case, Former Third Circuit Solicitor Kelly Jackson testified that he had contacts with SLED and law enforcement agencies prior to the trial. He stated that SLED Agents Bo Barton, David Caldwell, and Mark Creech were his contacts. He was also aware that Agent David Givens was the person who did the computer analysis. Solicitor Jackson stated he wanted the computers analyzed. He stated the report that he received from SLED indicated that both Mr. Tietjen's computer and Applicant's computer contained "nothing of evidentiary value ... In addition no evidence was identified that would have suggested Bryant had prior contact with any of the victims." March 15, 2005 Report. Jackson testified that he never received the diskette from SLED Agent Givens which included the Encase Reports and other data from the computer analysis.

He stated that he sought all material for disclosure to the defense. He declared that he provided the defense everything he received from SLED. He stated that he was not specifically

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advised about the existence of any internet browsing history related to pornography sites or the existence of any adult pornography on the computer. He also stated Deputy Solicitor Saleeby was primary on the Tietjen case.

Deputy Solicitor Saleeby testified similarly that they never received the Givens disc with the computer analysis of Applicant's and Mr. Tietjen's computers. Upon reviewing the materials at the hearing, Mr. Saleeby stated if they had received them, he would have forwarded it to the defense team. He stated that there was no reason not to send it. He asserted that it cut both ways. He noted the report, contrary to Applicant's statements, found no child pornography or bestiality photographs. Also, the material may in fact corroborate the fact that Applicant was on the scene. Mr. Saleeby's only recollection about the computers was that he was advised that there was nothing of evidentiary value.

SLED Agent Givens testified that he performed an analysis on Mr. Tietjen's computer and created an image gallery and ran an Encase report which he placed on a diskette. Agent Givens testified that he reviewed the material and did not see any child pornography or bestiality. He confirmed that on October 21, 2004 when he reported "no child porn or bestiality photos located." However, Agent Givens did locate adult porn in Temp Internet files and located several pornographic movies within the program files.

It was also developed through Mr. Given's testimony and review of the Encase Report that the browsing history reflected possible internet pornography sites were visited the day before the incident, not contemporaneous within the incident based upon the computers clock compared to real time, which is contrary to the initial assertion made by Applicant

Agent Barton stated that he asked Agent Givens to see if there was child porn on the computer due to the assertions by Applicant. However, he confirmed he was not trying to limit

Agent Givens search. He stated he learned there was no child porn or communication between the Tietjen and Bryant computers. Agent Barton stated that he never received the CD from Agent 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.

This Court finds that Applicant has failed to prove the materiality prong *of Brady v. Maryland, supra.* and *Kyles v. Whitley, supra.* 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. Additionally, it is uncontested that the defense requested all exculpatory and mitigating evidence.

However, this Court must find that Applicant has failed to show a reasonable probability that the result of the proceeding would have been different had the State disclosed to the defense the complete report of Agent Givens. First, it is uncontested in the statements and the evidence presented that Applicant did not claim to have viewed any images on the victim's computer until after he had killed Mr. Tietjen. In his statements, he even declared that he had to turn on the computer using the password. Therefore, the existence or non-existence of internet porn on the computer was not a "trigger" to the death of Mr. Tietjen. To the contrary, the record is full of evidence from Applicant's own statements about his discussions with Mr. Tietjen concerning girls. Further, it did not corroborate his comment about seeing bestiality because Agent Givens review could not locate any such images. However, to the extent the mere existence of prior internet browsing the previous day by someone on Tietjen's computer other than Applicant corroborates his version is difficult to connect. It merely supports that Mr. Tietjen may have had discussions with Applicant about it. However, it is as likely that Applicant, with knowledge of

temporary internet files, could have browsed those histories himself after the death when he claimed to have turned on the computer.

Similarly, Dr. Watts had information from numerous statements and her own interview about the impact of the discussions Applicant had with Mr. Tietjan, including when and what he claimed to see on the computer. What Dr. Watts would additionally learn is that there was no bestiality, the particular item Applicant claimed to view, in the computer's image. It is difficult to know how this additional information would have impacted the assessment by Dr. Watts but she did indicate that the additional information would have corroborated her conclusions. Thus, Applicant has failed to show its materiality under *Brady*.

Counsel Jack 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, like Mr. Babb, could not explain how the presence of pornography on the victim's computer which did not include the images he described in his statements would have corroborated the defense. Similarly, he could not explain how the claimed viewing after the death of Mr. Tietjen would be a trigger for the murder. Former 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 Applicant's account that he killed Mr. Tietjen because of a "trigger" based on discussing and/or viewing pornography with Mr. Tietjen. However, he ignores that the so-called trigger would only have happened after the death. While Mr. Jackson did question corroboration about the child sexual abuse, he did not challenge any lack of corroboration about the pornography - a point that Mr. Babb missed at the PCR hearing. He further ignores that the computer assessment does not fully corroborate Applicant's version

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because it did not support the existence of either child pornography or bestiality - matters that were not challenged before Judge Russo. The Court also notes that Applicant testified at the PCR hearing and did not present any evidence that he viewed the internet history or other particular images on the computer.

Applicant has claimed it may have triggered his post-mortem abuse of Mr. Tietjen's eyes. The record reveals that this theory was fully presented within his statements to Dr. Crawford and was given to the defense and their experts. The fact of the presence on the computer of some images, but not the particular images he had described of child pornography or bestiality and their non-disclosure does not mandate a new sentencing proceeding under *Brady*. Although this Court agrees with Applicant, as well as the prosecution, that the material should have been disclosed and provided to each of them prior to trial, the failure of it being provided to the defense does not undermine confidence in the sentencing by Judge Russo.

As represented by Applicant, the triggering event in the victim's death, according to Applicant's statements went to the discussion about the Masons and his reaction to the assault. The pornography issue then and now was a two-edge sword, reflecting his presence at the scene, yet his alleged disgust at pornography was disputed by his own history on the internet according to a prior girlfriend. The mental health experts were aware of his statements to the police and to them concerning the effect the discussion with Tietjen he claimed to have had and how it affected his actions. The malicious actions of Applicant on Mr. Tietjen and his family, in the face of the other admitted murders and assaults, are not changed by the mere presence of images or browsing history on Mr. Tietjen's computer. Applicant has 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. It must be dismissed.

V.
CONCLUSION

Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**; and,

2. Applicant is to remain in Respondent's custody and his sentence shall be carried out.

IT IS SO ORDERED.

Marion, South Carolina.
Dec. 4, 2012.

The Honorable Ralph F. Cothran, Jr.
Presiding Judge

The Supreme Court of South Carolina

Stephen Corey Bryant, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-000518
Lower Court Case No. 2011-CP-43-00901

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief. We deny the petition.

C.J.
FOR THE COURT

Columbia, South Carolina

March 4, 2015

cc:
Melody Jane Brown, Esquire
Alan McCrory Wilson, Esquire
Susan Barber Hackett, Esquire
Miles Edward Coleman, Esquire
James C. Campbell

The Supreme Court of South Carolina

Stephen Corey Bryant, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-000518
Lower Court Case No. 2011-CP-43-00901

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

C.J.

J.

J.

J.

J.

Columbia, South Carolina

May 6, 2015

cc:
Melody Jane Brown, Esquire
Susan Barber Hackett, Esquire
Miles Edward Coleman, Esquire