

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
James E. Lockemy, Circuit Court Judge

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S.C. Supreme Court

MARION BOWMAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213468

SUPPLEMENTAL APPENDIX

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THE FOLLOWING EXHIBIT IS ON FILE WITH THIS COURT:

DEFENSE EXHIBIT #19 (VIDEOCASSETTE TAPE) FROM TRIAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1.

Whether the court erred by failing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse, and lay testimony and circumstantial evidence that the parties were drinking alcohol throughout the day?

2.

Whether the court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about conditions in general population, such as recreational facilities, watching movies, watching television and reading books, since this was not proper testimony?

3.

Whether the court erred by refusing to grant a mistrial where the solicitor cross-examined James Aiken about the possibility of escape, since the jury's attention is properly focused on the penalties of death and life without parole, and the judge's curative instruction was not sufficient to remove the taint of this extraneous improper consideration?

4.

Whether the court was without jurisdiction to try appellant for capital murder where his indictment did not allege an aggravating circumstance necessary for capital murder as required by Jones v. United States and Ring v. Arizona, and since aggravating circumstances must now be considered elements of the crime of capital murder?

5.

Whether the court erred by ruling appellant did not have an expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants since the pants were seized during an illegal warrantless arrest and the court erred by ruling the arrest was pursuant to a valid Orangeburg warrant for another minor offense?

STATEMENT OF THE CASE

Appellant was indicted at the August 6, 2001, of the Dorchester County grand jury for the offenses of murder and arson in the third degree. ROA pp. 5254 - 5257. His case came on for trial on May 15, 2002, before the Honorable Diane S. Goodstein and a jury. Norbert E. Cummings, Jr. and Marva Hardee-Thomas represented appellant. The solicitors were Walter M. Bailey, Jr. and Benjamin Lafond. ROA p. 1.

The jury found appellant guilty on both counts. ROA p. 4564.

At the conclusion of the sentencing phase on May 23, 2002, the jury found that the murder was committed during the commission of a kidnapping, and that the murder was committed while in the commission of larceny with a deadly weapon. The jury recommended a sentence of death. ROA p. 5051, ll. 12-25. Judge Goodstein then sentenced appellant to death for murder and ten years imprisonment for arson in the third degree. ROA p. 5056, l. 4 – p. 5057, l. 4.

This appeal follows.

STATEMENT OF FACTS

Keith Rivers remembered that on February 16, 2001, the men were in Hank Koger's yard "drinking beer, drinking liquor and talking." Appellant was known as "Black" or "J. R." in the community, and he was there, as was James Gadson. ROA p. 3689, ll. 21-25.

"We was just all talking, having a good time, that's all." ROA p. 3690, ll. 4-22.

All of this began about eleven o'clock that morning, according to Koger. ROA p. 3780, ll. 5-8. Koger had a fifty-five gallon drum in his yard that the men lit a fire in when it got cold. Koger explained, "We have [sic] sit there and drink beer, hang out." That's what the men were doing the morning of February 16, 2001, in Koger's yard, which was right next to the Branchville Villa Apartments. ROA p. 3674, l. 11 – p. 3675, l. 5. Koger remembered that Hiram Johnson was also there that morning. ROA p. 3675, l. 6 – p. 3676, l. 10.

Koger specifically recalled that appellant became angry because someone had removed his gun from the fifty-five gallon drum. ROA p. 3676, l. 4 – p. 3680, l. 8. Koger also remembered the men were planning for a party later that day. ROA p. 3680, ll. 15-25.

Carolyn Brown was living in apartment 21 of the Branchville Villa Apartments on February 16, 2001. ROA p. 3698, l. 8 – p. 3700, l. 4. Brown went next door to Hank Koger's house. She remembered, "We was getting together a party for Joe Fogle, was cleaning some chicken and stuff at a neighbor's house and we walked back and forth across the street to see what was going on." Brown remembered that appellant and about fifteen to twenty other people were out in the yard that day. ROA p. 3700, ll. 18-23; ROA p. 3707, ll. 12-17. Brown also recalled the argument about someone having moved a gun out of the barrel. ROA p. 3700, l. 18 – p. 3701, l. 3.

Brown testified that later that night, she went to Allen Murray's nightclub in Bowman, South Carolina. ROA p. 3708, ll. 1-9. She got there after midnight.

Keith Rivers also went to the Allen Murray club that night "to get another beer and whatnot." ROA p. 3691, ll. 13-25. Rivers recalled seeing appellant outside the club in an automobile with Hiram Johnson. ROA p. 3692, ll. 1-9.

Brown testified they left the Allen Murray club about 2:45 a.m. that morning. ROA p. 3709, ll. 18-24. They returned to the Villa apartments. ROA p. 3710, l. 7 – p. 3711, l. 10.

Brown remembered that sometime after they returned from the club appellant knocked on the door and said, "Man, Trav [Travis Felder], could you run me home?" ROA p. 3711, ll. 11-18. Brown said, "they got in the car and left out the projects." ROA p. 3711, l. 19 – p. 3712, l. 3.

Brown testified when Travis Felder returned fifteen to twenty minutes later, he appeared "fine, they went upstairs, him and Valorna went upstairs, and me and my baby [sic] father was downstairs and we called it a night after that." ROA p. 3712, ll. 20-24.

There was evidence appellant and the decedent, Candee Martin, were friends. The state's two key witnesses against appellant were James Gadson and Travis Felder. Gadson was charged with murder and reached a plea agreement with the state where he would plead guilty to accessory after the fact and misprision of a felony. Gadson would receive a twenty-year sentence in return for his plea. ROA p. 3981, ll. 7-25.

Gadson testified appellant was his first cousin. ROA p. 3982, ll. 15-20. Gadson said he first saw appellant "early in the morning" on February 16, 2001. Appellant was in the vehicle with his sister, Yolanda Bowman, and Gadson said they were on their way to St.

George "to the meat market." ROA p. 3983, ll. 4-23. Gadson rode along with them that day. Gadson recalled appellant had a gun in his pants. ROA p. 3984, l. 2 – p. 3985, l. 9.

Gadson testified while in the car, appellant "put his beer out of the bag and he put it [the gun] in the bag."¹ ROA p. 3985, l. 10 – p. 3986, l. 25. Gadson recalled that Yolanda Bowman then took them back to the "Villa projects." ROA p. 3987, ll. 11-15. Then they went next door to Hank Koger's house where there were "a lot of people." Gadson said when he arrived, he "went up under the tree, sit down drinking." ROA p. 3988, ll. 1-13. Gadson said appellant put his gun in the trash barrel and "left and went to the store." ROA p. 3988, ll. 18-23.

Gadson testified when appellant returned, they began arguing because his gun was no longer in the large barrel. However, Hiram Johnson had apparently moved the gun out of fear someone would start a fire with the gun in the barrel. Johnson went into the woods and retrieved the gun for appellant. Once appellant had his gun, "he pull it out the bag to make sure everything was right and he left." ROA p. 3989, ll. 4-24.

Gadson, appellant and the decedent

Gadson testified that he was still at Hank Koger's house under the tree at about 7:00 or 7:30 p.m. That was when he saw appellant and the decedent in an automobile. The decedent was driving. ROA p. 3991, l. 4 – p. 3992, l. 3.

Gadson said appellant called out for him. Gadson responded, and he got into the vehicle with appellant and the decedent. Gadson admitted he had been drinking that day, but he claimed he did not start until about 1:00 p.m. ROA p. 3992, ll. 4-22.

When Gadson was asked how much gin he had had between 1:00 and 7:30 p.m., he answered "it was a good little bit." He was "feeling in good shape." ROA p. 3992, l. 11 – p. 3993, l. 25.

Gadson said the decedent drove to the Horizon E-Z Shop, where they got gas, and drove away without paying. ROA p. 3994, l. 3 – p. 3995, l. 2. Gadson testified appellant told the decedent where to drive and that she drove onto Nursery Road. "She stopped, cut the car off, cut the lights off, we got out." ROA p. 3995, ll. 3-21.

Gadson claimed appellant walked away from the car and said "he was going to kill her [the decedent] because she was wearing a wire." "We was walking down the road, she came down the road then, [she] grabbed him [appellant] by the right arm, said she was scared." ROA p. 3998, l. 4 – p. 3999, l. 3.

Gadson maintained that a car drove by and they "jumped in the woods." ROA p. 3999, ll. 16-21. Gadson said the decedent starting walking back to the car and appellant followed her. ROA p. 3999, l. 23 – p. 4000, l. 7.

Gadson testified that he heard a gunshot and he saw the decedent come running back towards him. ROA p. 4001, l. 5 – p. 4003, l. 17. Gadson claimed appellant shot at the decedent two times and "she fell to the ground." Gadson said appellant then dragged her body into the woods. ROA p. 4012, ll. 1-24.

Gadson claimed that he jumped back into the car. ROA p. 4013, ll. 2-5. Gadson said that after the shooting they drove back to the Villa projects. Then Gadson testified that

¹ Defense counsel wanted to know on voir dire if juror biases about consuming alcohol would prevent them from being impartial. ROA pp. 1821-1821; ROA p. 1853; ROA p. 1854; ROA p. 3020.

he then went back over to Hank Koger's house. Gadson recalled, "Marion [appellant] said he was going to the store and get some beer." ROA p. 4015, l. 16 – p. 4016, l. 11.

Gadson testified later that night he went to the Allen Murray club with appellant and Hiram Johnson. They got to the club at about midnight. ROA p. 4017, l. 4 – p. 4018, l. 17.

Gadson said they rode to the club in the decedent's car. Gadson stated that appellant instructed the men to put on the "four pair of burnt brown gloves." ROA p. 4018, l. 15 – p. 4019, l. 17.

Gadson acknowledged he had been drinking all day and that he laid down in the back seat of the automobile. ROA p. 4019, l. 6 – p. 4021, l. 9. Hiram Johnson would later testify that appellant was trying to sell the decedent's car at the Allen Murray club late that evening. ROA p. 4067, ll. 3-20.

Travis Felder

The state's theory of the case was that after the decedent was killed, appellant enlisted the help of Travis Felder to destroy the car. Felder was charged as an accessory after the fact of arson for the events that occurred after leaving the Allen Murray Club, and before the decedent's car was burned. ROA p. 4087, ll. 7-16. Felder testified appellant came to his door in the projects and told him "I need to park this car." Felder claimed he only followed appellant while appellant drove the decedent's automobile to Nursery Road. ROA p. 4092, l. 6 – p. 4096, l. 19.

Felder maintained that when they arrived at Nursery Road, appellant pulled the decedent's body out of the woods put it in the trunk and set the car on fire. ROA p. 4096, l. 13 – p. 4100, l. 14. It was undisputed that the decedent was dead at the time.

During the penalty phase of the trial, the defense played a videotape of Felder alone at the E-Z Shop gas station at 3:14 a.m. purchasing gasoline. Appellant was not with him. ROA p. 4914, l. 2 – p. 4916, l. 16. Travis Felder admitted he did not tell the jury he purchased the gasoline alone during the guilt phase of the trial. ROA p. 4915, ll. 2-21.

During the penalty stage, Felder claimed appellant got the gasoline from him on Nursery Road and that appellant set the car on fire. ROA p. 4917, ll. 8-17. On cross-examination, Felder maintained that appellant also supplied him the red plastic gasoline jug and told him to get two to three dollars worth of gasoline. ROA p. 4923, l. 17 – p. 4925, l. 16. Felder said he did not earlier tell the jury that he was the one who actually purchased the gasoline because “you [defense counsel] didn’t ask.” ROA p. 4925, ll. 17-25.

Appellant’s substance abuse

During the penalty stage, the defense presented the expert testimony of Jeffrey Youngman. Youngman was qualified as an expert in forensic social work and psychosocial assessments. ROA p. 4777, ll. 10-14; ROA p. 4786, ll. 11-25.

Among the records Youngman relied upon were appellant’s from the “Dawn Center, which is a program sponsored by the tri-county commission of alcohol and drug abuse.” ROA p. 4789, ll. 7-21. Youngman said he did his background check to see if appellant had a significant history of mental illness or substance abuse. ROA p. 4790, l. 5 – p. 4791, l. 1.

Youngman said appellant’s mother “was known to drink, also suspected of using drugs and she testified she was arrested once for possession of drugs.” ROA p. 4794, ll. 2-9. Youngman said that at age fourteen, appellant was drinking and selling drugs, mostly marijuana. ROA p. 4800, ll. 14-20.

On cross-examination, Youngman testified appellant had a history of substance abuse. ROA p. 4824, ll. 18-25. Youngman admitted to the solicitor that no one forced appellant to drink or use drugs, and that he did so “of his own free will.” ROA p. 4825, ll. 1-6.

Mitigating circumstances

Defense counsel Cummings told the judge before closing arguments that the defense requested that the judge charge the statutory mitigating circumstance regarding “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.”² ROA p. 4937, ll. 4-14. Cummings told the judge, “Mr. Bowman has asked that we submit that to you for consideration in mitigation.” ROA p. 4937, l. 17 – p. 4938, l. 16.

The solicitor responded that the defense had decided not to “get into any potential diagnosis of any mental health conditions that could create some impairment in his ability to conform his conduct.” The solicitor therefore reasoned there was no evidentiary basis to submit this mitigating circumstance. ROA p. 4938, l. 22 – p. 4939, l. 6.

The judge then ruled that the record was void of any evidence of that statutory mitigating circumstance, and ruled that she would not charge it. ROA p. 4939, l. 7 – p. 4940, l. 7.

Testimony of James E. Aiken

Correctional Consultant James E. Aiken testified about his long career in the field of corrections. Aiken had supervised approximately sixteen wardens, and also had experience as the Commissioner of Corrections for the State of Indiana. ROA p. 4832, l. 22 – p. 4836,

l. 15. Aiken was qualified as an expert without objection. ROA p. 4838, ll. 2-9. Aiken testified appellant could adapt to serving the rest of his life in prison. ROA p. 4844, ll. 7-24.

On cross-examination, the solicitor questioned Aiken about appellant having received a youthful offender sentence in the past. Aiken acknowledged that the purpose of a youthful offender sentence was to rehabilitate the youthful offender, and that appellant “flunked out” on that score. ROA p. 4847, l. 20 – p. 4848, l. 3. Aiken also acknowledged there was a “use of force” report regarding a fight appellant had while serving his YOA sentence at Stevenson Correctional Institution. ROA p. 4848, l. 22 – p. 4849, l. 2.

Aiken then acknowledged that inmates were placed into three different classifications. Aiken testified “you put more aggressive population with more aggressive population with adequate management, the incidents of violence decreases.” ROA p. 4850, l. 13 – p. 4855, l. 17.

The solicitor then asked Aiken about “super-max.” Aiken explained that super-max was an extremely controlled environment for problem inmates. ROA p. 4855, l. 2 – p. 4856, l. 3.

The solicitor also had Aiken acknowledge that inmate behavior controls the restrictiveness of their environment. ROA p. 4856, l. 11 – p. 4857, l. 21. The solicitor also had Aiken admit that inmates can work while inside the facility. ROA p. 4857, ll. 22-25. However, when the solicitor asked Aiken to acknowledge that inmates were allowed to leave the facility and pick up trash on the side of the road, defense counsel objected on the ground “that’s clearly not available here and it’s not proper.” ROA p. 4858, ll. 1-6.

² See S.C. Code §16-3-20(C) (b)(6)

After a bench conference, the solicitor asked Aiken to admit that no matter how "bad a person thinks he is or how serious the crime is, there is a mechanism in place within the Department of Corrections to deal with that inmate." Aiken admitted that was true. ROA p. 4858, l. 12 – p. 4862, l. 10.

The solicitor then asked Aiken to admit that a person serving a life without parole sentence could still work. Aiken answered, "If you're going to be in prison, you're going to work." ROA p. 4862, l. 2 – p. 4864, l. 11.

On re-direct examination, Aiken said there was not any way a person serving life without parole would be allowed outside the prison to pick up trash. ROA p. 4864, l. 16 – p. 4869, l. 3.

Escape and prison conditions

Immediately on re-cross examination, the solicitor noted Aiken had testified appellant would never get out of prison and then asked him how many inmates had escaped during the time he was affiliated with the Department of Corrections. Defense counsel objected on the basis that the sentence would be life without the possibility of parole "and we have told this jury that is all he will ever get and that is the law." ROA p. 4869, l. 13 – p. 4970, l. 11.

The solicitor then argued that under State v. Plath, 277 S.C. 126, 284 S.E.2d 221 (1981) that he was allowed to ask this question. The trial judge stated that Plath was distinguishable. ROA p. 4870, l. 14 – p. 4872, l. 4.

Defense counsel Cummings then noted that a curative instruction would only "re-emphasize the issue on escape or the possibility of escape to these jurors." Defense counsel argued that the jury considering the possibility of escape would preclude them from

understanding or treating life without the possibility of parole as being just that sentence – life without parole. ROA p. 4872, ll. 5-23.

The solicitor responded that the jury was being left with the impression that nobody gets out, and he argued that inmates do escape. ROA p. 4873, ll. 2-17. The judge ruled she was not going to allow the jury to consider escape. ROA p. 4873, ll. 18-20.

The solicitor then requested permission to question Aiken about “conditions of the general population, the work conditions he’s already gotten into.” The judge told the solicitor she would allow him to ask those questions. Defense counsel objected, noting “we’re on re-cross, Judge.” ROA p. 4873, l. 21 – p. 4874, l. 7. The judge responded that she understood the solicitor was on re-cross, but ruled “I will let him go into those areas.” ROA p. 4873, l. 21 – p. 4874, l. 19.

Defense counsel then noted that a curative instruction on escape would only re-emphasize the damage. Counsel argued it was like a policeman testifying he saw somebody running a red light “and the defense attorney says, ‘Are you sure you saw my client run a red light?’ They’ve heard it twice now.” Defense counsel then moved for a mistrial based on the fact that the prejudice could not be cured. ROA p. 4874, l. 22 – p. 4875, l. 17.

The judge denied the mistrial motion and stated that she would give a curative instruction that the statute on life imprisonment without parole meant “until the death of the defendant.” ROA p. 4875, l. 22 – p. 4876, l. 8.

The judge then instructed the jury that life without parole meant “until the death of the offender” and told the jurors the last question they heard was not proper, and to disregard it. ROA p. 4876, l. 4 – p. 4877, l. 23.

Armed with the judge's ruling on prison conditions, the solicitor then asked Aiken about appellant's opportunity to work and the compensation he would receive for that work. Aiken responded appellant would be minimally compensated for his work at a rate of about three, four or five dollars. ROA p. 4878, l. 1 – p. 4879, l. 24.

The solicitor then asked Aiken in addition to work "what is going on there [in the prison]?" ROA p. 4878, l. 25 – p. 4879, l. 3. Aiken responded and explained the daily routine of a prisoner. He said the inmates get up in the morning, eat, go to work and take a recess and lunch break in the middle of the day. Aiken said an inmate could involve himself in Bible study, education, and anger management classes. ROA p. 4879, l. 8 – p. 4880, l. 7.

When Aiken noted that the prisoners were still watched twenty-four hours a day, the solicitor objected on the basis that Aiken was "going off into a speech." The judge stated Aiken was trying to answer the questions, but she asked Aiken to be as responsive as possible to the solicitor's questions, rather than giving narrative answers ROA p. 4880, ll. 5-

23. The following then occurred on re-cross examination of Aiken:

THE COURT: Thank you. You may proceed.

A. I'll just answer the question like this. I gave the daily routine, but you have to understand that you are doing it around very dangerous people that use violence to resolve issues. And that gives a better picture of what it means living in prison.

Q. All right, sir. And are there recreational facilities available?

A. Yes, sir.

Q. What type of recreational facilities?

A. An inmate can play basketball, an inmate can exercise, you know, on his own, but to understand,

again, to give it in a complete context as briefly as I can, you're doing it around very dangerous predator people.

Q. My question is related to the recreational facilities and we understand prison [has] dangerous people. In addition to that are there libraries they go to, to read books?

A. Yes, sir. As guaranteed by the constitution.

Q. Are there movies they can watch?

A. Yes, sir.

Q. Television?

A. In some instances, yes, sir.

Q. Softball, do they play softball?

A. I don't know. It's some type of recreation such as that.

Q. Thank you. That's all I have.

ROA p. 4881, l. 1 – p. 4882, l. 3.

ARGUMENT

1.

The court erred by refusing to instruct the jury on the statutory mitigating circumstance that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, since there was expert testimony of appellant's substance abuse problem, and evidence the parties were drinking alcohol throughout the day.

As seen, hard drinking that started in the morning and went late into the night was involved in this case. As seen, defense counsel wanted to know on voir dire if juror biases about consuming alcohol would prevent them from being impartial. ROA p. 1821-1821; ROA p. 1853; ROA p. 1854; ROA p. 3020.

Jeffrey Youngman examined letters from the Dawn Center, an alcohol and drug abuse program. ROA p. 4789, ll. 7-21. Youngman testified appellant had a history of substance abuse. Further, appellant's mother also drank, was arrested for possession of drugs, and was suspected of using drugs. ROA p. 4794, l. 2 – p. 4800, l. 20; ROA p. 4824, ll. 18-25.

As seen, there was evidence the drinking began at William Koger's on the morning of February 16, 2001. The men were planning a party for Joe Fogle.

James Gadson testified he first saw appellant "early in the morning" on February 16, 2001. The men drove with Yolanda Bowman and Gadson recalled while in the car, appellant "put his beer out of the bag and put it [the gun] in the bag." ROA p. 3985, l. 10 – p. 3986, l. 25. Gadson acknowledged he had been drinking gin for hours that day and drank

“a good little bit.” Gadson was feeling “in good shape.” ROA p. 3992, l. 11 – p. 3993, l. 25.

Moreover, the drinking continued throughout the day and Gadson said appellant went to get more beer after he claimed appellant shot the decedent and they returned to the Villa Projects. ROA p. 4015, l. 16 – p. 4016, l. 11.

The judge refused to charge the statutory mitigating circumstance at issue here. See, S.C. Code §16-3-20(C)(b)(6). That statutory mitigating circumstance is that “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.”

This statutory mitigating circumstance has widely been accepted to include evidence of intoxication. See State v. Stone, 350 S.C. 442, 567 S.E.2d 244, 248 (2002). Where there is evidence of intoxication or drug use, this Court has required the trial judge to instruct the jury on statutory mitigating circumstances 2, 6 and 7. See State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986); State v. Young, 305 S.C. 380, 409 S.E.2d 352, 356 (1991); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990).

In deciding whether a statutory mitigating circumstance should be submitted, the trial judge is concerned only with the existence of the evidence, not its weight. Further, the trial judge has a duty to review all statutory mitigating circumstances and instruct the jury as to any circumstances which may be supported by the evidence, and not merely those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, 730 (2000), citing State v. Bellamy, 293 S.C. 103, 359 S.E.2d 63 (1987); State v. Caldwell, supra.

Under this Court’s precedents, appellant was at least entitled to the mitigating circumstance of S. C. Code §16-3-20(C)(b)(6) being submitted to the jury. Appellant had a

history of substance abuse, he was drinking the day of this incident, and there was evidence of a “party atmosphere” throughout the day. Appellant is entitled to a new sentencing trial.

2.

The court abused its discretion by allowing the solicitor on re-cross examination of James Aiken to examine him about conditions in general population. Recreational facilities, watching movies, watching television and reading books were matters not raised by any relevant evidence, and the jury's sole concern was supposed to be whether appellant should be sentenced to death or life imprisonment without parole.

As seen, when the solicitor argued that escape from prison was a fair line of testimony, defense counsel objected on the basis that the sentence would be life without the possibility of parole "and we have told this jury that is all he will ever get and that is the law." ROA p. 4869, l. 3 – p. 4970, l. 11. Defense counsel argued the escape issue had now been put before the jury and that a curative instruction would only exacerbate the damage. Defense counsel then moved for a mistrial. ROA p. 4874, l. 22 – p. 4875, l. 17.

When the judge ruled she was not going to allow escape as a jury issue, the solicitor successfully requested permission to question Aiken about the conditions in the general population. Defense counsel objected, noting "we're on re-cross, Judge." The judge responded that "I will let him go into those areas." ROA p. 4873, l. 21 – p. 4874, l. 19.

The solicitor then had Aiken explain the daily routine of a prisoner. Aiken confirmed that inmates could become immersed in education, Bible study and anger management classes. ROA p. 4879, l. 8 – p. 4880, l. 7. The solicitor also questioned Aiken about recreational facilities and Aiken acknowledged that inmates could play basketball and had access to libraries, movies and television sets. ROA p. 4881, l. 1 – p. 4882, l. 3.

Discussion

Defense counsel correctly argued that the jury's province was to decide whether appellant should be sentenced to death or life imprisonment without parole. Issues such as escape and conditions in the general population should not be placed before the jury. When evidence is allowed, it is obviously allowed as being relevant.

As this Court noted in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), the Department of Corrections controls the conditions of imprisonment and not the defendant. "Such determination as to the time, place, manner, and condition of execution or incarceration...are reserved by statute... to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and the characteristics of the individual defendant."

In State v. Plath, this Court noted that it was highly improper for the defense to paint a picture of life imprisonment as slavery and capital punishment as "an ineffective instrument of deterrence, a crude device for expressing social approval, and even a counter-productive approach to control of crime." State v. Plath, 313 S.E.2d at 626.

"A jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison]." 313 S.E.2d at 627.

The present case deals with prejudicial prison conditions evidence put before the jury by the solicitor, and not a prejudicial closing argument. However, this Court has repeatedly emphasized that solicitors must carefully tailor their arguments in a capital case so that they do not appeal to a personal bias of a juror, or arouse his passion or prejudice

See State v. Reed, 293 S.C. 515, 362 S.E.2d 13, 15 (1987). There is not any reason to treat evidence designed to appeal to juror bias or prejudices any differently.

In State v. Atkinson, 253 S.C. 531, 172 S.E.2d 111, 112 (1970), this Court noted:

The Legislature committed to the jury the responsibility to decide in the first instance whether punishment should be life or death. It charged another agency with the responsibility of how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. *What happens thereafter is no concern of theirs.*

(emphasis added).

The solicitor's obvious theme with James Aiken was that life imprisonment was not at all a harsh punishment when jurors consider that inmates can play basketball, watch television and movies, exercise, and go the library. What the solicitor did here was no less improper than what this Court condemned the defense for attempting to do in State v. Plath. The solicitor was painting a picture of life in prison as being a relaxing experience.

That was painting a picture designed to influence juror biases. Complaints are common in our society about prisoners watching television, and being able to work out, exercise and lift weights. Indeed, the cornerstone of former Commissioner Michael Moore's highly publicized "get tough" policy was the removal of television sets from the prisons.

What is perhaps most unfair about this irrelevant side issue play to juror biases is that the day to day conditions of life imprisonment are entirely beyond appellant's -- or any inmates -- control. See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000). Appellant could not deny or explain the conditions of life imprisonment.

In Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 1207 (1977), the Supreme Court held that a defendant is denied due process "when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."

Here, the solicitor's re-cross examination of James Aiken about the "lenient" conditions of life imprisonment implied appellant would escape real punishment if he was not sentenced to death. That was improper. See Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382 (1980).

Just as capital punishment as public policy is a matter established by the Legislature and not a concern of the jury, so the conditions of imprisonment controlled by the South Carolina Department of Corrections should not be placed before the jury. Cf. State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 320 (1982). The solicitor's "country club prison" cross-examination of James Aiken was totally improper, given a principled reading of this Court's precedents.

The only relevant issue regarding prison is whether the defendant can adapt to prison, or whether he is a future danger. See, Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986). This evidence is either mitigating or aggravating.

However, evidence that prison conditions are allegedly not particularly harsh or that conditions are "lenient," and that life in the general population is like being at a "country club prison," is improper. Evidence about prison conditions should not be used by either the defense or the solicitor as "aggravating" or "mitigating" when jurors consider the proper punishment – death or life without parole.

The solicitor here was making a "those bad life sentences" argument to the jury by way of his re-examination of James Aiken. See State v. Reed, 293 S.C. 515, 362 S.E.2d 13,

15 (1987). Appellant respectfully submits it is time for this Court again to speak on what is relevant for a jury to consider during the penalty stage of a capital trial, and prison conditions – good or bad – are not relevant to the consideration of a proper penalty.

The judge correctly ruled that escape was not a proper consideration for the jury. However, the judge erred by allowing the jury to consider evidence of prison conditions in the general population. Appellant should be granted a new sentencing trial.

3.

The court erred by refusing to grant a mistrial where the solicitor attempted to question James Aiken about the possibility of escape, since the solicitor injected an improper consideration and an arbitrary factor into the sentencing phase. The jury's attention is properly focused on the penalties of death and life without parole, and not speculative matters beyond appellant's control. Defense counsel correctly argued that the judge could not remove the taint through a curative instruction once escape was raised by the state as an issue.

As seen, the solicitor asked James Aiken how many times inmates had escaped during the time he was affiliated with the Department of Corrections. Defense counsel immediately objected, noting the jury was instructed that life meant life without parole and that appellant would never be released. The judge correctly sustained the objection, and disagreed with the solicitor's assertion that he was allowed to cross-examine on the possibility of escape under the precedent of State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). ROA p. 4869 l.1 – p. 4970, l. 11.

Defense counsel then told the judge that a curative instruction would not remove the taint. It would only “re-emphasize the issues of escape or the possibility of escape to these jurors.” ROA p. 4872, ll. 5-23. Defense counsel urged that the bell could not be unrung. He moved for a mistrial on the basis that the prejudice caused by the state raising the possibility of escape could not be cured. ROA p. 4874, l. 22 – p. 4875, l. 17.

The judge refused to grant a mistrial. Instead, the judge gave a truncated instruction that told the jurors again that life without parole meant “until the death of the defendant” and that the last question was not proper and to disregard it. ROA p. 4875, l. 22 – p. 4877, l. 23.

Discussion

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court held that raising the possibility of escape was not reversible error because it was in fair response to the defense strategy to paint life imprisonment as a form of slavery. This Court found since the witness presented himself as an expert on the horrors of prison life as a form of permanent slavery, raising the issue of escape was therefore a fair test of the witness' credibility about what occurred in prison. That was especially true since three years had passed from the earlier State v. Plath, 277 S.C. 126, 140-141, 284 S.E.2d 221, 229 (1981).

As stated, the essence of State v. Plath was that focusing the jury's attention upon conditions in prison is improper. The jury's attention was properly focused only on death or life imprisonment as a proper punishment for the particular defendant. A death penalty trial is not a forum for the prosecution and the defense to wage a political war about the death penalty or how harsh life imprisonment is in reality.

Further, in this case, there was not any evidence appellant ever escaped from prison or ever attempted to escape while awaiting trial on these charges. In State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000), this Court held it was improper for the state to introduce several pieces of mail that were sent to the defendant at the Lexington County Detention Center. These pieces of mail contained illegal drugs. This Court noted that since the state could not produce any evidence the defendant conspired or asked for the drugs to be mailed to him, there was not any nexus between drugs being sent to him and his ability to adapt to prison life. See, also, State v. Bailey, 279 S.C. 437, 308 S.E.2d 795 (1983).

Here, similarly, there was not any evidence linking appellant to any escape attempt. As the solicitor did in Quattlebaum, the solicitor here wanted the jury to hold against

appellant something that was out of his control – the fact some prisoner some day may escape. Cf. State v. Kelley, 343 S.C. 350, 540 S.E.2d 851, 855-857 (2001).

Further, this Court's opinion in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982), also states that the possibility of escape is only admissible where it has a direct nexus to the defendant's conduct. In State v. Woomer, this Court held that evidence of the defendant's prior escape while in prison in West Virginia was a proper reply to his evidence of his good conduct while in prison in South Carolina. State v. Woomer, 299 S.E.2d at 319.

Evidence of a defendant's misconduct in jail, including any prior plan to escape or an escape attempt, is clearly relevant to his character and his ability to adapt to prison. Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991 (1976); State v. Woomer, 278 S.C. 468, 299 S.E.2d 317, 319 (1982). A defendant is also entitled to introduce evidence that he can adapt to prison. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1982).

However, in the final analysis, factors behind the prison walls that an individual defendant cannot control are unfair to hold against him. Where there is not any nexus between the speculative evidence and the defendant, as here, the speculative evidence should not be allowed before the jury because it constitutes an arbitrary factor.

The judge correctly ruled that it was error for the solicitor to inject the broad issue of the possibility of escape into this case. Defense counsel correctly argued prejudice from that error could not be cured, and he moved for a mistrial.

There was not any ambiguity in the solicitor's question about escape, and it was etched in the minds of the jurors. It was a vivid way of reminding jurors that an escape could happen, and some inmate could harm or kill an innocent member of the public. The

judge should have declared a mistrial because it was necessary to a fair sentencing procedure untainted by the arbitrary factor of escape. Cf. State v. Council, 335 S.C. 1, 515 S.E.2d 508, 513-514 (1999). Appellant should be granted a new sentencing trial.

4.

The trial court lacked subject matter jurisdiction to sentence appellant to death since the murder indictment did not allege any aggravating circumstances. Aggravating circumstances are now elements of the offense of capital murder that must be contained in the indictment.

The murder indictment against appellant does not list any of the aggravating circumstances. See R. p 5254-5257. Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) holds that aggravating factors are elements of the offense of capital murder, and as such, when read together with Apprendi and Jones, those aggravating factors must be charged in an indictment, and found by a jury beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355 (2000); Jones v. United States, 526 U.S. 227, 243 n. 6, 119 S.Ct. 1215, 1223 (1999).

South Carolina law, like the Fifth Amendment Indictment Clause of the United States Constitution, requires that all elements of a crime be alleged in an indictment. Hooks v. State, 353 S.C. 48, 577 S.E.2d 211 (2003) (Indictment defective for failing to state all the necessary elements for accessory plea); Padgett v. State, 324 S.C. 22, 484 S.E.2d 101 (1997) (First-degree burglary indictment defective because it alleged burglary of dwelling, but the evidence revealed the building was a barn); Hopkins v. State, 317 S.C. 7, 451 S.E.2d 389 (1994) (Indictment defective because at plea the state changed offense from DUI causing great bodily injury to DUI causing death, thereby raising the maximum punishment from 10 to 25 years, and the amendment deprived the court of jurisdiction to accept the guilty plea); See S.C. Const. Art. I, §11; S.C. Code §17-23-10 et seq.

The New Jersey Supreme Court has held that “the State is required to submit the aggravating factors to the grand jury and specify in the indictment those factors it intends to prove at a penalty hearing.” State v. Fortin, 178 N.J. 540, 843, A.2d 974, 1037 (2004). The Court in State v. Fortin, 178 N.J. 540, 843, A.2d 974, 1030 (2004), also ruled that assurances of adequate actual notice of the aggravating circumstances is not any substitute for the historic role of the grand jury now that aggravating circumstances are elements of the crime of capital murder.

That court held as follows:

If aggravating factors and capital triggers are the functional equivalent of elements of capital murder pursuant to the Sixth Amendment’s right to trial by jury, we see no reason to define them as something other than elements for purposes of the state constitutional right to a grand jury presentation. We, therefore, hold that our State Constitution requires that aggravating factors be submitted to the grand jury and returned in an indictment. In a criminal justice system in which all of the elements of a crime must be submitted to the grand jury it would be odd to make capital murder the one exception. Our analysis of the development of federal law does not compel this result; logic and fairness and the historical importance we attach to our grand jury system do. ¶ In light of Apprendi and Ring and our recognition that “functionally, the aggravating factors in [N.J.S.A. 2C:11-3c] are indistinguishable ... from the elements of a crime,” we conclude that Article I, Paragraph 8 [of the New Jersey Constitution] requires the submission of the aggravating factors and capital “triggers” to the grand jury.

State v. Fortin, 178 N.J. 540, 843 A.2d 974 (2004) at 1035 (internal citation omitted).

This Court, like New Jersey, should now require and hold that the aggravating circumstances must be charged in an indictment that is true-billed by the grand jury of the county in which the capital murder was committed before the state can seek the death

penalty. See S.C. Const. Art. I §11; See, also S.C. Code §17-19-10. When an indictment fails to allege the essential elements of an offense, the bill of indictment is insufficient to vest the court with jurisdiction to try the defendant. State v. Beachum, 288 S.C. 325, 342 S.E.2d 597 (1986). This issue is presently pending in State v. William Ernest Downs at the time this brief was written. Nonetheless, a brief history of this issue follows, and how this Court's precedents can easily be adapted to it.

Ring v. Arizona, indictments, and defining elements

As seen, Ring now defines capital murder as that which includes murder and aggravating circumstances. The aggravating circumstances proven in the penalty phase are, in fact, elements of the aggravated crime of capital murder. Ring, supra.

The protections of Ring turn on the designation of certain facts as the essential elements of a crime. In Apprendi, the Supreme Court established a test for classifying a fact as an element of an offense or as a sentencing factor: "[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime *must be charged in an indictment*, submitted to a jury, and proven beyond a reasonable doubt." Apprendi, 530 U.S. at 476, 120 S.Ct at 2355 quoting Jones v. United States, 526 U.S. at 243, n.6, 119 S.Ct. 1215." (emphasis supplied).

The Fourteenth Amendment commands the same answer in a case involving a state statute. Here, S.C. Code §16-3-20(C)(a)(1) – (11), is the aggravating circumstances provision of our murder statute. The key inquiry thus is whether the required finding exposes the defendant to a greater punishment than that authorized by the jury's guilty

verdict. Appendi, 530 at 494, 120 S.Ct. at 2365. If it does, then that finding is a distinct element of a criminal offense and must be charged in the indictment.

The maximum sentence for murder, the killing of another human being with malice aforethought is life imprisonment. See S.C. Code §16-3-20. The maximum sentence for capital murder, that is, murder in addition to an aggravating circumstance is death, just as in Arizona. See S.C. Code §16-3-20(C)(a)(1) – (11) (2002 Cum.Supp.). Cf. Ariz. Rev. Stat. §13-1703.

The aggravating factors enumerated in South Carolina's death penalty statute thus expose a defendant to a punishment (the death penalty) for capital murder greater than that otherwise legally prescribed (life imprisonment) for non-capital murder. Under this system, the elements of murder and the aggravating circumstances together constitute the aggravated crime of capital murder.

"[I]f the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact[,] . . . the core crime and the aggravating fact together constitute an aggravated crime, just as grand larceny is an aggravated form of petit larceny. The aggravating fact is an *element* of the aggravated crime." Appendi, 530 U.S. at 501, 120 S.Ct. at 2369, (Thomas, J., concurring); see also Harris v. United States, 536 U.S. 545, 122 S. Ct. 2406, 2417 (2002) (emphasis supplied).

A court can no longer hold that aggravating circumstances are not elements of capital murder and are merely "sentencing factors" or considerations. That was the premise of Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047 (1990), which has now been expressly overruled by Ring.

Since the indictment in this case was defective there was not the requisite jurisdiction necessary for this case to proceed as a capital case, and appellant's death sentence must be vacated.

Other courts have decided this same issue as urged by appellant

Courts in other jurisdictions have already reached the conclusion that Ring, Apprendi, and Jones, mandate that any indictment for capital murder must include the aggravating factors in the murder indictment.

In light of the Supreme Court's mandate in Jones that "any fact . . . that increases the maximum penalty of a crime must be charged in an indictment," a federal court in Virginia stated that it appears to be a foregone conclusion that *aggravating factors that are essential to the imposition of the death penalty must appear in the indictment.*" United States v. Lentz, 225 F.Supp.2d 672 (E.D. Va. 2002) (quoting Jones, 526 U.S. at 253 n.6) (emphasis supplied).

Similarly, in United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002), the court held that the "clear implication of the [Ring] decision is that in a federal capital case the Fifth Amendment right to grand jury indictment will apply." *Id.* at 483.

As stated, this Court's precedents on what an indictment must contain are the same as those New Jersey Supreme Court has required. For example, this Court in Mathis v. State, 355 S.C. 87, 584 S.E.2d 366 (2003), vacated the defendant's first degree burglary conviction because it did not allege the element – the aggravating circumstance - that the burglary occurred during the nighttime. This Court again noted that lack of subject matter jurisdiction can be raised at any time.

The failure to allege the aggravating factors for capital murder in the murder indictment against appellant violated this fundamental principle. Appellant's death sentence should be vacated.

5.

The court erred by ruling appellant did not have an expectation of privacy in the pants he wore to his wife's house, and by refusing to suppress the watch and liquid material found in and on those pants. The pants were seized during an illegal warrantless arrest, and the court erred by ruling the arrest was pursuant to a "valid" Orangeburg warrant -- that was several months old -- and was for a minor unrelated offense.

Relevant Facts

This case involves a Dorchester County murder, and a Orangeburg County arrest warrant for receiving stolen goods that was issued on December 1, 2000. Dorchester County Detective Terrance Van Doran testified he was called to the scene of the arson on Nursery Road in Dorchester County on February 17, 2001, at 4:00 a.m.. ROA p. 7, ll. 3-21. Van Doran said appellant became a suspect in the case. Van Doran claimed the police learned there was an outstanding arrest warrant for appellant from Orangeburg County.³ ROA p. 8, ll. 6-10.

Van Doran went with some police officers to the residence of appellant and his wife at 210 Church Street in Branchville later that morning. As will be seen *infra*, appellant's wife, Dorothy Bowman, testified appellant was not living with her at the time. Under what authority the police got inside the home to arrest appellant and seize his pants was the key issue. ROA p 10, l. 21 – p. 12, l. 14.

³ This Court can take judicial notice of the fact that Nursery Road is approximately three miles from the nearest town, D'Orange, South Carolina in Dorchester County. Branchville is in Orangeburg County, South Carolina. Branchville is approximately twelve miles from the D'Orange area near Nursery Road. Branchville is approximately a twenty six minute drive from Orangeburg where the detention center is located. See Mapquest.com.

Van Doran said that once inside the police encountered appellant in the bedroom "behind the bed, between the bed and the wall, where you couldn't hardly see him." Appellant was wearing only his underwear. Appellant was arrested and Van Doran said he read appellant his Miranda rights. ROA p. 10, l. 21 – p. 12, l. 14.

Van Doran remembered that appellant asked for his pants. "I asked him where they were and he informed me that he thought they were in the living room ... we allowed Dorothy to go to the living room ... and she started to bring the pants, I thought better of allowing her to hand him the pants, I took them and I checked them for any weapons, just for safety purposes." ROA p. 12, l. 15 – p. 13, l. 5. When Van Doran searched appellant's pockets, he found a "lady's watch with a brown wristband." The state would later offer evidence the watch belonged to the decedent. ROA p. 13, ll. 6-10.

Van Doran said he discussed the watch with Detective Coker, and he then informed Dorothy that "we would need something else for him to wear because we were going to take the pants, not let him wear them." ROA p. 13, ll. 6-17. The state would later offer evidence that petroleum products were discovered on appellant's pants, although that petroleum product was not gasoline. The state would, nonetheless, introduce them into evidence. ROA p. 4129, ll. 10-24; ROA p. 4164, l. 15 – p. 4165, l. 14.

On cross-examination, Van Doran claimed he could not remember if anybody gave appellant a copy of the Orangeburg County arrest warrant when he was taken into custody. ROA p. 119, ll. 8-21. The Orangeburg County arrest warrant was for possession of stolen goods. The warrant was served on February 18, 2001. As stated, it had been issued on December 1, 2000. ROA p. 5258.

Officer Tim Stevenson admitted he did not recall "whether or not he [appellant] had been picked up on a fresh warrant or a bench warrant." ROA p. 134, l. 23 – p. 135, l. 1.

Appellant's testimony

Appellant testified in camera that on February 17, 2001, he was at Dorothy's mobile home in Branchville, South Carolina. Appellant said his stepson told him, "Daddy, I see the police." Appellant said he looked out the window and saw the Chief of Police driving by the mobile home. Appellant sat back down in the chair. He did not attempt to flee. ROA p. 727, l. 20 – p. 729, l. 1. Appellant confirmed that he was not residing with Dorothy at the time, and the only clothing he had with him were the pants he had been wearing. ROA p. 729, ll. 2-5.

Appellant heard a knock on the door. Appellant testified he instructed his wife, "Don't open the door for the police." Appellant recalled, "I heard them saying that they had a search warrant to come in the house, search me and my wife, told them she didn't know whether I was in the house or not." Law enforcement then entered the mobile home. ROA p. 730, l. 6 – p. 731, l. 17.⁴

Appellant said the police came in the home and they saw him laying on the bed. Appellant was handcuffed. Appellant recalled that all he was wearing at the time was his white shorts. ROA p. 731, l. 20 – p. 733, l. 2. Appellant said the police "put me on my knees in the hallway floor." ROA p. 733, ll. 2-21.

Appellant remembered, "I asked my wife for some clothes." Appellant said the only clothes the police eventually allowed him to put on was "a pair of my wife's jogging pants." Appellant recalled when he asked his wife for clothes, "Mr. Van Doran walked off from the

hallway and came back, [he] was in the living room saying he had to find something else [for me] to put on, I heard him say that.” ROA p.. 734, ll. 5-18.

Appellant said the police did not show him a copy of an arrest warrant or tell him there was an outstanding warrant for his arrest. Appellant testified he was not given any reason why he was being held at the Branchville Police Department following his arrest. Appellant recalled Detective Coker told him, “I was only at the police station to answer the questions.” ROA p. 743, l. 2 – p. 744, l. 21. Appellant was also never shown a copy of a search warrant. ROA p. 744, ll. 19-21.

Appellant testified he took a polygraph examination. He was then told he was lying to the police. ROA p. 763, l. 8 – p. 765, l. 7. The police then asked appellant if he did not know what happened to the decedent, “why do you have her watch?” Appellant told the police the decedent gave him the watch in return for drugs. ROA p. 765, ll. 3-16.

Dorothy Bowman

Appellant’s wife, Dorothy Bowman, testified during the pre-trial hearing on April 15, 2002, that she had been living at 210 Church Street in Branchville for about three months prior to this incident. Appellant was not living with her at the time. ROA p. 1039, ll. 13-25.

Mrs. Bowman remembered that the police came to her door about eight or nine o’clock that February morning. Branchville Police Officer Boom Walters knocked on her door “and he said something about some kind of – he had Dorchester County with him and something about J. R. [appellant] *and a warrant*. And he asked me can he come in and look for J. R. And I told him ‘Yeah.’” ROA p. 1041, l. 10 – p. 1042, l. 3. (emphasis added).

⁴ April 11, 2002, hearing.

Why Mrs. Bowman let the police come into her home that morning was the key issue. The following occurred between the solicitor and Mrs. Bowman:

Q. Did they ever tell you they had a search warrant for Marion?

A. *They said something like that, about a warrant and Marion, yes, sir.*

Q. Did they say anything about an arrest warrant?

A. I can't remember that. I don't think so.

Q. What did they say about a warrant, to the best of your recollection? If they talked about a warrant, what did they say?

A. *They had a warrant for his arrest.*

Q. Okay. All right. And how many police came into your house?

A. During that time I'd say about three or four.

ROA p. 1051, l. 18 – p. 1052, l. 5. (emphasis added).

The following occurred on cross-examination of Branchville Chief of Police Quillie Walters about the Orangeburg arrest warrant:

Q. Good morning, Chief. On the back it's marked State's Exhibit 5 for ID. I'm going to ask you to look at that. Up in the left-hand corner can you read the address of where the arrest warrant for Mr. Bowman [is], [what] his address would be?

A. It says 220 Locket Street.

Q. All right, sir. Where is Locket Street, is that in the town of Branchville?

A. It's close by this Carry Street. It's a couple streets or two over from Carry Street.

Q. All right, sir. And I'm asking now this is an attested true copy. Did you or any law enforcement officers on the day of [February 17 2001] have this piece of paper in your possession?

A. I had the -- not -- I had a copy of the warrant.

Q. All right, sir. You carried just a photocopy around with you?

A. I had it at the office and I carried it with me that day.

Q. You would agree with me, Chief, a photocopy is not a valid warrant, it has to have a judge's signature on it?

MR. BAILEY: Objection to him getting any legal implications. It's a valid warrant, he's a fact witness.

ROA p. 325, l. 3 -- p. 326, l. 2.

THE COURT: I'll allow you to proceed, Mr. Cummings.

Q. When did you make a copy of that warrant?

A. I have no idea. I don't remember. It was sent for me from the sheriff's office. But that morning in question an investigator from the sheriff's department checked with Orangeburg with their records and verified that the warrant was in existence and it was still needed to be, still active.

Q. Who did this, sir?

A. Investigator Varnadoe.

Q. All right, sir. Since last Friday until today have you talked to any officers about your testimony today?

A. No, sir.

Q. Has anybody come to you, asked you about any issues?

A. No, sir.

Q. All right. Have you seen that attested true copy of the warrant prior to testifying today?

A. Not till today.

Q. Okay. Mr. Bailey just when he showed it to you, that the first time[was] today?

A. That's right.

Q. All right. Now, when – you were told there was a valid warrant in existence, but you didn't have actually a warrant with a judge's signature on it that day, correct?

A. I don't understand your question.

Q. Well, when you went to Mr. – Ms. Bowman's house, did you have a valid warrant with a judge's signature on it that morning, sir?

A. I didn't have the original warrant, no, sir, I did not.

Q. Did you have – did you gentlemen have a search warrant when you went to Ms. Bowman's residence?

A. No search warrant.

Q. Okay. Had you applied for a search warrant that morning?

A. This was the sheriff's department warrant, it wasn't mine. I was assisting them in executing their warrant.

Q. An arrest warrant on Mr. Bowman?

A. Right.

ROA p. 326, l. 11 – p. 328, l. 4. (emphasis added).

Mrs. Bowman said after the police entered, they allowed her to stay in front "while they went down the hall to search for him." The police did not show Mrs. Bowman any documents justifying an arrest or a search of her home. ROA p. 1042, ll. 6-15.

"Then after they found him, and then one of the officers asked me did he have any clothes in my house and I said yes. He asked me, 'Can I go get them,' and I went and got them ... I remember getting him a pair of black pants and a shirt, gray shirt." ROA p. 1042, ll. 16-23.

Mrs. Bowman remembered the police searched her home after appellant's arrest. "And then after they finished searching, they got – well, while they was searching, they had me sign some kind of waiver form ... just telling me about what they took from my house, like his pants, his watch, stuff like that." ROA p. 1043, ll. 3-12.

The Orangeburg arrest warrant was for receiving stolen goods, one thousand to five thousand. The arrest warrant affidavit was signed on December 1, 2000, by Kerry Kinsey at Post Office Box 1366, Orangeburg, South Carolina, 29116. Magistrate Peggy G. Davis signed the arrest warrant that same day. The return stated that the warrant was delivered to appellant on February 18, 2001. See Arrest Warrant, ROA p. 5258.

Rulings on appellant's statements following his arrest.

The judge ultimately suppressed appellant's statement to the police. The evidence showed appellant was taken to the Orangeburg County jail, but his arraignment or bond hearing was delayed. Further, it was undisputed the police brought appellant back from the Orangeburg County jail on a Sunday night to Branchville to see his wife. The defense maintained that law enforcement was threatening that appellant's children could be taken

into DSS custody, and his wife could be charged in this case. Appellant also testified he did not read what the police wrote for him to sign. ROA pp. 770; 790; 862-864.

Arguments on seized property

Defense counsel argued before the court on May 1, 2002, that appellant was illegally arrested. Appellant was not informed of the reasons for his arrest, and there was not any testimony "saying either Chief Walters or whoever said, 'You're under arrest for stolen goods,' none of that ... There's no proof saying he had knowledge of an outstanding felony warrant. Judge, a copy of a warrant is insufficient. This is illegal to have a copy of the warrant. The copy of the warrant hasn't even been produced in the various stages of this issue." ROA p. 1254, l. 20 – p. 1256, l. 14.

Defense counsel noted that appellant's pants were seized when they were brought to him inside the mobile home. Defense counsel argued that, if the court were to find appellant was legally being arrested for receiving stolen goods, "what issue is the pants based on that case?" ROA p. 1257, l. 15 – p. 1259, l. 14.

Counsel also argued Mrs. Bowman "can't give permission for his pants." Counsel said appellant had standing to challenge the search. ROA p. 1259, l. 15 – p. 1260, l. 1. Counsel argued that the watch and any other evidence seized from appellant's clothes were the fruit of the poisonous tree, and should be suppressed. ROA p. 1261, l. 1 – p. 1262, l. 6.

State v. Sims

The judge asked the parties to discuss the arrest in terms of State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991). Counsel argued the police were vague about the warrant, "who had access to it, how it got there, who got the warrant..." The warrant was "only allegedly signed by a judge in December, [2000]." ROA p. 1263, l. 1 – p. 1264, l. 7.

Counsel reminded the judge that the police did not tell appellant he was being arrested for receiving stolen goods. ROA p. 1263, l. 21 – p. 1266, l. 17. Counsel noted the police “chose to seize those pants as the result of a homicide investigation, not receiving stolen goods, not for any issue of contraband...” ROA p. 1266, l. 13 – p. 1267, l. 1. “Therefore, Judge, respectfully, the pants and anything found therein should be suppressed.” ROA p. 1267, ll. 2-8.

The judge denied appellant’s motion to suppress the evidence seized at the time of his arrest. The judge ruled, “the arrest was made based upon information that there was a valid warrant. And, in fact, there was a valid warrant. And I find that, first of all, it was a valid arrest.”

The judge also ruled appellant had no expectation to privacy in his pants, and that they were legally seized incident to arrest. ROA p. 1275, l. 16 – p. 1276, l. 19.

Trial evidence

Appellant’s pants and the watch were later entered into evidence. ROA p. 4129, ll. 10-24; ROA p. 4164, l. 15 – p. 4165, l. 14. SLED agent Grady Layton testified he “found the presence of a heavy petroleum product on these jeans.” Layton admitted on cross-examination these heavy petroleum products could be charcoal starters, oil lamps, paint thinners, or insect sprays. Layton also acknowledged that a heavy petroleum product was also found on the shoe of James Gadson. ROA p. 4300, l. 7 – p. 4301, l. 24.

The solicitor noted that the decedent’s watch was found in appellant’s pants, and he argued appellant’s wife consented to the police taking appellant’s pants and the watch. ROA p. 4476, l. 11 – p. 4477, l. 9.

Discussion

The judge erred by ruling appellant did not have any expectation of privacy in his pants. Those pants were seized from his wife's mobile home while appellant was present, and inside the home with his wife's permission.

In Minnesota v. Olsen, 495 U.S. 91, 110 S.Ct. 1684 (1990), the police entered a residence, without a warrant, to apprehend an overnight guest who was a suspect in a murder and robbery. The Supreme Court found the defendant's status as an overnight guest alone was "enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." Minnesota v. Olsen, 495 U.S. at 96-97, 110 S.Ct. at 1688. Appellant was at least as well situated in this case. He was staying at his wife's mobile home when the police entered.

Defense counsel correctly argued that appellant was illegally arrested. The state's witnesses were very vague about the December 1, 2000, warrant issued for appellant's arrest by Judge Peggy D. Davis for receiving stolen goods. This Orangeburg County arrest warrant alleged appellant sold four guns that were stolen from a residence in Cope, South Carolina. ROA p. 5258.

Further, there was not any reason in this case that the police could not have obtained a valid arrest warrant for murder, assuming they had probable cause for appellant's arrest at the time. As seen, the Chief of Police claimed: "an investigator from the sheriff's department checked with Orangeburg with their records and verified that the warrant was in existence and it was still needed to be, still active." Defense counsel correctly argued that the seizure of appellant's pants and his watch clearly showed the police entered the mobile home to arrest appellant and search for evidence of the homicide.

Further, this was not a case of hot pursuit. The police were allegedly taking time to check on the Orangeburg arrest warrant. If the police had probable cause to arrest, that same time could have been taken to obtain an arrest warrant for murder.

Appellant resided in the area. He had family ties to the community, including his wife Dorothy. Appellant was at his wife's mobile home with her permission. He was sitting around the mobile home in his boxer shorts when the police arrived. Appellant could not be considered a flight risk unless any other murder suspect who was a resident of the local area, and who had family ties to the community was to be considered a flight risk. Cf. State v. George, 323 S.C. 496, 476 S.E.2d 903, 911 (1996), (where the defendant did not have ties to the community and was a flight risk).

Dorothy Bowman remembered that the police told her they either had a search warrant or "a warrant for his arrest." ROA p. 1051, l. 18 – p. 1052, l. 5. The police were allowed into the home for that reason. If the police had a warrant and Mrs. Bowman refused them entry, the police had a right to break into her home. See S. C. Code §43-15-60 (1976). Mrs. Bowman had the right to rely on assertions the police had a warrant, and she should not be expected to deny them entry – or force the police to break into her home -- lest it be deemed that she consented to their entry. Yet Officer Tim Stephenson could not recall whether appellant was arrested on a fresh warrant or a bench warrant. ROA p. 134, l. 23 – p. 135, l. 1.

It is apparent that to any extent the police relied on the stale December 1, 2000, Orangeburg arrest warrant for receiving stolen goods, that their reliance was a subterfuge to

gather evidence and obtain a statement from appellant in what was obviously a murder investigation.⁵

Further, the court's reliance on State v. Sims, *supra*, based upon the dated Orangeburg arrest warrant for receiving stolen goods was misplaced. In Sims, the police were aware of murder warrants issued for Sims' arrest. Sims was on a crime spree. The arresting officer in Sims was aware of a Federal Bureau of Investigation warrant, and of a warrant from California that had been issued for Sims' arrest. In addition, there were warrants for Sims' arrest in South Carolina. Further, unlike the present case, appellant did not voluntarily disclose the location of any inculpatory evidence when confronted by the police. The police just seized his pants. See State v. Sims, 405 S.E.2d at 382.

Interestingly, at the time Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371 (1980) was decided, South Carolina was one of four states in the country that prohibited warrantless arrests in the home by statute. See, S. C. Code §23-15-60 (1976); Payton v. New York, 445 U. S. at 599, n. 47, 100 S.Ct. at 1386, n. 47. S. C. Code §23-15-60 provides a sheriff or deputy may force his way into the home, after a request and refusal, to arrest a person, provided, the sheriff or deputy has the process requirement to arrest the person.

In Payton v. New York, a second defendant involved, one Riddick, was arrested when a detective, accompanied by three police officers, knocked on the door of his New York home. When his young son opened the door, the police saw Riddick sitting in bed

⁵ Appellant recognizes that *if* the police had probable cause to arrest, appellant's subsequent statement obtained after a warrantless entry into the home was not inadmissible under the exclusionary rule. New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640 (1990). However, the judge excluded appellant's statement on other grounds. Appellant also testified he did not read any of the statements that were written for him, and he requested a lawyer. ROA pp. 770; 790; 862-864.

covered by a sheet. They entered the house and placed him under arrest. The United States Supreme Court in Payton v. New York found this warrantless arrest in the home unconstitutional. See Payton v New York, 445 U.S. 573 100 S.Ct. 1371 (1980).

Several facts are clear here. The solicitor argued the actions of the police were lawful under State v. Sims because they were aware of the Orangeburg County arrest warrant. That warrant did not have anything to do with the murder in this case, and it was a dated warrant for a minor offense.

Further, appellant testified he instructed his wife not to open the door for the police. Mrs. Dorothy Bowman testified that she was told the police had either an arrest or search warrant allowing them entry into the home. Mrs. Bowman allowing the police entry under these circumstances was not consent, but acquiescence to an assertion of lawful authority to enter. Finally, a fair reading of this record shows the police had time to obtain an arrest warrant from a magistrate for murder if they had probable cause to arrest, and there were not any exigent circumstances involved in this case.

Under these circumstances, the fruits of the illegal arrest, the watch and appellant's pants themselves, should have been suppressed as a result of an illegal arrest. Cf. State v. Dupree, 319 S.C. 454, 462 S.E.2d 279 (1995), *cert. denied*, 516 U.S. 1131, 116 S.Ct. 951 (1996) (search incident to lawful arrest).

The judge erred by reasoning appellant did not have an expectation of privacy in his pants that were seized in his wife's home where he was at least a guest, and by ruling appellant's arrest was lawful. The seized watch and appellant's pants were the fruit of the poisonous tree. They would not have come to light but for the illegal actions of the police,

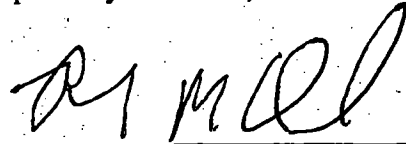
and they should have been suppressed. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963).

The refusal to suppress the objectionable evidence was an error of law, and appellant should be granted a new trial.

CONCLUSION

By reason of argument five, appellant's conviction should be reversed, and this case remanded to the Dorchester County Court of General Sessions for a new trial. In the alternative, by reason of arguments one, two, three and four, appellant should be granted a new sentencing trial.

Respectfully submitted,



Robert M. Dudek
Assistant Appellate Defender

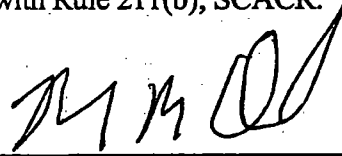
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July 6, 2005

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 6, 2005

A handwritten signature in dark ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

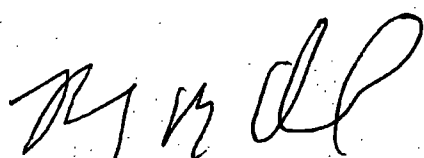
V.

MARION BOWMAN, JR.,

APPELLANT

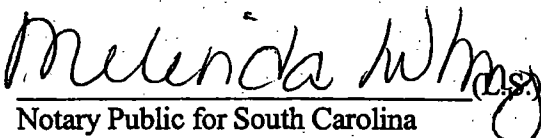
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, this 6th day of July, 2005.


Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2005.


Notary Public for South Carolina

My Commission Expires: November 16, 2008.

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

v.

MARION BOWMAN, JR.,

Appellant.

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STATEMENT OF THE ISSUES ON APPEAL

- I. IS THERE REVERSIBLE ERROR FROM THE TRIAL COURT'S FAILURE TO CHARGE THREE STATUTORY MITIGATORS BASED ON SUPPOSED EVIDENCE OF APPELLANT'S VOLUNTARY INTOXICATION, WHERE THE ISSUE WAS NOT EVEN MENTIONED TO THE TRIAL COURT, AND IN ANY EVENT THERE WAS ABSOLUTELY NO EVIDENCE APPELLANT WAS ACTUALLY INTOXICATED AT THE TIME OF THE CRIME OR ENGAGING IN HEAVY CONSUMPTION IMMEDIATELY PRIOR?
- II. WAS THERE REVERSIBLE ERROR FROM THE SOLICITOR'S BRIEF AND LIMITED QUESTIONING AS TO RECREATION AVAILABLE IN PRISON, WHERE THE ISSUE IS NOT PRESERVED, BUT IN ANY EVENT WAS APPROPRIATE RESPONSE TO DEFENSE EVIDENCE ABOUT THE HARSHNESS OF LIFE IN PRISON AND EMPLOYMENT REQUIREMENTS THEREIN, AS WELL AS INDEPENDENTLY RELEVANT AS SPECIFICS TO CHALLENGE THE DEFENSE EXPERT'S GENERAL ADAPTABILITY OPINION AND TO PLACE PERMISSIBLE RETRIBUTIVE CONCEPTS BEFORE THE JURY?
- III. WAS THE TRIAL COURT'S CURATIVE INSTRUCTION MORE THAN SUFFICIENT TO CURE ANY PREJUDICE FROM THE SOLICITOR'S ONE UNANSWERED QUESTION ABOUT ESCAPE, ESPECIALLY WHERE THE QUESTION WAS PROPER ANYWAY GIVEN THAT ONE OF THE DEFENSE EXPERT'S MAIN POINTS WAS THAT SCDC COULD SAFELY AND EASILY INCAPACITATE APPELLANT FOR THE REST OF HIS LIFE?
- IV. IS THERE REVERSIBLE ERROR WHERE THIS COURT HAS ALREADY RULED THREE TIMES THAT *RING v. ARIZONA* DOES NOT DEPRIVE A TRIAL COURT OF SUBJECT MATTER JURISDICTION EVEN THOUGH THE AGGRAVATING FACTORS WERE NOT ALLEGED WITHIN THE INDICTMENT?
- V. WAS THERE REVERSIBLE ERROR IN ADMISSION OF APPELLANT'S PANTS AND THE VICTIM'S WATCH FOUND WITHIN THEM AT THE TIME OF HIS ARREST, WHERE THE ISSUE IS NOT PRESERVED, THE PANTS WERE SEARCHED INCIDENT TO A LAWFUL ARREST PURSUANT TO A VALID WARRANT, AND THE SEARCH WAS IN ANY EVENT JUSTIFIED BY CONSENT FROM APPELLANT'S WIFE?

STATEMENT OF THE CASE

During the August 2001 term, the Dorchester County Grand Jury indicted Appellant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R. 5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. {R. 1640-43; 4570-71; 5260-61}.

The trial judge in this case was the Honorable Diane S. Goodstein. Appellant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Appellant's jury trial from May 17th until May 20th, 2002. Appellant's jury convicted him of both charges. {R. 4564}.

Appellant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. {R. 4569}. The sentencing phase of the trial began on May 22nd, 2002. Judge Goodstein submitted the following aggravating factors to the jury:

- (1) Murder was committed while in the commission of criminal sexual conduct.
- (2) Murder was committed while in the commission of kidnapping.
- (3) Murder was committed while in the commission of larceny with the use of a deadly weapon.

(4) Murder was committed while in the commission of robbery while armed with a deadly weapon.

{R. 5018}. The following mitigating factors were charged:

(1) The defendant has no significant history of prior criminal convictions involving the use of violence against another person.

(2) The age or mentality at the time of the crime.

(3) Any other mitigating factors that the jury may find. [The jury] may also consider any nonstatutory mitigating factors.

{R. 5032}.

On May 23rd, 2002, Appellant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. It recommended a sentence of death. **{R. 5051}.** After finding that the verdict was not the result of prejudice, passion, or any arbitrary factor, Judge Goodstein sentenced Appellant to death for murder and ten years for third degree arson.

A timely Notice of Appeal was filed and served on May 24th, 2002. This appeal follows.

STATEMENT OF FACTS

This case concerns the murder of 21-year old Kandee Martin, who was found off a country road shot to death and in the trunk of her completely burned out Ford Escort. Appellant did not offer any witnesses in the guilt phase, but put the State to its proof. Three of the issues on appeal challenge the sentencing phase, one raises a subject matter issue based in Ring v. Arizona (which this Court has already rejected), and the last asserts a search and seizure and illegal arrest issue based on the admission of Kandee's watch and Appellant's pants.

A. Friday evening, 2/16/01: a suspiciously abandoned car and gunshots in the night

At about five minutes to eight on the Friday evening of February 16th, 2001, Dorchester County resident Dennis Judy was trying to get his wife home to see her TV show after they had eaten barbeque in Holly Hill. As he came around a curve on Nursery Road in rural Dorchester County, Judy noticed a car on the side of the road, with two of its wheels on the shoulder. Finding it odd that the car was parked with its lights off and windows down, Judy stopped briefly, but continued on. {R. 3782-85}.

Bryan Newhouse managed the nearby nursery and was watching TV that Friday evening. Hearing something outside, he muted the TV, at which point three gunshots rang out within ten or fifteen seconds apart. Newhouse went outside, opened the gate, and drove down the road to see if anyone was illegally hunting at night on the nursery grounds. Finding nothing on the dark and unlit country road, Newhouse went home, and fell asleep about midnight. {R. 3798-3801; 3803-05}.

B. Early morning Saturday, 2/17/01: the car found ablaze

Newhouse was awakened from his sleep in the early morning hours by a loud exploding noise. He again drove down the road to the same location – but this time, he found a car engulfed in flames as high as twenty feet. Newhouse quickly went home and called police. {R. 3801-02}.

Dispatched to the scene a few minutes before 4:00 a.m were Captain Perry Chinnors and his squad of volunteer firemen from nearby Reevesville, as well as Dorchester County sheriff's deputy James Kicklighter. On a path leading into a fallow field about 50 to 75 feet off Nursery Road, they found a small four-door car almost completely burned. They hosed the fire down, and opened the trunk. Inside was the charred body of Kandee Martin. {R. 3807-3810; 3814-16; 3819-22; 3875-78}.

C. 2/17/01: the crime scene evidence at Nursery Road

Dorchester County detectives and a SLED arson investigator responded in the early morning hours of February 17th, 2001. The Ford Escort's license tag was still readable, and it was registered to Kandee and her mother. {R. 3829-31}. Kandee had been shot to death by two bullets, each equally fatal, with one to the back of the head, and another to the left back. {R. 3944-49}. Her body was extremely burned and charred, and the only skin remaining was on part of her back. {R. 3941-43}. The lungs were clear, indicating that Kandee was dead before the fire started. {R. 3954-55}.

Most everything that could burn did burn in the passenger area and trunk of Kandee's Ford Escort. {R. 3879-83}. SLED investigator James Helms testified that the fire began in the passenger compartment rather than by an engine fire, because some

flammable items in the engine area as well as the VIN plate in the dashboard were not completely obliterated. {R. 3883-84}. From the Escort's trunk, officers collected the burned remainders of a woman's pocketbook, the back part of a shirt, some books and paperwork, the remainder of a belt, a gold earring, and some miscellaneous debris. {R. 3904-08}. On the pocketbook, SLED chemist Grady Layton identified a medium petroleum accelerant; on the shirt, paper material, belt, and miscellaneous debris, Layton was able to conclusively identify the presence of gasoline. {R. 4298-4399}. Thus, Agent Helms concluded the fire was intentionally set. {R. 3889-90}.

Dennis Judy returned to the scene that Saturday morning and showed Agent Helms where he had observed the Escort parked on the roadway the night before – approximately some 800 feet from where the car was ultimately found. {R. 3849-3853; 3909-11; 3936-38}. In that area, SLED agent Edward Porter collected in the street or on its shoulder one fired bullet and six .380 shell casings. The officers found in the middle of the road a pool of blood containing some hair and a earring back. As they scanned the area, they noticed blood on pine straw and branches 18 and 29 feet off the roadway down a path towards the wood line. There, they found a woman's shoe identified as Kandee's by her mother. {R. 3853-3860; 3867-71; 3910-12; 4164-66; 4272; 4286}. SLED DNA expert Matt Fitts later matched the blood samples to Kandee Martin. {R. 4366-67; 4377-79}.

D. Saturday morning, 2/17/01: Appellant's arrest, his pants, and Kandee's watch

After receiving information that Appellant had been with Kandee the night before, Branchville Chief Boom Walters, Dorchester County Lieutenant James Nettles, Dorchester

detectives Terrence Van Doran and Alvin Coker, and other police arrived at Dorothy's trailer on the Saturday morning of February 17th, 2001. The officers asked Dorothy if they could enter to search for Appellant, and she voluntarily agreed – eventually signing a consent to search form. Officers found Appellant hiding alongside a bed in a child's room down the hall, and he was promptly arrested and Mirandized.¹ {R. 4125-29; 4139-42; 4144-45; 4191-95; 4208; State's Exhibit #27}.

Appellant was wearing nothing but his boxer shorts, and officers asked him if he wanted his pants. When Detective Van Doran retrieved the back jeans from the sofa in the living room, he found a brown lady's watch in the pocket. {R. 4129-32; 4142; 4150-52; 4195-98; 4207-08}. Kandee's mother identified at trial the watch as belonging to her daughter. {R. 4164-65}. Moreover, SLED chemist Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on the black Levi's – and a number of Appellant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

E. Appellant's friends and relatives come clean about Kandee's murder

As the investigation progressed, it began to center around a number of people who had known each other for years and lived in or hung out at Branchville Villas Apartments, or "the projects". Of these people, Appellant's sisters Yolanda and Kendra, his first cousin (and codefendant) James Tywan Gadson, and his lifelong friend Travis Felder all testified

¹ During the Jackson v. Denno hearing (but not in the guilt phase), it was brought out that officers arrested Appellant at Dorothy's trailer that morning based on an outstanding Orangeburg County arrest warrant for receiving stolen goods. {R. 321-22; 331, 648, 665, 797, 935; 5420-22}.

for the State after securing plea agreements. {R. 3735-36; 3981; 4085-86; 4167-68}.

1. The argument over the gun

William Henry Koger lived across the street from the projects, and people tended to gather in his yard, drink beer, and stand around a fire in a 55-gallon barrel. On February 16th, a gathering was planned at Koger's for Joseph Fogle's birthday. {R. 3673-76; 3680; 3683; 3700; 3988; 4060}.

Koger stated people started to arrive about 11:00 a.m. or so. Appellant – also known as “JR” or “Black” – was apparently there periodically throughout that afternoon. At some point Appellant left – there was some disagreement in the testimony from various witnesses about whether this was a trip to the meat market for the party, or whether the meat market trip was earlier and this was a different trip. In any event, before he left, Appellant took out from his waistband a grey and black High Point .380 semiautomatic pistol – which he had bought a couple of weeks earlier – wrapped it in a paper bag, and put it into the barrel in Koger's yard. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}.

When Appellant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Appellant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Appellant he had taken the gun back to Katrina West's apartment in the projects. Appellant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}.

2. Unpaid debts and threats to kill

At another point later that afternoon, Appellant asked Fogle to take him to Frankie Martin's house. Kande's car was parked out front, and Appellant mentioned to Fogle that Kande owed him some money. {R. 3685-87}.

Appellant apparently also spent some time that afternoon with his sister Yolanda and Katrina West's apartment in the projects. The three of them left in Yolanda's little blue Volkswagen to go get medicine for Katrina's baby at the pharmacy, with Appellant riding in the back seat and the girls in front. On the way, they saw Kande's car parked out in front of Charlie Fralix's house, and Appellant told Yolanda to stop. {R. 3701; 3721-24; 3736-40; 3763-65}.

Charlie's nephew Eddie Waters was leaning in the car window and talking to Kande, who asked to borrow \$5 for gas. Appellant told Yolanda to pull up alongside Kande's car, and tried to get her attention through the open rear window of Yolanda's VW. However, Kande held up her finger at Appellant, saying "hold on a minute", and turned back to her conversation with Eddie. {R. 3724-35; 3740-42; 3764-66}.

There is some discrepancy as to the words Appellant actually used when Kande told him to wait, but it is clear that Kande's gesture angered Appellant. Eddie heard Appellant say "Fuck waiting a minute. I'm about to kill this bitch." {R. 3725-27}. According to Katrina, Appellant declared "fuck that ride, that bitch be dead by dark fall". Appellant's sister Yolanda described his comments as "Fuck that bitch, that bitch be dead by dark". {R. 3765-66}. Yolanda also told police Appellant said "that bitch owed me some money and I want my money today". In any event, Yolanda drove off. {R. 3742-45; 3749}.

3. Tywan Gadsden describes Kandee's murder

Appellant made true on his threat later that night. Appellant's first cousin and codefendant Tywan Gadsden described the murder at trial pursuant to a plea agreement. Tywan, who had spent the afternoon drinking with others under a tree in Koger's back yard, testified Appellant did not return to Koger's until around 7:00 or 7:30 that evening. Appellant was riding with Kandee in her green Ford Escort, and he called Tywan over and told him to get in. {R. 3990-93; 4033}.

The three drove to a nearby Horizon EZ shop, where they gassed up the car and drove off without paying. With Appellant directing the way, Kandee then drove out into the country, where they eventually ended up on Nursery Road. There, they stopped, turned the car off, and Appellant and Tywan got out. {R. 3994-96; 4033-35}.

Appellant and Tywan walked down the road a ways, as Appellant whispered he was going to kill Kandee because she was wearing a wire. Kandee followed behind, grabbed Appellant by the arm and said she was scared. A car came down the road, and the three jumped into the woods until it passed. {R. 3997-99; 4035-36}.

Kandee then started back down the roadway with Appellant following. As Tywan came out of the woods behind them, he saw Appellant fire three times at Kandee. Kandee ran towards Tywan, but stopped and turned to face Appellant. She begged, "Please Black, don't shoot me no more. I have a baby to take care of." Appellant responded to her pleas by firing twice more, and Kandee fell to the ground. {R. 3997-4003; 4011-12; 4036-37}.

Tywan, who said he "messed in his pants a little bit", jumped in the car while Appellant dragged Kandee into the woods by her feet. Appellant then climbed in the

driver's seat of Kandee's car, remarking: "I shot that bitch in the head. Heard her head hit the ground." They then headed back to Branchville. {R. 4012-14}.

Eventually, they parked Kandee's car in a wooded area behind a coal plant. Before they got out, Appellant threatened to blow Tywan's brains out if he ever told anyone. Appellant then headed for the projects while Tywan walked back to Koger's house. Appellant eventually came back with Yolanda's car, and he and Tywan went to the EZ shop for some beer. They then went to another friend's house where they talked to Travis Felder, before returning to Koger's. {R. 4015-17; 4033-35}.

4. The trip to the club in Kandee's car: admissions of guilt

Appellant eventually went to Meeka and Katrina's apartments in the projects, where he ran into Hiram Johnson. Hiram testified he agreed to go with Appellant downtown, and they left in Yolanda's car to go to the EZ shop. There, they ran into Appellant's uncle (and Tywan's father) James J. Gadsden, who was walking home from a restaurant where James does odd jobs in return for burgers. Appellant gave James \$10 and told him to go inside and buy them four pairs of gloves. James did so, purchasing brown cotton gloves and a beer with the change. Appellant and Hiram then drove back to the projects. {R. 3957-60; 3962-63; 4017; 4061-63}.

Around midnight, everyone decided to go to the Allen Murray nightclub outside of Bowman. Appellant drove Kandee's car, with Hiram, Tywan, and Darrien Williams as passengers. Appellant told the men he had stolen the car, and made them put on the gloves James bought at the EZ store. {R. 4017-20; 4063-65; 4081}.

State's witnesses Yolanda, Carolyn Brown, Valorna Smith, Travis Felder, and Keith

Rivers were among those who also went to the Allen Murray Club around midnight. All of them testified Appellant never went inside the club, but instead hung around in the parking lot, often sitting in Yolanda's Volkswagen. {R. 3691-92; 3696-97; 3707-09; 3714; 4039-42; 4089-90; 4104; 4112-15}. Hiram stated Appellant walked around the lot some, trying to sell Kande's car. {R. 4067}.

After about an hour or so, Appellant, Hiram, Tywan and Darrien headed back to Branchville in Kande's car. As he drove the Escort with the pistol sitting in his lap, Appellant remarked, "I killed Kande, heh heh heh". Appellant dropped Hiram off at the projects. {R. 4021-22; 4067-69}.

5. Travis Felder describes the car fire

Travis, Carolyn, and Valorna also left the club and went back to Valorna's apartment in the projects. They were watching movies and hanging out when there was a knock at the door about 3:00 a.m. Appellant was alone, and said "Trav, come here, let me holler at you quick like". Appellant told Travis he needed help parking a car. {R. 4042-45; 4116-18; 4090-92; 4119-20}.

Travis testified that he got in his own car and followed Appellant in the Ford Escort back to Nursery Road. Appellant pulled over on the side of the road, cut his lights, and went into the woods for a minute. The next thing Travis saw was Appellant pulling a body by its feet face down. As Appellant opened the trunk and put the body inside, Travis could see by the trunk light it was Kande. {R. 4093-97}.

Appellant looked back at Travis, and said, "You didn't think I would do it, did you? I killed Kande Martin." Appellant told Travis to go down the road and turn around, while

Appellant drove the Escort up into a field. Travis watched as Appellant threw a light into the car, which erupted in flames. Travis then took Appellant back and returned to Valorna's, where he went to sleep. {R. 4098-4101; 4106}.

F. May and June 2001: a pistol found in the Edisto river – and bullets found in the couch

Appellant's murder weapon was found after police managed to get information in May and June 2001 from Appellant's wife Dorothy and his sisters Yolanda and Kendra, all of whom, as mentioned before, testified at trial with plea agreements. {R. 3735-36; 4161; 4167-68}. Dorothy stated that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer on Lockett Street. She found the pistol hidden a "cuff" or "sleeve" of the couch, put it in her pocketbook, and went over to see Kendra at Appellant's grandmother's. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Appellant's father Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Appellant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}. On May 28th, 2001, diver Mark Sheetz recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was conclusively matched by SLED firearms examiner

David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched to Appellant's .380, they were of course consistent. {R. 4315-20}.

Following Dorothy's statement to police in June 2001, officers visited the residence of her sister Sally Bookhart, Dorothy had moved from her trailer on Lockett Street within a week or so after Appellant's arrest, and she gave the sofa back to Sally. When the officers arrived, Sally willingly agreed to their requests to search the sofa. In a little "pocket" of the sofa's fabric, SLED agent James Helms discovered a box of Winchester .380 ammunition, consistent with the shell casings found at the Nursery Road scene. {R. 4205; 4244-49; 4259-62}.

G. The DNA match

Finally, SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Appellant to a probability of 1 in 5300. {R. 4370-72; 4379-87}.

H. The State's sentencing phase case

Following the 24-hour "cool down" period, the State began its evidentiary presentation in the sentencing phase by reincorporating its evidence from the guilt phase. {R. 4650}. It then introduced certified copies of Appellant's March 1998 convictions from two incidents – with a third degree burglary charge and a petty larceny charge for each. {R. 4652}.

Next to testify were Joseph Wimberly and David Thompson – the two victims from

the March 1998 convictions. Wimberly noted that his house was robbed of a shotgun, of which the barrel was later sawed off. Stolen from Thompson's residence was cash and a .357 pistol. Within 24 hours, Appellant's cousin used the pistol to kill himself. {R. 4653-59; 4801-02}.

Next was SLED arson agent James Helms, through which the State introduced photographs of Kandee as she was found severely burned in the back of her trunk. {R. 4660-68}.

The pathologist Dr. Janice Ross described autopsy photographs of the entrance and exit wounds to Kandee's back and behind her left ear. The trial court excluded the general autopsy photographs in view of the pictures introduced through Helms. {R. 4669-91}.

Finally, Kandee's mother Cordillia Martin and father Wayne Martin gave victim impact testimony about Kandee and the effect of her loss on them and Kandee's young son. {R. 4692-4708}.

I. The defense's sentencing case

The defense case in mitigation began with Appellant's older sister Kendra Bowman. She generally described good times growing up with Appellant, but noted her biological father was abusive until he left when the children were babies. {R. 4742-48}.

Next to testify was Appellant mother Dorothy Bowman (his wife, who testified during the guilt phase, is also named Dorothy). Dorothy related that Appellant's father was abusive, but he left when the kids were very small. She theorized that Appellant longed for fatherly involvement, and noted that her subsequent boyfriend Joseph Sims was a positive influence on the kids. Appellant had trouble in school and only finished the ninth

grade, but he would help his mother out after she became disabled. {R. 4750-59}.

Appellant called Margaret Baughman, an adult education teacher at the Dorchester County Detention Center. She testified that during he pre-trial incarceration Appellant took classes, and even became a reliable assistant to her teaching at the jail. {R. 4761-67}.

A forensic social worker named Jeffrey Youngman also testified in Appellant's mitigation presentation. Generally, Youngman theorized Appellant's functioning was negatively impacted by his upbringing. Appellant's biological father was abusive, and then generally absent after he left when the kids were very young. The mother was very strict, and would "box" or beat Appellant daily. The family was poor, and Appellant was supposedly deprived and dirty when young. While the social worker detailed some injuries Appellant suffered as a child, he noted that the doctor at the time did not suspect abuse. {R. 4791-94}.

Appellant started having difficulty in school after the third grade, and became both an academic and disciplinary problem. When his mother's health worsened, he had to assist with the household. {R. 4794-4800}.

The social worker noted a family history of alcohol abuse. Appellant started experimenting with alcohol in the 5th grade, and eventually started selling drugs. Appellant also supposedly faced repeated abandonment from male figures in his life, from his father, to his mother's paramour Joseph Sims, to the death of his grandfather. The deaths of two cousins – including one who killed himself with the gun Appellant stole – negatively affected Appellant. {R. 4797-4802; 4807}.

These factors led Youngman to theorize that Appellant would make impulsive

decisions with poor judgment and a lack of consideration of the consequences. {R. 4805-09}.

Frankie Martin testified that Kandee came by on February 16th to borrow \$3. He stated Appellant came by with Joe Fogle to see Kandee, and that Appellant left with Kandee. {R. 4830-32}.

Corrections consultant and former South Carolina prisons official James Aiken was called to the stand next for the defense. He was qualified as an expert in future dangerousness and prison adaptability issues. Aiken noted that he had evaluated thousands of inmates for placement in prisons. According to Aiken, if Appellant was given life, he would never leave again from a South Carolina prison for any reason whatsoever. He noted the South Carolina Department of Corrections could easily manage and incapacitate Appellant for the rest of his life, with the prison's fences, gun towers, and trained guards. Aiken also opined that Appellant would adapt well to prison life, given that during his three previous incarcerations, Appellant had no significant incidents of violence to staff and inmates, and had assisted the adult education classes. {R. 4832-45}.

Interestingly, Appellant's next witness – who, unlike Aiken, had contact with Appellant in a jail setting – was not quite as kind about Appellant's behavior. Dorchester County Detention Center guard Sharon J. Branch testified that Appellant has "attitude", and would often speak out to guards. While Appellant never made her feel threatened or raised his hand, he would often refuse direct orders – depending on what kind of day he was having. For example, he would refuse to return to his cell when ordered, saying: "you want me to go in, put me in". As his death penalty trial approached, Appellant started

behaving “calmer” and “better”, but had on a Sunday during the trial caused a problem requiring the intervention of ministers and prison staff, because he was not allowed to go to church when he wanted. **{R. 4882-88}**.

On the other hand, another jail guard named Enrique Badillo testified that Appellant was very polite, and presented no difficulty or threats to safety. **{R. 4902-05}**.

Finally, guilt phase witness Travis Felder was shown a security videotape from the Horizon EZ store at approximately 3:00 a.m. on February 17th, 2001. He admitted the tape showed him at the store – without Appellant – buying gasoline in a small gas container. Felder admitted that after Appellant came and got him from the girls' apartment in the Branchville Villas, Appellant gave him a gas jug and asked him to buy some fuel. Travis stated he thought Appellant was just filling up the can to move the car. **{R. 4911-28}**.

ARGUMENT

I. THERE IS NO REVERSIBLE ERROR FROM THE TRIAL COURT'S FAILURE TO CHARGE THREE STATUTORY MITIGATORS BASED ON SUPPOSED EVIDENCE OF APPELLANT'S VOLUNTARY INTOXICATION, WHERE THE ISSUE WAS NOT EVEN MENTIONED TO THE TRIAL COURT, AND IN ANY EVENT THERE WAS ABSOLUTELY NO EVIDENCE APPELLANT WAS ACTUALLY INTOXICATED AT THE TIME OF THE CRIME OR ENGAGING IN HEAVY CONSUMPTION IMMEDIATELY PRIOR.

Appellant first contends the trial court erred by failing to instruct on three statutory mitigators despite the supposed existence of evidence Appellant was voluntarily intoxicated at the time he committed the crime. However, the issue is not preserved, as it was never as much as mentioned to the trial court at any point during the proceedings. In any event, there was no evidence Appellant was either actually intoxicated at the time of the crime or at least engaging in heavy consumption reasonably prior to the time of the crime. As such, there could be no error.

A. Events at trial

As noted before, William Koger testified that people liked to come to his house, hang out, and drink beer, and that a party for Joe Fogle was planned that night. While Appellant was at his house at times after 11:00 a.m., he left at three times that afternoon and evening. {R. 3673-79}.

Joe Fogle did not mention any drinking. He testified that Appellant left Koger's house to go to the meat market at one point, and that at another time Appellant and Fogle went to Frankie's house, where they saw Kandee. {R. 3682-87}.

Keith Rivers stated that on February 16th he was in Koger's yard. When asked what "you all" were doing, he stated "drinking beer, drinking liquor, and talking". Rivers stated he saw Appellant at Koger's, and when asked what they were doing, stated "we was just

all talking, having a good time, that's all". Finally, Rivers stated that he saw Appellant at about midnight or one a.m. outside of the Allen Murrery club. Rivers asked Appellant if he wanted to go in and get Rivers a beer, but Appellant said he wasn't going in the club. {R. 3690-96}.

Carolyn Brown testified about cleaning chicken for the party and Appellant's argument with Tywan over the pistol. She did not mention any drinking, and noted that she saw Appellant later that day in a car with his sister and another woman. {R. 3699-3702; 3706-07}.

Eddie Waters described hanging around Charlie Fralix's house (NOT Koger's) and drinking beer. He related about seeing Appellant as a passenger in the rear of the car that pulled up next to Kandee's when Eddie was talking to her through the window. Appellant left without getting out. {R. 3721-28}.

Appellant's sister Yolanda and cousin Katrina West testified about spending part of the afternoon with Appellant, during which they went to the pharmacy in Yolanda's VW and stopped by Fralix's house on the way. Neither Yolanda nor Katrina described them doing any drinking; indeed Katrina testified she was not drinking and saw no one drinking at Fralix's house. {R. 3737-45; 3761-72}.

James J. Gadsden (Tywan's father) testified about seeing Appellant and Hiram that evening parked in the EZ shop parking lot. Appellant gave James \$10 to buy the four pairs of gloves. While James stated he bought a beer with the change, he did not mention buying any beer for Appellant or Appellant drinking any. {R. 3957-61}.

As noted in the Statement of Facts, James Tywan Gadsden testified about spending

portions of the day with Appellant, including when he killed Kandee. Tywan first described riding in Yolanda's car with Appellant during the morning of February 16th. Back in Branchville, he noted that Appellant took a beer out of the paper bag before putting the gun in it. Tywan stated that Appellant put the gun in a trash barrel at Koger's house and left, while Tywan sat down drinking. Appellant returned at which point the previously-described argument over the gun happened. {R. 3984-90; 4031-32}.

Tywan testified that after the gun dispute was resolved, Appellant left and Tywan did not see him until 7:00 or 7:30 p.m. Tywan stated that *he* had been drinking since 1:00 p.m., that he was drinking beer and sharing a fifth of gin with "everybody", and that he was "feeling in good shape" when Appellant picked him up. However, again, Tywan testified Appellant was NOT at Koger's during the six and a half hours or so during which Tywan was drinking. {R. 3989-94; 4031-32}.

Tywan of course then described Appellant's murder of Kandee and their return to town in her car. He specifically noted he was not drinking while riding with Appellant and Kandee. {R. 4034}.

According to Tywan, after they returned Appellant stated he was going to get some beer in Yolanda's car, and that Tywan went in and bought the beer at the EZ shop. Tywan stated that they then went to Fred's house before returning to the projects. Tywan went back under the tree at Koger's – he stated Appellant left at some point with Hiram in Yolanda's car. {R. 4014-17}.

Tywan stated that later that night going to the Allen Murray Club with Appellant, Darrien, and Hiram in Kandee's car. According to Tywan, he went inside the club, but

Appellant stayed outside the entire time with Hiram. They left in Kandee's car about 2:00 a.m., and Tywan testified he laid down in the back seat because he had been drinking all day, and was "near about" drunk. {R. 4018-22}.

Hiram Johnson testified seeing Appellant at Koger's in the afternoon during the dispute over the gun, but stated he left and did not see Appellant again until that night when they went to buy gloves at the EZ store. Later, Hiram went with Appellant to the Allen Murray club, and noted they just hung around the parking lot. {R. 4058-67}. On cross, Hiram stated that some of the men were drinking when he was at Koger's house earlier that afternoon, but Hiram himself was not. {R. 4076-78}.

Travis Felder described drinking some beer at "Fred's" house after he got off work late Friday afternoon. He testified Appellant stopped by and asked him if he was going to the club before leaving. Felder went to the "Get it Get it" club, and described doing some beer drinking before going to the Allen Murray Club, where he saw Appellant in the parking lot. Felder then related how Appellant came and asked him for a ride, and how Appellant lit Kandee's car on fire. {R. 4087-92}.

Carolyn Brown also stated she saw Appellant standing outside of the Allen Murray club before she left at 2:30 to 3:00 a.m. She described Appellant sticking his head in the door and asking Travis Felder for a ride. {R. 4042-45}.

During the sentencing phase, the defense called forensic social worker Jeffrey Youngman. In describing Appellant's general social history, Youngman stated that Appellant's mother and father drank, and that Appellant started experimenting with alcohol and "stealing sips" in the 5th grade. {R. 4797}. Later, Youngman noted that Appellant's

decisionmaking structure was weakened by Appellant's mother selling drugs, Appellant's "alcohol abuse", and the fact he was selling drugs. {R. 4807}. On cross, Youngman noted that Appellant's selling of drugs affected his decision making process with regard to Kandee's murder inasmuch as he had an image to protect. Youngman did say he found the existence of substance abuse in Appellant's life. {R. 4811; 4824}.

The issue of charging mitigators based on voluntary intoxication was never raised to or ruled upon by the trial court.

B. General Rules

When fashioning a capital sentencing charge, the trial court has a duty to review all statutory instructions and instruct the jury on any circumstances which may be supported by the evidence, and not merely on those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721 (2000). In making this determination, the trial court is concerned with only the existence of evidence at not its weight. Id.

Evidence of voluntary intoxication is a proper matter for consideration by the jury in mitigation of punishment. State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986). When there is evidence that the defendant was intoxicated at the time of the crime, the trial court should instruct the jurors on three statutory mitigating factors: S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000). Pierce, 289 S.C. 430, 346 S.E.2d 707. These mitigators are:

(2) The murder was committed while the defendant was under the influence of mental or emotional disturbance;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired;

(7) The age or mentality of the defendant at the time of the crime.

If the trial court gives a specific charge on a nonstatutory mitigator of voluntary intoxication, it is not reversible error to fail to charge the three statutory mitigators. State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (1988).

C. The issue is not preserved.

As noted before, a trial court has an independent duty to review the evidence at trial and charge any and all mitigators warranted by that admitted before the jury. Hughey, *supra*. However, this general statement does not abdicate the requirement that the defense must contemporaneously raise the issue and give the trial court a fair chance to rule upon it in order to preserve the issue for appeal – as this Court abolished *in favorem vitae* review for capital cases in 1991. See State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). Indeed, Hughey cites two pre-Torrence death penalty cases in support for the proposition that a trial court has an independent duty to charge mitigators regardless of a request by the defendant – State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990) and State v. Bellamy, 392 S.C. 103, 359 S.E.2d 63 (1987). Caldwell specifically noted it was applying *in favorem vitae* review to the trial judge's failure to charge a mitigator, because no specific request was made at trial for the mitigator at issue on appeal in that case. 300 S.C. at 506, 388 S.E.2d at 823.

This case is of course post-Torrence, and there is no amorphous “statutory mitigator” exception to the contemporaneous objection rule that has somehow been the only thing to survive abolition of *in favorem vitae*. Thus, Appellant was required to raise the issue below in order to assert it on appeal. See State v. Humphries, 325 S.C. 28, 479

S.E.2d (1997) (where judge gave defense opportunity to request mitigators, and it did not, issue was not preserved for appeal).

And it is clear the present issue is not preserved. In this case, the issue of charging mitigators based on voluntary intoxication was **never** raised whatsoever at any time or in any fashion by the defense. Voluntary intoxication during commission of the crime simply was never discussed at the sentencing phase, even tangentially. While the defense halfheartedly requested a charge on mitigator (2) – mental or emotional disturbance – it virtually conceded that the record was devoid of any evidence to support such a charge. Apparently, this was because the defense as a tactical matter did not want to raise mental health issues as they would “place [Appellant] in greater jeopardy” based on “certain issues that were part of the preliminary matters” – presumably referring to the fact that the State could point out Appellant’s statement to the Hall Institute during his evaluation that Kandee’s vagina was fondled after her death. {R. 350-51; 960-64; 1107; 1244}.² The judge then expressly found no evidence in the record of mental or emotional disturbance or impaired capacity, but asked the defense to point to any the court may have missed. The defense attorney responded by simply noting he wanted his client to personally hear the judge reject the mitigator. {R. 4937-40}. Moreover, the defense also did not object on this issue at the end of the judge’s sentencing phase charge. {R. 5046-49}.

Therefore, Appellant’s present issue was not raised below and is not preserved for

² Appellant made similar claims to Orangeburg County Sheriff in part of a particular statement that was ultimately excluded by the trial court. {R. 350-51; 374-77; 418-19; 1353-54}. Thus, having won that battle, the defense obviously did not want to lose its benefit by opening the door to the same information for use by the State. Indeed, the defense had a number of mental health experts on its witness list for the sentencing phase, but did not call any of them other than a social worker. {R. 4576-79}.

appeal. See State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998) (to preserve for appeal a request for a jury instruction, the party must object before the jury retires); Rule 20, SCRCrimP (requests for instructions must be submitted at the close of evidence, and parties must object to instruction issues before the jury retires; failure to do so constitutes a waiver).

D. Since there was absolutely no evidence that Appellant was actually intoxicated at the time of the crimes, there was no reversible error.

Even if a request was made, there was no evidence in the record of intoxication to justify charging the three mentality mitigators. In his brief, Appellant essentially tries to create sufficient evidence from two sources – testimony that some other folks were drinking the day Kandee was murdered, combined with general mitigation testimony that appellant and his family have a *history* of substance abuse or alcohol use.

However, such evidence of is patently insufficient to justify the charge under this Court's precedent. In State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987), the defendant pointed to evidence that his confession stated he drank alcohol on the night of the murder, as well as that he drank beer at the convenience store where the victim was abducted. The Court held that such evidence did not require charging of the three mitigators, as such evidence was NOT evidence that the defendant was *actually intoxicated* at the time the crime was committed. Similarly, in State v. Humphries, 325 S.C. 28, 479 S.E.2d 52 (1997), the Court found insufficient evidence to justify the diminished capacity mitigator where the only evidence was the defendant's statement that he and his accomplice were drinking beer the night before the early morning robbery.

In contrast, this Court has required the instructions where there was evidence either

generally that the usage was extremely heavy or specifically that the defendant was intoxicated. See State v. Young (evidence that defendant and his companions were drinking heavily on the night of the murder); State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986) (defendant was extremely intoxicated, smoking marijuana, and injecting drugs during the crimes).

Here, not one person testified Appellant was intoxicated at the time of the crime or any other time. Indeed, no one even specifically testified that Appellant drank as much as one beer. While Appellant relies much on the fact that Tywan testified *he* was drinking all day at Koger's house – and “near about” drunk by the time he went with Appellant to the Allen Murray club a few hours *after* the murder, at no time did Tywan actually describe Appellant actually drinking anything, much less acting or behaving in an intoxicated manner. The most Tywan stated was that Appellant had a beer in a bag at some point early in the afternoon, and that Appellant went to get some unspecified quantity of beer at the EZ shop *after* he had killed Kande. {R. 3985; 4016}.

Further, Tywan stated that he was not even around Appellant during most of the afternoon – as following the spat over Appellant's gun, Appellant left, and Tywan did not see him again until 7:00 or 7:30 p.m. {R. 3990-91}. This is confirmed by the testimony of Yolanda, Katrina, and Eddie Waters, who described the event that afternoon where Appellant threatened Kande from the back seat of Yolanda's car as they rode to the pharmacy. Neither Yolanda, Katrina, or Eddie described Appellant doing any drinking during this time.

Moreover, while Appellant bought some beer and later went to the Allen Murray club

after the murder had been committed, by all accounts he remained outside in the parking lot the entire time – and no one described him as either drinking or intoxicated. Aside from the fact that this was after the crime was committed, and thus hardly relevant to the mitigator anyway, there is nothing to indicate either heavy consumption or intoxicated behavior or characteristics. Similarly, Travis Felder never described any intoxicated behavior or drinking by Appellant when they went to fire Kandee's car.

Since there was no evidence that Appellant was engaging in heavy consumption or was actually intoxicated at the time of the murder, there was no reversible error even though the mitigators were not charged.

II. THERE WAS NO REVERSIBLE ERROR FROM THE SOLICITOR'S BRIEF AND LIMITED QUESTIONING AS TO RECREATION AVAILABLE IN PRISON, WHERE THE ISSUE IS NOT PRESERVED. IN ANY EVENT, THE QUESTIONING WAS APPROPRIATE RESPONSE TO DEFENSE EVIDENCE ABOUT THE HARSHNESS OF LIFE IN PRISON AND EMPLOYMENT REQUIREMENTS THEREIN, AS WELL AS INDEPENDENTLY RELEVANT AS SPECIFICS TO CHALLENGE THE DEFENSE EXPERT'S GENERAL ADAPTABILITY OPINION AND TO PLACE PERMISSIBLE RETRIBUTIVE CONCEPTS BEFORE THE JURY.

Appellant next contends the trial court erred in allowing the solicitor to briefly question defense prison adaptability expert James Aiken on educational and recreational activities available to a prisoner in general population. He asserts that this Court has repeatedly held in older cases that conditions of confinement are irrelevant to the jury's determination, and further argues that because conditions of confinement are beyond his control, he had no opportunity to explain or deny this information. However, the issue is not preserved as it was never raised to the trial court. In any event, the defense opened the door to such questioning by eliciting testimony about the harshness of life in prison without parole, as well as evidence of employment opportunities in prison. Moreover, limited questioning about conditions of confinement is independently relevant as permissible specifics the State needs to be able to explore in order to effectively cross-examine the defense expert's general opinion on adaptability. Finally, given that the United States Supreme Court and the state legislature have made future events relevant in a sentencing proceeding, and capital defendants fundamentally argue life without parole not in response to future dangerousness but solely as the proper retribution, it is only fair that the State be allowed limited information on conditions of confinement to aid the jury's determination of retributive concepts as to the appropriate punishment for the defendant's crimes.

A. Events at trial

As noted before, during its sentencing phase case the State only presented the two victims of Appellant's prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as to any of Appellant's misbehavior in or lack of adaptability to prison.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Appellant spent his pre-trial confinement. This teacher stated that Appellant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. {R. 4761-65}. On redirect, Appellant elicited that there are limited educational opportunities available for inmates, and Appellant made him self available for any class. {R. 4767}.

Appellant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Appellant would *never* leave prison until he was dead. According to Aiken, Appellant's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted that SCDC could manage and incapacitate any inmate with its security measures. {R. 4838-4845}.

On cross, Aiken testified extensively without objection relevant to this issue on the various security levels of custody an inmate can achieve. Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" – without objection from the defense. {R. 4854-4862}.

On redirect, *the defense* elicited that Appellant could not work outside the prison,

that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches", and that he would be around a "predator, dangerous violent inmate population". *The defense* then elicited the dimensions of a supermax cell. *The defense* then asked Aiken what productive endeavors were available for Appellant in prison, to which Aiken replied that Appellant could "pay back society" and "do something for himself" by working in such areas as food service, maintenance, or painting. *The defense* asked Aiken if Appellant was going to be "molly-coddled", and elicited that Appellant could get involved with the Scared Straight program. {R. 4864-68}.

On re-cross, the prosecutor asked about escapes, to which the defense objected. Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. During the discussion, the prosecutor asked if he could explore "certain conditions of the general population, the work conditions he's already gotten into, that area", since the defense had established that Appellant was not going to "kiddy camp" and would have work available. The trial court agreed, to which the defense only stated, "We're on recross, Judge". The judge replied that work situations was an issue certainly before the jury "at this point". {R. 4869-76}.

Following a curative charge by the judge as to the escape question, the prosecutor elicited from Aiken that (1) Appellant would not be in supermax, (2) he would be able to work for a modest income of a few dollars per day, (3) he would have a daily routine that included eating times, work times, and recess, (4) he would be able to engage in Bible study, education, anger management, and "other things". While Aiken again noted Appellant would be around very dangerous people, he stated Appellant could have access

to libraries, television, football, and softball. There was no defense objection to any of this testimony. {R. 4877-81}.

Appellant next called jail guard Sharon Branch, who stated that while Appellant displayed some "attitude" and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Appellant was allowed "one hour of rec per day", but that sometimes the guards extended that. {R. 4882-88}.

Finally, jail guard Enrique Badillo testified that Appellant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

B. The issue is not preserved.

On appeal, Appellant argues that the solicitor's questioning about movies, television, and books was irrelevant under this Court's decision in State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), and violative of the constitutional due process mandate in Gardner v. Florida, 430 U.S. 349 (1977) that a death sentence cannot be based "on information the defendant had no opportunity to deny or explain".

However, the present issue is not preserved as it was never raised to the trial court. While Plath was discussed, the *solicitor* only mentioned Plath, and only in the context of *supporting* his questioning of Aiken on inmate escapes. After the judge ruled the escape question was inadmissible, the solicitor requested to go into "certain conditions of the general population, the work conditions [Appellant has] already gotten into". The defense never once made any argument or objection on this "conditions of confinement" issue other than to say "we're on recross, Judge". {R. 4873-74}. Moreover, the defense never made

one objection when the answers were actually elicited before the jury.

Of course, a party cannot argue one ground below and another on appeal, and any argument, even constitutional, must be specified to the trial court in order to be preserved for appeal. See, e.g. State v. Byram, 326 S.C. 107, 485 S.E.2d 360 (1997) (party cannot argue one ground at trial and then another on appeal); State v. Ivey, 325 S.C. 137, 481 S.E.2d 125 (1997) (failure to specify grounds waives issue on appeal); State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (8th Amendment claim that parole eligibility should have been charged was not preserved because that constitutional basis was not asserted at trial); Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (issue must be raised to and ruled upon by trial judge to be preserved for appeal).

Here, the present grounds for relief on appeal were not specified to the trial court. Indeed, the only argument made was “we’re on recross, Judge”, which at best can only be construed as a procedural objection that the solicitor was impermissibly attempting to introduce new matter on a re-cross examination. It certainly is not an objection or argument that such questioning was not relevant under Plath, or was a constitutional due process violation under Gardner. As such, the issue is not preserved.

Moreover, while the solicitor requested to go into “certain conditions of the general population, the work conditions he’s already gotten into, that area” {R. 4874}, he ultimately asked questions about recreation outside the subject of in-prison employment. There was no contemporaneous objection. As such, any contention with regard to subject matter outside of work is not preserved.

C. State v. Plath in view of modern developments in capital sentencing phase law on future adaptability to prison and life without parole.

As will be seen, the solicitor's limited questioning was permissible under the precedent of this Court. Indeed, the case Appellant refers to as most supporting his position in fact most supports admission of the challenged questioning due to Appellant's opening of the door – State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984). However, changes in the law since Plath make the questioning no longer prohibited under the general principles expressed within it.

Plath first found no error in the State's examination of defense expert witnesses on cases in which they testified but the jury still found the death penalty. The Court noted that the experts were there to testify about the declining acceptance of and international trends away from capital punishment, which it ruled was entirely impermissible. However, it concluded that since the trial court allowed the defense testimony, the State was permitted to respond with the challenged cross-examination. 281 S.C. 1, 313 S.E.2d 619.

Next, Plath addressed state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" – which this Court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment". On cross, the State asked about another inmate's escape, which the Court ultimately held was permissible:

Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626.

After also rejecting a claim that the State was improperly was allowed to cross a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the Court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The Court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded:

In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Plath, 281 S.C. at 14-15, 313 S.E.2d at 627.

The Plath Court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not – a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina. Only in the context of justifying this distinction, Plath stated:

A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

Plath, 281 S.C. at 15, 313 S.E.2d at 627.

Despite these admonitions, the Plath Court returned to how the State's challenged

questioning was only proper response to what that Court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added). See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Plath thus addressed a number of issues arguably relevant to the case at bar – but Plath also was issued prior to the United States Supreme Court's decisions in Skipper v. South Carolina, 476 U.S. 1 (1986), which essentially held that due process required admission of prison adaptability evidence, and the line of cases following Simmons v. South Carolina, 512 U.S. 154 (1994), which has ultimately led to the point where every capital jury is now informed a life sentence is without the possibility of parole. Indeed, in 2002, the Legislature provided that upon request of a party any capital jury should be informed a life sentence is without the possibility of parole, which this Court has stated should be charged in every case regardless of request. State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001) and Kelly v. South Carolina, 534 U.S. 246 (2002)).

With these developments in mind, it is clear that not only was the State's

questioning proper response to defense testimony on the harshness of life in prison under Plath itself, but it is now also independently relevant and admissible to explore the adaptability case, as well as to rebut it with retributive themes, under the present state of the law.

D. The defense opened the door to the solicitor's limited questioning about conditions of confinement by first eliciting testimony about the harshness of life in prison as well as presenting evidence about employment opportunities in jail.

As an initial matter, the defense opened the door to the solicitor's questioning – consistent with Plath – by eliciting testimony about the harshness of life in prison as well as bringing out employment opportunities available to Appellant.

During James Aiken's direct testimony, he stated Appellant would be "incapacitated" and "lock[ed] up" for the rest of his life, with guards "that know how to use weapons", and behind fences, gun towers, concrete, and bars. {R. 4842; 4845}. After the solicitor's cross, in which he did not specifically ask about conditions of confinement other than various security classifications, the defense elicited that the guards could use "lethal force", and Appellant could be further prosecuted for any violations in prison. At this point, the defense asked whether a life sentence would be "kiddy camp", whether Appellant would get "picnic lunches", that he would live the rest of his days amidst a predatory and dangerous community of inmates, and that he would not be "molly-coddled" by the prison authorities. {R. 4864-66}.

Given this defense-elicited evidence of the harshness of prison, in which Appellant not only starkly discussed the severe security regime as well as very pointedly used terms as "kiddy camp", "picnic lunches", and "molly-coddled", it was only appropriate that the

State be entitled to respond by showing that Appellant would have opportunities for recreation if sentenced to life – that “life imprisonment was not the total abyss which [the defendant] portrayed it to be”. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. As this Court has stated, “[b]oth the accused and the State are entitled to a fair trial.” State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982). It is simply not consistent with a level and fair adversary system for the defense to be able to freely display all the negative consequences or aspects of a lifetime behind bars, without the State being able to respond in a limited fashion by eliciting some of the small comforts or enjoyments even a LWOP defendant will experience – such as TV, reading, or even a point not brought up by the solicitor in this case – visitation by family or friends.

Moreover, the defense elicited prior to the solicitor’s examination from both Baughman as well as Aiken that employment and educational opportunities available to a defendant behind bars. Like recreation, these opportunities undoubtedly can be a source of distraction from the rigors of prison life as well as a source of personal fulfillment; thus, it was only fair – and indeed certainly not prejudicial given the work evidence already elicited – that the State be allowed to also bring out in a limited fashion some other recreational activities available to inmates aside from work and education.³ Further, Aiken also very pointedly stated on cross that every inmate would be required to work, and that an inmate would be put in “supermax” if he refused. This was followed up on by the

³ See generally State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim’s family could only visit him at the grave after defendant’s sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).....

defense in redirect. {Tr.4862-63; 4866-67}. It was only appropriate that the State point out an inmate would have time for recreation, too – not that he would be breaking rocks all day every day “at hard labor”.

Finally, on cross when asked what motivation a life without parole inmate had to comply with the rules, Aiken stated that SCDC’s only business was incapacitation of life without parole inmates, because they are not preparing such an inmate for release. {R. 4861}. It is only fair for the State to be able to rebut the obvious inferences from these statements by showing that SCDC does not merely incapacitate – it does allow life without parole inmates recreation and education.

There was no error.

E. Limited questioning on conditions of confinement is warranted for the solicitor to effectively explore details and specifics behind the general opinion of adaptability offered by the defense expert.

As noted before, at the time of Plath, this Court excluded evidence of the defendant’s future adaptability to prison. However, after Skipper, that issue is central to virtually every modern capital sentencing proceeding – especially in this case, where Appellant specifically called a former senior corrections official to testify Appellant could be safely and easily maintained by the prison system.

However, the defense should not be entitled to simply present an expert to generally testify to a defendant’s purported adaptability in our prison system without specific inquiry into the details behind such an opinion. Along these lines, relevant to future adaptability are limited questions as to with whom the defendant will be interacting, and what exactly he will be doing during the course of his incarceration. Consistent with Plath – inasmuch

as the Court held inquiry into another's escape attempt was "proper as a test of the information upon which the witness based his opinion" – the State should be entitled to explore the expert's opinion of adaptability by asking in a limited fashion about the various conditions the inmate will experience. Plath, 281 S.C. at 13, 313 S.E.2d at 626. See also State v. Plath 277 S.C. 126, 284 S.E.2d 221 (1981) (Plath I) (proper for solicitor to "inquire into the source of information upon which [the expert's opinion against the death penalty] was based").

Without the ability to explore the specific aspects of an inmate's future experiences within prison, cross-examination to challenge the expert's opinion about adaptability would be essentially meaningless. See generally Rule 705, SCORE (permitting the disclosure and exploration during cross-examination of the facts and data relied upon by an expert in reaching his ultimate conclusion). Indeed, the whole question of a determination of adaptability to prison specifically involves what exactly an inmate will be doing during his incarceration, and with whom he will be doing it with. A general opinion of adaptability unchallengeable by those specifics is not consistent with the level playing field contemplated by our adversary system.

Such questioning does not need to include "how often [an] inmate will take a shower" – and of course the solicitor here never approached such irrelevant detail. But once the defendant asserts he will easily adapt to the realities of life in prison, the state should be entitled to explore exactly what those realities are – whether they be security, educational, vocational, or recreational.

F. Limited information on the conditions of confinement in a life without parole sentence is necessarily and inevitably relevant to the jury's consideration of retributive concepts in its sentencing determination.

Appellant of course relies heavily on Plath's express preference for a simple "either/or" choice between life and death, independent of any consideration of "time, place, manner, and conditions of execution or incarceration". Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, as noted before, Plath also noted it believed evidence of future adaptability should be excluded as part of the simple "either/or" choice, but that restriction was abolished by the United States Supreme Court in Skipper. Further, while the State and this Court used the simple "either/or" argument to justify plain and ordinary meaning charges in the Simmons line of cases culminating with Kelly v. South Carolina, 534 U.S. 246 (2002), the United States Supreme Court nullified that restriction as well. Finally, by mandating an instruction, the legislature has made the actual length of sentence a relevant consideration in every case regardless of considerations of future dangerousness. See State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001)).

Thus, the simple "either/or" choice contemplated by Plath and its language has been entirely shattered, as juries already now consider aspects of the defendant's future life after trial with issues of adaptability in prison and the actual indeterminate length of sentence.⁴

⁴ Given that during litigation of the Simmons/Kelly lines of cases before the United States Supreme Court the State relied on this Court's express preference for a simple "either/or" choice in which the jury is not to be concerned with what happens after sentence, it is interesting that the defense bar apparently wanted to abandon Plath when it benefitted them in the life without parole litigation, but invoke and revive the *very same passage and principle* today when it suits them.

Moreover, it is a fallacy to think that capital defendants argue the actual indeterminate length of life without parole sentence to the jury only in the context of a Simmons-style rebuttal to prosecution claims of future dangerousness. Like this case, *far more often* the defense simply argues that the “without parole” portion of a life sentence makes it sufficiently severe enough punishment to be appropriate retribution for the crimes, without the need to impose death. See {R. 4982} (defense derisively refers to prosecutor’s argument as “reward-a-prison”); {R. 4991} (defense states its “easy to try to paint prison as a reward”, and argues: “The line forms back there if anybody wants to spend the rest of their life behind bars.”); {R. 4991} (defense argues it is “wrong” and an “injustice” if the jury thinks a life sentence is a “reward”); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Appellant, and argues “Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That’s a life sentence without the possibility of parole.”); {R. 4997-98} (defense argues that jury should give Appellant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and prison is appropriate punishment for Appellant because it is a death sentence too).

Given that this is really how life without parole is used by the defense, how could it possibly be fair that the State then not be allowed to rebut this argument with accurate but limited information about the positive things Appellant will be able to enjoy in general population? Retribution is of course one of the two primary justifications for the death penalty, see generally Gregg v. Georgia, 428 U.S. 153, 183 (1976), and the State should

not be precluded from offering rebuttal evidence *directly* relevant to that most important and legitimate consideration.

Moreover, this Court has approved as relevant victim impact evidence argument that the victim's family could only see him at the grave, made after the defendant's sister testified she would visit him in prison at Christmas. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991). While this ruling was based in application of the approval of victim impact evidence in Payne v. Tennessee, 501 U.S. 808 (1991), there is no question that such permissible argument at least implicitly also speaks to the insufficient retribution of a life sentence.

The whole point of Simmons and its progeny was that the jury be given accurate information to make its choice between life and death. Given the predominant relevance of retributive considerations to this determination, the jury should also be given limited and reasonable information towards the issue that is necessarily part of every jury's capital sentencing determination – whether a life sentence is in fact sufficient retribution for the grave crimes that the jury has already determined the defendant committed. If we are no longer to indulge in the fiction that juries do not consider the actual length of confinement when assessing a life sentence, we should also no longer tolerate the fiction that juries do not expressly consider the retributive sufficiency of a life sentence in deciding whether or not it is appropriate punishment. Indeed, the defense expressly asks them to – but Appellant wants to be able to do so without fair and equal time on the issue for the State.

Along these lines, and especially when a defendant calls a witness like Aiken to testify to the severe incapacitation of a life sentence in the South Carolina Department of Corrections, the State should be able to simply point out in limited evidence and argument

that while life imprisonment may be bleak, a defendant will still get to enjoy recreation, employment, education, and visitation. It is nothing but the truth, and we all know juries think about this anyway.⁵

⁵ Nor would there be any due process problem under Gardner v. Florida, 430 U.S. 349 (1977), that a death sentence cannot be based “on information the defendant had no opportunity to deny or explain”. Within reason, Petitioner could explain anything about prisons he wanted – indeed, it was *his* expert on prison management that first broached the subjects, and his expert who kept painting life imprisonment harshly. Neither would there be an issue under State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), inasmuch as Appellant has no control over the circumstances of his incarceration. The system is the system, and now that the United States Supreme Court and the state legislature have made future events pertinent in a sentencing proceeding, the system is relevant as to what is appropriate retribution for the crimes. Appellant simply cannot be allowed to make his arguments about future events without allowing limited fair response by the State.

III. THE TRIAL COURT'S CURATIVE INSTRUCTION WAS MORE THAN SUFFICIENT TO CURE ANY PREJUDICE FROM THE SOLICITOR'S ONE UNANSWERED QUESTION ABOUT ESCAPE, ESPECIALLY WHERE THE QUESTION WAS PROPER ANYWAY GIVEN THAT ONE OF THE DEFENSE EXPERT'S MAIN POINTS WAS THAT SCDC COULD SAFELY AND EASILY INCAPACITATE APPELLANT FOR THE REST OF HIS LIFE.

Appellant next contends that the trial court erred in refusing to grant a mistrial when the solicitor asked defense corrections expert about escape from prison. He asserts that escape is a speculative matter beyond his control, and that there was no evidence linking him personally to any escape. He further contends the trial court's curative instruction was insufficient to cure any prejudice. However, not only was the curative instruction sufficient, but there can be no reversible error as the questioning on escape was admissible and proper anyway.

A. Events at trial

Much of James Aiken's testimony has already been described in the preceding section. He testified that as a former senior corrections official, he had classified "thousands" of inmates, placing them "in the right level of security and the right level of management". {R. 4835}. Aiken continued that the nature of Appellant's offense gave him no pause in classification, because he has dealt with people who have committed heinous crimes for 30 years, and he puts "a very high level of priority on that person's community behavior in relationship to protection of the public". {R. 4839-40}.

Aiken then stated without equivocation that Appellant would **never** leave prison if given life without parole. He then testified that Appellant could be easily and adequately maintained and incapacitated by SCDC for the rest of his life, as SCDC has "fences", "gun towers", "people who know how to use weapons". According to Aiken, SCDC knows "how

to lock people up and keep them there for extended periods of time”. {R. 4842}. Aiken stated he “no reservations whatsoever” in saying that Appellant would “adapt to future prison”, even knowing his sentence was without parole. {R. 4844}.

Finally, Aiken very strongly and without reservation concluded:

[Appellant] would be kept behind bars, behind fences, behind bars, behind concrete, and he would be adequately managed in a security setting for the remainder of his life because of his behavior in the community. And that the system can adequately manage him. And that I have classified thousands on inmates in this type of situation where they have inflicted violence upon people, the have violated the laws of this jurisdiction.

{R. 4845}.

On cross, Aiken asserted no matter what custody assignment an inmate works into he will still be watched by gun towers, that lethal force could be used against the inmate, that an inmate “can’t beat the system”, and that the system could manage any type off conduct the individual demonstrates. {R. 4857-58; 4863-64}.

On redirect, Aiken stated that a life without parole inmate could not work outside the prison, and is subject to lethal force and prosecution for any misbehavior. {R. 4864-66}.

On recross, Aiken reasserted that Appellant would never get out prison. The prosecutor then asked how many inmates escaped during Aiken’s tenure with SCDC, at which point the defense objected, stating that the jury has been told all he will receive is life without parole.

After the jury was excused, the prosecutor argued that since Aiken had testified Appellant would never get out of prison, cross-examination on escape was permissible under State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) – which allowed questioning on another inmate’s escape attempt was relevant to test the credibility of a social scientist who

testified about conditions of life imprisonment. The solicitor noted that the door was opened when the defense mentioned "kiddy camp" and "supermax". {R. 4870-71}.

The trial court reviewed the Plath case, and concluded – wrongly – that the inquiry on escape was allowed only because Plath himself was an escapee when he committed the offenses in that case.⁶ {R. 4870-72}.

The defense then argued that a curative instruction would only reemphasize the issue to the jury, and that inquiry into the possibility of escape would violate the United States Supreme Court's and this Court's ruling that a jury should only consider life without parole as meaning exactly what it says. The prosecution again responded that the Aiken repeatedly referred to the security measures of SCDC and gave the impression no one escapes – when in fact people escape "on a halfway frequent basis" from every prison in the state. The trial court ruled the questioning on escape was simply not going to be allowed. {R. 4872-74}.

The defense then moved for a mistrial, arguing that a curative instruction was insufficient to remove the supposed taint. The court proposed a curative instruction, and offered to let the defense add anything to it, which it declined. The jury then returned, to which the trial court gave the following instruction:

⁶ The challenged questioning in Plath was when the solicitor there asked a professor, who had testified about the superiority of life imprisonment to the death penalty, about "a particular inmate who had escaped while serving a life term". The Court held the question was permissible to test the credibility and sources of information upon which the professor had based his opinion. Plath, 281 S.C. at 12-13; 313 S.E.2d 619 at 626. As the first Plath decision makes clear, though, this incident involved one Lewis Bostick, a person entirely unrelated and unconnected with the Plath and Arnold. State v. Plath, 277 S.C. 126, 140, 284 S.E.2d 221, 228-29 (1981) (Plath I).

Ladies and gentlemen, there was a question that was asked before you left and I have ruled that question was not proper and I'm going to ask you to disavow it from your minds for this reason: There are two sentences that you will concern yourselves and we're going to have an opportunity during my charge to talk about them at great length, but for this moment I will tell you, and I think I am reminding you based on the instructions that you have received even preliminarily, but there are two sentences that you will concern yourselves. One, the death penalty, and the other is life imprisonment without the possibility of parole. The Statute says until the death of the defendant. Those would be the two sentences that you will concern yourselves.

{R. 4874-77}.

B. Given that the witness did not even answer the question and the jury knew a lawyer's questions were not evidence, the trial court's sustaining of the objection and immediate and thorough curative instruction was more than enough to prevent any reversible error.

As an initial matter, there was no reversible error as the trial court sustained the defense objection and immediately gave a curative instruction directed right at the issue.

Generally, a trial court's curative instruction is deemed to have cured any error. State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998). An instruction to disregard incompetent evidence is usually deemed to have cured the error unless on the facts of the particular case it is probable that, notwithstanding the instruction, the accused was prejudiced. State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986). Moreover, a mistrial should only be granted when absolutely necessary, and the defendant must show both error and resulting prejudice. State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000).

In applying these rules, this Court has repeatedly found curative instructions sufficient to cure any prejudice from improper admission of evidence or improper argument, including in an analogous situation where the time period for parole eligibility was mentioned in a capital sentencing phase. See State v. Plath, 277 S.C. 126, 140, 284

S.E.2d 221, 228-29 (1981) (Plath I) (finding no prejudicial error where trial court told jury not to consider parole after the twenty year eligibility requirement was mentioned in a codefendant's argument). See also Gill v. State, 346 S.C. 209, 552 S.E.2d 26 (2001) (curative instruction cured any possible prejudice from prosecutor's statement that "there is no defense to this case", where the jury was instructed that the defendant did not have to demonstrate his innocence and the failure to testify could not be considered); Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997) (question regarding post-arrest silence was nullified by curative instruction to disregard the evidence and not consider it for any purpose); State v. Simmons, 352 S.C. 342, 573 S.E.2d 856 (Ct. App. 2002) (curative instruction sufficed where trial court granted directed verdict as to one crime and instructed jury not to consider it any longer).

Here, the curative instruction was more than sufficient. First, the witness *never* answered the question, as the objection came quickly and the issue was resolved against the State. Thus, there was no actual admission of any incompetent evidence. Moreover, the jury was repeatedly informed that what the lawyers said in argument or questioning was not evidence. {R. 3636; 3641}.

Second, the challenged question only mention other inmates in SCDC – it did not in any way refer to Appellant *specifically*. Thus, any negative aspersions as to him were muted, and any possibility of prejudice is remote.

Third, the curative instruction was given immediately after the jury returned – so the temporal connection of the instruction to the question certainly assures it had the desired effect. Cf. State v. Reid, 324 S.C. 74, 79, 476 S.E.2d 695, 696 (1995) (curative instruction

insufficient in part because it was given at the end of the case), overruled on other grounds by State v. Watson, 349 S.C. 372, 563 S.E.2d 336 (2002)

Fourth, the instruction was thoroughly complete and aimed directly at the heart of the matter. It: (1) told the jury the question was improper, (2) told them to remove it from their minds, and (3) the only things they could consider were death and life without parole. {R. 4877}. This was not just some "general remark". See State v. Smith, 290 S.C. 393, 350 S.E.2d 923 (1986) (casual remark to "forget" the evidence was insufficient).

C. Given that life without parole is now an issue in every case, the possibility of escape is independently relevant to explain the realities of such a sentence.

In any event, there can be no reversible error because the trial court erred in ruling that the solicitor's questioning about escape was no proper.

As noted before, the United States Supreme Court, this Court, and the state legislature have opened every capital sentencing proceeding to information that the defendant will never receive the possibility of parole if sentenced to life. State v. Shafer, 352 S.C. 191, 573 S.E.2d 796 (2002) (discussing S.C. Code Ann. § 16-3-20 (Supp. 2001) and Kelly v. South Carolina, 534 U.S. 246 (2002)).

However, the United States Supreme Court has also noted that a life without parole instruction may be of "uncertain materiality, as it may be overcome if a jury concludes the defendant . . . may escape to murder again". Ramdass v. Angelone, 530 U.S. 156, 170 (2000).

These changes in the law have gradually made future events a central focus of a sentencing proceeding – and thus the possibility of escape is now independently relevant

as at least a subject of argument in any case. Moreover, there need not be any "nexus" of prior escape attempts by the particular defendant before the issue is broached – since the future length of confinement is now a relevant and mandatory issue in every capital case, then the very real possibilities that might happen during those future years are also relevant. Of course we do not know exactly what any particular defendant will do during that time – but that is no reason to hamstring the State in merely pointing out the **truth** – that life in prison is not an absolute be-all-to-end-all, and that people can and do escape. It is simply to explain to the jury the realities of what they are being charged. The whole point of the Simmons/Kelly case law is no longer to indulge fictions before the jury, and there is no reason to indulge ones where the truth would benefit the State or rebut defense points, simply because that is what it happens to do. See Gregg v. Georgia, 428 U.S. 153, 204 (1976) ("It is desirable for the jury have as much information as possible when it makes its sentencing determination.").⁷

D. Even if the possibility of escape is not independently relevant in every case, the defense certainly opened the door here during the adaptability case by extensive testimony from its expert as to the incapacitive capabilities of SCDC.

The defense's adaptability case more than opened the door to questioning about past escapes from SCDC. As noted before, defense corrections expert Aiken confidently

⁷ In his brief, Appellant contends that this Court mandated that the possibility of escape is only admissible when it has a direct nexus to the defendant's conduct in State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982). This is incorrect. Woomer merely held that evidence of the defendant's prior escape was admissible to rebut defense evidence of good conduct in prison. Nothing was said about a required nexus, and, of course in modern practice actual escape evidence would be flatly admissible in the prosecution's case in chief without question not as rebuttal evidence but evidence of the defendant's character and characteristics.

stated *without any qualification whatsoever* that SCDC could completely incapacitate and secure Appellant for the rest of his life. No problem at all – he repeatedly referred to fences, bars, concrete, gun towers, lethal force, and guards. Aiken stated this conclusion was expressly based on his experience doing security classifications of “thousands” of prior inmates, and his long prior service with various prison systems, which of course also involved inmates other than Appellant. {R. 4833-36}.

It seems only fair that the State could quite reasonably challenge this confident and unqualified opinion by asking how many of Mr. Aiken’s inmates escaped – or also how many have escaped from the particular system in which he already placed such unequivocal confidence before the jury. Moreover, since Mr. Aiken based his assessment on his past experiences with other inmates, the State can legitimately ask about these other inmates.

Like in the preceding ground, the State is entitled to ask the expert about specific facts and data that might challenge or undermine his general conclusion. Otherwise, cross-examination is meaningless. Appellant through his expert brought up prison security, and the *main point* of Aiken’s testimony was to assure the jury that Appellant would in fact be safely contained until he died of natural causes. It is only fair that the State be able to respond by pointing out the truth – that despite best efforts, inmates can and do escape. This is entirely consistent with this Court’s prior precedent. See State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (permissible to ask expert witness, who testified regarding conditions of life imprisonment, about a prior escape attempt by another inmate as a test of the sufficiency of the information upon which the witness based his opinion, as well as

his credibility as a social scientist).

Appellant wants his life without parole charge, but does not want to allow the State to go into things that the United States Supreme Court has said are directly relevant to the materiality of such a charge. Appellant wants to present evidence on SCDC's incapacitative capabilities, but does not want the State to be able to simply point out that these capabilities are not absolute and foolproof. For each of these points, one is part and parcel of the other.

The State is entitled to a level playing field and equal time, too.

IV. THIS COURT HAS ALREADY RULED THREE TIMES THAT *RING v. ARIZONA* DOES NOT DEPRIVE A TRIAL COURT OF SUBJECT MATTER JURISDICTION EVEN THOUGH THE AGGRAVATING FACTORS WERE NOT ALLEGED WITHIN THE INDICTMENT.

Appellant next contends the trial court lacked subject matter jurisdiction to sentence him to death because the murder indictment did not also allege aggravating circumstances. He asserts that following the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), aggravating factors are now "elements" of the crime of capital murder.

This Court has already rejected this contention or similar ones in three recent cases, and the State would incorporate those its results and its arguments therein here. State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005); State v. Downs, 361 S.C. 141, 604 S.E.2d 377 (2004); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004).

Appellant's aggravators were found beyond a reasonable doubt by his jury. There is no state subject matter jurisdiction problem from something that would not even be a federal constitutional problem under Ring anyway.

V. THERE WAS NO REVERSIBLE ERROR IN ADMISSION OF APPELLANT'S PANTS AND THE VICTIM'S WATCH FOUND WITHIN THEM AT THE TIME OF HIS ARREST, WHERE THE ISSUE IS NOT PRESERVED, THE PANTS WERE SEARCHED INCIDENT TO A LAWFUL ARREST PURSUANT TO A VALID WARRANT, AND THE SEARCH WAS IN ANY EVENT JUSTIFIED BY CONSENT FROM APPELLANT'S WIFE.

Appellant next contends that the trial court erred in admitting his pants and the victim's watch found within when he was arrested at his wife's trailer on the morning after the murder. He asserts that his wife did not consent for police to enter, that he had an expectation of privacy, and that he was illegally arrested. However, the issue is not preserved inasmuch as the objection was not renewed upon introduction of the evidence. In any event, the pants were searched incident to a lawful arrest based on an outstanding arrest warrant, and in any event the search was justified by the consent of Appellant's wife.

A. Events at trial

Extensive pre-trial hearings were held in this case not only on this issue but also the admissibility of Appellant's statements to police.

It first should be noted that while the town of Branchville where Appellant was arrested is in Orangeburg County, the body was found in Dorchester County. {R. 979; 5076-77}.

At the pre-trial hearings, Dorchester County Sherriff's Deputy Terrence Van Doran testified about accompanying other officers to the trailer of Ms. Dorothy Bowman. He testified he had spoken to the Chief of the Branchville Police and was told there was an outstanding Orangeburg County arrest warrant on Appellant. Van Doran stated that after they found Appellant hiding behind a bed, he was Mirandized and Appellant asked for his pants. Dorothy went into the other room and got the pants, but before she could give them

to Appellant, Van Doren searched them. Inside he found a lady's wrist watch identified at trial as belonging to the victim. **{R. 5076-81; 5085-88; 5177; 5187}**.

Dorchester County officer Alvin Coker similarly testified that after they received information Appellant was with the victim the previous afternoon, they found out from Orangeburg County that there was a warrant on Appellant. He never saw the warrant physically, but Branchville Chief Walters told Coker he was aware of it. **{R. 5124-25}**. Coker also noted they had a signed consent to search form from Dorothy. **{R. 5127}**.

Chief Walters of the Branchville Police testified that he was aware of and had a copy – but not the original – of Appellant's Orangeburg arrest warrant for receiving stolen goods. He stated he went with the other officers to Dorothy's trailer, and knocked on the door. They told Dorothy they had a warrant for Appellant, and she invited them inside. Dorothy said she did not know where Appellant was but the officers could look around. Once they found Appellant, he was told he was under arrest for receiving stolen goods. **{R. 320-23; 325-31}**.

Willie Bamberg of the Orangeburg-Calhoun Regional Detention Center testified that Appellant was booked in that night on a receiving stolen goods warrant. **{R. 665-66}**.

Major Walters of the Orangeburg County Sheriff's Office testified she went to the trailer and talked with Dorothy. She noted she had been told there were charges on the defendant. **{R. 683-85}**.

Appellant testified at the pre-trial hearing, and stated that he was at his wife's trailer at the point of his arrest but did not live there. He claimed he told his wife not to let the police in when they arrived, but they told her they had a *search* warrant to see if Appellant

was in her house. Supposedly the police told him he needed to put something on his lower body, and only brought him a pair of his wife's jogging pants. {R. 729-37}. Appellant admitted being presented the warrant for receiving stolen goods once he reached the Orangeburg County Jail that night. {R. 796-97; 935; 987}.

On cross, Appellant admitted knowing Kandee's watch was in his pocket. He claimed he did not know a warrant was out for him even though he went and hid in a child's bedroom. {R. 910-13}.

Dorothy Bowman also testified. She stated Appellant was not living with her, although some of his clothes were at her house. According to Dorothy, the police came to her door and said "something about JR [Appellant] and a warrant". They asked if they could come in and look for him, and she agreed. After they found Appellant, one of the officers asked her for Appellant's clothes. She went and got them, including the black pants. Dorothy stated that after Appellant was taken out she signed the consent to search form. {R. 1039-43}.

On cross, Dorothy again stated that the police requested to come in, and she let them in voluntarily. She was not afraid of Chief Walters at all. She noted police only said they had a warrant for his arrest, and noted police did not have a warrant to search her house. {R. 1050-53; 1056}.

The defense moved to suppress the evidence, arguing (1) Appellant was not informed of the nature of his arrest; (2) there was no proof the Branchville chief had knowledge of an outstanding felony or warrant; (3) even if he did, only having a copy of a warrant is insufficient, and (4) Appellant never received a bail or bond hearing on that

offense, which violates the state statute. Thus, the defense stated that the fruits of the illegal arrest should be suppressed. Appellant also argued that Dorothy did not consent until after the fact of the search, and that she could not consent to search Appellant's pants anyway. Finally, Appellant argued that since the pants were outside of Appellant's wingspan, a warrant was needed. {R. 1255-66; 1271-73}.

The trial court denied the motion to suppress, finding that the arrest was made on a valid warrant, that Appellant had no expectation of privacy in the pants as Appellant asked for them, the wife retrieved them and they were examined incident to arrest. Finally, the court ruled Dorothy consented to a search of the home before the watch and pants were removed. {R. 1275-76}.

When the pants and watch were entered into evidence, there was no objection. {R. 4129-30; 4164}.

B. The issue is not preserved.

In most cases, making a motion *in limine* does not preserve an issue for review unless the objection is renewed upon introduction of the evidence in question. However, if the evidence is admitted immediately after the ruling, there is no need to renew the objection. See, e.g. State v. Forrester, 343 S.C. 637, 541 S.E.2d 837 (2001).

Here, almost three thousand pages of transcript separate the judge's ruling and the introduction of the evidence at trial without objection. {R. 1275-76; 4129-30; 4164}. Since the objection was not renewed, the issue on appeal is not preserved.

C. There can be no possible prejudice with regard admission of the pants.

As Appellant notes, while there was a heavy accelerant on Appellant's pants, it was

not gasoline, and there is a difference. {R. 4297-98; 4301-05}. Thus, there was really nothing that incriminating about the pants themselves (other than the mere fact they were black, and Appellant was described as wearing similar pants the night before). Indeed, the solicitor in argument never mentioned the accelerant on the pants as indicative of anything. {R. 4461; 4476}.

Thus, the only possible issue of consequence deals with admission of the watch found within the pants, not the pants themselves.

D. Appellant was properly arrested pursuant to a valid warrant.

The first point in the analysis is that Appellant was legally arrested pursuant to a valid warrant. Appellant really only argues that the state's witnesses were very "vague" about the warrant, and that they could have taken the time to obtain a murder warrant if they wanted.

However, a true attested copy of the warrant was admitted into evidence, Appellant admitted he was served a copy of the warrant when he was booked in the Orangeburg-Calhoun Regional Detention Center the night of his arrest, and an officer testified about serving the warrant on Appellant at the jail that night. {R. 796-97; 935; 987; 5420-22}. There is no legitimate issue as to whether there was a valid warrant in existence justifying Appellant's arrest.

Second, this Court has already held on two occasions that no challenge can be made to arrest based merely on the fact that the arresting officers were *aware* of an outstanding valid warrant but in fact did not have the original on them when they apprehended the suspect. State v. Holmes, 320 S.C. 259, 464 S.E.2d 334 (1995)

(defendant's clothes admissible where officer was acting pursuant to a valid warrant event though he was not in actual possession of it); State v. Sims, 304 S.C. 409, 405 S.E.2d 377 (1991) (where officers knew of FBI warrant and California warrant, and there were also South Carolina warrants, arrest was properly conducted and evidence was admissible) (both citing Payton v. New York, 445 U.S. 573 (1980)).

Third, as long as the warrant was valid, the subjective motivations of the officers in making the arrest – such as to inquire about another crime – are of no consequence to the legality of the arrest. Indeed, since there was a valid arrest warrant, a judge had already made a probable cause determination irrespective of the subjective considerations of the officers who made the arrest. And, ultimately, Appellant has raised no challenge to the probable cause determination of the warrant itself. As such, the arrest was proper. See Whren v. United States, 517 U.S. 806, 813 (1996) (“subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis”); Painter v. Robertson, 185 F.3d 557 (6th Cir. 1999) (if circumstances support finding of probable cause, officer’s actual motives are irrelevant); United States v. Dela Pena, 62 Fed. Appx. 754 (9th Cir. 2003) (search of car properly admitted, as officers had probable cause since there was a valid arrest warrant, and their subjective motivations are irrelevant).

Fourth, it is true that officers must have a separate search warrant for a home of a third party when executing an arrest warrant for the subject there. Steageld v. United States, 451 U.S. 204 (1981). However, consent or exigent circumstances will allow officers to execute the arrest warrant in the home of the third party. Id.

Here, Dorothy testified repeatedly that she voluntarily let the officers inside after they told her they had an arrest warrant for Appellant and asked to come in to search for him.

She stated she was not at all afraid of the police. {R. 1039-43; 1050-53; 1056}. As noted before in the description of events at trial, Chief Walters and Deputy Van Doran also described a consensual entry, and Dorothy ultimately signed a written consent to search form. There was more than enough evidence to support the trial court's determination that the arrest was validly made pursuant to a warrant in this case.

E. Seizure of the watch was valid as a search incident to arrest.

Of course, police may make a search incident to a lawful arrest of a defendant, and this may include the "wingspan" – anywhere the person might reach to destroy evidence or obtain weapons. Chimel v. California, 395 U.S. 752 (1969). However, this wingspan can "move" – as in Washington v. Chrisman, 455 U.S. 1 (1982), the Court found no violation where an officer accompanied an arrested person back to his dorm room and saw contraband in plain view. The Court noted:

It is not unreasonable under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest.

455 U.S. at 7.

This case is simply Chrisman in reverse inasmuch as the pants came to Appellant at his request and out of necessity. Obviously Appellant needed pants to go to jail, and he asked for them. Obviously, then, the officers were entitled to search those pants incident to arrest before Appellant was allowed to put them on to be transported in custody. See People v. Jones, 767 P.2d 236 (Colo. 1989) (en banc) (marked bill found in wallet of defendant's pants admissible; even though they were not within his reach, they were in the nearby area, and appellant asked for his pants). Indeed, police are entitled to search a

person's personal belongings before incarceration; thus, even if Appellant had put on the pants, officers would have eventually found the watch. Illinois v. Lafayette, 459 U.S. 986 (1983).

F. In any event, the search of the pants was permissible based on Dorothy's consent to search the house.

Dorothy's consent also justifies the search of the pants. This Court has held that a third party can consent to a search if they have common authority or other sufficient relationship to consent to a search of the effects. State v. Middleton, 266 S.C. 251, 222 S.E.2d 763 (1976) (father could consent to search of son's bedroom in father's house).

Here, Dorothy's husband's pants here were laying on her couch in her living room. As Dorothy testified, she was voluntarily cooperating with police. The pants and watch were not removed from the house until after Dorothy even went as far as to sign a written consent to search. Under these circumstances, Dorothy had sufficient nexus to the pants to consent to a search of them when she consented to a search of her premises. {R. 1043; 1054-55}. See also State v. Laux, 344 S.C. 374, 544 S.E.2d 276 (2001) (defendant's girlfriend had authority to consent to search of apartment, where she answered in her nightclothes, said she lived there, had a key, and personal effects in the bathroom). Cf. State v. Bailey, 276 S.C. 32, 274 S.E.2d 913 (1981) (officer's had reasonable belief of resident's authority to consent to search of truck parked behind residence, as the truck was left unlocked with keys in the cab); United States v. Diggs, 544 F.2d 116 (3rd Cir. 1976) ("bailee consent" case noting that the right of a bailee to exculpate herself and explain or disclose property of another's in her possession outweighs any privacy interest of the defendant).

The pants were properly admitted into evidence.

CONCLUSION

For the foregoing reasons, this Court should affirm Appellant's convictions and sentences.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

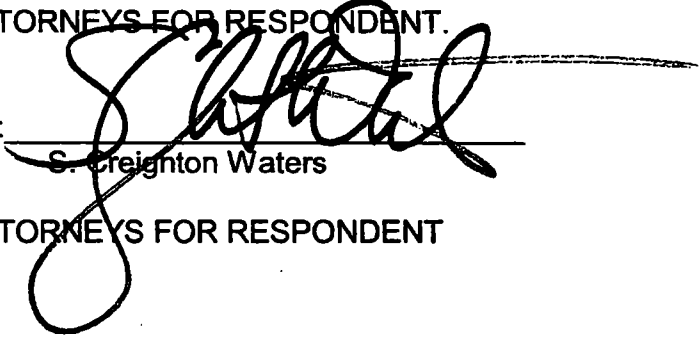
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S. Creighton Waters

ATTORNEYS FOR RESPONDENT

July 7, 2005

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

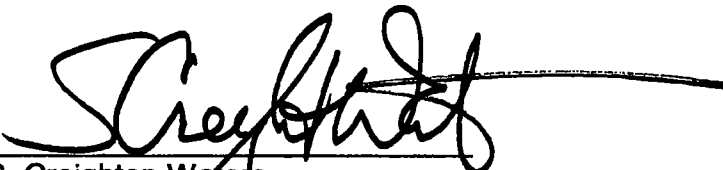
v.

MARION BOWMAN, JR.,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.



A handwritten signature in black ink, appearing to read 'S. Creighton Waters', is written over a horizontal line.

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July 7, 2005

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

Respondent,

v.

MARION BOWMAN, JR.,

Appellant.

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Final Brief of Respondent***, dated July 7, 2005, on Appellant by depositing three (3) copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Esquire
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I further certify that I have served all parties required by Rule to be served.

This 7th day of July, 2005.



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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

FINAL REPLY BRIEF OF APPELLANT

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1.

Defense counsel requested that the judge charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20 (C)(b)(6) on the capacity of the defendant to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. The trial judge refused to charge this mitigating circumstance. The issue is therefore preserved, and this statutory mitigating circumstance has widely been accepted to include evidence of intoxication 3

2.

The state argues that information about the conditions of confinement in prison is necessary. The state's argument is a request for this Court to open the door for both the defense and the prosecution to offer evidence about the time, place, manner, and conditions of incarceration or execution. This Court clearly stated in *State v. Plath* that such matters were not proper for the jury's consideration. (Issues 2 and 3) 5

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ARGUMENT IN REPLY

1.

Defense counsel requested that the judge charge the statutory mitigating circumstance contained in S.C. Code § 16-3-20 (C)(b)(6) on the capacity of the defendant to appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of the law was substantially impaired. The trial judge refused to charge this mitigating circumstance. The issue is therefore preserved, and this statutory mitigating circumstance has widely been accepted to include evidence of intoxication.

Defense counsel requested the statutory mitigating circumstance on “the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law [being] substantially impaired.” ROA p. 4937, l. 4 – p. 4938, l. 16. The judge ruled the record was “void of any evidence” of the capacity to conform his conduct mitigating circumstance contained in S.C. Code § 16-3-20(C)(b)(6). ROA p. 4938, ll. 7 – 21.

The state attempts to create a procedural bar even though defense counsel requested that this statutory mitigating circumstance be charged, and despite the fact the court has a duty to review all statutory mitigating circumstances, and then to instruct the jury as to any circumstance that may be supported by the evidence, and not merely those requested by the defendant. State v. Hughey, 339 S.C. 439, 529 S.E.2d 721, 730 (2000). Appellant’s Brief at 17.

Further, the state appears to argue that evidence of intoxication or hard drinking was greater in other cases, and therefore the failure to charge this mitigating circumstance was not error. However, a judge is only concerned with the existence of evidence of the

mitigating circumstance, and not its weight. There clearly was evidence in this case of a "party atmosphere" throughout the day, and evidence that appellant had been drinking with his friends.. He also had a history of substance abuse.

Further, the state's assertion that by all accounts appellant "remained outside in the parking lot [of the Allen Murray Club]" ignores the fact that drinking outside such a rural club is the rule and not the exception. It ignores evidence that appellant had been drinking, and that one man he was partying with essentially admitted being grossly intoxicated.

The state further argues that the issue is procedurally barred because appellant did not take exception to the penalty phase jury instruction on mitigating evidence. However, this argument ignores State v. Johnson, 333 S.C. 62, 508 S.E.2d 29, 31, n.1 (2000) wherein this Court held that once a party requests a jury instruction on the record, and the Court rejects the request, there is not any need to object again to preserve the issue.

This Court has consistently held that the trial judge must instruct the jury on statutory mitigating circumstances two, six, and seven where there is evidence of intoxication or drug use. See State v. Stone, 350 S.C. 442, 567 S.E.2d 244, 248 (2002); State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986); State v. Young, 305 S.C. 380, 409 S.E.2d 352, 356 (1991); State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). This case should not be any exception.

Defense counsel preserved the issue by asking that the judge charge this mitigating circumstance. The judge had an independent duty to review the record for proper mitigating circumstances even if defense counsel in this case had not made the request. There was evidence supporting this mitigating circumstance and the court erred by refusing to charge it. Appellant is entitled to a new sentencing hearing.

2.

The state argues that information about the conditions of confinement in prison is necessary. The state's argument is a request for this Court to open the door to both the defense and the prosecution to offer evidence about the time, place, manner, and conditions of incarceration or execution. This Court clearly stated in *State v. Plath* that such matters were not proper for the jury's consideration, and there is not any reason to revisit its logic (Issues 2 and 3)

Defense counsel objected and moved for a mistrial when the solicitor asked defense expert James Aiken about inmates escaping. ROA pp. 4869 – 4873. It unfortunately is not unusual when the state is prohibited from pursuing a line of questioning that the solicitor then requests permission to travel into another line of questioning that on its face seems less objectionable. That was what happened in this case. The solicitor then requested permission to question Aiken about the conditions of prison in the general population. Defense counsel objected, and the judge stated that she understood the solicitor was on re-cross, but ruled “I will let him go into those areas.” ROA. pp. 4873 – 4874. That was clearly error under the reasoning of *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984).

The solicitor, armed with the judge's permission, then elicited testimony on recreational activities in prison such as playing basketball, exercising, watching movies, watching television, and other recreational activities such as playing softball. ROA pp. 4881 – 4882.

The state in essence argues that this Court should overrule its holding in *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), wherein this Court noted that the Department of Corrections controls the conditions of imprisonment and not the defendant. The manner

of execution and the conditions of imprisonment are not proper during the penalty phase of a death penalty case. The penalty phase of a death penalty case is not a sociology course. Respectfully, there is not any reason for this Court to depart from its holding that the defense is not allowed to offer evidence on the horrors of the death penalty, and that neither the state nor the defendant should be allowed to introduce evidence on prison conditions that are totally out of the defendant's ability to control.

Prison conditions, good or bad, are not relevant to the consideration of the proper penalty to jury should impose on the defendant since they are matters beyond the defendant's control, and because this Court has clearly stated that sociological evidence on the propriety of the death sentence and conditions within the prison walls are improper. Respectfully, there is not principled reason for this Court to depart from those precedents.

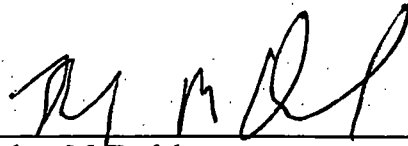
Similarly, the possibility of prisoners escaping from prison is irrelevant where there is not evidence the defendant on trial attempted to escape. See State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105, 111 (2000). Cf. State v. Kelley, 343 S.C. 350, 540 S.E.2d 851, 855 – 857 (2001).

Appellant respectfully submits this Court should reiterate that evidence about escape, prison conditions and the manner of execution are not proper during a capital sentencing hearing. Rather than depart from this Court's precedents on the subject, appellant's submits, respectfully, that it is time for this Court to reiterate them for the consideration of the Bench and Bar.

CONCLUSION

Based on the arguments made in appellant's initial brief, and the arguments in this reply brief, this Court should reverse appellant's convictions and remand this case to the Dorchester County Court of General Sessions for a new trial. In the alternative, appellant should be granted a new sentencing trial.

Respectfully submitted,

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

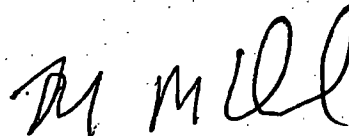
Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

July 6, 2005

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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

Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

July 6, 2005

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Dorchester County

Diane Schafer Goodstein, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARION BOWMAN, JR.,

APPELLANT

CERTIFICATE OF SERVICE

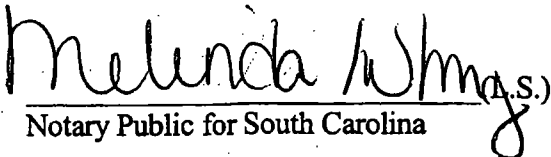
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon S. Creighton Waters, Esquire, this 6th day of July, 2005.



Robert M. Dudek
Assistant Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 6th day of July, 2005.



(S.)
Notary Public for South Carolina

My Commission Expires: November 16, 2008.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DORCHESTER	)	
	)	
Marion Bowman, Jr., #6006	)	C/A No. 2006-CP-18-569
	)	
Applicant,	)	ORDER DENYING APPLICATION
v.	)	FOR POST-CONVICTION RELIEF
	)	
The State of South Carolina,	)	(Capital Case)
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Respondent.	)	
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Before this Court is an Application for Post-Conviction Relief ("APCR"), filed by Marion Bowman, Jr. ("Applicant"). This APCR stems from a murder conviction and death sentence. For the following reasons, this Court denies and dismisses the APCR.

PROCEDURAL HISTORY

During the August 2001 term, the Dorchester County Grand Jury indicted Applicant, Marion Bowman, Jr., for murder and third degree arson (01-GS-18-0348 & -0349). {R. 5254-57}. The state gave notice of intent to seek the death penalty, and served notice of evidence in aggravation. {R. 1640-43; 4570-71; 5260-61}.

The trial judge in this case was the Honorable Diane S. Goodstein. Applicant was represented at the trial level by Norbert E. Cummings, Jr. and Marva A. Hardee-Thomas; First Circuit Solicitor Walter M. Bailey, Jr. and Assistant Solicitor Benjamin Lafond prosecuted the case for the State.

A pretrial Jackson v. Denno hearing was held before Judge Goodstein during various days between April 5th, 2002 and May 2nd, 2002. Jury selection began in Dorchester County on May 13th, 2002, and was completed on May 17th, 2002. Judge Goodstein conducted the guilt phase of Applicant's jury trial from May 17th until May 20th, 2002. Applicant's jury convicted him of both charges. {R. 4564}.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. {R. 4569}. The sentencing phase of the trial began on May 22nd, 2002.

On May 23rd, 2002, Applicant's jury found the existence of two of the four aggravating factors: the murder was committed in the commission of kidnapping, and in

the commission of larceny with the use of a deadly weapon. It recommended a sentence of death. {R. 5051}. Judge Goodstein sentenced Applicant to death for murder and ten years for arson.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court on May 24th, 2002. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July 6th, 2005, Dudek filed with the state supreme court a Final Brief of Appellant. The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 7th, 2005. Dudek followed with a Final Reply Brief of Appellant also dated July 6th, 2005.

Oral argument in the case was held before the state supreme court on October 6th, 2005. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on November 28th, 2004. State v. Bowman, 623 S.E.2d 378 (S.C. 2005). A petition for rehearing was denied by that court on January 6th, 2006.

On February 1st, 2006, the South Carolina Supreme Court granted a stay of execution so that Applicant could pursue certiorari review before the United States Supreme Court. Applicant through Mr. Dudek filed a Petition for Writ of Certiorari with the United State Supreme Court dated April 5th, 2006; the State through AAG Waters filed a Brief in Opposition on May 12th, 2006. The United States Supreme Court denied the certiorari petition by order dated June 12th, 2006.

While his certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR on April 7th, 2006. On August 4th, 2006, Applicant filed with the state supreme court a Petition to Appoint Post-Conviction Relief Judge. The State filed a

Return on August 18th, 2006, and a Motion to Set Execution Date on August 22nd, 2006. On August 28th, 2006, Petitioner filed a Motion for a Stay of Execution, or, in the Alternative to Appoint a Post-Conviction Relief Judge. The State filed a Return to the latest motion on August 29th, 2006. The State filed its initial Return, Motion to Dismiss, and Motion for Summary Judgment dated August 31st, 2006. The South Carolina Supreme Court issued an Order dated September 7th, 2006, in which it stayed the execution for this PCR and appointed this Court.

Applicant filed his First Amended Application, and his Second Amended Application prior to the evidentiary hearing. He also filed his Third Amended Application a week before the evidentiary hearing began in September 2008. The hearing took place over the course of various days in September, October, and December 2008. He filed his Fourth Amended Application in June 2009, some six months after the evidentiary hearing in this case had concluded. He also filed his Amended Brief Supporting Application for Post-Conviction Relief. The Respondent filed a Brief in Opposition. The Applicant then filed a Reply.

This Order of Dismissal follows.

ANALYSIS

Based on the factual findings and legal analysis set forth as follows for each issue, this Court denies relief.

I. James Tawain Gadson, Jr.

Applicant first raises a number of issues with regard to testifying witness James Tawain Gadson, who was at the scene when Kandee Martin was killed.

A. The Prosecution Did Not Violate Brady By Not Disclosing Gadson's William S. Hall Institute Psychiatric Report

Applicant contends that the First Circuit Solicitor's Office failed to properly disclose a copy of his co-defendant's psychiatric evaluation from the William S. Hall Psychiatric Institute to Applicant pursuant to Brady v. Maryland, 373 U.S. 83 (1963). At the PCR hearing, Solicitor Bailey testified that he did not believe they provided defense counsel with a copy of the William S. Hall Psychiatric Institute report for Tawain Gadson. {PCR Tr. 2120}. Lead trial counsel Cummings also testified that he did not recall receiving a copy of the psychiatric evaluation for Gadson. {PCR Tr. 1647}. Applicant asserts the State should have provided him with the report because it contained information that could have been used for impeachment purposes in cross-examining Gadson at trial.

"A Brady violation occurs when the government fails to disclose evidence materially favorable to the accused." Youngblood v. West Virginia, 547 U.S. 867, 869, 126 S.Ct. 2188, 165 L.Ed.2d 269 (2006). Evidence that is not disclosed is suppressed for Brady purposes even when it is "known only to police investigators and not to the prosecutor." Kyles v. Whitley, 514 U.S. 419, 438, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Evidence is favorable if it is either exculpatory or impeaching. See, e.g., Strickler v. Greene, 527

U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). However, a "'showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal,' " id. (quoting Kyles, 514 U.S. at 434, 115 S.Ct. 1555), but only a "'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,'" Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (quoting Kyles, 514 U.S. at 435, 115 S.Ct. 1555). The assessment of materiality is made in light of the entire record. United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

A Brady claim is based upon the requirement of due process. Such a claim 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, 514 S.E.2d 320, 324 (1999) (citing Kyles v. Whitley, 514 U.S. 419, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). If a Brady violation is found to have occurred, PCR must be granted. Gibson, supra.

[T]he Brady rule does not apply if the evidence in question is available to the defendant from other sources; thus, when defense counsel could have discovered the evidence through reasonable diligence, there is no Brady violation if the Government fails to produce it." U.S. v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)(internal quotations omitted).

“[W]here evidence is equally available to the accused, the obligation on the part of the State to furnish such evidence to the accused is relieved.” Anderson v. Leeke, 271 S.C. 435, 439, 248 S.E.2d 120, 122 (1978).

Here, this Court finds that Applicant has failed to establish a Brady claim in this situation. First, defense counsel had other means by which it could obtain Gadson’s psychiatric report. Gadson’s psychiatric evaluation was done by order of the court. **{See Applicant’s 8 & 31}**. The court order was clearly public record. Thus, the fact that Gadson was evaluated could easily have been discovered by trial counsel upon examination of court records in the Clerk of Court’s office. Counsel was well aware that the Department of Mental Health provided the court with a psychiatric report when ordered to conduct such an evaluation. The Department had done so in Applicant’s case. **{See Respondent’s 29}**. Thus, had counsel reviewed the clerk of court records for Applicant’s co-defendant Gadson, he would have clearly been aware that a psychiatric report to the court would have been available. Counsel could have easily filed a subpoena to obtain a copy of Gadson’s psychiatric report from the court. Since this information could have been requested by counsel by other means, Applicant has failed to establish there was a Brady violation. Kelly, supra; Leeke, supra.

Second, Applicant’s claim is rejected because he failed to establish Gadson’s psychiatric report was favorable or impeaching evidence. Applicant argues that the psychiatric report “revealed serious mental health concerns and questions about Gadson’s ability to recall events.” **{Applicant’s Brief, p. 4}**. This argument is not supported by the report. First, contrary to Applicant’s argument, the report does not call into question

Gadson's short and long term memory. Specifically, the report found "no evidence of long or short-term memory impairment." {Applicant's 8 & 31, at p. 3}. Further, the report indicates that "[o]n the Repeatable Battery for the Assessment of Neuropsychological Status, he exhibited some mild impairment of verbal memory, but verbal learning was good." {Applicant's 8 & 31, at p. 3}. Overall, the report does not indicate that Gadson suffered from any mental illness other than cannabis dependence. Since there was no indication that Gadson suffered from any type of memory impairment that would have affected his ability to recall what occurred in this case, the report would have had no impeachment value in that regard.

The report was also not material. The William S. Hall report does not indicate that Gadson suffered any memory issues as a result of his seizures. In fact, based on the details provided about the seizures, it appears that he is able to recall what occurred before his seizures (i.e. his food consumption, use of marijuana, etc.). Regardless, neither Gadson nor any other witness testified that Gadson suffered a seizure on Nursery Road at the time of the shooting. Further, no witness testified at either trial or the PCR hearing that Gadson smoked marijuana on the day of the shooting. Gadson did admit at trial that he drank alcohol all day on the day of the murder. {R. 3992-93; 4021; 4031}. Absent some actual evidence that Gadson suffered a blackout on the scene, trial counsel could not have argued Gadson suffered a blackout.

Further, the overwhelming evidence of guilt in this case clearly shows that this evidence would not have undermined the confidence in the verdicts at trial. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten

to kill the victim on the day of the murder. {R. 3726, 3739-3744, 3764-66}. Gadson saw Applicant shoot the victim. {R. 4000-02}. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. {R. 4012}. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. {R. 4094}. He watched as Applicant pulled a body out of the woods. {R. 4096}. According to Felder, he saw it was the victim when Applicant put her body in the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. Overall, even without Gadson's testimony, there was a very strong case against Applicant.

Moreover, Gadson's credibility had already been impeached by his testimony regarding his drinking. United States v. Amiel, 95 F.3d 135, 145 (2nd Cir. 1996) ("Suppressed evidence is not material when it merely furnishes an additional basis on

which to impeach a witness whose credibility has already been shown to be questionable."'). In light of the fact that the limited impeachment value of Gadson's psychiatric report and the overall strength of the case against Applicant, Applicant has failed to prove by a preponderance of the evidence that the confidence in the verdicts in this case was undermined by the nondisclosure of Gadson's psychiatric report. As a result, Applicant has failed to sustain his burden of establishing there was a Brady violation in the handling of Gadson's William S. Hall report. As a result, this claim for relief is denied.

B. Trial Counsel Was Not Ineffective In Addressing Gadson's Plea Deal and/or Any Possible Bias that May Have Resulted Therefrom

Applicant has asserted that trial counsel were ineffective because they failed to investigate, impeach, and introduce evidence of Gadson's plea deal and his true bias to avoid a death sentence. Applicant asserts the plea agreement threatened Gadson with a death sentence. Further, Applicant asserts the jury was left with the incorrect impression that Gadson would serve twenty years in prison under his plea agreement. Applicant's claims are denied because they are not supported by the record.

To establish a claim that counsel was ineffective, a PCR applicant must show that (1) counsel's representation fell below an objective standard of reasonableness and (2) 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. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

When reviewing a counsel's performance, there is a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066. Consequently, courts apply a "highly deferential" standard of review. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065. Counsel may avoid a finding of ineffectiveness if he articulates a valid reason for using a certain strategy. Ingle v. State, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) (citations omitted). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Id.

First, Applicant's allegation that Gadson expressly bargained to avoid a death sentence is not supported by the record. At no point in time did the First Circuit Solicitor's Office file a Notice of Intent to Seek Death Penalty against Gadson. Gadson testified the neither he nor his counsel were ever served with a Notice of Intent to Seek the Death Penalty at trial and at the PCR hearing. **{R. 4024, PCR Tr. 121, 185}**.

Applicant's argument relies upon the clause in paragraph 9(b) of Gadson's plea agreement which states that the State may reinstate the murder charges and seek the death penalty if Gadson did not comply with the terms of the plea agreement. Applicant's reliance upon this language in the agreement is misplaced. The language in the agreement does not constitute a Notice of Intent to Seek the Death Penalty. It merely outlines the fact that if Gadson did not tell the truth at trial, the State could reinstate the murder charge in its entirety against Gadson. There was no evidence that Gadson plea bargained to avoid the death penalty, and when Gadson pled guilty, he was not facing a death sentence. Thus, Applicant has failed to show that trial counsel was deficient.

Moreover, Applicant has failed to show prejudice. Applicant has not presented any testimony or evidence that indicated that Gadson actually believed that he was avoiding a death sentence with his plea agreement. In fact, Gadson's testimony at the PCR hearing clearly demonstrated the opposite was true. Gadson noted in his testimony that he was never threatened with the death penalty. {PCR Tr. 121}. He noted that his attorney informed him after receiving the indictments that Gadson could get life for shooting and killing someone. {PCR Tr. 209}. He did not see that as being the same as the death penalty. Id.

Moreover, even without Gadson's testimony, there was overwhelming evidence presented of Applicant's guilt, as set forth in the preceding subsection. Thus, this claim of ineffective assistance of counsel is denied.

C. Trial Counsel Did Correct Gadson's Testimony At Trial Regarding his Twenty Year Sentence

Applicant also failed to establish trial counsel was ineffective for not correcting Gadson's testimony at trial indicating that he would serve twenty (20) years in prison. At trial, Solicitor Bailey asked Gadson if he was testifying pursuant to a plea agreement:

Q. Okay. And through Mr. Dukes, through his representation, you have entered into a plea agreement with the State of South Carolina; have you not?

A. Yes, sir.

Q. Okay. And would you tell the Court and the jury what that agreement is, your understanding of that agreement?

A. Accessory after the fact and misprision of a felony.

Q. All right, sir. And are you going to get a negotiated sentence of 20 years for that?

A. Yes, sir.

Q. Okay. And in exchange for that, dropping the murder charge and allowing you to plead to accessory after the fact of murder and misprision of a felony and receiving a 20-year sentence, have you agreed to testify truthfully in this case?

A. Yes, sir.

{R. 3981, 17-25}. During cross examination, trial counsel asked Gadson about the plea bargain he made with the State. Gadson testified that he was set to receive a fifteen (15) year sentence for accessory after the fact to murder. **{R. 4023}**. He was also set to receive a five (5) year sentence for misprision of a felony. **{R. 4023}**.

Applicant has failed to establish that trial counsel was deficient in cross examining Gadson on how much time he would actually serve in prison. First, there was no testimony that indicated that Gadson would actually serve 20 years in prison at trial. The testimony indicated only what his sentence would be.

Furthermore, Applicant fails to establish prejudice. First, there was no testimony offered at the PCR hearing that Gadson was aware at trial that he could serve substantially less than twenty years confinement under his plea agreement. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284,298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Second, Applicant can not show prejudice because of the overwhelming evidence of guilt, as set forth in the preceding sections. Thus, this claim for relief is denied.

D. Trial Counsel Was Not Ineffective Because It Chose Not to Attempt to Introduce Arrest Warrants and Indictments As Evidence Gadson Was the Shooter.

Applicant asserts trial counsel was ineffective for not presenting evidence to the jury that the State had asserted that Gadson was the one who shot the victim in other court proceedings. Applicant has failed to meet his burden in this regard.

First, Applicant relies upon the fact that the lead detective in the investigation, Alvin Coker, submitted a affidavit for Gadson's arrest warrant that indicated there was evidence Gadson was the shooter. The affidavit states that there was probable cause to believe that Gadson murdered Kandee Martin. **{Applicant's 4}**. The affidavit clearly notes that the basis for the probable cause was a statement that *Applicant himself* gave to police, blaming the crime on others:

Investigation lead Officers to interview a co-defendant (Marion Bowman Jr. (AKA: "Black" or "Jr."), who provided a written statement wherein he stated that between the incident time aforementioned, that the defendant and a co-defendant approached him while driving the victims car. The defendant and co-defendant had socks on their hands and confided in him that the defendant and co-defendant had shot and killed the victim (Kandee Martin). The defendant and codefendant then recruited Marion Bowman Jr. to assist them in moving the victims body and destroying the car and other evidence by burning them.

{Applicant's 4}. Applicant also relies upon the fact that Gadson was also indicted for murder in this case. **{See Applicant's Brief at p. 9}**.

At the PCR hearing, Coker credibly testified that the affidavit to the arrest warrant was based upon the information and evidence the police had at that time. **{PCR Tr. 890}**. That information consisted of the statement provided by Marion Bowman. As for the

murder indictment against Gadson, Coker testified that he was the sole witness presented to the grand jury in this case. **{PCR Tr. 862}**. He testified to the facts as he knew them. Id. Coker testified that he told the grand jury that the evidence they had at the time indicated Gadson was present when the murder occurred, but Applicant was the one who fired the fatal shot. **{PCR Tr. 863-64}**.

Applicant has not established that trial counsel was deficient. First, “[i]t is well settled in this jurisdiction that affidavits are inadmissible in criminal cases.” State v. Alexander, 303 S.C. 408, 409, 401 S.E.2d 167, 168 (1991) (citing State v. Stewart, 288 S.C. 232, 341 S.E.2d 789 (1986); State v. Lathan, 275 S.C. 550, 273 S.E.2d 772 (1981); State v. Smith, 230 S.C. 164, 94 S.E.2d 886 (1956)). Trial counsel cannot be found deficient for not introducing inadmissible evidence. See generally Strickland, supra. Thus, to the extent that Applicant asserts that Gadson’s arrest warrant should have been introduced at trial, his claim is denied.

More importantly, however, is the fact that the arrest warrant affidavit in no way indicates the State believed Gadson was the one who fired the fatal shot. All the arrest warrant affidavit shows is that early in the investigation the police thought there was probable cause to believe that Gadson may have been the shooter. Indeed, the arrest warrant was sworn out by Coker on February 17, 2001, the same day the victim’s car and body were found. **{Applicant’s 4}**.

Also, the arrest warrant affidavit was based upon the second statement provided to police by Applicant. Trial counsel provided a valid, strategic reason for not wanting any of Applicant’s statements entered into evidence. He did not ask the question because he

knew the response would be that they relied upon Applicant's (obviously self-serving) statements in making the arrest. **{PCR Tr. 1914}**. That was not a road that he wanted to take at trial. **Id.** Further, Cummings pointed out that arrest warrants do not count any way, and that they can be amended and changed. **{PCR Tr. 1914}**. Furthermore, indictments supersede arrest warrants. **Id.** Thus, this claim is denied because trial counsel was not deficient.

Trial counsel was also not deficient in not introducing the indictment against Gadson as evidence that the State once "believed" Gadson was the shooter. First, the indictment was not evidence that the State believed was the shooter. Under South Carolina law, "one who is present, aiding and abetting the commission of a crime is a principal, and may be convicted on an indictment charging him alone as such." State v. Cox, 258 S.C. 114, 118, 187 S.E.2d 525, 528 (1972)(internal citation omitted). Solicitor Bailey credibly and accurately testified that Gadson was charged as a principal first and could have been convicted as such under alternative theories of him either being the trigger man or him being present and abetting Applicant. **{PCR Tr. 2139-40}**. He also noted that their practice was to charge as principal first with the understanding that they could convict as a principal second on the theory of hand of one, hand of all. **{PCR Tr. 2140}**. There was no reason to specify exactly what part of the law they were relying upon because he could be convicted under any of the three theories under the indictment. **{PCR Tr. 2140}**. Bailey also indicated that the indictment was done that way to keep the options open in case later evidence took them in a different direction in the case. **Id.** Bailey also pointed out that Gadson's true billed indictment does not mean Coker told the grand jury that Gadson was

the one who shot the victim. Id. Bailey did not want to speculate as to what Coker may or may not have told the grand jury, but the only concern in the grand jury is whether there is sufficient evidence to continue prosecution under some legally valid theory. {PCR Tr. 2140-41}. Since as a legal and practical matter the language of the indictment does not mean the State believed Gadson was the actual shooter, counsel cannot be found deficient. Overall, Applicant has failed to show deficiency.

Applicant has also failed to establish prejudice. Not only was the jury informed Gadson's murder charge in this case was being reduced to accessory after the fact to murder and misprision of a felony in exchange for truthful testimony {R. 3980-81}, but there was overwhelming evidence of Applicant's guilt as set forth in the preceding subsections. Indeed, the supposed subjective "belief" of one officer or prosecutor at one time or another is not what is important and relevant in a criminal trial – what is important is what the *jury* believes after hearing actual evidence related to the crime itself. Since Applicant has failed to show deficiency or prejudice, this claim for relief is denied.

E. Trial Counsel was Not Ineffective in Not Presenting Alleged Evidence from Wayne Mood

Applicant asserts that trial counsel should have presented the testimony of Wayne Mood, a jailhouse informant interviewed by the State about this case. According to the notes from Solicitor Bailey's interview with Wayne Mood, Gadson told Mood and another man that both he and Bowman shot Kandee Martin. {Applicant's 68}. The notes indicate that both Bowman and Gadson told Mood a similar story. They were with Kandee Martin and were planning to rob a house. Id. Bowman gave the victim some crack. At some point in time, the victim became afraid and ran towards Bowman. They argued. Bowman

mentioned to Mood that the victim was supposedly wired. According to the statement, the initial story was Gadson shot her in the back first. The victim ran until she ran out of breath. She then begged for mercy. Shortly thereafter, Bowman shot her in the head. The note also indicates that Bowman threatened to kill Gadson if he told anyone, and it mentioned that Gadson defecated on himself. The notes also indicate that later on, Bowman and Felder went back to the scene, put the body in the trunk of the victim's car, and set the car on fire. It appears that Gadson's initial version had Bowman shooting first. However, the Wayne Mood notes also indicate that Gadson later admitted he shot the victim first.

Applicant has failed to show that trial counsel was deficient in not presenting the testimony of Wayne Mood at trial. First, Applicant did not call Wayne Mood to testify at the hearing. Thus, there is no evidence on the record as to what Wayne Mood would have said if he was called to testify at trial. See also Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

Further, trial counsel gave a reasonable strategic reason for not calling Wayne Mood to testify. Cummings testified that he contacted Mood's attorney shortly after receiving the notes from Solicitor Bailey. {PCR Tr. 1366-67; see Applicant's 70}. Mood's counsel would not allow the defense to talk with Mood. Overall, in assessing the value of

Mood's potential testimony, Cummings noted that parts of what he was saying about Bowman had to do with Bowman shooting the victim in the back. **{PCR Tr. 1367-68}**. He did not want to put up a witness that was going to possibly implicate Applicant for any reason. **{PCR Tr. 1368}**. He did not even want to present testimony that would have indicated he was at the scene with Gadson with Gadson being the shooter. **Id.** He was concerned that presenting testimony that put Applicant at the scene could backfire. **Id.** Clearly, counsel's explanation for not calling Wayne Mood was reasonable trial strategy. As a result, Applicant failed to establish deficiency. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Applicant also fails to establish prejudice. First, if Mood testified in accordance with the Solicitor's notes, then the testimony would not have been exculpatory. The notes clearly detail that Bowman admitted to Mood he was the one who shot Kandee Martin in the head after she begged for her life. The forensic pathologist who testified at trial indicated that both the head wound and the wound to the back were fatal wounds. **{R. 3945, 3949}**.

Second, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This claim for relief is denied.

F. Trial Counsel Was Not Ineffective In Handling Evidence that Gadson Had Access To Applicant's Gun.

Applicant also asserts trial counsel was ineffective for not presenting evidence that Gadson had fired the murder weapon two weeks prior to the victim's murder. According to the police statement given by Tiara Coleman, she and Gadson were walking around the Villas when Coleman got into an argument with someone else. **{Applicant's 30}**. *Applicant* gave Gadson a gun, which he shot into the air. **Id.** The casings from that shooting were recovered by another resident in the Villas, Margaret Hawkins. **{Applicant's 29}**. Those casings were fired by the same gun that killed the victim. **{R. 4315}**. At the PCR hearing, Gadson corroborated the sequence of events contained in Coleman's statements. **{PCR Tr. 161-62}**. He noted that Bowman let him borrow the gun for that shooting. **{PCR Tr. 195-96}**.

Q Which .380 were you firing at the Villas that they were asking about?

A The one Marion bought from the dude in Orangeburg.

Q That was Marion's gun?

A Uh-huh.

Q He let you borrow it?

A It was a dude standing in front of the apartments talking as if he had a knife, he handed me the gun, I started shooting it.

Q Marion Bowman was there?

A Yes, he was there.

{PCR Tr. 195}.

Cummings testified that he did not want the information about the shooting at the Villas in evidence. **{PCR Tr. 1704}**. He noted that while Coleman and Hawkins could testify Gadson had fired the gun, they also indicated that Bowman handed him the gun immediately beforehand. **{PCR Tr. 1705}**.

Trial counsel was not deficient in not presenting this information that Gadson had access to the gun, as such testimony would have clearly indicated that the only reason he had access to the gun was because Applicant had it concealed on his person and just handed it to Gadson. Any cross-examination questions on this issue would have had minimal benefit to Applicant.

Further, Applicant did not establish that he was prejudiced by trial counsel's decision not to introduce evidence of the shooting at the Villas, given the overwhelming evidence as set forth in Section I, *supra*, and the minimal benefit this evidence could have had. This claim of ineffective assistance is denied.

G. Trial Counsel was Not Ineffective with Regard to Gadson's ownership of a .380 Handgun.

Applicant also asserts trial counsel was ineffective for not pointing out that Gadson had lied about owning a .380 High Point firearm. In essence, Applicant asserts that the jury was led to believe that only Bowman owned a weapon that would produce the characteristics consistent with the casings linked to Martin's death.

Applicant's claim lacks merit. First, Applicant did not establish deficiency. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. **{R. 4026}**. Over the State's objection, Gadson was allowed to answer. **{R. 4027-31}**. He admitted that he had

purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. **{R. 4031}**. Clearly, the jury was made aware that Gadson also had a weapon of the same caliber as the one used in the murder.

Applicant also failed to show prejudice. As already noted, the jury was informed of the fact that Gadson owned a .380. Further, there was no evidence that Gadson's gun was connected in any way to the murder. Gadson had legally purchased his gun, and although he claimed it had since been stolen, the gun Gadson bought a different serial number from the gun found in the river which was matched to the murder scene. **{PCR Tr. 195-96; 338; 991-1003; 1919-21}**. Finally, there was overwhelming evidence of Applicant's guilt, as set forth in Section I, *supra*. This ground for relief is denied..

II. Travis Felder

A. The Prosecution Did Not Fail to Correct False Testimony in Regards to Felder Purchasing the Gasoline.

Applicant's first claim involving Travis Felder alleges the State failed to correct false testimony when Felder omitted the fact that he was the one who purchased the gasoline that was used to burn the victim's car. During the guilt phase of trial, Felder testified that after leaving the apartments in Branchville, he followed Applicant down McElhaney Road to Nursery Road. **{R. 4092-94}**. However, during the sentencing phase, Felder was recalled to the stand by Applicant. During his second stint on the stand, Felder testified that he was the one who purchased the gasoline used to burn the victim's car on February 17. **{R. 4915-16}**. He testified that Applicant gave him a gas jug and asked that he purchase gasoline to assist him in "parking a car." **{R. 4916, 4922}**. Felder also indicated

that he understood he was supposed to tell the truth the first time he was on the stand, but he omitted that part of the truth. **{R. 4926}**.

A state "denies a defendant due process by knowingly offering or failing to correct false testimony." Basden v. Lee, 290 F.3d 602, 614 (4th Cir.2002) (citing Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959)). Furthermore, "[a] Napue claim requires a showing of the falsity and materiality of testimony." Id. False testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)).

First, Applicant failed to establish that the State knowingly offered false testimony. At the PCR hearing, Solicitor Walter Bailey testified that he did not know that Felder was the one who purchased the gasoline. **{PCR Tr. 2037}**. He testified that he never specifically asked Felder any questions about purchasing gasoline, and none of the versions of the facts provided to him by Felder included Felder's purchase of the gasoline. Id. Bailey noted that Felder had omitted that fact in both meetings he had with Felder and his attorney and in the proffer letter that was submitted by Felder's attorney. **{PCR Tr. 2040}**. Bailey recalled that he first heard that Felder was the one who purchased the gasoline from trial counsel Cummings. **{PCR Tr. 2037}**. Bailey reiterated several times that he never knew that Felder was the one who purchased the gasoline. **{PCR Tr. 2047}**. He could not correct the omission because he did not know there was an omission. **{PCR Tr. 2047-48}**.

At the PCR hearing, Felder testified that he could not remember if he told Bailey he was the one who bought the gasoline. **{PCR Tr. 706, 711}**. He did agree that he said he told Bailey when he was deposed for these proceedings. **{PCR Tr. 671}**. However, he also noted that he could not say for sure that he told Solicitor Bailey. **{PCR Tr. 714}**. Overall, Felder testified that he did not have a specific memory of telling Bailey that he was the one who purchased the gasoline. **{PCR Tr. 729}**.

Without specific information from Felder, the State could not know for certain that Felder was the one who purchased the gasoline used in the arson. There was no mention of Felder being the one who purchased the gasoline in the proffer letter sent to Solicitor Bailey by Felder's counsel. **{See Applicant's 64}**. Also, Felder's role as the one who purchased the gasoline was not an issue he was questioned about during his polygraph. **{See Applicant's 15}**. It is also not mentioned in Solicitor's Bailey's outline for Felder's testimony. **{Applicant's 82}**. In light of the fact that neither Felder nor Bailey could recall Felder telling Bailey he was the one who purchased the gasoline, Applicant has failed to show by a preponderance of the evidence that Bailey knowingly presented false testimony in allowing Felder to omit the fact he was the one who purchased the gasoline. As a result, this claim for relief is denied.

Second, Applicant failed to show materiality. As already noted, false testimony is "material" when " 'there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.' " Boyd v. French, 147 F.3d 319, 329-30 (4th Cir.1998) (quoting Kyles v. Whitley, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). Here, there is no reasonable likelihood that Felder's omission could have affected the

judgment of the jury. First, the omitted testimony did not indicate that Applicant was any less guilty of the crimes for which he was convicted. In fact, the omitted testimony further confirms that Applicant was guilty in the arson. At trial, Felder testified that he purchased the gasoline at Applicant's request. **{R. 4922-24}**. He further testified that Applicant was the one who provided the jug that was used. **{R. 4922}**. Felder confirmed that he purchased the gasoline at Applicant's request at the PCR hearing. **{PCR Tr. 699-700}**. Felder consistently maintained that he thought the gasoline was needed so that Bowman could go "park a car." **{PCR Tr. 699-700; R. 4092}**. Applicant offers no other probative evidence to show that Felder knew Bowman was going to burn the car.

Furthermore, no other witness testified that Felder assisted in the planning or participated in the burning of the car. In fact, at least two witnesses confirm that Felder was at a friend's apartment when Bowman came to him about the issue. Carolyn Brown testified that Applicant stopped by Bolorna Smith's apartment and asked Felder for a ride home. **{R. 3711, 4045}**. Bolorna Smith similarly testified that Applicant stopped by her apartment and asked Felder to come out and speak with him. **{R. 4117}**. She also noted that Felder left, and he came back later. **{R. 4117-18}**.

Even without Felder's testimony, there was overwhelming evidence of Applicant's guilt in this case. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}**. Gadson saw Applicant shoot the victim. **{R. 4000-02}**. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}**. Applicant then dragged her body into the woods. Id. Gadson later rode

with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. {R. 4018}. They all wore gloves. Id. Hiram Johnson testified that Applicant said he stole the victim's car and he made everyone wear gloves. {R. 4065}. He also testified that he heard Applicant admit to he killed the victim. {R. 4068}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim at the scene. {R. 4381}. In light of the overwhelming evidence of Applicant's guilt, it is highly unlikely that the testimony was material. The claim is denied.

B. The State Did Not Fail to Correct Felder Regarding How Many Times He Met with the State in Preparation for His Testimony at Trial

Applicant next contends that the State did not correct Felder's testimony as to the number of times he spoke with someone from the State. This claim is denied as it is not supported by the record. Solicitor Bailey properly corrected Felder's testimony in response to the question that was asked at trial.

At issue is the following exchange between trial counsel Cummings and Felder:

- Q. Mr. Felder, it wasn't until last week, and I want to go back over it again, how many times have you met with anybody representing the State to go over your testimony today?
- A. Excuse me?
- Q. How many times have you met with anybody to go over your testimony today
-
- A. Once.

Q. -- with the State? One time.

{R. 4109}. Clearly, the questions asked at trial pertained only to how many times Felder talked with someone from the State about *his testimony at trial*.

During redirect, Solicitor Bailey clearly corrected Felder's testimony as to the total number of meetings he had with Felder.

Q. Travis, we met in your lawyer's office a couple weeks ago, right?

A. Yes.

Q. And this morning we also talked, is that correct?

A. Yes.

Q. So you've actually talked to me two times?

A. Yes, sir.

{R. 4110}.

Contrary to Applicant's assertions, there were no other meetings between representatives of the State with Felder regarding his testimony at trial. The other interactions that Felder had with state officials regarding preparation of actual testimony for trial. The first three meetings cited by Applicant were clearly interactions Felder had with law enforcement as they investigated the case. The first was when he was initially questioned by police. The second occurred when he was arrested. The third meeting occurred when Felder was polygraphed. Only in the last two meetings between Felder and Bailey did he actually discuss his testimony at trial. Thus, Bailey did properly correct Felder's testimony regarding how many times he met with a representative of the State

regarding his testimony. As a result, Applicant's claim is not supported by the record and is denied.

Regardless, given the other strong evidence in the case detailed before and the jury was apprised the State had met with Felder and that Felder had a plea agreement, Applicant has not established materiality.

C. The Prosecution Did Not Commit Any Brady Violations with Evidence Relating to Travis Felder

Applicant next asserts that the State failed to provide the defense with Brady information regarding Travis Felder. As will be seen, each one of these contentions is denied.

1. The State Did Properly Disclose Evidence that Felder Purchased Gasoline on the Morning of the Arson.

Applicant asserts that the State failed to provide trial counsel with evidence that Felder was the one who purchased the gasoline. This Brady claim is without merit. Applicant has failed to establish that the State suppressed any evidence identifying Felder as one who purchased gasoline from the EZ Horizon convenience store on the morning of the arson. Also, Applicant fails to show that evidence Felder purchased the gasoline was favorable to Applicant's case. Furthermore, Applicant does not establish that the fact Felder purchased gasoline on the morning of the arson was material to Applicant's case. Overall, Applicant does not prove by a preponderance of the evidence that the State violated Brady by not providing the defense with evidence Felder purchased the gasoline used in the arson. As a result, this claim is denied.

First, as already noted in Section II, A, it is not clear that the State had evidence that Felder purchased the gasoline used to burn the victim's car. At the PCR hearing, Solicitor Bailey consistently testified that he was not aware that Felder was the one who purchased the gasoline. **{PCR Tr. 2037, 2047-48}**. While Felder testified at the PCR hearing that he did say he told Solicitor Bailey he purchased the gasoline at his deposition, Felder indicated at the hearing that he did not have a specific memory of whether or not he did tell Bailey. **{See PCR Tr. 729}**. He was unable to confirm about telling Bailey because he simply could not remember. **{PCR Tr. 706, 714, 729}**.

Next, while the State had circumstantial evidence that it was Felder who purchased the small amount of gasoline from the EZ Horizon convenience store, they did not have any evidence indicating that the gasoline purchased by Felder was the gasoline used in the arson until Felder testified to as much during the penalty phase at trial. The proffer letter that was sent to Bailey did not include any discussion about Felder purchasing gasoline. **{Applicant's 64}**. Felder's polygraph report indicates Felder did not mention anything about purchasing the gasoline. **{Applicant's 15}**. Most telling, however, is the fact that Solicitor's Bailey's notes created in preparation for Felder's testimony also include no mention of Felder purchasing the gasoline. Clearly, the State would have had no reason not to present such testimony. Based on Felder's testimony during the penalty phase and at the PCR hearing, it would have assisted the State's case because Felder clearly testified that he purchased the gasoline on Applicant's instruction. **{R. 4922-24; PCR Tr. 699-700}**. None of the evidence presented at the PCR hearing indicated the State had evidence connecting the gasoline purchased by Felder to the arson.

Indeed, the State did provide the defense with the evidence it did have regarding the gasoline purchase. Cummings testified that they received a copy of the video surveillance from the EZ Horizon convenience store. **{PCR Tr. 1933-34; Respondent's 34}**. Also, the investigative file contains a note denoting the times on the video that the police thought was significant in their initial review. **{See Applicant's 42/Court's 2}**. Applicant has neither presented nor pointed to any evidence regarding the purchase of the gasoline that was not provided to defense counsel. Thus, Applicant has not established suppression.

To the extent Applicant relies upon Detective Coker to establish the State knew Felder purchased the gasoline used in the arson, that reliance is not supported by the record. Coker testified that the video tape from EZ Horizon was of very poor quality. **{PCR Tr. 900-01}**. He could not recognize anyone on the video. **{PCR Tr. 901}**. The video was sent to SLED, and SLED made a few still photos. **Id.** Coker did not recall if he interviewed Felder, showed him the video, or asked if he was on it. **Id.** Coker also could not recall Felder's response to questions about him being on the video tape. **{PCR Tr. 902}**. Noticeably absent from his testimony at the PCR hearing is any indication the State knew that gasoline purchased from the EZ Horizon convenience store was used in the arson. Obviously the investigation looked for gasoline purchases at the EZ Horizon store because they had statements indicating Gadson may have purchased gasoline for the arson. **{See Applicant's 36}**. It is also clear that law enforcement reviewed the tape for any small purchases of gasoline. However, at no point at trial did the State present any evidence that

indicated they knew who purchased the accelerant used in the arson and from where it was purchased.

Indeed, Cummings testified that while they could not tell if Felder was on the tape, *Applicant informed him that Felder was on the tape at 3:14 a.m. purchasing the gasoline. {PCR Tr. 1287}*. Cummings did not want Felder testifying about the fact that he purchased the gasoline because of the implication of Applicant's involvement in the planning of the arson. *{PCR Tr. 1289-90}*. Defense counsel had the tape and was aware of the evidence.

Second, Applicant has failed to show that any evidence that Felder purchased the gasoline was favorable. Felder testified that he purchased the gasoline at Applicant's request. *{R. 4922-24, PCR Tr. 699-700}*. According to Felder's testimony at trial, Applicant provided the container used to hold the gasoline. *{R. 4916, 4922}*. He has consistently testified that when he purchased the gasoline, he thought he was doing so to assist Applicant "park a car." *{R. 4916-4924; PCR Tr. 699-700}*. At best, the information could have had very limited impeachment value.

Third, Applicant has failed to show that Felder's purchasing the gasoline used to burn the car was material evidence. There was overwhelming evidence of Applicant's guilt, as detailed before in previous sections, and whether Felder was the one who actually made the purchase of the gas to late burn the car does not rise to the level of materiality. *{R. 3711, 4117-18; 4045}*. This claim is denied.

2. The State Did Not Violate Brady When It Did Not Disclose the Proffer Letter from Felder's Attorney.

Applicant has failed to establish by a preponderance of the evidence that the State did not properly provide the defense with a proffer letter from Felder's attorney.

Solicitor Bailey testified that he received a letter from Felder's counsel during their negotiations regarding a possible plea agreement. **{See PCR Tr. 2109}**. The letter contained a proffer of what Felder could testify to if called upon at trial. **{PCR Tr. 2109, Applicant's 64}**. The letter indicated that Felder had seen Applicant, Gadson, Williams, and Johnson at the Allen Murray Club that night. **{Applicant's 64}**. The letter indicated Felder went to his girlfriend's apartment after returning from the Allen Murray Club. **Id.** About fifteen minutes later, Applicant stopped by and asked Felder for some assistance in parking a car. **Id.** According to the letter, Felder then followed Bowman down McAlhaney Road. **Id.** The letter noted that Bowman pulled up into a field, got out, and then the car was on fire. **Id.** Felder did not recognize the car; instead, according to the letter, he assumed it was one of Bowman's sister's car. **Id.** Bailey testified that he did not necessarily believe the contents of the proffer letter. **{PCR Tr. 2109}**. As a result, he had Felder take a polygraph examination to verify the veracity of Felder's statements. **Id.** Bailey testified that to the best of his recollection, he forwarded a copy of the proffer letter to defense counsel. **{PCR Tr. 2110}**. He also forwarded the results of the polygraph report to defense counsel after it was completed. **{PCR Tr. 2110, Respondent's 36}**. At the PCR hearing, Norb Cummings testified that he did not recall receiving a copy the proffer letter sent by Felder's attorney to Solicitor Bailey. **{PCR Tr. 1319}**. Cummings did recall that a few days before trial he got a phone call from the solicitor's office informing him Felder was going to testify. **{PCR Tr. 1294}**. He also recalled that he received a letter or fax that confirmed Felder was going to cooperate with the state. **{PCR Tr. 1294}**.

Applicant has failed to establish that the State violated Brady by not providing the defense with a copy of the letter. First, this Court credits Solicitor Bailey's testimony that the proffer letter was sent to the defense. Suppression has not been established.

Next, Applicant has failed to establish by a preponderance of the evidence that the proffer letter was favorable to Applicant. The letter offers no exculpatory evidence for Applicant's case. Outside of the testimony regarding seeing the body in the car, it was consistent with Felder's testimony at trial during the guilt phase. More importantly, the evidence could not be used for impeachment purposes. It was not a statement made by Felder. It was simply a reflection of what Felder's attorney provided the solicitor's office as it opened negotiations for a plea agreement.

Third, Applicant fails to show the proffer letter was material. Any minor differences in the proffer letter and the trial testimony do not overcome the overwhelming evidence of Applicant's guilt presented in this case, as set forth in prior subsections. The claim is denied.

3. There Was No "Wink Wink" Deal Between the State and Felder

Applicant contends there was an undisclosed "wink wink" deal for Felder's testimony. This Court finds there was no "wink wink" deal between the State and Felder, and thus the State could not have violated Brady in this regard.

Applicant's complaint derives from the fact that Felder received the benefit of his signed plea agreement with the State even though he omitted the fact he purchased the gasoline during his guilt phase testimony. At the PCR hearing, Solicitor Bailey testified that he was surprised to learn that Felder had purchased the gasoline used in the burning of

the victim's car. **{PCR Tr. 2040}**. The State and Felder reached a verbal agreement for Felder's testimony shortly before trial. **{PCR Tr. 1295, Applicant's 14}**. When Felder initially testified, Bailey noted they only had a verbal agreement. **{PCR Tr. 2045}**. The written agreement had been drafted and sent to Felder's attorney. Id. However, when Felder testified during the guilt phase, Bailey had not received the signed copy of the agreement from Felder's attorney. Id. The plea agreement was signed when Felder returned to testify during the penalty phase of trial. **{PCR Tr. 2128}**. Bailey noted that the verbal agreement would not have contained all of the specific terms that were included in the written agreement. **{PCR Tr. 2043}**.

Bailey explained that the plea agreement with Felder provided the State with the option to void the agreement. **{PCR Tr. 2042-43}**. He ultimately decided not to void the agreement because he felt that it was not worth it as far as utilizing court time and for whatever marginal benefit the State might have received with an increased sentence. **{PCR Tr. 2126-27}**. Further, Bailey indicated it may have been difficult to void the agreement because Felder did not tell an outright lie. **{PCR Tr. 2044}**. Bailey noted that neither he nor Cummings asked any questions that would have specifically elicited the testimony regarding Felder's purchase of the gasoline. **{PCR Tr. 2044}**. Ultimately, Felder did tell the jury of his involvement in purchasing the gasoline. **{PCR Tr. 2127}**. While Bailey wished that information would have come out the first time Felder testified, there was not much that he could do about it. **{PCR Tr. 2127}**.

To the extent that Applicant relies upon the fact that the State did not disclose the fact that Felder had lied in his attempt to garner the plea agreement, that claim is not

supported by the record. Bailey provided trial counsel with Felder's polygraph report by letter dated April 24, 2002. **{Respondent's 33, 44}**. On May 10, 2002, Bailey informed trial counsel that the State had reached an agreement with Bailey for his testimony. **{Res. Ex. 32}**. Clearly, Applicant was on notice that Felder was receiving a plea agreement despite the fact he had lied to the State at some point in time. **{See PCR Tr. 2144-46}**.

Overall, this Court credits Bailey's testimony and specifically finds that Applicant has not established the existence of a "wink wink" deal between Felder and the State. Since Applicant prove such a deal, his Brady claim for relief is denied.

D. Trial Counsel Was Not Ineffective for not Presenting Evidence of Felder's Original Arrest/Charge

In this claim, Applicant asserts trial counsel was ineffective for not exposing the fact that Felder was initially arrested and charged with Accessory to Murder/Arson and Arson, Third Degree. According to the arrest warrant affidavit, the evidence utilized to establish probable cause for the charges consisted of a statement provided by Applicant. **{Applicant's 17 & 18}**. According to Applicant's statement, Gadson and Felder were the ones who shot the victim and burned the car. **{See Applicant's 17 & 18}**. After he was arrested, Felder did not give a statement to police. Instead, he invoked his right to counsel. **{See Applicant's 16}**. During June 2001, Felder was indicted for Third Degree Arson and Accessory After the Fact to the murder. **{Applicant's 43, 44}**. By all accounts, Felder did not have any contact with law enforcement or the solicitor's office until his attorney contacted the solicitor's office about a plea in March 2002. **{See Applicant's 64, PCR Tr. 2107-2110}**.

Applicant argues that trial counsel was ineffective for not pointing out that Felder was once charged with accessory before the fact to the murder and that the State could have sought the death penalty for such a charge. First, it should be pointed out that the South Carolina Supreme Court has held that one indicted for accessory before the fact *cannot* be eligible for the death penalty. State v. Bixby, 373 S.C. 74, 644 S.E.2d 54 (2007). Even though this decision came out after Applicant's trial, it was merely interpreting statutes on the books when Applicant was tried. This Court cannot assume that had the issue been raised to Applicant's trial judge he would have gotten it wrong.¹ Since the death penalty would not have been on the table, counsel cannot have been deficient nor Petitioner prejudiced for not cross-examining on it.

Regardless, there is no evidence that supports the implication that the accessory before the fact to the murder charge was "reduced" to accessory after the fact as a result of Felder's cooperation. In fact, the evidence clearly points to the contrary. The charge was reduced to Accessory After the Fact when Felder was indicted in June 2001. At that point, Felder had not given any statement to law enforcement other than his initial denial of all involvement. Thus, since there was no basis to imply that Felder's cooperation at trial was to avoid being charged with accessory before the fact, counsel could not have made the inference. It was accurately brought out to the jury, however, that Felder's charges were reduced to a single accessory to Arson 3rd based on his cooperation. {R. 4085-86; 4108-09}. There was no deficiency.

¹ Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law", and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like". 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id.

Additionally, counsel expressed a valid strategic reason for not getting into the initial charges from Felder. Cummings testified that it was his understanding that Felder was initially charged based upon a statement given to police *by Applicant*. {PCR Tr. 1971}. Counsel noted on several occasions that he did not want any of Applicant's statements to come into evidence. {PCR Tr. 1827-29; 1834-37; 1908-14; 2004-05}. Obviously, questioning along this line could elicit that the charge was based on Applicant's attempt to deflect blame by implicating others.

Second, trial counsel did attempt to elicit testimony from Felder regarding how much time he was facing under his plea agreement. Counsel asked Felder "[h]ave you been told a possible sentence?" {R. 4108}. Felder responded, "[n]o sir." Id. Counsel did attempt to show bias in this regard, and thus counsel cannot be deficient.

As to claims that counsel should have somehow raised that fact that the State had "a long-held belief" that Gadson and Felder were the ones who killed the victim and burned the car, the claim is without merit. Applicant's position relies solely upon the arrest warrant affidavits, which of course refer only to probable cause. However, this probable cause was based solely in the fact of the statement from Applicant trying to deflect blame to other people. It was very early in the investigation. Cummings testified that he did not want any of Applicant's statements admitted into evidence, and he was surprised that the State did not present those statements. Obviously, there was little to be gained from such an examination, and this strategic decision was reasonable.

Finally, Applicant fails to establish prejudice, given the overwhelming evidence as set forth in the prior subsections, the extent of cross-examination and impeaching

information otherwise elicited at trial, and the minimal value and potentially harmful character of the initial charges given that the jury could conclude they stem from Applicant's attempt to blame others for his crimes. This claim for relief is denied.

E. Trial Counsel was not Ineffective in Not Presenting Evidence Felder Was the One Who Purchased the Gasoline During the Guilt Phase at Trial.

Applicant fails to establish trial counsel was ineffective in not presenting evidence that Felder purchased the gasoline. Counsel elicited a valid and reasonable strategic reason explaining why he did not ask Felder about purchasing the gasoline. Further, Applicant has failed to show that there was a reasonable probability that the outcome at trial would have been different had counsel presented evidence and testimony that Felder purchased the gasoline during the guilt phase.

As noted in response to Applicant's argument that the State failed to provide Applicant with information regarding Felder's purchase of the gasoline, trial counsel knew Felder had purchased the gasoline. At the PCR hearing, Cummings testified that he did not want the video of Felder purchasing the gasoline coming into evidence. {PCR Tr. 1276}. While he did not know why the State had not entered the video into evidence, he did not want it in because he felt it would corroborate Applicant's involvement in the plan to burn the car. {PCR Tr. 1276}. Cummings also testified that the entry of the video into evidence during the sentencing phase was done at Applicant's insistence and was not in line with his strategy. {See PCR Tr. 1290}.² This fear was well placed, as illustrated by Felder's testimony during the sentencing phase. Felder testified that he purchased the

² This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. {PCR Tr. 1290-91, see R. 4911-26}.

gasoline after being instructed to do so by Applicant. {R. 4916-24}. He also testified that Applicant provided the gas jug to be used in the purchase. Id. Clearly, trial counsel articulated a valid, reasonable strategic reason for not presenting the evidence of Felder purchasing the gasoline. As a result, this claim is denied.

Applicant has also failed to establish prejudice. First, Applicant presents no evidence to support its contention that Felder's omission that he was the one who purchased the gasoline indicated he was involved in the murder of Kandee Martin. Second, Felder's testimony regarding the omission during the sentencing phase and during the PCR hearing clearly shows that cross-examination on this issue during the guilt phase would have done nothing to exculpate Bowman from being a participant in the arson. To the contrary, Felder's testimony clearly indicated that Bowman directed the arson to cover his crime. Third, as noted before, there was overwhelming evidence of Applicant's guilt in both the murder and the arson. Given this overwhelming evidence and the potentially harmful inferences from the gasoline evidence, the prejudice standard is simply not met.

F. Trial counsel Was Not Ineffective for not Filing a Rule 29 Motion for a New Trial; Counsel Was Aware that Felder Was the One Who Purchased the Gasoline at Trial

Applicant asserts trial counsel was ineffective for failing to file a Rule 29(b) Motion for a New Trial because once Felder testified was the one who purchased the gasoline after the guilt phase was complete.

This claim is denied. Indeed, Applicant in fact filed a motion for a new trial in General Sessions Court on September 8, 2008, which Judge Goodstein denied by Order filed January 21, 2010. Specifically, Judge Goodstein ruled that the defense was well

aware of Felder's actions at the time of trial and thus the evidence was not "new" under the test for after-discovered evidence.

Such a finding has support in the record. Cummings testified at PCR that the defense received a copy of the video surveillance from the EZ Horizon convenience store. **{PCR Tr. 1933-34; Respondent's 34}**. It is also clear from the testimony of Cummings that Defendant was well aware that Felder was the one who purchased the gasoline. **{PCR Tr. 1274-76; 1287-88}**. Cummings testified it was Defendant who informed him that Felder purchased the gasoline. Id. At the PCR hearing, Cummings testified that he strategically did not want the video of Felder purchasing the gasoline coming into evidence. **{PCR Tr. 1276}**. Cummings stated did not want it in because he felt it would corroborate Defendant's involvement in the plan to burn the car. **{PCR Tr. 1276}**. Cummings added that the entry of the video into evidence during the sentencing phase was done at Defendant's insistence and was not in line with counsel's strategy. **{See PCR Tr. 1290}**.³ Counsel's fear was well placed, as illustrated by Felder's testimony during the sentencing phase, which did nothing to exculpate Defendant other than by the impeaching nature of its inconsistency on one point.

This Court agrees that trial counsel was aware at the time of trial that Felder purchased the gasoline and that counsel made a reasonable strategic decision not to present the evidence during the guilt phase. As such, counsel would not have had a factual basis for a motion for a new trial based upon newly discovered evidence. The claim is denied.

³ This testimony was also confirmed during Cummings' cross examination and is supported by the trial record. **{PCR Tr. 1290-91, see R. 4911-26}**.

III. Hiram Johnson

A. The State Did Not Violate Brady in Not Disclosing Hiram Johnson's then Pending Charges

Applicant's first Brady claim in reference to Hiram Johnson concerns Johnson's criminal charges. On May 29, 2001, Johnson was served with arrest warrants for Receiving Stolen Goods Less than \$1000, Burglary - Second Degree, and Grand Larceny. **{Applicant's 48, 71}**. The Receiving Stolen Goods Less than \$1000 charge stemmed from an incident on November 2, 2000. **{Applicant's 48}**. The Burglary charge and the Grand Larceny charge resulted from an incident in Orangeburg County on September 26, 2000. **{Applicant's 71}**. Applicant asserts that the prosecution violated Brady because it failed to disclose these charges to trial counsel.

Applicant failed to establish materiality. First, there was overwhelming evidence of Applicant's guilt presented at trial outside of Hiram Johnson's testimony. Several witnesses, including one of Applicant's sisters, testified they observed Applicant threaten to kill the victim on the day of the murder. **{R. 3726, 3739-3744, 3764-66}**. Gadson saw Applicant shoot the victim. **{R. 4000-02}**. According to Gadson, the victim begged Applicant not to shoot her again, but he shot her two more times. **{R. 4012}**. Applicant then dragged her body into the woods. Id. Gadson later rode with Applicant, Hiram Johnson, and Darian Williams to the Allen Murray Club in the victim's car. **{R. 4018}**. They all wore gloves. Id. Travis Felder also testified that early the next morning, Applicant requested assistance in getting rid of a car. Id. Felder testified that he followed Applicant out to Nursery Road. **{R. 4094}**. He watched as Applicant pulled a body out of the woods. **{R. 4096}**. According to Felder, he saw it was the victim when Applicant put her body in

the trunk. {R. 4097}. He testified that Applicant admitted that he killed the victim. {R. 4098}. He also observed Applicant set the car on fire. {R. 4100}. The victim's watch was recovered from Applicant's pants pocket when he was arrested. {R. 4126-30; 4164-65}. Applicant's family got rid of the gun that was used in the murder. {R. 4177, 4185-86}. The gun they threw in the Edisto River was conclusively matched the five of the casings at the murder scene. {R. 4315}. Also, Applicant's DNA was found in the victim. {R. 4381}.

Second, the impeachment value of Johnson's pending charges was limited, particularly in view of the overwhelming evidence of guilt detailed above. There is no evidence Johnson actually got any special consideration for his charges due to testimony, and the charges were completely unrelated to the murder of Kandee Martin. Moreover, Johnson was impeached on whether he could remember what occurred as a result of his head injury, and on the fact that his head injury occurred after he was shot by a police officer. {R. 4071}. In light of the overwhelming evidence of Applicant's guilt in this case, coupled with the limited impact of an impeachment on the suppressed charges, Applicant has failed to establish this Brady claim. It is denied.

B. There Was No "Wink Wink" Deal Between the State and Johnson

In Applicant's second Brady claim, he asserts that the prosecution failed to provide Applicant's counsel with evidence of a "wink wink" deal between the State and Hiram Johnson for his testimony.

In this claim, Applicant essentially asserts that the Solicitor's Office attempted to use Hiram Johnson's pending charges for Burglary and Grand Larceny from a September 2000 incident, and charges for Receiving Stolen Goods less than or equal to \$1000 from a

November 2, 2000, incident as leverage to obtain testimony favorable testimony from Johnson. Specifically, Applicant asserts that Solicitor Bailey used those pending charges to get Johnson to testify that Bowman admitted he killed Kandee Martin.

This Brady claim is not supported by the record. There was no testimony or evidence presented at the PCR hearing that indicated Solicitor Bailey or the police officers made a “wink wink” deal with Hiram Johnson. Detective Coker testified that he was not aware that Johnson had pending charges when he interviewed him.⁴ {PCR Tr. 927, 942}. Bailey credibly testified there was no plea agreement with Johnson: to their knowledge, there were no charges against Johnson and Johnson just agreed to testify. {PCR Tr. 2134}.

Indeed, the progression of those charges after Bowman’s trial also indicates that his cooperation with the Solicitor’s office had no effect on those charges. Johnson was indicted by the Orangeburg County Grand Jury on the all three charges during the April 14, 2003 term of the Orangeburg County Court of General Sessions. {Applicant’s 48, 71}. While the Burglary and Grand Larceny indictments were later nol prossed because of a lack of credible evidence, those indictments remained pending for over one and one-half years before disposition. {See Applicant’s 48, 71}. Resolution of Johnson’s criminal charges were clearly not related to the Bowman case. {See also Respondent’s 39-42}. Applicant has failed to establish there was a “wink wink” deal between the State and Hiram

⁴ Coker also testified that he did not know that Johnson later filed a lawsuit against Orangeburg County deputies until later informed by Chief Walters from the Orangeburg County Sheriff’s Department. {PCR Tr. 942-43}.

Johnson. Since there was no “wink wink” deal between the two, the prosecution could not have violated Brady by not turning over details of such a deal. The claim is denied.

C. Trial Counsel Was Not Ineffective in Not Cross Examining Johnson on the Absence of Bowman’s Alleged Confession in Johnson’s Prior Statements.

Applicant argues that trial counsel was ineffective because Cummings did not cross-examine Hiram Johnson on the fact that none of Johnson’s prior statements indicated Applicant had confessed to killing Kandee Martin. Applicant has failed to establish ineffectiveness in this regard.

As has been noted: “In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster.” Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

At trial, Hiram Johnson testified that on the night of the murder, he went to the Allen Murray Club with Bowman, Gadson, and Darian Williams. {R. 4064}. They rode in the victim’s Ford Escort. Id. Johnson testified that Applicant said he stole the car, and Bowman made them all wear gloves. {R. 4065}. At the Allen Murray Club, Johnson sat in the victim’s car in the parking lot while Applicant walked around the parking lot. {R. 4066}. Johnson also testified that Applicant attempted to sell the car in the parking lot. {R.

4067}. At some point during the evening, Johnson heard Applicant admit that “I killed Kandee, heh, heh, heh.” **{R. 4068}**. At the PCR hearing, Johnson testified that he could not remember if he told police that Bowman said he had killed Kandee Martin. **{PCR Tr. 558-559}**. He also noted that he thought Applicant was kidding when he said it. **{PCR Tr. 560, 565}**. He did not know that the victim was dead when Applicant made the statement. **{PCR Tr. 565}**.

Detective Coker testified at the PCR hearing that he spoke with Johnson on two occasions. The first was on February 22, 2001 at the Branchville Police Department. **{PCR Tr. 927}**. According to Coker’s notes, Johnson indicated he had gone to the club with Bowman, Gadson, and Darian Williams. **{PCR Tr. 929}**. The notes also indicated that Johnson saw Applicant with the gun in his lap while Applicant was driving, and that Johnson knew Applicant had admitted to Trina West that he killed the victim. **Id.** As noted above, trial counsel was provided with a copy of Detective Coker’s notes as part of the Rule 5 discovery. **{See PCR Tr. 1285}**. Coker interviewed Johnson a second time on April 5, 2001. **{PCR Tr. 929}**. He testified that interview began at approximately 1:40 p.m. **{PCR Tr. 929}**. The interview was held at Johnson’s father’s fish market in Branchville. **{PCR Tr. 929-30}**.

Cummings testified that at trial, Johnson testified he overheard a confession from Applicant about killing Kandee Martin. **{PCR Tr. 1372}**. He also noted that the confession Johnson overheard was not included in his written statement from April 5, 2001. **{PCR Tr. 1386}**. Cummings noted that the testimony including the confession was not inconsistent with the written statement. **{PCR Tr. 1386}**. Cummings testified that he did not cross-

examine Johnson on the statement because he did not want to have Johnson repeat the statement during cross-examination. **{PCR Tr. 1387-88}**. Cummings also indicated that the first time he heard about the confession was at trial. **{PCR Tr. 1387}**.

Trial counsel gave a valid strategic reason for not crossing Johnson on this issue. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). Cummings indicated that he did not want to risk having Johnson repeat the statement in front of the jury. Cummings noted it was the worst thing that Johnson said about Applicant at trial. **{PCR Tr. 1386}**. Counsel cannot be found deficient in this regard. See Moss v. Hofbauer, 286 F.3d 851, 865 (6th Cir. 2002) (reviewing court must consider potential risk that cross-examination would have led to damaging testimony being repeated).

Finally, Applicant has not established prejudice. Johnson had indicated to police that he knew Bowman had confessed to killing Kandee Martin. Detective Coker noted as much in his investigative notes regarding his first interview with Hiram Johnson. **{See Applicant's 47}**. Thus, any impeachment would be limited, particularly in view of the

overwhelming evidence of Applicant's guilt, as detailed before. This claim for relief is denied.

D. Trial Counsel Was Not Ineffective for Not Cross-Examining Johnson on the Fact he was Not Charged with Possession of Stolen Vehicle.

Applicant also fails to establish ineffectiveness with regard to cross-examining Hiram Johnson on the fact he was not charged with possession of a stolen vehicle for riding with Applicant in Kandee's car.

Applicant did not establish that trial counsel was deficient in not asking Hiram Johnson whether he knew he could potentially be charged with possession of a stolen vehicle in Applicant's case. First, there was no testimony introduced at the hearing to support a finding that Hiram Johnson was aware that he could be charged with possession of a stolen vehicle. Detective Coker testified that he did not recall having any discussions with Hiram Johnson about charging him with possession of a stolen vehicle. {PCR Tr. 937}. Coker also noted that he did not have an explanation for why Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 938}. He surmised that it was likely because their focus was on getting more information about the murder and arson. Id. Solicitor Bailey recalled that Hiram Johnson was not charged with possession of a stolen vehicle. {PCR Tr. 2104}. Bailey explained that no charge was filed because there were so many other individuals in the case that had already been charged with more serious offenses. Id. Bailey asserted that he did not feel that such a charge was warranted in Johnson's case. Id. Hiram Johnson was asked if he was aware that he could have been charged with possession of a stolen vehicle in this case. {PCR Tr. 539}. Hiram Johnson

never responded to the question.⁵ **{See PCR Tr. 539-46}**. Since there was no evidence that Johnson was aware that he could be charged with possession of a stolen vehicle, Applicant has failed to show that such a method of impeachment would have been successful at trial. As a result, Applicant has failed to establish that trial counsel was deficient in not questioning Johnson in this regard.

Applicant also fails to establish prejudice given the minimal value of any impeachment and the overwhelming evidence of guilt as detailed before. The claim is denied.

IV. Ricky Davis

A. The Prosecution Did Not Violate Brady in Not Disclosing the “Sam Memo”

Applicant asserts that the prosecution violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing Applicant with a copy of typed notes apparently drafted by Sam Richardson, an investigator for the First Circuit Solicitor's Office. The so-called “Sam Memo” appears to reflect the contents of an interview that Richardson conducted with Ricky Davis at Lieber Correctional Institution. **{Applicant's 67; see Applicant's 11}**.

At the PCR hearing, Solicitor Bailey testified that he was familiar with the Sam Memo. **{PCR Tr. 2021}**. He confirmed that it was prepared by Sam Richardson and noted that from the context of the notes, it appeared that it was prepared late in the proceedings.

⁵ The State objected to the question, and the court asked Applicant's counsel how the question was relevant. (PCR Tr. 539). After the discussion about the specific question regarding a potential charge of possession of a stolen vehicle, the objection argument moved on to whether Applicant's counsel was aware of the claim involving Johnson's other pending charges before they filed the third amended application. (PCR Tr. 544-550). At no point did counsel ever return to the question of whether Johnson knew he could be charged with possession of a stolen vehicle.

Id. Bailey did not recall seeing anything in his file that indicated he sent the Sam Memo to defense counsel. {PCR Tr. 2130}. He also testified that he considered the Sam Memo to be work product. Id. Typically, he did almost all of his own work in preparation for a death penalty trial except for typing his handwritten notes. Id. Ordinarily, he would have interviewed Ricky Davis personally. Id. However, he delegated the task of interviewing Davis to Sam Richardson because it was getting close to trial and so much other stuff was going on at that time. Id. Since Richardson interviewed Ricky Davis on Bailey's behalf in preparation for trial, Bailey considered his notes to be protected by attorney-client privilege. Id. More importantly, Bailey testified that he did not think the Sam Memo was inconsistent with the handwritten Ricky Davis statement. {PCR Tr. 2130-31}. Bailey noted that he would have disclosed any information that was inconsistent. {PCR Tr. 2131}. He also testified that the notes would have been in the Solicitor's file and trial counsel could have seen them in the file under the office's open file policy. Id.

Given these facts, the claim for relief is denied. First, Applicant fails to establish suppression of favorable evidence to his case. The Supreme Court has noted that "evidence" that is inadmissible is not evidence at all, and thus cannot affect the outcome of trial. Wood v. Bartholomew, 516 U.S. 1, 6, 116 S.Ct. 7 (1995) (per curiam) (holding that inadmissible materials that are not likely to lead to the discovery of admissible exculpatory evidence are not subject to disclosure under Brady). At best, the notes could be considered evidence that could be used to impeach Ricky Davis if he testified at trial. Here, the defense was aware of Ricky Davis's handwritten note which contained the crucial fact that Ricky claimed Gadson said he shot Kandee, but the defense did not call Davis

because Davis told the defense's investigator that his handwritten statement was false and Applicant put him up to it. Counsel also stated that he would still be in the "same boat" based on his investigator's assessment of Ricky even if he had the Sam Memo.⁶ {PCR Tr. 1335-37; 1339}. Since in substance the Sam Memo did not contain anything the defense was not already provided, and the Sam Memo merely represented nothing more than the prosecution's trial preparation interview based on their possession of the handwritten statement, then there was no suppression of favorable evidence.

Second, the Sam Memo is not material. Evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Youngblood, 547 U.S. at 870, 126 S.Ct. 2188 (internal quotation marks omitted). Moreover, Applicant is incorrect that materiality is measured by the supposed impact the undisclosed notes on defense strategy:

It has been argued that the standard should focus on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, rather than the materiality of the evidence to the issue of guilt or innocence. See Note, The Prosecutor's Constitutional Duty to Reveal Evidence to the Defense, 74 Yale L.J. 136 (1964). Such a standard would be unacceptable for determining the materiality of what has been generally recognized as "Brady material" for two reasons. First, that standard would necessarily encompass incriminating evidence as well as exculpatory evidence, since knowledge of the prosecutor's entire case would always be useful in planning the defense. Second, such an approach would primarily involve an analysis of the adequacy of the notice given to the defendant by the State, and it has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge.

⁶ Trial counsel never stated that he would have called Ricky Davis to testify had he known about the information in the Sam Memo. Cummings noted that he tried to do more investigation into Ricky Davis based on the information he had, and nothing else came up in the defense's investigation. {PCR Tr. 1901}. He also agreed that even with the Sam Memo he would still be in the same boat in deciding whether to call Ricky Davis, because the defense's investigator indicated that Ricky Davis would not testify to what was in the handwritten document, and assessed that Davis was "full of bunk". {PCR Tr. 1901-02}.

U.S. v. Agurs, 427 U.S. 97, 112 n.20, 96 S.Ct. 2392, 2401 n.20 (1976).

Here, as noted before, Ricky Davis told the defense investigator at the time of trial and testified at the PCR hearing that the handwritten statement was not true, and Bowman was the one who gave him all of the information for the handwritten note. {PCR Tr. 263-64}. Davis further professed that he did not know anything about this case. {PCR Tr. 264}. Assuming that Davis had been called, testified as he did at PCR, and then was impeached with the Sam Memo, it simply cannot be said that a reasonable probability of a different result would occur from such impeachment, especially when the defense already possessed the statement written in Davis's own hand, and could have called him and impeached him with that but decided against it. Said another way, the difference between possible impeachment with the disclosed handwritten statement in Davis's own hand, and impeachment with the Sam Memo or testimony from Sam, is not so great that it undermines confidence in the verdict under the standard for materiality. This is especially so given the overwhelming evidence of guilt, as detailed before.

Overall, Applicant has failed to establish he is entitled to relief upon this claim. As a result, this Brady claim is denied.

B. Trial Counsel was Not Ineffective in Not Presenting Ricky Davis' Testimony Regarding Tawain Gadson's Confession

Applicant alleges trial counsel was ineffective for not presenting evidence related to Gadson's alleged confession to Ricky Davis. At some point, the State was provided with a handwritten note from Ricky Davis, now an inmate in Lieber Correctional Institution for armed robbery. The statement, dated August 6, states "I Rickie Davis was on A side with Gadson and he said that he was the one that shot the girl and he gave Bowman back the

gun that was used and He said that it didn't mater[sic] because Blak[sic] famile[sic] had got caught with the gun He also that the police all[sic] he got to do is say Blak did it." **{Applicant's 11, Respondent's 30}**. At the PCR hearing, trial counsel Cummings testified that he received the statement from the Solicitor's Office. He sent an investigator, Walter Mitchell, to Lieber Correctional Institution to interview Mr. Davis regarding the handwritten note. **{PCR Tr. 1328, 1673-74}**. According to Cummings, the investigator informed him that Mr. Davis denied his signature and denied the contents of the statement. **{PCR Tr. 1335, 1341}**.

Court: In talking with him what is your understanding of what he [Ricky Davis] told the investigator?

Cummings: That he did not do this and basically it was junk.

Court: Did your investigator let you know whether or not if he was on the stand he could be a witness against Mr. Bowman in any way?

Cummings: Yes, sir, that he would say that Marion told him to do this, Marion had it created.

Court: So, your understanding was that Mr. Davis was going to deny making the statement and say that - - apparently he must be admitting he make the statement if he's going to say Bowman made him say it?

Cummings: Right.

Court: And, so, your information was he was going to say, "I said it but Mr. Bowman made me?"

Cummings: Right, that would have been the statement. It was proved he gave the statement but Marion made him do it. Mr. Mitchell said he was not going to be a helpful person at all to us, he was facing time and Marion was trying to get him involved in this.

{PCR Tr. 1340-1341}. Clearly, Cummings testified he made a strategic decision to not put Ricky Davis on the stand to testify about the statement. **{PCR Tr. 1342}**.

Given that counsel had the issue checked out the information and assessment provided by the defense investigator was not favorable, this Court finds counsel made a reasonable strategic decision not to call Ricky Davis. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

Indeed, at the PCR hearing, Davis testified that he did not know anything about this case other than what Applicant told him. **{PCR Tr. 264}**. He also testified that at the deposition, he testified he did not recall hearing anything about Applicant's case from Gadson. Id. He further noted that Gadson did not tell him anything that was included in the handwritten note. Id. Applicant was the one who provided Davis with the information. Id. During re-direct, Davis again reasserted that Bowman was the one who told him what to write. **{PCR Tr. 265}**.

Davis' testimony at PCR, which was consistent with what the defense investigator told counsel, would just as likely have been damaging to Applicant's case as helpful. It would have presented the jury with additional evidence that Applicant was attempting to cover up his involvement in the murder of Kandee Martin. In light of the extensive

damaging nature of Davis' testimony and the significantly limited benefit that would have resulted if Davis was called to testify, Applicant has failed to show by a preponderance of the evidence that trial counsel was deficient in not presenting his testimony at trial.

Also, Applicant has failed to show that Applicant was prejudiced by counsel's decision not to call Ricky Davis at trial. As already noted, any benefit from Davis' testimony was extremely limited because Davis would have denied any knowledge of Gadson's involvement in the case. Further, there was overwhelming evidence of Applicant's guilt in both the murder and arson presented at trial, as detailed before. As a result, this claim is denied.

C. Trial Counsel was Not Ineffective in Not Presenting Gadson's Location on A-Side or Detective Coker's Notes Confirming Gadson and Davis Together on A-Side

Applicant asserts two more claims of ineffective assistance of counsel in relation to Ricky Davis. In both, Applicant asserts trial counsel was ineffective in not presenting evidence that Tawain Gadson was on A-side at the Dorchester County Detention Center at the same time as Ricky Davis. Both of these claims should be dismissed because they lack merit. The only reason to present any evidence about Gadson being located on A-Side of the Dorchester County Detention Center is if Ricky Davis was called to testify about his handwritten note. As noted above, trial counsel made a reasonable strategic decision not to call Davis to testify about his statement. Since Davis did not testify at trial, the fact that Gadson was once held on A-Side in the Dorchester County Detention Center was not relevant to any issue at Applicant's trial. Thus, trial counsel could not be found deficient.

Further, Applicant does not establish that he was prejudiced as a result for the reasons noted in the prior subsection.

V. Alvin Coker

A. Trial Counsel Was Not Ineffective in Not Asking Coker About Gadson Lying About Owning a .380

Applicant's first claim in this section is that trial counsel was ineffective because he did not cross examine Detective Coker about the fact that Gadson lied about owning a High Point .380. This claim is denied.

First, trial counsel was not deficient in not asking Coker about Gadson's misstatement about owning a .380. At the PCR hearing, Cummings testified that he recalled finding out that the gun found in the river, which was matched to the murder and deposited there by Applicant's family, did not have the same serial number as the .380 Gadson purchased at a pawn shop. **{PCR Tr. 1920}**. Counsel wanted the jury to hear that Gadson also had a .380 High Point, but understood that if the fact there were two different serial numbers came out, it would mute the benefit of informing the jury that Gadson had the same type of gun. **Id.** Cummings explained that he deliberately stopped at that level when asking Gadson if he owned a .380. **Id.**

Similarly, had counsel gone into that line of questioning with Coker, the same sort of information could have been elicited. At the PCR hearing, Coker testified that he thought the gun they pulled from the river was Gadson's gun until he learned the serial numbers did not match. **{PCR Tr. 1002}**. Counsel clearly expressed valid, reasonable strategic reasons for approaching the Gadson gun issues in the way that he did. As a result, Applicant has failed to establish trial counsel was deficient.

Second, Applicant has not established prejudice. At trial, Cummings asked Gadson if he owned a high powered .380 pistol. {R. 4026}. Over the State's objection, Gadson was allowed to answer. {R. 4027-31}. He admitted that he had purchased a .380 pistol in July 2000, and the pistol he purchased was the same color as Applicant's. {R. 4031}. Clearly, the jury was made aware that Gadson also had the same type of weapon that could have been used in the murder, and indeed, the issue ultimately insured to Applicant's benefit, and there was no explanation the gun Gadson purchased was not the same as the gun found in the river which was matched to the murder.

Indeed, given the overwhelming evidence of guilt, detailed before, the fact that the jury heard Gadson did own a .380, and the fact that Gadson's gun was different from the 380 used to kill the victim, there is no prejudice from the absence of testimony regarding whether Gadson lied about owning a .380.

B. Trial Counsel was not Ineffective in Not Bringing Out Statements Heard by Bruce McLean.

Applicant next asserts that trial counsel was ineffective in not cross-examining Coker about the EZ Horizon video evidence in which Bruce McLean states he overheard some people at the fuel pumps talking about killing a girl and disposing of her body.

First, Applicant did not establish that trial counsel was deficient in not cross-examining on the statements by Bruce McLean. As has been noted: "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to

the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

Here, Cummings testified that he followed up with the lead from the EZ Horizon video. **{PCR Tr. 1943}**. He sent Mitchell to Orangeburg to look for the Jamaican boyfriend, but nothing came of the search. Id. Based on the testimony presented at trial, it appeared counsel had good reason to believe that a line of questioning concerning Bruce McLean would not be fruitful. Thus, counsel was not deficient for not choosing to explore the line of questioning now proposed by Applicant.

Second, Applicant fails to show that he was prejudiced as a result. At the PCR hearing, Applicant's counsel asked Coker about Bruce McLean. Detective Coker testified that they tried to get in contact with Octavia Legree and Bruce McLean, her Jamaican boyfriend. **{PCR Tr. 982}**. Coker noted they had set up several meetings to meet with McLean's girlfriend who was the clerk at the EZ Horizon that night. **{PCR Tr. 924}**. Coker further indicated that they could never catch anyone home. Id. He also notes that they even had a meeting scheduled with them through the Orangeburg County Sheriff's Office. Id. However, McLean and Legree did not show. Id. **{PCR Tr. 924}**. Thus, all that would have resulted from asking Coker about McLean's statements would be that law enforcement could not get in contact with the witness.

Indeed, the statements on the video would have been objectionable hearsay and could not have been admitted for the truth of the matter asserted simply by asking Coker

on cross-examination about it. Mr. McLean did not testify in PCR, and there has been no evidence presented that Mr. McLean could have been located at the time of trial, or that had he been located he would have testified in a manner favorable to Applicant.⁷

Indeed, given the overwhelming evidence detailed before and the lack of any detail as to what McLean heard and from whom, it cannot be said that the absence of any cross of Coker on the subject rises to the level of Strickland prejudice.

C. Trial Counsel was Not Ineffective in not Cross-Examining Detective Coker About Felder Being the One Who Purchased Gasoline

This is essentially the same claim that was raised by Applicant in Section II, particularly E and F. Thus, for the reasons stated there, this claim is denied.

As an additional note, Applicant's assertion that presenting this evidence that Felder purchased the gasoline was exculpatory does not fit with other evidence that was presented at trial. For instance, two witnesses identified Applicant as the one who stopped by Felder's girlfriend's apartment after 3:00 a.m. {R. 4044-4045; 4117-4120}. Both also testified that Felder's girlfriend was loosening his braids when Applicant stopped by to ask for a ride. Id. Both indicated that Felder left with Applicant and returned fifteen minutes later. {R. 3712, 4120}.

⁷ See Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state's failure to object at PCR to hearsay testimony as to what another witness's testimony might have been does not relieve PCR applicant of burden of producing admissible testimony in accordance with the rules of evidence). Indeed, it is speculative as to whom McLean would have described discussing the incident, or whether those persons had actual knowledge of the events on Nursery Road. Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency "based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense"; rather, facts must be presented).

D. Trial Counsel was Not Ineffective in Crossing Coker About the Sworn Statements to Other Tribunals

In this claim, Applicant essentially reasserts the same claim that was raised in Sections I, D and II, D. For the reasons stated in those sections, the claim is denied. Counsel articulated valid strategic reasons in this regard, as Applicant was the source of information for early actions in the investigation, and eliciting such evidence would be damning in that it would show Applicant's connection to the crimes as well as his attempt to cover up his involvement and blame others. Counsel also did not want to elicit evidence of Applicant's earlier statements to police after the confession was excluded and the State elected not to put in any of Applicant's statements. {PCR Tr. 1272-78; 1367-69; 1909-14}. Moreover, because of these explanations, statements made in arrest warrants based on then-existing investigatory information, and in indictments based on concepts of accomplice liability do not amount to a reasonable probability of a different result. All are easily explainable.

VI. Conflicts of Interest:

A. Applicant Failed to Establish Hardee-Thomas Operated Under An Actual Conflict of Interest As a Result of Her Former Representation of Ricky Davis and Then Active Representation of Applicant

Marva Hardee Thomas was appointed to represent Ricky Davis on April 23, 2001. {Applicant's 12}. At the time, Davis faced two charges for armed robbery. {Applicant's 12, 19, 21}. On October 16, 2001, Davis was tried by a jury and convicted of one count of armed robbery. {See Applicant's 20}. He was sentenced to twenty (20) years confinement by the Honorable Diane Goodstein, Circuit Court Judge. Id. The second indictment against Ricky Davis was not pressed with a right to restore on October 18,

2001.⁸ **{See Respondent's 14}**. Marva Hardee-Thomas filed a Notice of Appeal on Ricky Davis' behalf on October 24, 2001. **{Respondent's 14}**.

Marva Hardee-Thomas was appointed to represent Applicant. At the PCR hearing, Hardee-Thomas testified that she did not recall receiving the handwritten note written by Ricky Davis. **{PCR Tr. 1564}**. She did identify the notary block as being in her handwriting. **Id.** However, she did not recall seeing the statement and noted that the notary block was not witnessed by anyone. **Id.** She did not have any independent recollection of talking with Ricky Davis about the handwritten note. **{PCR Tr. 1601}**. She testified that she would not have had a discussion directly with Davis about the document. **{PCR Tr. 1602}**.

Counsel was served with a copy of Ricky Davis' handwritten note on or about January 2, 2002. **{See Respondent's 36}**. At the PCR hearing, Hardee-Thomas testified that she did not know why Ricky Davis did not testify. **{PCR Tr. 1572}**. She did not have a strategic reason for not calling Ricky Davis, but noted that the decision to call Davis to the stand would be one left to the lead attorney in a death penalty case. **Id.** In Applicant's case, Cummings was the lead attorney. Hardee-Thomas guessed that Cummings made the decision to not call Ricky Davis as a witness because she did not make that decision. **{PCR Tr. 1573}**.

"The Sixth Amendment right to counsel attaches upon initiation of adversarial judicial proceedings and at all critical stages of a criminal trial." State v. Sterling, 377 S.C. 475, 479, 661 S.E.2d 99, 101 (2008). "To establish a violation of the Sixth Amendment

⁸ It appears that the victim in the second armed robbery could not be located.

right to effective counsel due to a conflict of interest arising from multiple representation, a defendant who did not object at trial must show an actual conflict of interest adversely affected his attorney's performance." Thomas v. State, 346 S.C. 140, 143, 551 S.E.2d 254, 256 (2001). "An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." Staggs v. State, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007).

"[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." Cuyler v. Sullivan, 446 U.S. 335, 349-50 (1980) (citing Holloway v. Arkansas, 435 U.S. 475, 487-491 (1978)). "But until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." Cuyler, 446 U.S. at 350 (citation omitted). "[A]n actual conflict of interest occurs:

when a defense attorney places himself in a situation inherently conducive to divided loyalties.... If a defense attorney owes duties to a party whose interests are adverse to those of the defendant, then an actual conflict exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client.

Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809, 811 (1984) (quoting Zuck v. State of Alabama, 588 F.2d 436, 439 (5th Cir.1979)).

"The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." State v. Gregory, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005). Additionally, the fact that counsel does not advise a defendant of the potential conflict of interest does not affect the constitutionality of the conviction. Jackson v. State,

329 S.C. 345, 355, 495 S.E.2d 768, 773 (1998). Moreover, the “Rules of Professional Conduct have no bearing on the constitutionality of a criminal conviction.” Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 795 (1993).

Applicant has failed to establish that Hardee-Thomas acted under a conflict of interest in representing Applicant in this case. Hardee-Thomas’ representation of Ricky Davis ended on October 24, 2001, the date she filed his Notice of Appeal with the circuit court. Rule 602(e)(3), SCACR (public defender automatically relieved after filing of Notice of Appeal to conviction). At that time, his second armed robbery charge had already been nol prossed by the Solicitor’s Office. **{See Applicant’s 22}**. Thus, when counsel was presumably made aware that Davis had written a statement regarding Bowman’s case on or around January 2, 2002, she did not represent Ricky Davis. At that point, she owed no duty to Ricky Davis other than to maintain his confidences from her representation of him on the two armed robbery charges. Since there was not a potential conflict of interest, Hardee-Thomas was not obligated to obtain a waiver from either Bowman or Davis.

Even if Hardee-Thomas’ representation of Ricky Davis constituted a potential conflict of interest with her representation of Applicant, Applicant has failed to establish that the potential conflict developed into an actual conflict of interest. At no point were Ricky Davis’ interests adverse to Applicant’s interests. First, Davis’ handwritten statement, if established to be true, would have benefitted Applicant because it indicated that Gadson, Applicant’s co-defendant, was the one who killed Kandee Martin. Further, contrary to Applicant’s assertions, there was no evidence presented in this PCR Action that indicated Ricky Davis’ interests would have been at odds with Applicant’s had he testified at trial. Applicant asserts that Ricky Davis would not testify because the solicitor’s office could still

restore the nolle prossed charge against him as leverage. Applicant presented no evidence to show that the solicitor's office either used the nolle prossed indictment in such a fashion or that it could. Clearly, the disposition sheet on Ricky Davis' nolle prossed charge indicates that the case was dismissed because the State could not find the victim. **{Applicant's 22}**. There was no evidence presented at the PCR hearing that circumstances had changed, or that the solicitor's office was in a position to re-present the indictment to the grand jury. Thus, Applicant never established that Davis' interests were in a position contrary to Applicant's.

Applicant also failed to present credible evidence that Hardee-Thomas spoke to Davis about Applicant. The only person who testified that Hardee-Thomas met with Davis to talk about Applicant's case is Davis.⁹ **{PCR Tr. 251}**. Cummings testified that he sent Walt Mitchell to speak with Ricky Davis about Applicant. **{PCR Tr. 1328}**. Hardee-Thomas indicated she did not recall talking with Ricky Davis about the note and that she thought an investigator was sent out to talk to Davis about his handwritten note. **{PCR Tr. 1603-04}**. Further, Hardee-Thomas testified that she could not recall when she drafted the signature block she put on the handwritten note. **{PCR Tr. 1601}**. She noted that she likely would have received the paper from a guard at the jail. **{PCR Tr. 1602}**.

Overall, Applicant has failed to establish that trial counsel did not call Ricky Davis to testify as the result of an actual conflict of interest. Indeed, as noted before the credible evidence discloses a reasonable strategic decision that Davis was not a reliable witness and his testimony was likely to be damaging to Applicant's case. **{PCR Tr. 1335, 1894-5,**

⁹ His testimony indicates that he was not sure if she was the one from the defense team who spoke with him. **{PCR Tr. 251}**.

1901-02}. There was no probative evidence at trial that indicated that any potential conflict of interest played a role in the decision making process. Applicant has failed to prove his claim and it is denied.

B. There was no Conflict of Interest As a Result of the Fact that Gene Dukes Represented Applicant's Co-Defendant Tawain Gadson

Applicant's second conflict of interest claim derives from the fact that Hardee-Thomas represented Applicant while the Chief Public Defender for Dorchester County represented a co-defendant. As already noted, Marva Hardee-Thomas, Esquire, a Dorchester County Public Defender, was appointed to represent Applicant. Gene Dukes, Esquire, another Dorchester County Public Defender, was appointed to represent Gadson, Applicant's co-defendant who later testified against him at trial. **{Applicant's 77}**. At the PCR hearing, Marva Hardee-Thomas testified that the Dorchester County Public Defender's Office was essentially a conglomeration of independent contractors. **{See PCR Tr. 1535, 1548}**. Gene Dukes was listed as the Chief Public Defender because he had the most seniority. **{PCR Tr. 1540}**. According to Hardee-Thomas, the Public Defenders did not share an office. **{PCR Tr. 1541-43}**. They each worked from their own separate office. **{PCR Tr. 1541}**. They were not full-time Public Defenders, so they each had their own separate practices. **{See PCR Tr. 1535, 1550}**. The public defender corporation did have one employee, Kathy Rogers, who was responsible for assigning cases. **{PCR Tr. 1537}**. The only common space the Dorchester County Public Defenders shared was a small conference room in the Dorchester County Courthouse in Saint George. **{See PCR Tr. 1541, 1553}**. Hardee-Thomas also testified that they would never have co-defendants in the conference room at the same time. **{PCR tr. 1607}**. They did not share personnel.

{PCR Tr. 1554}. There was no investigator for the Public Defender Corporation. Id. Instead, each public defender had to petition the Court for funds if an investigator was needed. {PCR Tr. 1554}.

Applicant has failed to establish there was an actual conflict of interest in this case. Applicant essentially argues there was a conflict of interest because both Gene Dukes and Marva Hardee-Thomas were Public Defenders. There was no evidence presented that indicated they discussed Applicant's case or any of the related cases. Further, there was no evidence presented that indicated they worked in concert in representing individual clients, or that they shared the confidences of individual clients with one another. This claim parallels a similar claim made the applicant in Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998). In Jackson, the Applicant argued he was entitled to a new trial because of a conflict of interest because his co-defendant was represented by another public defender in the Richland County Public Defender's Office. Id. at 347-48, 495 S.E.2d at 769. The PCR Court found trial counsel was ineffective because he operated under a conflict of interest, among other things. Id. at 348, 495 S.E.2d at 769. On appeal, the South Carolina Supreme Court reversed.

In our opinion, respondent did not show any actual conflict of interest resulted from counsel's representation of him while others in counsel's office represented respondent's co-defendants. All respondent showed and the PCR judge found was a potential conflict of interest because counsel worked in the same office with the attorneys who represented the co-defendants. Counsel testified no conflict existed, and respondent could not point to an actual conflict. Thus, this potential conflict never ripened into an actual conflict. Nothing in the record suggests the potential conflict caused counsel to treat respondent's case in such a manner as to obtain more favorable consideration for respondent's co-defendants. Further, the fact that counsel never advised respondent of the potential conflict of interest does not affect the constitutionality of the conviction. See Langford v. State, 310 S.C. 357, 360, 426 S.E.2d 793, 794 (1993).

Id. at 354-55, 495 S.E.2d at 773. Here, as in Jackson, there was no evidence presented at the PCR hearing that an actual conflict of interest existed. As a result, this ground for relief is denied.

VII. Ineffective Assistance Regarding Evidence Admitted in Guilt Phase

Applicant next asserts counsel was ineffective in his handling of a number of items of evidence in the guilt phase.

A. Failure to move to exclude evidence of Bowman's DNA found in the victim's vagina

SLED DNA analyst Fitts found human blood and semen in the vaginal swabs taken from Kandee at autopsy. While the mixture of female and male secretions in the vaginal swabs complicated identification, Agent Fitts was able to match Applicant to a probability of 1 in 5300. {R. 4370-72; 4379-87}. Applicant now contends his counsel was ineffective for failing to move to exclude this match from evidence.

1. There was no valid objection to this testimony.

As an initial matter, Applicant did not show either deficiency or prejudice as there was no sustainable objection that could be made to the DNA match. Regardless of Applicant's complaints that there was no testimony that Applicant and Kandee had sex out at the Nursery Road location, this evidence is undoubtedly relevant to and confirmatory of the identity of Applicant as the murderer, as it places Applicant in close presence of Kandee during the time period at issue. See Rule 401, SCORE (evidence is relevant if it would make a fact in issue more probable or less probable).

Admissibility is not affected by the fact that the DNA match might not necessarily establish the exact point when Applicant had sex with the victim, or because James

Gadson claimed he did not observe any sexual contact at the Nursery Road scene. As noted in State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001):

All that is required is that the fact shown tends to make more or less probable some matter in issue and to bear directly or indirectly thereon. *It is not required that the inference sought should necessarily follow from the fact proved.* Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.

(Emphasis added).

Here, the DNA match is objective scientific evidence that the victim and Applicant were in very close contact around the relevant time period of the murder, and this point alone is sufficient to make it admissible in trial – even if it only provides objective and indisputable corroboration to witness testimony that they were together at some point during the day Kandee was killed. Given the issues Applicant raised with the credibility of the fact witnesses, this indisputable scientific evidence aids a finding of identity, which was especially relevant in this case, where Applicant pled not guilty and put the State to its proof.¹⁰

Applicant contends the proof of sex is an inadmissible “bad act” pursuant to Rule 404(b), SCRE. First, though, is the point that the mere fact Applicant and Kandee had sex – which is all the semen evidence proves by itself – is not a “bad act” in the legal sense. See Rule 404(b), SCRE. Although Applicant contends that fornication is criminal in South

¹⁰ See generally State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300, 311-12 (2001) (finding letters were relevant to show identity as murderer inasmuch as they referred to a safe and a safe was present at the murder scene, and rejecting claim that they were inadmissible because it was not established that the safe referenced in the letters was at the barbershop, where the incident referred to in the letter fit the general time frame of the barbershop killings); State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (2001) (evidence defendant was willing active participant in later robbery was relevant to rebut claim of duress at earlier robbery, even though robbery being tried occurred later); State v. Daniels, 252 S.C. 591, 167 S.E.2d 621 (1969) (held evidence of a prior robbery admissible to show identity because it placed the defendant together with his alleged accomplice); State v. Varvil, 338 S.C. 335, 526 S.E.2d 248 (Ct. App. 2000) (in unlawful use of telephone prosecution, evidence defendant rode by victim’s office and home was relevant to show his intent to harass her with his phone calls).

Carolina, that law is not enforced, and sex is not considered “criminal” or a “bad act” in the legal sense by modern social standards simply because it is out of wedlock.

The same goes for Applicant’s contention that interracial sex between Applicant and the victim is a bad act or is unduly prejudicial. Applicant cannot assume racism on the part of the jury, which was subject to extensive *voir dire* and instructions from the judge on their ability to be fair and decide the case apart from bias or prejudice. There is no proof that the jury was racially biased in this case, and the mere fact of interracial sex does not constitute a “bad act” under contemporaneous values.

Even if adultery or interracial sex could be considered a “bad act”, though, as noted before, “bad acts” under Rule 404(b) are still admissible if they show identity, which the DNA match does in this case. Thus, even if the sexual contact is a bad act, it would still be admissible. And, given that identity was the main issue in the case, it was more probative than prejudicial.¹¹

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, 272 F.3d 878 (7th Cir. 2001) (ineffective assistance claims based on failure to object is tied to the admissibility

¹¹ See State v. Simmons, 310 S.C. 439, 427 S.E.2d 175 (1993) (where intent was contested on burglary charge, the probative value of defendant’s prior attacks on elderly women outweighed the prejudicial effect); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct. App. 1999) (because defendants disputed state’s allegations about their motive and intent, evidence of prior robbery of victim was “highly probative”); State v. Waddle, 873 P.2d 171 (Idaho Ct. App. 1994) (where defendant denies being the perpetrator, evidence tending to establish identity is always relevant). See generally State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990) (Lyle evidence was not just admissible when “necessary”, but is admissible whenever it is “relevant”); State v. Woomey, 276 S.C. 258, 277 S.E.2d 696 (1981) (evidence of other crimes admissible even though appellant’s confession to the crimes was also admitted); State v. Green, 261 S.C. 366, 371, 200 S.E.2d 74, 77 (1973) (evidence logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime).

of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test, as it was neither deficient nor prejudicial).

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection, there is no basis for relief because counsel had a valid strategic reason for admitting the intimate contact. At the PCR hearing, counsel Cummings testified that he did not elicit from Gadson that he observed no sex between Applicant and Kandee because:

[H]ere is my theory and this is what I want to show. Marion and Kandee were friends; they were intimate friends, if I can use the words. I wanted to show that this man would not hurt this little girl because he cared about her and she was an intimate friend of Mr. Bowman's.

{PCR Tr. 1750}. Counsel stated that while he considered a Dorchester County jury to be a “small town jury”, and while he was aware of concerns about adultery and interracial sex, he still wanted to show “they were intimate friends and . . . he had no ill motive or reason to kill this lady”. **{PCR Tr. 1752}**. Counsel pointed out that since the DNA expert could not testify as to precisely when the DNA was put there, he wanted to “clean . . . up” any attempts of the State to sully the relationship, thus showing “he had no malice to this lady, had no reason to hurt her”. Indeed, counsel hired his own DNA expert to verify that it could not be precisely determined when the Applicant deposited his semen into the victim. **{PCR Tr. 1753-54; 1792; 1955; 1980-81}**. Counsel stated he did not want to elicit that Kandee was around Applicant to get drugs, as that would obviously “dirty up” his attempt to show an intimate friendship. **{PCR Tr. 1755}**.

On cross by the State, counsel reiterated that he wanted to show Applicant and Kandee were friends and Applicant would not have killed her. He added that he was not

afraid of the DNA evidence because Applicant was not charged with criminal sexual conduct ("CSC") in the guilt phase, and counsel did not believe the State could prove CSC in the sentencing phase. Counsel stated that since Gadson never testified there was any sex at the scene, he saw no reason to broach the subject. **{PCR Tr. 1866-67}**.

Thus, counsel elicited a valid strategic reason for not objecting to the DNA evidence. He was not at all scared of it as he did not think CSC could be proven (especially since he had Applicant's statement suppressed in which Applicant talked of sexual contact with the victim's corpse), and he thought it could be used to undermine any motive to kill since Applicant and Kandee were lovers. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming even if the DNA match was excluded, as set forth in preceding subsections. Moreover, as argued before, contemporary social values towards extramarital sex and interracial relationships preclude any *per se* finding of undue prejudice from those issues. Therefore, Applicant has not met his burden of showing prejudice.

Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence).

B. Failure to move to exclude petroleum evidence

Applicant next asserts counsel failed to object to introduction of Applicant's pants, because the accelerant present on the pants – a “heavy” accelerant – was not the same as the substance used to ignite Kandee's car – which was gasoline, or a “medium” petroleum accelerant.

At trial, SLED chemist Grady Layton identified a medium petroleum accelerant on Kandee's pocketbook, and Layton was able to conclusively identify the presence of gasoline on the shirt, paper material, belt, and miscellaneous debris found in her car. {R. 4298-4299}. SLED Agent Helms concluded the fire was intentionally set. {R. 3889-90}. Layton also found the presence of a heavy petroleum accelerant, but not gasoline, on Applicant's black Levi's – and a number of Appellant's friends testified at trial he was wearing black jeans the day before. {R. 3763; 4058; 4093; 4193; 4297-98}.

Solicitor Bailey pointed out at PCR that the SLED arson expert had done a complete report, so he introduced testimony on all aspects of the report to avoid allowing the defense to assert or imply the State had not done a full and fair investigation. {PCR Tr. 2026; 2136}.

1. There was no valid basis for objection.

Given this evidence, as an initial matter there could be no deficiency for failure to object nor prejudice as there was no valid basis for objection. The pants themselves were undoubtedly relevant to identity, as they were consistent with and corroborative of what

people said Applicant was wearing the night of the murders, and Applicant asked for them the next morning when he was arrested. More importantly, the pants contained Kandee's watch, which was very relevant to the identity of the murderer. See Rule 401, SCRE (evidence is relevant if it would make a fact in issue more probable or less probable).

As to the accelerant, counsel had no valid objection. It goes without saying that within reason a solicitor is certainly entitled to introduce evidence the complete investigation done by police, even if not necessarily incriminating, to avoid any defense contention that the State rushed to judgment or failed to fully investigate the case. A classic example, as this Court pointed out during argument **{PCR Tr. 2249}**, is calling the fingerprint expert to testify no prints were found despite investigation, in order to avoid later defense argument that the State failed to look for prints or that the lack of prints constitutes reasonable doubt. This is even more important in this post-"CSI" world, given that many jurors watch that TV show and expect such forensic evidence. See United States v. Fields, 483 F.3d 313, 355 n. 39 (5th Cir.2007) (citing an article discussing the "CSI effect" on jurors, and stating: "Some have claimed that jurors who see the high-quality forensic evidence presented on CSI raise their standards in real trials, in which actual evidence is typically more flawed and uncertain.").

As to any concern that the mention of an accelerant might confuse the jury and was substantially more prejudicial than probative under Rule 403, SCRE, no such prejudice occurred. The SLED agent was clear that while there was a heavy accelerant on Appellant's pants, it was NOT gasoline, and there is a difference. **{R. 4297-98; 4301-05}**. Counsel also elicited that Dorothy used kerosene to heat her house. **{R. 4831}**. And, the

solicitor in argument never mentioned the accelerant on the pants or claimed it was indicative of anything. {R. 4461; 4476}. Thus, there is no indication this evidence was unfairly prejudicial or confusing to the jury, or that the State misused it.

Since the evidence was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, supra.

2. Counsel had a valid strategic reason for admitting the testimony.

Even if there was a valid objection to the testimony, Applicant cannot establish a valid claim for relief because counsel articulated a valid strategic reason for wanting the testimony to be admitted.

At PCR, counsel Cummings testified that he tried to suppress the seizure of the jeans, but that was overruled. He noted he did get family to say they used kerosene to heat the house, and he got the expert to say the accelerant on the jeans was not gasoline. {PCR Tr. 1706-07}. Counsel stated he did not consider objecting to any evidence about the petroleum accelerant found on the pants, because the expert was going to and indeed did testify that the accelerant was not gasoline, but kerosene like that which Applicant's wife used to heat the house. Counsel stated that had the solicitor not called the SLED arson expert, counsel probably would have to elicit that only kerosene was found on Applicant's pants. Counsel felt he needed to do this to counter the fact that the victim's watch was found in his pants and witnesses were saying Applicant burned the car. {PCR Tr. 1708-09; 1711-14}.

On cross by the State, counsel noted he had his crime scene expert review the arson report. The expert advised counsel that if all the State had was that a heavy

accelerant was on the pants, that was good for the defense. Counsel strategically decided to bring out that Applicant only had kerosene and not gasoline on his pants, and felt was had successfully taken a state's witness and "made him mine". Counsel pointed out he also elicited from Applicant's wife Dorothy that they used kerosene at home, and of course Dorothy's home is where the pants were found. {R. 4831; PCR Tr. 1845-46; 1854-55}.

Thus, counsel had a valid reason for allowing the evidence – it allowed him to use a State's expert to establish that nothing on Applicant's clothes forensically linked him with the crime, even though the State asserted those were the pants Applicant was wearing when he killed Kandee. Counsel accordingly was not deficient simply because the strategy did not work, particularly given the overwhelming evidence facing counsel in this case. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, trial tactics are not ineffective because they were unsuccessful).

3. There was no prejudice.

In any event, there was no reasonable probability of a different result. The evidence of identity was overwhelming, as previously detailed before in this Order. Moreover, the evidence introduced at trial was clear that the accelerant on the pants did not match the accelerant used to burn the car, and the solicitor in argument never contended otherwise. Given these circumstances, it could not possibly have been so prejudicial to create a reasonable probability of a different result. Applicant has not met his burden of showing prejudice. Reed v. Norris, *supra*. The issue is denied.

C. Failure to object to evidence of conspiracy to secrete Applicant's gun and examination on plea agreements

Applicant contends his counsel was ineffective for failing to object to evidence his relatives were engaging in a conspiracy to “secrete” the murder weapon, by arguing there is no evidence of such a conspiracy or Applicant’s connection to it. He also asserts counsel was ineffective in failing to object to the solicitor’s examination on plea agreements Applicant’s family had with the State.

As noted before, at a party the day Kandee disappeared, Applicant took out from his waistband a grey and black High Point .380 semiautomatic pistol – which he had bought a couple of weeks earlier – wrapped it in a paper bag, and put it into the barrel in Koger’s yard. {R. 3675-77; 3683-84; 3700; 3750-51; 3983-89; 4031-32; 4057-59; 4077-78; 4101}. When Applicant returned, a number of people, including trial witnesses Koger, Fogle, and Carolyn Brown – saw Applicant get upset at Tywan because someone had taken his gun. However, Hiram Johnson interceded, and told Applicant he had taken the gun back to Katrina West’s apartment in the projects. Applicant went across the street and got the gun, and put it back in his pants. {R. 3677-79; 3684-85; 3690-91; 3701; 3985-90; 4058-60; 4077-78}.

Applicant’s murder weapon was found after police managed to get information in May and June 2001 from Applicant’s wife Dorothy and his sisters Yolanda and Kendra, all of whom testified at trial with plea agreements to accessory to the fact of murder. {R. 3735-36; 4161; 4167-68}. Dorothy testified that a few days after the murder Hiram Johnson told her the gun was hidden in the sleeper sofa at her trailer. She found the pistol hidden in a “cuff” or “sleeve” of the couch, put it in her pocketbook, and went over to see Kendra at Applicant’s grandmother’s house. {R. 4198-4202; 4210-12}.

While Dorothy claimed she talked with Kendra and then left the gun at Kendra's in the clothes hamper, Kendra testified that she and Dorothy went to meet Applicant's father Marion Bowman, Sr. at the EZ shop. Marion Sr. took the gun and put it in the middle console of his truck. {R. 4168-73; 4203-04; 4211-12; 4358}.

The next day, Kendra and Yolanda met with Marion Sr., and then followed him out to the graveyard at the Zion AME church. Applicant's father brought the pistol from out of the nearby woods, and they wrapped it in a towel and put it in Yolanda's trunk. Kendra and Yolanda drove out to the Old Cope Road bridge and threw the gun over the side into the Edisto River. {R. 4174-78; 4183-87}.

On May 28th, 2001, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was matched by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be matched to Applicant's .380, they were consistent. {R. 4315-20}.

1. There was no valid objection to the conspiracy.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced as there was no valid objection to be made to the evidence of concealment of the weapon by Applicant's family. First, the weapon was obviously relevant to identity. It shows Applicant's possession of a firearm matched with or at least consistent with the gun used to kill the victim during the time period that the victim was killed. See State v. Braxton, 343 S.C. 629, 634, 541 S.E.2d 833, 836 (2001) (testimony that witness knew appellant possessed a nine millimeter pistol was relevant because it tended to identify appellant as

the possessor of the murder weapon, also nine millimeter pistol); State v. Cheeseboro, 346 S.C. 526, 547, 552 S.E.2d 300, 311 (2001) (prior murder was admissible to establish appellant's identity in the prosecution of the current murder, where the same weapon was used in both murders).

Moreover, there was ample evidence from which the gun and its subsequent concealment could be tied to Applicant. Applicant was identified by his friends in possession of such a gun prior to the crime, and Dorothy testified that on the night of the incident Applicant came in and slept in the chair where she later found the gun. **{R. 4193-94; 4198-99}**. It is certainly a reasonable inference from the evidence that Applicant hid the gun there, and at Applicant's request through his own communications or through Hiram Johnson, his wife, sisters, and father subsequently attempted to permanently hide or destroy the gun to protect Applicant. Again, Applicant overlooks that evidence can be relevant not just by what it directly shows, but also by reasonable inferences from the evidence. See State v. Benjamin, 345 S.C. 470, 480, 549 S.E.2d 258, 263 (S.C. 2001) ("It is not required that the inference sought should necessarily follow from the fact proved. Evidence is relevant if it makes the desired inference more probable than it would be without the evidence.").

Destruction of evidence is relevant to identity, and of course any admissions that Applicant made to his family about the gun – whether expressly testified to or implicit in the subsequent actions of the family – would be substantively admissible.¹²

¹² See Rule 801(d)(2), SCRE (admissions of party opponent). See also State v. Beckham, 334 S.C. 302, 513 S.E.2d 606 (1999) (destruction of evidence and evidence of flight relevant as incriminating circumstance, and to show guilty knowledge and intent); State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991) (evidence of flight admissible to show guilty knowledge and intent); State v. Ezell, 321 S.C. 421, 468 S.E.2d 679 (Ct. App. 1996) (in case where defendant ran and vial of crack was found nearby, evidence of

Moreover, the gun and the events surrounding its recovery would still be admissible even if there was no evidence tying the attempt to conceal it to Applicant. The description of how the gun was recovered was part of the *res gestae*, as it was necessary to tell the complete story of how the gun was recovered to show its link to Applicant and its relevance to this crime. See State v. Adams, 322 S.C. 114, 470 S.E.2d 366 (1996) ("One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence "furnishes part of the context of the crime" or is necessary to a "full presentation" of the case"). "[T]he jury is entitled to know the 'setting' of the case. It cannot be expected to make its decision in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of the charge." United States v. Roberts, 548 F.2d 665, 667 (6th Cir. 1977), cited in Rebecca Smith, 309 S.C. at 453, 424 S.E.2d at 502 (Toal, J., dissenting).

Obviously, the jury was entitled to know the circumstances surrounding the police's discovery of the murder weapon – particularly since the State had to explain why the firing pin broke during examination by Agent Collins, likely due to its long submergence in the river. Indeed, counsel testified at PCR he did not see any valid objection for keeping out the evidence as to how the gun was found by police. **{PCR App. 1849}**. Counsel was correct in this assessment.

Further, had counsel tried to exclude the evidence of the attempt to conceal the gun by arguing a lack of evidence tying it to Applicant, the State would have easily overcome that objection by introducing one of Applicant's letters to his wife, admitted at PCR as

flight shows guilty knowledge and intent). See also United States v. Robinson, 161 F.3d 463 (7th Cir. 1998) (evidence of flight shows consciousness of guilt under Rule 404(b)); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989) (evidence of flight and concealment is probative of guilty consciousness under Rule 404(b)).

Applicant's 56. In it, Applicant asks Dorothy to tell her lawyer she only found the gun after someone broke into her house and put blood in there (obviously to try to then claim the gun was planted by the "real killer") {R. 4360}, and goes on to ask her to tell Hiram to say he only saw Applicant with a .32 or .38 revolver (which is different from the murder weapon). Even assuming loose ends existed as to whether Applicant had knowledge of or instigated the concealment of the weapon, they would have more than been tied up by this letter. Counsel was adamant he in no way wanted this letter in evidence given all the incriminating admissions within it {PCR Tr. 1838-39}, as it clearly shows Applicant's attempt to encourage perjury and obstruct justice. Indeed, he also goes on to ask Dorothy to tell Travis Felder not to say anything, and to tell Travis that Applicant told his lawyer Travis had nothing to do with the crime and would clear him in court. {Applicant's 56}.

Since the evidence surrounding recovery of the gun was admissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, supra.

2. There was no prejudice.

Even if there was somehow a valid objection to introduction of how police discovered the gun, there was no prejudice. As set forth previously, the evidence of guilt was overwhelming. Even if the story of how police found the gun was excluded, the gun itself combined with all the other evidence of identity would preclude a reasonable probability of a different result. Therefore, Applicant has not met his burden of showing prejudice. Reed v. Norris, supra.

3. There was no valid objection to the solicitor's reference to the plea agreements.

Next, there was no valid objection to be made to the solicitor's questioning of Dorothy, Yolanda, and Kendra on the plea agreements; thus, counsel could not have been deficient nor Petitioner prejudiced by the failure to make such an objection.

The law is clear that codefendants may testify even though they have agreed to a plea agreement, and additionally a plea or plea agreement is admissible not as substantive evidence of the defendant's guilt or innocence, but to support or attack the credibility of a testifying codefendant. See, e.g. U.S. v. Gray, 491 F.3d 138 (4th Cir. 2007) (testimony of codefendants testifying pursuant to a plea agreement or immunity agreement still admissible where product of free will, albeit a hard choice); State v. Moore, 337 S.C. 104, 522 S.E.2d 354, 355 n.2 (Ct. App. 1999) (while a codefendant's plea is not admissible as substantive evidence of the defendant's guilt or innocence, it is admissible to support or attack the credibility of a testifying codefendant).

Additionally, the law is clear that the State may elicit plea agreements on direct examination to avoid the perception it was hiding something when the defense inevitably cross-examines the witness on his or her deal with the State. See State v. Shuler, 344 S.C. 604, 545 S.E.2d 805 (S.C. 2001) ("Initially, it was not error for the Solicitor to introduce the plea agreement on direct examination because the Solicitor was entitled to anticipate the inevitable cross examination of a federal inmate and to dispel any notion he was hiding something from the jury."). Indeed, counsel Cummings pointed out that he was the trial attorney in the Shuler case, and thus saw no basis for objecting. **{PCR Tr. 1849-52}**.

Since the questioning was permissible, then counsel could not have been deficient nor Applicant prejudiced as a matter of law. See Hough v. Anderson, *supra*.

4. Counsel had a valid strategic reason for not objecting.

Although counsel did testify he did not see a valid objection to the plea agreements, he also expressed a valid strategic reason for wanting the plea agreements admitted into evidence. Counsel stated he “wanted the rest of the stuff about how they went after his whole family to get him”, and “wanted everybody to know that everybody was charged, everybody, and the only one they went after was him”. {PCR Tr. 1702, 1704}. Indeed, if counsel had NOT engaged in such common and basic impeachment as examining the State’s witnesses on their deals with the State, surely then the allegation now would be ineffectiveness for failing to do so. The fact that Applicant’s present counsel may have treated the issue differently is irrelevant as it is precisely the kind of hindsight Strickland forbids. See Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack).

5. There was no prejudice from admission of the plea agreements.

Even if there was somehow a valid objection to introduction of the plea agreements, there was no prejudice. As previously set forth, the evidence of guilt was overwhelming. Indeed, had counsel precluded testimony about the deals with the State, that might just as well have enhanced the credibility of the family members in the absence of such a common method of impeachment. Therefore, Applicant has not shown prejudice. Reed v. Norris, *supra*.

VIII. Failure to Object to Admission of Ballistics Evidence

Applicant next contends his counsel was ineffective for failing to object to admission of the opinion of the SLED firearms examiner that the casings at the scene matched Bowman's .380 to the exclusion of all other firearms.

Of course, after Applicant's sisters confessed to throwing Applicant's pistol in the river, a police diver recovered the black and grey High Point .380 semiautomatic in the river bottom about 25 to 30 feet from the bridge. {R. 4220-29}. The gun was matched "to the exclusion of all other firearms" by SLED firearms examiner David Collins to five of the six Winchester .380 shell casings found at the Nursery Road scene. While the sixth casing and spent bullet could not be conclusively matched, they were consistent. {R. 4315-20}.

A. Counsel was not deficient.

Despite having the gun transported to Atlanta for review by his expert for these PCR proceedings, Applicant presented no evidence that Collins's conclusion as to the match was invalid. His only attack goes to the validity itself of the discipline of firearms and toolmark examination, and the ability of that discipline to make an exclusive match.

However, even assuming the present validity of an attack on the discipline of firearms and toolmark identification or the relative conclusiveness of a match, counsel was not deficient. Two relevant principles for analyzing claims of ineffectiveness come into play here. First is the point that there is no constitutional claim of ineffective assistance of an expert witness. See Wilson v. Greene, 155 F.3d 396, 401 (4th Cir. 1998) ("The Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts to determine whether a particular psychiatric examination was appropriate.");

Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir.1989). Lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop" until they find one who will testify favorably. See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). To be actionable, the failure must be of counsel in failing to obtain or present the expert testimony; the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992).

Second is the principle that the reasonableness of counsel's actions must be viewed in the context of the time period they took place, and not in hindsight. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.") (quoting Strickland); Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) ("Though hindsight may provide a different view of counsel's actions, Simpson is not entitled to a new trial for the sole purpose of presenting a 'fancier' case."). See also Harden v. State, 360 S.C. 405, 602 S.E.2d 48 (2004) ("An attorney is not required to anticipate potential changes in the law which are not in existence at the time of the conviction.").

When these principles are considered, it is clear counsel could not have been deficient for failing to challenge the underlying discipline of firearms examination at the time of a trial in May 2002. Counsel testified he hired a recognized firearms examiner, Cleon Mauer, to review the State's firearms evidence. {PCR Tr. 1794; 5316-17}. Counsel stated that Mauer concurred with the State's findings of a match, and never once advised

him that he should challenge the entire discipline of firearms identification or have a match excluded from evidence. **{PCR Tr. 1684; 1847-49}**. Counsel noted that “at the time of trial” he understood firearms examination to be a “recognized science”. Counsel testified he had an sheriff’s investigator bring all the evidence to his expert so that the expert could conduct his own examination, and the expert also found a match. **{PCR Tr. 1681-85}**. While counsel agreed that a ballistics examiner might have an vested interest in protecting the discipline, he relied on his expert to tell him the truth. **{PCR Tr. 1688; 1690}**. Counsel cross-examined the State’s expert Collins as best he could with questions suggested to him by his own expert, by eliciting that the firing pin was broken, and that the State could not match the weapon to the actual projectile that killed Kandee. **{PCR Tr. 1684; 1699}**.

Since: (1) counsel here hired and relied upon a firearms expert who did not advise him to make a challenge to the underlying discipline – which would not be actionable even if the expert was at fault in not knowing of such a challenge – and (2) defense lawyers were not making challenges to the underlying discipline of firearms examination in South Carolina at the time of trial in 2002, but instead considered it a “recognized” discipline, then counsel could not have been deficient for failing to challenge the validity of the discipline.

Further, Applicant’s Exhibit 78 would not change this conclusion and somehow make counsel deficient for not raising a fundamental challenge to firearms identification. Applicant’s 78 reflects a motion made to a federal court in Massachusetts in 2000 to exclude for various reasons a firearms examination finding a match. First, of course, is the fact that this Court excluded Applicant’s 78 from evidence, so Applicant’s citation to it in his brief is inappropriate. **{PCR Tr. 1692-94}**.

However, even if this Court was to consider it, it does not establish that counsel here did not meet the minimum level of competence for South Carolina lawyers. Applicant offered no proof whatsoever that defense lawyers *in South Carolina* were routinely making such challenges as a matter of course, and counsel was therefore deficient for not meeting this supposed minimum standard of competence. Simply because one lawyer in Massachusetts had filed the motion does not mean that counsel here would be ineffective when such an attack was not commonly (or indeed – ever) done by criminal defense attorneys in South Carolina in 2002, particularly since counsel consulted an expert in the field and was not advised to make such a challenge.

Indeed, Applicant primarily relies on the “Ballistic Imaging” study that did not come out in final form until August of 2008 {PCR Tr. 412; 423} – over six years after trial and three weeks before the PCR hearing began. These issues are just now percolating into the courts, and counsel cannot be held deficient for failing to raise a challenge for which the basis did not arise until years after Applicant’s trial. See, e.g. Gentry v. Sinclair, 576 F.Supp.2d 1130 (W.D. Wash. 2008) (counsel’s decision to attack reliability of DNA science and not the results was reasonable, as reasonableness the decision must be considered at the time it took place, in 1991, when DNA was still “cutting edge”); McDonald v. State, 952 So.2d 484 (Fla. 2006) (holding that counsel was not ineffective for failing to request a Frye hearing because there was general acceptance in the scientific community of the particular science at issue at the time of the defendant’s 1995 trial).

As noted before, counsel is not required to second guess his expert, and indeed, Applicant’s claim essentially depends on the premise that counsel himself should have had

more of an expertise on the cutting edge issues in firearms examination than his own firearms expert did. The law plainly does not require that. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous); Green v. Koerner, 312 Fed.Appx. 105 (10th Cir. 2009) (defendant charged with arson was not denied effective assistance of counsel due to counsel's failure to foresee future developments in fire investigation science that occurred after date she entered her plea).

Indeed, Applicant's "flat earth" discussion confirms the very point. At PCR, Applicant pointed out to counsel that it would "seem reasonable" for an expert prior to Columbus to advise that the earth was flat, but that later after ships sailed around the world it was found not to be flat. {PCR Tr. 1691-92}. Counsel cannot be found deficient because at the time he was not more ahead of the scientific curve than most of the rest of the world, including his own qualified hired expert. Counsel was not deficient.

B. There was no prejudice.

In any event, Applicant has not shown prejudice. First, the evidentiary showing Applicant made at PCR was insufficient to completely undermine the discipline of firearms examination and create a reasonable probability of a different result had it been presented to the jury.

Again, there has been no evidence presented that David Collins was incorrect in finding a match pursuant to the accepted standards in the profession of firearms identification. Applicant's only contention goes to the underlying validity of the premise that firearms make distinguishing marks upon casings and projectiles that can be used to match them to a particular firearm to the exclusion of other firearms.

In support of his claim, Applicant called Dr. Marc DeGraef, who was on a committee that authored the report, "Ballistic Imaging", which was marked as Court's Exhibit 1 but excluded from evidence. **{PCR Tr. 477-78}**. This report was a study of the feasibility of creating a national computer database of images of all new firearms that could be searched for matches to evidence from crime scenes. **{PCR Tr. 406-08; 454}**. Dr. DeGraef admitted his expertise, and thus his basis for inclusion in the committee, was only in imaging and imaging analysis, and that was the extent to which he was qualified as an expert at the PCR hearing. Dr. De Graef conceded that none of the studies on his CV involved analysis of ballistics or projectiles, that he had never conducted a firearms or toolmark analysis, and that he had never independently researched or studied the uniqueness of toolmarks. Indeed, he even pointed out that none of the other committee members had actually performed a study involving the uniqueness of firearms or toolmark identification. **{PCR Tr. 414-23}**. Finally, Dr. De Graef conceded he had not reviewed the specific evidence in this case. **{PCR Tr. 442-43}**.

Because of his lack of expertise with anything specifically relating to firearms or toolmark examination, Dr. De Graef was limited to testifying that the discipline was not a "science" because no statistical quantification of an error rate has occurred. **{PCR Tr. 435-**

38; 441-42; 451-52}. Dr. De Graef also criticized any use of subjectivity in science, **{PCR Tr. 444-45}**, and complained Collins's notes were not as detailed as a scientist would like **{PCR Tr. 448-50}**. He asserted that a statement of exclusivity imported an error rare of zero to a subjective determination. **{PCR Tr. 474-75}**.

On cross, Dr. De Graef admitted that the "Ballistic Imaging" report only questioned whether uniqueness of toolmarks had been fully demonstrated, and conceded the report expressly did not challenge the validity of firearms identification or take any position on whether such evidence was admissible in court. Moreover, Dr. De Graef conceded that the report accepted the prospect that the same gun would produce the same marks as having a "baseline level of credibility" given "existing research" and its acceptance as evidence in courts for years. He ultimately admitted that assessing the validity of the assumptions behind the discipline were not within the scope of the report, and the only conclusion of the report was that further study was warranted. **{PCR Tr. 453-58; 470-72}**. Dr. De Graef further conceded that the only independent study conducted for the report did not at all assess the question of uniqueness, and Dr. De Graef had no idea whether Agent Collins had correctly or incorrectly identified a match in accordance with then-existing standards. **{PCR Tr. 463-66; 472}**. Finally, Dr. De Graef admitted that he did not even write the portion of the report which questioned whether uniqueness had been established, but instead wrote portions addressing how various imaging systems might be applied to a firearms database. **{PCR Tr. 466-67}**.

The expert who testified as to the match at trial, David Collins, is a member of the Association of Firearms and Toolmark Examiners (AFTE) with a long career of experience

in the field. **{PCR Tr. 367-70}**. He testified at PCR as to how sufficient agreement is found for a match. He noted that the observation of the various markings on a subject item and a test item is very objective, and agreed though that the ultimate conclusion of whether those markings proved a match did have a subjective component, based on the experience and training of the examiner. **{PCR Tr. 296-99}**. Collins testified that in his opinion firearms leave individual markings that are unique to that firearm. **{PCR Tr. 307}**. He noted he used rules of matching that have been accepted and used throughout the world and in place since the 1920s. **{PCR Tr. 314-16; 321; 388}**. Collins also pointed out that he personally has participated in as well as reviewed studies in which trained examiners were able to distinguish firearms that had been consecutively manufactured, thus proving the validity of the premise of uniqueness. **{PCR Tr. 317-18; 321; 397-99; 481-86; 497-98}**. Finally, he noted that he has never failed a proficiency test and is not aware that anyone else at SLED failed one while he was there. **{PCR Tr. 336; 383}**.

As to his specific finding in this case, Collins testified he found the possibility that the marks were made by a firearm other than Applicant's to be so remote and infinitesimal as to be a practical impossibility. He again pointed out that studies had confirmed this finding of uniqueness. **{PCR Tr. 339-41; 349; 385-88}**. Collins agreed his "exclusion" language might indicate complete certainty, but stated he was just trying to express his opinion that it was a practical impossibility another gun made the same markings. He agreed though, that at this time there was no way to put a statistical number on the conclusion like is done with DNA, for example. **{PCR Tr. 341-50; 499-500}**.

Given this testimony, no Strickland prejudice could result even if it is assumed that counsel should have called Dr. De Graef to attempt to exclude or undermine firearms identification testimony. Applicant simply did not provide sufficient evidence to preclude the firearms identification from being entered into evidence. All he offered was a general and *possible* criticism of the statement of exclusivity from someone who had no experience with firearms and toolmarks analysis, and had never actually conducted a study assessing the uniqueness of such marks. Thus, nothing concrete was offered to actually disprove the premise of the discipline that toolmarks are unique.

To the contrary, the “Ballistic Imaging” report specifically noted that assessing the premise of uniqueness was beyond its scope, and it accepted the premise that the same gun would produce the same marks as having a baseline level of credibility – while just recommending further study. A generalized criticism and request for additional study simply does not establish that uniqueness of firearms does not exist. Indeed, the only person testifying before the Court who actually had participated in a study assessing uniqueness was Agent Collins, and he noted examiners were able to distinguish firearms even though they had been consecutively manufactured. Applicant’s attack on the validity of the discipline itself was simply insufficient to preclude a type of testimony that has been routinely accepted in the courts since the 1920s. See Overton v. State, 976 So.2d 536 (Fla. 2007) (no prejudice from failure of counsel to challenge testing procedures of lab, where testimony showed that any such challenge would likely have been unsuccessful). See generally Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (In a PCR proceeding, the applicant bears the burden of establishing that he is entitled to relief); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency “based on

vague and conclusory allegations that some unspecified and speculative testimony might have established his defense”; rather, facts must be presented).

Inasmuch as Applicant makes the lesser contention that counsel should have examined Collins on his “exclusion of all other firearms” language, again no prejudice resulted. Collins testified that he was simply trying to convey the concept of “practical impossibility” with such language, and that he remained sure the casings came from the subject firearm. Thus, had counsel probed the manner, Collings’ answers would have been more than satisfactory and would not have created a reasonable probability of a different result.

Even if counsel had successfully reduced Collings’ testimony to no more than the fact that the marks on the casings matched marks on known casings fired from the firearm, without any testimony as to the exclusive significance of that match, there still would be no reasonable probability of a different result. Collings still at a minimum would be able to testify the casings matched and thus could have come from the firearm, even if he was precluded from testifying the match was exclusive. This evidence still would make a fact in issue more likely than not, see Rule 401, SCRE, and would be akin to the serology evidence common before DNA, which was admissible even though millions of people have the same blood type. See generally Adams v. State, 794 So.2d 1049 (Miss. Ct. App. 2001) (Southwick, J., concurring) (inconclusiveness of mitochondrial DNA testing did not make it inadmissible where it could not exclude defendant but could exclude most of general population; while it does not confirm identity it makes it more probable than not). When the fact that the markings physically match is combined with the fact that Applicant’s family conspired to hide the gun in the river, the gun would remain strong evidence indeed.

And, there was other conclusive evidence of identity without reference to an “exclusive” ballistics match, as previously detailed. Given all this evidence of identity, it cannot be said that a mere challenge to the exclusivity but not the match of the State’s ballistics result would have created a reasonable probability of a different result. Indeed, given this evidence, even if the match were excluded in its entirety the evidence was still overwhelming. There was no prejudice. Reed v. Norris, 195 F.3d 1004 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence); Simmons v. Taylor, 195 F.3d 346 (8th Cir. 1999) (failure to object to jail clothing not prejudicial under Strickland given the state’s overwhelming evidence).

IX. Failure to object to arbitrary factor of “good” prison conditions

Applicant next contends his counsel was ineffective for failing to object to the solicitor’s questioning of defense prison expert James Aiken on so-called “good” prison conditions, which he asserts introduced an arbitrary factor into his sentencing proceeding. As will be seen, since the defense opened the door on the issue and thus the solicitor’s subsequent questioning was permissible as a matter of law, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, supra.

A. Events at trial

As noted before, during its sentencing phase case the State only presented the two victims of Applicant’s prior crimes, the SLED arson agent, the pathologist, and two victim impact witnesses. {R. 4652-4708}. The State presented no witnesses or information as to any of Applicant’s misbehavior in or lack of adaptability to prison, or on conditions of confinement generally.

On the other hand, the defense's third witness was Margaret Baughman, an adult education teacher at the jail where Applicant spent his pre-trial confinement. This teacher stated that Applicant had been taking her classes in jail for fourteen to fifteen months, and eventually became her reliable and trustworthy teacher's assistant. **{R. 4761-65}**. On redirect, Applicant elicited that there are limited educational opportunities available for inmates, and Applicant made him self available for any class. **{R. 4767}**.

Applicant next called James Aiken, a former state corrections official and corrections consultant, who was qualified as an expert in future danger and prison adjustment issues. On direct, Aiken testified Applicant would *never* leave prison until he was dead. According to Aiken, Applicant's institutional record of one fight and assistance to Baughman in the classroom indicated he could adapt to prison, but fundamentally Aiken noted that SCDC could manage and incapacitate any inmate with its security measures. **{R. 4838-4845}**.

On cross, Aiken testified extensively without objection on the various security levels of custody an inmate can achieve. Aiken stated that a LWOP inmate has the incentives of getting to go to work and "get[ting] an opportunity to live" – without objection from the defense. **{R. 4854-4862}**.

On redirect, the defense elicited that Applicant could not work outside the prison, that he would not be going to "kiddy camp" if he was given a life sentence, that he would not have "picnic lunches", and that he would be around a "predator, dangerous violent inmate population". The defense then elicited the dimensions of a supermax cell. The defense then asked Aiken what productive endeavors were available for Applicant in prison, to which Aiken replied that Applicant could "pay back society" and "do something

for himself” by working in such areas as food service, maintenance, or painting. The defense asked Aiken if Applicant was going to be “molly-coddled”, and elicited that Applicant could get involved with the Scared Straight program. **{R. 4864-68}**.

On re-cross, the prosecutor asked about escapes, to which the defense objected. Outside the presence of the jury, the court sustained the defense objection to the questioning on escape, but declined the motion for a mistrial. During the discussion, the prosecutor asked if he could explore “certain conditions of the general population, the work conditions he’s already gotten into, that area”, since the defense had established that Applicant was not going to “kiddy camp” and would have work available. The trial court agreed, to which the defense only stated, “We’re on recross, Judge”. The judge replied that work situations was an issue certainly before the jury “at this point”. **{R. 4869-76}**.

Following a curative charge by the judge as to the escape question, the prosecutor elicited from Aiken that (1) Applicant would not be in supermax, (2) he would be able to work for a modest income of a few dollars per day, (3) he would have a daily routine that included eating times, work times, and recess, (4) he would be able to engage in Bible study, education, anger management, and “other things”. While Aiken again noted Applicant would be around very dangerous people, he stated Applicant could have access to libraries, television, football, and softball. There was no defense objection to any of this testimony. **{R. 4877-81}**.

Applicant next called jail guard Sharon Branch, who stated that while Applicant displayed some “attitude” and had a recent difficulty with authorities over going to church, he never made her feel physically threatened. The defense elicited that Applicant was

allowed “one hour of rec per day”. {R. 4882-88}. Finally, jail guard Enrique Badillo testified that Applicant displayed a very polite and cooperative attitude in jail. {R. 4902-05}.

B. Plath, Bowman, Burkhart, and Bryant

The reason evidence about “good” prison conditions is problematic stems from four South Carolina cases – one that was in existence prior to this case and three that were handed down after Applicant’s trial, including Applicant’s on direct appeal.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), the court *affirmed* a death sentence despite issues related to the State’s cross-examination and evidence responsive to a defense presentation “[demonstrating] the permanence and deprivation entailed in life imprisonment”. Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which “sought to portray life imprisonment as preferable to capital punishment as a matter of social policy”, or “drew a picture of life imprisonment as slavery, a condition of irretrievable loss”. Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly “invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment”, and concluded that “determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.” Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State’s challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.

Nearly two decades later, and four months *before* Applicant's trial, the United States Supreme Court issued Kelly v. South Carolina, 534 U.S. 246 (2002), which so broadly defined "future dangerousness" that it effectively ended years of litigation in South Carolina over whether a capital inmate could have the specific charge that a life sentence would be without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Regardless, Kelly as a practical matter ensured Applicant at trial would get a charge that his life sentence would be without parole. It was in this new legal setting that Applicant went to trial a mere few months later.

Subsequently, the state supreme court decided Applicant's direct appeal in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, Applicant contended that the solicitor's questioning was improper about movies, television, and books in prison. The Court found the issue was not preserved, but added a cautionary instruction to both sides:

We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Subsequent to Bowman, the South Carolina Supreme Court addressed a case where the *solicitor* preemptively called a witness who extensively testified as to the

conditions of confinement for a inmate serving life without parole. State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Justice Moore was joined by Justice Waller and wrote the opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Burkhart, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime". Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)". Burkhart, 640 S.E.2d at 454.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. The Chief concluded that the issue was fully joined by both sides and used by the defendant to his advantage. 640 S.E.2d at 454-57.

Subsequent to Burkhart, the South Carolina Supreme Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, although the solicitor (also Solicitor Bailey in that case) called *no* witness on conditions of confinement, the *defense* called an expert that testified in great detail as to the “dismal conditions of prison life in general”, including testimony about the mean guards, the bad food, the uncomfortable furniture, and the incessant noise. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject.

C. Counsel was not deficient in handling the issue.

In his brief, Applicant cites some isolated passages from counsel Cummings’ testimony under questioning by Applicant to assert that counsel simply “missed” the issue by failing to object. {PCR App. 1720-22}. However, when one explores counsel’s testimony more carefully, it is clear that the fact of the matter is counsel was operating in one of the vanguard cases after LWOP became a mandatory charge in every case, and was strategically using the burdensome “without parole” aspect of that sentence as the centerpiece of the defense strategy. Since neither Bowman, Burkhart, or Bryant had been issued yet, counsel’s strategy was reasonable, including his (and the judge’s) determination that the solicitor’s responsive question was permissible given the evidence elicited by the defense.

In his testimony on cross during PCR, counsel Cummings explained that his strategy was to portray life in prison without parole as a particularly horrible fate that it amounted to sufficient punishment for a young man like Applicant. He noted he wanted to “paint a picture, paint it nasty for [the jury]”. {PCR Tr. 1876-80}. Counsel noted that he has

successfully objected when the solicitor attempted to talk about escape, but knew that once he had questioned the witness on some of the harsh conditions of prison he fully expected the solicitor to ask Aiken about “whether or not they get to eat in prison”. Since Bowman, Bryant, and Burkhart were not out yet, he did not see a valid objection outside of the solicitor “talking about things that were outside the scope – that being escape”. Counsel added, “I knew it was coming; I took a calculated risk; I made a decision”, and agreed that he knew full well that “by going down the road of saying life in prison is so horrible that it’s good enough punishment for Marion Bowman”, the solicitor was going to try to show that it was not as bad as all that. **{PCR Tr. 1882-84}**. While of course counsel later stated he was not strategically trying to introduce what the law determined was an arbitrary factor **{PCR App. 1986-87}**, on cross, counsel stated he made a “calculated risk” in eliciting the evidence on the toughness of prison from Aiken. He noted he “made that choice to try to give the jury an alternative”, asking rhetorically, “why do we give the jury a LWOP choice if we’re not going to let them know what prison is like?”. He agreed he was willing to take on the issue of prison conditions because he thought he could use it to his client’s benefit. **{PCR App. 1884-85}**. Finally, counsel agreed that at the time they were on the “frontier” of how to litigate a capital case with the mandatory LWOP charge, and he “did try to push the envelope”. **{PCR App. 1885-86}**.

Given counsel’s testimony, it is clear that counsel was not deficient when one considers the time period and the then-existing state of the law in which counsel operated. Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging LWOP and essentially required such charges in every case, had come out just a few

months before Applicant's trial. Knowing that he was going to get a LWOP charge, and given Applicant's relatively young age, counsel decided to attempt to portray through Aiken the conditions of LWOP as so severe that it was a sufficient alternative to death for the conservative Dorchester County jury to choose. Given the time period and the state of the law when this trial took place, with Kelly being freshly decided and Bowman, Bryant, and Burkhart not issued yet, counsel was reasonable in deciding to use the LWOP charge to his advantage in this manner. Strickland plainly does not require counsel to anticipate changes and developments in the law. See Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (holding that while Victor v. Nebraska, 511 U.S. 1 (1994) is retroactive, counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner's trial); Walker v. Jones, 10 F.3d 1569 (11th Cir. 1994) (trial counsel not ineffective for failing to object to reasonable doubt charge where petitioner's trial took place four years before Cage v. Louisiana, 498 U.S. 39 (1990), and state courts at that time had affirmed use of such charges).

Since counsel had reasonably decided to elicit evidence that Petitioner was not going to "kiddy camp", that he was not going to be "molly-coddled", that he would be around a dangerous predatory population, and that he would be required to make something of himself through work and educational opportunities in prison, he expected that the solicitor would seek to respond with his own questioning about some of the less harsh conditions of confinement. Counsel testified he took the "calculated risk" that he would gain more with his stark portrayal of LWOP than he lost with any response. Given the testimony on the issue he elicited, counsel testified he did not see a valid objection to the solicitor's own limited questioning on conditions – except when the solicitor went

outside the “scope” into questioning about escape, to which counsel successfully did object.

Given the state of the law when this trial took place – in Plath that “the State was entitled to make this response” to defense evidence on conditions – then counsel was correct that, based on his own questioning, he would not have had a valid objection to the solicitor’s limited responsive questioning. See Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (although defendants should not have entered the forbidden field of penology, once they did, State was entitled to respond and show “life imprisonment was not the total abyss which [the defendant] portrayed it to be”); State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (proper for solicitor to respond that victim’s family could only visit him at the grave after defendant’s sister testified she would visit him in prison at Christmas); State v. Thibodeaux, 750 So.2d 916 (La. 1999) (defendant opened the door to prosecution questioning of its corrections expert on recreational activities at prison).

Thus, counsel was not deficient: (1) in strategically deciding to enter to confinements issue as part of his strategy to portray LWOP as a particularly harsh sentence and viable punitive alternative, and (2) in acquiescing to the solicitor’s limited responsive questioning on the same subject. Simply because the State was then able to score a few points back on cross – as is the case for any party during almost any examination – does not mean that counsel was somehow ineffective in deciding on this strategy. Trial counsel has to take the good with the bad, and in almost every case a prosecutor will be able to score points off of the defense’s presentations. The fact of such an inevitable response does not make counsel deficient for eliciting it for his beneficial purposes. To find deficiency would be precisely the type of hindsight Strickland forbids. See generally Sexton v. French, 163

F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack); Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy).

There was no deficiency.

D. Applicability of a *Strickland* analysis to this issue

A normal Strickland analysis still applies to a claim that counsel did not object to introduction of conditions evidence. Unlike Burkhart, Bowman, or Bryant, which were direct appeals, this case is in PCR, and on collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel). Of course, the familiar standard in Strickland v. Washington that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice – a reasonable probability of a different result at trial.

In the sentencing phase, prejudice is phrased somewhat differently. In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court described it as “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,” citing Strickland.

There are only limited exceptions where prejudice is presumed under Strickland – none of which apply here. See Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (rare three exceptions are: (1) denial of counsel at critical stage; (2) failure of counsel to subject case to meaningful adversarial testing; and (3) extremely prejudicial circumstances surrounding trial where no lawyer could be effective). Nance concluded that “[a]bsent these narrow circumstances of presumed prejudice under Chronic, defendants must show actual prejudice under Strickland.” Id. at 880.

The conclusion that a prejudice analysis applies is consistent with the language of Strickland itself, despite Burkhart's view of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of “profound importance”. See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the court held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. Franklin noted the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae*

review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74; 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that “a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*”. Franklin, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis original).

And that last statement precisely raises the final point why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. While Burkhart phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant here in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel’s omission. Applicant must filter his statutory claim through the constitutional one – as a fundamental and legal matter, the claim he pled is constitutional. As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.

E. There was no prejudice.

There was no prejudice warranting reversal. Here, the defense was able to score a lot of points with its presentation as to the harshness of life without parole. Indeed, the main thrust of the defense in the sentencing phase was the concept that the “without parole” portion of a life sentence in harsh conditions makes life without parole sufficiently severe enough punishment to be appropriate retribution for the crime, without the need to

impose death. See {R. 4982} (defense derisively refers to prosecutor's argument as "reward-a-prison"); {R. 4991} (defense states its "easy to try to paint prison as a reward", and argues: "The line forms back there if anybody wants to spend the rest of their life behind bars."); {R. 4991} (defense argues it is "wrong" and an "injustice" if the jury thinks a life sentence is a "reward"); {R. 4996-97} (defense implies that a life sentence is worse than death for a person as young as Applicant, and argues "Can you imagine spending from the years of the youngest person on the jury until the oldest person on the jury behind bars? That's a life sentence without the possibility of parole."); {R. 4997-98} (defense argues that jury should give Applicant life so that he would have to remember what he did to Kandee for the rest of his days); {R. 5005-06} (defense argues that prison is a dangerous place, and prison is appropriate punishment for Applicant because it is a death sentence too).

Given the defense's extensive exploration of the harshness of prison, it cannot be said that a much smaller amount of fair and accurate comment the other way would create a reasonable probability of a different result. Indeed, given the extensive focus of the defense on the retributive sufficiency of the "without parole" aspect of a life sentence, it cannot be said that a little further accurate information about life without parole to complete the picture was so far out of bounds as to necessitate a new sentencing hearing. Applicant cannot show prejudice simply because he was not allowed to create a one-sided and inaccurate perspective.

There is no reasonable probability of a different result if a few pages of questioning on this issue during a multi-day sentencing hearing had been excluded, in a case where the defense had their own full comment by choice on the issue.

X. Failure to object to submission of kidnapping aggravator

Applicant next contends his counsel were ineffective for failing to call Gadson during the sentencing phase to refute the kidnapping aggravator, by having him testify that there Kandee willingly went with Applicant to help him burglarize a house. He also asserts that the testimony of inveiglement was too vague and thus submission of the aggravator violated due process.

A. Events at trial and in PCR

In one statement to police, Gadson said that stated that when he got in the Kandee's car with Applicant and Kandee, Applicant said he was going to "pull a caper", and when Gadson asked what caper, Applicant said he was going to "rob somebody". Kandee then said she needed gas money. Gadson then claimed he had them take him home. **{Applicant's Exhibit 5}**. In his other statement to police, Gadson said Applicant said he was going to "pull a caper". Kandee then said she would do anything for a hit of crack. Gadson said that while they were riding to Nursery Road, Applicant made a gun with his fingers and pointed it at Kandee's head. He also stated that Applicant said he was going to kill Kandee because she had been "wired" by police when she bought drugs from Applicant. **{Applicant's Ex. 6}**.

In his trial testimony, though, while Gadson did note that after they left the car Applicant said he was going to kill Kandee because she was wearing a wire **{R. 3998}**, he

did not mention on direct the plan to rob a house or the gesture of a gun to the back of Kandee's head. On cross, when counsel asked Gadson why Kandee was afraid when a car was coming down the road, and the three of them then jumped in the woods, Gadson stated it was because Applicant said he was going "to pull a caper". Counsel quickly moved on and there was no explanation of what "pulling a caper" meant. **{R. 4035}**.

Prior to the beginning of the sentencing phase, counsel moved for a directed verdict of life, arguing against all of the possible aggravating factors, including kidnapping. The court found the motion premature. **{R. 4611-17}**.

At the close of the State's evidence in the sentencing phase, counsel again asked for a directed verdict on the aggravating circumstances. He argued that Gadson's testimony that all three of them jumped in the bushes when the car passed meant that Kandee was no under anyone's control, and contended there was no testimony establishing the weapon was ever used to keep Kandee in a particular place. Counsel contended that testimony Kandee was given directions where to go did not amount to inveiglement, and that the testimony was she was shot without any warning. **{R. 4711-17}**.

The trial court found this case to be similar to Plath inasmuch as the victim was lured after Applicant had formed an intention to kill, and allowed the aggravator. **{R. 4731-32}**. Counsel renewed his argument on kidnapping at the close of evidence, but the judge affirmed her prior ruling. **{R. 4930-31}**.

At PCR, Gadson admitted, as he related to police in Applicant's 6, that he knew beforehand Applicant was planning to kill Kandee, but did not mention that in his testimony. Gadson then backtracked and said he only knew there was going to be a killing when

Applicant started shooting Kandee. Gadson stated that he and Kandee thought they were heading out to Nursery Road to rob someone else. **{PCR App. 144-47}**. On cross by the State, Gadson stated they were looking for a home to rob, and claimed he did not know when Applicant pointed at Kandee's head whether he was making a gun-like gesture or merely pointing to a house to rob. **{PCR Tr. 181-84}**.

Counsel Cummings testified in PCR that he did not want to elicit evidence that Applicant was planning a nighttime burglary of a residence, and pointed out that such evidence "didn't get out" during the trial. Counsel stated that he "walked the tight rope as tight as he could" with this aggravating evidence, and based on experience he wanted to make the State prove its case rather than portray Applicant as "the reason why she's dead, dope, sex, drugs". He noted that it would have done no good anyway if the jury found that Kandee was tricked into going with Applicant with the ruse that they were heading to a house to rob, as that might meet the "inveigle" or "decoy" version of kidnapping. Counsel pointed out that South Carolina had what he referred to as one of the broadest kidnapping statutes in the nation. **{PCR Tr. 1395-96}**.

Later, when asked if Kandee's crack use at the scene of her murder "might be relevant to the issue of her state of mind in . . . for the kidnapping aggravator", counsel again noted that South Carolina had an extremely broad kidnapping statute. He stated "if you want to argue the state of mind, they were going there to do a job", and pointed out and "any way I turned on this thing I was stepping on a land mine". **{PCR Tr. 1643-44}**.

On cross by the State, when asked about impeaching Gadson for leaving out of his trial testimony things in his statement such as that Applicant "was going to pistol whip

another girl who owed him crack money, that they of course were looking for houses to rob when they went out to the Nursery Road location, that [Applicant] made a gun sign to the back of the victim's head on the way out there, that he said he was going to kill the victim and that he gave the victim crack before killing her", Cummings testified he was "shocked" those things did not come out on direct and did not want to open the door to them. Cummings noted that whatever value might be gained in impeachment was more than outweighed by the egregious nature of those facts. He also stated that he saw no value in eliciting those egregious facts from Gadson, since being tricked into going with Applicant could still support kidnapping as well. {PCR Tr. 1923-25}.

B. Failure to call Gadson in sentencing phase

Applicant's first contention now is that had counsel called Gadson back during the penalty phase and elicited testimony that Kandee went willingly with Applicant as part of a supposed plan to rob a house, then the trial court would have granted a directed verdict as to the kidnapping aggravators since Kandee was not inveigled.

As an initial matter, counsel could not have been deficient nor Applicant prejudiced because testimony of a plan to rob houses (or even to smoke crack) out on Nursery Road would not have precluded a kidnapping aggravator under South Carolina law. As counsel repeatedly pointed out, kidnapping in South Carolina is very broad and is satisfied if the person is seized, confined, inveigled, or decoyed, "by any means whatsoever". S.C. Code Ann. § 16-3-910 (Rev. 2003). In interpreting this statute, the state supreme court held "specious" an argument that the evidence did not support the aggravator of kidnapping, "where the victim was invited into the appellants' car [and went willingly], after they had

formed and expressed the intention to carry away and murder her". State v. Plath, 281 S.C. 1, 18, 313 S.E.2d 619, 629 (1984). Additionally, in State v. Ray, 310 S.C. 431, 427 S.E.2d 171 (1993), the Court found that while the evidence was conflicting as to when the defendant formed the intention to kill the victim, a finding of kidnapping was supported by the evidence where the defendant supposedly agreed to take the victim to the hospital after shooting her, but in fact took her somewhere else to finish her off, during which she resisted. Finally, most relevant is State v. Stokes, 345 S.C. 368, 548 S.E.2d 202 (2001), in which the Court found no error in redaction of a portion of a letter showing that the victim was tricked into going into the woods under the premise that they were going to kill someone else, by finding that rather than disproving kidnapping by showing the victim went willingly, rather would in fact go to proving the "inveigle" and "decoy" forms of kidnapping. See Stokes (quoting, *inter alia*, United States v. Hughes, 716 F.2d 234, 239 (4th Cir.1983), "nothing in the policy of the ... kidnapping statute justifies rewarding the kidnapper simply because he is ingenious enough to conceal his true motive from his victim until he is able to transport her ... [to another location]").

As the prosecutor pointed out, the evidence had already shown that Applicant had threatened to kill Kandee before the day was out – and this evidence came from Applicant's own sister Yolanda, his own cousin Katrina, and Eddie Waters. **{R. 3726; 3744; 3766}**. Additionally, had counsel called Gadson to elicit the plan to burglarize houses, the prosecutor most assuredly would have cross-examined him on Applicant's 6, wherein Gadson told police that Applicant made the gun gesture to Kandee's head before they arrived at Nursery Road. From this evidence a jury could have concluded that

Applicant had already formed the intention to kill her when he invited her along on the supposed plan to burglarize houses – or even just to go somewhere to smoke crack. Just like the victim's belief in Stokes that she was going in the woods to kill someone else, the fact that Kandee thought she was willingly participating in an illegal scheme would not prevent a finding of kidnapping, where the scheme was merely Applicant's ruse to get Kandee in a location where he could kill her. As such, counsel was not deficient nor Petitioner prejudiced.

Regardless, counsel was adamant that he did not want to elicit in detail egregious facts that had been left out of Gadson's statement, such as the fact that they were looking to burglarize a residence. Although Gadson did briefly mention Applicant's desire to "pull a caper" in response to one of counsel's questions, counsel quickly moved on and did not have Gadson explain to the jury what that meant – for the obvious reason that it would only harm his client. Indeed, calling Gadson back in the penalty phase would have been extremely risky, as the prosecutor might then elicit on cross some of the other egregious facts from the statement, such as Applicant's providing of crack to Kandee, and Applicant's threat to pistol whip another woman who owed him money. Counsel's strategic decision to avoid as best as possible any reference to Applicant's plan to burglarize houses is certainly reasonable and sustainable under Strickland – especially when one considers, as argued above, that eliciting such testimony from Gadson would not have precluded a kidnapping aggravator anyway. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance).

Finally, Applicant has not shown prejudice. South Carolina is a "consider" state, in that juries are not instructed to "weigh" aggravators and mitigators. Thus, the subsequent

overturning on appeal of one aggravator does not affect the validity of a death sentence as long as one valid aggravator remains. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained, and citing (citing Zant v. Stephens, 462 U.S. 862 (1983)); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (citing Zant). The jury in this case found two aggravators: the murder was committed in the commission of kidnapping, and larceny with the use of a deadly weapon. Accordingly, Appellant's death sentence would not be compromised even if this Court were to find counsel ineffective in not achieving a directed verdict on the kidnapping aggravator.

C. Lack of proof in record supporting kidnapping aggravator

Applicant next makes the freestanding contention that there was no evidence in the trial record to support the kidnapping aggravator. He asserts that Gadson never testified to anything Applicant did to inveigle or decoy Kande Martin.

As an initial matter, this freestanding claim is procedurally improper in PCR. As noted before in the preceding subsection, counsel argued that a directed verdict should be granted on the kidnapping aggravator, but the trial court declined, accepting the solicitor's argument that the victim was lured after Applicant had formed an intention to kill. {R. 4731-32}. Any freestanding claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Regardless, even if this Court could “overrule” Judge Goodstein’s decision on the directed verdict motion at trial, it is clear that she was correct. As argued before, Yolanda, Katrina, and Eddie all testified that Applicant threatened to kill Kandee before the day was out. {Tr. 3726; 3744; 3766}. Gadson testified that Applicant was telling Kandee where to turn and led her to drive out to Nursery Road where she was murdered. {R. 3994-96}. And, Gadson testified Applicant wanted to pull a caper {R. 4035}, and stated Applicant said he wanted to kill Kandee because she was wearing a wire {R. 3998}. From this a jury could reasonably conclude that Applicant had the preexisting intention of killing Kandee and inveigled and decoyed her by leading her out to the deserted stretch of rural road where he killed her. There is no error.

Regardless, as argued before, even if the kidnapping aggravator was unsupported reversal is still not warranted given that South Carolina is a “consider” state and not a “weighing” state, and the larceny aggravator is unaffected. See State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (finding invalidation of armed robbery aggravator did not require reversal of death sentence where other aggravators remained).

The issue is denied.

XI. Alleged ineffective investigation and presentation of mitigation case

Applicant next contends his counsel were ineffective in their investigation and presentation of the case in mitigation.

A. Alleged constructive absence and the presumption of prejudice

Applicant first contends his counsel constructively absented themselves from the preparation and presentation of the mitigation case, thus mandating a presumption of prejudice under the doctrine of United States v. Cronic, 466 U.S. 648 (1984).

1. Cronic is not applicable to this case.

As an initial matter, the narrowly and rarely applied Cronic doctrine, allowing a presumption of prejudice when counsel is constructively absent, is simply not applicable to the circumstances this case. The constructive absence form of Cronic occurs where counsel “entirely fails to subject the prosecution’s case to adversarial testing”.

In the only opinion where the South Carolina Supreme Court has presumed prejudice pursuant to the “constructive absence” form of Cronic, the lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory and capacity. Co-counsel was a new lawyer with no death penalty experience who had only been practicing for eighteen months. The lawyers only interviewed *one* family member in preparation, and the mental expert was not provided with *any* requested background information. The lawyer told the jury in opening argument that he did not ask for the case but had been appointed; counsel only called *three* witnesses in the guilt phase during which they elicited prejudicial information; they failed to even qualify their expert; and they called the sister at the last minute without any preparation. The defense sentencing phase case only lasted *seven* minutes, and during closing co-counsel did not plead for his client’s life, but instead described him as a “sick” man who did “sick” things. Nance, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

Indeed, the United States Supreme Court and the federal appellate courts have repeatedly pointed out how rare and narrow the Cronic exception to prejudice is, occurring only when there is a overwhelmingly complete breakdown of counsel in all aspects of the representation rather than mere deficiencies in trying the case. In Bell v. Cone, 543 U.S. 447 (2005), the Court reversed the Sixth Circuit Court of Appeals, which had concluded that *Cronic's* presumption of prejudice analysis applied because counsel did not ask for mercy after the prosecutor's final argument. Bell, 535 U.S. at 693. The United States Supreme Court stressed that Cronic's exception is very narrow, and stated:

When we spoke in *Cronic* of the possibility of presuming prejudice based on an attorney's failure to test the prosecutor's case, we indicated that *the attorney's failure must be complete*. We said 'if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing.'

535 U.S. at 696-97 (emphasis added). See also Wright v. Van Patten, 128 S.Ct. 743, 746 (2008) (same). Finally, Bell held that "[t]he aspects of counsel's performance challenged by respondent – the failure to adduce mitigating evidence and the waiver of closing argument – are plainly of the same ilk as other specific attorney errors we have held subject to Strickland's performance and prejudice components." *Id.* at 698.¹³

Other lower federal and state courts have also recognized that the Cronic doctrine is only to be applied in "very rare", "extraordinary", and "exceptional" circumstances, upon

¹³ See also Florida v. Nixon, 543 U.S. 175 (2004) (concession of guilt in a capital trial was reasonable and did not "rank as a 'fail[ure]' to function in any meaningful sense as the Government's adversary.") See also Mickens v. Taylor, 535 U.S. at 166 (clarifying that Cronic is limited to cases where the magnitude of counsel's error is such that the verdict is almost certain to be unreliable) (citing Cronic, 466 U.S. at 659 & n. 26); Williams v. Taylor, 529 U.S. 362, 391, 396-97 (2000) (examining a claim under the Strickland standard where the petitioner's "trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

an “extremely high showing” of deficient performance – and inapplicable where an otherwise incompetent counsel at least provided *some* representation to the client.¹⁴

With this review of the law in mind, it is clear Cronic simply does not apply, even if everything Dale Davis said is taken at face value. The woeful description of the representation in Nance is of course nothing like the representation that Applicant received in this case, where one of his lawyer is an extremely experienced criminal defense litigator in the state. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State’s case throughout the proceedings. For example, counsel engaged in an extensive suppression hearing for various pieces of evidence over multiple days, which ultimately resulted in the suppression of Applicant’s very incriminating and egregious fourth statement to police, in which he speaks of post-mortem sexual contact with the victim. This was a huge victory after a hearing that took over 1000 pages of transcript, and alone would preclude a finding that counsel was so completely “inert” that Cronic would apply. **{R. 313-1322}**.

Counsel Cummings also credibly testified to the extensive preparation they did, including hiring and consulting with Robert Minter, an investigator; Walt Mitchell, another investigator; Donald Girndt, a crime scene expert; Jeff Hollifield, a forensic scientist; Cleon Mauer, a firearms examiner; Dale Davis, a mitigation investigator; Jeff Yungman, a forensic social worker; Dr. Harold Morgan, a psychiatrist; Dr. Brian West, a psychologist; Dr. Clay Nichols, a forensic pathologist; Ronald Ostrowski, a DNA expert; Frank Bloomingburg, a

¹⁴ E.g. Young v. Catoe, 205 F.3d 750 (4th Cir. 2000) (applied only in “rare cases” and “extraordinary” situations); Childress v. Johnson, 103 F.3d 1221 (5th Cir. 1997) (for Cronic to apply, counsel must not be merely incompetent, but inert); Scarpa v. DuBois, 38 F.3d 1 (1st Cir. 1994) (a lawyer’s “maladroit performance” is a trial error, where a “non-performance” is a structural error); Toomey v. Bunnell, 898 F.2d 741, 744 n. 2 (9th Cir. 1990) (applied “very sparingly”).

polygrapher; and Sally Hayden, a speech and reading teacher who assessed Applicant and found he could read and write just fine (despite his lies to the trial court and apparently to counsel that he could not). **{PCR Tr. 1784-98}**. Counsel also made scores of other pre-trial motions, including motions to reveal the deal, to exclude photographs, and to declare the death penalty unconstitutional. **{R. 70-314}**. Counsel conducted extensive capital voir dire, which encompasses over 2000 pages of transcript. **{R. 1383-3492}**. Counsel cross-examined every single one of the fifty-two state's witnesses in the guilt and sentencing phases – save only the victim's mother in the sentencing phase, and of course it is not unusual for capital defense attorneys to stay away from grieving family members testifying as to victim impact. Counsel presented a mitigation case in which he hired and called in mitigation family members, jail guards, jail education teachers, and a corrections and adaptability expert. **{R. 4742-4928}**. And, regardless of what Dale Davis and Jeff Yungman want to say in hindsight, counsel hired and called a forensic social worker who testified in detail during the mitigation case about the psychosocial assessment he conducted of Applicant's life. Finally, counsel gave pointed and relevant closing arguments, including an impassioned plea for a sentence of life without parole in which he argued that for Applicant it was a fate worse than death. **{R. 4979-5011}**.

Clearly, this is not a Nance-type situation where counsel “entirely failed to subject the prosecution's case to any meaningful adversarial testing.” Essentially, the entire claim Applicant makes here is that counsel did not spend enough time talking with and giving guidance to mitigation investigator Dale Davis and social worker Jeff Yungman – although it is undisputed he did talk with them some. Given all the work counsel undisputably did, Applicant's present claim is certainly “of the same ilk” as other specific attorney errors the

United States Supreme Court has held are "subject to Strickland's performance and prejudice components." See Cone, 535 U.S. at 698; Nixon, 543 U.S. at 189-92.

Cronic is inapplicable and Applicant must show prejudice.

2. Counsel did not absent themselves from the mitigation preparation, whether in the context of applying *Cronic* or assessing deficiency.

Next, this Court concludes that the evidence does not justify a finding counsel completely absented themselves from preparation of the mitigation case.

Testifying social worker Jeff Yungman complained that he did not have much contact with the attorneys, and Applicant introduced a letter in which Yungman complained to counsel that trial was upcoming and he did not know the strategy. {PCR Tr. 1056-58}. However, Yungman also admitted he had worked on 26 prior death penalty cases and had been qualified as an expert in 12-15, and knew what he was looking for in a social history. {PCR Tr. 1057; 1062; 1113-15}. He explained what he was looking for in mitigation, and admitted there was not that much difference in how one handles a case where guilt was conceded as opposed to one where it was not. The point was still to use the person's life experiences to find factors that might explain behavior. {PCR Tr. 1062-65; 1077}. He admitted Dale Davis gave him a great deal of information. {PCR Tr. 1076}.

On cross, Yungman displayed his expertise in knowing what issues to address in conducting a mitigation analysis, and conceded there was no question he knew what he was hired to do, and indeed it was a common analysis he had done in all his prior cases. He agreed counsel hired him to put the social information together in a coherent form for trial, and they relied on his expertise in looking at the information to determine what was

significant and relevant. He also conceded he had a lot of contact with Dale Davis during the process. {PCR Tr. 1120-25; 1142-43}. Finally, he agreed his report was submitted to the attorneys prior to trial. {PCR Tr. 1127-29; Respondent's 11}.

Of course, Dale Davis testified that Cummings was not particularly responsive to her attempts to contact him, so she began to keep a secret log of things he did she did not like to give to Applicant's attorneys in PCR. She did not tell Cummings or Hardee-Thomas she was keeping this secret log to use against them in the current process. She also conceded that she did have some contact with the attorneys, just not as much as she would have liked. {PCR Tr. 1227-41; 1515}. Davis also testified on direct that she was an "expert in mitigation", that when you begin gathering the social history you do not know where it will lead you, and that she was hired by the attorney "to lead the investigation and coordinate the investigation" into mitigation. {PCR Tr. 1220-21}.

On cross, Davis was led on an discussion where she talked at length and in great detail about all the various issues and the information supporting it that arise in social history mitigation. She testified as to why a case in mitigation was important, and what the defense would try to show in such a case. {PCR Tr. 1426-28}. She noted she seeks all records {PCR Tr. 1417}, and testified that she has the training and expertise to know what to look for – which is why the attorneys hire her in the first place {PCR Tr. 1426-28}. The State at PCR introduced her time log, which showed all of the work she did on the case, including interviewing 30 people, and she brought to the hearing the large amount of records and other information she gathered in the case. {PCR Tr. 1432-35; 1440-44; Respondent's 12; Respondent's 13}. She agreed she gave all this information to Jeff

Yungman. **{PCR Tr. 1435}**. Finally, Davis conceded she had no problem faxing memorandums and the like to counsel during the representation, and conceded under questioning by this Court that Marva Hardee-Thomas took her calls without problem and would then contact Cummings' office. **{PCR Tr. 1442-43; 1494}**.

Most importantly, after allowing Davis to speak at length on her knowledge of how to do a mitigation investigation and why certain information was important, she conceded she had not needed an attorney sitting next to her during her testimony to provide guidance as to how to answer those questions. While she complained that she did not think the information at trial was presented well, she admitted she knew how to gather the information herself, and she did in fact gather it and present it to Yungman and counsel. **{PCR Tr. 1445-47}**. She also conceded she suggested Yungman to counsel and knew he had done these cases in the past. **{PCR Tr. 1445-47}**.

Under questioning by this Court, Davis could not give one specific example of anything she told Cummings but he ignored **{PCR Tr. 1483-84}**, and conceded there was nothing wrong with the information in Yungman's report **{PCR App. 1484-85}**. She also admitted they discussed the mitigation case after the conclusion of the guilt phase, and while she complained Cummings did not talk to the lay witnesses beforehand, admitted she talked with them about their testimony. **{PCR App. 1486-93}**.

Aside from these telling admissions, counsel in large measure credibly refuted the claims of Dale Davis. Marva Hardee-Thomas noted she was shocked when she got the "panic memo" from Davis. With regard to Davis's complaints she could not contact counsel, Thomas testified "she didn't know where that was coming from", as she never

refused to return calls from Davis and felt the complaint was "out of the blue". She also testified Dale Davis was known for "turning on" attorneys in PCR. **{PCR App. 1591-93; 1609-10}**. Counsel Thomas also remembered talking with the sisters and the mother. **{PCR App. 1614-15}**.

Counsel Cummings also credibly testified. He said that Dale Davis was the mitigation specialist the defense hired and relied upon to have have the expertise to gather the social history. He noted she suggested Yungman. **{PCR App. 1789-90; 1806-07}**. Cummings admitted he had some disagreements with Davis towards the end of trial, but felt she had been sabotaging his relationship with Applicant. Cummings denied ever refusing phone calls from Davis or making himself unavailable to her. Counsel denied there was ever any "panic", and stated matter of factly, "we had what we had to work with". **{PCR Tr. 1807-08; 1816}**. Counsel denied he ever refused to look at any information Davis sent or to discuss the case with her, and pointed out she never told him she was keeping a log of things he was doing she did not like. He testified everything always seemed to be a crisis with Davis. **{PCR Tr. 1808-09}**.

Counsel also specifically remembered meeting with Yungman and discussing his testimony. Counsel felt Yungman was properly prepped and wanted him to testify freely, as opposed to a situation where it was perceived counsel was pulling everything out of him. He felt Yungman's testimony would give reasons for why Applicant did what he did. He did not recall Yungman ever calling and saying he needed additional information. **{PCR Tr. 1809-12; 1873}**. Counsel also noted that he was impressed by Yungman's experience and

resume and his prior employment as a police officer, which he thought would aid Yungman's credibility. {PCR Tr. 1814-16}.

Counsel noted he did not think that some of Davis's suggested witnesses would work well with a Dorchester jury, and stated he fundamentally relied on her to gather the social history. Counsel discussed meeting with Applicant's mother and family but stated they were not particularly helpful. {PCR Tr. 1816-21; 1826}.

Finally, counsel was clear that he made a strategic decision to introduce Yungman's testimony as to what caused Applicant to commit the crime rather than hold on to some amorphous concept of residual doubt; he noted that the jury had already convicted Applicant and residual doubt was not a valid mitigator anyway, so he felt like he had to address causation head on. {PCR Tr. 1870-73}.

Thus, counsel's testimony credibly refutes Ms. Davis's claim that they refused to contact her and discuss the case with her. Indeed, Ms. Davis's credibility is suspect and her biases obvious, as proven by her conduct in keeping a secret log of counsel's alleged faults for use later at a PCR. Regardless, counsel is not required to personally like the expert or involve her in his ultimate strategy discussions; by all accounts counsel hired a recognized mitigation expert to gather the records and that is what Davis did, and counsel hired a recognized forensic social worker to testify as to what was in the social history and that is what Yungman did. While Yungman and Davis might have wanted more guidance, counsel was clear he met with Yungman prior to trial and discussed the testimony, and also stated as a strategic matter he wanted Yungman's testimony to flow more freely from the heart than be robotically elicited. This was a reasonable decision, and counsel, Davis,

and Yungman were all clear that Davis got all the information she could find, and she delivered it all to Yungman, and counsel got a copy of Yungman's final report in anticipation of testimony.

Again, lawyers are entitled to reasonably rely on their experts, and they are not required to second-guess their expert's conclusions or "expert shop". See Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998); Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). Here, counsel reasonably relied on his hired experts to do their jobs, and cannot be faulted for not micro-managing the very areas in which those experts had the expertise and for which they were hired in the first place. See, e.g. Hendricks v. Calderon, 70 F.3d 1032 (9th Cir. 1995) (to impose a duty on the attorney to gather background information for an expert independent of any request from that expert would defeat the whole purpose of hiring the expert, as understanding what information is needed is an integral part of the expert's skill, and requiring an attorney to review the trustworthiness of the expert's conclusions would make the expert superfluous).

Whether in the context of application of Cronic or an assessment of deficiency under Strickland, the issue is denied.

B. Alleged failure to present evidence of Applicant's emotional value to others

Applicant can show neither deficiency nor prejudice with regard to the alleged failure to present evidence of Applicant's emotional value to others.

As his first specific allegation of evidence counsel supposedly failed to present in mitigation, Applicant contends counsel failed to present evidence of his capacity to be of

emotional value to others. He contends this could have come from sister Kendra, wife Dorothy, and an expert in family psychology.

1. Counsel were not deficient.

As an initial matter, counsel were not deficient with regard to this issue. Four factors are most important here. First, as set forth in the discussion above, counsel hired recognized experts in the mitigation field and relied upon them to identify the important mitigation issues in counsel's life. Indeed, Davis suggested and counsel hired psychiatrist Dr. Morgan and psychologist Dr. West **{PCR Tr. 1449; 1791}**, but there was no evidence that they or Yungman advised counsel to present a family psychologist or lay witnesses on Applicant's capacity to be of emotional value to others. Indeed, although he tried to blame it on counsel, Yungman – the expert in the field – testified that he apparently made the decision to focus more on Applicant's difficult upbringing and negative influences. **{PCR Tr. 1093}**. And, Yungman was clear he spoke with Kendra. **{PCR Tr. 1163}**. If the experts failed to identify an issue, it is not counsel's fault and is not actionable. See Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992) (counsel entitled to rely on experts, and the fact that the testifying expert did not identify "every possible malady or argument" is not a basis for relief).

Second is the fact that the family was generally reluctant to testify and to help counsel. This made counsel's job difficult, and counsel testified he had to beg Applicant's mother to testify on his behalf. **{PCR Tr. 1801; 1819-21; 1825}**. Corroborative of this is the fact that counsel even mentioned "great reluctance of the family" at Applicant's trial. **{R. 4547}**. Any assessment of counsel's supposed failure to present one aspect or

another of Applicant's relationship with his family must be assessed in the context of the circumstances in which counsel was operating – including this general reluctance of the family. See generally Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him).

Third is the fact that as a strategic matter counsel was clear that in no way would he want to present the letters Applicant wrote to Dorothy after his arrest. While those letters did start with some pleasantries to Dorothy, they also go on and try to get her to lie to police, to cover up evidence, to get others to lie, and to refuse to cooperate with authorities. **{Applicant's 56}**. Counsel was clear he did not want this egregious information coming before the jury, showing Applicant's attempts to suborn perjury or commit obstruction of justice. **{PCR Tr. 1838-41; 1950}**. This strategic decision is certainly reasonable and thus unassailable under Strickland.

Fourth is the fact that counsel did present lay testimony from Applicant's family, including evidence from Kendra that he used to cook for the family and play with his mother's godson, Dominique. **{R. 4743}**. Applicant's mother testified at trial as to how he would cut grass to help the family, and that he was always willing to help out. **{R. 4753}**. Applicant's mother also noted Applicant had a daughter during her appeal for mercy. **{R. 4760}**. Counsel also elicited from Yungman that Applicant was helpful to his family and was good to his stepchildren and to Kendra's child. **{R. 4806}**. This, of course, was all Yungman identified for counsel in his report. **{Respondent's 11 p. 8}**.

When these four factors are considered, it is clear counsel was not deficient. Counsel relied upon their experts to identify and advise him of the relevant issues. There

is no mention in Yungman's report of "capacity for emotional value to others", and there was no testimony at PCR that Dr. West offered to testify as Dr. Kissiah did at PCR, but counsel just failed to call him. There is no testimony that any of the hired experts suggested calling a witness like Dr. Kissiah, but counsel ignored it. Moreover, despite a difficult family, counsel did elicit information as to Applicant's value to his family and his young daughter.¹⁵ Counsel was not deficient and the issue is denied.

2. There was no prejudice.

In any event, Applicant has not shown prejudice under Strickland. Again, in Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court restated the "prejudice" prong in a capital sentencing proceeding as being established when "there is a reasonable probability that, absent [counsel's] errors, the sentencer – including an

¹⁵ See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006) (Trial counsel did not render deficient performance by failing to fully investigate defendant's medical, mental, social, and familial history for purposes of penalty phase of capital murder trial, as element of ineffective assistance claim; counsel interviewed a number of witnesses about defendant's childhood and life, counsel hired a private investigator to go and gather background information on defendant, counsel called several witnesses, including three experts, to offer mitigating evidence, and counsel testified that information gathered about defendant's background was available to the experts). See also, e.g. Tucker v. Ozmint, 350 F.3d 433 (4th Cir. 2003) (where defendant claimed that counsel failed to submit early reports of sexual abuse to the trial expert, the case was unlike Wiggins in that there was no deficiency, as counsel presented a substantial mitigation case including lay witnesses and expert testimony on abuse and ASPD issues); Byram v. Ozmint, 339 F.3d 203 (4th Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was "completely in the dark as to the defendant's alleged mental problems"); Wilson v. Ozmint, 352 F.3d 847 (4th Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant's family life and the large amount of evidence introduced at the plea hearing); Davis v. State, 875 So.2d 359 (Fla. 2004) (rejecting claim that counsel was ineffective for failure to present a "qualified" expert on the relationship between sexual abuse and PTSD, where, unlike Wiggins, counsel conducted an investigation into background and presented three mental health experts, with a number of diagnoses; relief is not warranted simply because PCR counsel can later find a "more favorable" expert report); Ringo v. State, 120 S.W.3d 743 (Mo. 2003) (en banc) (no deficiency in investigation where counsel hired four experts; while one trial expert merely noted a high score on the PTSD scale but did not diagnose it, and a PCR expert later actually diagnosed PTSD, counsel's hiring of four experts was sufficient and reasonable investigation, making this case different from Wiggins).

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,” citing Strickland.

Moreover, for claims counsel failed to investigate and present evidence, an applicant must *actually present* in PCR the evidence he claims was missed, in order for the reviewing court to accurately assess whether counsel was deficient for failing to present it, and whether its absence was prejudicial. It is not enough simply to offer criticisms of counsel’s performance – the applicant must actually present into evidence the “case that should have been”.¹⁶

Applicant has wholly failed to show prejudice. First is the point that it is inappropriate for Applicant to rely on Applicant’s 53, the Kendra affidavit, because it was never admitted into evidence. Dr. Kissiah testified he did not rely on the affidavit, and ultimately it was not admitted with Applicant’s present counsel stating he would call Kendra to testify, which never happened. {PCR Tr. 1090; 1188; 1506}. The Kendra information thus cannot be considered in a prejudice analysis. See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998).

¹⁶ See Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998) (state’s failure to object to hearsay testimony as to what another witness’s testimony might have been does not relieve applicant of burden of producing admissible testimony, in accordance with the rules of evidence, of that which counsel supposedly failed to present). See also Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990) (petitioner’s allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness’s favorable testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3rd Cir. 1991) (applicant cannot show deficiency “based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense”; rather, facts must be presented).

Second is the fact that even if the Kendra affidavit and Dr. Kissiah's testimony are considered, it is not the type of testimony that would call the entire sentencing phase into question and create a reasonable probability that the sentencer would re-assess the aggravating and mitigating factors. In cases where such prejudice has been found, the omitted information was stark and extensive.¹⁷

Such is not the circumstance here with the relatively tame and limited information from Kendra's affidavit and Dr. Kissiah's testimony. Counsel did elicit some testimony as to Applicant's involvement with Dominique, as well as the fact that Applicant had a young daughter and was always willing to help out the family. It cannot be said that a little more information on this subject – particularly from a cold affidavit – would create a reasonable probability of a different result given the other information presented and the extremely egregious manner in which this crime was committed.

¹⁷ See Williams v. Taylor, 529 U.S. 362 (2000) (trial counsel only presented a "scant" mitigation case, and ignored a wealth of information regarding the defendant's "nightmarish" background, including the fact that his parents were jailed for neglect, records showed an extremely unkept house, the defendant was beaten by his father and foster parents, the defendant was borderline retarded, and he had favorable prison records from previous commitments); Wiggins v. Smith, 123 S.Ct. 2527 (2003) (trial counsel failed at all to have a social history performed, and did not have anything regarding the defendant's background save rudimentary information, overlooking that the defendant's mother was an alcoholic, he was often left alone with no food, he was exposed to sexual activity by his mother, and he was physically and sexually abused in his mother's and foster care); Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004) (trial psychiatrist testified at PCR that he had not been provided with available medical and psychiatric records, and another psychiatrist who had extensively examined Petitioner found, a far more serious depressive condition to the point that his altered mental state made the murder *non-volitional*); Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5 (2009) (counsel ineffective where they did not present evidence of schizophrenia based on mistaken belief that finding of competence precluded it; inmate was prejudiced as his counsel only presented limited information from pastor and family and one expert, and no evidence was presented of his "troubling mental health issues"); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008) (counsel ineffective where he only presented limited testimony in mitigation from defendant's mother; for example, counsel failed to hire a social history investigator and relied on investigator with no social work training, started the investigation late in the process, provided only limited records to the expert and only met with him a month before trial, failed to get family history records, and would have been put on notice by the records he did have that "powerful mitigating evidence" was available).

As to Dr. Kissiah, again, not only was some information presented on the subject, but an assessment of prejudice would also have to include the damaging information that would have been elicited by focusing on Applicant's post-arrest letters to his wife. The State extensively cross-examined Dr. Kissiah on the fact that the expressions of love in the letters could be construed as manipulative in an attempt to get Dorothy to help obstruct justice and lie to police to cover up Applicant's crime. **{Applicant's 56}**. Additionally, the Applicant lies in the letter by stating that he was not unfaithful to Dorothy, and did not have other girls "suck his dick", when the evidence of course shows Applicant's DNA was found in Kandee. Applicant also asks Dorothy for money, which shows an ulterior motive. Thus, Dr. Kissiah and the letters would likely have done more to condemn Applicant than aid him.

Applicant simply has not shown prejudice. See Byram v. Ozmint, note 14, *supra*.

C. Failure to present evidence of work record

Applicant next contends his counsel was ineffective for failing to present evidence of Applicant's work record.

1. There was no deficiency.

As an initial matter, counsel was not deficient. Again, counsel hired a qualified mitigation specialist to get all the records, and indeed counsel stated he specifically relied on Davis to do her job and get relevant work records. **{PCR Tr. 1870}**. Counsel also hired a qualified forensic social worker to review the records and social history and identify issues of consequence for testimony, and Yungman provided to counsel a final report detailing his findings. **{PCR Tr. 1127-29; Respondent's 11}**. That report only mentions

that Applicant was able to maintain employment, and that fact was elicited during Yungman's testimony at trial. **{R. 4806}**.

Dale Davis testified she had some employment records **{PCR Tr. 1478-81}**, and Yungman testified he was aware of some of Applicant's employment history from what Applicant told him. However, Applicant did not tell Yungman that he worked at the Naval Weapons Station while he was discharging his responsibilities at the restitution center following his prior incarceration. Yungman was not aware that Applicant supposedly worked at Hood Construction. **{PCR Tr. 1082-85}**.

Regardless, if the mitigation specialist failed to get the records, or if the testifying social worker decided not to put emphasis on them in his expert analysis of Applicant's social history, that is the fault of the expert, not counsel, and is not actionable. See Poyner v. Murray, supra. Counsel elicited what the expert found in this case. Again, counsel is not required to second guess his expert's report or have a greater understanding of the expert field than the expert does. See, e.g. Hendricks v. Calderon, supra. Moreover, if Applicant failed to disclose his entire work history to Yungman, that is not a basis for ineffective assistance. See Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984) (counsel was not ineffective for failing to investigate witnesses about whom defendant did not tell him); Primeaux v. Leapley, 502 N.W.2d 265, 268 (S.D. 1993) ("Where [defendant] did not give information to counsel, counsel could neither investigate it or pass it on to the expert.").

Counsel was not deficient.

2. There was no prejudice.

Regardless, Applicant has not shown prejudice. The only evidence of work history actually admitted was Applicant's 76, which was a one-page employment application to Moody's Mechanical. Again, consideration of anything else not properly admitted is improper in a prejudice analysis, Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998), and clearly this one page application would not create a reasonable probability the sentencer would re-weigh the aggravators and mitigators and conclude a sentence of death was not warranted. Jones v. State, *supra*.

However, even if Applicant's 55 and 76 are considered, along with an "inference" that Applicant completed his restitution obligations, it still would not arise to the prejudice standard. Supporting the unchallenged statement elicited at trial that Applicant maintained a good employment history with an application or pay stubs is precisely the "fancier" kind of mitigation case that Jones has held is insufficient for relief. Indeed, documentary evidence of Applicant's employment record in and of itself is simply not akin to the kind of stark, extensive, and moving evidence of mental illness or a nightmarish background, the absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Applicant has not shown prejudice.

D. Failure to challenge evidence of Kandee's good character

Applicant next contends his counsel was ineffective for failing to rebut the State's victim impact evidence as to Kandee Martin and the effect of her death on her family.

Of course, the State called the victim's mother, who described her "wonderful" relationship with her daughter, and Kandee's relationship with her son. She noted that the effect of Kandee's death had been traumatic for the young boy, and has torn apart the

relationship between her and her husband. {R. 4692-4702}. Kandee's father testified similarly. {R. 4703-07}. Counsel asked Kandee's father if Kandee had another child, but he stated no, and refused to say who the father was on Kandee's child. {R. 4707-08}.

Applicant now contends counsel should have elicited that Kandee was a crack addict and a prostitute. However, counsel was clear that as a strategic matter he saw nothing to be gained from eliciting before the jury that the victim was a crack addict, noting that from his prior experience in the Joseph Gardner trial "it didn't sit well with the jury" to elicit that the victim might have been selling her body for drugs. Counsel stated he thought that would "hurt [Applicant] more", and distinguished testimony from Yungman in the sentencing phase as to Applicant's own crack use, by noting they were trying to show he had been "kicked to the curb at a young age and he would do what he had to do to survive". {PCR Tr. 1631-37; 1821-25}. Counsel stated he heard Kandee had another child, but despite investigation could not get any proof of it. {PCR Tr. 1637-41}. Counsel was also clear that a landmine he wanted to avoid (and indeed was able to avoid) was any inference that Applicant killed Kandee because she owed him money for drugs or was going to rat him out to police. {PCR Tr. 1642-43}.

Thus, counsel credibly set forth a reasonable strategic basis for avoiding any testimony Kandee was a crack addict or a prostitute, as he felt it could potentially prejudice the jury against his client, based in part from his negative experience in a prior case. This decision is reasonable and precludes a finding of deficiency. See generally Sexton v. French, supra; Bell v. Evatt, supra.

Regardless, Applicant has not shown prejudice. For the defense to call the victim a crack addict or prostitute would raise a significant possibility of offending the jury, but the fact that she was a crack addict would do little to rebut the fact that she loved her parents and son and they loved her. For whatever crack use might say about her parenting skills, it does little to rebut testimony was that she loved to play with her son and they had a special bond. It simply cannot be said that this attack on the victim would create a reasonable probability of a different result in the whole sentencing phase.

E. Failure to object to instruction on allocution

Applicant next contends the trial court erred in advising him that he must limit his penalty closing argument to evidence in the record, and that counsel was ineffective for failing to object to this limitation.

During the colloquy on Applicant's right to give argument in the penalty phase, the trial court advised Applicant that, like lawyers, he would be bound by the evidence in the case and could not simply testify to the jury during closing argument. The judge noted Applicant could make any argument within the record and its reasonable inferences. However, the judge also pointed out to Applicant that he would be certainly entitled to talk about the proper penalty, and that Applicant should "feel very free" to do that. The judge noted that Applicant would be allowed to discuss the penalty itself "freely". {R. 4942-45}. Applicant ultimately declined to give argument. {R. 5012}.

At PCR, counsel credibly testified that he repeatedly "begged [Applicant] to beg for his life" before the jury. Counsel noted that Judge Goodstein extensively went over Applicant's right to testify but Petitioner refused. Counsel stated he told Applicant that during allocution he could "stand in front of the jury and talk", and "beg for [his] life in simple

plain words". Counsel stated he did not hear Judge Goodstein say anything to Petitioner that violated the law. **{PCR Tr. 1735-38}**. Later, counsel reviewed the passages and flatly stated he saw nothing objectionable in Judge Goodstein's comments, pointing out that she specifically advised Petitioner he could talk freely about penalty. Counsel also stated he talked with Applicant about the fact that he could ask the jury for mercy, and denied that Applicant ever said to him that he was going to give argument or allocution until Judge Goodstein told him he could not argue facts outside the record. Counsel also stated that there was *never* a point, during the guilt phase or the sentencing phase, that Applicant expressed a desire to testify or address the jury, despite counsel's attempts to get him to speak in sentencing phase argument. **{PCR Tr. 1887-90}**.

Counsel were not deficient nor was Applicant prejudiced. Like any lawyer, a defendant would be limited in argument to arguing only within the evidence presented and its reasonable inferences – South Carolina Supreme Court decisions are clear that the closing argument right is NOT an unfettered opportunity for the defendant to give unsworn testimony to the jury, free of cross-examination from the State.¹⁸ Here, the trial court properly limited Applicant from giving unsworn testimony, but allowed him to discuss the proper penalty "freely". Since the instructions were correct, counsel could not have been deficient nor Applicant prejudiced. See Hough v. Anderson, *supra*.

¹⁸ See State v. Davis, 306 S.C. 246, 411 S.E.2d 220 (1991) ("Although, of course, the trial judge may prohibit a defendant from offering unsworn testimony in his statement to the jury, a defendant may present argument regarding facts that are in evidence to direct the jury's attention to the circumstances of the crime or the defendant's own characteristics since these are proper sentencing considerations."). See also State v. Moore, 357 S.C. 458, 593 S.E.2d 608 (2004) (in description of the facts, quoting the trial court's admonition to a capital defendant during argument that he could not testify or go beyond comment on the evidence admitted at trial, and concluding that a defendant in the guilt phase could not stress something irrelevant like the fact that his life was at stake).

Applicant also has not shown prejudice under Strickland. Even if the instructions were improper, Applicant put forth no proof that absent those instructions he would have given closing argument in the sentencing phase. Indeed, the evidence goes the other way, as counsel was adamant that despite their pleas Applicant never expressed any interest whatsoever in addressing the jury in any fashion – whether by testifying or giving argument. There was no evidence that Applicant stated that he wanted to give argument but decided he would not because the judge told him he would not be able to offer unsworn testimony to the jury. **{PCR Tr. 1887-90}**. Applicant has not established prejudice.

And that does not end the analysis, as Applicant did not testify in PCR as to what he would have said had he given closing argument in the sentencing phase. Without his testimony as to what he would have said, this Court cannot judge whether the failure to give argument would create a reasonable probability of a different result in sentencing. See, e.g. Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001) (finding no prejudice from the failure to advise the capital defendant about his right to personally argue to the jury, “because the evidence of guilt was overwhelming and because the jury had already heard him arguing for his innocence when [he] testified”); Cooper v. Moore, 351 S.C. 207, 569 S.E.2d 330 (2002) (finding prejudice from the failure to advise of argument right, where the evidence was not overwhelming, no testimony or exculpatory version was presented in any respect from the defendant, and “Respondent wanted to tell the jury he was not guilty of the charged crimes and to show them he was not a ‘crazy person’”).

Applicant has not met his burden of showing a reasonable probability of a different result from the limitation on argument, and thus the claim should be denied.

F. Failure to present evidence of intoxication

Applicant next contends his counsel was ineffective for failing to elicit evidence Applicant was intoxicated at the time he committed the crime.

On direct appeal, Applicant contended that he should have received instructions on statutory mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), due to his voluntary intoxication. The state supreme court held that while there was ample evidence Applicant had been drinking that day and in the past, there was no evidence he was actually intoxicated at the time of the crime. Accordingly, the court found no error in failing to charge the mitigators. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

At PCR, James Gadson testified that Applicant drank every day and had been drinking four or five hours that day. He said Bowman was tipsy. {PCR Tr. 149-56}. On cross, though, he defined "tipsy" as the lowest level, where one is NOT staggering, or slurring, or displaying any of the effects of alcohol. He stated Applicant was not a "stone cold drunk". {PCR Tr. 190-94}.

Counsel, though, was clear that he saw no value in eliciting in the guilt phase that Applicant was drunk, as it would do him no good and potentially prejudice his client before the jury. While counsel elicited evidence from Yungman during the social history that Applicant had alcohol abuse, it was because he "had to try it at the end [the sentencing phase]". Counsel credibly testified as a strategic matter he would never have called Gadson back during the sentencing phase to elicit whether Applicant was drunk when he killed Kandee, because of the risk of what else Gadson might say, including reiterating how Applicant killed Kandee. Counsel was adamant he never would call a co-defendant to the stand for that purpose. {PCR Tr. 1757-59}.

On cross, counsel added an additional credible reason – he also noted that he was avoiding any testimony that might raise a mental health mitigator and possibly open the door to the solicitor's use of the William S. Hall report, in which Applicant also mentioned post-mortem sexual contact with Kandee. He noted he had successfully prevented that information from coming before the jury with the suppression motion, and wanted to be careful not to open the door another way and allow it to come in by way of the Hall report. Since his psychiatric expert had offered him nothing of value, counsel did not want to open the door with something of little use like voluntary intoxication. **{PCR Tr. 1827-38}**. Indeed, counsel at trial halfheartedly requested a charge on mitigator (2) – mental or emotional disturbance – but he virtually conceded that the record was devoid of any evidence to support such a charge. Again, this was because the defense as a tactical matter did not want to raise mental health issues as they would “place [Appellant] in greater jeopardy” based on “certain issues that were part of the preliminary matters” – referring to Appellant's statement to the Hall Institute during his evaluation that Kandee's vagina was fondled after her death. **{R. 350-51; 960-64; 1107; 1244}**

Counsel was not deficient. Counsel strategically and reasonably saw no value in eliciting that Applicant was drunk during the guilt phase, as voluntary intoxication is not a legal defense and it would potentially be prejudicial to his client. However, while he felt he needed to try anything in the sentencing phase, including eliciting the full social history that showed Applicant's alcohol abuse from an early age, he never would have under any circumstances called Gadson back to testify Applicant was drunk when he killed Kandee

– for fear of what other damaging information Gadson might offer or reiterate. These decisions were reasonable. See generally Sexton v. French, *supra*; Bell v. Evatt, *supra*.

Regardless, Applicant cannot show prejudice. Calling Gadson to say Applicant was merely tipsy and not showing any outward effects of alcohol would have little if any mitigating value, and certainly cannot be said to create a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. See Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998). This relatively tame evidence of drinking is in no way akin to the stark, extensive, and moving evidence of mental illness or a nightmarish background, the complete absence of which was found to be prejudicial in Wiggins, Williams, and Von Dohlen.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

XII. Failure to request mitigating instructions on voluntary intoxication

Based on the previous allegation with regard to the failure to call James Gadson back during the sentencing phase to testify that Applicant was tipsy when he killed Kandee, Applicant finally contends his counsel were ineffective for failing to request either the specific mitigators in S.C. Code Ann. § 16-3-20(C)(b)(2), (6) & (7) (Supp. 2000), or a specific non-statutory mitigator specifically related to voluntary intoxication.

Applicant is correct that evidence of intoxication at the time the crime was committed entitles one to *either* the three statutory mitigators, or a specific instruction as to intoxication. See State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (S.C. 1988). And, the state supreme court held in this case that the mitigators are not required unless there is actual evidence the defendant was intoxicated at the time the crime was committed. State v. Bowman, 623 S.E.2d 378 (S.C. 2005).

The basis for rejecting this claim has been previously discussed in the preceding subsection and is incorporated here. Counsel strategically and reasonably would not have called Gadson back for such a purpose for the risk of what else he might say, and counsel was also concerned about opening any door to the State's use of the Hall report with its damaging information. See Buchanan v. Kentucky, 483 U.S. 402 (1987) (the Court specifically noted that if a defendant "requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested").

Moreover, some evidence that Applicant was "tipsy" is simply not the kind of evidence that would create a reasonable probability of a different result, particularly if it had opened the door to the Hall report.

Further, any freestanding due process claim could have been raised at trial or on direct appeal if preserved at trial, and as such the present freestanding claim is improper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

CONCLUSION

For the foregoing reasons, Applicant's APCR is denied and dismissed with prejudice.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The application for post-conviction is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina.

This _____ day of _____, 2011.

James E. Lockemy
Presiding Judge

_____, South Carolina