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S C Supreme Court

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

Larry R Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

1

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2

Whether defense counsel were ineffective at sentencing when they failed to object to the Solicitor's closing argument that, if the jury sentenced Petitioner to life imprisonment, he would "rise in the hierarchy of the prison" and be the "leader" and "king" of a prison gang, as this argument was not supported by the evidence or any reasonable inference drawn therefrom and so infected the proceeding with unfairness as to make the resulting death sentence a denial of due process?

3

Whether defense counsel were ineffective at sentencing by failing to secure the testimony of Petitioner's sister, Connie, who would have pleaded for mercy on his behalf and for the sake of his infant son, and would have corroborated the limited expert mitigation testimony counsel did present?

STATEMENT OF THE CASE

Procedural History

Petitioner was indicted by the Greenville County grand jury for the offense of murder App 2516 The state served its notice of intent to seek the death penalty based upon the aggravating circumstance that the decedent was a police officer killed during the performance of his duties See S C Code §16-3-20 (C)(a)(7)

Petitioner's case was called to trial on February 8, 2002 before the Honorable John W Kittredge, and a jury The solicitors were Robert Ariail, Betty C Strom, and Mindy Hervey John Mauldin, James Bannister, and Rodney Richey represented Petitioner App 1

The jury found Petitioner guilty of murder App 1780 At the conclusion of the penalty stage, the jury recommended a sentence of death App 2255 The trial judge then imposed the sentence of death App 2259

The South Carolina Supreme Court affirmed Petitioner's murder conviction and his death sentence in State v Wood, 362 S C 135, 607 S E 2d 57 (2004) Petitioner sought a writ of certiorari from the United State Supreme Court on April 15, 2005 App 3635 The United States Supreme Court denied the writ on June 30, 2005

This Court then granted Petitioner a stay of execution to pursue his post-conviction relief remedies The Honorable Larry Patterson was appointed as the PCR judge Petitioner filed his initial application for post-conviction relief on July 28, 2005 App 2589-2596 The state filed a Return, Motion to Dismiss and Motion for Summary Judgment dated August 29, 2005 App 2597-2634 The motions to dismiss and for summary judgment were later denied

On October 15, 2005 Judge Patterson appointed James Brown and Symmes Culbertson to represent Petitioner Later, due to family medical concerns of second-chair Symmes Culbertson, Judge Patterson appointed Bill Godfrey to serve as second-chair to Brown

PCR hearings were held on September 30, 2005, January 8, 2007, and March 6-8, 2007 App 2636, app 2657, app 2697 At the conclusion of the March 8, 2007 hearing Judge Patterson took the matter under advisement

Judge Patterson issued an order of dismissal dated December 19, 2007 App 3633-3726 Petitioner now seeks a writ of certiorari from this Court on the following three issues

ARGUMENT

1

The post-conviction relief court erred by ruling that defense counsel was not ineffective for failing to object to general prison conditions evidence purporting to show that prison was like "a city" with many amenities, since this evidence was inadmissible and improper because it did not focus on Petitioner's character or the circumstances of his crime, and this Court years ago held such prison conditions evidence and circumstances of execution evidence was improper in *State v Plath*

Petitioner alleged he was ineffectively represented as follows

> Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial Strickland v Washington, 466 U S 668 (1984) and State v Burkhart, [____ S E 2d ____, 2007 WL 80036 (S C 2007)]

Supp App 15

During the state's case-in-chief during the penalty stage South Carolina Department of Corrections Classification Director, Jimmy Sligh, was called to testify about conditions in prison Prior to Sligh's testimony lead counsel Mauldin told the judge, "We're not at this point going to enter an objection to that witness" The judge responded, "If there is an objection, we'll deal with it at that time" App 1877, ll 8-23

Sligh then testified, in response to the solicitor's question, that it was fair "to say that a prison is kind of like a mini city" App 1882, ll 10-13 As will be seen infra, Sligh would

elaborate greatly on all of the alleged amenities that "mini city" had while being questioned by the solicitor

After agreeing that a prison was like a "mini city," Sligh testified that inmates had their own cafeteria

> There's a canteen that the inmates with money can buy their personal hygiene items and some very basic necessities There is an education building where we offer some basic education and G E D prep courses There is a medical unit where we do daily sick call and triage of different types of problems And in some institutions they actually have an in-bed infirmary for those inmates that need that The idea obviously is to try to be as self-contained as we can so you are not in a position to have to transport somebody outside the confines of the institution

App 1882, l 23-1883, l 7

Sligh offered that inmates had access to vocational training and that "some of the vocational schools support different things that are available in the needed areas as far as the teachers that can come in Some support some of our industry's programs as far as the training program But they are different in each of the institutions that they are offered [in] " App 1883, ll 17-24

Sligh stated that inmates work within the institution unless there was a physical reason why they could not work Sligh said inmates did such jobs as mopping the floor or doing laundry While they were not paid for their work "our custody system is based on good behavior and good work record So, yes, if they work and do a good job, then they will be able to maintain their benefits within the institution " App 1884, l 23- 1885, l 3

Sligh described the "day-to-day" routine of an inmate sentenced to life imprisonment for murder as him being awakened at 5 30 a m for a standing count followed by breakfast at 6 00 a m

"In order to serve breakfast we release each lıvıng unıt ındıvıdually They go ın and eat and come back, and there's four or five that go out Once breakfast ıs served then the ınmates are released ın a controlled envıronment to eıther go to work or school or whatever theır sıtuatıon ıs We only allow ınmates to move once an hour " App 1887, ll 4-17

Slıgh told the jurors that at lunch tıme the ınmates returned to theır unıts and were fed and then went back to work "The work day ends for the normal ınmates late ın the afternoon They return to theır unıts They are fed supper " App 1887, ll 14-24

Slıgh elaborated that ınmates beıng "locked ınto theır unıts" dıd not mean that they were locked ınsıde theır cells "They can move around a lıttle bıt at that poınt We have day rooms and we have televısıons ın a common area on each sıde of the wıngs " Usually around 9 30 then they are locked ınto theır cells for the rest of the nıght " App 1888, ll 6-24

Slıgh confirmed to the solıcıtor that ınmates were allowed to play cards, and basketball They also read books App 1888, ll 6-24 Each ınmate was allowed to have "ten books or magazınes, letters and pıctures and that kınd of thıng " App 1890, l 9-1891, l 8

Slıgh testıfied that each ınmate was permıtted to have fifteen ındıvıduals on hıs vısıtıng lıst at any one tıme Vısıtors could be added or subtracted by the ınmate An ınmate wıth full prıvıleges was allowed eıght vısıts per month The vısıtatıons were Frıday from 3 00 p m to 9 00 p m and Saturdays and Sundays "they usually do ıt by the first letter of the last name and you get one or the other, and ıt rotates lıke that through the month " App 1890, l 9-1891, l 8 Slıgh acknowledged that ınmates were permıtted to hug theır vısıtors "when they come ın for the vısıt and when they leave," and that chıldren could sıt ın the lap of theır ınmate parent durıng the vısıt App 1891, l 9-1892, l 1

Sligh said conversely on death row the inmates stayed in their cells twenty-three hours a day in an “entirely self-contained unit ” App 1892, l 2- 1893, l 17 Sligh stated his Department was required to offer death row inmates five hours of recreation per week, “weather permitting,” and he said that death row inmates did not mingle or play basketball with the general population inmates at all App 1895, ll 3-21

Sligh testified that on death row there were no contact visits and that “a Plexiglas sheet” was between the death row inmate and his visitor App 1888, l 14- 1889, l 25

Rodney Richey handled the five pages of transcript cross-examination of Jimmy Sligh for the defense, which concluded

> Q And I’m just going to ask you, the wardens at the Department of Corrections, they can handle these facilities, can’t they?
>
> A Absolutely Yes, sir
>
> Q And they sign their names on life and death decisions every day?
>
> A They make tough decisions every day
>
> Q And they—and they’ll do whatever it takes, whatever it takes, to protect not only the inmates but their folks, including deadly force?
>
> A To protect the property, protect our employees and protect the inmates, yes, sir That’s our mission
>
> Mr Richey And y’all do a good job Thank you
>
> Witness Thank you

App 1911, ll 3-16

At the subsequent post-conviction relief hearing, Richey testified that he did not recall cross-examining Sligh and he stated he did not “even know if I was part of the [defense team] discussion”

that was held off the record prior to Jimmy Sligh's testimony App 3373, l 6- 3374, l 3 The following occurred on direct-examination of Richey at the PCR hearing

> Q [A]re you aware of any strategic reason, strategic reason that an objection was not made to that line of [Jimmy Sligh's] testimony?
>
> A I don't know, but like I said, I'm not the one that's doing the strategy, but I don't know of any reason why But I mean, John [Mauldin] could have had a reason, but I don't know
>
> Q Okay And if you spoke to him you don't remember what it was?
>
> A No, I don't remember If I did, I don't know

App 3370, ll 8-17

Solicitor Arial seized upon this prison conditions evidence in his closing argument at sentencing

> Are we really going to do anything to John Richard Wood? Going to prison is like being in a big city – in a little city You've got a restaurant You've got a canteen You've got a medical center You've got a gymnasium You've got fields to work out in They give you clothing You get contact visits with your family You've got T V You play cards and games You've got a social structure You've got freedom of movement It might be limited, but you've got freedom of movement Thirty or forty acres to live in Watch ball games on the T V You go to school And you do all of those things that you want to You may not have a car to drive around, and they may limit your travel And you standards may not be as high as what you're used to But based on what John Richard Wood was doing, prison is just about going to be a change of address and nothing more

App 2191, l 24 – 2192, l 14

At the post-conviction relief hearing, lead counsel John Mauldin testified that he regretted that he did not object to the testimony of about general prison conditions "[I] definitely regret that I

did not enter an objection" App 3046, ll 13-25 Mauldin admitted he did not have any strategic reason for his failure to object to this testimony App 3043, ll 12-15 Mauldin repeatedly stated that it was error for him not to have objected to Sligh's prison condition evidence "I can't say it any other way I should have objected The objection should have been sustained Mr Sligh's testimony should not have been allowed" App 3127, ll 7-16 Mauldin said that Solicitor Ariail's closing argument based on this prison conditions evidence injected an arbitrary factor into the sentencing phase, and Mauldin said the failure of the defense to object to this evidence was not reasonable "I think it was clearly error" App 3127, l 7- 3129, l 3

Mauldin said he not only should have objected but his objection either would have been sustained or Wood's case would have been reversed on appeal App 3047, ll 6-22 When post-conviction relief counsel Brown went to refer to the record in State v Burkhart, 371 S C 482, 640 S E 2d 450 (2007), during his questioning of Mauldin, where Burkhart referenced this Court's opinion in State v Plath, 281 S C 1, 11-12 313 S E 2d 619, 625-626 (1984), the assistant attorney general objected to the transcript from the Burkhart trial being used for comparison purposes "We have case law which you can take judicial notice of, and I think that's enough for now So I would object The judge sustained the objection Mauldin then testified that Sligh's testimony and the closing argument based on it in Petitioner's case "was pretty devastating to our case I thought" App 3048, l 16- 3050, l 7

Second-chair James Bannister testified that Mauldin was the lead counsel Bannister said that he was primarily responsible for the guilt stage of the trial, while Mauldin handled the penalty phase App 3257, ll 2-18

Bannister testified he thought Jimmy Sligh's prison conditions testimony "was not helpful to us for sure" Bannister said he did not "want it [prison conditions evidence] in" but that Sligh was Mauldin's "witness to handle" Bannister stated that during Sligh's testimony "I may have not even been in the court room I may have been working on trying to get ready for Dr Narayan, depending on when it came in the testimony" App 3306, l 8- 3307, l 22

At the conclusion of the post-conviction relief hearing Assistant Attorney General Waters said "[I] think both sides would agree this is obviously the most sticky issue in the case" The attorneys offered to brief the issue for the court The judge acknowledged, " [T]his is one of the toughest decisions in this case" App 3401, l 15- 3402, l 1

Waters argued that if this evidentiary issue had been preserved and raised it "would have technically [been] error on direct appeal and would have resulted in reversal" but he argued that Petitioner still had to show prejudice on post-conviction relief App 3402, l 2- 3403 Post-conviction relief counsel Brown noted Justice Pleicone's concurrence in State v Burkhart, wherein he found this general prison conditions evidence constituted an impermissible statutory arbitrary factor After a discussion of this Court's holding in State v Burkhart, the judge took the matter under advisement App 3403, l 15- 3407, l 5

In his order of dismissal the judge cited State v Plath, 281 S C 1, 11-12 313 S E 2d 619, 625-626 (1984), where this Court had held that the sentencing phase of a capital trial is not about social policy or penology The order also noted that this Court's holding in State v Bowman, 366 S C 485, 623 S E2d 378 (2005), where this Court again cautioned the state and the defense that the penalty phase of capital trial was restricted to the defendant's actions, behavior, and character This Court emphasized that how inmates, other than the defendant at trial, are treated in prison, was

inappropriate evidence in a capital case This Court admonished both the state and defense to stay away from this general prison conditions evidence State v Bowman, 366 S C at 498, 499

The order stated that in State v Burkhart, 371 S C 482, 640 S E 2d 450 (2007) Justices Waller and Justice Moore cited State v Plath and other cases "from the 80's and 90's" for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible during the sentencing phase App 3717-3718

The order concluded that Wood "had three highly qualified and active lawyers, one of whom was among the most experienced capital defense litigators in the state " The Court reasoned this case was not like Nance v Ozmint, 367 S C 547, 551-552, 626 S E 2d 878, 880 (2006), where lead counsel was hampered by "alcoholism, drug intake and health issues affecting his memory " App 3720-3721

The post-conviction relief judge ruled that Wood's attorneys were deficient for not objecting to this evidence However, the post-conviction judge concluded that the deficiency did not warrant reversal, reasoning that "given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the state's and defense's evidence of conditions of confinement has not established Strickland prejudice " App 3723-3725

The judge also wrote that it was "inappropriate" for trial counsel Mauldin to testify that had he objected to this prison conditions evidence and had the trial court overruled his objection, Wood's case would have been reversed on appeal by this Court and "thus prejudice is established " App 3725, n 2

Discussion

The PCR judge correctly concluded that defense counsel was deficient for failing to object to this prison conditions evidence The order noted that the prison conditions evidence violated this Court's holding in <u>State v Plath</u>, 281 S C 1, 15, 313 S E 2d 619, 627 (1984), where this Court held that determination as to the "time, place, manner and conditions of execution or incarceration are reserved by statute to agencies other than the jury The jury's sole function in a capital sentencing proceeding is individual selection of either the death penalty or life imprisonment based upon the circumstances of the crime and the characteristics of the individual defendant " App 2488 This Court reiterated this principle in <u>State v Bowman</u>, 366 S C 485, 498, 623 S E 2d 378, 385 (2005), and <u>State v Burkhart</u>, 371 S C 482, 487, 640 S E 2d 450, 452-453 (2007) App 3715-3719

As seen above, Wood argued that this type of evidence was extremely prejudicial and required reversal because the entire subject matter injected "an arbitrary factor into the jury sentencing considerations" in violation of S C Code §16-3-25 (C)(1) <u>See</u> <u>State v Burkhart</u>, 371 S C at 488-489, 640 S E 2d at 453 The state argued the Justice Pleicones' concurrence was not supported by a majority of members of this Court and therefore the PCR judge was free to weigh the aggravating evidence against the mitigating evidence when determining whether prejudice had been established Petitioner strongly submits the prison conditions evidence here, as in <u>Burkhart</u>, injected an an arbitrary factor into the jury sentencing considerations in violation of S C Code §16-3-25 (C)(1)

Further, when a death sentence is predicated on mere "caprice" or "factors that are constitutionally impermissible or totally irrelevant to the sentencing process," the death sentence

cannot stand See Johnson v Mississippi, 486 U S 578, 585 (1988) (quoting Zant v Stephens, 462 U S 862, 884-885, 887 n 24 (1983)) Evidence in a capital sentencing trial must be relevant to the character of the defendant or the circumstances of the crime See State v Atkinson, 253 S C 531, 535, 172 S E 2d 111 at 112 (1970) *quoting* State v White, 142 A 2d 65, 68 (N J 1958)

> The legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death It charged another agency with the responsibility of deciding 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 of no concern of theirs

In State v Plath, 281 S C 1, 313 S E 2d 619, 627 (1984), this Court clearly stated that the Department of Corrections controls the conditions of imprisonment and not the defendant This Court also wrote 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

This Court also stated that "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] " State v Plath, 313 S E 2d at 627 These clearly stated principles on the purpose of a capital sentencing phase trial have anchored our state's capital jurisprudence for many years before Wood's case was called to trial

Defense counsel Mauldin candidly admitted that he should have objected to this prison conditions evidence He acknowledged he had no strategic reason for not objecting and that this evidence painting prison as a town or city within itself was very prejudicial to Wood Luchenburg v Smith, 79 F 3rd 388, 392-393 (4th Cir 1996) Defense counsel Bannister testified that he did not want this prison conditions evidence before the jury but that Mauldin was responsible for the penalty phase, and Bannister did not remember if he was even in the courtroom at the time Sligh testified Defense counsel Richey did not even remember cross-examining Sligh, and he did not recall being part of an off-the-record conference before Sligh's testimony Richey also said Mauldin was the lead counsel who handled this matter Defense counsel here were ineffective in violation of Wood's rights under the Sixth and Fourteenth amendments to the United States Constitution by not objecting to this prison conditions evidence and thereby opening the door to the closing argument on it See Strickland v Washington, 466 U S 668 (1984)

While the PCR judge found defense counsel were deficient for failing to object to this evidence, he ruled Wood had failed to prove prejudice "A finding of prejudice under Strickland requires that an applicant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different '" Strickland, 466 U S at 694 Strickland defined "reasonable probability" as a "probability sufficient to undermine confidence in the outcome" of the proceeding Id at 692 This test is not, however, an outcome determinative inquiry In other words "[T]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome " Id at 694

Thus, “a defendant need *not* show that counsel’s deficient conduct more likely than not altered the outcome in the case ” Id at 693 (emphasis added) To the contrary, prejudice is established if “there is a reasonable probability that *at least one juror* would have struck a different balance” but for counsel’s errors Wiggins v Smith, 539 U S 510, 537 (2003) (emphasis added) ” App 2485 - 2586

The jury in this case heard testimony that inmates watched television, read books, magazines, played cards, played basketball, worked, received vocational training, and ate three meals a day Prison was portrayed as much life in a town on the outside except it was a town or city within itself where movement was restricted The jury was told by the solicitor, based on this evidence in his closing argument, that prison would just be a change of address for Petitioner

Unlike most forms of evidentiary error that may occur in a capital trial, evidence, and argument eroding the punitive character of life in prison is particularly likely to render a jury’s sentencing verdict inherently unreliable In South Carolina, jurors at the sentencing phase of a capital trial are faced with a binary choice between the two most severe sanctions available under the law life in prison or death See S C Code Ann § 16-3-20

When the jury is led to believe that only one of those two options is truly punitive while the other promises a life of leisure at taxpayer expense, the sentencing choice prescribed for capital juries by the Legislature becomes no choice at all Rather, in such circumstances a juror wishing to punish a defendant harshly is left with only one option – death – even though that juror, absent a misleading depiction of prison life, might well have selected life behind bars as a sufficiently punitive sentence for the defendant Cf Beck v Alabama, 447 U S 625 (1980) (state

may not constitutionally withdraw lesser included offense option from capital jury, thereby leaving death sentence as only ostensibly punitive option)

Defense counsel Mauldin acknowledged that this prison conditions evidence was very prejudicial to Wood's penalty stage attempts at mitigation It conveyed to the jury that he would not be severely punished for his crime, and that he would conversely live a rather good life in prison That life was certainly one no worse than the one he was living before the solicitor argued based on this evidence Death was the only real punishment given this impermissible evidence of life behind the prison walls

The PCR judge's citation to *State v Nance*, *supra*, was misplaced because the fact Wood did not have counsel whose memory was impaired by drugs and his actions affected by alcohol was irrelevant The prejudice analysis here failed to appreciate the extreme prejudice from this evidence that was offered to convince the jurors that life imprisonment was not a severe punishment It respectfully cannot be said with any confidence that without this prison conditions evidence, and the closing argument allowed by it, that at least one juror would not have voted to spare Wood's life and sentence him to life imprisonment without parole *Wiggins v Smith*, 539 U S 510, 537 (2003) John Richard Wood should be granted a new sentencing phase trial

2

Defense counsel were ineffective at sentencing when they failed to object to the Solicitor's closing argument that, if the jury sentenced Petitioner to life imprisonment, he would "rise in the hierarchy of the prison" and be the "leader" and "king" of a prison gang, as this argument was not supported by the evidence or any reasonable inference drawn therefrom and so infected the proceeding with unfairness as to make the resulting death sentence a denial of due process

At sentencing, the defense called James Aiken, a former warden at the now-demolished Central Correctional Institution (CCI), as an expert witness "regarding future prison adaptability and risk assessment of prisoners" App 2034, l 24- 2035, l 2 The State had no objection to Aiken's testimony App 2035, ll 3-6 As to Wood's future adaptability to prison, Aiken testified

> I found no violence against persons while being confined Also, I did not find where he is a part of a security threat group, or where he has attacked staff, or where he has incited riot, [or] where he has taken hostages

App 2037, ll 16-21 Moreover

> When you have human beings confined, there is a hierarchy There is nothing that would indicate that [Wood] would ever be allowed into an unofficial hierarchy in a prison setting

App 2043, ll 14-25 Because Wood was white and of normal size and weight, Warden Aiken believed, "[H]e is more likely to be subjected to persons inflicting violence upon him, not only individually but collectively" App 2040, l 25- 2041, l 12 Based upon his own experience, however, Aiken's expert opinion was that "this individual can be housed in the South Carolina

Department of Corrections for the remainder of his life without causing undue risk of harm to the staff, community or other inmates" App 2041, ll 13-23 The Solicitor asked no questions of Aiken App 2044, l 9

Nevertheless, in his closing argument at sentencing, the Solicitor argued

> [I]f he got away and he went to prison for life, he would become a part of the hierarchy [L]et me tell you what he would bring to the table What is the most despised aspect that an inmate has? What does he dislike the most? The cop who put him there And you are sending a man to prison who is a cop killer He'll be a king He will rise in the hierarchy of the prison and he will be a leader

App 2191, ll 13-20 Defense counsel did not object to this argument At the post-conviction relief hearing, he testified, "I'm not even real sure I'd object to it if it happened today [M]aybe that's inadmissible I just don't realize it" App 3106, l 23- 3107, l 18 Counsel had no strategic reason for not objecting App 3107, l 19- 3108, l 22 But he had to admit there was no evidence in the record which supported the Solicitor's argument App 3123, ll 6-24

In the order of dismissal, the PCR judge wrote

> Obviously, the solicitor was merely raising his own contrary inference in response to this defense evidence, by arguing the point that a "cop killer" might very well be highly regarded by his fellow criminals, of which all of whom most likely have had their freedom taken away from the actions of law enforcement

App 3709 Also

> Even if the comment was error, this Court finds neither a due process violation nor ineffective assistance from the failure to object This one comment in the context of an entire sentencing hearing for an extremely aggravated crime with limited mitigation would not have "so infected the trial with unfairness as to make the resulting conviction a denial of due process"

App 3710, quotıng Donnelly v DeChrıstoforo, 416 U S 637, 643 (1974)

A Solıcıtor's closıng argument must be confined to the evıdence ın the record and reasonable ınferences drawn from the evıdence Vasquez v State, 388 S C 447, 698 S E 2d 561 (2010) "A solıcıtor has a rıght to state hıs versıon of the testımony and to comment on the weıght to be gıven such testımony " Randall v State, 356 S C 639, 591 S E 2d 608, 610 (2004) "The relevant questıon ıs whether the solıcıtor's comment so ınfected the trıal wıth unfaırness as to make the resultıng convıctıon a denıal of due process " State v Northcutt, 372 S C 207, 641 S E 2d 873, 881(2007), cıtıng Donnelly v DeChrıstoforo

The Sıxth Amendment to the Unıted States Constıtutıon guarantees a defendant effectıve assıstance of counsel In Strıckland v Washıngton, 466, U S 668 (1984), the Unıted States Supreme Court establıshed a two-pronged test to establısh ıneffectıve assıstance of counsel, by whıch a PCR applıcant must show (1) counsel's performance was deficıent and (2) thıs deficıency prejudıced the defendant See, also, Cherry v State, 300 S C 115, 386 S E 2d 624 (1989) In a death penalty case, errors whıch occur durıng sentencıng are much more lıkely to be prejudıcıal See Von Dohlen v State, 360 S C 598, 602 S E 2d 738, 746 (2004) ("If ıt ıs dıfficult to determıne the precıse ımpact of the solıcıtor's argument on the jury's delıberatıon of the sentence), State v McClure, 342 S C 403, 537 S E 2d 273, 275 (2000) ("We note the evaluatıon of the consequences of an error ın the sentencıng phase of a capıtal case [ıs] more dıfficult because of the dıscretıon that ıs gıven to the sentencıng jury A capıtal jury can recommend a lıfe sentence for any reason or no reason at all "), State v Whıte, 246 S C 502, 144 S E 2d 481, 483 (1965) ("[I]n vıew of the absolute

discretion of the jury with regard to the issue of mercy, it is impossible to determine whether the argument actually had a prejudicial affect upon the verdict ")

The Solicitor's assertion that Wood would become "king" of the inmate pecking-order and the "leader" of a prison gang if sentenced to life imprisonment was not supported by the evidence at sentencing and was therefore spurious and unduly prejudicial Id Since trial counsel did not object to the Solicitor's improper argument, the judge was afforded no opportunity to even attempt to cure the error Vasquez v State Finally, the PCR judge bootstrapped counsels' presentation of "limited mitigation" (a matter addressed subsequently) to find the error harmless App 3710

Accordingly, the Court should grant certiorari and ultimately reverse John Richard Wood's death sentence

3

<u>Defense counsel were ineffective at sentencing by failing to secure the testimony of Petitioner's sister, Connie, who would have pleaded for mercy on his behalf and for the sake of his infant son, and would have corroborated the limited expert mitigation testimony counsel did present</u>

At the post-conviction relief hearing, lead counsel for Wood testified, "I felt like the saving of Mr Wood was going to occur during the penalty phase " App 2870, ll 6-15 Yet he realized the case in mitigation the defense team had developed was, for whatever reason, "thin " App 3097, l 12- 398, l 7 Second-chair counsel concurred "[We] knew we were slim on the mitigation side of things " App 3295, l 21- 3296, l 23

The case in mitigation was presented almost entirely by three expert witnesses A social worker testified

> [There] is evidence that John Wood's social and emotional functioning as an adult was affected by his family dysfunction, there is evidence that John Wood's social environment played an adverse role in his level of social and emotional functioning, there is evidence that John Wood's behavior is consistent with that of someone suffering from mental illness, and there is evidence that John Richard Wood has no significant history of prior criminal convictions involving violence against another person

App 1975, ll 4-8 As discussed previously, James Aiken, a former South Carolina prison warden, testified, "My opinion is that this individual can be housed in the South Carolina Department of Corrections for the remainder of his life without causing undue risk of harm to the staff, community or other inmates " App 2034, l 24- 2035, l 3, App 2041, ll 13-23 Finally, a psychiatrist diagnosed Wood as bipolar and paranoid App 2070, ll 19-24 All three witnesses were paid for their testimony, which the Solicitor pointed out during his cross-examination of the social worker

and the psychiatrist App 1996, ll 6-8, App 2112, ll 10-20 (He did not cross-examine Warden Aiken App 2044, ll 4-17)

Apart from this, there were several vague references to a "child" that was born to Wood and his co-defendant, Karen McCall, while they were in jail awaiting trial McCall, who was a State's witness, testified that she was 4½ months pregnant at the time of their arrest and that Wood was the father "[a]s far as I know " App 1427, ll 5-7 "I was afraid to die," she added, "and I didn't want my baby to die " App 1445, ll 22-24

> He [Wood] was shooting at them, and they [the police] were shooting at him, and I was praying "Please don't let them hurt my baby Please don't let them hurt my baby "

App 1451, ll 5-8 Defense counsel's cross-examination of McCall about the child Wood had fathered was brief

> Q [Y]ou say that at the time of this incident you were about four and a half months pregnant?
>
> A Yes, sir
>
> Q And I assume you have had your baby?
>
> A Yes, sir
>
> Q And your baby is well?
>
> A Yes, sir

App 1468, ll 9-15

In his opening statement at sentencing, defense counsel mentioned in passing, "Karen became pregnant with John's child that has now been born " App 1858, ll 9-10 The defense

psychiatrist testified, "[H]e had his first child on the way He believed he was doing God's plan" App 2092, ll 23-25

In short, this "child" remained a nameless, genderless nonentity to the sentencing jury When asked at PCR why the defense did not stress the child's existence and identity as mitigating, second-chair counsel responded, "I don't recall us having any discussions about that particular aspect of it" App 3299, ll 2-23 In his closing argument, the Solicitor argued that this generic infant constituted evidence in *aggravation* of punishment "He will see his baby every weekend and that baby will sit in his lap" App 2192, ll 15-16 See, Argument 1

In fact, John Wood and Karen McCall had a baby boy, who they also named John Wood App 2693, Tr p 2791, ll 8-16 He was born in April of 2002 App 2792, ll 16-19

None of Wood's family members were called to testify on his behalf at sentencing App 3702 "I cannot recall any family witness who wanted to testify in the mitigation phase," lead counsel stated App 3102, ll 7-9 He added, "John's mother was very uncooperative" App 3102, ll 11-13 The defense team relied on Wood's sister, Betsy Martinez, to "manage the family issues," which included locating his other sister, Connie Jantz App 3102, l 17- 3103, l 7 According to second-chair counsel, Martinez was "able to be there but she did not want to participate in the trial in any other way" App 3292, ll 21-23 Lead counsel testified that Martinez made "ongoing efforts to contact the sister [Jantz] in West Virginia, and those efforts were unsuccessful" App 3027, l 13- 3029, l 13 He admitted

> I did not make a direct effort to make a direct contact, so I'm really not sure direct contact would have been fruitful or not It may very well have been, if I had written this woman a direct letter with my signature, she may have contacted me, but that would be to some extent speculative on my part

> I do not remember whether Ms Martinez said the letters were returned or whether they just simply were not being responded to There is a difference And I cannot under oath testify that they were actually being returned to sender I just know that she was telling us that they could not get in touch with her sister and her letters were not being responded to I can't say more than that

App 3029, l 23-3030, l 23 Counsel arbitrarily assumed Jantz' testimony would be unfavorable to her brother App 3117, l 18- 3118, l 13 He was wrong

Post-conviction relief counsel hired an investigator and located Connie Jantz in Maryland with no apparent difficulty App 2671, l 20- 2672, l 1 She willingly testified on her brother's behalf at the PCR hearing

> Q [W]hen did you hear from any of the attorneys from Mr Wood?
>
> A I never heard from any of them
>
> Q And how about from their mitigation team?
>
> A No, you're the first one to ever call me about it The only news I ever heard was through the news after that, via my sister
>
> Q When I called what did you think? What thoughts were going through your head?
>
> A I was shocked I thought you were calling and going to tell me my brother was being executed

App 2790, ll 15-25 Jantz had custody of Wood's son, John App 2791, ll 8-16 She and her sister were not on speaking terms for a variety of reasons, primarily Martinez' own criminal activities and her being a poor example for the kids App 2791, ll 17-21, App 2801, ll 10-23

The only letter Jantz could remember having received from Martinez was a Christmas greeting which contained with a picture of her infant nephew App 2801, l 24- 2802, l 9

Connie Jantz would have provided relevant mitigating testimony had trial counsel taken reasonable steps to locate her instead of relying on informal communication among Wood's family members, especially since counsel himself described the family as "dysfunctional" and exhibiting "disconnects among family members" App 3118, ll 6-9 At the PCR hearing, Jantz described what her sentencing testimony would have been had she been called as a witness

> Q Now, if you had been called before the jury, would you have informed them that if they spared John's life, you would have encouraged a relationship between John and his child?
>
> A Yes
>
> Q Would you have done so because you believe your brother John has redeeming qualities which he could convey to his own son?
>
> A I believe so
>
> Q Would you have asked the jury to spare your brother?
>
> A Yes

App 2792, l 25- 2796, l 3 Moreover, after speaking with Jantz, the defense psychiatrist who had testified at sentencing testified at the PCR hearing that "there were many things Ms Jantz just told me that certainly would have added credibility to my opinion" App 2825, l 22- App 2827, l 9, App 2851, l 10- 2855, l 6 (At sentencing, the Solicitor had argued that her diagnosis was "just

not valid" because "[s]he didn't check with the witnesses," such as Connie Jantz App 2188, ll 4-7)

In his order of dismissal, the post-conviction relief judge found

> [C]ounsel's efforts to contact Ms Jantz were reasonable given that they attempted phone calls, letters, and contact through [Wood's] other sister Ms Martinez [C]ounsel made reasonable and constitutionally sufficient efforts to obtain Ms Jantz' help that were frustrated by Ms Jantz' own unwillingness to have contact with her family at the time and be involved in the defense of her brother

App 3699

> [D]espite reasonable efforts of counsel and the defense investigators, Jantz was non responsive because of her desire to avoid contact with her family and her desire not to be involved with [Wood's] case Moreover, counsel cannot be faulted for not subpoenaing Jantz and seeking mitigation testimony from her against her will Further, this Court finds no prejudice from the fact that Ms Jantz did not testify [T]his Court is not persuaded that Jantz' request to the jury to spare her brother's life and her mention of the fact that he has a child would create a reasonable probability that the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death

App 3704 The record contains no probative evidence supporting the judge's finding that Jantz was unwilling to become involved her brother's defense or testify on his behalf See Smith v State, 375 S C 507, 654 S E 2d 523 (2007) (a PCR court's findings will only be upheld on appeal if there is any evidence of probative value to support them)

The judge's finding that Jantz' testimony would have made no difference to the sentencing jury, "[g]iven the introduction of much of the background at trial and the extremely aggravated nature of this crime," is belied by their actual deliberations After approximately 7½ hours, the jury asked to rehear the testimony "as to the mental state of the defendant" App 2235, ll 5-7 Following two further hours of deliberation, the jury informed the judge

> We appear to have an 11-1 hung jury Please advise what and how we can resolve this situation and what this will do to the case in the future Will Mr Wood be retried? And what does this do to his chance of going free or will you now sentence him?

App 2240, ll 19-25 Over the objection of defense counsel, the judge gave the jury a so-called *Allen* charge App 2241, l 1-2246, l 2 See Allen v United States, 164 U S 492 (1896) The jury deliberated for an additional two hours (not counting their overnight sequestration) before they arrived at a verdict App 2246, l 3- 2254, l 9 Finally, the PCR judge himself --albeit in a context favorable to the State-- described the defense case in mitigation as "limited " App 3710

Once again, in order to prove that trial counsel was ineffective, a post-conviction relief applicant must show (1) counsel's performance was deficient and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different Strickland v Washington, 466 U S 668 (1984), Vasquez v State, 388 S C 447, 698 S E 2d 561 (2010)

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments

466 U S at 690-91 "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case " Ard v Catoe, 372 S C 318, 642 S E 2d 590, 597 (2007) (citation and emphasis omitted)

> When determining if want of mitigation evidence resulted in prejudice, [the Court] must determine whether the "mitigating evidence, taken as a whole, might well have influenced the jury's appraisal of [the defendant's] culpability "

Rosemond v Catoe, 383 S C 320, 680 S E 2d 5, 9 (2009), quoting Wiggins v Smith, 539 U S 510, 538 (203) (interior quotation marks omitted) See, also, Council v State 380 S C 159, 670 S E 2d 356 (2008), and Von Dohlen v State, 360 S C 598, 602 S E 2d 738 (2004)

Instead of relying on a member of Wood's dysfunctional family to "manage the family issues," defense counsel should have employed an investigator to locate Connie Jantz and himself determined her suitability as a mitigating witness See Sears v Upton, 130 S Ct 3259, 3264 (2010) See, also, Eaton v State, 192 P 3d 36 (Wy 2008) As to Wood's infant son, John, the defense team did not appear to have any inkling of the powerful mitigating circumstance he represented by his very existence

Finally, the PCR judge's prejudice analysis does not comport with Wiggins v Smith and Sears v Upton Even if true, the fact that "[m]uch of the background to which [Jantz] testified was set forth at trial during the testimony of [the social worker] and [the psychiatrist]," no defense witness pleaded for mercy on Wood's behalf, State v Torrence, 305 S C 45, 406 S E 2d 315, 318-319 (1991), nor did the defense reveal that he had a son, John, State v Plath, 277 S C 126, 284 S E 2d 221, 220 (1981), both of which were indisputably mitigating Given the jury's struggle during the sentencing phase, the omission of this non-cumulative mitigating evidence could not possibly have been harmless Rosemond v Catoe and Ard v Catoe

Accordingly, the Court should grant certiorari and ultimately reverse John Richard Wood's death sentence

CONCLUSION

By reason of the foregoing arguments, a writ of certiorari should issue to allow full briefing on these issues

Respectfully submitted,

Robert M Dudek
Chief Appellate Defender

Joseph L Savitz, III
Senior Appellant Defense

ATTORNEYS FOR PETITIONER

This 5th day of November, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certıorarı to Greenvılle County
Larry R Patterson, Cırcuıt Court Judge

JOHN RICHARD WOOD,

PETITIONER,

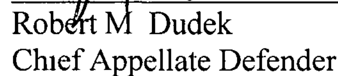
V

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certıfy that a true copy of the petıtıon for wrıt of certıorarı and a copy of the appendıx and supplemental appendıx ın thıs case have been served on S Creıghton Waters, Esquıre and a copy of the petıtıon for wrıt of certıorarı and a copy of the appendıx and supplemental appendıx have been served on John Rıchard Wood, #6005 at Leıber Correctıonal Insıtutıon thıs 5th day of November, 2010

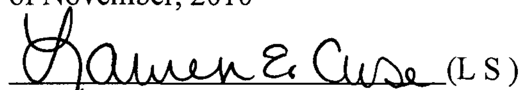


Robert M Dudek
Chıef Appellate Defender

Joseph L Savıtz, III
Senıor Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME thıs 5th day
of November, 2010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