

JANET, JENNER & SUGGS, LLC

Attorneys at Law

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Kenneth M. Suggs*
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Stephen C. Offutt**
John C. Hensley, Jr.*

* Member of Maryland Bar
* Member of South Carolina Bar
* Member of District of Columbia Bar
* Member of Pennsylvania Bar
* Member of Georgia Bar
* Member of Minnesota Bar
* Member of North Carolina Bar

Please respond to the South Carolina
mailing address: P.O. Box 927,
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Gerald D. Jowers, Jr.*
John J. Cord**
Sharon R. Guzejko*
Francis M. Hinson, IV*

Of Counsel
Giles H. Manley, M.D., J.D.*

info@medlawlegalteam.com
www.medlawlegalteam.com
Toll Free (888) 463-3529

May 6, 2009

The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
PO Box 11330
Columbia SC 29211

RECEIVED

MAY 07 2009

Re: Franklin, Ellis v. State (1996-CP-45-117)

S.C. SUPREME COURT

Dear Mr. Shearouse:

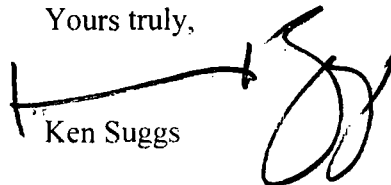
Thanks for your letter of May 1, 2009. We are still actively litigating this matter. A hearing was held on April 14, 2008. At that time the State requested that Mr. Franklin be evaluated by the South Carolina Department of Disabilities and Special Needs.

On July 8, 2008 the attached letter was sent from SCDDSN to the Attorney General's office, but was apparently never received by them. On April 15, 2009, I received the attached email from the Attorney General's office, indicating they had followed up with SCDDSN, had realized there was missed correspondence, and had furnished the requested information

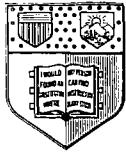
We'll report again in 60 days.

Yours truly,

Ken Suggs



cc: John Blume



Cornell Law School

May 7, 2009

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MAY - 7 2009

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

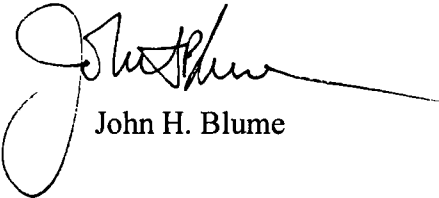
Re: *Franklin v. Ozmint*, 96-CP-45-117

Dear Mr. Shearouse:

Please be advised that a hearing has been held in conjunction with Applicant's motion for summary judgment. The court took the motion under advisement pending an evaluation, at the Attorney General's Request, of Mr. Franklin by the Department of Disabilities and Special Needs (DDSN). That evaluation has not yet been conducted by DDSN.

If you should need any further information, please do not hesitate to contact this office.

Sincerely,



John H. Blume

cc: Donald J. Zelenka, Esq.
Kenneth M. Suggs, Esq.
The Honorable Thomas W. Cooper, Jr.

ATTORNEY GENERAL'S OFFICE
RECEIVED 2-4-11

STATE OF SOUTH CAROLINA
COUNTY OF WILLIAMSBURG
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 1996CP4500117

Ellis Franklin vs. Michael Moore

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy: ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;

☐ Statement of Judgment by the Court:

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FEB 16 2011

Dated at Kingstree, South Carolina, this .

Court Reporter:

S.C. SUPREME COURT

PRESIDING JUDGE -

This judgment was entered on the , and a copy mailed first class this 3rd day of February, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

John Blume & Kenneth M. Sugg
ATTORNEY(S) FOR THE PLAINTIFF(S)

Ernest J. Zelenka
ATTORNEY(S) FOR THE DEFENDANT(S)
Carelyn J. Williams
Clerk of Court

CERTIFIED TRUE COPY
Carolyn F. Williams
CAROLYN F. WILLIAMS
CLERK OF COURT
WILLIAMSBURG COUNTY

IN THE COURT OF COMMON PLEAS
96-CP-45-117

STATE OF SOUTH CAROLINA)
COUNTY OF WILLIAMSBURG)

ELLIS FRANKLIN)
Applicant,)
v.)
JON E. OZMINT, Director)
of Department of Corrections.)
Respondent.)

ORDER

FILED
11 JAN 29 PM 12:58
CAROLYN F. WILLIAMS
CLERK OF COURT
WILLIAMSBURG COUNTY, S.C.

This matter is before the Court pursuant to Applicant's motion that his death sentence be set aside because he is mentally retarded and thus not eligible for the death penalty pursuant to the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002), and the South Carolina Supreme Court's decision in *Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003). For the reasons set forth below, this court grants the motion and finds that Mr. Franklin does have mental retardation.

Applicant was sentenced to death for murder and related charges in Williamsburg County, South Carolina in 1993. The South Carolina Supreme Court affirmed Mr. Franklin's conviction and death sentence for murder. *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995). Mr. Franklin then filed an application for post-conviction relief. This Court granted post-conviction relief finding that Mr. Franklin had not waived his right to address the jury at the culpability phase of his trial and that his trial counsel were ineffective for not advising him about that right. The South Carolina Supreme Court, however, reversed this Court's decision to grant post-conviction relief. *Franklin v. Catoe*, 346 S.C. 563, 552 S.E.2d 718 (2001), *cert. denied*, 535

[Signature]
1

U.S. 1114 (2002).

Following the decision of the United States Supreme Court in *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment to the United States Constitution prohibited the execution of person with mental retardation, Mr. Franklin amended his application for post-conviction relief to include an allegation that "Applicant may not be executed consistent with the Eighth and Fourteenth Amendments to the United States Constitution because he is mentally retarded." See Amended Application for Post-Conviction Relief, dated June 2003. In response to applicant's motion, Respondent requested that applicant be evaluated by the South Carolina Department of Disabilities and Special Needs (DDSN). This Court granted respondent's motion. On December 15, 2010, the designated DDSN examiner, Dr. Gordon E. Brown, Jr., Ph.D., filed his report. Dr. Brown concluded in the report that applicant is mentally retarded. A hearing was conducted by this Court on January 18, 2011.

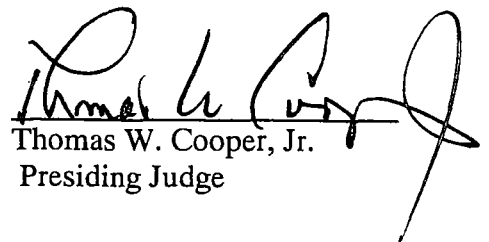
In *Franklin v. Maynard*, *supra*, the South Carolina Supreme Court held that the definition for what constitutes mental retardation is found in S.C. Code Ann. § 16-3-20(C)(b)(10): mental retardation is defined as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." At the hearing, Dr. Brown testified, consistent with his report, that Mr. Franklin met all three criteria for mental retardation as defined in S.C. Code §16-3-20(C)(b)(10). As for the first prong, Dr. Brown testified that all of applicant's I.Q. tests fell in the mental retardation range. Thus, it was his opinion, to a reasonable degree of certainty in his profession, that Mr. Franklin has significantly subaverage intellectual functioning. As for the second prong, Dr. Brown testified that the totality of the information, including standardized tests and secondary source

materials, persuaded him to a reasonable degree of certainty, that Mr. Franklin also had deficits in adaptive behavior. As for the third prong, Dr. Brown testified that Mr. Franklin had been evaluated by the Williamsburg County School system during the developmental period, and the results of that testing and evaluation, which found Mr. Franklin to be mentally retarded, established, to a reasonable degree of certainty, that Mr. Franklin's mental retardation manifested itself during the developmental period.

Based on Dr. Brown's testimony and report, which was entered into evidence at the hearing, as well as the totality of the evidence on this issue presented at Mr. Franklin's trial and at the initial post-conviction relief hearing, this Court finds that applicant has established by a preponderance of the evidence that he is a person with mental retardation. Therefore, pursuant to *Franklin v. Maynard*, *supra*, this Court vacates applicant's death sentence and imposes a sentence of life imprisonment with the possibility of parole as was the law at the time of the offense in 1993. Furthermore, based upon Dr. Brown's determination that Mr. Franklin suffers from schizophrenia, this Court orders that the South Carolina Department of Corrections take his mental illness into consideration when deciding where Mr. Franklin should be incarcerated and what mental health treatment he is entitled to.

Applicant's additional claims for post-conviction relief relating to his death sentence are rendered moot by this Court's decision vacating that sentence. The additional claims for post-conviction relief relating to applicant's conviction are denied as being without merit.

IT IS SO ORDERED.


Thomas W. Cooper, Jr.
Presiding Judge

January 26, 2011



ALAN WILSON
ATTORNEY GENERAL

February 14, 2011

David M. Tatarsky
General Counsel
S.C. Department of Corrections
P. O. Box 21787
Columbia, SC 29221

Re: **Ellis Franklin v. Michael Moore** - 96-CP-45-117
Order - January 26, 2011, filed January 28, 2011
Indictment No. 91-GS-45-451

Dear Mr. Tatarsky:

Attached is an Order filed in Ellis Franklin's state post-conviction relief case in which Judge Thomas W. Cooper entered an Order concluded as fact and law that Mr. Franklin met the definition of suffering from mental retardation and entered an Order vacating his death sentence and ordered his sentence to be a "life sentence with the possibility of parole as it was the law at the time of the offense in 1993."

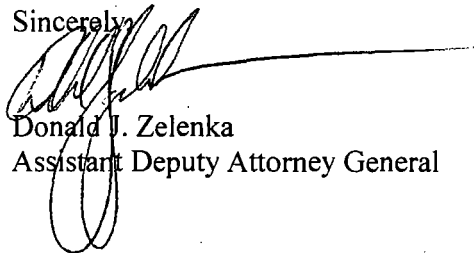
The Order was received by this office on February 4, 2011 and becomes final thirty (30) days thereafter if no appeal is filed by either party. If you have any questions, please advise me.

RECEIVED

FEB 16 2011

S.C. SUPREME COURT

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosure

cc: Honorable Daniel E. Shearouse
Ernest A. Finney, III - Solicitor, 3rd Circuit
John H. Blume, III, Esquire
Kenneth M. Suggs, Esquire
Sandi Wofford, Victims Assistance

JANET, JENNER & SUGGS, LLC*Attorneys at Law*

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 Diana M. Morris**

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Of Counsel!
 Giles H. Mantley, M.D., J.D.*
 info@medlawlegalteam.com
 www.medlawlegalteam.com
 Toll Free (888) 463-3529

FACSIMILE COVER SHEET

To:	Debbie w/SC Supreme Court	From:	Hal Ray
Fax:	803.734.1499	Pages:	06
Re:	Ellis Franklin	Date:	May 8, 2009

Copies: X Will Follow Will Not Follow

Comments:

Debbie, here are the attachments that are mentioned in Mr. Suggs letter and I apologize for not including the attachments when the letter was sent. Please call me if you need anything else.

Hal Ray

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MAY 12 2009

S.C. SUPREME COURT

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04/15/2009 09:05 803-898-9658

SCDDSN

PAGE 01/03



P. O. BOX 4706, COLUMBIA, SOUTH CAROLINA 29240
3440 HARDEN STREET EXTENSION (29203)
TELEPHONE: (803) 898-9683 TOLL FREE: 888-DSN-INFO
FAX: (803) 898-9658

DATE: APRIL 15, 2009
TO: DON ZELENKA
FAX NO.: 734-41035
FROM: TANA VANDERBILT
GENERAL COUNSEL
TOTAL PAGES INCLUDING COVER SHEET: 173
MESSAGE: Re: ELUS FRANKLIN

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04/15/2009 09:06 803-898-9658

SCDDSN

PAGE 02/03

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July 8, 2008

Mr. Donald J. Zelenka, Esq.
S.C. Attorney General's Office
P.O. Box 11549
Columbia, SC 29211

RE: Ellis Franklin, #4855
1996-CP-45-117

Dear Mr. Zelenka:

The South Carolina Department of Disabilities and Special Needs (DDSN) has received a Court Order for an evaluation for mental retardation.

Please submit the following documents to DDSN.

1. All law enforcement documents including:

- | | |
|---------------------------------|---------------------------|
| (a) Indictments | (b) Incident Reports |
| (c) Warrants | (d) Defendants Statement |
| (e) Witness/Victim Statement(s) | (f) Investigative Reports |

2. All trial transcripts (including PCR & pre-trial hearings)

3. All psychological/mental health records including, but not limited to the following:

- | | |
|--|--|
| (a) psychological evaluations | (b) psychological testing protocols |
| (c) Interview notes | (d) psychiatric evaluations |
| (e) all outpatient mental health records | (f) school psycho-educational evaluations |
| (g) school records | (h) social security disability documents (if applicable) |
| (i) Dept. of Corrections psychiatric & medical records | |
| (j) all inpatient records | |

During the course of the examination, if the examiner determines additional records are necessary, a follow up request will be made. If, at any time either party receives or becomes aware of new

DISTRICT I

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Saleeby Center - Phone: 843/332-4104

04/15/2009 09:06

803-898-9659

SCDDSN

PAGE 03/03

information as outlined above, please submit a copy to this office. DDSN will arrange an appointment for the examination of Mr. Franklin and we will notify all interested parties.

If you have any questions, please feel free to contact me at (803) 898-9683 or by e-mail at tvanderbilt@ddsn.sc.gov. Thank you for your assistance in the timely completion of this evaluation.

Sincerely,



Tana Vanderbilt
General Counsel

Harrell R. Ray

From: Kenneth M. Suggs
Sent: Friday, May 08, 2009 9:14 AM
To: Harrell R. Ray
Subject: FW: Status on Death Penalty Evaluation - Ellis Franklin

From: Don Zelenka [mailto:AGDZELENKA@scag.gov]
Sent: Wednesday, April 15, 2009 2:49 PM
To: Kenneth M. Suggs
Cc: Tana G. Vanderbilt
Subject: RE: Status on Death Penalty Evaluation - Ellis Franklin

Ken,

I am attaching the letter I received by fax today. Let me know if you have seen this before. I cannot anticipate when this examination will be completed. I still do not have a report in the William Bell MR case when Judge Williams ordered an evaluation to be done on August 21, 2006 and SC DDSN requested additional info on the Bell case on April 21, 2008. I had assumed Bell would be done before Franklin because SC DDSN had previously told me that they do the evaluations in the order they receive the court orders.

I am getting a copy of PCR appendix in Franklin made today. I am also going through and pulling copies of the reports and including those not in the appendix, if any. Of course, I will send you an inventory when the documents are sent to SC DDSN.

It is unclear to me how the original mailing got lost, but glad I followed up with SC DDSN. What triggered this request was I saw on the Death Row List that Franklin had been transferred to Gilliam Psych on January 16, 2009 and wanted to know if the evaluation had been done. Obviously not.

Also, I am sure that you are keeping track of Bobby v Bies, an Ohio case to be argued on April 27. The issue there is "whether the holding of a state post-conviction hearing to determine the mental capacity of a capital defendant whose death sentence was affirmed before Atkins v. Virginia (2002), which barred the execution of mentally retarded defendants, violates the Double Jeopardy clause."

Congratulations on your article in SuperLawyer. Well deserved.

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov

>>> "Kenneth M. Suggs" <ksuggs@medlawlegalteam.com> 4/15/2009 2:15 PM >>>

5/8/2009

Don, I'd like to see a copy of the letter when you get it please.

From: Vanderbilt,Tana G. [mailto:TVanderbilt@ddsn.sc.gov]
Sent: Wednesday, April 15, 2009 8:48 AM
To: 'Don Zelenka'
Cc: Kenneth M. Suggs; Culley, Donna C.
Subject: RE: Status on Death Penalty Evaluation - Ellis Franklin

Don

The agency sent a letter dated July 8, 2008 to you requesting additional information. As of this date we have not received it. Please send me your fax number and I will send the letter to you again.

From: Don Zelenka [mailto:AGDZELENKA@scag.gov]
Sent: Tuesday, April 14, 2009 3:54 PM
To: Vanderbilt,Tana G.
Cc: ksuggs@medlawlegalteam.com
Subject: Status on Death Penalty Evaluation - Ellis Franklin

Ms. Vanderbilt:

Please advise me of the status of the following death penalty inmates for evaluations for the existence of mental retardation.

Ellis Franklin - #4855 - Williamsburg County - Order by Thomas Cooper April 2008

I do not have any reports according to my records. If further information is needed, please advise me.

cc: Kenneth Suggs

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov

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FACSIMILE COVER SHEET

To: Debbie w/SC Supreme Court **From:** Hal Ray
Fax: 803.734.1499 **Pages:** 06
Re: Ellis Franklin **Date:** May 8, 2009

Copies: X Will Follow Will Not Follow

Comments:

Debbie, here are the attachments that are mentioned in Mr. Suggs letter and I apologize for not including the attachments when the letter was sent. Please call me if you need anything else.

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P. O. BOX 4706, COLUMBIA, SOUTH CAROLINA 29240 S.C. SUPREME COURT
3440 HARDEN STREET EXTENSION (29203)
TELEPHONE: (803) 898-9683 TOLL FREE: 888-DSN-INFO
FAX: (803) 898-9658

DATE: APR 15, 2009
TO: DON ZELENKA
FAX NO.: 734-4035
FROM: TANA VANDERBILT
GENERAL COUNSEL
TOTAL PAGES INCLUDING COVER SHEET: 173
MESSAGE: Re: ELUS FRANKLIN

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04/15/2009 09:06

803-898-9658

SCDDSN

PAGE 02/03

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Associate State Director
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 Kelly Hanson Floyd

July 8, 2008

Mr. Donald J. Zelenka, Esq.
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| (c) Interview notes | (d) psychiatric evaluations |
| (e) all outpatient mental health records | (f) school psycho-educational evaluations |
| (g) school records | (h) social security disability documents (if applicable) |
| (i) Dept. of Corrections psychiatric & medical records | |
| (j) all inpatient records | |

During the course of the examination, if the examiner determines additional records are necessary, a follow up request will be made. If, at any time either party receives or becomes aware of new

DISTRICT I

P.O. Box 249
 Clinton, SC 29325-5328
 Phone: (864) 933-3497

Midlands Center - Phone: 803/935-7500
 Whitten Center - Phone: 864/833-2733

DISTRICT II

9995 Miles Jamison Road
 Summerville, SC 29485
 Phone: 843/332-5576

Coastal Center - Phone: 843/873-5750
 Pee Dee Center - Phone: 843/664-1600
 Santee Center - Phone: 843/332-4104

04/15/2009 09:06 803-898-9658

SCDDSN

PAGE 03/03

information as outlined above, please submit a copy to this office. DDSN will arrange an appointment for the examination of Mr. Franklin and we will notify all interested parties.

If you have any questions, please feel free to contact me at (803) 898-9683 or by e-mail at tvanderbilt@ddsn.sc.gov. Thank you for your assistance in the timely completion of this evaluation.

Sincerely,

A handwritten signature in black ink, reading "Tana Vanderbilt". The signature is fluid and cursive, with the first name "Tana" and last name "Vanderbilt" clearly legible.

Tana Vanderbilt
General Counsel

Harrell R. Ray

From: Kenneth M. Suggs
Sent: Friday, May 08, 2009 9:14 AM
To: Harrell R. Ray
Subject: FW: Status on Death Penalty Evaluation - Ellis Franklin

From: Don Zelenka [mailto:AGDZELENKA@scag.gov]
Sent: Wednesday, April 15, 2009 2:49 PM
To: Kenneth M. Suggs
Cc: Tana G. Vanderbilt
Subject: RE: Status on Death Penalty Evaluation - Ellis Franklin

Ken,

I am attaching the letter I received by fax today. Let me know if you have seen this before. I cannot anticipate when this examination will be completed. I still do not have a report in the William Bell MR case when Judge Williams ordered an evaluation to be done on August 21, 2006 and SC DDSN requested additional info on the Bell case on April 21, 2008. I had assumed Bell would be done before Franklin because SC DDSN had previously told me that they do the evaluations in the order they receive the court orders.

I am getting a copy of PCR appendix in Franklin made today. I am also going through and pulling copies of the reports and including those not in the appendix, if any. Of course, I will send you an inventory when the documents are sent to SC DDSN.

It is unclear to me how the original mailing got lost, but glad I followed up with SC DDSN. What triggered this request was I saw on the Death Row List that Franklin had been transferred to Gilliam Psych on January 16, 2009 and wanted to know if the evaluation had been done. Obviously not.

Also, I am sure that you are keeping track of Bobby v Bies, an Ohio case to be argued on April 27. The issue there is "whether the holding of a state post-conviction hearing to determine the mental capacity of a capital defendant whose death sentence was affirmed before Atkins v. Virginia (2002), which barred the execution of mentally retarded defendants, violates the Double Jeopardy clause."

Congratulations on your article in SuperLawyer. Well deserved.

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov

>>> "Kenneth M. Suggs" <ksuggs@medlawlegalteam.com> 4/15/2009 2:15 PM >>>

5/8/2009

Don, I'd like to see a copy of the letter when you get it please.

From: Vanderbilt,Tana G. [mailto:TVanderbilt@ddsn.sc.gov]
Sent: Wednesday, April 15, 2009 8:48 AM
To: 'Don Zelenka'
Cc: Kenneth M. Suggs; Culley, Donna C.
Subject: RE: Status on Death Penalty Evaluation - Ellis Franklin

Don,

The agency sent a letter dated July 8, 2008 to you requesting additional information. As of this date we have not received it. Please send me your fax number and I will send the letter to you again.

From: Don Zelenka [mailto:AGDZELENKA@scag.gov]
Sent: Tuesday, April 14, 2009 3:54 PM
To: Vanderbilt,Tana G.
Cc: ksuggs@medlawlegalteam.com
Subject: Status on Death Penalty Evaluation - Ellis Franklin

Ms. Vanderbilt:

Please advise me of the status of the following death penalty inmates for evaluations for the existence of mental retardation.

Ellis Franklin - #4855 - Williamsburg County - Order by Thomas Cooper April 2008

I do not have any reports according to my records. If further information is needed, please advise me.

cc: Kenneth Suggs

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
803-734-4035(FAX)
agdzenka@scag.gov

5/8/2009

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

RECEIVED
2002 JUN -7 AM 8:40

June 3, 2002

SC SUPREME COURT

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

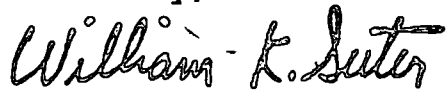
Re: Ellis Franklin
v. Gary D. Maynard, Director, South Carolina
Department of Corrections
No. 01-9013
(Your No. 25353)

Dear Clerk:

The Court today entered the following order in the above
entitled case:

The petition for a writ of certiorari is denied.

Sincerely,



William K. Suter, Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

RECEIVED

2002 MAR 21 AM 9:14

March 18, 2002 SC SUPREME COURT

Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: Ellis Franklin
v. William D. Catoe, Director, South Carolina
Department of Corrections
No. 01-9013
(Your No. 25353)

Dear Clerk:

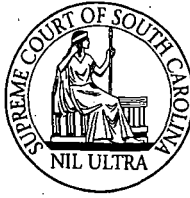
The petition for a writ of certiorari in the above
entitled case was filed December 21, 2001 and placed on the
docket March 15, 2002 as No. 01-9013.

Sincerely,

William K. Suter, Clerk

by

Clayton R. Higgins, Jr.
Assistant



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

October 1, 2001

Kenneth M. Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

On September 28, 2001, a letter was sent to you from this office in regard to the denial of the Petition for Rehearing. That letter contained a clerical error concerning the county to which the remittitur would be sent.

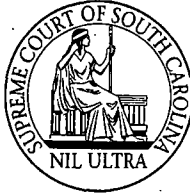
Enclosed is a corrected letter. Please substitute this letter for the one that was sent to you on September 28, 2001. We apologize for any inconvenience this may have caused you.

Very truly yours,

Brenda F. Shealy
DEPUTY CLERK

DES/jjp

cc: Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

September 28, 2001

Kenneth M. Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

I would grant rehearing.

s/ Costa M. Pleicones J.

September 28, 2001."

The remittitur in this matter is today being forwarded to the Clerk of Court of Williamsburg County .

Very truly yours,

Brenda F. Shealy
DEPUTY CLERK

DES/jjp

page 2
9-28-01 letter
Ellis Franklin v. The State

cc: Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

September 28, 2001

REMITTITUR

The Honorable Carolyn Williams
125 W. Main St.
Kingstree, SC 29556-3347

Re: Franklin, Ellis v. Catoe, William D.
1996-CP-42-117

Dear Ms. Williams:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,

Brenda F. Shealy
DEPUTY CLERK

DES/jjp

cc: Kenneth M. Suggs, Esquire
David P. Voisin, Esquire
Assistant Deputy Attorney General Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

September 28, 2001

Kenneth M. Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

The Court has issued the following Order on your Petition for Rehearing in the above matter:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

I would grant rehearing.

s/ Costa M. Pleicones J.

September 28, 2001."

The remittitur in this matter is today being forwarded to the Clerk of Court of part County .

Very truly yours,
Brenda F. Shealy
DEPUTY CLERK

DES/jjp

page 2
9-28-01 letter
Ellis Franklin v. The State

cc: Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esquire

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

SEP 10 2001

S.C. S

T

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director, South
Carolina Department of Corrections,

Petitioner-Respondent.

PETITION FOR REHEARING

KENNETH M. SUGGS
500 Taylor Street
Columbia, SC 29201
(803) 256-7550

DAVID P. VOISIN
P.O. Drawer 23786
Jackson, MS 39225
(601) 354-6066

Attorneys For Respondent-Petitioner

PETITION FOR REHEARING

Respondent-petitioner, Ellis Franklin, files this petition for rehearing pursuant to Rule 221(a), SCACR. In its opinion filed on August 27, 2001, this Court held that Mr. Franklin did not waive his right to address the jury at the conclusion of the guilt-innocence phase of his trial. Overruling a lengthy chain of precedent, however, the Court held that Mr. Franklin was not entitled to relief because he did not show that result of his trial would have been different had he chosen to make a closing argument. Petitioner asks the Court to rehear its decision for two reasons: (1) the Court's decision violated petitioner's right to due process and equal protection of the laws guaranteed by the state and federal constitutions; and (2) the Court overlooked an alternative sustaining ground upon which the lower court relied in determining that petitioner was entitled to relief.

I. THIS COURT'S DECISION VIOLATED MR. FRANKLIN'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

This Court observed that Mr. Franklin correctly pointed out that "prior South Carolina cases have not undertaken a prejudice analysis when holding the defendant was entitled to a new trial on the ground the court failed to obtain a waiver of allocution rights under section 16-3-28." Slip op., page 8. The Court then added that "this is the first case which addresses this issue on post conviction relief." *Id.* This, however, is not the first time in which the courts of this state have considered this question. In two other cases, involving death-sentenced inmates James Russell Cain and Bobby Lee Holmes, circuit courts have reversed the convictions without requiring a show of prejudice, and this Court has not disturbed those opinions.¹ What is perhaps even more important is that Bobby

¹In fact, in *Cain*, this Court originally granted cert but later dismissed the writ as improvidently granted. *Cain v. State*, 477 S.E.2d 98 (S.C. 1996). The PCR court's orders in both

Holmes received the benefit of the line of cases overruled by this Court even though he was tried *after* Mr. Franklin.

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a directive that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *see also Nordlinger v. Hahn*, 505 U.S. 1 (1992) (the Equal Protection Clause keeps governmental decision makers from treating differently persons who are in all relevant respects alike). This Court has likewise explained that the “guiding principle” of the Equal Protection Clause “requires that all persons shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.” *Thompson v. South Carolina Com’n on Alcohol and Drug Abuse*, 267 S.C. 463, 229 S.E.2d 718, 722 (1976). A person alleging a violation of the guarantee of equal protection “must show that similarly situated persons received disparate treatment.” *TNS Mills v. South Carolina Department of Revenue*, 331 S.C. 611, 626, 503 S.E.2d 471, 479 (1998); *see also Weaver v. South Carolina Coastal Council*, 309 S.C. 368, 423 S.E.2d 340 (1992); *Southern Bell Telephone and Telegraph Co. v. City of Spartanburg*, 285 S.C. 495, 331 S.E.2d 333 (1985).

Petitioner was convicted and sentenced to death for murder in January 1993. Bobby Holmes of York County was convicted and sentenced to death in April of 1993. During the course of his post-conviction proceedings, Mr. Holmes pursued a track similar to the one taken by petitioner. He alleged that he did not knowingly waive his right to make a closing statement at the guilt-innocence

Cain and *Holmes* were provided to the lower court in Mr. Franklin’s case.

phase of his trial, he moved for summary judgment on that issue, and he asked the PCR court to bifurcate his proceedings. The PCR court, after conducting an evidentiary hearing, entered an order granting Mr. Holmes post-conviction relief. That court ruled that Mr. Holmes did not have to show a reasonable probability that the result of the proceeding would have been different, which was consistent with this Court's prior decisions in *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991), *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993), *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994), and *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987). This Court denied the state's petition for a writ of certiorari to review the decision in Mr. Holmes' case. When pursuing post-conviction relief, Mr. Franklin advised the PCR court in his case of the PCR court order in Mr. Holmes' case. App. 3533-34.

In another related case, James Russell Cain obtained post-conviction relief on this same basis. In fact, the lower court orders in *Holmes* and in petitioner's case closely tracked the order in *Cain*. In *Cain*, as in the two subsequent cases, the inmate was not required to make a showing of prejudice, which was in line with existing precedent.

In all material respects, Mr. Holmes, Mr. Cain, and Mr. Franklin are similarly situated and thus should have received equal treatment from the state courts. This is especially true because Mr. Holmes' trial occurred after Mr. Franklin's trial. Additionally, Mr. Franklin is mentally retarded, and this Court's prior decisions were initially made to ensure that mentally retarded defendants receive all safeguards to which they are entitled. (Neither Mr. Cain nor Mr. Holmes is mentally retarded).

It should also be noted that this issue is unlikely to arise again. Since the Court's decisions in *Cooper* and *Charping*, trial judges (and prosecutors) have been vigilant in obtaining an on-the-

record waiver of statutory and constitutional rights. In fact, undersigned counsel is not aware of any other post-conviction cases in which there has even been a successful challenge to the adequacy of any alleged waiver.

Ordinarily, when this Court announces a new procedural rule, it provides that it shall be applied prospectively only. *See, e.g., State v. Collins*, 329 S.C. 23, 26, 495 S.E.2d 202, 204 (1998) (“Prospective application should be afforded a new rule of criminal procedure which is a ‘clear break’ from earlier precedent.”). Here, not only did the Court fail to apply its traditional rule of prospective application but it went further and denied Mr. Franklin the protection of established case law even though the state courts had provided relief to another inmate whose trial occurred after Mr. Franklin’s trial. Because Mr. Franklin and the other inmates are “under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed,” *Thompson*, 229 S.E.2d at 722, they should have received the same treatment from the state courts. When Mr. Franklin received disparate treatment despite being in all material respects in an identical situation as the others, he was denied his federal and state constitutional guarantees of equal protection of the laws. For this reason, this Court should grant rehearing.

II THE ADDITIONAL INSTANCE OF COUNSEL’S INEFFECTIVE PERFORMANCE.

Although the Court agreed with the PCR court that Mr. Franklin did not waive his right to address the jury, it overlooked an additional ground for relief discussed by the lower court. During the penalty phase, the trial judge discussed with Mr. Franklin and trial counsel, Charles Barr the defendant’s right to testify and to address the jury. In the course of that lengthy colloquy, the trial

judge referred in passing to the guilt phase right to address the jury. App. 2938, 2940. Neither Mr. Franklin nor his trial counsel understood the significance of that passing remark. During that discussion, the trial court at one point referred to the guilt phase by using the phrase, “as he did at the last phase,” and once using the phrase, “just like you did before.” App. 2938, 2940. In an affidavit submitted to the PCR court, the trial judge conceded that he had not ascertained whether Mr. Franklin desired to waive his right to a guilt phase closing argument during the guilt phase itself and that he sought to rectify his mistake during the penalty phase. App. 3865-66. Because he did not detect any “verbal or non-verbal” indications that Mr. Franklin was unaware of his guilt phase rights, the trial judge proceeded with the penalty phase. App. 3866.

Mr. Barr testified that did not specifically recall the trial court making those remarks. When he reviewed the transcript of the trial, Mr. Barr initially thought that the trial court’s remarks were directed toward Mr. Franklin’s right to testify. Mr. Barr, however, reaffirmed that at the time he was not aware that Mr. Franklin had the right to address the jury at the guilt phase. App. 3574-77. Legrand Carraway, the second defense attorney, had some recollection of the trial judge making those remarks. Mr. Carraway, however, speculated that he may have thought that the trial judge was referring to Mr. Franklin’s right to testify. App. 3593-94.

Mr. Franklin also did not attribute any significance to the trial court’s remarks, primarily because he would not have understood them. At the evidentiary hearing, it was established that Mr. Franklin is mentally retarded.

As discussed in this Court’s opinion, the lower court properly found that Mr. Franklin did not make a knowing and intelligent waiver of his right to make a closing argument. This Court reversed the lower court (and in the process reversed a series of prior decisions) and held that

petitioner failed to show that the result of the proceeding would have been different had Mr. Franklin been aware of that right. Besides addressing whether Mr. Franklin waived his right, however, the lower court also found that counsel were ineffective for not objecting when the trial court referred to the right during his remarks at the penalty phase. Counsel have an elementary duty to be aware of their client's statutory and constitutional rights and take appropriate measures to safeguard those rights. *See Adrien Brown v. State*, 340 S.C. 590, 533 S.E.2d 308 (2000); *Simmons v. State*, 308 S.C. 481, 419 S.E.2d 225 (1992); *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996). According to Pete Partee, petitioner's expert witness, if counsel previously knew about the right—and competent counsel should have known of that right, App. 3672, 3690-91—"what Judge Shuler said should have really hit you hard." App. 3690. In fact, competent counsel would "have realized got [sic] two bites at the apple." App. 3691. Competent counsel, therefore, would have immediately grasped the significance of the judge's remarks and moved for a mistrial, and the trial court would have had no option but to grant the motion. App. 3799. As noted by the PCR court, counsel's failure to object during the penalty phase when the trial court referred to the guilt phase right also constitutes ineffective assistance of counsel and provides an additional basis for relief. As the PCR court explained, the trial judge's remarks should have been sufficient to alert trial counsel to move immediately for a mistrial, as this was the only remedy available to applicant at the time." App. 3799. Had counsel moved for a mistrial, Mr. Franklin would have received a new trial. At a minimum, it would have created a sufficient basis for review on direct appeal.

The state did not address this additional ground in its cert petition for brief. Thus, it was waived, and Mr. Franklin is entitled to have that aspect of the lower court's judgment stand. Even if it was not waived, it constitutes an additional sustaining ground. Rule 220(c), SCACR; *see also*

I'on, L.L.C., v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 776 (2000).

CONCLUSION

WHEREFORE, for the foregoing reasons, this Court should grant rehearing and affirm the decision of the lower court to vacate Mr. Franklin's murder convictions and reverse the lower court's decision affirming his non-murder convictions.

Respectfully submitted,

KENNETH M. SUGGS
500 Taylor Street
Columbia, SC 29201
(803) 256-7550

DAVID P. VOISIN
P.O. Drawer 23786
Jackson, MS 39225
(601) 354-6066

By: Kenneth M. Suggs *by* *DX*
Attorneys For Respondent-Petitioner

September 10, 2001.

**THE STATE OF SOUTH CAROLINA
In the Supreme Court**

**APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas**

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

SEP 10 2001

S.C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

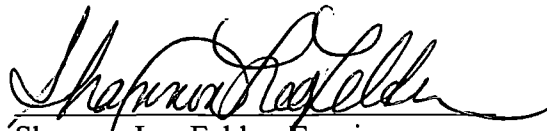
**WILLIAM D. CATOE, Director, South
Carolina Department of Corrections,**

Petitioner-Respondent.

PROOF OF SERVICE

I, Shannon Lee Felder, an employee of Suggs & Kelly Lawyers, P.A., attorney for Respondent-Petitioner hereby certify that I have served Donald Zelenka, attorney for the Petitioner-Respondent, with the **Petition for Rehearing** in the captioned action by depositing a copy of each of the same in the United States Mail, postage prepaid, on September 10, 2001, addressed as follows:

Assistant Deputy Attorney General Donald Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211



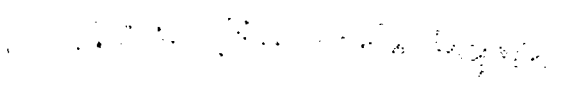
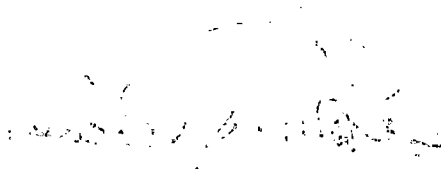
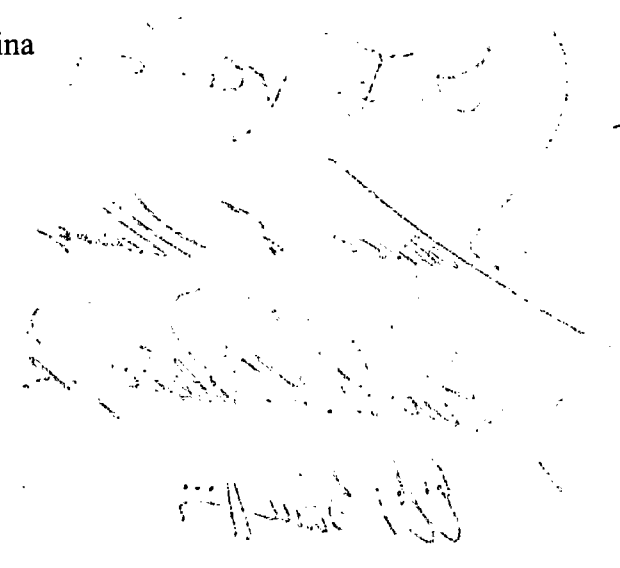
Shannon Lee Felder, Esquire
Kenneth M. Suggs, Esquire
Suggs & Kelly, Lawyers, P.A.
Post Office Box 8113
Columbia, South Carolina 29202
(803) 256-7550

David P. Voisin
P.O. Drawer 23786
Jackson, MS 39225
(601)354-6066

Attorneys for Respondent-Petitioner

Columbia, South Carolina

September 10, 2001



Petition for Rehearing is denied.

John F. Moore C.J.

James E. Moore J.

John H. Walker Jr. J.

Edmund H. ... J.

I would grant rehearing.

Tom. ... J.

September 28, 2001.

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Ellis Franklin,

Respondent/Petitioner,

v.

William D. Catoe,
Director, South Carolina
Department of
Corrections,

Petitioner/Respondent.

ON WRIT OF CERTIORARI

Appeal From Williamsburg County
M. Duane Shuler, Trial Judge
Thomas W. Cooper, Jr., Post-Conviction Judge

Opinion No. 25353
Heard November 14, 2000 - Filed August 27, 2001

REVERSED IN PART

Attorney General Charles M. Condon, Chief Deputy
Attorney General John W. McIntosh, and Assistant
Deputy Attorney General Donald J. Zelenka, all of
Columbia, for petitioner/respondent.

Kenneth M. Suggs, of Suggs & Kelly, P.A., of

Columbia, and David P. Voisin, of Center for Capital Litigation, of Columbia, for respondent/petitioner.

CHIEF JUSTICE TOAL: The State appeals the post conviction relief (“PCR”) court’s order granting Ellis Franklin (“Franklin”) a new trial on his capital murder charge. Franklin cross appeals the PCR court’s ruling that he was not entitled to a new trial on his non-murder charges. We reverse.

FACTUAL/ PROCEDURAL BACKGROUND

In January of 1993, Franklin was found guilty of murder, burglary in the first degree, grand larceny, and criminal sexual conduct in the first degree. In the penalty phase, the jury found four statutory aggravating circumstances and recommended a death sentence. The trial judge sentenced Franklin to death for murder, to ten years for grand larceny, to thirty years for criminal sexual conduct, and to life imprisonment for burglary. This Court affirmed these convictions on direct appeal. *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995). Franklin’s petition for writ of certiorari to the United States Supreme Court was denied. *Franklin v. South Carolina*, 516 U.S. 856, 116 S. Ct. 160, 133 L. E. 2d 103 (1995).

Franklin then filed for PCR on March 14, 1996. An evidentiary hearing was held on January 27, 1998. The evidentiary hearing was limited to the following allegations in Franklin’s petition for relief:

1. Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code Ann. § 16-3-28 (Supp. 2000) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.
2. Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by the following acts and omissions of trial counsel:

Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. *See* S.C. Code Ann. § 16-3-28.

On October 2, 1998, the PCR judge entered an order granting Franklin post conviction relief and requiring a new trial on all the charges. The State then moved to alter or amend the judgment asserting the non-murder charges of burglary, grand larceny, and criminal sexual conduct charges should not be affected by the alleged error and should be reinstated. On February 12, 1999, the PCR judge granted the State's request to limit relief to Franklin's murder conviction. Both parties appealed. This Court granted certiorari as to the State's Questions I and II and Franklin's Question II, and the following issues are before this Court:

I. Did the PCR court err by finding Franklin did not waive his statutory right to make a personal closing statement in the guilt phase of his trial?

II. Assuming there was no waiver of Franklin's statutory right to make a closing statement in the guilt phase, did the PCR court err by granting a new trial because Franklin did not show he was prejudiced under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 88 L. E. 2d 908 (1984) or Rule 61, SCRCPP, by the lack of waiver?

III. Did the PCR court err by denying relief on Franklin's non-capital convictions after finding he had not knowingly and intelligently waived his right to address the jury during the guilt phase of his trial and after finding that counsel was ineffective for not advising him of that right?

LAW/ ANALYSIS

I. Waiver

The State argues the PCR court erred in holding Franklin did not knowingly and intelligently waive his statutory right under S.C. Code Ann. § 16-3-28 to make a personal closing statement during the guilt phase of his capital murder trial. We disagree.

On October 2, 1998, the PCR court granted Franklin post conviction relief on the ground he did not knowingly and intelligently waive his statutory right to make an argument in the guilt phase of his trial.¹ In reviewing a grant of post conviction relief, we are “concerned only with whether there is any evidence of probative value to support the PCR judge’s decision.” *Palacio v. State*, 333 S.C. 506, 512, 511 S.E.2d 62, 65 (1999); *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129 (1997). Therefore, the PCR court’s findings should be affirmed if there is “any probative evidence” to support the court’s findings. *Palacio, supra*.

Section 16-3-28 provides: “Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.” Before the abolition of *in favorem vitae* review, we held in *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991), a capital defendant was entitled to reversal of his conviction where the trial judge failed to obtain an on-the-record waiver of the defendant’s statutory right under section 16-3-28. *See also State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987), *overruled in part by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

After *in favorem vitae* review was abolished, we stated the appropriate forum for addressing this issue was a post conviction relief proceeding “where the facts surrounding the trial can be fully explored.” *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993); *Cartrette v. State*, 323 S.C. 15, 448

¹The trial court did obtain an on-the-record waiver during the penalty phase of the trial.

S.E.2d 553 (1994); *State v. Torrence, supra*. We found “[t]he post conviction relief process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant’s information and/or waiver of rights . . .” *Cartrette*, 323 S.C. at 18, 448 S.E.2d at 555. Therefore, under the current law, a petitioner for post conviction relief may no longer rely solely on the trial record to demonstrate the lack of waiver. The PCR court should analyze all the facts surrounding the trial to determine if a petitioner knowingly and intelligently waived his rights under section 16-3-28.

The trial record, PCR transcript, affidavits, and depositions support the PCR court’s finding that Franklin did not knowingly and intelligently waive his right. There was no *on-the-record* waiver of Franklin’s statutory right to personally address the jury at the end of the guilt phase. At the conclusion of the guilt phase, the trial court merely stated the order of closing arguments, but did not mention a defendant’s right to address the jury. After reviewing the record, we cannot find any reference to Franklin’s rights under section 16-3-28 until the penalty phase of the trial.²

²During the *penalty* phase of the trial the following colloquy between the defense and the court occurred:

THE COURT: [W]hile we’re doing it I want him to understand that he also has the right – *as he did at the last phase* – he has the right to make an argument along with you or Mr. Carraway, whoever makes the argument. He has the right to speak to the jury as well and I need to know whether or not he, you know desires to do that.

I want to make him aware of it, know he’s aware of it – *was aware before* but I want to make sure he was aware of it *again* at this stage . . . I want to know – be sure that he understands that he has a right to do both [testify and argue]. . . (emphasis added).

THE COURT: All right, sir, and the same is true of your closing argument. Mr. Barr or Mr. Carraway will make the last argument. The state has to argue first in this portion of

Testimony at the PCR hearing further supports Franklin's argument that no waiver occurred. Two defense attorneys represented Franklin in his initial trial. Although it was not their first murder trial, it was the first capital case tried by either attorney. One of Franklin's attorneys testified he did not know at the time of trial a defendant had the right to make a closing argument in the guilt phase and did not advise Franklin he had such a right. He stated if he had known of the right, he "would have advised [Franklin] that was his right and certainly would have left it up to him to make a decision regarding what he wished to do." Co-counsel testified similarly. He stated at the time of the trial

the trial, and your lawyers or lawyer has the right to argue last just like he did in the last portion of the trial *and you have the same right*. You've got the right – *just like you did before* – you've got the right to stand before the jury at this time – at the end of this phase of the trial – and tell them anything you want to tell them about yourself or about anything about the facts of the case or anything that you want to say you've got the right to do it.

And I just want to make you aware of that fact and would like to know before – before– we make final arguments I would like for you all to come and let me know what his intention is just before you make the argument. I don't want to pin him down now. I'll let him think about it but I'm going to – I need to know whether he's waiving his right or whether he wants to do it before it happens. That's the thing I've got to get on the record. (emphasis added).

After these remarks by the court, neither defense counsel made any comment or took any action which would indicate they were receiving this knowledge for the first time. The State argues this inaction by Franklin's attorneys speaks volumes about their actual knowledge at that time. The State further contends this penalty phase inquiry was sufficient to appraise and to verify the preexisting knowledge of Franklin and his counsel of the right as it existed in the guilt phase. We find this passing reference in the *penalty* phase does not imply Franklin waived his right during the *guilt* phase. The judge's comments were too little and too late.

he was not aware of the guilt phase statutory right. He further stated he personally did not advise Franklin of this right, and, to his knowledge, his co-counsel had not either. Former solicitor Wade Kolb, the prosecutor in Franklin's case, also testified at the PCR hearing. He stated he did not specifically hear the trial court discuss a defendant's rights under section 16-3-28 with either defense counsel or Franklin. Finally, Franklin testified before the PCR judge. He stated neither of his counsel ever informed him of a statutory right to make a closing argument in the guilt phase.

Therefore, there is ample probative evidence to support the PCR court's finding that Franklin did not waive his right to make a personal argument during the guilt phase of the trial. The PCR court was correct in finding Franklin did not knowingly and intelligently waive his right under section 16-3-28.

II. Prejudice

The State argues the PCR court erred in granting Franklin a new trial because Franklin did not show he was prejudiced under *Strickland* by the lack of waiver. We agree and hold Franklin should have been required to show prejudice under *Strickland*.

In order to prevail in a PCR action, an applicant has to satisfy a two prong test.³ First, he must show his counsel's performance fell below an objective

³Franklin asserts two separate grounds for relief: (1) ineffective assistance of counsel; and (2) denial of his right under section 16-3-28. We analyze under the *Strickland* prejudice standard, however, the same result would be reached under the harmless error standard. An error is harmless where it could not reasonably have affected the result of the trial. *State v. Reeves*, 301 S.C. 191, 391 S.E.2d 241 (1990). Although the *Strickland* prejudice standard arguably places a greater burden on the defendant than the showing required to obtain reversal on direct appeal, the overwhelming evidence of guilt, as discussed below, negates any claim that the denial of Franklin's right under section 16-3-28 could have "reasonably affected the result" of his trial.

The dissent argues a violation of a statutory right, in this case of section 16-3-28, should be analyzed under a different standard than other PCR claims.

standard of reasonableness. Secondly, he is required to prove he suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 88 L. E. 2d 908 (1984); *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). To prove prejudice, an applicant must show there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* Franklin has met his burden as to the first prong of the test by showing his counsel did not apprise him of his rights under section 16-3-28 and did not object to the trial court's failure to obtain a waiver. The State contends Franklin must also prove prejudice in this case, while Franklin argues South Carolina case law provides he is not required to show prejudice in this instance. We find Franklin is required to prove prejudice.

Franklin is correct in observing that prior South Carolina cases have not undertaken a prejudice analysis when holding the defendant was entitled to a new trial on the ground the court failed to obtain a waiver of allocution rights under section 16-3-28. However, this is the first case which addresses this issue on post conviction relief.⁴ In *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987), we reversed defendant's murder conviction on the ground he did not knowingly and intelligently waive his right to make a personal closing statement. This Court stated, "Speculation as to whether appellant was prejudiced by being

This Court has never made such a distinction. In analyzing a PCR claim, this Court applies a *Strickland* prejudice standard. As discussed below, this Court in *Torrence, supra*, abolished *in favorem vitae* review in part because of its faith in the PCR system. The Court held that where counsel fails to object to an error committed during trial, PCR would be the proper and effective forum for a defendant to bring his claims. In a PCR proceeding, the applicant has always had the burden of demonstrating prejudice. This Court has never made a distinction between failure to object to a statutory violation and failure to object to any other type of error.

⁴Although it could be argued that a harmless error analysis is also appropriate on direct appeal, note that in *Cartrette* and *Rocheville*, this Court stated a PCR proceeding was the appropriate forum for addressing the issue of voluntary waiver under section 16-3-28, therefore in the future, the issue is unlikely to be addressed on a direct appeal.

denied his right to final argument is inappropriate in this situation.” *Id.* at 518. Additionally, in *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991), *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993), and *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994), we held that failure to obtain a knowing and voluntary waiver of the statutory rights under section 16-3-28 was alone ground for reversal. In none of these cases did the Court undertake a prejudice analysis.⁵

However, all of these cases were decided before our decision in *Torrence*, *supra*, where this Court abolished *in favorem vitae* review of death penalty cases. As discussed in detail in *Torrence*, the reasons and basis for the Court’s adoption of *in favorem vitae* review no longer exist. When *in favorem vitae* review was established, the appellate review system did not include a post conviction relief system. Presently, with such a system in place, the Court reasoned, “In situations where an objection is not made due to alleged ineffective assistance of defense counsel, we hold the more preferable method of exploring this issue is via the avenue of an application for post conviction relief.” *Torrence*, 305 S.C. at 66, 406 S.E.2d at 326. In the instant case, Franklin’s counsel failed to make an objection, and the proper review of this alleged error is in an application for post conviction relief. In a post conviction proceeding, the applicant’s burden has always been to demonstrate prejudice. *Strickland*, *supra*.

The facts of the instant case are a clear illustration why due process is not offended by, and public policy supports, the application of a prejudice analysis to this type of statutory error. First, we note the harmless error rule and a prejudice analysis are no strangers to cases involving the death penalty. For example, the United States Supreme Court has approved the application of a harmless error analysis in death penalty cases even when a defendant’s constitutional rights have been violated. *See Yates v. Evatt*, 500 U.S. 391, 111 S. Ct. 1884, 114 L. E. 2d 432 (1991) (jury charge on malice unconstitutionally shifted the burden of proof from the State to the defendant, nonetheless the constitutional violation was subject to harmless error analysis); *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. E. 2d 302 (1991) (admission

⁵The PCR court’s order relied on these cases when holding Franklin did not have to show prejudice in order to be entitled to relief.

of an involuntary confession subject to a harmless error analysis); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. E. 2d 705 (1967) (harmless error analysis used where state prosecutor's argument and trial judge's instruction continuously and repeatedly impressed to the jury that since defendant refused to testify, all the inferences from facts in evidence had to be drawn in state's favor). Our Court has also acknowledged the appropriateness of a harmless error analysis even when a defendant's constitutional rights have been violated. See *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992), *cert. denied*, 507 U.S. 927, 113 S.Ct. 1302, 122 L.Ed. 2d 691 (1993) (in this death penalty case, the malice instruction was found to be in violation of *Sandstrom v. Montana*, 422 U.S. 510, 99 S. Ct. 2450, 61 L. E. 2d. (1979), thus unconstitutional, but subject to harmless error standard).

Second, we note this error occurred during the guilt phase, where the jury is confined to determining whether Franklin committed the crime, not whether he deserved the death penalty. Had Franklin been apprised of his right to address the jury during closing, and had he chosen to do so,⁶ he would have been arguing for his innocence, not pleading for his life. However, the jury had already heard Franklin argue for his innocence when he testified in his own defense. Franklin testified he had consensual sexual intercourse with the victim on the date of the murder, but he denied killing the victim. Therefore, the jury had the opportunity to hear and consider Franklin's side of the story. The fact that Franklin did appear before the jury during the guilt phase, even if his appearance was not during the closing, demonstrates due process and fundamental fairness were not offended by the error.

Third, it is important to note the policy behind a harmless error and prejudice analysis. These rules are rooted in the fundamental goal of the criminal justice system - that no citizen forfeit his life or liberty unless found guilty beyond a reasonable doubt. As discussed below, it is clear beyond a reasonable doubt the correct man was found guilty of this crime. Based on a review of the evidence presented, we can find no evidence whatsoever the jury

⁶Even if Franklin was aware of his right to argue, it is unlikely he would have chosen to do so. Franklin's attorneys testified they did not think Franklin should personally address the jury during the penalty phase since he did not make a good impression on the jury during his guilt phase testimony.

would have rendered a different verdict had the error not been made.

Finally, the evidence of guilt in this case is overwhelming. The facts in brief are as follows. Victim Jennifer Martin and family members attended a cousin's wedding earlier in the day. Thereafter, Jennifer visited her grandmother, then drove to her mother's house about 11:00 p.m. to use the telephone. Her mother left the house shortly before Jennifer arrived. Jennifer had a ten minute conversation with her fiancé, beginning at 11:13 p.m. Shortly after midnight, less than 45 minutes after the victim had spoken with her fiancé, police found Jennifer's car abandoned across town with the engine running and the lights on. Police determined ownership, proceeded to the mother's house, and discovered Jennifer's badly battered, partially nude body. She had been raped, violently beaten, and sexually assaulted with a broomstick. The post mortem examination demonstrated that Jennifer suffered many pre-mortem injuries. The photographs introduced at trial showed extensive pre-mortem injuries, and these injuries led the jury to find the aggravating circumstance of physical torture. Franklin's own testimony placed him at the scene of the crime. It is impossible to believe a reasonable juror could find the violent brutality of this murder to be the result of consensual sex, as Franklin claimed. Furthermore, Franklin's bloody palm print was left on the fan that crushed the victim's head. DNA analysis confirmed the semen found on the victim's body belonged to Franklin. Necklaces belonging to the victim were found in Franklin's possession. Blood on Franklin's pants matched the blood found on the fan and victim. Considering the evidence of guilt and malice outlined above,⁷ Franklin's testimony in front of the jury, and his attorney's closing argument, there is no reasonable possibility Franklin's failure to make a personal closing argument to the jury during the guilt phase of his trial contributed in any way to his convictions.

In conclusion, we find a prejudice analysis is appropriate for the error

⁷For a more detailed discussion of the evidence of guilt and malice displayed by Franklin at the crime scene see *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995).

committed in this case.⁸ To the extent *State v. Orr*, *State v. Cooper*, *State v. Charping*, and *State v. Reed* hold differently, they are overruled. Since there is no reasonable probability that but for counsel's deficient performance, the result of Franklin's trial would have been different, we find Franklin suffered no prejudice. We reverse the PCR court's order granting Franklin a new trial.⁹

III. Non-Murder Convictions

Franklin argues the PCR court erred in denying him relief on his non-murder convictions of burglary, grand larceny, and criminal sexual conduct after finding he had not knowingly and intelligently waived his right to address the jury at the close of the guilt phase. In light of our holding above, reinstating Franklin's murder conviction, it is not necessary to reach the merits of

⁸The dissent argues imposing a prejudice analysis places a "virtually insurmountable obstacle" in the way of a convicted capital defendant. While there may be some instances where prejudice may be presumed because of the nature and circumstances surrounding the error, this is not one of those rare instances. The error in this case occurred during the guilt phase of Franklin's trial. Had he exercised his statutory right under section 16-3-28 during the guilt phase, he would have argued for the jury to believe his side of the story. As discussed previously, Franklin exercised his opportunity to testify and tell the jury his side of the story. The jury received all the overwhelming evidence, including Franklin's own testimony, and rendered a verdict of guilty. Nothing in the facts or circumstances surrounding this guilt phase error makes a prejudice analysis inappropriate or a "virtually insurmountable obstacle."

Furthermore, as discussed previously, both the United States Supreme Court and this Court have held a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*. It is hard to reason why a statutory right, enacted by our state legislature, should be given a higher importance than rights guaranteed by the Constitution of the United States.

⁹For further policy arguments concerning the appropriateness of a prejudice analysis in this case see *Charping, supra* (Goolsby, AAJ, joined by Justice Toal, concurring in part and dissenting in part).

Franklin's argument.

CONCLUSION

For the foregoing reasons, we **REVERSE** in part the findings of the PCR court and reinstate Franklin's murder conviction.

MOORE, WALLER and BURNETT, JJ., concur. PLEICONES, J. dissenting in a separate opinion.

JUSTICE PLEICONES: We granted cross-petitions for certiorari to review a post-conviction relief (PCR) order granting respondent-petitioner (Franklin) a new trial on his capital murder charge but denying him relief on the other three convictions¹⁰ arising out of his death penalty trial. The majority reverses the order granting Franklin relief and therefore does not reach the remedy issue he raises. I would grant Franklin a new trial on the murder charge only, and therefore respectfully dissent.

A. State's Petition

The PCR judge found, and the majority agrees, that Franklin was never informed of his statutory right to argue to the jury during the guilt phase of his trial. See S.C. Code Ann. § 16-3-28 (Supp. 2000). Based on this finding, the judge granted relief on two grounds:

- (1) Franklin's trial counsel's performance was ineffective in violation of the sixth amendment;¹¹ and
- (2) Franklin's conviction was obtained "in violation of the . . . laws of this State . . ."¹²

As explained below, I agree that Franklin cannot prevail on his ineffective assistance claim. I would hold, however, that the violation of state law which occurred here compels us to grant a new trial.

i. Ineffective Assistance

In order to obtain relief on an ineffective assistance of counsel claim, a

¹⁰Franklin was convicted of murder, first degree burglary, first degree criminal sexual conduct, and grand larceny. See State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995).

¹¹U.S. Const. amend. VI.

¹²See S.C. Code Ann. § 17-27-20(a)(1)(1985).

PCR applicant must establish both that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668 (1984); Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000). In this case, there is no question but that Franklin's trial attorneys performed below professional norms. Their admitted failure to review the applicable statutes when they undertook to represent this individual charged with capital murder should undermine our confidence in the integrity of our judicial system. No defendant, most especially one facing the death penalty, should be afforded such perfunctory representation.

Franklin's sixth amendment claim also requires that he demonstrate prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. at 694. Even where, as here, counsels' performance has deprived the defendant of a substantive or procedural right to which the law entitled him, he must establish Strickland prejudice in order to prevail. Williams v. Taylor, 592 U.S. 362 (2000); see Brown v. State, *supra*. Whether there is a reasonable probability that, but for the error the result would have been different, is a fact-intensive inquiry. Strickland v. Washington, 466 U.S. at 695-96. I agree with the majority that, given the overwhelming evidence of Franklin's guilt, there is no reasonable probability that a jury would have returned a not guilty verdict had Franklin been informed of, and chosen to exercise, his statutory right to argue to the jury.

I therefore concur in the majority's opinion insofar as it reverses the grant of PCR because of a sixth amendment violation.

B. Violation of State Law

We are free to decide the statutory violation issue under the standard we deem appropriate. I would hold that when a capital defendant is denied the opportunity to exercise a statutory right afforded him by our death penalty statutes,¹³ we must reverse.

¹³S.C. Code Ann. §§ 16-3-20 through -28 (Supp. 2000).

In my opinion, we must honor the General Assembly's prerogative to establish the procedural safeguards which it deems necessary to the fair administration of the death penalty. Where the legislature has prescribed a departure from the procedures observed in "ordinary" criminal trials, those deviations should be scrupulously honored. I would thus not engage in a prejudice analysis where the undisputed facts do not demonstrate a conscious waiver or strategic decision to forego one of the special protections mandated by the capital statutes. When a capital defendant is deprived of the opportunity to exercise one of these statutory rights, whether through ignorance or design, I would hold that justice requires we grant a new trial.

Even if we were to require a showing of prejudice, Franklin has met that burden here. In four prior decisions, we have granted relief to capital defendants who suffered this same delict. See State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1996); State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993); State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991); State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987). In all four cases, the reversals resulted from this Court's *in favorem vitae* review. By definition, the error was found to be inherently prejudicial. See e.g., Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 519 (1993) ("In *favorem vitae* review requires us to painstakingly inspect capital cases to determine whether prejudicial error has been committed in a trial . . ."). We subsequently abandoned our rule of automatic reversal where no waiver of this right to address the jury appeared on the record, recognizing that a collateral inquiry may reveal a knowing, intelligent, and voluntary waiver. See e.g., State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993) (where trial record is silent on waiver of right to address jury in guilt phase, issue may be fully explored at PCR to determine whether defendant was adequately informed of right but chose to waive it for strategic reasons); see also Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994).

In State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), this Court agreed to abolish the doctrine of *in favorem vitae* because, among other things, the adoption of the Uniform Post Conviction Relief Act¹⁴ in 1969 and the

¹⁴S.C. Code Ann. §§ 17-27-10 through -160 (1988 and Supp. 2000).

revitalization of the great writ of habeas corpus in 1990¹⁵ assured that “[O]ther mechanisms of protection and of relief have now been created for the [capital] defendant which safeguard [him] and render the protections afforded by *in favorem vitae* surplusage.” *Id.* at 61, 406 S.E.2d at 324.¹⁶

In my opinion, if we are to safeguard the rights of the capital defendant and follow our precedents, then the only issue before this Court is whether there is any evidence of probative value in the record to support the PCR judge’s finding that Franklin did not waive his statutory right to address the jury at the close of the guilt phase of his trial. Humbert v. State, Op. No. 25314 (S.C. Sup. Ct. filed June 25, 2001)(Shearouse Adv. Sh. No. 23 at p. 64); State v. Rocheville, *supra*. I disagree with the majority’s decision applying the Strickland prejudice standard to our analysis of this state law issue. The effect of imposing this requirement is to place a virtually insurmountable obstacle in the way of a convicted capital defendant who has been deprived of one of these statutory rights.¹⁷

B. Franklin’s Petition

Franklin contends the PCR court erroneously limited relief to the murder charge alone. I disagree. See State v. Cooper, *supra*; State v. Charping, *supra* (both reversing only the murder conviction for lack of a waiver of the right to closing argument in the guilt phase).

¹⁵See Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990).

¹⁶Among the other grounds advanced for the abolition of the doctrine was “the advances in the quality of legal representation.” *Id.* at 60, 406 S.E.2d at 324. As this case demonstrates, we must not assume that capital defendants will necessarily be afforded competent representation.

¹⁷Since the ultimate sanction is reserved for the “worst of the worst,” it will be a rare death row inmate who can demonstrate a “reasonable probability” of a different outcome where, for example, the statutory waiting period required between the guilty verdict and the commencement of the penalty phase is not observed, or even where separate sentencing and penalty hearings are not held.

Conclusion

For the reasons given above, I would affirm the issues raised in the State's petition and the issue raised in Franklin's petition. Accordingly, I would affirm the PCR order granting a new trial on the murder charge only.

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S.C. SUPREME COURT

November 24, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Change of Address

Dear Mr. Shearouse:

I am writing to notify the Court of my change of mailing address and telephone number. I can now be reached at P.O. Drawer 23786, Jackson, MS 39225-3786. My telephone number is 601.948.6882. I am counsel in the following cases pending before the Court: *Ellis Franklin v. Catoe*, *Richard Johnson v. Catoe*, and *James William Wilson v. Evatt*. By copy of this letter, I am also informing opposing counsel of my change in address. If you have any questions about this matter, please do not hesitate to contact me.

Yours sincerely,

David P. Voisin

David P. Voisin

cc: Donald J. Zelenka
William Edgar Salter, III

DAVID I. BRUCK

Attorney at Law

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November 21, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

NOV 22 2000

S.C. SUPREME COURT

Re: Request for audio tape

Dear Mr. Shearouse:

This letter is to request a copy of the recording of the oral argument in State v. Ellis Franklin that was heard by this Court on Tuesday November 14, 2000

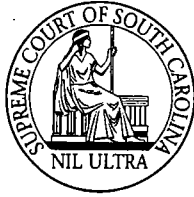
Thank you in advance for your kind assistance in this matter.

Yours truly,

David I. Bruck/njh

David I. Bruck

DIB/njh



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
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November 8, 2000

Assistant Deputy Attorney General Donald J. Zelenka
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David P. Voisin, Esquire
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Kenneth M. Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

The record in the above case has been reviewed and the time allotment for oral argument for this case is as follows:

Petitioner/Respondent	15 minutes
Respondent/Petitioner	15 minutes
Petitioner/Respondent in Reply	5 minutes

This case is scheduled for hearing at 10:00 a.m. Tuesday, November 14, 2000.

Very truly yours,

Daniel E. Shearouse, Clerk

By *Jean J. Peebles*
Administrative Assistant

DES/jjp

CENTER FOR CAPITAL LITIGATION

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88

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September 14, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Catoe

Dear Mr. Shearouse:

Today I received notice that oral argument in the above-referenced case is scheduled for the November term of court. I am writing to ask that the Court schedule the case for November 14 or 15. I have scheduling conflicts during the earlier week. I will be moving on October 31 and will be out of town the rest of that week. If you have any questions about this, please do not hesitate to contact me.

Yours sincerely,



David Voisin

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.

RECEIVED

SEP 18 2000

S.C. SUPREME COURT



The Supreme Court of South Carolina

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BRENDA F. SHEALY
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FAX (803) 734-1499

August 18, 2000

David P. Voisin, Esquire
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

The following order has been endorsed on your Request for Oral Argument in the above entitled case on appeal.

"Request for oral argument
is granted.

s/ Jean H. Toal C.J.
For the Court

August 18, 2000."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

CLERK

DES/dmh

cc: Kenneth M. Suggs, Esquire
Assistant Deputy Attorney General Donald J. Zelenka

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)

POST OFFICE BOX 11311

COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

July 17, 2000

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Catoe - Case No. 96-CP-45-117

Dear Mr. Shearouse:

Enclosed please find for filing, with proof of service, the original and six (6) copies of the Request for Oral Argument.

Please do not hesitate to contact me if you have any questions regarding this matter or if I can provide you with any additional information.

Very truly yours,


David P. Voisin

c: Kenneth M. Suggs, Esq.
Donald J. Zelenka, Esq.
Ellis Franklin

RECEIVED

JUL 18 2000

S.C. SUPREME COURT

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

JUL 11 2000

S. C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 227(h), SCRAP, petitioner, through his undersigned counsel, hereby requests oral argument in this matter. Counsel believe oral argument would be beneficial to this Court in resolving the issues presented in this death penalty case. In support of this motion, petitioner would show the following:

I.

This Court granted certiorari to consider two questions posed by the state: (1) "whether there was probative evidence to support the Circuit Court's finding of a lack of waiver of Franklin's personal right to make a closing statement at the penalty [sic] phase when the evidence of the penalty phase waive acknowledges awareness of the 'same right' of the guilt phase right to make a personal statement; and (2) "whether prejudice under Strickland or prejudicial error under SCRPC, Rule 61,

is shown by an alleged lack of an on-the-record waiver of his right to make a guilt phase argument when he testified in the guilt phase and there was an expressed and sound strategy that he not make further arguments or testimony to the jury since he made a bad impression.” Pet. For Writ of Certiorari of Petitioner/Respondent at 4.

The Court also granted certiorari to consider a question presented by Mr. Franklin in a cross-petition for writ of certiorari: “whether the lower court erred in denying relief on respondent-petitioner’s non-murder convictions even after finding that respondent-petitioner had not knowingly and intelligently waived his right to address the jury pursuant to S.C. Code § 16-3-28 and that trial counsel were ineffective for not advising him of that right.” Petition for Writ of Certiorari on Behalf of Respondent-Petitioner at ii.

II.

After reviewing the briefs that have been filed, respondent-petitioner believes that oral argument will be beneficial to the Court at least with respect to the question raised in the cross-petition, there seems to be a dispute among circuit court judges as to whether a lack of a waiver should result only in a reversal of a murder conviction or whether the applicant should be entitled to a new trial on all other related charges.

With respect to the questions presented by the state, respondent-petitioner believes that oral argument may be beneficial to the Court

WHEREFORE, for the foregoing reasons, respondent-petitioner Ellis Franklin respectfully requests that the Court grant oral argument.

Respectfully submitted,

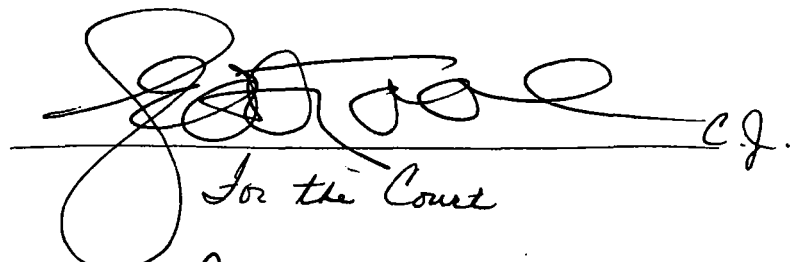
KENNETH M. SUGGS
Suggs & Kelly
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

DAVID P. VOISIN
Center for Capital Litigation
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

BY: David P. Voisin
ATTORNEY FOR ELLIS FRANKLIN

July 17, 2000.

*Request for oral argument
is granted.*


For the Court
August 18, 2000

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department of
Corrections,

Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the request for oral argument in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 17th day of July, 2000.


DAVID P. VOISIN

P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEY FOR RESPONDENT-PETITIONER.

RECEIVED

JUL 18 2000

S.C. SUPREME COURT

CENTER FOR CAPITAL LITIGATION

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POST OFFICE BOX 11311
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

June 26, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

JUN 26 2000

S.C. SUPREME COURT

VIA HAND DELIVERY

Re: Franklin v. Catoe

Dear Mr. Shearouse:

Enclosed for filing, with proof of service, please find fifteen copies of respondent-petitioner's Reply to Petitioner-Respondent's Brief on Cross-Appeal. If you have any questions about this, please do not hesitate to contact me.

Yours sincerely,



David Voisin

Enc.

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 16, 2000

RECEIVED
JUN 16 2000
S. C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Ellis Franklin v. William D. Catoe

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the *Brief in Response to Opening Brief of Respondent-Petitioner Ellis Franklin on Cross-Appeal* in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with this Brief.

Sincerely,

A handwritten signature in black ink, appearing to read "Donald J. Zelenka", followed by a horizontal line.

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lb
Enclosures

cc: Kenneth M. Suggs, Esquire
David P. Voisin, Esquire

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)

POST OFFICE BOX 11311

COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

May 15, 2000

RECEIVED

MAY 15 2000

S. C. SUPREME COURT

VIA HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

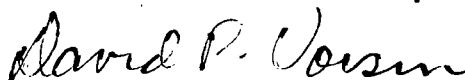
Re: Franklin v. Catoe - Case No. 96-CP-45-117

Dear Mr. Shearouse:

Enclosed please find for filing, with proof of service, the original and fourteen (14) copies of the Opening Brief of Respondent-Petitioner on Cross-Appeal and the Brief in Response to Opening Brief of Petitioner-Respondent, as well as thirteen (13) additional copies of the supplemental appendix in the above captioned matter.

Please do not hesitate to contact me if you have any questions regarding this matter or if I can provide you with any additional information.

Very truly yours,



David P. Voisin

c: Kenneth M. Suggs, Esq.
Donald J. Zelenka, Esq.
Ellis Franklin



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211
(803) 734-1080
FAX (803) 734-1499

May 12, 2000

David P. Voisin, Esquire
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Kenneth M. Suggs, Esquire
P. O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

The following order has been endorsed on your Motion for Enlargement of Time of Seven Days in Which to File Respondent-Petitioner's Briefs and Additional Copies of the Supplemental Appendix in the above entitled matter.

"Granted.

s/ Jean H. Toal C.J.
For the Court

May 12, 2000."

Please be advised that the briefs and supplemental appendix should be filed in this office on or before May 15, 2000.

Very truly yours,

Brenda F. Shealy
DEPUTY CLERK

BFS/dmh

cc: Assistant Deputy Attorney General Donald J. Zelenka

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)
POST OFFICE BOX 11311
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

May 8, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED
MAY 08 2000
S. C. SUPREME COURT

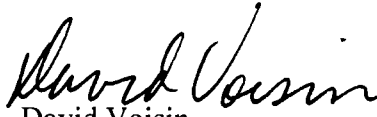
VIA HAND DELIVERY

Re: Franklin v. Catoe

Dear Mr. Shearouse:

Enclosed for filing, with proof of service, please find the original and six (6) copies of a motion for enlargement of time of seven days in which to file respondent-petitioner's responsive brief and respondent-petitioner's opening brief on his cross-appeal.

Yours sincerely,


David Voisin

Enc.

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED
MAY 08 2000
S. C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department
of Corrections,

Petitioner-Respondent.

MOTION FOR ENLARGEMENT OF TIME OF SEVEN DAYS
IN WHICH TO FILE RESPONDENT-PETITIONER'S BRIEFS
AND ADDITIONAL COPIES OF THE SUPPLEMENTAL APPENDIX

Pursuant to Rule 234(b), SCRAP, respondent-petitioner, Ellis Franklin, respectfully requests an enlargement of time of seven days in which to file his briefs in the above-referenced case. This is Respondent-Petitioner's third request for additional time. The briefs are currently due on May 8, 2000, and Mr. Franklin is requesting an extension until May 15, 2000. Counsel for petitioner-respondent, Donald J. Zelenka, has no objection to this request. In support of this motion, Mr. Franklin would advise the Court of the following:

I.

Ellis Franklin is a death-sentenced inmate seeking post-conviction relief. The lower court initially granted relief as to all of his convictions. The court then granted in part the state's motion to alter or amend the judgment and reinstated Mr. Franklin's non-murder convictions. The court

denied the state's motion to reinstate the murder conviction. Mr. Franklin then filed a motion pursuant to Rule 59(e), SCRCP, requesting the lower court to adhere to its original position. That motion was denied. Each party then filed a timely notice of appeal.

II.

The state has filed a petition for writ of certiorari and appendix, and Mr. Franklin also filed a cross-petition for writ of certiorari. The Court granted the state's petition, and also granted certiorari on Question II of the issues raised in the cross-petition. Mr. Franklin must therefore file a brief in response to the state's opening brief as well as his brief on the merits of the question raised in the cross-petition for writ of certiorari.

III.

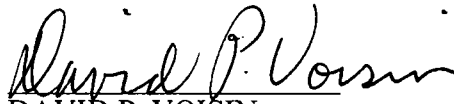
Undersigned counsel respectfully requests the additional time due to his case load in several other capital cases. In particular, he is counsel of record in Johnson v. Catoe, which is in this Court's original jurisdiction. Undersigned counsel had to travel to Nebraska for a rule to show cause hearing pertaining to the issuance of subpoenas pursuant to the uniform act to secure the attendance of witnesses from without the state in a criminal proceeding. There was an evidentiary hearing before Judge Keesley on April 25-27, 2000. Undersigned counsel also had to return to Nebraska on April 27-29, 2000, to take depositions *de bene esse*. Finally, the evidentiary hearing will reconvene on Monday, May 8, 2000, at which time the petitioner in that case will be allowed to present reply testimony.

In addition, the lead counsel for Mr. Franklin, Ken Suggs, has been in trial in a medical malpractice suit in York County the week of May 1, 2000. Because the trial has lasted much longer than anticipated, he has not been able to review and revise the drafts of the briefs. He will not return to his office until May 8, 2000.

IV.

Undersigned counsel has conferred with Mr. Zelenka, counsel for petitioner-respondent, and he does not oppose this request.

WHEREFORE, for the foregoing reasons, respondent-petitioner requests an enlargement of ten days to file both his response to the state's opening brief as well as his own brief on the cross-petition for writ of certiorari.

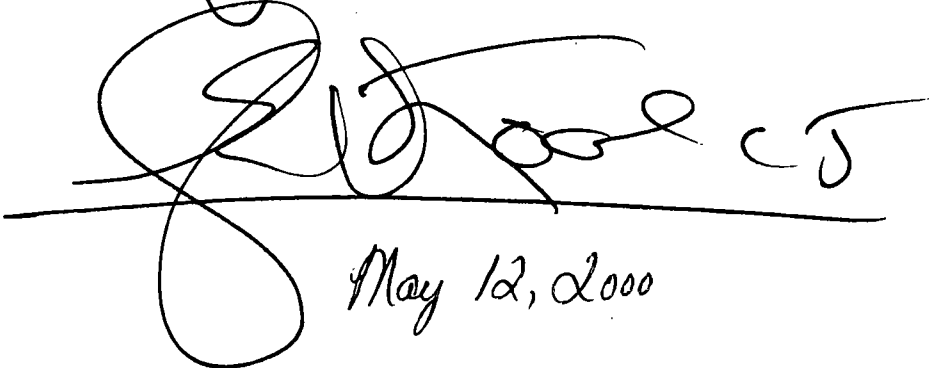


DAVID P. VOISIN
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

KENNETH M. SUGGS
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

Attorneys for Respondent-Petitioner

May 5, 2000.


May 12, 2000

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED
MAY 08 2000
S. C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

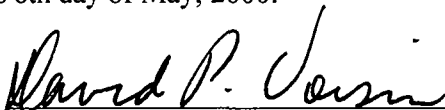
v.

WILLIAM D. CATOE, Director,
South Carolina Department of
Corrections,

Petitioner-Respondent.

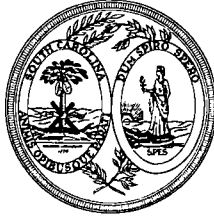
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the motion for enlargement of time of seven days in which to file respondent-petitioner's briefs and additional copies of the supplemental appendix in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 8th day of May, 2000.


DAVID P. VOISIN

P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEY FOR RESPONDENT-PETITIONER.



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

MAY 11 2000

May 9, 2000

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re; Ellis Franklin v. William D. Catoe

Dear Mr. Shearouse:

I am in receipt of the May 5, 2000 motion, through counsel David Voisin, to request up to May 15, 2000 to file his briefs in the above-referenced case. Please be advised that Mr. Voisin previously consulted with me and I advised him that I had no objection to the request. This is to confirm that response in writing on this date.

Sincerely,

A handwritten signature in dark ink, appearing to read "Donald J. Zelenka", with a long horizontal flourish extending to the right.

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: David Voisin, Esquire

The Supreme Court of South Carolina

Ellis Franklin,

Respondent/Petitioner

v.

William D. Catoe, Director, South Carolina
Department of Corrections,

Petitioner/Respondent.

The Honorable Thomas W. Cooper, Jr.
Williamsburg County
Trial Court Case No. 1996-CP-45-117

AMENDED ORDER

For good cause having been shown, the time for serving and filing the brief of petitioner and brief of respondent on behalf of respondent/petitioner in the above entitled matter is hereby extended until May 8, 2000.

IT IS SO ORDERED.

 J.
For the Court

Columbia, South Carolina

April 25, 2000

cc: Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esquire
Kenneth M. Suggs, Esquire

The Supreme Court of South Carolina

Ellis Franklin,

Respondent/Petitioner

v.

William D. Catoe, Director, South Carolina
Department of Corrections,

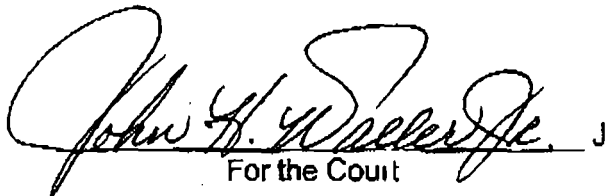
Petitioner/Respondent.

The Honorable Thomas W. Cooper, Jr.
Williamsburg County
Trial Court Case No. 1996-CP-45-117

AMENDED ORDER

For good cause having been shown, the time for serving and filing the brief of petitioner and brief of respondent on behalf of respondent/petitioner in the above entitled matter is hereby extended until May 8, 2000.

IT IS SO ORDERED.


For the Court

Columbia, South Carolina

April 25, 2000

cc: Assistant Deputy Attorney General Donald J. Zelerka
David P. Voisin, Esquire
Kenneth M. Suggs, Esquire

The Supreme Court of South Carolina

Ellis Franklin,

Respondent/Petitioner,

v.

William D. Catoe, Director, South Carolina
Department of Corrections,

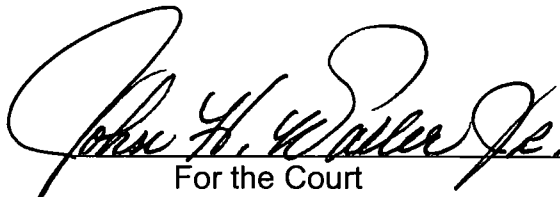
Petitioner/Respondent.

The Honorable Thomas W. Cooper, Jr.
Williamsburg County
Trial Court Case No. 1996-CP-45-117

ORDER

For good cause having been shown, the time for serving and filing the brief of petitioner filed on behalf of the respondent/petitioner in the above entitled matter is hereby extended until May 8, 2000.

IT IS SO ORDERED.

 J.
For the Court

Columbia, South Carolina

April 11, 2000

cc: Attorney General Charles M. Condon
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esq.
Kenneth M. Suggs, Esquire

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)
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Voice: (803) 765-0650

4035
Lonnit
5/8/00

Fax: (803) 765-0705

April 6, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

APR 06 2000

S. C. SUPREME COURT

VIA HAND DELIVERY

Re: Franklin v. Catoe

Dear Mr. Shearouse:

Enclosed for filing, with proof of service, please find the original and six (6) copies of a motion for enlargement of time of thirty (30) days in which to file respondent-petitioner's brief and additional copies of the supplemental appendix filed.

Yours sincerely,



David Voisin

Enc.

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin

The Supreme Court of South Carolina

Ellis Franklin,

Respondent/Petitioner,

v.

William D. Catoe, Director, South Carolina
Department of Corrections,

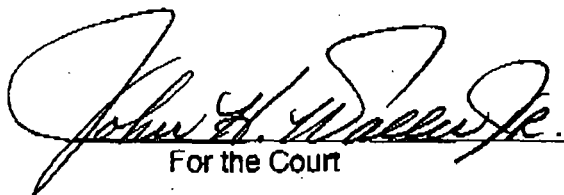
Petitioner/Respondent.

The Honorable Thomas W. Cooper, Jr.
Williamsburg County
Trial Court Case No. 1996-CP-45-117

ORDER

For good cause having been shown, the time for serving and filing the brief of petitioner filed on behalf of the respondent/petitioner in the above entitled matter is hereby extended until May 8, 2000.

IT IS SO ORDERED.

 J.
For the Court

Columbia, South Carolina

April 11, 2000

cc: Attorney General Charles M. Condon
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelinka
David P. Voisin, Esq.
Kenneth M. Suggs, Esquire

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

RECEIVED

APR 06 2000

S. C. SUPREME COURT

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department
of Corrections,

Petitioner-Respondent.

MOTION FOR ENLARGEMENT OF TIME OF THIRTY DAYS
IN WHICH TO FILE RESPONDENT-PETITIONER'S BRIEF
AND ADDITIONAL COPIES OF THE SUPPLEMENTAL APPENDIX

Pursuant to Rule 234(b), SCRAP, respondent-petitioner, Ellis Franklin, respectfully requests an enlargement of time of thirty days in which to file his briefs in the above-referenced case. This is Respondent-Petitioner's second request for additional time. Counsel for petitioner-respondent, Donald J. Zelenka, does not oppose this request. In support of this motion, Mr. Franklin would advise the Court of the following:

I.

Ellis Franklin is a death-sentenced inmate seeking post-conviction relief. The lower court initially granted relief as to all of his convictions. The court then granted in part the state's motion to alter or amend the judgment and reinstated Mr. Franklin's non-murder convictions. The court denied the state's motion to reinstate the murder conviction. Mr. Franklin then filed a motion

pursuant to Rule 59(e), SCRCP, requesting the lower court to adhere to its original position. That motion was denied. Each party then filed a timely notice of appeal.

II.

The state has filed a petition for writ of certiorari and appendix, and Mr. Franklin also filed a cross-petition for writ of certiorari. The Court granted the state's petition, and also granted certiorari on Question II of the issues raised in the cross-petition. Mr. Franklin must therefore file a brief in response to the state's opening brief as well as his brief on the merits of the question raised in the cross-petition for writ of certiorari.

III.

Undersigned counsel respectfully requests the additional time due to his case load in several other capital cases. In particular, he has been preparing for the evidentiary hearing in the case of Johnson v. Catoe, which is pending in this Court's original jurisdiction. The Honorable William P. Keesley, whom the Court appointed as a special referee, has scheduled the evidentiary hearing in Johnson for the week of April 25, 2000. I must also travel to Nebraska for a hearing on a rule to show cause regarding the issuance of subpoenas to out-of-state witnesses, and we may also take the deposition of a number of witnesses.

IV.

Undersigned counsel has conferred with Mr. Zelenka, counsel for petitioner-respondent, and he does not oppose this request.

WHEREFORE, for the foregoing reasons, respondent-petitioner requests an enlargement of thirty days to file his response to the state's opening brief as well as his own brief on the cross-petition for writ of certiorari.

A handwritten signature in cursive script, appearing to read "David P. Voisin", written over a horizontal line.

DAVID P. VOISIN
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

KENNETH M. SUGGS
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

Attorneys for Respondent-Petitioner

April 5, 2000.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

APR 06 2000

S. C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department of
Corrections,

Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the motion for enlargement of time of thirty (30) days in which to file respondent-petitioner's brief and additional copies of the supplemental appendix in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 6th day of April, 2000.


DAVID P. VOISIN

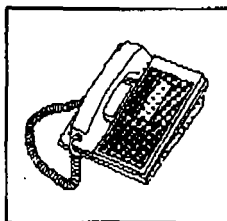
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEY FOR RESPONDENT-PETITIONER.



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL



CAPITAL LITIGATION, HOMICIDE APPEALS
FEDERAL HABEAS CORPUS SECTION

FAX TRANSMISSION FORM

TO: Supreme Court FAX NUMBER: 734-1499
ATTN: Erica DATE: 4-7-00
FROM: Don Telente OFFICE: (803) 734-3601
FAX: (803) 734-4035
MESSAGE: Per conversation today w/ Louie,
I am putting in writing my consent.

TOTAL NUMBER OF PAGES IN TRANSMISSION INCLUDING COVER: 4

NOTICE OF CONFIDENTIALITY: The information contained in this facsimile message is legally privileged and confidential information intended only for the use of the individual(s) or entity named above. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copy of this telecopy is strictly prohibited. If you have received this telecopy in error, please notify us immediately by telephone at (803) 734-6305 and return the original message to us at the address below via the United States Postal Service. Thank you.

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

RECEIVED

APR 06 2008

S. C. SUPREME COURT

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department
of Corrections,

Petitioner-Respondent.

MOTION FOR ENLARGEMENT OF TIME OF THIRTY DAYS
IN WHICH TO FILE RESPONDENT-PETITIONER'S BRIEF
AND ADDITIONAL COPIES OF THE SUPPLEMENTAL APPENDIX

Pursuant to Rule 234(b), SCRAP, respondent-petitioner, Ellis Franklin, respectfully requests an enlargement of time of thirty days in which to file his briefs in the above-referenced case. This is Respondent-Petitioner's second request for additional time. Counsel for petitioner-respondent, Donald J. Zelenka, does not oppose this request. In support of this motion, Mr. Franklin would advise the Court of the following:

I.

Ellis Franklin is a death-sentenced inmate seeking post-conviction relief. The lower court initially granted relief as to all of his convictions. The court then granted in part the state's motion to alter or amend the judgment and reinstated Mr. Franklin's non-murder convictions. The court denied the state's motion to reinstate the murder conviction. Mr. Franklin then filed a motion

pursuant to Rule 59(e), SCRCP, requesting the lower court to adhere to its original position. That motion was denied. Each party then filed a timely notice of appeal.

II.

The state has filed a petition for writ of certiorari and appendix, and Mr. Franklin also filed a cross-petition for writ of certiorari. The Court granted the state's petition, and also granted certiorari on Question II of the issues raised in the cross-petition. Mr. Franklin must therefore file a brief in response to the state's opening brief as well as his brief on the merits of the question raised in the cross-petition for writ of certiorari.

III.

Undersigned counsel respectfully requests the additional time due to his case load in several other capital cases. In particular, he has been preparing for the evidentiary hearing in the case of Johnson v. Catot, which is pending in this Court's original jurisdiction. The Honorable William P. Keesley, whom the Court appointed as a special referee, has scheduled the evidentiary hearing in Johnson for the week of April 25, 2000. I must also travel to Nebraska for a hearing on a rule to show cause regarding the issuance of subpoenas to out-of-state witnesses, and we may also take the deposition of a number of witnesses.

IV.

Undersigned counsel has conferred with Mr. Zelenka, counsel for petitioner-respondent, and he does not oppose this request.

WHEREFORE, for the foregoing reasons, respondent-petitioner requests an enlargement of thirty days to file his response to the state's opening brief as well as his own brief on the cross-petition for writ of certiorari.


DAVID P. VOISIN
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

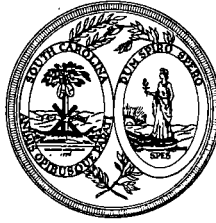
KENNETH M. SUGGS
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

Attorneys for Respondent-Petitioner

April 5, 2000.

I have no objection
as stated in the
motion for the
reasons of Mr.
Voisin's intervening
involvement in the Richard
Johnson case.


4/7/2000



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

March 6, 2000

Ph 3-6-00
RECEIVED
MAR 08 2000
S.C. SUPREME COURT

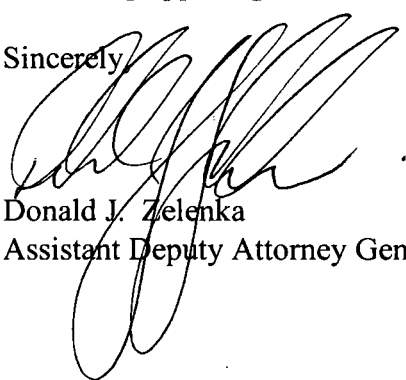
Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Ellis Franklin v. William D. Catoe

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) copies of the *Opening Brief of Petitioner/Respondent William D. Catoe, Commissioner on Writ of Certiorari* in the above-referenced matter for filing. By copy of this letter I am serving opposing counsel with this Brief.

Sincerely,


Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Kenneth M. Suggs, Esquire
David P. Voisin, Esquire

The Supreme Court of South Carolina

Ellis Franklin,

Respondent/Petitioner,

v

William D. Catoe, Director, South Carolina
Department of Corrections,

Petitioner/Respondent.

The Honorable Thomas W. Cooper, Jr.
Williamsburg County
Trial Court Case No. 1996-CP-45-117

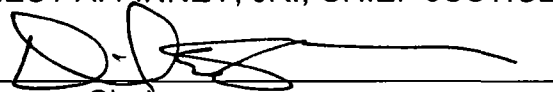
ORDER

For good cause having been shown, the time for serving and filing the brief of petitioner filed on behalf of the respondent/petitioner in the above entitled matter is hereby extended until April 6, 2000.

IT IS SO ORDERED.

ERNEST A. FINNEY, JR., CHIEF JUSTICE

BY


Clerk

Columbia, South Carolina

March 8, 2000

cc: Attorney General Charles M. Condon
Chief Deputy Attorney General John W. McIntosh
Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esq.
Kenneth M. Suggs, Esquire

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED
MAR 07 2000
S. C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department
of Corrections,

Petitioner-Respondent.

MOTION FOR ENLARGEMENT OF TIME OF THIRTY DAYS
IN WHICH TO FILE RESPONDENT-PETITIONER'S BRIEF
AND ADDITIONAL COPIES OF THE SUPPLEMENTAL APPENDIX

Pursuant to Rule 234(b), SCRAP, respondent-petitioner, Ellis Franklin, respectfully requests an enlargement of time of thirty days in which to file his brief in the above-referenced case. Counsel for petitioner-respondent, Donald J. Zelenka, has no objection to this request. In support of this motion, Mr. Franklin would advise the Court of the following:

I.

Ellis Franklin is a death-sentenced inmate seeking post-conviction relief. The lower court initially granted relief as to all of his convictions. The court then granted in part the state's motion to alter or amend the judgment and reinstated Mr. Franklin's non-murder convictions. The court denied the state's motion to reinstate the murder conviction. Mr. Franklin then filed a motion pursuant to Rule 59(e), SCRPC, requesting the lower court to adhere to its original position. That motion was denied. Each party then filed a timely notice of appeal.

II.

The state has filed a petition for writ of certiorari and appendix, and Mr. Franklin also filed a cross-petition for writ of certiorari. The Court granted the state's petition, and also granted certiorari on Question II of the issues raised in the cross-petition.

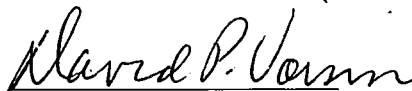
III.

Undersigned counsel respectfully requests the additional time due to his case load in several other capital cases. In particular, he has been serving as counsel of record in State v. Hollis, a Lexington County death penalty trial that ran from February 21 through March 4. Prior to the beginning of the trial, undersigned counsel was fully engaged in pre-trial investigation, research, and preparation for the trial. Due to the unexpected length of the trial, undersigned counsel was unable to complete the brief on Mr. Franklin's behalf. Moreover, in the aftermath of the trial, I inadvertently forgot to file this request for an enlargement of time on March 6, 2000, the date on which the brief was due.

IV.

Undersigned counsel has conferred with Mr. Zelenka, counsel for petitioner-respondent, and he has no objection to this request.

WHEREFORE, for the foregoing reasons, respondent-petitioner requests an enlargement of thirty days to file his brief on the cross-petition for writ of certiorari.



DAVID P. VOISIN
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

KENNETH M. SUGGS
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

Attorneys for Respondent-Petitioner

March 7, 2000.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

MAR 07 2000

S. C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

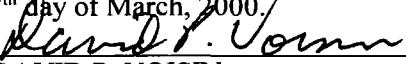
v.

MICHAEL MOORE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the motion for enlargement of time of thirty (30) days in which to file respondent-petitioner's brief and additional copies of the supplemental appendix in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 7th day of March, 2000.


DAVID P. VOISIN

P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEY FOR PETITIONER-RESPONDENT(s)

99/00 PC-711

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)
POST OFFICE BOX 11311
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

March 7, 2000

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

MAR 07 2000

S. C. SUPREME COURT

Re: Franklin v. Catoe

Dear Mr. Shearouse:

Enclosed for filing, with proof of service, please find the original and six (6) copies of a motion for enlargement of time of thirty (30) days in which to file respondent-petitioner's brief and additional copies of the supplemental appendix filed.

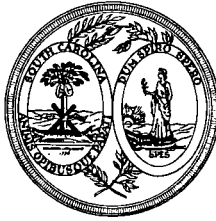
Yours sincerely,

David Voisin (cg)

David Voisin

Enc.

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin



RECEIVED
FEB. 18 2000
S.C. SUPREME COURT

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

February 18, 2000

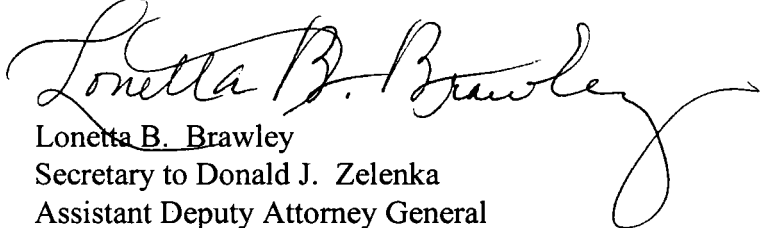
Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Ellis Franklin v. William D. Catoe

Dear Mr. Shearouse:

Pursuant to your request, enclosed please find thirteen (13) additional copies of the Appendix in the above-referenced matter.

Sincerely,


Lonetta B. Brawley
Secretary to Donald J. Zelenka
Assistant Deputy Attorney General

lbb
Enclosures



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

February 4, 2000

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

David P. Voisin, Esquire
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Kenneth M. Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v. Catoe, William D.

Dear Counsel:

Enclosed is the order granting your Petitions for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

The briefs of petitioners should be served and filed on or before March 6, 2000. The briefs are not properly filed until we have proof of service.

The briefs of respondents should be served and filed within thirty (30) days after service of the petitioners' brief filed by the opposing party. We must have proof of service. Any reply briefs should be served and filed within ten (10) days after service of the respondents' brief filed by the opposing party.

Very truly yours,

CLERK

DES/dmh

Enclosure

The Supreme Court of South Carolina

Ellis Franklin,

Respondent-Petitioner,

v.

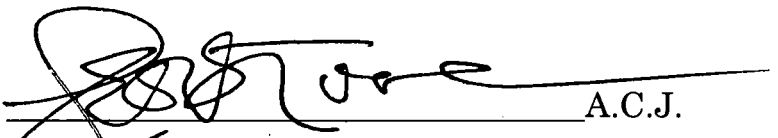
William D. Catoe,
Director, South
Carolina Department
of Corrections,

Petitioner-Respondent.

ORDER

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

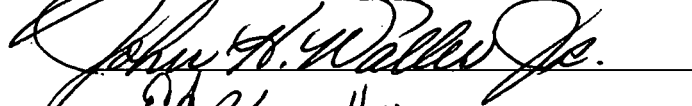
The State's petition for a writ of certiorari is granted. Respondent-Petitioner's petition for a writ of certiorari is granted as to Question II and denied as to Question I. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 227(h), SCACR.



A.C.J.



A.J.



A.J.



A.J.

Finney, C.J., not participating.

RECEIVED

JUL 06 1999

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Williamsburg County Court of Common Pleas
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

ORIGINAL

Case No. 96-CP-45-117
Opinion No. 24190

ELLIS FRANKLIN Respondent / Petitioner.

v.

WILLIAM D. CATOE, Commissioner,
South Carolina Department of Corrections Petitioner / Respondent.

**PETITION FOR WRIT OF CERTIORARI
OF PETITIONER/RESPONDENT WILLIAM D. CATOE, COMMISSIONER**

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3601

ATTORNEYS FOR PETITIONER/
RESPONDENT CATOE

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II. Whether prejudice under <u>Strickland</u> or prejudicial error under SCRCP, Rule 61 is shown by an alleged lack of an on-the-record waiver of his right to make a guilt phase argument when he testified in the guilt phase and there was an expressed and sound strategy that he <u>not</u> make further arguments or testimony to the jury since he made a bad impression?	
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QUESTIONS PRESENTED

- I. Whether there was probative evidence to support the Circuit Court's finding of a lack of a waiver of Franklin's personal right to make a personal closing statement in the penalty phase when the evidence of the penalty phase waiver acknowledges awareness of the "same right" of the guilt phase right to make a personal statement?
- II. Whether prejudice under Strickland or prejudicial error under SCRCF, Rule 61 is shown by an alleged lack of an on-the-record waiver of his right to make a guilt phase argument when he testified in the guilt phase and there was an expressed and sound strategy that he not make further arguments or testimony to the jury since he made a bad impression?

STATEMENT OF THE CASE

This matter comes before this Court in an appeal from the partial granting of state post-conviction relief to Ellis Franklin by the Honorable Thomas W. Cooper, Jr., Presiding Judge. These proceedings began with an application for post-conviction relief filed by Ellis Franklin, SK#4855, through his court-appointed counsel, Kenneth Suggs, David P. Voisin, and John H. Blume, filed March 14, 1996. App. p. 3418. The Respondents made a Return April 15, 1996. App. p. 3426. On January 12, 1998, Franklin made a motion for summary judgment with respect to grounds 9(a) and 9(b)(1) in the amended Application or in the alternative to limit the January 27, 1998 hearing to these two (2) allegations. App. p. 3470. On the same date, he filed an Amended Application. App. p. 3461. On January 14, 1998, Franklin filed a Memorandum in Support of his motion. App. p.3472. On January 21, 1998, the Respondents made a Memorandum of Law in Opposition to the Motion for Summary Judgment. App. p. 3503.

On January 22, 1998, a hearing on the Motion for Summary Judgment was held in Manning, South Carolina at the Clarendon County Courthouse. App. p. 3527-58. Franklin was present and represented by Mr. Suggs and Mr. Voisin. The Respondents were represented by Donald J. Zelenka. After hearing arguments, this Court denied Franklin's Motion for Summary Judgment. The Court, however, agreed that the pending evidentiary hearing be limited to the issues set forth in the Amended Application, grounds 9(a) and 9(b)(1).

In his initial state Application for Post-Conviction Relief on March 14, 1996, Franklin made the following allegations:

9(a) Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated by counsel's failure to object to the virtually unlimited scope of the trial court's order regarding a competency evaluation and by counsel's failure to object to the lack of a competency hearing conducted in conformity with due process and with the provisions of S.C. Code Section 44-23-410.

10(a) Prior to trial, the court granted the state's motion to have applicant evaluated to determine his competency to be tried, his criminal capacity and responsibility pursuant to the McNaghten test, and whether he lacked sufficient capacity to conform his conduct to the requirements of law. The trial judge also ordered the state hospital to administer an MMPI and to evaluate applicant's adaptability and evaluate his future dangerousness. R. 3242-43. The state hospital simply issued a report, which was made a part of the record. R. 153. Defense counsel, however, only objected on the ground that the report contained only hearsay information. R. 155. There was never a hearing on competency, and the evaluation did not comport with S.C. Code Section 44-23-410.

9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by counsel's failure to adequately prepare for penalty phase and by counsel's failure to investigate and present compelling evidence in mitigation of punishment.

10(b) At the penalty phase, counsel admitted that they had not even read records from the Hall Institute, upon which the state so heavily relied during the penalty phase. R. 2920. Counsel also failed to provide the social worker with records she had requested. R. 3028. As a result, the state was able to cross-examine the defense witnesses based on their unfamiliarity with basic materials. Counsel also failed to conduct an adequate and reliable investigation into applicant's background and mental state.

9(c) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by counsel's failure to object to sentencing instructions that would likely have been interpreted to require unanimity among jurors with respect to

mitigating circumstances. See McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

10(c) The ground for relief states the relevant facts.

9(d) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by counsel's failure to object to the solicitor's closing argument regarding deterrence as well as other prejudicial and inflammatory aspects of the solicitor's closing which violated applicant's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

10(d) In his closing, the solicitor argued that the jury should return with a death sentence because the death penalty is a deterrent to crime. R. 3167-3170. No evidence was presented during trial about deterrence. Even more significantly, the solicitor's argument was wrong. The proposition that the imposition of the death penalty is not a general deterrent is supported by overwhelming statistical evidence. See generally Fox and Radelet, Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty, 23 Loy. L.A.L. Rev. 29 (1989); Alfred, Blumstein, Cohen, and Nagin, eds., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, National Academy of Sciences, Washington, D.C. (1978); William J. Bowers and Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions? Crime and Delinquency, 453 (October 1980); Bailey, Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago, 74 J. Crim. L. & Criminology 827 (1983). Solicitor's argument was actually false.

The solicitor also compared the jury's responsibility to that of soldiers during wartime, Abraham Lincoln, Dwight Eisenhower, and Winston Churchill. The solicitor urged the jurors to do their duty just as the leaders had to do their duty. These types of arguments have been roundly and universally condemned. See, e.g., Vierceck v. United States, 318 U.S. 236 (1943); Young v. United States, 470 U.S. 1, 18 (1985); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991); William Boyd Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985) (en banc).

9(e) Applicant was denied his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it is reasonably likely that the jurors would have understood the trial court's instructions to require that they

unanimously agree as to the existence of any mitigating circumstances. See McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

10(e) The ground for relief states the relevant facts.

In the amended Application, Franklin raises the following allegations:

9(a) Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code § 16-3-28 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

10(a) The trial judge did not ask applicant whether he wished to address the jury at the conclusion of the guilt/innocence phase of his trial. Furthermore, neither of applicant's lawyers apprised him of his right to make a closing statement to the jury at the guilt phase. Because applicant did not know that he had that right, he could not have made a knowing and intelligent waiver of the right. See State v. Cooper, 439 S.E.2d 276 (S.C. 1994); State v. Charping, 437 S.E.2d 88 (S.C. 1993); State v. Orr, 403 S.E.2d 623 (S.C. 1991); Cain v. Evatt, No. 90-CP-13-382 at 3 (S.C. 4th Cir. Common Pleas, May 4, 1995)(Final Order), cert. dismissed as improvidently granted, Cain v. State, 477 S.E.2d 98 (S.C. 1996).

9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and South Carolina law by the following acts and omissions of trial counsel:

10(b)(i) Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. See S.C. Code § 16-3-28.

10(b)(ii) By failing to conduct a minimally adequate investigation of applicant's mental state and social history, counsel could not adequately advise applicant concerning trial strategy or about the exercise of his constitutional rights, such as taking the stand in his own defense.

10(b)(iii) Because they failed to conduct even a minimally adequate investigation into applicant's mental state and social history, counsel

were ineffective in failing to request that applicant undergo another competency evaluation prior tot rial.

10(b)(iv) Because counsel's investigation into applicant's mental stat and social history was not even minimally adequate, counsel failed to present conclusive evidence of mental retardation, organic brain damage, and mental illness as well as compelling factors from applicant's background and family history. This evidence would have supported several statutory mitigating circumstances and would have also provided the jury with additional nonstatutory mitigating circumstances to consider.

10(b)(v) Counsel failed to explain to the jury the reasons for applicant's inappropriate affect (primarily his giggling) during the trial.

10(b)(vi) Counsel failed to provide their trial experts with essential records, corroborative evidence of their findings, time in which to conduct an adequate investigation or evaluation, the opportunity to consult with each other, and the opportunity to prepare their testimony. This not only prevented the defense experts from reaching reliable and accurate conclusions about applicant, it also opened the door to prejudicial cross-examination and rebuttal testimony. At the penalty phase, counsel admitted that they had not even read records from the Hall Institute, upon which the State so heavily relied during the penalty phase. ROA 2920. Counsel also failed to provide the social worker with records she had requested. ROA 3028. As a result, the state was able to cross-examine the defense witnesses based on their unfamiliarity with basic materials.

10(b)(vii) Counsel failed to challenge the credentials of the state's rebuttal witness, who had his license to practice medicine suspended and was under probation at the time of applicant's trial.

10(b)(viii) Counsel failed to conduct a minimally adequate cross-examination of the state's rebuttal witness due to their unfamiliarity with records in their possession, their failure to acquire additional, readily available documents, and their overall unfamiliarity with the mental health issues in the case.

10(b)(ix) Counsel failed to cross-examine the state's rebuttal witness about his failure to abide by the Ethical Guidelines for the Practice of

Forensic Psychiatry by testifying about applicant's mental state without making any effort to see applicant before testifying.

10(b)(x) Counsel failed to object to testimony elicited from the prosecution's rebuttal witness that applicant allegedly displayed no remorse at the state hospital. As a result, counsel failed to protect applicant's right to remain silent while at the state hospital, his right to plead not guilty, and his right to remain silent during the penalty phase. See Estelle v. Smith, 451 U.S. 454 (1981); State v. Hawkins, 357 S.E.2d 10 (S.C. 1987); State v. (Jesse Keith) Brown, 347 S.E.2d 882 (S.C. 1986).

10(b)(xi) Counsel pursued inconsistent and incoherent theories of the case at the guilt/innocence and penalty phases of the trial thereby destroying any credibility that the defense would otherwise have had with the jury.

10(b)(xii) Counsel failed to object to the solicitor's closing argument regarding deterrence as well as to other prejudicial and inflammatory aspects of the solicitor's summation. In his closing, the solicitor argued that the jury should return with a death sentence because the death penalty is a deterrent to crime. ROA 3167-3170. No evidence was presented during trial about deterrence. Even more significantly, the solicitor's argument was wrong. The proposition that the imposition of the death penalty is not a general deterrent is supported by overwhelming statistical evidence. See generally Fox & Radelet, Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty, 23 Loy. L.A.L. Rev. 29 (1989); Alfred, Blumstein, Cohen & Nagin, eds., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, National Academy of Sciences, Washington, D.C. (1978); William J. Bowers and Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions? Crime and Delinquency, 453 (October 1980); Bailey, Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago, 74 J. Crim. L. & Criminology 827 (1983). Solicitor's argument was actually false. The solicitor also compared the jury's responsibility to that of soldiers during wartime, Abraham Lincoln, Dwight Eisenhower, and Winston Churchill. The solicitor urged the jurors to do their duty just as the leaders had to do their duty. These types of arguments have been roundly and universally condemned. See, e.g., Vierceck v. United States, 318 U.S. 236 (1943); Young v. United States, 470 U.S. 1, 18 (1985); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991); William Boyd Tucker v.

Kemp, 762 F.2d 1480 (11th Cir. 1985)(en banc); State v. Cockerham, 365 S.E.2d 22 (S.C. 1988).

10(b)(xiii) The cumulative effect of the numerous deficiencies in counsel's performance deprived applicant of his right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); see also Kyles v. Whitley, 514 U.S. 419 (1995).

9(c) The state created a false impression of the evidence during its rebuttal testimony at the penalty phase in violation of applicant's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and applicable South Carolina law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

10(c) During its case in rebuttal, the prosecution elicited testimony that there was no evidence of applicant's mental illness when the prosecution had in its possession records indicating that applicant had been prescribed antipsychotic medication at the time of the trial.

9(d) Applicant underwent trial in violation of his right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and applicable South Carolina law when he was not competent to stand trial or make decisions concerning the exercise of his constitutional rights, such as the right to testify. See Godinez v. Moran, 113 S.Ct. 2680 (1993); Dusky v. United States, 362 U.S. 402 (1960); Estock v. Lane, 842 F.2d 184 (7th Cir. 1988)(per curiam); State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978).

10(d) Because of his psychosis, organic brain impairments, and mental retardation, applicant was unable to adequately understand the proceedings against him, assist trial counsel in his defense, or make knowing and intelligent critical decisions during the trial.

The hearing court limited the evidentiary hearing, to the following allegations at the request and consent of both counsel:

9(a) Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code §.16-3-28 and the Due Process

Clause of the Fourteenth amendment to the United States Constitution.

10(a) The trial judge did not ask applicant whether he wished to address the jury at the conclusion of the guilt/innocence phase of his trial. Furthermore, neither of applicant's lawyers apprised him of his right to make a closing statement to the jury at the guilt phase. Because applicant did not know that he had that right, he could not have made a knowing and intelligent waiver of the right. See State v. Cooper, 439 S.E.2d 276 (S.C. 1994); State v. Charping, 437 S.E.2d 88 (S.C. 1993); State v. Orr, 403 S.E.2d 623 (S.C. 1991); Cain v. Evatt, No. 90-CP-13-382 at 3 (S.C. 4th Cir. Common Pleas, May 4, 1995)(Final Order), cert. dismissed as improvidently granted, Cain v. State, 477 S.E.2d 98 (S.C. 1996).

9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by the following acts and omissions of trial counsel:

10(b)(i) Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. See S.C. Code § 16-3-28.

On January 27, 1998, an evidentiary hearing was convened in the matter at the Sumter County Courthouse. App. p. 3559-3736. Franklin was present and represented by Mr. Suggs and Mr. Voisin. The Respondents were represented by Donald J. Zelenka and Lauri Soles of the Attorney General's Office. Testimony was received from his original trial counsel, Charles D. Barr, LeGrand Carraway, Dr. Daniel Hicky Grant, Pete Partee, Wade Kolb, and Franklin. Exhibits were also introduced, including an affidavit from Judge Shuler. At the conclusion of the hearing, this Court took the matter under advisement and requested the parties to submit proposed orders. The parties each submitted proposed orders on April 29, 1998. App. p. 3735, 3744.

On October 2, 1999, Judge Cooper entered a written order granting state post-conviction relief requiring a new trial on the charges. App. 3791-3801. Respondent Moore on October 15, 1998 made a motion to alter or amend the judgment asserting that the charges other than murder should not be affected by the alleged error and should be reinstated. App. 3801. Franklin opposed the motion by written response on October 26, 1998. App. p. 3816. On February 12, 1999, Judge Cooper entered an order granting the Respondent's request to limit relief to the murder conviction. App. p. 3823. Franklin then filed a motion to alter and amend the February 12, 1999 Order on February 25, 1999. App. 3238. On April 8, 1999, Judge Cooper entered an order denying Franklin's request to alter or amend judgment. App. 3844. Respondent Moore filed a notice of appeal on May 7, 1999 and Franklin filed his notice of cross-appeal on May 13, 1999.

STATEMENT OF THE PRIOR PROCEEDINGS

A. The Trial

The Applicant, Ellis Franklin, was indicted at the February 3, 1992, Court of General Sessions for Williamsburg County for the crime of murder, burglary in the first degree, grand larceny, grand larceny of a vehicle, resisting arrest, and criminal sexual conduct in the first degree involving an August 30, 1991 incident resulting in the death of Jennifer Sue Martin. The Honorable Wade S. Kolb, Jr., Solicitor of the Third Judicial Circuit, served his notice of intent to seek the death penalty on Franklin on February 10, 1992. Franklin was represented by Charles David Barr of the Williamsburg County Bar, and W. LeGrand Carraway, Public Defender of Williamsburg County. Franklin's co-defendant, Martha Sierra, was represented by Jerome P. Askins, III, and William D. Pridgen.

The matter was called to trial on January 11, 1993 before the Honorable M. Duane Shuler, Presiding Judge, in Williamsburg County. The prosecution was represented by Solicitor Kolb and Assistant Solicitor Clifton Newman. At the outset, co-defendant Sierra's case was severed from the trial upon motion of Ms. Sierra. App.p. 39-40. During pretrial motions the resisting arrest count of the indictment was severed. App.pp. 47-53. The court also received the report of the finding of mental capacity and concluded that absent any evidence to the contrary, he was competent to stand trial. App.pp. 152-157. Jury selection began on January 11, 1993. After the initial jury was struck each defendant moved under Batson v. Kentucky, 479 U.S. 79 (1986). App.pp. 1307-1353. During the Batson discussion, the trial court stated: "... my idea is for us to go through each one of these people and let me tell you what I rule on it so the next time it comes up you won't be striking those people knowing that I'm going to rule that way." App.p. 1334, ll. 7-13. The trial court ruled the defense had violated the mandates of Batson with respect to jurors William Knight (17), Brent Higgins (105), Bradley Cantley (25), and Elizabeth Whaley (107). App.p. 1353, ll. 12-24. The trial court found that the state had violated Batson with respect to one juror, Shirley Davis. App.p. 1354, ll. 10-19. After the initial selection was stricken by the court's Batson ruling, another panel was selected using the same qualified jurors randomly selected. When juror Cantley (25) was called, despite the trial court's earlier Batson ruling, the defense sought to strike him again. App.p. 1359, l. 17 - p. 1360, l. 8. The juror was seated by the trial judge. App.p. 1359, l. 16 - p. 1360, l. 13. After the jury selection was completed the jury was sworn on January 14, 1993. App.p. 1366. The trial judge stated on the record that at the time juror Cantley was struck, the trial judge had previously ruled that the defense counsel had already violated Batson before and "I ruled at the side bar that he

did not have the right to again give some raise some neutral reason" and that his objection would be timely. App.p. 1377, l. 16 - p. 1378, l. 9.

The trial began on January 15, 1993. An in camera suppression hearing was held concerning the search and seizure of evidence. The trial judge denied the motions to suppress over the objection of Franklin. App.pp. 1384-1447, 1450. The court further allowed the introduction of a statement of Franklin, over objection. App.p. 1452. The state then presented its case-in-chief. At the conclusion of its case, a defense motion for directed verdict of acquittal on the charges was made. App.pp. 2453-2470, 2477-2481.

The defense presented evidence in its defense. App.pp. 2482-2690. The Applicant, Ellis Franklin, testified on his own behalf. App.pp. 2615-2682. In his testimony, he claimed that he had consensual sexual intercourse with the victim on that date, but had not told anyone else about their relationship. App.pp. 2630-2632. He further claimed that the victim drove him home later that day. App.pp. 2622-2624, 2628. He denied killing the victim and claimed he did not know who did. App.p. 2628.

After closing arguments and instructions, jury unanimously found Franklin guilty of murder, burglary in the first degree, grand larceny, and criminal sexual conduct in the first degree on January 20, 1993 at 6:10 p.m. App.pp. 2789-2791.

The penalty phase began at 6:30 p.m. on January 21, 1993. App.p. 2804. The prosecution offered in evidence the guilt phase evidence. App.pp. 2811-2812. The prosecution also presented evidence and testimony in the penalty phase. App.pp. 2813-2947. The defense presented evidence in mitigation. App.pp. 2948-3122. The prosecution called Dr. Jack Dunlap in reply. App.pp. 3132-

3161. After closing arguments, the trial judge instructed the jury on the following statutory aggravating circumstances:

1. Murder while in commission of criminal sexual conduct.
2. Murder while in commission of burglary.
3. Murder while in commission of larceny with use of a deadly weapon.
4. Murder while in commission of physical torture.

App.pp. 3201-3202. The trial court also instructed the jury on the following statutory mitigating circumstances:

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
3. The age or mentality of the defendant at the time of the crime.
4. The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
5. Any other non-statutory mitigating circumstance.

(App.pp. 3212-3213).

The jury deliberated from 7:45 p.m. to 10:25 p.m., on January 23, 1993. (App.p. 3222). The jury found all of the four statutory aggravating circumstances and recommended a death sentence. (App.p. 3223). Judge Shuler sentenced Applicant to death for murder, to ten (10) years for grand

larceny, to thirty (30) years for criminal sexual conduct and to life imprisonment for burglary.
(App.p. 3235, ll. 3-20).

B. The Direct Appeal

Franklin filed a timely notice of appeal. On appeal, he was represented by Daniel T. Stacey and Robert M. Pachak of the South Carolina Office of Appellate Defense. In his appeal, Applicant raised the following issues on appeal in his Final Brief of Appellant:

- I. Did the trial court err in ruling appellant competent to stand trial solely on the basis of a written report finding mental capacity?
- II. Did the trial court err in its sua sponte refusal to allow defense counsel to strike juror Bradley Cantley at a second jury selection because he ruled that defense counsel had previously stricken the same juror without a racially neutral reason at the first jury selection process?
- III. Did the court err when it failed to obtain appellant's waiver of the right to personally make final argument to the jury in the guilt or innocence phase?¹
- IV. Did the trial judge err in admitting over objection at the penalty phase seventeen gruesome color photographs of the victim at the scene and ten color autopsy slides of the victim because they were highly prejudicial, denied appellant a fair trial, and denied appellant any meaningful opportunity to have the jury consider mitigating factors?
- V. Did the trial court err in allowing state's witness, Dr. Dunlap, to testify on reply at the penalty phase of the trial as to his opinions concerning appellant's psychiatric and mental condition without first hand knowledge and without introducing into evidence the psychiatric and mental records to support his opinions?
- VI. Did the solicitor's extensive penalty phase closing argument on deterrence inject an unreliable factor into the sentencing determination and was fundamentally unfair because defendants in South Carolina may not introduce evidence that the death penalty fails to deter crime?

¹ Pertinent to the issue before this Court.

On September 21, 1994, oral argument was held on the matter. The Supreme Court initially affirmed the appeal on January 30, 1995, and amended its Order upon Petition for Rehearing on March 13, 1995. State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995). A Petition for Writ of Certiorari was made to the United States Supreme Court. It was denied on October 2, 1995. Franklin v. South Carolina, ___ U.S. ___, 116 S.Ct. 160 (1995).

ARGUMENT

- I. Whether there was probative evidence to support the Circuit Court's finding of a lack of a waiver of Franklin's personal right to make a personal closing statement in the penalty phase when the evidence of the penalty phase waiver acknowledges awareness of the "same right" of the guilt phase right to make a personal statement?**
- II. Whether prejudice under Strickland or prejudicial error under SCRPC, Rule 61 is shown by an alleged lack of an on-the-record waiver of his right to make a guilt phase argument when he testified in the guilt phase and there was an expressed and sound strategy that he not make further arguments or testimony to the jury since he made a bad impression?**

In this appeal from the partial granting of state post-conviction relief, the Commissioner asserts the Circuit Court erred in concluding that Ellis Franklin was not aware of his right to make a personal closing argument in the guilt phase because the evidence of the penalty phase inquiry, in fact, revealed an admission by trial counsel and Franklin of their awareness of the right. The Commissioner respectfully asserts that this evidence, supported by Judge Shuler's affidavit (App. p. 3865-66), revealed that "counsel was aware, as [the trial judge] had stated; that Mr. Franklin had the right during the guilt phase to make a closing argument in addition to his attorney's closing

argument.” App. p. 3866 (Affidavit of Judge Shuler). The affirmations made by counsel and Franklin at trial carry a presumption of verity.²

Further, even if this Court finds that there is support for the factual findings, a new trial is not warranted where the evidence is clear that had Franklin known of the right to make a guilt phase closing argument he would not have invoked that right based upon sound strategic reasons. Certiorari is warranted on these assertions.

Relevant Factual Background on the Waiver of the Right to Make a Personal Guilt Phase Argument.

A. The Trial and Appeal

In Mr. Franklin's direct appeal, Franklin sought to present this issue as argument III. In the opinion of the South Carolina Supreme Court, the Court stated the following:

3. DID THE TRIAL COURT ERR WHEN IT FAILED TO OBTAIN APPELLANT'S WAIVER OF THE RIGHT TO PERSONALLY MAKE FINAL ARGUMENT TO THE JURY IN THE GUILT PHASE?

Franklin did not personally exercise his statutory right to make a final argument to the jury in the guilt phase nor did he waive this right on the record. See S.C. Code Ann. § 16-3-28 (Supp. 1993) (defendant has right to argue to jury in guilt and penalty phase of death penalty trial). Franklin was tried after our decision in *State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). Absent an in favorem vitae review, when

² We acknowledge that the PCR Court's factual findings are that Franklin was not aware of that right. App. p. 3795. However, the PCR Court did not make findings that counsel were either aware or unaware of the statutory right. Pauling v. State, 331 S.C. 606, 503 S.E.2d 468 (1998) (findings must be affirmed if supported by any evidence in the record.)

there is no on-the-record waiver of defendant's right to address the jury in the guilt phase or the penalty phase of the trial, there must be a contemporaneous objection. State v. Hall, 312 S.C. 95, 439 S.E.2d 278 (1994), cert. denied, 512 U.S. 1246, 114 S.Ct. 2770, 129 L.Ed.2d 883; State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993), cert. denied, 508 U.S. 978, 113 S.Ct. 2978, 125 L.Ed.2d 675. Otherwise, the issue is not preserved for appellate review. State v. Hall, 312 S.C. 95, 439 S.E.2d 278 (1994), cert. denied, 512 U.S. 1246, 114 S.Ct. 2770, 129 L.Ed.2d 883; State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993), cert. denied, 508 U.S. 978 113 S.Ct. 2978, 125 L.Ed.2d 675; see also State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994)(issue presented for first time on appeal not preserved for appellate review). State v. Franklin, 318 S.C. 47, 56, 456 S.E.2d 357, 362 (1995).

The record before this Court, however, reveals that Franklin must be denied relief on the claim of whether he waived his right to make a personal closing statement in the guilt phase under S.C. Code § 16-3-28 and State v. Orr, *supra*, and State v. Charping, *supra* and whether counsel was ineffective in failing to advise him of the right. The guilt phase record reveals that there was discussion on the record about the right to testify with Franklin and his counsel. App.p. 2450, l. 21 - p. 2452, l. 19, p. 2480, ll. 5-18. As previously stated, Franklin testified in his own defense in the guilt phase. App.pp. 2621-2680. At the conclusion of the guilt phase, no inquiry was made of either Franklin or his counsel of Franklin's statutory right to personally address the jury in the guilt phase arguments. The trial court merely stated the order of argument of the prosecution and then the defense. App.p. 2711, l. 19 - p. 2712, l. 1.

The record of the penalty phase suggests that the trial court became aware of the deficiency of the on-the-record waiver of the closing argument in the guilt phase and sought to remedy and

resolve those questions in the penalty phase.³ In the trial judge's inquiry on the issues of the right to testify and make a closing statement at the penalty phase the following occurred pertinent to the guilt phase issue:

THE COURT: [W]hile we're doing it I want him to understand that he also has the right - AS HE DID AT THE LAST PHASE -- he has the right to make an argument along with you or Mr. Carraway, whoever makes the argument. He has the right to speak to the jury as well and I need to know whether or not he, you know desires to do that.

I want to make him aware of it, know he's aware of it -- WAS AWARE BEFORE but I want to make sure he was aware of it again ... be sure he understands that he has a right to do both [testify and argue].

App.p. 2938, l. 14 - p. 2939, l. 8 (emphasis added).

THE COURT: All right, sir, and the same is true of your closing argument. Mr. Barr or Mr. Carraway will make the last argument. The state has to argue first in this portion of the trial, and your lawyers or lawyer has the right to argue last just like he did in the last portion of the trial and you have the same right. You've got the right -- just like you did before -- you've got the right to stand before the jury at this time -- at the end of this phase of the trial -- and tell them anything you want to tell them about yourself or about anything about the facts of the case or anything that you want to say you've got the right to do it.

And I just want to make you aware of that fact and would like to know before -- before -- we make final arguments I would like for you all to come and let me know what his intention is just before you make the argument. I don't want to pin him down now. I'll let him think about it but I'm going to -- I need to know whether he's waiving his right or whether he wants to do it before it happens. That's the thing I've got to get on record.

³ The admitted affidavit of Judge Shuler (State's Exhibit 1) confirms this. App. 3865-66.

App.p. 2939, l. 24 - p. 2940, l. 18. See also, App.p. 2941, l. 21 - 2943, l. 16. The trial court further personally inquired of Franklin concerning his understanding of the scope of testimony or closing argument. App.p. 2943, l. 17 - p. 2945, l. 1. Later, the court inquired of the right of Franklin to make a closing argument in the penalty phase which he waived.

In this PCR action, Franklin bears the burden of showing by a preponderance of the evidence his entitlement to relief. S.C. Rule of Civil Procedure, Rule 71.1(e). In Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972), the Supreme Court held that a trial record that did not contain sufficient evidence of a waiver of the constitutional right to a jury trial may be supplemented by evidence of a collateral proceeding. Here, the record at the original trial strongly suggests by the inquiry the trial court had with both counsel and Franklin that he was aware of his right to make a personal closing statement in the guilt phase of the trial. App.pp. 2938-2939. These representations, even by the silence in response to the trial court's specific inquiry must carry a presumption of verity absent a cogent reason to the contrary. Blackledge v. Allison, 431 U.S. 63, 74 (1979). Here, the record supports the view stressed by Respondents on the basis of the contemporaneous record that Franklin and his counsel "was aware before" of the right. App.pp. 2938-2939. A review of the evidentiary record in the state post-conviction relief hearing may reveal contradiction to the original trial record by both Franklin and counsel, but does not satisfy Franklin's burden of proof when their testimony is reviewed against the record, in its entirety, including the reasonable impeachment of each at the time of the hearing.

B. Summary of State Post-Conviction Relief Hearing Testimony

At the state post-conviction relief hearing on January 27, 1998, his prior counsel, Charles D. Barr, was the first witness. Counsel Barr testified, upon questioning from Franklin's current counsel, that he did not advise Franklin of his right to make a closing argument during the guilt phase of his trial. App. 3564, PCR Tr. p. 6, ll. 15-17. He declared he never gave Franklin that advice. Barr also stated that he did not know at the time of the trial that Franklin had the right to make a closing argument at the guilt phase. App. 3564-65, PCR Tr. p. 6, l. 23 - p. 7, l. 1. He stated that if he had known "I would have advised him that was his right and certainly would have left it up to him to make a decision regarding what he wished to do." App. 3565, PCR Tr. p. 7, ll. 4-6. Barr declared that he had not read the transcript prior to the state PCR hearing. App. 3565, PCR Tr. p. 7, l. 19. Nevertheless, Barr stated "no" to the inquiry as to whether Judge Shuler had ever given him the impression that he was trying to send a message that Franklin had a right to make a closing argument in the guilt phase. App. 3565, PCR Tr. p. 7, ll. 20-25. Further, counsel testified that he had not told the solicitor that Franklin had the right to make an argument in the guilt phase.

On cross-examination, counsel Barr testified that he had been practicing law since 1979. He testified that it was his first capital case, but not his first murder case. App. 3566, PCR Tr. p. 8. He stated that he began his legal investigation by a meeting with David Bruck, who at that time was the South Carolina Office of Appellate Defense who provided some guidance to them on what to expect in a capital case. App. 3567, PCR Tr. p. 9. He declared that he tried to make himself aware of South Carolina case law as it came out. App. 3567-68, PCR Tr. pp. 9-10. He said that he reviewed advance sheets [S.C. Supreme Court slip opinions] and attended various criminal law seminars.

App. 3568, PCR Tr. p. 10. He declared that he attended the January 1992 Criminal Law Seminar, but did not recall what was on the program, but could not locate the written materials. App. 3570, PCR Tr. p. 12. Counsel Barr declared that he did not recall any discussion of either § 16-3-28 or a defendant's right to make a closing statement in the guilt phase from either Mr. Bruck or at the continuing legal education seminars he attended in 1992 or 1993. App. 3570-71, PCR Tr. pp. 12-13. He stated that he did not recall ever reviewing the 1991 case of State v. Orr that reversed a case for a failure to have an on the record waiver that came out during his representation of Franklin. He also did not recall State v. David Rocheville which dealt with the issue. App. 3572, PCR Tr. p. 14, ll. 14-22.

On cross-examination, counsel Barr denied that he ever became aware of the right" during the trial. App. 3572, PCR Tr. p. 14. In reviewing trial transcript pages 2938-2941, counsel Barr stated that "he did not recall it" in reference to Judge Shuler's comments during the penalty phase that "he has the right as he did in the last phase, he has the right to make an argument along with you or Mr. Carraway whoever makes the argument." App. 3574, PCR Tr. p. 16, ll. 2-15. Counsel Barr then asserted that it appeared to him that he was talking about the "right to testify." App. 3574, PCR Tr. 16, ll. 22-25. He claimed, however, that at the time of trial he does not know what he thought. App. 3575, PCR Tr. p. 17, ll. 16-17. He admitted that he never indicated to the trial judge any disagreement, and for unexplained reason stated he responded to Judge Shuler's statement that "I wasn't aware of it." App. 3575, PCR Tr. p. 17, ll. 1-2. Further, Barr admitted that he did not indicate to the trial judge any disagreement with his statement. App. 3575, PCR Tr. p. 17, ll. 18-24.

Counsel Barr admitted that he had not reviewed those pages of the transcript prior to the earlier affidavit. He claimed the first he learned of the right was when counsel Voisin and Suggs met

with him. App. 3578, PCR Tr. p. 20, ll. 6-9. However, counsel Barr first indicated that he read the appellate decision in Franklin's case. App. 3578, PCR Tr. p. 20. Interestingly, he indicated that this was not one of the issues he was concerned about in the appeal and did not recall if it was discussed in the opinion. App. 3579, PCR Tr. p. 21, ll. 3-21. Although not recalling this portion of the opinion, counsel Barr admitted that when he read the opinion, "it didn't set off a red light or green light" that he made a mistake at trial. App. 3581-82, PCR Tr. pp. 23-24.

Further, counsel Barr acknowledged that his client did not make a closing argument in the penalty phase of the trial. Counsel Barr stated that "I did not think that at that time after seeing Mr. Franklin on the witness stand (in the guilt phase), I didn't feel that he would make a good impression on the jury" in closing argument. App. 3583, PCR Tr. p. 25, ll. 6-20. Counsel Barr acknowledged that he had a firm opinion that Franklin would not have made a good impression in making a closing argument to the jury. App. 3585, PCR Tr. p. 27.

On re-direct, he declared that Franklin would not have known about the right because he did not tell him. App. 3585, PCR Tr. p. 27.

LeGrand Carraway, his other counsel, testified similarly. He testified that this was his first capital case after he had been appointed Public Defender in 1991. Specifically, he testified that he did not advise him of his right to make a guilt phase closing argument and did not advise of that after the guilt phase. App. 3587-88, PCR Tr. pp. 29-30. He said that at that time, he was not aware of the guilt phase statutory right. App. 3588, PCR Tr. p. 30. Further, he said that he did not tell Franklin of the right and Barr, to his own knowledge, did not tell him of the right. App. 3588-89, PCR Tr. pp. 30-31.

On cross-examination, Carraway acknowledged that he had attended C.L.E. programs on criminal law, some which included death penalty issues. App. 3589-90, PCR Tr. pp. 31-33. He declared that he reviewed death penalty opinions prior to trial, including advance sheets. App. 3590, PCR Tr. p. 33. Carraway admitted that he "probably" reviewed the Ronald Orr decision, but this year the holding "did not ring a bell" and he did not have a recollection of being aware of its holding before. App. 3592, PCR Tr. p. 34. Concerning the trial court's penalty phase inquiry of counsel and Franklin about the right to make the argument, Carraway declared "I don't recall any of it." App. 3594-96, PCR Tr. p. 36, ll. 1-5, p. 38, l. 6. Similarly, Carraway recalled reading the Rocheville opinion that was decided in January 1993, but did not recall reviewing the opinion prior to ordering the trial. App. 3597, PCR Tr. p. 39. Interestingly, after reading the opinion later, he said he never brought to anyone's attention that there was a mistake that occurred during the trial. App. 3597, PCR Tr. p. 39. Although he reviewed the Franklin opinion, he acknowledged that the issue "did not register" with him. App. 3598, PCR Tr. p. 40. He said that counsel Barr spoke with him within two (2) months of the state PCR hearing and told him about the right and Carraway suggested he had no prior knowledge of the right. App. 3598, PCR Tr. p. 40.

Carraway recalled that he may have expressed to Mr. Barr his impression that Franklin had been a bad witness and did not want him to make a closing argument. App. 3598-99, PCR Tr. pp. 40-41.

Dr. Daniel Grant, an expert in psychology and neuropsychology specializing in mental retardation, testified on Franklin's behalf. He testified that he evaluated Franklin and found him to

be in the mildly retarded range of intellectual functioning. App. 3618, PCR Tr. p. 58.⁴ Further, he found that Franklin had tested as having significant deficits in adaptive behavior. App. 3633, PCR Tr. p. 75. He opined that Franklin satisfied all three (3) parts of the definitive of mentally retarded and is mildly mentally retarded. App. 3633, PCR Tr. p. 75.

Dr. Grant opined that it would have been difficult for Mr. Franklin to have understood the judge's inquiry about the closing argument as applying to the guilt phase. App. 3635-37, PCR Tr. pp. 77-79. Dr. Grant opined that the understanding would require several hours of explanation. App. 3638, PCR Tr. p. 80. Further, he opined that it would be difficult for Franklin to explain in hindsight a decision as to whether or not he would have given a closing argument and what he would have said. App. 3641-42, PCR Tr. pp. 83-84.

On cross-examination, Dr. Grant acknowledged that he had reviewed the records revealing his school grades, but questioned whether the grades were accurate when some were above average. App. 3646-47, PCR Tr. pp. 88-89. Further, he questioned the trial testimony that declared Franklin was not mentally retarded, despite his IQ testing. App. 3649, PCR Tr. p. 91. Also, Dr. Grant admitted that he never asked Franklin about his understanding of the closing argument. App. 3656, PCR Tr. p. 98. Also, he stated on re-direct that his recent opinion was consistent with the 1998 opinion of Dr. Geoffrey McKee who had originally found Franklin to not be mentally retarded in 1991. App. 3658, PCR Tr. p. 100.

Franklin also called Pete Partee, former Greenville Public Defender, to testify. He stated that he had been in practice since 1951. He opined that a capital case takes more diligence than an

⁴ Dr. Grant's curriculum vitae was introduced as Plaintiff's Exhibit 1. App. 3606, 3852-55.

ordinary case. App. 3668-69, PCR Tr. pp. 110-111. He stated the defense must familiarize themselves with statutes governing a capital case, the law, and the facts. App. 3669, PCR Tr. p. 111. Assuming that defense counsel did not know and/or advise his client of the right to make a personal guilt phase argument, Mr. Partee opined that it would fall below the standards of competence. App. 3672, PCR Tr. p. 114. Mr. Partee further suggested the right to make an "unsworn statement" or argument was a useful defense tool. App. 3672-73, PCR Tr. pp. 114-115. Concerning Judge Shuler's comments, Mr. Partee thought the comments would have thrown up a red flag to trial counsel if they had listened to the words. App. 3676, PCR Tr. p. 118, ll. 1-17. He suggested that competent counsel should have asked the judge for a mistrial at that time. App. 3676-77, PCR Tr. pp. 118-119.

On cross-examination, counsel Partee stated he thought the original statute in 1977 allowed for a defendant to make an unsworn statement in addition to his counsel. App. 3679, PCR Tr. p. 121. Further, he stated that he thinks the average lawyer would have picked up on Judge Shuler's comments as discussing that the defendant had the right to make a closing argument in the guilt phase. App. 3687-88, PCR Tr. pp. 129-130.

Former Solicitor Wade Kolb testified that he prosecuted Franklin. He said that when Judge Shuler did what he did on the record in the penalty phase that he realized that there was some technical mistake made. App. 3694, PCR Tr. p. 136, ll. 8-23. In Mr. Kolb's opinion, the guilt phase closing argument was something that Franklin would not have done. App. 3695, Tr. p. 137. Further, Mr. Kolb opined that when Judge Shuler asked the questions, "when nothing was said, I just took it to be confirmation of what had occurred just being put on the record for technical requirement." App. 3697, PCR Tr. p. 139, ll. 3-20. Prior to that inquiry, he said he did not

specifically hear Judge Shuler ever discuss this with counsel or Franklin. App. 3698, PCR Tr. p. 140.

The Respondents called Ellis Franklin, the Applicant, to the stand. App. 3715, PCR Tr. p. 157. Franklin stated he did not do a closing argument in the penalty phase, because they already found him guilty, never spoke with his lawyers about the penalty phase argument, denied he had spoke to the despite what he told the original trial judge. Franklin did not remember any responses he gave to the trial judge about his closing argument. App. 3716-17, PCR Tr. pp. 158-160.⁵

Relevant Legal Principles

South Carolina Code § 16-3-28 provides as follows:

Punishment for murder: right of defendant to make last argument

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

In 1991, the Supreme Court of South Carolina for the first time addressed the same issue raised herein in State v. Orr, 304 S.C. 185, 403 S.E.2d 623, 624-625 (1991). In Orr, the Court reviewed a record where the trial court had advised counsel of his right to make the lasts closing statement and counsel replied "we have conferred with Mr. Orr and explained to him the best we can

⁵ Earlier in the hearing, Franklin had introduced his own affidavit that he "may" have wanted to speak to the jury. App. 3663, 3863. Also, an affidavit of the trial judge was introduced concerning his attempt to clarify the awareness of Franklin's right to make a closing statement. App. 3865-66.

and he has ... given us the indication that he doesn't want to say anything." Orr, 403 S.E.2d at 624.

The Court therein set forth for the first time:

We hold that the knowing and voluntary waiver requirement must be established by a full record. This may be established by colloquy between the court and the defendant himself, between the court and defendant's counsel, or both.

State v. Arthur, [supra], is modified to the extent it implies that a court must establish the waiver solely by colloquy with the defendant himself.

As in Arthur, the necessity for a full and adequate record is heightened in the present case by Orr's mental retardation. We find the trial court's inquiry insufficient.

Orr, supra, at 625. The court reaffirmed that the defendant's right to make a final argument, personally and/or by counsel, at both phases of a capital trial is statutory, and as in State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987), it held the denial of this right, absent a showing on the record of a knowing and voluntary waiver constitutes reversible error.

In State v. Thomas Lee Davis, 422 S.E.2d 171, 174 (S.C. 1992), the court next addressed a waiver issue, therein concerning the right to testify and construed the record to suggest that the waiver was intelligently made.

In State v. Rocheville, 425 S.E.2d 32, 35 (S.C. 1993), issued one week prior to this trial on January 4, 1993, the court again addressed the precise issue presented here concerning the waiver of the right to make a closing statement. Therein, the court stated:

Rocheville raised an issue for the first time on appeal that illustrates one of the reasons why this court abolished the doctrine. Rocheville asserts that the record failed to disclose a knowing and intelligent

waiver of his right to address the jury at the close of the guilt phase and to testify in the sentencing phase. Under in favorem vitae, the omission of knowing and intelligent waiver on the record mandated reversal. State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991); State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987), overruled on other grounds by Torrence, supra. Thus, a defendant would be encouraged to purposely refrain from raising the issue of obtaining a waiver in the record. This incentive to "sandbag" was cited by Torrence to be the primary danger associated with in favorem vitae. Torrence, 305 S.C. AT 64, 406 S.E.2d at 326.

[2,3] In favorem vitae review of the waiver issue would preclude this Court from analyzing whether the failure to obtain a knowing and intelligent waiver on the record was harmless error. The trial record is silent on the possibility that the defendant was, in fact, adequately informed of his rights, and did, for strategic reasons, desire to waive those rights. Review of this issue is better left to a post conviction relief proceeding where the facts surrounding the trial can be fully explored. State v. McKinney, 278 S.C. 107, 292 S.E.2d 598 (1982). Accordingly, we do not address any issues raised on appeal which were not raised in the trial court.

Id. at 34-35.

Next, in State v. Ray, 427 S.E.2d 171 (S.C. 1993), the court awarded a new sentencing proceeding following a guilty plea where the record was devoid of any showing that the defendant was aware of his right to testify at the sentencing proceeding, even though he waived those rights during the guilty plea proceeding relative to the plea itself, citing Orr.

In State v. Charping, 437 S.E.2d 88, 89 (S.C. 1993), the court held that the failure to obtain a knowing and voluntary waiver of a defendant's right to make a final closing argument was

reversible error. The concurrence and dissent in Charging concluded that the error was harmless and not reversible and appropriate for a remand. Id. a 93-97.

On January 10, 1994, the South Carolina Supreme Court issued two (2) opinions, State v. Cooper, 439 S.E.2d 276 (S.C. 1994) and State v. Hall, 439 S.E.2d 278, 281 (S.C. 1994). In Cooper, the court held, reviewing the record in favorem vitae, that the failure to have an on-the-record waiver of his right to personally address the guilt phase jury mandates reversal, relying upon State v. Charging, supra. In Hall, however, the court concluded in a post-Torrence trial that the same issue did not entitle the defendant to relief since he raised no objection and it then must be raised in state post-conviction relief proceedings.

LAW / ANALYSIS

Argument I *Franklin was aware of his right to make a closing statement and waived the right.*

Contrary to the conclusions of the state PCR court, this Court must find based upon the actions of Mr. Franklin at his 1993 trial in response to the questions from Judge Shuler that he was aware of his right to make a personal closing argument in the guilt phase and chose not to do it. At the state PCR hearing, Mr. Franklin could not recall the questions that were asked of him or his responses. This requires this Court to find the originally submitted affidavit to lack any veracity or probative value. App. p. 3863. A reasonable reading of Judge Shuler's inquiry at App. pp. 2939-2941 would reveal to all parties, *as it did to the Solicitor and Mr. Partee*, that Franklin had a right to make a personal closing argument in the guilt phase as well as the penalty phase. Further, it reveals a blatant attempt by Judge Shuler to seek agreement or disagreement by either counsel or Mr. Franklin, even at that late stage, of what their knowledge and intent was in the guilt stage. This

action, albeit inaction, speaks volumes about their actual knowledge at that time. The inability of counsel (and Franklin) to *currently* recall is disturbing, but it cannot be binding upon this Court, as a reviewer of the existence of *probative* facts to accept, in light of the actions of the 1993 trial judge. Even more telling, is the refusal, for unknown reasons, of trial counsel to acknowledge, despite their affirmation that they read the opinion in their only capital client's case, that this issue was discussed by the Court. Again, this testimony reasonably questions each counsels' ability to recall events.

As Mr. Partee testified the judge's inquiry (as well as the court's opinion) would have thrown up a red flag to counsel. The affirmations by counsel and Franklin at trial are alone persuasive. The attempt to extricate themselves from the 1993 actions by the current inability to recall does not satisfy the burden of proof that Franklin has in these proceedings.

First, this Court must reject the state PCR court's conclusion that Franklin did knowingly and intelligently waive his right to address the jury in the guilt phase. Further, while the court must find that the 1993 trial judge did not ask either counsel or Franklin *during the guilt phase* of that right, his penalty phase inquiry was sufficient to apprise both counsel and Franklin of that right. Further, it is uniquely probative of Franklin's knowledge and intent that the failure to respond differently to the questions, consistent with Judge Shuler's affidavit and former Solicitor Kolb's contemporaneous impression, reveals an acknowledgment of the right to make a guilt phase argument and a probative affirmance that it was waived.

Argument II. *Even if there was no waiver of the statutory right, a new trial is not warranted under either an ineffective assistance or due process showing where prejudice under Strickland is not shown and any error was harmless and did not affect substantial rights.*

Assuming arguendo that the PCR court was correct in concluding that counsel neither advised his client and that Franklin was not aware of the right prior to the penalty phase, this Court must conclude that the PCR court erred as a matter of law in concluding that a new trial was warranted. *First*, when made aware of the right by the trial court, Franklin, himself, did not complain nor seek to invoke it. *Second*, trial counsel expressed a firm and sound strategy that after Franklin had invoked his right to testify, as a matter of strategy, counsel recommended and his client agreed to not make a personal closing argument in the penalty phase because he made a "bad impression" on the jury in his guilt phase testimony. Franklin has therefore failed in his burden to convince this Court of any desire on his part to have made a guilt phase closing argument, and falls short of showing any reasonable probability that the result of the proceeding would be different under the prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). . His failure to do so reveals his lack of entitlement to relief.

Further, both counsel were consistent, although their testimony related to penalty phase, that the recommended strategy was to not have him do a closing argument after the impression given in his guilt phase testimony. This Court must be convinced that this course would have been the same strategy (and most likely was) for the guilt phase and Franklin acceded to the wishes. He has failed in his burden of proof.

Further, under South Carolina Rules of Civil Procedure, Rule 61, relief cannot be granted for *harmless error*. The Rules provide that "the court at every stage of the proceedings must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. Assuming arguendo that he was not advised of the right, the failure does not demand vacation of either guilt or sentencing. See, State v. Charping, 313 S.C. 147, 151-160, 437 S.E.2d 88, 90-95

(1993)(Goolsby, AAJ, concurred in part and dissented in part, joined by Justice Toal). In the Charging concurrence, Judge Goolsby found the same error "is a most harmless and therefore not reversible. Like Charging, Franklin testified in his own defense that he did have sexual relations with the victim, but denied the homicide. Charging's counsel, (Franklin's current counsel, Kenneth Suggs), like Franklin's guilt phase counsel made a guilt phase closing that sought to bring out every conceivable weakness in the state's case. As in Charging, Franklin voices no complaint whatsoever about the argument counsel made for him and even now could offer no suggestions on anything that should have been argued, (recognizing that argument would not allow new evidentiary matter to be presented).

Considering the overwhelming evidence of guilt documented in the record, counsel's affirmation of Franklin's poor impression, the jury's rejection of the presentation, and his own decision not to do a penalty phase closing when admittedly being aware of the right, this Court must find the alleged error to be harmless and vacate the contrary legal conclusion by the state PCR judge. As the Charging concurrent stated, "a harmless error, by definition, is an error that is not prejudicial." This alleged error plainly meets that definition and relief must be denied pursuant to Rule 61.

Further, this Court must alternately find that there was no ineffective assistance of counsel. For the reasons stated above, this Court must find that he failed in his burden of proof in satisfying the deficient performance prong of Strickland v. Washington, 466 U.S. 668 (1984). Even assuming that this has not been satisfied, his Sixth Amendment request must fail because he cannot also satisfy the "prejudice" prong of Strickland, that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. A reasonable

probability has been defined in Strickland, a probability sufficient to undermine confidence in the outcome of the trial or sentencing proceeding. First, there is no showing that he would have made a closing statement. Second, there has been no showing what statement would have been that would have influenced the jury to the extent to "undermine confidence in the outcome." Finally, the record reveals overwhelming evidence that Franklin made a "bad impression" on the jury when he testified and counsel's strategic attempt to recommend that he not make a further "bad impression" by making a penalty phase closing. In light of this record, this Court must find that Franklin has failed to show a Sixth Amendment violation, particularly that such alleged deficiency was not a reasonable probability that the result of the trial would have been different had he been advised as he claims he should have been. It would take a tremendous leap of logic to find that this alleged failure "undermined confidence in the outcome." This Court need not take that step. The decision of the Circuit Court to the contrary must be vacated and reversed.

CONCLUSION

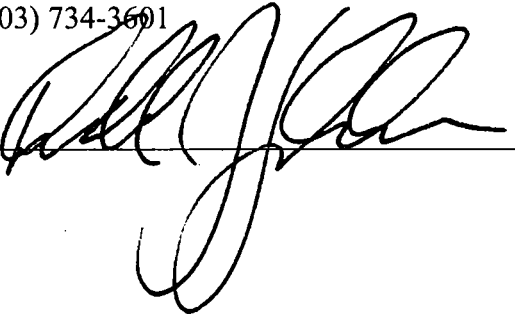
For all the foregoing reasons, this Court must grant the petition for writ of certiorari and reverse the decision of the Circuit Court granting Ellis Franklin state post-conviction relief. The murder conviction and sentence of death must be reinstated.

Respectfully submitted,

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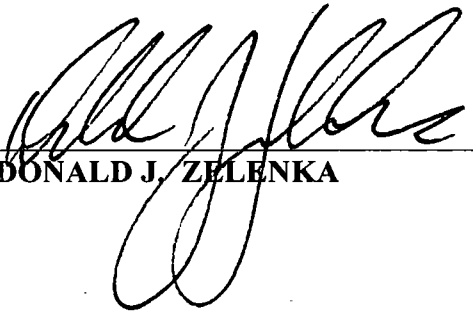
CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the *Petition for Writ of Certiorari* of *Petitioner/Respondent William D. Catoe, Commissioner* on opposing counsel by depositing two (2) copies of same in the United States mail, postage prepaid, to the following:

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This 2nd day of July, 1999.



DONALD J. ZELENSKA

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

SEP 28 1999

S.C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

**PETITION FOR WRIT OF CERTIORARI
ON BEHALF OF RESPONDENT-PETITIONER**

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QUESTIONS FOR REVIEW

I. DID THE LOWER COURT ERR AS A MATTER OF LAW IN FAILING TO FIND THAT PETITIONER-RESPONDENT DEFAULTED AND WAIVED HIS RIGHT TO CHALLENGE THE GRANT OF RELIEF AS TO RESPONDENT-PETITIONER'S NON-MURDER CONVICTIONS?

II. WHETHER THE LOWER COURT ERRED IN DENYING RELIEF ON RESPONDENT-PETITIONER'S NON-MURDER CONVICTIONS EVEN AFTER FINDING THAT RESPONDENT-PETITIONER HAD NOT KNOWINGLY AND INTELLIGENTLY WAIVED HIS RIGHT TO ADDRESS THE JURY PURSUANT TO S.C. CODE § 16-3-28 AND THAT COUNSEL WERE INEFFECTIVE FOR NOT ADVISING HIM OF THAT RIGHT?

STATEMENT OF THE CASE

Respondent-petitioner, Ellis Franklin, was convicted of murder, criminal sexual conduct, burglary, and grand larceny. He was also sentenced to death. *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357 (1995). Mr. Franklin filed an amended application for post-conviction relief on January 12, 1998, requesting that the lower court vacate all of his convictions and death sentence. App. 3461-68. He moved for summary judgment with respect to two grounds: (1) that he did not knowingly and intelligently waive his right to make a closing statement to the jury at the guilt-innocence phase of his trial, S.C. Code § 16-3-28; and (2) that counsel were ineffective for not advising him of his right to make such a statement. In the alternative, Mr. Franklin requested that the court bifurcate the proceedings and address those two claims. The state opposed the motion for summary judgment but agreed that “it would be more efficient and better use of the court’s time to bifurcate.” App. 3536. After hearing arguments, the lower court denied the summary judgment motion but agreed to bifurcate the proceedings and address issues concerning the right to address the jury. App. 3552-53.

On January 27, 1998, the lower court heard testimony from Mr. Franklin’s trial attorneys, psychologist Daniel Grant, H. F. Pete Partee, an attorney expert in the conduct of capital trials, former solicitor Wade Kolb, and Mr. Franklin. The court also accepted affidavits from Mr. Franklin and the trial judge, the Honorable M. Duane Shuler. At the lower court’s request, both sides submitted proposed orders. App. 3735-43, 3744- 78. In his proposed order, Mr. Franklin wrote that he was entitled to relief on all convictions. App. 3743. The lower court granted the requested relief. App. 3791-3800. The state then filed a motion to alter or amend the judgment. App. 3801. The lower court granted the motion and ordered that Mr. Franklin’s non-murder convictions be reinstated. The lower court, however, denied the state’s request that he vacate his decision with respect to the murder conviction. App. 3823-27. Mr. Franklin then filed a motion to alter or amend

the judgment, asking the court to vacate his non-murder convictions. That motion was denied. App. 3844-46.

Both parties filed timely notices of appeal. The state filed a petition for writ of certiorari. In addition to this pleading, Mr. Franklin is simultaneously filing a return to the state's petition. In this matter, there are no disputed facts. Mr. Franklin's petition turns on two legal questions: (1) whether the lower court erred in failing to find that the state had waived or defaulted its challenge to the lower court's initial decision to reverse the non-murder convictions; and (2) whether the lower court erred in reversing only the murder conviction.

STATEMENT OF FACTS

As discussed above, Mr. Franklin filed an amended application for post-conviction relief on January 12, 1998, requesting that the lower court vacate all convictions as well as his death sentence. App. 3461-68. Although the lower court denied a motion for summary judgment with respect to issues surrounding Mr. Franklin's right to address the jury at the conclusion of the guilt-innocence phase, it did agree to bifurcate the proceedings and hold an evidentiary hearing limited to those issues. At the conclusion of the January 27, 1998, hearing, the lower court asked both sides to prepare proposed orders. App. 3730. In his proposed order, Mr. Franklin requested relief on all of his convictions. App. 3743. After receiving the state's proposed order, Mr. Franklin filed a motion requesting permission to file a reply to the state's proposed order. App. 3779-80. In response to that motion, the state wrote to the lower court, stating that "[f]or the reasons asserted in our Proposed Order submitted to you on April 29, 1998, I would oppose Applicant's Proposed Order Granting Post-Conviction Relief and waive our right to file further briefing in the matter." (emphasis added). Supp. App. 1.

Mr. Franklin submitted a reply, App. 3781-89, and the lower court entered an order granting post-conviction relief with respect to all of Mr. Franklin's convictions. In brief, the lower court

found that Mr. Franklin's trial attorneys did not advise him of his right to make a statement to the jury and that each testified that he did not know of the right himself. Mr. Franklin had no independent knowledge of his right; consequently, he did not make a knowing and intelligent waiver. The lower court also rejected the state's contention that the court could infer waiver from remarks made by the trial court during a colloquy occurring at the conclusion of the penalty phase of the trial. The lower court found that the trial court's remarks came too late. In addition, the lower court observed that the trial court never directly addressed Mr. Franklin concerning his guilt phase right. Moreover, the court placed great significance on the fact that not only is Mr. Franklin mentally retarded, but he has oral language skills comparable to a seven year old. As a result, Mr. Franklin would not have understood the significance of the trial judge's remarks and would not have known that he was expected to respond in some way to the trial judge's penalty phase reference to his guilt phase rights. App. 3794-97. Besides finding a lack of a valid waiver of Mr. Franklin's rights, the lower court also found that he received the ineffective assistance of counsel. App. 3797-3800. As a result, the lower court granted relief from all convictions.

The state then filed a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, asking the lower court to deny relief with respect to the non-murder convictions. App. 3801-04. Mr. Franklin filed a return to the state's motion and argued that the state had defaulted and waived that objection to the lower court's order. App. 3817-18. In the alternative, Mr. Franklin argued that the lower court had been correct in initially vacating all of the convictions. App. 3819-20. Without addressing Mr. Franklin's default and waiver arguments, the lower court granted the state's motion and reinstated the non-murder convictions.

Mr. Franklin then filed his motion to alter or amend the judgment to apprise the lower court

of the decision of another circuit court facing a similar issue,¹ and he renewed his argument that respondent waived or defaulted the issue. App. 3828-30. This motion was denied. App. 3845-46.

ARGUMENT

I. PETITIONER-RESPONDENT DEFAULTED AND WAIVED ANY ISSUE CONCERNING THE ORIGINAL GRANT OF POST-CONVICTION RELIEF AS TO ALL CONVICTIONS.

In the alternative, this Court need not even address the scope of relief when a defendant does not make a valid waiver of his right to address the jury because the state defaulted and waived its right to pursue this issue. In its Rule 59(e) motion, the state asserted that “[w]here a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal.” App. 3802-03. The state, however, did not satisfy the condition precedent for preserving the objection using Rule 59 because the lower court’s order did not grant “certain relief not previously contemplated.” Rather, this issue was plainly raised in Mr. Franklin’s proposed order, and the state, therefore, had adequate notice. App. 3743. Likewise, in his amended application for post-conviction relief, Mr. Franklin had specifically stated that he sought vacation of “his convictions and sentences.” App. 3468. Furthermore, nothing in Mr. Franklin’s summary judgment pleadings even remotely suggested that he was confining himself solely to reversal of the murder conviction. Finally, in several of the primary cases on which Mr. Franklin relied, this Court reversed all convictions after it found a lack of an on-the-record waiver. *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623 (1991); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13 (1987).²

It is well-settled under South Carolina law that a party cannot use Rule 59(e) to present to

¹*Cooper v. Moore*, No. 95-CP-32-2248 (Lex. Co. Court of Com. Pleas Dec. 3, 1998) (state’s petition for writ of certiorari is pending before this Court).

²*See also Holmes v. Moore*, No. 96-CP-46-966 at 7 (York Co. Ct. of Com. Pleas January 15, 1998) (granting relief from all convictions and sentence).

the trial court an issue that the party could have raised prior to judgment but did not. *C.A.H. v. L.H.*, 434 S.E.2d 268, 270 (S.C. 1993); *Crary v. Djebelli*, 467 S.E.2d 128, 131-32 (S.C. App. 1995), *rev'd on other grounds*, 496 S.E.2d 21 (S.C. 1998); *Hickman v. Hickman*, 392 S.E.2d 481, 482 (S.C. App. 1990) (also citing federal cases holding that under the federal rules of procedure, Rule 59(e) motions cannot be used to present issues that could have been raised previously). Here, the state unquestionably had the opportunity to raise this matter with the lower court but did not do so. The state, therefore, defaulted this issue by its failure to raise this matter until after the lower court entered judgment in Mr. Franklin's favor.

A party would be bound by the procedural default rules even if its noncompliance was entirely inadvertent. Here, however, the state did not simply default the issue; instead, it waived this objection to the lower court's order. *See Johnson v. Hoechst Celanese Corp.*, 453 S.E.2d 908, 912 (S.C. 1995); *Vaughn v. City of Anderson*, 386 S.E.2d 297 (S.C. App. 1989). As noted, the state explicitly waived the opportunity to file objections to Mr. Franklin's draft order in its letter of April 30, 1998 and instead noted that it would rely only on its proposed order addressing the adequacy of the testimony concerning Mr. Franklin's waiver and the additional comments concerning Rule 61, SCRPC.³ In short, the state had the opportunity to present a challenge to the proposal that the court vacate all convictions but chose at that time not to do so. Given the state's clear default and waiver of this issue, the lower court erred in even considering it. As a result, this Court should grant certiorari and vacate Mr. Franklin's non-murder convictions.

³In its proposed order, the state's position was that Mr. Franklin and his attorneys knew of the right to make a closing guilt phase statement and for strategic reasons chose not to do so. The lower court, however, found otherwise.

II. THE LOWER COURT ERRED IN FINDING THAT IT WAS LIMITED TO GRANTING RELIEF WITH RESPECT TO THE MURDER CONVICTION.

Even if the Court finds that the state did not default or waive its challenge to the initial decision to grant relief as to all convictions, it should consider whether the lower court erred in ultimately limiting relief to the murder conviction. In granting the state's Rule 59(e) motion, the lower court held that "the General Assembly did not intend for S.C. Code § 16-3-28 to be available to defendants as an additional layer of protection against a conviction for a non-capital offense." App. 3824. In addition, the PCR court relied on this Court's holdings in *State v. Charping*, 313 S.C. 147, 437 S.E.2d 88 (1993), and *State v. Cooper*, 312 S.C. 90, 439 S.E.2d 276 (1994). In those cases, this Court invalidated the defendants' murder convictions but did not disturb the non-capital convictions. App. 3825-26. The lower court, however, misconstrued the statute as well as decisions of this Court.

"[I]n any criminal trial where the maximum penalty is death . . . the defendant and his counsel shall have the right to make the last argument." S.C. Code § 16-3-28. There is nothing in this language that suggests that the right to argue pertains only to the murder charge; instead, the language applies to *any criminal trial* in which the death penalty is sought. In addition, there is no question that if a defendant exercises his right to address the jury, he is not limited to discussing only the murder charge.⁴ If, therefore, a defendant is denied his right to make a closing argument, he should be entitled to a new trial on all charges. In Mr. Franklin's case, the murder and non-capital charges were inextricably intertwined. Besides the murder charge, he was also charged with burglary, larceny, criminal sexual misconduct. Under the prosecution's theory of the case presented at trial, all offenses were part of the same series of conduct that was committed by Mr. Franklin

⁴Denying relief as to the non-murder charges would be as illogical under these circumstances as granting only partial relief to a convicted drug trafficking-murder defendant who was wrongfully allowed only five peremptory strikes instead of ten on the ground that the right to ten challenges attached only to the murder count.

acting alone.⁵ Given that the state had wrapped all charges together, it follows that if Mr. Franklin's murder conviction is vacated due to the violation of S.C. Code § 16-3-28, then the plain language of the provision requires that all other convictions must fall as well.

The state did not even attempt to address the fact that the prosecution considered all charges as having been part of the same sequence of events. Instead, citing *Charping*, *supra*, and *Cooper*, *supra*, it simply argued that this Court has held that only the murder conviction should be reversed in these instances. This, however, is not accurate. In both *Orr* and *Reed*, this Court reversed all convictions after it found that there was no on-the-record waiver concerning the defendant's guilt phase closing argument. Furthermore, in neither *Cooper* nor *Charping* did this Court ever suggest that it was overruling its prior holdings in *Orr* and *Reed*.

Furthermore, *Charping* and *Cooper* are distinguishable. In *Charping*, the Court found that the defendant's non-capital convictions "are unaffected by trial errors raised for the first time on appeal," *Charping*, 437 S.E.2d at 90, and thus fell into the category of claims "not appropriate for direct appeal [which] must now be raised in applications for Post Conviction Relief." *Cooper*, 439 S.E.2d at 277 n.1. The *Cooper* Court also found the other convictions "unaffected" by the closing argument error. *Cooper*, 439 S.E.2d at 277, n.2 (citing *Charping*). It is clear that this Court never meant that § 16-3-28 applied only to a murder conviction and that other convictions should always remain. Rather, this Court held in *Charping* that it would not review unpreserved errors not related to the capital charges. Thus, *Charping* involved nothing more than this Court's delineation between errors reviewed *in favorem vitae*, i.e., those affecting the capital conviction and death sentence, and errors affecting other aspects of the trial. Only the murder conviction could be challenged *in favorem*

⁵Although the state originally charged Martha Sierra for these offenses, it dropped all charges against her at the conclusion of Mr. Franklin's trial.

vitae. The other convictions, however, would have to be challenged in post-conviction proceedings.⁶

This Court's decision in *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553 (1994), is consistent with this point. There, the state sought the death penalty against Cartrette. Although convicted of murder, Cartrette was sentenced to life imprisonment when the jury was unable to reach a unanimous decision with respect to the appropriate sentence. Because he was not sentenced to death, he could not have this error reviewed *in favorem vitae*. As a result, in post-conviction proceedings, Cartrette asserted that he did not knowingly waive his right to make a final argument at the guilt phase. Even though he had not been sentenced to death, this Court did not draw any distinction between his murder and non-capital convictions. Instead, this Court held that post-conviction proceedings are the appropriate forum in which to address issues of waiver when *in favorem vitae* review is not in effect. *Cartrette*, 448 S.E.2d at 555 & n.3. As in *Cartrette*, this issue in Mr. Franklin's case was not reviewed *in favorem vitae*. Thus, rather than relying on the trial record, issues of waiver had to be explored in post-conviction proceedings. There is, however, no distinction that can properly be drawn between the murder and non-murder convictions.

In fact, the position espoused by Mr. Franklin in these proceedings was adopted by another circuit court in Tony Cooper's case. After this Court affirmed his non-capital convictions, Cooper sought post-conviction relief. The PCR court entered an order granting Cooper post-conviction relief on the non-capital charges due to the lack of a knowing and intelligent waiver of his right to argue at the guilt-or-innocence phase of his trial. As it did here, the state argued that the statutory provision did not apply to such charges because the right would not have attached had those charges been tried by themselves. The post-conviction court, however, found:

⁶Moreover, it appears that this Court requires a reviewing court to determine, based on the facts of the particular case, whether the non-capital convictions "are unaffected by trial errors." As indicated previously, because Mr. Franklin's defense to all charges was starkly at odds with the prosecution's theory in every respect, the convictions on the other charges are very much affected by the murder conviction.

The conclusion does not follow from the premise Regardless of whether this right applies to a non-capital proceeding, the capital nature of *this* trial meant that the applicant had a right to make a personal appeal to the jury with respect to all the counts against him, not merely the murder count. There is no basis for holding that the denial of this right was any less prejudicial with respect to one count than another.

App. 3835 (Order, *Cooper v. Moore*, No. 95-CP-32-2248, at p. 5 (Lex. Co. Court of Com. Pleas Dec. 3, 1998) (emphasis in original)).⁷ In addition, the post-conviction court held that while Cooper may not have been entitled to *in favorem vitae* review of the non-capital charges, he was nevertheless entitled to have the waiver issue addressed in post-conviction proceedings. App. 3838 (and citing *State v. Cooper*, 439 S.E.2d at 276 n.1 (“Errors not appropriate for direct appeal must now be raised in applications for Post Conviction Relief.”)).

The lower court found that Mr. Franklin was not aware of and thus did not waive his right to address the jury. It also found that his attorneys were ineffective for not advising him of that right. Mr. Franklin, therefore, was entitled to full guilt phase relief and not just relief on the murder charge. Because the lower court misconstrued the statute as well as this Court’s precedents in restricting the relief sought, this Court should grant certiorari.

⁷Judge Keesley also noted that all of the crimes for which Cooper was convicted arose from one factual scenario.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent-petitioner, Ellis Franklin, respectfully requests that the Court grant certiorari to review the lower court's decision to limit relief to the murder conviction.

Respectfully submitted,

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BY:


ATTORNEY FOR ELLIS FRANKLIN

Sept. 27, 1999.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

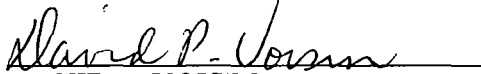
v.

WILLIAM D. CATOE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the petition for writ of certiorari on behalf of respondent-petitioner, a return to petition for writ of certiorari of petitioner-respondent and a motion for leave to file supplemental appendix, as well as a copy of the supplemental appendix in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 27th day of September, 1999.


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RECEIVED

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S.C. SUPREME COURT

Original

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Williamsburg County Court of Common Pleas
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117
Opinion No. 24190

ELLIS FRANKLIN Respondent / Petitioner.

v.

WILLIAM D. CATOE, Commissioner,
South Carolina Department of Corrections Petitioner / Respondent.

**RETURN
OF PETITIONER/RESPONDENT WILLIAM D. CATOE, COMMISSIONER
TO CROSS-PETITION FOR WRIT OF CERTIORARI OF ELLIS FRANKLIN**

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OCT 29 1999

S.C. SUPREME COURT

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FRANKLIN'S QUESTIONS PRESENTED

- I. Did the lower court err as a matter of law in failing to find that Petitioner-Respondent defaulted and waived his right to challenge the grant of relief as to Respondent-Petitioner's non-murder convictions?

- II. Whether the lower court erred in denying relief on Respondent-Petitioner's non-murder convictions even after finding that Respondent-Petitioner had not knowingly and intelligently waived his right to address the jury pursuant to S.C. Code § 16-3-28 and that counsel were ineffective for not advising him of that right?

RESPONDENT'S STATEMENT OF THE CASE

This matter comes before this Court in an appeal from the partial granting of state post-conviction relief to Ellis Franklin by the Honorable Thomas W. Cooper, Jr., Presiding Judge. These proceedings began with an application for post-conviction relief filed by Ellis Franklin, SK#4855, through his court-appointed counsel, Kenneth Suggs, David P. Voisin, and John H. Blume, filed March 14, 1996. App. p. 3418. The Respondents made a Return April 15, 1996. App. p. 3426. On January 12, 1998, Franklin made a motion for summary judgment with respect to grounds 9(a) and 9(b)(1) in the amended Application or in the alternative to limit the January 27, 1998 hearing to these two (2) allegations. App. p. 3470. On the same date, he filed an Amended Application. App. p. 3461. On January 14, 1998, Franklin filed a Memorandum in Support of his motion. App. p. 3472. On January 21, 1998, the Respondents made a Memorandum of Law in Opposition to the Motion for Summary Judgment. App. p. 3503.

On January 22, 1998, a hearing on the Motion for Summary Judgment was held in Manning, South Carolina at the Clarendon County Courthouse. App. p. 3527-58. Franklin was present and represented by Mr. Suggs and Mr. Voisin. The Respondents were represented by Donald J. Zelenka. After hearing arguments, this Court denied Franklin's Motion for Summary Judgment. The Court, however, agreed that the pending evidentiary hearing be limited to the issues set forth in the Amended Application, grounds 9(a) and 9(b)(1).

In his initial state Application for Post-Conviction Relief on March 14, 1996, Franklin made the following allegations:

9(a) Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law was violated by counsel's

failure to object to the virtually unlimited scope of the trial court's order regarding a competency evaluation and by counsel's failure to object to the lack of a competency hearing conducted in conformity with due process and with the provisions of S.C. Code Section 44-23-410.

10(a) Prior to trial, the court granted the state's motion to have applicant evaluated to determine his competency to be tried, his criminal capacity and responsibility pursuant to the McNaghten test, and whether he lacked sufficient capacity to conform his conduct to the requirements of law. The trial judge also ordered the state hospital to administer an MMPI and to evaluate applicant's adaptability and evaluate his future dangerousness. R. 3242-43. The state hospital simply issued a report, which was made a part of the record. R. 153. Defense counsel, however, only objected on the ground that the report contained only hearsay information. R. 155. There was never a hearing on competency, and the evaluation did not comport with S.C. Code Section 44-23-410.

9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by counsel's failure to adequately prepare for penalty phase and by counsel's failure to investigate and present compelling evidence in mitigation of punishment.

10(b) At the penalty phase, counsel admitted that they had not even read records from the Hall Institute, upon which the state so heavily relied during the penalty phase. R. 2920. Counsel also failed to provide the social worker with records she had requested. R. 3028. As a result, the state was able to cross-examine the defense witnesses based on their unfamiliarity with basic materials. Counsel also failed to conduct an adequate and reliable investigation into applicant's background and mental state.

9(c) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by counsel's failure to object to sentencing instructions that would likely have been interpreted to require unanimity among jurors with respect to mitigating circumstances. See McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

10(c) The ground for relief states the relevant facts.

9(d) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by counsel's failure to object to the solicitor's closing argument regarding deterrence as well as other prejudicial and inflammatory aspects of the solicitor's closing which violated applicant's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments.

10(d) In his closing, the solicitor argued that the jury should return with a death sentence because the death penalty is a deterrent to crime. R. 3167-3170. No evidence was presented during trial about deterrence. Even more significantly, the solicitor's argument was wrong. The proposition that the imposition of the death penalty is not a general deterrent is supported by overwhelming statistical evidence. See generally Fox and Radelet, Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty, 23 Loy. L.A.L. Rev. 29 (1989); Alfred, Blumstein, Cohen, and Nagin, eds., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, National Academy of Sciences, Washington, D.C. (1978); William J. Bowers and Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions? Crime and Delinquency, 453 (October 1980); Bailey, Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago, 74 J. Crim. L. & Criminology 827 (1983). Solicitor's argument was actually false.

The solicitor also compared the jury's responsibility to that of soldiers during wartime, Abraham Lincoln, Dwight Eisenhower, and Winston Churchill. The solicitor urged the jurors to do their duty just as the leaders had to do their duty. These types of arguments have been roundly and universally condemned. See, e.g., Vierceck v. United States, 318 U.S. 236 (1943); Young v. United States, 470 U.S. 1, 18 (1985); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991); William Boyd Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985) (en banc).

9(e) Applicant was denied his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it is reasonably likely that the jurors would have understood the trial court's instructions to require that they unanimously agree as to the existence of any mitigating circumstances. See McKoy v. North Carolina, 494 U.S. 433 (1990); Mills v. Maryland, 486 U.S. 367 (1988).

10(e) The ground for relief states the relevant facts.

In the amended Application, Franklin raises the following allegations:

9(a) Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code § 16-3-28 and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

10(a) The trial judge did not ask applicant whether he wished to address the jury at the conclusion of the guilt/innocence phase of his trial. Furthermore, neither of applicant's lawyers apprised him of his right to make a closing statement to the jury at the guilt phase. Because applicant did not know that he had that right, he could not have made a knowing and intelligent waiver of the right. See State v. Cooper, 439 S.E.2d 276 (S.C. 1994); State v. Charping, 437 S.E.2d 88 (S.C. 1993); State v. Orr, 403 S.E.2d 623 (S.C. 1991); Cain v. Evatt, No. 90-CP-13-382 at 3 (S.C. 4th Cir. Common Pleas, May 4, 1995)(Final Order), cert. dismissed as improvidently granted, Cain v. State, 477 S.E.2d 98 (S.C. 1996).

9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment to the United States Constitution and South Carolina law by the following acts and omissions of trial counsel:

10(b)(i) Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. See S.C. Code § 16-3-28.

10(b)(ii) By failing to conduct a minimally adequate investigation of applicant's mental state and social history, counsel could not adequately advise applicant concerning trial strategy or about the exercise of his constitutional rights, such as taking the stand in his own defense.

10(b)(iii) Because they failed to conduct even a minimally adequate investigation into applicant's mental state and social history, counsel were ineffective in failing to request that applicant undergo another competency evaluation prior tot rial.

10(b)(iv) Because counsel's investigation into applicant's mental state and social history was not even minimally adequate, counsel failed to present conclusive evidence of mental retardation, organic brain damage, and mental illness as well as compelling factors from applicant's background and family history. This evidence would have supported several statutory mitigating circumstances and would have also provided the jury with additional nonstatutory mitigating circumstances to consider.

10(b)(v) Counsel failed to explain to the jury the reasons for applicant's inappropriate affect (primarily his giggling) during the trial.

10(b)(vi) Counsel failed to provide their trial experts with essential records, corroborative evidence of their findings, time in which to conduct an adequate investigation or evaluation, the opportunity to consult with each other, and the opportunity to prepare their testimony. This not only prevented the defense experts from reaching reliable and accurate conclusions about applicant, it also opened the door to prejudicial cross-examination and rebuttal testimony. At the penalty phase, counsel admitted that they had not even read records from the Hall Institute, upon which the State so heavily relied during the penalty phase. ROA 2920. Counsel also failed to provide the social worker with records she had requested. ROA 3028. As a result, the state was able to cross-examine the defense witnesses based on their unfamiliarity with basic materials.

10(b)(vii) Counsel failed to challenge the credentials of the state's rebuttal witness, who had his license to practice medicine suspended and was under probation at the time of applicant's trial.

10(b)(viii) Counsel failed to conduct a minimally adequate cross-examination of the state's rebuttal witness due to their unfamiliarity with records in their possession, their failure to acquire additional, readily available documents, and their overall unfamiliarity with the mental health issues in the case.

10(b)(ix) Counsel failed to cross-examine the state's rebuttal witness about his failure to abide by the Ethical Guidelines for the Practice of Forensic Psychiatry by testifying about applicant's mental state without making any effort to see applicant before testifying.

10(b)(x) Counsel failed to object to testimony elicited from the prosecution's rebuttal witness that applicant allegedly displayed no remorse at the state hospital. As a result, counsel failed to protect applicant's right to remain silent while at the state hospital, his right to plead not guilty, and his right to remain silent during the penalty phase. See Estelle v. Smith, 451 U.S. 454 (1981); State v. Hawkins, 357 S.E.2d 10 (S.C. 1987); State v. (Jesse Keith) Brown, 347 S.E.2d 882 (S.C. 1986).

10(b)(xi) Counsel pursued inconsistent and incoherent theories of the case at the guilt/innocence and penalty phases of the trial thereby destroying any credibility that the defense would otherwise have had with the jury.

10(b)(xii) Counsel failed to object to the solicitor's closing argument regarding deterrence as well as to other prejudicial and inflammatory aspects of the solicitor's summation. In his closing, the solicitor argued that the jury should return with a death sentence because the death penalty is a deterrent to crime. ROA 3167-3170. No evidence was presented during trial about deterrence. Even more significantly, the solicitor's argument was wrong. The proposition that the imposition of the death penalty is not a general deterrent is supported by overwhelming statistical evidence. See generally Fox & Radelet, Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty, 23 Loy. L.A.L. Rev. 29 (1989); Alfred, Blumstein, Cohen & Nagin, eds., Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates, National Academy of Sciences, Washington, D.C. (1978); William J. Bowers and Glenn L. Pierce, Deterrence or Brutalization: What is the Effect of Executions? Crime and Delinquency, 453 (October 1980); Bailey, Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago, 74 J. Crim. L. & Criminology 827 (1983). Solicitor's argument was actually false. The solicitor also compared the jury's responsibility to that of soldiers during wartime, Abraham Lincoln, Dwight Eisenhower, and Winston Churchill. The solicitor urged the jurors to do their duty just as the leaders had to do their duty. These types of arguments have been roundly and universally condemned. See, e.g., Vierceck v. United States, 318 U.S. 236 (1943); Young v. United States, 470 U.S. 1, 18 (1985); United States v. Solivan, 937 F.2d 1146 (6th Cir. 1991); William Boyd Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985)(en banc); State v. Cockerham, 365 S.E.2d 22 (S.C. 1988).

10(b)(xiii) The cumulative effect of the numerous deficiencies in counsel's performance deprived applicant of his right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984); see also Kyles v. Whitley, 514 U.S. 419 (1995).

9(c) The state created a false impression of the evidence during its rebuttal testimony at the penalty phase in violation of applicant's rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and applicable South Carolina law. See Miller v. Pate, 386 U.S. 1, 6-7 (1968); Napue v. Illinois, 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103 (1935).

10(c) During its case in rebuttal, the prosecution elicited testimony that there was no evidence of applicant's mental illness when the prosecution had in its possession records indicating that applicant had been prescribed antipsychotic medication at the time of the trial.

9(d) Applicant underwent trial in violation of his right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and applicable South Carolina law when he was not competent to stand trial or make decisions concerning the exercise of his constitutional rights, such as the right to testify. See Godinez v. Moran, 113 S.Ct. 2680 (1993); Dusky v. United States, 362 U.S. 402 (1960); Estock v. Lane, 842 F.2d 184 (7th Cir. 1988)(per curiam); State v. Law, 270 S.C. 664, 244 S.E.2d 302 (1978).

10(d) Because of his psychosis, organic brain impairments, and mental retardation, applicant was unable to adequately understand the proceedings against him, assist trial counsel in his defense, or make knowing and intelligent critical decisions during the trial.

The hearing court limited the evidentiary hearing, to the following allegations at the request and consent of both counsel:

9(a) Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code § 16-3-28 and the Due Process Clause of the Fourteenth amendment to the United States Constitution.

10(a) The trial judge did not ask applicant whether he wished to address the jury at the conclusion of the guilt/innocence phase of his trial. Furthermore, neither of applicant's lawyers apprised him of his right to make a closing statement to the jury at the guilt phase. Because applicant did not know that he had that right, he could not have made a knowing and intelligent waiver of the right. See State v. Cooper, 439 S.E.2d 276 (S.C. 1994); State v. Charping, 437 S.E.2d 88 (S.C. 1993); State v. Orr, 403 S.E.2d 623 (S.C. 1991); Cain v. Evatt, No. 90-CP-13-382 at 3 (S.C. 4th Cir. Common Pleas, May 4, 1995)(Final Order), cert. dismissed as improvidently granted, Cain v. State, 477 S.E.2d 98 (S.C. 1996).

9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by the following acts and omissions of trial counsel:

10(b)(i) Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. See S.C. Code § 16-3-28.

On January 27, 1998, an evidentiary hearing was convened in the matter at the Sumter County Courthouse. App. p. 3559-3736. Franklin was present and represented by Mr. Suggs and Mr. Voisin. The Respondents were represented by Donald J. Zelenka and Lauri Soles of the Attorney General's Office. Testimony was received from his original trial counsel, Charles D. Barr, LeGrand Carraway, Dr. Daniel Hicky Grant, Pete Partee, Wade Kolb, and Franklin. Exhibits were also introduced, including an affidavit from Judge Shuler. At the conclusion of the hearing, the Court took the matter under advisement and requested the parties to submit proposed orders. The parties each submitted proposed orders on April 29, 1998. App. p. 3735, 3744.

On October 2, 1999, Judge Cooper entered a written order granting state post-conviction relief requiring a new trial on the charges. App. 3791-3801. Respondent Moore on October 15, 1998 made a motion to alter or amend the judgment asserting that the charges other than murder

should not be affected by the alleged error and should be reinstated. App. 3801. Franklin opposed the motion by written response on October 26, 1998. App. p. 3816. On February 12, 1999, Judge Cooper entered an order granting the Respondent's request to limit relief to the murder conviction. App. p. 3823. Franklin then filed a motion to alter and amend the February 12, 1999 Order on February 25, 1999. App. 3238. On April 8, 1999, Judge Cooper entered an order denying Franklin's request to alter or amend judgment. App. 3844. Respondent Moore filed a notice of appeal on May 7, 1999 and Franklin filed his notice of cross-appeal on May 13, 1999.

A. The Trial

The Applicant, Ellis Franklin, was indicted at the February 3, 1992, Court of General Sessions for Williamsburg County for the crime of murder, burglary in the first degree, grand larceny, grand larceny of a vehicle, resisting arrest, and criminal sexual conduct in the first degree involving an August 30, 1991 incident resulting in the death of Jennifer Sue Martin. The Honorable Wade S. Kolb, Jr., Solicitor of the Third Judicial Circuit, served his notice of intent to seek the death penalty on Franklin on February 10, 1992. Franklin was represented by Charles David Barr of the Williamsburg County Bar, and W. LeGrand Carraway, Public Defender of Williamsburg County. Franklin's co-defendant, Martha Sierra, was represented by Jerome P. Askins, III, and William D. Pridgen.

The matter was called to trial on January 11, 1993 before the Honorable M. Duane Shuler, Presiding Judge, in Williamsburg County. The prosecution was represented by Solicitor Kolb and Assistant Solicitor Clifton Newman. At the outset, co-defendant Sierra's case was severed from the trial upon motion of Ms. Sierra. App. p. 39-40. During pretrial motions the resisting arrest count of the indictment was severed. App. p. 47-53. The court also received the report of the finding of

mental capacity and concluded that absent any evidence to the contrary, he was competent to stand trial. App. p. 152-157. Jury selection began on January 11, 1993.

After closing arguments and instructions, jury unanimously found Franklin guilty of murder, burglary in the first degree, grand larceny, and criminal sexual conduct in the first degree on January 20, 1993 at 6:10 p.m. App. p. 2789-2791.

The penalty phase began at 6:30 p.m. on January 21, 1993. App. p. 2804. The prosecution offered in evidence the guilt phase evidence. App. p. 2811-2812. The prosecution also presented evidence and testimony in the penalty phase. App. p. 2813-2947. The defense presented evidence in mitigation. App. p. 2948-3122. The prosecution called Dr. Jack Dunlap in reply. App. p. 3132-3161. After closing arguments, the trial judge instructed the jury on the following statutory aggravating circumstances:

1. Murder while in commission of criminal sexual conduct.
2. Murder while in commission of burglary.
3. Murder while in commission of larceny with use of a deadly weapon.
4. Murder while in commission of physical torture.

App. p. 3201-3202. The trial court also instructed the jury on the following statutory mitigating circumstances:

1. The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
2. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

3. The age or mentality of the defendant at the time of the crime.
4. The defendant had mental retardation at the time of the crime. "Mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.
5. Any other non-statutory mitigating circumstance.

App. p. 3212-3213.

The jury deliberated from 7:45 p.m. to 10:25 p.m., on January 23, 1993. App. p. 3222. The jury found all of the four statutory aggravating circumstances and recommended a death sentence. App. p. 3223. Judge Shuler sentenced Applicant to death for murder, to ten (10) years for grand larceny, to thirty (30) years for criminal sexual conduct and to life imprisonment for burglary. App. p. 3235, ll. 3-20.

B. The Direct Appeal

Franklin filed a timely notice of appeal. On appeal, he was represented by Daniel T. Stacey and Robert M. Pachak of the South Carolina Office of Appellate Defense.

On September 21, 1994, oral argument was held on the matter. The Supreme Court initially affirmed the appeal on January 30, 1995, and amended its Order upon Petition for Rehearing on March 13, 1995. State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995). A Petition for Writ of Certiorari was made to the United States Supreme Court. It was denied on October 2, 1995. Franklin v. South Carolina, ___ U.S. ___, 116 S.Ct. 160 (1995).

Petitioner-Respondent Catoe would incorporate herein by reference its Petition to this Court dated July 2, 1999.

ARGUMENT

- I. The State PCR Court properly found that the failure to make a knowing waiver of his right to make a guilt phase closing statement provide solely for the murder conviction.
(Franklin's Question II, Argument II, p. 6-9)**

Upon the Respondent's Motion to Alter or Amend the Judgment, Judge Cooper concluded that post-conviction relief for error under § 16-3-28 is limited to the capital offense of murder and not the non-capital offenses. App. p. 3823-3827. Respondents submit that this conclusion is an appropriate reading of the legislative intent of § 16-3-28 and this Court's prior precedent in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994), State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993).

The State PCR Court determined that PCR relief should be granted because it concluded that there was no allegedly waiver of the defendant's rights pursuant to § 16-3-28 which provides:

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

Respondents respectfully submit, however, that assuming arguendo that relief should be granted due to this special provision in death penalty cases, the state PCR Court properly found that it has no applicability to the convictions for grand larceny, burglary or criminal sexual conduct. In State v. Cooper, 312 S.C. 90, 91, 439 S.E.2d 276, 277 (1994). The Supreme Court of South Carolina granted a new trial based upon the failure to have an on-the-record waiver of § 16-3-28 that "mandates reversal of the defendant's murder conviction", but concluded that "Cooper's conviction for conspiracy and armed robbery are unaffected," citing State v. Charping, 313 S.C. 147, 437

S.E.2d 88 (1993). Similarly, in Charging, this Court concluded similarly that the alleged error, in *favorem vitae*, mandated reversal of the murder conviction, but “Charging’s convictions for kidnapping, first degree criminal sexual conduct, and conspiracy are unaffected by trial errors raised for the first time on appeal and therefore, are affirmed.” The only other case by this Court that may have addressed this issue was Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553, 555 (1994) where state post-conviction relief had been granted to a defendant on his murder conviction, as well as his remaining conviction. The question, however, raised on appeal did not encompass the assertion herein (or the lower court) and merely alleged “Did Cartrette waive his statutory right to make a final argument to the jury during the guilt phase of the trial?” Nothing related to this issue is probative from that action because the issue was neither perfected nor presented to the Supreme Court.

Further, Respondents submit that the hearing judge properly concluded that the General Assembly did not intend for the statutory right of closing argument to provide for a protection for the non-capital offenses. App. p. 3824. It is reasonable that the remedy should exist for the crime that he right was intended to protect and not other collateral crimes.

His reliance on Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994) is misplaced. Cartrette is distinguishable because it was a challenge to a murder conviction is a case tried as a capital case and not a challenge to the incidental crimes.¹

¹ We would also note that it remains an open question whether Cartrette could have been subjected to the death penalty on a retrial since his original jury mistried the sentencing phase. Poland v. Arizona, 476 U.S. 147, 106 S.C. 1749 (1986); Commonwealth v. Elred, 973 S.W.2d 43 (Ky. 1998) (fact the jury imposed sentence less than death at first trial did not bar retrial for death sentence where aggravating factors found).

In conclusion, assuming that relief should be given, it was properly limited to the murder charge for the particular statutory error claimed. The state PCR court properly prevented a windfall of relief for the Applicant. This Court should do the same.

**II. The State PCR Judge did not abuse his discretion in granting the Rule 59(e) Motion to Alter and Amend the relief by limiting it to murder conviction when initially raised in the Respondents' Motion.
(Franklin's Question I, Argument I, p. 4-5).**

In his initial question before this Court, Franklin claims that the Petitioner-Respondent "defaulted and waived any issue concerning the original grant of post-conviction relief as to all convictions." Cross-Petition, p. 4-5. In his pleadings before this Court, Franklin contends that the mere fact that relief as to all convictions rather than just his murder conviction was suggested in Franklin's proposed order to Judge Cooper prevented the use of Rule 59(e) because there was no expressed objection to this proposed broad relief on a limited issue.

We submit the Rule 59(e) SCRPC provided a remedy and our action in filing the motion after the proposed order was signed was timely. First, Franklin contends that prior to his proposed order submission, he contends that the Motion was not timely because we failed to show "certain relief not previously contemplated or presented to the trial court..." His initial contention is that the Respondents did not satisfy the condition precedent for a Rule 59(e) motion because the proposed order submitted by Franklin included the request for relief for all convictions, not just the murder conviction.

In the recent case of In re Estate of Cumbee, 333 S.C. 664, 511 S.E.2d 390 (S.C. App. 1999), the Court of Appeals held that where a Rule 59(e) motion was not made on the basis of certain relief

not previously contemplated, the aggrieved party must move to alter or amend judgment to preserve the issue for appeal. Franklin turns this preservation issue on its head by contending that it is a condition precedent for a Rule 59 motion, when in fact the Rule 59 motion is a condition precedent to preserving the issue for an appeal under those circumstances by ensuring the trial court had the first opportunity to correct its error. Therefore, Franklin was seeking to apply an erroneous standard of preservation for appellate purposes. Accord, In Re Estate of Timmerman, 331 S.C. 455, 502 S.E.2d 920 (S.C. App. 1998).

Further, his logic fails on the manner the relief was requested. It is undisputed that Franklin made a broad request for relief in his amended application which included claims concerning guilt phase issues, other than his “waiver” issue. Prior to the submission of the proposed order, Respondents had consistently asserted that no relief was appropriate. App. p. 3426-3460 (Return), 3503-3527 (Memorandum in Opposition to Motion for Summary Judgment), p. 3721-3729 (Argument at PCR Hearing). Further, like the Applicant, the Respondents also submitted a proposed order which recommended that relief be denied in its entirety in the allegations. App. p. 3744-3778. It was not until Judge Cooper entered his Order on October 2, 1998 that vacated not the murder conviction, but also the grand larceny, criminal sexual conduct, and first degree burglary conviction on the basis of the allegedly invalid waiver that the propriety of the relief became ripe.

It has been stated that the purpose of a Rule 59(e) motion was to enable the trial court to “rectify its own mistakes in the period immediately following the entry of judgment.” Moore’s Federal Practice 3d, § 59.30. Rule 59 itself is silent as to the grounds for the motion and it has been recognized that courts have “considerable discretion in determining whether to grant or deny the

motion.” Id. However, it is held that the motion may not be used to relitigate old issues, which this motion was clearly not.

The granting of a Rule 59(e) motion has been held to be reversible only if the appellate court finds that it abused its broad discretion. Here, the PCR court presented with a timely motion under Rule 59 used its discretion to revise the entry of relief consistent with its understanding of the law. Since the precise argument of limited relief could only be presented when the decision was made, the PCR court did not abuse its discretion in this correction of clear legal error. Accord, Atlantic States Legal Foundation v. Karg Brothers, 841 F.Supp. 51, 55-56 (N.D.N.Y. 1993), EEOC v. Lockheed-Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997). Contrary to the assertion of Franklin, the Respondents did not “waive” its objection to the order, it challenged it entirely by the submission of its own order which contemplated no relief. The issue was properly asserted in the hearing court. See Revis v. Barratt, 467 S.E.2d 460 (S.C. App. 1996)(failure to file a Rule 59 motion or seek clarification precludes argument on appeal).

CONCLUSION

For all the foregoing reasons, this Court must deny the Cross-Petition for Writ of Certiorari. The murder conviction and sentence of death must be reinstated.

Respectfully submitted,

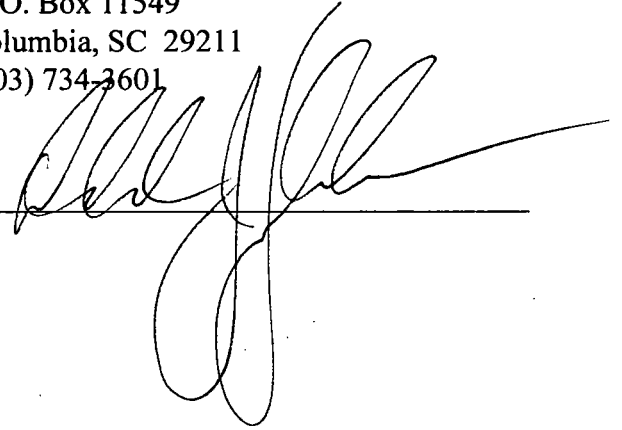
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By: _____

A handwritten signature in black ink, appearing to read 'D. Zelenka', is written over a horizontal line. The signature is stylized with large, sweeping loops and a long horizontal stroke extending to the right.

October 27, 1999

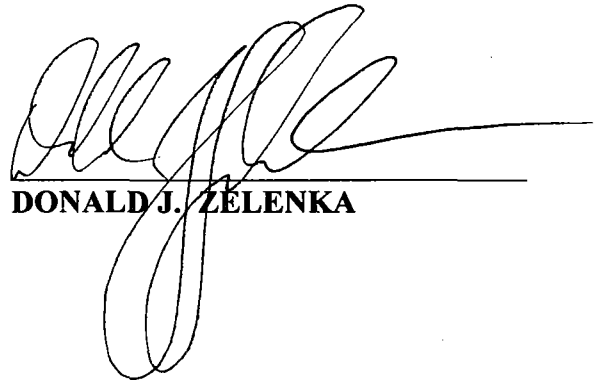
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the *Return of Petitioner/Respondent William D. Catoe, Commissioner to Cross-Petition for Writ of Certiorari of Ellis Franklin* on opposing counsel by depositing two (2) copies of same in the United States mail, postage prepaid, to the following:

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The Center for Capital Litigation
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Columbia, South Carolina 29211

This 27th day of October, 1999.



DONALD J. ZELENKA

ORIGINAL

RECEIVED

SEP 28 1999

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA.
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

**RETURN TO PETITION FOR WRIT OF
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QUESTIONS FOR REVIEW

- I. IS THERE ANY PROBATIVE EVIDENCE SUPPORTING THE LOWER COURT'S FINDING THAT RESPONDENT-PETITIONER DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO ADDRESS THE JURY AT THE CONCLUSION OF THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL?

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STATEMENT OF THE CASE

Respondent-petitioner, Ellis Franklin, incorporates by reference the statement of the case set forth by petitioner-respondent set forth on pages 5-13 of petitioner-respondent's petition for writ of certiorari. This case turns on two issues: whether Mr. Franklin knowingly and intelligently waived his right to address the jury, S.C. Code § 16-3-28, and whether counsel were ineffective for failing to apprise Mr. Franklin of his rights under § 16-3-28. The lower court reversed Mr. Franklin's murder conviction on each allegation.¹

STATEMENT OF FACTS

A. Relevant Facts from the Trial.

The state sought the death penalty against Ellis Franklin for the murder of Jennifer Martin. He also faced charges of burglary, grand larceny, and criminal sexual conduct. Mr. Franklin was represented by Charles David Barr and W. Legrand Carraway. At trial, the state presented physical evidence, including a palm print and DNA, linking Mr. Franklin to the crime scene. Mr. Franklin, however, took the stand in his own defense to explain that he had a relationship with the victim and that she had brought him to her mother's house that night. App. 2615-2681. Mr. Franklin also testified that he and Ms. Martin had sex and that she then dropped him off near his house. App. 2621. Mr. Franklin also denied that he killed Ms. Martin. App. 2628.

Mr. Franklin did not address the jury at the conclusion of the guilt-or-innocence phase of the trial. The trial judge did not inform him of that right,² nor did he otherwise waive that right on the

¹The lower court originally granted post-conviction relief with respect to all of Mr. Franklin's convictions. The court, however, granted in part petitioner-respondent's motion to alter or amend the judgment and reinstated Mr. Franklin's non-murder convictions. App. 3827. Mr. Franklin is challenging that ruling in his cross-petition for writ of certiorari.

²Judge Shuler, just prior to the penalty phase arguments, mentioned in passing that Mr. Franklin had the right to make a similar argument at the guilt-or-innocence phase of the trial. App.

record. *State v. Franklin*, 318 S.C. 47, 456 S.E.2d 357, 361 (1995). Furthermore, there is nothing else in the trial record suggesting that Mr. Franklin was aware of that right and that he knowingly and intelligently waived his right to speak to the jury before they returned a verdict.³ In fact, he was not even aware that he had the right to appear again before the jury to talk to them about the evidence presented in the case.

During the penalty phase, the trial judge discussed with Mr. Franklin and Mr. Barr the defendant's right to testify and to address the jury. In the course of that lengthy colloquy, the trial judge referred in passing to the guilt phase right to address the jury. App. 2938, 2940.

B. Relevant Testimony from the PCR hearing.

Mr. Franklin's trial lawyers, Charles David Barr and W. Legrand Carraway, did not apprise him of his right to address the jury prior to or during the guilt phase.⁴ Mr. Barr testified that he did not inform Mr. Franklin that he had the right to address the jury at the conclusion of the guilt-innocence phase; furthermore, Mr. Barr did not know that Mr. Franklin had such a right. App. 3564-65, 3585-86.⁵ Likewise, Mr. Carraway testified that he had not advised Mr. Franklin of a defendant's right to make a closing argument, that he did not realize that Mr. Franklin had such a right, and that he never heard Mr. Barr inform Mr. Franklin of that right. App. 3587-88.⁶

2938-2939. As discussed below and in the lower court's order, that oblique reference came too late and was inadequate.

³Petitioner-respondent conceded that there was no on-the-record waiver of the right to make a closing statement at the guilt-innocence phase of the trial. App. 3545; *see also* Petition for Writ of Certiorari of Petitioner-Respondent at 20 ("At the conclusion of the guilt phase, no inquiry was made of either Franklin or his counsel of Franklin's statutory right to personally address the jury in the guilt phase arguments.").

⁴It is noteworthy that this was the first capital case tried by either Mr. Barr or Mr. Carraway. App. 3566, 3587.

⁵*See also* App. 3487 (affidavit of Charles David Barr).

⁶*See also* App. 3489 (affidavit of Legrand Carraway).

Petitioner-respondent suggests that this Court may infer from a colloquy occurring during the penalty phase that Mr. Franklin and his lawyers were aware of the right to address the jury at the conclusion of the guilt phase. At the conclusion of the penalty phase, the trial court discussed with Mr. Franklin and his attorneys the right to testify and address the jury. During that discussion, the trial court at one point referred to the guilt phase by using the phrase, “as he did at the last phase,” and once using the phrase, “just like you did before.” App. 2938, 2940. In an affidavit submitted to the PCR court, the trial judge conceded that he had not ascertained whether Mr. Franklin desired to waive his right to a guilt phase closing argument during the guilt phase itself and that he sought to rectify his mistake during the penalty phase. App. 3865-66. Not detecting any “verbal or non-verbal” indications that Mr. Franklin was unaware of his guilt phase rights, the trial judge proceeded with the penalty phase. App. 3866.

Mr. Barr testified that did not specifically recall the trial court making those remarks. When he reviewed the transcript of the trial, Mr. Barr initially thought that the trial court’s remarks were directed toward Mr. Franklin’s right to testify. Mr. Barr, however, reaffirmed that at the time he was not aware that Mr. Franklin had the right to address the jury. App. 3574-77. Mr. Carraway had some recollection of the trial judge making those remarks. Mr. Carraway, however, speculated that he may have thought that the trial judge was referring to Mr. Franklin’s right to testify. App. 3593-94.

Mr. Franklin also did not attribute any significance to the trial court’s remarks, primarily because he would not have understood them. At the evidentiary hearing, it was established that Mr. Franklin is mentally retarded. In fact, he has scored in the mentally retarded range on every IQ test that he has ever taken. App. 3612-16, 3857, 3858.⁷ More significantly, Mr. Franklin’s verbal and

⁷Only a week before the evidentiary hearing, Mr. Franklin was evaluated at the Hall Institute to determine his competency to proceed with the evidentiary hearing. His composite score on the IQ test was only 68, which falls in the mildly mentally retarded range. App. 3613; 3658. The report of Mr. Franklin’s 1998 evaluation is included in the supplemental appendix.

memory skills are even more impaired than one would expect even accounting for his mental retardation. According to Daniel Grant, a psychologist specializing in mental retardation, Mr. Franklin functions in terms of his language and communication skills as low as that of a six or seven year old. App. 3619-24.⁸ Dr. Grant also pointed out that records from the Hall Institute corroborated his findings. The evaluators from Hall noted that Mr. Franklin became easily confused unless questions were framed in simple language and that he was reluctant to disclose when he did not understand. In addition, Mr. Franklin did not understand hypothetical questions, and in the evaluation administered at the Hall Institute just prior to the PCR hearing, the evaluators noted that Mr. Franklin “showed difficulty understanding words and would answer questions inappropriately when he misunderstood them.” App. 3627-28.

Dr. Grant added that given Mr. Franklin’s pronounced language and communications impairments, it is unlikely that he would have understood the trial judge’s passing references to a guilt phase right made during a lengthy colloquy occurring during the penalty phase. Mr. Franklin’s misunderstanding of the trial judge’s remarks is all the more likely because the judge was speaking at a sixth or seventh grade level, which would have made them difficult for Mr. Franklin to understand. In addition, some of the judge’s language was confusing.⁹ App. 3635. In addition, due to Mr. Franklin’s memory deficits, he would have had a more difficult time acquiring and encoding new information and applying it to an event that had happened in the past. App. 3536. Moreover, Mr. Franklin would not likely have been aware that the judge expected some type of response. App. 3638.

According to Dr. Grant, Mr. Franklin would not have been able to make a knowing and

⁸When Mr. Franklin was evaluated at the Hall Institute in 1991, he was unable to take the MCMI vocabulary test because that test is geared to the sixth or seventh grade level. App. 3659.

⁹As noted previously, neither Mr. Barr nor Mr. Carraway understood the judge to be referring to the guilt phase during his penalty phase remarks.

intelligent decision about whether to exercise his rights unless his attorneys spent a great deal of time with him explaining his rights in detail. If Mr. Franklin had been inclined to address the jury, it would have taken several hours to prepare him. App. 3638. In short, if Mr. Franklin heard about his right only in passing, “he could not have made a rational intelligent decision whether or not to exercise that right.” App. 3639.

Respondent-petitioner also called H. F. Pete Partee, former public defender for Greenville County, as an expert on the representation of defendants in capital trials. Mr. Partee testified that defense counsel have an obligation to learn all relevant death penalty statutes, including that concerning the right to make a closing statement. In fact, Mr. Partee explained that the right to make an unsworn statement is an invaluable tool for the defense; it enables the jury to see the defendant as a person without subjecting him to cross-examination, especially if defense counsel do not believe that their client will make a good witness. App. 3672, 3673-74. In Mr. Partee’s opinion, Mr. Franklin’s counsel performed deficiently by not being familiar with the death penalty statutes. App. 3671-72. Mr. Partee added on cross-examination that a decision as to whether the defendant should make a closing statement should be made prior to trial and not at the conclusion of the guilt phase testimony. App. 3682.

C. The Lower Court’s Order.

Following well-settled precedent, the lower ruled that “the sole inquiry of the post conviction judge, in cases where the waiver of last argument is an issue, is to determine whether or not the defendant was apprised of his rights, and if he was, to determine whether or not he knowingly and intelligently waived those rights.” App. 3793.¹⁰

¹⁰See *Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553, 555 (1994); *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993) (the question to be answered by a reviewing court is whether the defendant was “in fact, adequately informed of his rights, and did, for strategic purposes, desire to waive those rights”).

The lower court first found that there had been no on-the-record waiver during the guilt phase of the trial. App. 3794-95. The court then noted that trial counsel testified that they were not aware of the right and did not inform their client of his right. App. 3795. Regarding the trial judge's belated attempt to ascertain whether Mr. Franklin waived his rights, the lower court found that it "was not persuaded that this is sufficient evidence that Mr. Franklin knew of his right." App. 3795.

The Court explained its finding:

First, Mr. Franklin was never asked directly whether he had known and understood the right then being referred to. Second, to impute knowledge to Mr. Franklin based on this exchange requires an inference that Franklin, a mentally retarded individual with oral language skills comparable to a seven year old, could extract an isolated piece of information from all the other information being imparted, distinguish the concept of a past right from the present rights being discussed, and comprehend that if he took issue with what the court was saying, he should protest. Such an inference simply requires too big a leap, especially in view of the fact that even Mr. Franklin's trial counsel were not alerted to any discrepancy by this colloquy.

App. 3795. The lower court then found that as a matter of law the trial court's penalty phase reference was an inadequate basis on which to find a waiver. App. 3796. The lower court added that even if the trial court's reference put Mr. Franklin on notice of his previous rights, "it came too late to satisfy § 16-3-28." App. 3796. After noting that this Court has never required a capital defendant to show prejudice resulting from the lack of a waiver,¹¹ the lower court granted post-conviction relief on this ground. App. 3796, 3798.

The lower court also found that "trial counsel's failure to advise the applicant of the right conferred upon him by § 16-3-28, or to take actions necessary to preserve that right on applicant's behalf, constitutes ineffective assistance of counsel. A capital defendant is entitled to decide whether

¹¹See *Cartrette*, 448 S.E.2d at 555 (limiting the waiver inquiry to "whether the defendant was appraised of his rights"); *State v. Charping*, 313 S.C. 147, 149 n.1, 437 S.E.2d 88, 89 n.1 (1993); *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13, 14 (1987) ("[s]peculation as to whether [an] appellant was prejudiced by being denied his right to the final argument is inappropriate"); *Cain v. Evatt*, No. 90-CP-13-382 (S.C. 4th Cir. Common Pleas May 4, 1995), *cert. dismissed as improvidently granted*, 323 S.C. 563, 477 S.E.2d 98 (1996); *Holmes v. Evatt*, No. 96-CP-46-966 (S.C. 16th Cir. Common Pleas January 15, 1998), *cert. denied* January 27, 1999.

to exercise this important right on the basis of complete and accurate information, and trial counsel's failure to provide that information renders their assistance ineffective." App. 3799. The lower court also noted that this Court has never required a showing of prejudice from the denial of the right to make a final argument. App. 3798 (citing *State v. Reed*, 293 S.C. 518, 362 S.E.2d 13, 14 (1987), and *State v. Charping*, 313 S.C. 147, 149 n.1, 437 S.E.2d 88, 89 n.1 (1993)).

In the alternative, the lower court pointed out that Mr. Franklin was under no obligation to "recite chapter and verse what he would have said to the jury five years ago. The uncontradicted evidence is that applicant is mildly mentally retarded, with specific limitations in verbal memory." App. 3798. The lower court then noted with approval Mr. Partee's testimony concerning the effective use of a closing statement to "personalize the client in a more controlled fashion than 'having him get up and lay himself bare to a mean old solicitor.'" App. 3799 (quoting testimony of Mr. Partee). Additionally, the lower court found that even though the trial judge's attempts to correct his oversight was inadequate, "it should have been sufficient to alert trial counsel to move immediately for a mistrial, as this was the only remedy available to applicant at the time." App. 3799.

Originally, the lower court granted post-conviction relief and vacated all of Mr. Franklin's convictions. The lower court, however, subsequently altered his judgment and reinstated the convictions for grand larceny, first-degree criminal sexual conduct, and first-degree burglary. App. 3827.

ARGUMENT

I. THE EVIDENTIARY RECORD OVERWHELMINGLY SUPPORTS THE LOWER COURT'S FINDING THAT MR. FRANKLIN DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS RIGHT TO ADDRESS THE JURY.

Prior to the abolition of *in favorem vitae* review, this Court held that a capital defendant was entitled to a reversal of his conviction if the trial judge failed to secure on-the-record a waiver of the

right to make a closing statement at the guilt phase. *State v. Orr*, 304 S.C. 185, 403 S.E.2d 623, 624 (1991). As noted by the lower court, this Court has never required a specific showing of prejudice. *See also State v. Charping, supra; State v. Reed, supra.* Following the demise of *in favorem vitae* review, the Court held that if there was no on-the-record waiver of the right to address the jury and if trial counsel failed to object, it would not consider the issue on direct review and instead held that such issues are “better left to a post conviction relief proceeding where the facts surrounding the trial can be fully explored.” *State v. Rocheville*, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993); *see also Cartrette v. State*, 323 S.C. 15, 448 S.E.2d 553, 555 (1994) (“[t]he post conviction relief process is specifically designed to allow an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights. . . .”). Specifically, the Court held that a PCR court should determine whether “the defendant was, in fact, adequately informed of his rights, and did, for strategic reasons, desire to waive those rights.” *Rocheville*, 425 S.E.2d at 35. The only meaningful consequence of *Rocheville*’s shift of the waiver inquiry from direct appeal to post-conviction proceedings, however, is that an inmate may no longer rely solely on the trial record to demonstrate the lack of a knowing and intelligent waiver.

Petitioner-respondent’s position rests exclusively on the trial judge’s passing reference to the guilt phase right during a lengthy colloquy during the penalty phase. *See* Petition for Writ of Certiorari at 32-33. The lower court specifically found that the trial judge’s oblique reference was an inadequate basis on which to find a waiver, especially considering (1) that the trial judge never asked Mr. Franklin directly about the right; (2) trial counsel testified that they were not alerted to any problem by the trial judge’s remarks; and (3) Mr. Franklin’s significant mental impairments. App. 3809. In reviewing a grant of post-conviction relief, this Court is “concerned only with whether there is any evidence of probative value to support the PCR judge’s decision.” *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62, 65 (1999); *Skeen v. State*, 325 S.C. 210, 481 S.E.2d 129, 131 (1997).

More fundamentally, under clearly established law, what transpired at the penalty phase cannot be considered to be a knowing and intelligent waiver. This Court has held, in no uncertain terms, that in ascertaining whether the accused waives a statutory or constitutional right

the duty of the trial court . . . is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from the mode of trial or from any of the essential elements thereof, *and with a caution increasing in degree as the offenses dealt with increase in gravity.*

State v. Arthur, 296 S.C. 495, 497, 374 S.E.2d 291, 293 (1988) (quoting *Patton v. United States*, 281 U.S. 276, 312-13 (1930)) (emphasis in Court’s opinion). By his own admission, the trial judge did not broach the subject with either Mr. Franklin or defense counsel until the penalty phase when the judge was trying to establish whether Mr. Franklin wished to testify or address the jury concerning punishment. And then, the judge did not even engage in a “mere matter of rote.” *Arthur*, 374 S.E.2d at 293; *see also Von Moltke v. Giles*, 332 U.S. 708, 721 (1948) (plurality). Instead, he simply alluded to the guilt phase right in the midst of a discussion of other matters.¹² Furthermore, this Court has even chastised trial courts for asking only leading questions about the waiver of rights when dealing with a defendant who is mentally retarded. *Arthur*, 374 S.E.2d at 293. Here, the trial judge’s “convoluted” mention of the waiver issue, App. 3687, embedded within a discussion of other issues, was insufficient for ascertaining whether Mr. Franklin was aware of his right and for strategic reasons chose to waive it. *See Rocheville, supra*.

Likewise, it would be inappropriate to infer a waiver based on the non-response of both Mr. Franklin and trial counsel following the trial judge’s belated reference. Waiver, of course, is “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Courts should “not presume acquiescence in the loss of fundamental rights.”

¹²Typically, judges secure waivers by asking the defendant or trial counsel directly about the right. *See* App. 3687 (Mr. Partee questioning why the judge did not ask about the right directly); App. 3708-09 (former Solicitor Kolb acknowledging that trial judges ordinarily make direct inquiries about the waiver of rights).

Ohio Bell Tel. Co. v. Public Utilities Comm'n, 301 U.S. 292, 307 (1937). This Court has specifically rejected the notion that a trial court should presume waiver from silence on the part of counsel. In *State v. Ray*, 310 S.C. 431, 427 S.E.2d 171 (S.C. 1993), there was no on-the-record waiver of the defendant's statutory right to a twenty-four hour waiting period before the beginning of the penalty phase of a capital trial. The state argued that the court should find a waiver of the right because counsel indicated that they were ready to proceed. The Court rejected that argument: "We do not deem defense counsel's assent to immediately proceeding with sentencing sufficient to constitute a waiver of the statutory waiting period." 427 S.E.2d at 174.

Here, trial counsel's failure to respond is even less indicative of waiver than the circumstances in *Ray*.¹³ The trial judge did not ask counsel or Mr. Franklin directly about the right to address the jury during the guilt phase of the trial. Instead, as the trial court indicated, he simply watched for either "verbal or non-verbal" reactions to his comments. App. 3866. That, however, conflicts with the trial court's duty to obtain a positive affirmation of a defendant's knowing and intelligent waiver and not presume waiver from silence or acquiescence. This is especially true in this case where the trial court's references to the guilt phase right were out of context (because they came during the penalty phase) and confusing.¹⁴

¹³If counsel had grasped the significance of the judge's remarks, they would have been ineffective for not immediately moving for a mistrial. Counsel have an elementary duty to be aware of their client's statutory and constitutional rights and take appropriate measures to safeguard those rights. *See also Simmons v. State*, 308 S.C. 481, 419 S.E.2d 225 (1992) ("counsel's failure to fulfill such a basic tenet of criminal defense brings his representation of the petitioner below the standard of reasonableness under the prevailing standards of the profession"); *German v. State*, 325 S.C. 25, 478 S.E.2d 687 (1996). According to Pete Partee, if counsel previously knew about the right—and competent counsel should have known of that right, App. 3672, 3690-91—"what Judge Shuler said should have really hit you hard." App. 3690. In fact, competent counsel would "have realized got [sic] two bites at the apple." App. 3691.

¹⁴Petitioner-respondent's cite to *Blackledge v. Allison*, 431 U.S. 63, 74 (1979), is inapposite. *See* Petition for Writ of Certiorari at 22. In *Blackledge*, a habeas petitioner alleged that his guilty plea was involuntary because it was induced by an unkept promise. When entering his guilty plea, however, the petitioner had stated in open court that he had not been made any promises. In Mr.

Petitioner-respondent also fails to consider Mr. Franklin's mental retardation as well as this Court's concern that care be taken to ensure that mentally retarded defendants are made sufficiently aware of their rights. *See Arthur*, 374 S.E.2d at 293-94) (necessity for full and adequate record heightened by defendant's mental retardation); *State v. Orr*, 403 S.E.2d at 625 (same). Given Mr. Franklin's substantial intellectual limitations, it would be difficult, if not impossible, to conclude from his non-response to the trial judge's remarks at the penalty phase that he had waived his guilt phase right to address the jury. The trial judge's comments were delivered at about the sixth or seventh grade level and thus would have gone over Mr. Franklin's head. App. 3635. As a result, it is unlikely that Mr. Franklin even understood what the judge was trying to convey. In addition, like mentally retarded people in general, Mr. Franklin would have had difficulty conceptualizing what the judge was talking about, and he would have been reluctant to disclose if he did not fully understand. App. 3635-40.

Mr. Franklin's case is no different from *Orr* and *Arthur* except for the fact that his case was litigated in post-conviction proceedings and not on direct appeal and thus there is additional probative evidence concerning the absence of a valid waiver. Like *Arthur* and *Orr*, therefore, Mr. Franklin is entitled to relief, and this Court should deny certiorari.

II. THE EVIDENTIARY RECORD SUPPORTS THE LOWER COURT'S FINDING THAT MR. FRANKLIN'S COUNSEL WERE INEFFECTIVE IN FAILING TO INFORM HIM OF HIS RIGHT TO ADDRESS THE JURY.

The PCR court also found that Mr. Franklin received ineffective assistance of counsel due to counsel's failure to inform him of his guilt phase right to address the jury. In Question II, Petitioner-respondent asks the Court to consider whether Mr. Franklin has shown prejudice pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), or under Rule 61, SCRPC.

Franklin's case, by contrast, neither he nor his attorneys made "solemn declarations in open court" concerning his right to address the jury at the guilt phase.

In most circumstances, a claim of ineffective assistance of counsel requires a showing that counsel's performance "fell below an objective standard of reasonableness," and a separate showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694; *see also Butler v. State*, 286 S.C. 441, 334 S.E.2d 813, 815 (1988). In this case, petitioner-respondent does not seriously dispute the lower court's finding that counsel were deficient. Instead, the primary thrust to the state's argument is that Mr. Franklin failed to establish prejudice as defined by *Strickland* and its progeny. This argument, however, is foreclosed by this Court's precedents, which make clear that "[s]peculation as to whether [an] appellant was prejudiced by being denied his right to final argument is inappropriate." *State v. Reed*, 293 S.C. 515, 362 S.E.2d 13, 14 (1987); *see also State v. Charping*, 313 S.C. 147, 149, 437 S.E.2d 88, 89 (1993) (citing *Reed* and rejecting dissent's suggestion that denial of right to closing argument should be subject to harmless error analysis).¹⁵ Thus, the PCR court was correct to find counsel ineffective for failing secure Mr. Franklin's right to make a closing argument without speculating as to the prejudice flowing from counsel's deficient performance.

Alternatively, a showing of prejudice in this context cannot be whether there is a reasonable likelihood that the result of the proceeding would have been different. Rather, the question must be whether there is a reasonable likelihood that Mr. Franklin would have availed himself of the right to argue had he been properly advised. *Cf. Shirley v. State*, 306 S.C. 241, 411 S.E.2d 215, 216 (1991) (for ineffectiveness claim in the context of a guilty plea, a defendant must show that he would have gone to trial and availed himself of the constitutional rights waived through a plea of guilty). Here, Mr. Franklin submitted an affidavit indicating that he may have wanted to address the jury if he

¹⁵This Court's position is consistent with the United States Supreme Court's holding in *Herring v. New York*, 422 U.S. 853 (1975), that convictions must be reversed when defense counsel is prohibited from making a closing argument "*no matter how strong the case for the prosecution may appear.*" 422 U.S. at 858 (emphasis added).

would have had the opportunity to discuss with the matter with trial counsel. App. 3863. The lower court found that Mr. Franklin did not shoulder the burden of reciting "chapter and verse" what he would have said to the jury in 1993. App. 3798. Such a burden would be unfair given the uncontradicted evidence of Mr. Franklin's mental retardation and "specific limitations in verbal memory." App. 3798.

The lower court, pointing to the testimony of Pete Partee, also noted that a closing statement at the guilt phase may have "accomplish[ed] the personalization of the defendant," which is "one of the most effective things that you can do." App. 3799. Moreover, the lower court correctly found that had counsel moved for a mistrial when the trial judge referred to the guilt phase right in the penalty phase, Mr. Franklin would have been entitled to a mistrial because "this was the only remedy available at the time." App. 3799. Thus, because the record supports a finding that Mr. Franklin was prejudiced by counsel's failure to properly advise him and secure his right to closing argument, the PCR court was correct in finding trial counsel ineffective.

Petitioner-respondent suggests that the lower court could have found any error harmless pursuant to Rule 61, SCRPC. This position is both unprecedented and inconsistent with every criminal procedure case decided by this Court and the United States Supreme Court. The lower court correctly found that Rule 61 applies to ordinary civil proceedings, whereas in Mr. Franklin's case, the court must determine what harmless error standard to apply to an error alleged to have occurred at a criminal trial. The Rules of Civil Procedure do not apply to criminal cases. *State v. Wren*, 470 S.E.2d 111, 112 (S.C. Ct. App. 1996).

Petitioner-respondent has not pointed to even a single state post-conviction case that applies Rule 61. Nor is there any.¹⁶ Besides being unprecedented, petitioner-respondent's proposed reliance

¹⁶Similarly, the state fails to point to a single federal habeas corpus action applying Fed. R. Civ. P. 61, which is identical to the state rule.

on Rule 61 is at odds with all other criminal procedure cases. There is no universal standard for assessing the prejudicial impact of constitutional or statutory violations. Instead, this Court and the United States Supreme Court have prescribed the applicable standard for different types of errors. For instance, some errors, such as the complete denial of counsel, a denial of counsel's right to make a closing argument, a defective reasonable doubt instruction, or a defendant's lack of competency, can never be harmless. See *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *Herring v. New York*, 422 U.S. 853 (1975); *Arizona v. Fulminante*, 499 U.S. 279 (1991). In other situations, for example when the prosecution knowingly relies on false testimony, a defendant's conviction will be reversed if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97 (1976). For allegations of counsel's ineffectiveness or the prosecution's failure to disclose material, exculpatory information, a conviction or sentence will be reversed if there is a reasonable probability that the result would have been different but for the constitutional violation. See *Kyles v. Whitley*, 115 S.Ct. 1555 (1995); *Strickland*, *supra*. For other situations, a conviction should be reversed unless the state can show beyond a reasonable doubt that the violation had no effect on the jury's verdict. See *Chapman v. California*, 386 U.S. 18 (1967). In sum, the applicable harmless error standard, if any, is determined by the nature of the alleged violation of the defendant's rights. And as mentioned above, this Court has held that a conviction should be reversed if there was no knowing and intelligent waiver of the right to address the jury, and that speculation about possible prejudice is inappropriate.

For all these reasons, the PCR court's finding that trial counsel were ineffective is supported by the record and in accord with South Carolina law. Therefore, this Court should decline review of the PCR court's Order granting relief.

CONCLUSION

WHEREFORE, for the foregoing reasons, respondent-petitioner, Ellis Franklin, respectfully requests that the Court deny certiorari to review the grant of post-conviction relief.

Respectfully submitted,

KENNETH M. SUGGS
Suggs & Kelly
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

DAVID P. VOISIN
Center for Capital Litigation
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

BY: David P. Voisin
ATTORNEY FOR ELLIS FRANKLIN

Sept. 27, 1999.



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

October 27, 1999

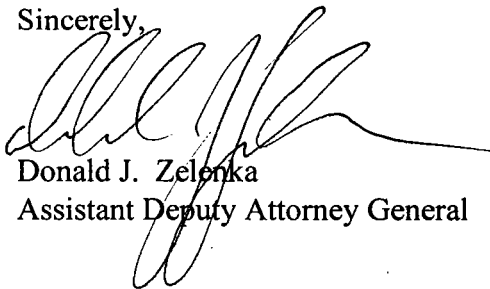
Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Ellis Franklin v. William D. Catoe

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Return of Petitioner/Respondent William D. Catoe, Commissioner to Cross-Petition for Writ of Certiorari of Ellis Franklin* in the above-referenced action for filing. By copy of this letter I am serving opposing counsel with this Return.

Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

RECEIVED
OCT 29 1999

DJZ/lbb S.C. SUPREME COURT
Enclosures

cc: Kenneth M. Suggs, Esquire
David P. Voisin, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

September 30, 1999

David P. Voisin, Esq.
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Mr. Kenneth Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v State

Dear Counsel:

The following Order has been endorsed on your Motion for Enlargement of Time in the above entitled case on appeal.

"Granted.

s/ Jean Toal, A.J.

September 30, 1999."

By copy of this letter we are advising opposing counsel of this action.

Very truly yours,



CLERK

DES/edc

cc: Assistant Deputy Attorney General Donald J. Zelenka



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

September 30, 1999

David P. Voisin, Esq.
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Mr. Kenneth Suggs, Esquire
Suggs & Kelly, P.A.
P.O. Box 8113
Columbia, SC 29202

Re: Franklin, Ellis v State

Dear Counsel:

The following Order has been endorsed on your Motion for Leave to File Supplemental Appendix in the above entitled case on appeal.

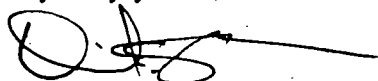
"Granted.

s/ Jean Toal, A.J.

September 30, 1999."

By copy of this letter we are advising opposing counsel of this action.

Very truly yours,



CLERK

DES/edc

cc: Assistant Deputy Attorney General Donald J. Zelenka

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director,
South Carolina Department
of Corrections,

Petitioner-Respondent.

MOTION FOR ENLARGEMENT OF TIME OF TEN DAYS
IN WHICH TO FILE A RETURN TO PETITIONER-RESPONDENT'S
PETITION FOR WRIT OF CERTIORARI,
RESPONDENT-PETITIONER'S PETITION FOR WRIT OF CERTIORARI,
AND SUPPLEMENTAL APPENDIX

Pursuant to Rule 234(b), SCRAP, respondent-petitioner, Ellis Franklin, respectfully requests an enlargement of time of ten days in which to file his return to petitioner-respondent's petition for writ of certiorari, his petition for writ of certiorari, and a supplemental appendix. Counsel for petitioner-respondent, Donald J. Zelenka, has no objection to this request. In support of this motion, Mr. Franklin would advise the Court of the following:

I.

Ellis Franklin is a death-sentenced inmate seeking post-conviction relief. The lower court initially granted relief as to all of his convictions. The court then granted in part the state's motion to alter or amend the judgment and reinstated Mr. Franklin's non-murder convictions. The court

denied the state's motion to reinstate the murder conviction. Mr. Franklin then filed a motion pursuant to Rule 59(e), SCRPC, requesting the lower court to adhere to its original position. That motion was denied. Each party then filed a timely notice of appeal.

II.

The state has filed a petition for writ of certiorari and appendix. Mr. Franklin's return, as well as his own petition for writ of certiorari, is currently due September 15, 1999. In preparing Mr. Franklin's petition, undersigned counsel has determined that several additional documents should be included in the appendix that has been filed in this case. *See* Rules 211(b) and 227(e), SCRAP. Mr. Franklin is requesting an extension of only ten days to file his pleadings and supplemental appendix. This is only his second request for additional time.

III.

Undersigned counsel respectfully request the additional time due to his case load in several other capital cases. He is counsel of record in a capital trial scheduled to begin in October. He is also preparing for a federal evidentiary hearing, and has also been involved in the drafting and filing of pleadings in *Johnson v. Catoe*. Due to these, as well as several other cases, undersigned counsel has been unable to complete all of the material that needs to be filed on Mr. Franklin's behalf.

IV.

Undersigned counsel has conferred with Mr. Zelenka, counsel for petitioner-respondent, and Mr. Zelenka has no objection to this request.

WHEREFORE, for the foregoing reasons, respondent-petitioner requests an enlargement of ten days to file his return, petition for writ of certiorari, and supplemental appendix.

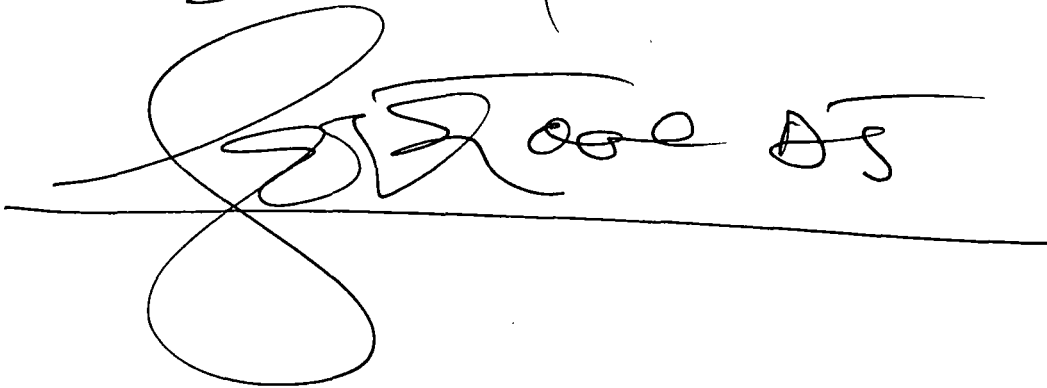

DAVID P. VOISIN
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

KENNETH M. SUGGS
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

Attorneys for Respondent-Petitioner

September 14, 1999.

Granted

A large, stylized handwritten signature, likely "G. R. Lee", is written over a horizontal line. The signature is written in dark ink and features a large, looping initial "G" and a long, horizontal stroke for the "R".

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

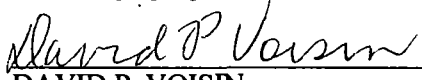
v.

WILLIAM D. CATOE, Director,
South Carolina Department of
Corrections,

Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the motion for enlargement of time of ten days in which to file a return to petitioner-respondent's petition for writ of certiorari, respondent-petitioner's petition for writ of certiorari, and supplemental appendix in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 14th day of September, 1999.



DAVID P. VOISIN

P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEY FOR RESPONDENT-PETITIONER.

ORIGINAL

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

RECEIVED

SEP 28 1999

S.C. SUPREME COURT

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

WILLIAM D. CATOE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

**MOTION FOR LEAVE TO FILE
SUPPLEMENTAL APPENDIX**

Respondent-Petitioner, Ellis Franklin, respectfully requests leave to file a supplemental appendix. Rule 211(b), SCRAP. The supplemental appendix, which Mr. Franklin is lodging with the Court, contains only three pages, but Mr. Franklin believes are necessary to the Court's consideration of his petition for writ of certiorari. The two documents contained in the supplemental appendix were a part of the lower court record. The first document, a two page letter from opposing counsel to the lower court, was attached as an exhibit to Mr. Franklin's return to the state's motion to alter or amend the judgment. The second document is a scheduling order.

Undersigned counsel has conferred with Donald J. Zelenka, counsel for Petitioner-Respondent, and Mr. Zelenka has no objection to the submission of the supplemental appendix.

Wherefore, for the foregoing reasons, Respondent-Petitioner, Ellis Franklin, requests that the Court accept the supplemental appendix.

Respectfully submitted,

KENNETH M. SUGGS
Suggs & Kelly
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

DAVID P. VOISIN
Center for Capital Litigation
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

BY: David P. Voisin
ATTORNEY FOR ELLIS FRANKLIN

Sept. 27, 1999.

Granted:
[Signature] A.J.

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)
POST OFFICE BOX 11311
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

September 14, 1999

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Catoe

Dear Mr. Shearouse:

Enclosed for filing please find a motion for enlargement of time of ten days in which to file a return to petitioner-respondent's petition for writ of certiorari, respondent-petitioner's petition for writ of certiorari, and supplemental appendix filed on behalf of Mr. Franklin. I have also enclosed a certificate of service.

Yours sincerely,



David Voisin

Enc.

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin

RECEIVED

SEP 15 1999

S SUPREME COURT

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)
POST OFFICE BOX 11311
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

September 27, 1999

The Honorable Daniel E. Shearouse
Clerk
South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Catoe - Case No. 96-CP-45-117

Dear Mr. Shearouse:

Enclosed please find for filing, with proof of service, the original and six (6) copies of a petition for writ of certiorari on behalf of respondent-petitioner, a return to petition for writ of certiorari of petitioner-respondent and a motion for leave to file supplemental appendix, as well as two (2) copies of the supplemental appendix in the above captioned matter.

Please do not hesitate to contact me if you have any questions regarding this matter or if I can provide you with any additional information.

Very truly yours,



David P. Voisin

RECEIVED

SEP 28 1999

S.C. SUPREME COURT

c: Kenneth M. Suggs, Esq.
Donald J. Zelenka, Esq.
Ellis Franklin

The Supreme Court of South Carolina

Ellis Franklin,

Respondent-Petitioner

v

State of South Carolina,

Petitioner-Respondent.

The Honorable Thomas W. Cooper, Jr.
Williamsburg County
Trial Court Case No. 96-CP-45-117

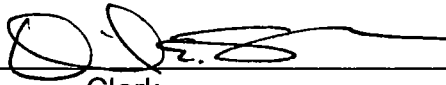
ORDER

For good cause having been shown, the time for serving and filing Respondent-Petitioner's Return to Petition for Writ of Certiorari and Respondent-Petitioner's Petition for Writ of Certiorari in the above entitled matter is hereby extended until September 15, 1999.

IT IS SO ORDERED.

ERNEST A. FINNEY, JR., CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

August 17, 1999

cc: Assistant Deputy Attorney General Donald J. Zelenka
David P. Voisin, Esquire
Kenneth Suggs, Esquire

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)

POST OFFICE BOX 11311

COLUMBIA, SOUTH CAROLINA 29211

RECEIVED
Voice: (803) 765-0650

Fax: (803) 765-0705

AUG 13 1999

S.C. SUPREME COURT

August 12, 1999

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Moore

Dear Mr. Shearouse:

I am writing to request an additional thirty days in which to file a return to petitioner's petition for writ of certiorari as well as a cross-petition for writ of certiorari. These are currently due August 16, 1999. This is my first request for an enlargement of time. I attempted to contact opposing counsel but was informed that he was not going to be in his office today or tomorrow.

Yours sincerely,



David Voisin

cc: Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)

POST OFFICE BOX 11311

COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

July 14, 1999

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Moore

Dear Mr. Shearouse:

Enclosed for filing please find the original exhibits from Mr. Franklin's post-conviction relief hearing. Upon my return from vacation, I learned that the Office of Appellate Defense had somehow obtained the exhibits. I am now sending them to the Court because the Court had ordered these exhibits be transported for its review. If you have any questions about this matter, please do not hesitate to contact me.

Yours sincerely,

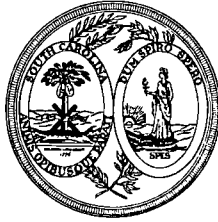


David Voisin

Enc.

c: Donald J. Zelenka, Esq.
Ken Suggs, Esq.

RECEIVED
JUL 15 1999
S.C. SUPREME COURT



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

July 2, 1999

Pm 7-2-99

RECEIVED

JUL 06 1999

S.C. SUPREME COURT

Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Ellis Franklin v. William D. Catoe

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the *Petition for Writ of Certiorari of Petitioner/Respondent William D. Catoe, Commissioner* and the original and one (1) copy of the *Appendix* in the above-referenced matter for filing. By copy of this letter we are serving opposing counsel with this Petition and Appendix.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: Kenneth M. Suggs, Esquire
David P. Voisin, Esquire
Sandi Wofford, Director, Victims Assistance

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Williamsburg County
Honorable Thomas W. Cooper, Jr., Circuit Court Judge

96-CP-45-117

ELLIS FRANKLIN Respondent / Petitioner.

v.

WILLIAM D. CATOE, Commissioner,
South Carolina Department of Corrections Petitioner / Respondent.

**TRANSPORTATION
ORDER**

UPON MOTION of Donald J. Zelenka, Attorney for the Petitioner / Respondent in the
above referenced matter, it is hereby ordered that:

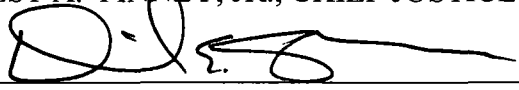
Plaintiff's Exhibit #1 - Dr. Grant's C.V.
Plaintiff's Exhibit #2 - "Materials...Retardation"
Plaintiff's Exhibit #3 - E.F. Composite Scores I.Q. Tests
Plaintiff's Exhibit #4 - E.F. Intelligence Tests
Plaintiff's Exhibit #5 - E.F. Tests Assessing Skills
Plaintiff's Exhibit #6 - E.F. Tests Assessing Functions
Plaintiff's Exhibit #7 - Assessment of Functional AC
Plaintiff's Exhibit #8 - Independent Living Scales
Plaintiff's Exhibit #9 - Affidavit of E. Franklin
Plaintiff's Exhibit #10 - "Death Penalty Cases"
State's Exhibit #1 - Affidavit of Shuler

from the January 27, 1998 Post Conviction Relief hearing, be released to the Office of the
Attorney General, or its designee, for transporting to the Supreme Court of South Carolina for

purposes of review by the Court for the above captioned case.

IT IS SO ORDERED.

ERNEST A. FINNEY, JR., CHIEF JUSTICE

By 

CLERK

Columbia, South Carolina

June 23, 1999

Copies to: Honorable Carolyn Williams

Kenneth M. Suggs, Esq.

David P. Voisin, Esq.

Assistant Attorney General Donald J. Zelenka



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

June 9, 1999

Honorable Daniel E. Shearouse
Clerk, The South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29201

Re: Ellis Franklin v. Michael Moore
96-CP-45-117
State Post-Conviction Relief Death Penalty Appeal

Dear Mr. Shearouse:

On May 7, 1999, Respondents filed their notice of appeal from the partial granting of post-conviction relief in the above-entitled case. On May 14, 1999, counsel for Ellis Franklin filed a notice of cross-appeal. Please be advised that prior to the entry of judgment both parties had already received a transcript of the state post-conviction relief hearings held on January 27, 1998 in the Sumter County Courthouse. Therefore, it will not be necessary to reorder the transcript for purposes of this appeal. Inasmuch as we have already received the transcript consistent with this Court's order of June 18, 1998 concerning the scheduling for pleadings in post-conviction relief cases, we are considering the petition for certiorari pursuant to that order to be due sixty (60) days from the filing of the notice of appeal which is July 6, 1999.

By copy of this letter we are advising opposing counsel and the South Carolina Office of Appellate Defense of our position in this matter. If I am in error please contact me. I also note that under the June 18, 1998 Order the thirty (30) day period for serving and filing a return, under

RECEIVED

JUN 10 1999

S.C. SUPREME COURT

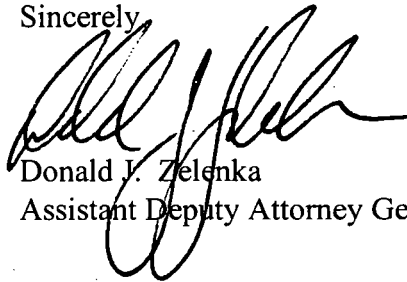
Honorable Daniel E. Shearouse
June 9, 1999

Page -2-

Rule 227(f) SCACR, has been increased to forty-five (45) days for opposing counsel's information:

If you have any questions in this matter please do not hesitate to contact me.

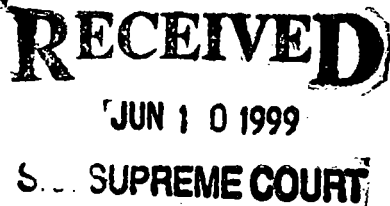
Sincerely,



Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb

cc: Daniel T. Stacey, Esquire
David Voisin, Esquire
Kenneth Suggs, Esquire



South Carolina Office of Appellate Defense

Daniel T. Stacey
Chief Attorney
Joseph L. Savitz, III
Deputy Chief Attorney

Wanda H. Haile
Senior Assistant Appellate Defender

1122 Lady Street, Suite 940
Columbia, S.C. 29201-3243

Telephone: (803) 734-1330
(888) 204-0345
Fax: (803) 734-1397

Robert M. Pachak
Robert M. Dudek
M. Anne Pearce
Melissa J. Kimbrough
Tara S. Taggart
Melody J. Brown
Aileen P. Clare
Assistant Appellate Defenders

June 11, 1999

David P. Voisin, Esquire
Center for Capital Litigation
P O Box 11311
Columbia, SC 29211

Kenneth Suggs, Esquire
P O Box 8113
Columbia, SC 29202

RECEIVED
JUN 11 1999
S.C. SUPREME COURT

Re: Ellis Franklin v. State of South Carolina

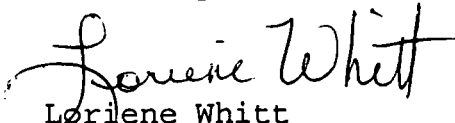
Dear Messrs. Voisin and Suggs:

The Deputy Chief Attorney has approved our associating with you in connection with this appeal for **costs of printing only**, up to a cost of five (.05) cents per page. Reimbursement for printing will only be for the quantity of documents required for this agency. You will be solely responsible for all aspects of the appeal, including printing and filing.

Requests for reimbursement of printing costs for this case should be directed to the attention of Mr. Jeff Smith at the agency address shown above. Requests must be accompanied by an Order of Appointment, or a copy of the letter from this agency approving you to be associated as counsel and the original paid receipt for costs of printing.

If you have any questions concerning the above matter, please do not hesitate to contact this Office.

Sincerely,


Lorlene Whitt
Legal Services Coordinator

xc: ~~S. C. Supreme Court~~



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

May 19, 1999

Assistant Deputy Attorney General Donald J. Zelenka
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

David P. Voisin, Esquire.
Center For Capital Litigation
P O Box 11311
Columbia, SC 29211

Re: **Franklin, Ellis v State**
96-CP-45-117

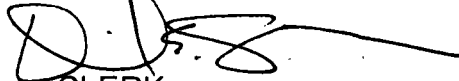
Dear Counsel:

We have received a Notice of Appeal from each of you in the above matter. Unless notified by you to the contrary, these appeals will be consolidated for consideration by the Court under the South Carolina Appellate Court Rules, and we anticipate receiving only one appendix.

When appeals are consolidated, the party filing the first Notice of Appeal (State) has been designated as the Petitioner/Respondent and the party filing the second Notice of Appeal (Ellis Franklin) has been designated as the Respondent/Petitioner.

Please notify this Court upon receipt of the trial transcript from the Court Reporter. Each party is allowed to serve and file a Petition for Writ of Certiorari and Return as provided for in Rule 227 of the South Carolina Appellate Court Rules.

Very truly yours,



CLERK

DES/sgl

cc: Mr. Kenneth Suggs, Esquire

67

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

v.

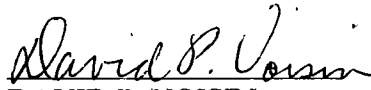
MICHAEL MOORE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

NOTICE OF CROSS-APPEAL

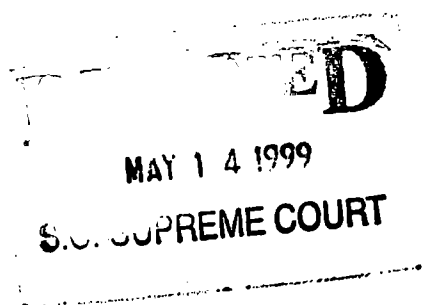
Ellis Franklin appeals the order of the Honorable Thomas W. Cooper, Jr., dated February 12, 1999, granting in part petitioner-respondent's motion to alter or amend the judgment, as well as the order, dated April 8, 1999, denying respondent-petitioner's motion to alter or amend the judgment. Petitioner received written notice of appeal from respondent-petitioner on May 10, 1999.

May 13, 1999.


DAVID P. VOISIN
P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

KENNETH M. SUGGS
P.O. Box 8113
Columbia, SC 29202
(803) 256-7550

Attorneys for Petitioner



Other counsel of record:

Donald J. Zelenka

Assistant Deputy Attorney General

P.O. Box 11549

Columbia, SC 29211

(803) 765-6305

Attorney for Petitioner-Respondent

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Circuit Court Judge

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent-Petitioner,

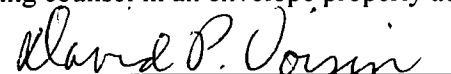
v.

MICHAEL MOORE, Director, South
Carolina Department of
Corrections,

Petitioner-Respondent.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that one (1) copy of the notice of cross-appeal in the above entitled case has been served upon opposing counsel in an envelope properly addressed with postage prepaid on this 13th day of May, 1999.


DAVID P. VOISIN

P.O. Box 11311
Columbia, SC 29211
(803) 765-0650

ATTORNEY FOR RESPONDENT-PETITIONER.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF WILLIAMSBURG	)	C/A No. 96-CP-45-117
ELLIS FRANKLIN,	)	
	)	
Applicant,	)	
	)	
vs.	)	ORDER
	)	
MICHAEL MOORE, Commissioner,	)	
South Carolina Department of	)	
Corrections,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before me by way of Respondent's Motion to Alter or Amend the Judgment in the above captioned post-conviction relief matter.

Applicant Ellis Franklin was convicted of murder, grand larceny, criminal sexual conduct, first degree, and burglary, first degree on January 20, 1993. He was sentenced on January 22, 1993 to ten years for grand larceny, thirty years for criminal sexual conduct, first degree, life imprisonment for burglary, first degree, and death by electrocution for murder. The Supreme Court of South Carolina affirmed applicant's convictions and sentences on March 13, 1995 in State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), and certiorari was denied by the Supreme Court of the United States on October 12, 1995 in Franklin v. South Carolina, ____ U.S. ____, 116 S.Ct. 160 (1995). By Order dated October 2, 1998, this Court granted Applicant's application for post-conviction relief from his convictions and sentences. Respondent thereafter timely submitted a Motion to Alter or Amend the Judgment.

Section 16-3-28 of the South Carolina Code of Laws provides that "... in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." As the language suggests, this statute applies only in capital murder cases where the death penalty is sought. The underlying purpose of this section must be to provide an additional layer of protection against a defendant being wrongly convicted and sentenced in a trial where the ultimate punishment is the death penalty. Given this, however, the burden of proof is not made any greater or otherwise enhanced by this statute. In other words, this section in no way changes the landscape of a criminal trial insofar as the elements of an offense, burden of proof, or rules of evidence or procedure; the only variation is that the defendant has the right to make the final argument to the trial jury. It is clear under South Carolina law that had this been a non-capital case (even non-capital murder), Franklin would have no statutory right to make the final argument, and therefore he could not ask for a new trial on the ground that he was not allowed the opportunity to make the final argument.



I hold the view that the General Assembly did not intend for § 16-3-28 to be available to defendants as an additional layer of protection against a conviction for a *non*-capital offense. The purpose of this section is to provide protection only in capital cases where the ultimate penalty is death. I therefore conclude that convictions for non-capital crimes, even when used as aggravating circumstances for a capital murder, should not be reversed for failure to obtain a knowing and voluntary waiver by the defendant on the record. The fact that Applicant was not given the opportunity to make the final argument to the jury has no bearing on his convictions for the non-capital offenses, as he would not have been entitled to make a final argument had those been the only offenses for which he was being tried.

Applicant argues that the remaining convictions must be vacated because they were “inextricably intertwined” with the murder charge and “all offenses were part of the same series of conduct...” Applicant’s Return at 4. However, in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994), the Defendant was convicted of murder, armed robbery, kidnapping, and conspiracy, with these offenses undoubtedly being part of the same series of conduct. The murder conviction there was reversed, due to the failure to obtain a knowing and voluntary waiver of the right to make the final argument on the record. However, the court held that the convictions for armed robbery and conspiracy were “unaffected” by the failure to obtain the waiver, and were thus not disturbed on appeal. Id. at 94, 439 S.E.2d at 278 (footnote 2).

Likewise, in State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993), a murder conviction was reversed after there was no on the record waiver of the final argument by the defendant, but the accompanying convictions for kidnapping, conspiracy, and criminal sexual conduct, first degree were affirmed. The court held that the remaining convictions (other than murder) were “unaffected by trial errors raised for the first time on appeal...” and were thus not disturbed by the Supreme Court. Id. at 150, 437 S.E.2d at 90. Applicant argues in his return brief that a reviewing court “must determine, based on the facts of the particular case, whether the non-capital convictions ‘are unaffected by trial errors.’” Applicant’s Return at 5.

Applicant relies chiefly on State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987) and State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) for the proposition that a failure to obtain an on the record waiver mandates reversal of not only the capital murder conviction, but all related convictions as well. I disagree. Although Applicant is correct in his contention that Cooper and Charping did not suggest that those holdings were overruling the prior decisions in Reed and Orr, I find that the

Supreme Court provided more guidance on this issue in Cooper and Charping by expressly reversing only the murder convictions and their accompanying death sentences while leaving the remaining non-capital convictions and sentences intact.

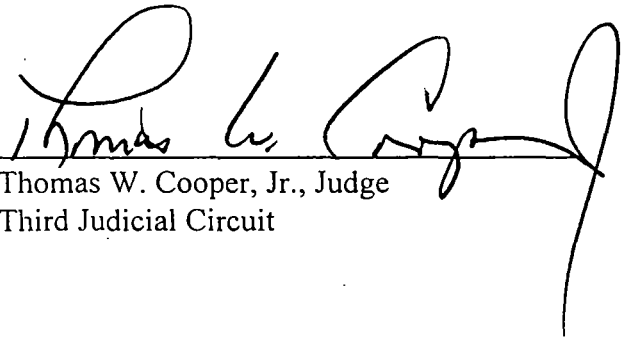
The thrust of Franklin's argument seems to be that, had he been allowed the opportunity to make the final argument before the jury as was his right in this capital murder trial pursuant to § 16-3-28, the verdicts of guilty returned by the jury on the non-capital offenses for which he was also on trial would have been different. I disagree. I find that the non-capital convictions in this case for criminal sexual conduct, first degree, burglary, first degree, and grand larceny were not affected by the failure to obtain a waiver of the right of final argument by the applicant/defendant. I find that there is sufficient evidence in the record to sustain guilty verdicts on the non-capital offenses even if they had been considered separately from the capital offense of murder. In other words, the evidence in the record is sufficient to support a finding that the jury could have convicted Applicant of the non-capital offenses in a separate trial on only those offenses, even though they were used as aggravating circumstances for the murder offense in this trial.

As has been stated above, such non-capital offenses are not contemplated by Code Section 16-3-28, and thus a defendant in such a trial would not have the right to make the final argument to the jury. This finding is further supported by the statutory interpretation that the General Assembly intended for § 16-3-28 to apply only in those trials where the ultimate punishment is the death penalty and also by the controlling precedent found in Cooper and Charping, where convictions for offenses other than capital murder were affirmed even after murder convictions were reversed pursuant to § 16-3-28.

Based on the foregoing, the motion to reconsider the order granting Applicant's relief from the conviction for murder is denied; the motion to reconsider the decision vacating the convictions for criminal sexual conduct, first degree, burglary, first degree, and grand larceny is granted and these convictions and sentences are reinstated.

AND IT IS SO ORDERED.

February 12, 1999


Thomas W. Cooper, Jr., Judge
Third Judicial Circuit

AT CHAMBERS
Manning, South Carolina

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

Ellis Franklin,)
)
Applicant,)

vs.) ORDER
) C/A NO.: 96-CP-45-117
)

Michael Moore, Director)
South Carolina Department of)
Corrections,)
)
Respondent.)

This matter is before the Court pursuant to Rule 59 (e) SCRCF.
The Applicant seeks an Order of this Court amending or altering its
Order of October 2, 1998 as modified by subsequent Order of this
Court dated February 12, 1999. The Motion to Alter or Amend or
Reconsider is respectfully denied.

This Court has considered the authority set out in the
Applicant's Motion and the Order granting Post Conviction Relief in
the case of Cooper v. Moore, 95-CP-32-2248. This Court accords
great deference to the PCR Judge in Cooper but does not feel bound
by his decision in that case. The factual circumstances in Cooper
are somewhat different than in the instant case. The PCR Judge
concluded in Cooper that "...all the testimony demonstrates that
Mr. Cooper would have wanted to speak to the jury had he known he
had that right." In the instant case, Mr. Franklin chose not even

to make a closing argument during the penalty phase, after he had been fully advised of his right in that regard.

Moreover, in Cooper, the PCR Court found that trial counsel's failure to advise him of his right to make a final argument constituted ineffective assistance of counsel. That Court found that the ineffective assistance applied to the non-capital as well as capital offenses facing Cooper.

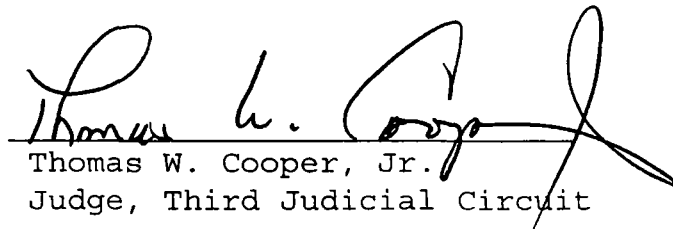
The right to make a final argument under these circumstances only attaches to capital offenses and the Defendant has been accorded the full benefit of that right in this Court's earlier Order. Inasmuch as the right to make the final argument does not attach to non-capital offenses, it is not ineffective assistance of counsel, insofar as those charges are concerned, to fail to advise a Defendant of the right to make a final argument.

For the foregoing reasons, the Applicant's Motion to Alter or Amend is denied.

AND IT IS SO ORDERED.

Manning, South Carolina

Dated: April 8, 1999


Thomas W. Cooper, Jr.
Judge, Third Judicial Circuit

June 7

CENTER FOR CAPITAL LITIGATION

1247 SUMTER STREET, SUITE 303 (29201)
POST OFFICE BOX 11311
COLUMBIA, SOUTH CAROLINA 29211

Voice: (803) 765-0650

Fax: (803) 765-0705

May 13, 1999

The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Franklin v. Moore

Dear Mr. Shearouse:

Enclosed for filing please find a notice of cross-appeal filed on behalf of Mr. Franklin. I have also enclosed a certificate of service as well as copies of the written orders which are to be challenged on cross-appeal. I am also filing a copy of the notice of cross-appeal with the clerk of the lower court.

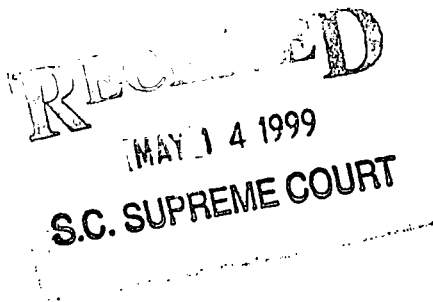
Yours sincerely,



David Voisin

Enc.

c: The Honorable Carolyn Williams
Donald J. Zelenka, Esq.
Ken Suggs, Esq.
Ellis Franklin



STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Williamsburg County
Honorable Thomas W. Cooper, Jr.

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent,

v.

MICHAEL MOORE, Commissioner, South Carolina
Department of Corrections,

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MAY 07 1999]

S. C. SUPREME COURT

Petitioner.

NOTICE OF APPEAL

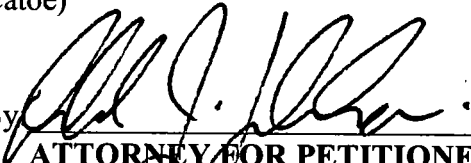
The Petitioner, Michael Moore, appeals from the Orders of the Honorable Thomas W. Cooper, Jr. dated October 2, 1998, and received on October 5, 1998, that granted state post-conviction relief for a new trial, as altered and amended in he Order dated February 12, 1999 and received on February 16, 1999 which Respondent Franklin's Motion to Alter or Amend was denied on April 8, 1999 and received on April 9, 1999.

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

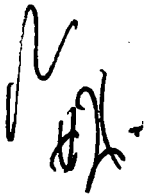
DONALD J. ZELENKA
Assistant Deputy Attorney General

MICHAEL MOORE
Commissioner of the South Carolina
Department of Corrections (now William D.
Catoe)

By 
ATTORNEY FOR PETITIONER

Other Counsel of Record:

David P. Voisin, Esquire
Kenneth Suggs, Esquire



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

Appeal from Williamsburg County
Honorable Thomas W. Cooper, Jr.

Case No. 96-CP-45-117

ELLIS FRANKLIN,

Respondent,

v.

MICHAEL MOORE, Commissioner, South Carolina
Department of Corrections,

Petitioner.

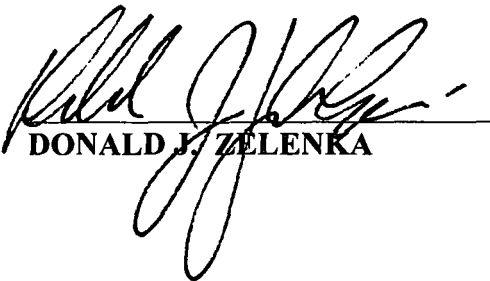
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Notice of Appeal in the above-referenced case has been served upon Respondent by mailing a copy properly addressed with postage prepaid this 7th day of May, 1999, addressed to the following:

David P. Voisin, Esquire
Center for Capital Litigation
Post Office Box 11311
Columbia, South Carolina 29211

Kenneth Suggs, Esquire
Post Office Box 8113
Columbia, South Carolina 29202

This 7th day of May, 1999.


DONALD J. ZELENSKA

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF WILLIAMSBURG	)	DOCKET NO. 96-CP-45-117
	)	
Ellis Franklin	)	
	)	
Applicant,	)	ORDER GRANTING
	)	POST-CONVICTION RELIEF
vs.	)	
	)	
Michael Moore, Commissioner,	)	
South Carolina Department of	)	
Corrections,	)	
Respondent.	)	
	)	

This matter is before the Court pursuant to an application for post-conviction relief. Applicant Ellis Franklin was convicted of murder, grand larceny, first-degree criminal sexual conduct, and first-degree burglary on January 20, 1993. On January 22, 1993, he was sentenced to 10 years for grand larceny, 30 years for criminal sexual conduct, life imprisonment for burglary and death by electrocution for murder. The Supreme Court of South Carolina affirmed applicant's convictions and sentences on March 13, 1995, State v. Franklin, 456 S.E.2d 357 (S.C. 1995) and the Supreme Court of the United States denied certiorari on October 12, 1995, Franklin v. South Carolina, 116 S.Ct. 160 (1995). On March 12, 1996, applicant filed an application for post-conviction relief that was amended on January 12, 1998. On January 14, 1998, applicant filed a motion for summary judgment as to grounds 9(a) and 9(b)(I), of the amended application, alleging that applicant was denied his right to make a closing argument during the guilt or innocence phase of his capital trial as guaranteed by § 16-3-28 of the South Carolina Code. Following a hearing on January 22, 1998 concerning applicant's motion for summary judgment, this court denied the motion but bifurcated the proceedings and ordered an evidentiary hearing limited to the allegations set forth

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in grounds 9(a) and 9(b)(I) of the amended application. At the hearing, which took place on January 27, 1998, the Court heard the testimony from applicant's trial counsel, the testimony of an expert capital lawyer, the testimony of a psychologist specializing in mental retardation, the testimony of former solicitor Wade Kolb and the testimony of Ellis Franklin. The Court accepted affidavits from former Solicitor Wade Kolb, the Honorable M. Duane Shuler and the applicant himself. Finally, the Court accepted evidence from the record of the trial. For the reasons discussed below, the Court, having considered the facts as presented in the pleadings and at the evidentiary hearing in light of governing South Carolina and federal law, now concludes that applicant, Ellis Franklin, is entitled to post-conviction relief from his convictions and sentences.

DISCUSSION

A. Grounds for Relief

In grounds 9(a), 9(b) and 10(b)(I) of his amended application for post-conviction relief, applicant alleged as follows:

- 9(a) Applicant did not knowingly or intelligently waive his right to address the jury at the conclusion of the guilt phase of his capital trial as guaranteed by S.C. Code § 16-3-28 and the Due Process clause of the Fourteenth Amendment to the United States Constitution.
- 9(b) Applicant was denied his right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law by the following acts and omissions of trial counsel:
- 10(b)(I) Counsel failed to explain to applicant that he had the right to address the jury at the conclusion of the guilt/innocence phase. See S.C. Code § 16-3-28.

Amended application for post-conviction relief at 2-3.

B. Legal Standard

Section 16-3-28 of the South Carolina Code provides as follows:

Punishment for murder: right of defendant to make last argument

Notwithstanding any other provision of law, in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument.

Before abolition of in favorem vitae review by State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991), the lack of an on-the-record waiver would have, by itself, been enough to warrant a new trial on direct appeal. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993). Since Torrence, the South Carolina Supreme Court has held in Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994), that a post-conviction relief proceeding is the appropriate forum in which to address denial of the defendant's right to a last argument in a capital case. Specifically, the court explained that, "the waiver of last argument should be viewed in light of the facts surrounding trial. The post conviction relief process is specifically designed to allow for an inquiry into the relevant facts surrounding the adequacy of a defendant's information and/or waiver of rights, and where this evidence is lacking, the appropriate remedy is to remand for a hearing to determine whether the defendant was apprised of his rights." Cartrette, 323 S.C. at 17,18, 448 S.E.2d at 555. Therefore, it appears from the express language of the Supreme Court, as well as by clear implication, that the sole inquiry of the post conviction judge, in cases where the waiver of last argument is an issue, is to determine whether or not the defendant was apprised of his rights, and if he was, to determine whether or not he knowingly and intelligently waived those rights. In the case of Ellis Franklin, this court has

conducted a hearing on the issue of applicant's knowing and voluntary waiver of the right to close. This court is therefore able to enter findings of fact as to the question of applicant's waiver of the right as conferred upon him by § 16-3-28.

The Supreme Court has also held that the question to be answered by a reviewing court is whether the defendant was, "in fact, adequately informed of his rights, and did, for strategic reasons, desire to waive those rights." State v. Rocheville, 310 S.C. 20, 25, 425 S.E.2d 32, 35 (1993). In this case, the trial record shows clearly that the defendant did not make a closing argument to the jury. Further, there is no evidence on the trial record that the defendant was informed by his attorneys or the judge that he had a right to make a closing argument at the end of the guilt-or-innocence phase of the trial.

As with other constitutional and statutory rights, a capital defendant may waive his statutory right to make a closing argument during his trial, but only if he does so knowingly and voluntarily. State v. Reed, 293 S.C. 515, 518 362 S.E.2d 3, 14 (1987). Such a waiver may be accomplished through a colloquy between the trial judge and the defendant or his counsel, and will be adequate if it is evidenced by a "full record." State v. Orr, 302 S.C. 185, 188, 403 S.E.2d 623, 624 (1991). Obviously there can be no "knowing and voluntary" waiver of a right if the subject is ignorant of that right. In his affidavit, Mr. Franklin stated that he did not know of his right to make a personal closing argument at the guilt-or-innocence phase of his trial.

The surest way to ensure that a defendant knows of an essential right is to inform him on the record. An examination of the record in this case reveals that there was never, prior to the jury returning its guilty verdict, an on-the-record discussion of Ellis Franklin's right to make a personal closing argument. This fact was conceded by the state in its Memorandum in Opposition to

Summary Judgment and verified by the trial judge in an affidavit introduced into evidence during the post-conviction relief hearing.

Another direct way of showing that a defendant knew of a right would be testimony that he was told off the record. In this case, both of Mr. Franklin's trial counsel testified affirmatively that they did not tell him of his right to an argument in the guilt phase. In fact, each testified that he did not know of that right himself and therefore could not have told Mr. Franklin.

The State argues that notwithstanding the absence of an on the record waiver, there is evidence that Franklin knew of his right to argue during the guilt phase, because it was discussed with him after the guilt phase and during the penalty phase. The record does show that the trial judge, during the penalty phase, discussed, on the record, Franklin's right to make a personal argument during the penalty phase. During that discussion the judge did make reference to the guilt phase by once using the phrase, "as he did at the last phase," (R. p.2938 ll.19-20), and once using the phrase, "just like you did before." (R. p.2940 l.5).

The Court is not persuaded that this is sufficient evidence that Mr. Franklin knew of his right. First, Mr. Franklin was never asked directly whether he had known and understood the right then being referred to. Second, to impute knowledge to Mr. Franklin based on this exchange requires an inference that Franklin, a mentally retarded individual with oral language skills comparable to a seven year old, could extract an isolated piece of information from all the other information being imparted, distinguish the concept of a past right from the present rights being discussed, and comprehend that if he took issue with what the court was saying, he should protest. Such an inference simply requires too big a leap, especially in view of the fact that even Mr. Franklin's trial counsel were not alerted to any discrepancy by this colloquy.

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The trial court's reference to the right during the penalty phase is, as a matter of law, an inadequate basis on which to find a waiver. In State v. Arthur, 374 S.E.2d 291, 293-94 (S.C. 1988), the Court found that the defendant's waiver of his right to a jury trial was inadequate even though the trial court directly asked him several leading questions about that right. Furthermore, in both Arthur and State v. Orr, 403 S.E.2d 623 (S.C. 1991), the South Carolina Supreme Court has expressly stated its concern that mentally retarded defendants be adequately apprised of their rights before a finding of waiver can be made. Like Orr and Arthur, applicant is mentally retarded, especially with regard to language and memory. The record is uncontradicted that no one carefully explained to applicant his right to address the jury at the conclusion of the guilt-or-innocence phase of his trial; indeed, the record reflects no such explanation at all.

Finally, even if the court believed that the trial court's reference put Mr. Franklin on notice of his previous rights, it came too late to satisfy § 16-3-28. His opportunity to make a guilt phase closing argument had been irrevocably lost. He had already been convicted on the charges by the jury.

In analyzing the impact of the absence of a knowing and voluntary waiver by Mr. Franklin of his right to argue to the jury, it is important to note that the applicant asserts two separate grounds for relief. First, the applicant asserts that the denial of the right to argue resulted in a conviction in violation of the laws of this State, under § 17-27-20 (a)(1), S.C. Code Ann. (1976), as amended. Second, the applicant asserts that the failure of trial counsel to advise him of his rights was ineffective assistance of counsel, entitling him to relief under § 17-27-20 (a)(6), S.C. Code Ann. (1976).

Clearly, Applicant did not knowingly or intelligently waive his right to address the jury. The State, however, argues that Applicant must nevertheless show prejudice in order to prevail. This court finds otherwise. The Supreme Court has never failed to reverse a conviction obtained in violation of a capital defendant's right to make a closing argument. Indeed the court has stated that, "[s]peculation as to whether [an] appellant was prejudiced by being denied his right to the final argument is inappropriate." State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987) See also State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993), Cain v. State, No. 90-CP-13-382 (S.C. 4th Cir. Common Pleas, May 4, 1995), cert. dismissed, 323 S.C. 563, 477 S.E.2d 98 (1996). Even where the court has declined to automatically reverse on direct appeal, and has reserved the issue for post conviction relief, it has limited the inquiry to "whether the defendant was appraised of his rights." Cartrette v. State, 323 S.C. 15, 448 S.E.2d 553 (1994) (emphasis added); See also State v. Rocheville, 310 S.C. 20, 425 S.E.2d 32 (1993).

The second ground for relief, ineffective assistance of counsel, does require a showing of prejudice. The applicant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). While the court finds that it is not necessary to reach this ground in order to grant relief, the court finds that applicant has demonstrated prejudice to some extent.

This court nevertheless invited an inquiry into the possible application of the harmless error rule (Rule 61, SCRCP) to these proceedings. However, upon further reflection, I conclude that the rule does not apply here. Rule 61 provides the harmless error standard for civil proceedings. Here, by contrast, the court is determining what, if any, harmless error standard

applies to the underlying criminal trial. The Rules of Civil Procedure are not applicable in criminal cases. State v. Wren, 470 S.E.2d 111, 112 (S.C. App. 1996). Moreover, the South Carolina Supreme Court has never instructed post-conviction courts to assess the presence or severity of prejudice flowing from denial of a capital defendant's right to make a closing argument. To the contrary, the Court has made clear that "[s]peculation as to whether [an] appellant was prejudiced by being denied his right to final argument is inappropriate." Reed, 293 S.C. 518, 362 S.E.2d at 14. Thus, application of harmless error analysis to this issue would be improper. See State v. Charing, 313 S.C. 147, 149 n.1, 437 S.E.2d 88, 89 n.1 (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); Reed, *supra*). Applicant has proven what the law requires: he did not make a closing argument; no adequate waiver of his right to do so appears in the trial record; neither his counsel nor anyone else adequately advised him of this right; he had no independent knowledge of this right; and he did not make a strategic decision to waive his right to argue. He is thus entitled to post-conviction relief.

However, should a higher court determine that a showing of prejudice is required, it is not necessary, in order for applicant to demonstrate prejudice, that he now recite chapter and verse what he would have said to the jury five years ago. The uncontradicted evidence is that applicant is mildly mentally retarded, with specific limitations in verbal memory. As stated by Dr. Daniel Grant, an expert in psychology and neuropsychology, "even the attorneys had difficulty remembering ... what transpired ... and they are obviously at least of average intelligence." (Hr'g. Tr. p. 83). Pete Partee was presented as an expert witness for the Applicant. Mr. Partee, a former Greenville County Public Defender, was served with notice of intent to seek the death penalty in nineteen cases, none of which ultimately resulted in death penalties. Mr. Partee made

it clear that effective assistance in such cases requires awareness by counsel of all the “assets and tools” in order to make the right strategic and tactical choices. One such choice, according to Mr. Partee, is how to accomplish the personalization of the defendant, described by Mr. Partee as “one of the most effective things that you can do.” (Hr’g. Tr. p.115). Having the closing argument as a choice gives counsel the opportunity to personalize the client in a more controlled fashion than “having him get up and lay himself bare to a mean old solicitor.”(Hr’g. Tr. p.117). Pete Partee’s testimony points up the inadequacy of trial counsel’s performance in the trial of this case. Additionally, although the trial judge’s attempt to cure was, as previously discussed, inadequate to inform Ellis Franklin of the right he had been deprived of, it should have been sufficient to alert trial counsel to move immediately for a mistrial, as this was the only remedy available to applicant at the time.

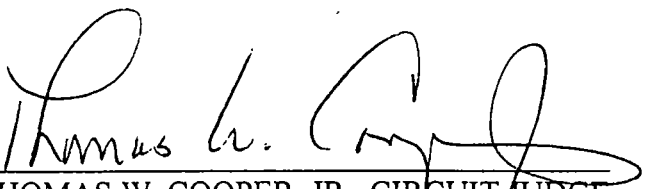
Counsel needs to know the law, assess all tools at his disposal, and advise his client. This Court concludes that trial counsel’s failure to advise the applicant of the right conferred upon him by § 16-3-28, or to take actions necessary to preserve that right on applicant’s behalf, constitutes ineffective assistance of counsel. A capital defendant is entitled to decide whether to exercise this important right on the basis of complete and accurate information, and trial counsel’s failure to provide that information renders their assistance ineffective. See Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (S.C. 1991) (counsel ineffective for failing to accurately advise defendant of law governing right to testify); Shirley v. State, 306 S.C. 241, 411 S.E.2d 215 (S.C. 1991) (counsel ineffective for failing to properly advise defendant as to relevant law); Kerrigan v. State, 304 S.C. 561, 406 S.E.2d 160 (S.C. 1991) (similar); Cain v. Evatt, No. 90-CP-13-382 (S.C. 4th Cir. Common Pleas, May 4, 1995) cert. dismissed sub nom., Cain v. State, Op. No. 24,503 (October 14, 1996)

(counsel ineffective for failing to advise capital defendant of right to personally make closing argument); Owens v. McKellar, No. 88-CP-26-605 (S.C. 15th Cir. Common Pleas, April 10, 1989) cert. denied, No. 90-OR-544 (April 9, 1990) (counsel ineffective for failure to secure capital defendant's right to final argument). Therefore, applicant is also entitled to post-conviction relief as to Ground 9(b) of his amended application.

Conclusion

This Court concludes that applicant is entitled to post-conviction relief on Grounds 9(a) and 9(b) of the amended application for post-conviction relief from his convictions and sentences for murder, grand larceny, first-degree criminal sexual conduct, and first-degree burglary because the trial court failed to secure a valid waiver of applicant's right to make a closing argument as guaranteed by S.C. Code § 16-3-28, and because trial counsel were ineffective for failing to advise applicant such that he could make an intelligent decision whether to exercise that right. The Court renders no judgment as to the remaining claims presented in the application.

IT IS SO ORDERED, this the 2^d day of October, 1998.


THOMAS W. COOPER, JR., CIRCUIT JUDGE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF WILLIAMSBURG	)	C/A No. 96-CP-45-117
ELLIS FRANKLIN,	)	
	)	
Applicant,	)	
	)	
vs.	)	ORDER
	)	
MICHAEL MOORE, Commissioner,	)	
South Carolina Department of	)	
Corrections,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before me by way of Respondent's Motion to Alter or Amend the Judgment in the above captioned post-conviction relief matter.

Applicant Ellis Franklin was convicted of murder, grand larceny, criminal sexual conduct, first degree, and burglary, first degree on January 20, 1993. He was sentenced on January 22, 1993 to ten years for grand larceny, thirty years for criminal sexual conduct, first degree, life imprisonment for burglary, first degree, and death by electrocution for murder. The Supreme Court of South Carolina affirmed applicant's convictions and sentences on March 13, 1995 in State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995), and certiorari was denied by the Supreme Court of the United States on October 12, 1995 in Franklin v. South Carolina, ____ U.S. ____, 116 S.Ct. 160 (1995). By Order dated October 2, 1998, this Court granted Applicant's application for post-conviction relief from his convictions and sentences. Respondent thereafter timely submitted a Motion to Alter or Amend the Judgment.

Section 16-3-28 of the South Carolina Code of Laws provides that "... in any criminal trial where the maximum penalty is death or in a separate sentencing proceeding following such trial, the defendant and his counsel shall have the right to make the last argument." As the language suggests, this statute applies only in capital murder cases where the death penalty is sought. The underlying purpose of this section must be to provide an additional layer of protection against a defendant being wrongly convicted and sentenced in a trial where the ultimate punishment is the death penalty. Given this, however, the burden of proof is not made any greater or otherwise enhanced by this statute. In other words, this section in no way changes the landscape of a criminal trial insofar as the elements of an offense, burden of proof, or rules of evidence or procedure; the only variation is that the defendant has the right to make the final argument to the trial jury. It is clear under South Carolina law that had this been a non-capital case (even non-capital murder), Franklin would have no statutory right to make the final argument, and therefore he could not ask for a new trial on the ground that he was not allowed the opportunity to make the final argument.



I hold the view that the General Assembly did not intend for § 16-3-28 to be available to defendants as an additional layer of protection against a conviction for a *non*-capital offense. The purpose of this section is to provide protection only in capital cases where the ultimate penalty is death. I therefore conclude that convictions for non-capital crimes, even when used as aggravating circumstances for a capital murder, should not be reversed for failure to obtain a knowing and voluntary waiver by the defendant on the record. The fact that Applicant was not given the opportunity to make the final argument to the jury has no bearing on his convictions for the non-capital offenses, as he would not have been entitled to make a final argument had those been the only offenses for which he was being tried.

Applicant argues that the remaining convictions must be vacated because they were “inextricably intertwined” with the murder charge and “all offenses were part of the same series of conduct...” Applicant’s Return at 4. However, in State v. Cooper, 312 S.C. 90, 439 S.E.2d 276 (1994), the Defendant was convicted of murder, armed robbery, kidnapping, and conspiracy, with these offenses undoubtedly being part of the same series of conduct. The murder conviction there was reversed, due to the failure to obtain a knowing and voluntary waiver of the right to make the final argument on the record. However, the court held that the convictions for armed robbery and conspiracy were “unaffected” by the failure to obtain the waiver, and were thus not disturbed on appeal. Id. at 94, 439 S.E.2d at 278 (footnote 2).

 Likewise, in State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1993), a murder conviction was reversed after there was no on the record waiver of the final argument by the defendant, but the accompanying convictions for kidnapping, conspiracy, and criminal sexual conduct, first degree were affirmed. The court held that the remaining convictions (other than murder) were “unaffected by trial errors raised for the first time on appeal...” and were thus not disturbed by the Supreme Court. Id. at 150, 437 S.E.2d at 90. Applicant argues in his return brief that a reviewing court “must determine, based on the facts of the particular case, whether the non-capital convictions ‘are unaffected by trial errors.’” Applicant’s Return at 5.

Applicant relies chiefly on State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987) and State v. Orr, 304 S.C. 185, 403 S.E.2d 623 (1991) for the proposition that a failure to obtain an on the record waiver mandates reversal of not only the capital murder conviction, but all related convictions as well. I disagree. Although Applicant is correct in his contention that Cooper and Charping did not suggest that those holdings were overruling the prior decisions in Reed and Orr, I find that the

Supreme Court provided more guidance on this issue in Cooper and Charping by expressly reversing only the murder convictions and their accompanying death sentences while leaving the remaining non-capital convictions and sentences intact.

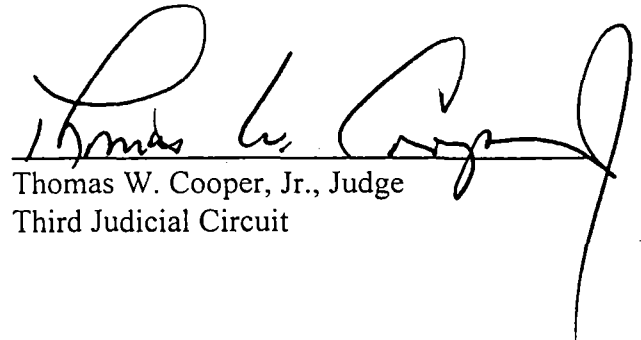
The thrust of Franklin's argument seems to be that, had he been allowed the opportunity to make the final argument before the jury as was his right in this capital murder trial pursuant to § 16-3-28, the verdicts of guilty returned by the jury on the non-capital offenses for which he was also on trial would have been different. I disagree. I find that the non-capital convictions in this case for criminal sexual conduct, first degree, burglary, first degree, and grand larceny were not affected by the failure to obtain a waiver of the right of final argument by the applicant/defendant. I find that there is sufficient evidence in the record to sustain guilty verdicts on the non-capital offenses even if they had been considered separately from the capital offense of murder. In other words, the evidence in the record is sufficient to support a finding that the jury could have convicted Applicant of the non-capital offenses in a separate trial on only those offenses, even though they were used as aggravating circumstances for the murder offense in this trial.

As has been stated above, such non-capital offenses are not contemplated by Code Section 16-3-28, and thus a defendant in such a trial would not have the right to make the final argument to the jury. This finding is further supported by the statutory interpretation that the General Assembly intended for § 16-3-28 to apply only in those trials where the ultimate punishment is the death penalty and also by the controlling precedent found in Cooper and Charping, where convictions for offenses other than capital murder were affirmed even after murder convictions were reversed pursuant to § 16-3-28.

Based on the foregoing, the motion to reconsider the order granting Applicant's relief from the conviction for murder is denied; the motion to reconsider the decision vacating the convictions for criminal sexual conduct, first degree, burglary, first degree, and grand larceny is granted and these convictions and sentences are reinstated.

AND IT IS SO ORDERED.

February 12, 1999



Thomas W. Cooper, Jr., Judge
Third Judicial Circuit

AT CHAMBERS
Manning, South Carolina

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

Ellis Franklin,)
)
Applicant,)

vs.) ORDER
) C/A NO.: 96-CP-45-117
)

Michael Moore, Director)
South Carolina Department of)
Corrections,)
)
Respondent.)

This matter is before the Court pursuant to Rule 59 (e) SCRCF.
The Applicant seeks an Order of this Court amending or altering its
Order of October 2, 1998 as modified by subsequent Order of this
Court dated February 12, 1999. The Motion to Alter or Amend or
Reconsider is respectfully denied.

This Court has considered the authority set out in the
Applicant's Motion and the Order granting Post Conviction Relief in
the case of Cooper v. Moore, 95-CP-32-2248. This Court accords
great deference to the PCR Judge in Cooper but does not feel bound
by his decision in that case. The factual circumstances in Cooper
are somewhat different than in the instant case. The PCR Judge
concluded in Cooper that "...all the testimony demonstrates that
Mr. Cooper would have wanted to speak to the jury had he known he
had that right." In the instant case, Mr. Franklin chose not even

to make a closing argument during the penalty phase, after he had been fully advised of his right in that regard.

Moreover, in Cooper, the PCR Court found that trial counsel's failure to advise him of his right to make a final argument constituted ineffective assistance of counsel. That Court found that the ineffective assistance applied to the non-capital as well as capital offenses facing Cooper.

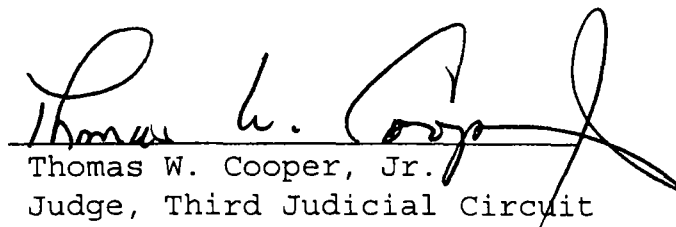
The right to make a final argument under these circumstances only attaches to capital offenses and the Defendant has been accorded the full benefit of that right in this Court's earlier Order. Inasmuch as the right to make the final argument does not attach to non-capital offenses, it is not ineffective assistance of counsel, insofar as those charges are concerned, to fail to advise a Defendant of the right to make a final argument.

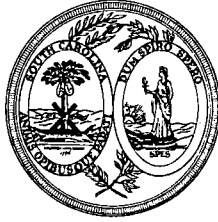
For the foregoing reasons, the Applicant's Motion to Alter or Amend is denied.

AND IT IS SO ORDERED.

Manning, South Carolina

Dated: April 8, 1999


Thomas W. Cooper, Jr.
Judge, Third Judicial Circuit



The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES M. CONDON
ATTORNEY GENERAL

May 7, 1999

Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

RECEIVED

MAY 07 1999

S. C. SUPREME COURT

Re: Notice of Appeal
Ellis Franklin v. Moore

Dear Mr. Shearouse:

Enclosed please find the original *Notice of Appeal* attached to the Orders dated February 12, 1999 and April 8, 1999 along with a Certificate of Service for filing in your office. By copy of this letter we are serving opposing counsel with this Notice today, as well as copies of the Notice to the South Carolina Office of Appellate Defense and the Clerk of Court for Williamsburg County for filing in their office.

Sincerely,

Donald J. Zelenka
Assistant Deputy Attorney General

DJZ/lbb
Enclosures

cc: David P. Voisin, Esquire
Kenneth Suggs, Esquire
S.C. Office of Appellate Defense
Clerk of Court, Williamsburg County