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

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

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

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**ELLIS FRANKLIN** . . . . . Respondent / Petitioner.

v.

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

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# OPENING BRIEF OF PETITIONER/RESPONDENT WILLIAM D. CATOE, COMMISSIONER ON WRIT OF CERTIORARI

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**RESPONDENT CATOE**

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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 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 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 upon a writ of certiorari entered on February 3, 2000. On that date the South Carolina Supreme Court granted the State's petition for a writ of certiorari that was filed on July 2, 1999 raising two questions for certiorari consideration. At the same time, the Court granted certiorari consideration as to Franklin's Question II and denied it as to Franklin's Question I. This opening brief of Respondent's solely addresses State's Question I and II.

### *A. Prior Procedural History of State v Ellis Franklin*

#### 1. The State Post-Conviction Relief Proceedings.

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 (943); 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. 985)(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 on the merits of grounds 9(a) and 9(b) 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. p. 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. p. 3801. Franklin opposed the motion by written response on October 26, 1998. App. p. 3816. On February 12, 1999, Judge Cooper entered and 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. p. 3238. On April 8, 1999, Judge Cooper entered an order denying Franklin's request to alter or amend judgement. 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.

Each side filed a timely notice of intent to appeal in the South Carolina Supreme Court. On July 2, 1999, the State of South Carolina filed a petition for writ of certiorari raising the following questions:

> **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 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 not make further arguments or testimony to the jury since he made a bad impression?**

On September 27, 1999, Franklin filed a Return to the State's Petition. He also filed a petition for writ of certiorari raising the following questions:

> 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?**

The Respondents filed a Return to the Cross-Petition on October 27, 1999. On February 3, 2000, the South Carolina Supreme Court granted the State's Petition for a Writ of Certiorari on each question. The Court also granted certiorari consideration as to Franklin's Question II and denied it as to Franklin's Question I. This opening brief of Respondent's solely addresses State's Question I and II.

**2. The Trial of Ellis Franklin.**

The Petitioner, 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 the initial jury was struck each defendant moved under Batson v. Kentucky, 479 U.S. 79 (1986). App. p. 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. p. 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. p. 2453-2470, 2477-2481.

The defense presented evidence in its defense. App. p. 2482-2690. The Petitioner, Ellis Franklin, testified on his own behalf. App. p. 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. p. 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. 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.

**3. 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, Petitioner 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?

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, 516 U.S.856, 116 S.Ct. 160 (1995).

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[1] Pertinent to the issue before this Court.

## ARGUMENT ON CERTIORARI

**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 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 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 *in open court* by counsel and Franklin to the trial judge a presumption of verity.[2]

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[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.)

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. Similarly, Sixth Amendment "prejudice" under Strickland v. Washington, 466 U.S. 668 (1984) has not been shown where there is no "reasonable probability that, but for the deficient performance, the result of the proceeding would have been different." Where confidence is the outcome is not undermined, post-conviction relief is not warranted. He decision of the state PCR court must be reversed and the conviction for murder reinstated.

**Standard of Review**

In this PCR action, Franklin bore the burden of showing by a preponderance of the evidence his entitlement to relief. S.C. Rule of Civil Procedure, Rule 71.1(e). Stated another way, in PCR proceedings, the applicant has the burden of establishing his entitlement to relief. Palacio v. State, 333 S.C. 506, 511 S.E.2d 62,65 (1999); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where allegations of ineffective assistance of counsel are made, the question becomes, whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Id.; Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1999)( Post-conviction relief (PCR) applicant's mere speculation as to what witness's testimony would have been had she been called at trial cannot, by itself, satisfy applicant's burden of showing prejudice resulting from counsel's failure to call such witness at trial.)

There is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in the case. Strickland v.

Washington, 466 U.S. 668, 104 S.Ct. 2025, 80 L.Ed.2d 674 (1984); Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In order to prove that counsel was ineffective, the petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, supra; Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). To show prejudice, the petitioner must show but for counsel's errors, there is a reasonable probability the result of the *trial* would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial. Strickland v. Washington, supra. This Court will sustain the PCR judge's factual findings and conclusions regarding ineffective assistance of counsel if there is any probative evidence to support those findings. Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997). However, if there is no probative evidence to support the PCR judge's findings, the findings will not be upheld. Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997).

In Adrien V. Brown v. State, Op. No. 25078, _ S.C. _ , _ S.E.2d _ (S.C. S.Ct March 6, 2000), this Court found that a trial counsel was deficient in failing to advise his client of his Fifth Amendment right not to testify, but further concluded that Brown failed to show Sixth Amendment "prejudice." [3] This Court stated that we do not believe that respondent was prejudiced, despite his assertion at his PCR hearing that he would not have testified at trial had he known his prior record would come out on cross-examination. On the whole, his testimony

[3] In Brown , this Court stated that "we nonetheless find defense counsel was ineffective." The Court however was equating "ineffective" with "deficient performance" under Strickland , not "ineffective assistance of counsel" and a Sixth Amendment violation. The inaccurate use of "ineffective" is conclusively revealed when the Court, on its own, analyzes the performance under Strickland's second prong finding no Sixth Amendment violation.

was more helpful than harmful. Furthermore, there is no reasonable probability the result of the trial would have been different had he chosen not to testify, because without his testimony, the jury would only have heard uncontroverted evidence of respondent's guilt." Brown firmly stands for the proposition that it is not enough to show deficiency in counsel advise on the right to testify or not testify, but that the second prong of Strickland must be shown before relief is granted.

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. More recently, this Court in Moorehead v. State, 329 S.C.329, 496 S.E.2d 415 (1998) reversed the granting of state PCR from a guilty plea. The Court concluded therein that information conveyed at defendant's plea hearing cured any misconception caused by counsel's alleged inaccurate advice. When considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing must be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing. Id.; Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997). Here, the on the record inquiry the trial court had with both counsel and Franklin at the original trial strongly suggests that Franklin had been aware of his right to make a personal closing statement in the guilt phase of the trial. App. p. 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.

p. 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 PCR hearing. [4] See Moorehead, supra.( "respondent's explanation that he answered the trial judge affirmatively on counsel's alleged advice that the questions were meaningless does not support the grant of PCR; defendant's claim he understood from counsel that the trial judge's questions at the guilty plea were only a "polite fiction" held not an invitation to answer untruthfully"). Reversal is warranted.

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[4] In Moorehead, this Court stated that a defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty. Wolfe v. State, 326 S.C. 158, 485 S.E.2d 367 (1997); Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997). It is reasonable to conclude , at a minimum, in this setting concerning a waiver of a *statutory nonconstitutional right* that in order to be granted relief Franklin also has the burden of showing that there is a reasonable probability that but for counsel's errors, the defendant would make a personal closing statement in the guilt phase. *Franklin has woefully fallen short in his burden where all evidence is that he would never had made such a statement.*

***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 a similar 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 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 post-conviction 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 conclusively 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. p. 2621-2680. At the conclusion of the guilt phase, however, no additional inquiry was made of either Franklin or his counsel of Franklin's statutory right to personally address the jury during 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 further shows 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.[5] In the trial judge's inquiry on the issues of the right to testify and make a closing statement during the penalty phase the following occurred pertinent to the guilt phase waiver 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.

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[5] The admitted affidavit of Judge Shuler (State's Exhibit 1) confirms this. See App.p. 3865-66.

> 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.

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 and closing argument. App. p. 2943, l. 17 - p. 2945, l. 1. Later, the court again inquired of the right of Franklin to make a closing argument in the penalty phase which he waived.

### 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. p. 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. p. 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. p. 3565, PCR Tr. p. 7, ll. 4-6. Barr declared that he had not read the transcript prior to the state PCR hearing. App. p. 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. p. 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. p. 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. p. 3567, PCR Tr. p. 9. He declared that he tried to make himself aware of South Carolina case law as it came out. App. p. 3567-68, PCR Tr. p. 9-10. He said that he reviewed advance sheets [S.C. Supreme Court slip opinions] and attended various criminal law seminars. App. p. 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. p. 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. p. 3570-71, PCR Tr. p. 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. p. 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. p. 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. p. 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. p. 3574, PCR Tr. 16, ll. 22-25. He claimed, however, that at the time of trial he does not know what he thought. App. p. 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. p. 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. p. 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. p. 3578, PCR Tr. p. 20, ll. 6-9. However, counsel Barr first indicated that he read the appellate decision in Franklin's case. App. p. 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. p. 3581-82, PCR Tr. p. 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. p. 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. p. 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. p. 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. p. 3587-88, PCR Tr. p. 29-30. He said that at that time, he was not aware of the guilt phase statutory right. App. p. 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. p. 3588-89, PCR Tr. p. 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. p. 3589-90, PCR Tr. p. 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. p. 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. p. 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. p. 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. p. 3597, PCR Tr. p. 39. Although he reviewed the Franklin opinion, he acknowledged that the issue "did not register" with him. App. p. 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. p. 3598, PCR Tr. p. 40.

Carraway recalled that he may have expressed to Mr. Barr him impression that Franklin had been a bad witness and did not want him to make a closing argument. App. p. 3598-99, PCR Tr. p. 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. p. 3618, PCR Tr. p. 58.[6] Further, he found that Franklin had tested as having significant deficits in adaptive behavior.

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

App. p. 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. p. 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. p. 3635-37, PCR Tr. p. 77-79. Dr. Grant opined that the understanding would require several hours of explanation. App. p. 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. p. 3641-42, PCR Tr. p. 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. p. 3646-47, PCR Tr. p. 88-89. Further, he questioned the trial testimony that declared Franklin was not mentally retarded, despite his IQ testing. App. p. 3649, PCR Tr. p. 91. Also, Dr. Grant admitted that he never asked Franklin about his understanding of the closing argument. App. p. 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. p. 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 ordinary case. App. p. 3668-69, PCR Tr. p. 110-111. He stated the defense must familiarize themselves with statutes governing a capital case, the law, and the facts. App. p. 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. p. 3672, PCR Tr. p. 114. Mr. Partee further suggested the right to make an "unsworn statement" or argument was a useful defense tool. App. p. 3672-73, PCR Tr. p. 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. p. 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. p. 3676-77, PCR Tr. p. 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. p. 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. p. 3687-88, PCR Tr. p. 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. p. 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. p. 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. p. 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. p. 3698, PCR Tr. p. 140.

The Respondents called Ellis Franklin, the Petitioner, to the stand. App. p. 3715, PCR Tr. p. 157. Franklin stated he did not do a closing argument in the penalty phase, because they

already found him guilty, initially claimed that he had never spoken with his lawyers about the penalty phase argument, denied he had spoke to the lawyers despite what he told the original trial judge. When there was an inquiry about whether he would have given an argument, Franklin declared " I would need to talk to my lawyer about advice." App. p. 3716, 17-18. Franklin did not remember any responses he gave to the trial judge about his closing argument. App. p. 3716-17, PCR Tr. p. 158-160.[7]

### C. 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 a similar 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 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:

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[7] 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.

> 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 Charping 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. Charping, 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. These cases were each addressing the matter under direct appeal standards of review, not collateral review standards. This is a distinction with a difference.

## LAW / ANALYSIS

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

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 of Franklin to lack any veracity or probative value. App. p. 3863. A reasonable reading of Judge Shuler's trial inquiry at App. p. 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 conspicuous and overt 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 in its opinion. Again, this testimony reasonably questions each counsels' ability to recall events about this issue despite their evident awareness of it at the time of the trial.

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 trial 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 collateral proceedings.

First, this Court must reject the state PCR court's conclusion that Franklin did not knowingly and intelligently waive his right to address the jury in the guilt phase. 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 and to verify the preexisting knowledge both counsel and Franklin of the right as it existed in the guilt phase. Accord, Moorehead , Brown , Importantly, Judge Shuler's unmistakable and evident questioning is uniquely probative of Franklin's knowledge and intent contemporaneous with the trial. The failure of counsel and Franklin 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 personal guilt phase argument and a probative affirmation that it was waived at the time of the guilt phase.

**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.***

**A. No Sixth Amendment Prejudice.**

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 guilt phase right by the trial court during the penalty phase, Franklin, himself, did not complain about any lack of knowledge nor express any desire to invoke it. *Second*, trial counsel expressed a firm and sound strategy that after Franklin had invoked his right to testify and presented testimony in the guilt phase, as a matter of strategy, counsel recommended and his client agreed to not make any personal closing argument in the penalty phase because he made a "bad impression" on the jury in his guilt phase testimony. 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. p. 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. p. 3585, PCR Tr. p. 27. Carraway recalled that he may have expressed to Mr. Barr him impression that Franklin had been a bad witness and did not want him

to make a closing argument. App. p. 3598-99, PCR Tr. p. 40-41. Franklin's own testimony at the state PCR hearing also revealed that he would have relied on counsel's advice to not give a closing statement in the guilt phase in the same manner that he relied upon it to not give a closing statement in the penalty phase. When there was an inquiry about whether he would have given an argument, Franklin declared " I would need to talk to my lawyer about advice." App. p. 3716, 17-18. Franklin has therefore failed in his burden of proof to show any intent on his part to have made a guilt phase closing argument. Therefore, it must be found to fall short, as a matter of law, 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).[8] His failure to do so must result in the denial of state post-conviction relief where no reasonable probability exists that he would have invoked his statutory right to make such a statement and/or that the verdict would be not guilty.

**B. Any Alleged Error Was Harmless**

First, both counsel were consistent, although their PCR 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.

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[8] Although this Court may conclude trial counsel's performance was deficient, it does not necessary follow that relief must be given. Confidence in the outcome must be undermined. Here, it is not.

Further, under South Carolina Rules of Civil Procedure, Rule 61, relief cannot be granted for *harmless nonconstitutional 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. Harmless-error analysis is triggered only after the reviewing court discovers that an error has been committed. See Lockhart v. Fretwell, 506 U.S. 364, 370 n. 2 (1993). And under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice. As the Court stated in Lockhart, supra, "our opinion does nothing more than apply the case-by-case prejudice inquiry that has always been built into the Strickland test. Since we find no constitutional error, we need not, and do not, consider harmlessness." See Kimmelman v. Morrison, 477 U.S. 365 (1986) (when attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under harmless error standard of Chapman v. California, which requires state to prove that defendant was not prejudiced by the error; by defaulting, counsel shifts burden to defendant to prove that there exists reasonable probability that, absent his attorney's incompetence, he would have been convicted.)

Assuming arguendo that he was not advised of the right, that failure alone does not demand vacation of either guilt verdict for murder or sentencing. Brown v. State, supra. 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 Charping concurrence, Judge Goolsby found the same error "is a most harmless and therefore not reversible. Like Charping, Franklin testified in his own defense that he did have sexual relations with the victim, but denied

the homicide. Charping'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 Charping, 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 jury 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 under the various theories of harmless error analysis. As the Charping concurrence stated, "a harmless error, by definition, is an error that is not prejudicial." Despite this alleged error of failing to be advised of his right to make a personal guilt phase closing statement in addition to his lawyers, Mr. Franklin is entitled to collateral relief for constitutional errors only if the above trial error is not harmless. See Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)(adopting the harmless- error standard from Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)); see Crespin v. New Mexico, 144 F.3d 641, 649 (10th Cir.1998). In the context of collateral review, an error is harmless unless it had "substantial and injurious effect or influence in determining the jury's verdict." See Crease v. McKune, 189 F.3d 1188, 1192 (10th Cir.1999)(quoting Brecht 507 U.S. at 637, 113 S.Ct. 1710). To warrant relief, Mr. Franklin must have suffered "actual prejudice." Id. If we are in grave doubt as to the harmlessness of an error, the PCR petitioner must prevail.

See O'Neal v. McAninch, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). "Grave doubt" exists when, in light of the entire record, the matter is so evenly balanced that the court feels itself in virtual equipoise regarding the error's harmlessness. Id. at 435, 115 S.Ct. 992. While the record must be reviewed in light of the error's effect, it is important to bear in mind that the appellate court may not usurp the jury's role as the arbiter of guilt or innocence. Kotteakos, 328 U.S. at 764, 66 S.Ct. 1239. The factors that a court may consider include the closeness of the case, the centrality of the issue affected by the error, and the steps taken to mitigate the effects of the error. See United States v. Nyman, 649 F.2d 208, 212 (4th Cir.1980). This alleged error plainly meets that definition of harmless error and relief must be denied pursuant to Rule 61 or any standard of harmless error applicable to state PCR proceedings.[9]

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[9] In the Return to the earlier certiorari petition, Franklin claimed that harmless error analysis under Rule 61 should not apply because this was a criminal rather than a civil matter. Rule 61 plainly states without exception: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court **inconsistent with substantial justice.** The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." As S.C. Code Section 17-27-70 states : *"All rules and statutes applicable in civil proceedings are available to the parties."* These rules necessary include Rule 61. Therefore the "substantial justice" harmless error test apples. Since this error is a statutory and not a constitutional error, the States submits that this test is the appropriate test. Since substantial justice had not been impaired by the failures concerning a closing statement that is not evidence, relief is not warranted.

First, there was overwhelming evidence of Franklin's guilt in the death of Ms. Jennifer Martin. Franklin's trial testimony was impeached and Franklin's varied versions on involvement with the victim pointed conclusively toward his own guilt. Plainly, no reasonable person could consider the violent brutality to be the result of consensual sex as franklin belatedly claimed. Franklin's bloody palm print was left on the fan that crushed the victim's head and his semen was determined by DNA analysis to on the victim's body. Blood on his pants matched the blood on the fan and the victim. Necklaces belonging to the victim were identified in his possession. The effect of any closing statement after his conflicting and contradictory testimony would have been imperceptible, except to more fully ensure a guilty verdict as his counsel analyzed. The result would not have changed. Post-conviction relief must be denied.

**C. Summary**

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 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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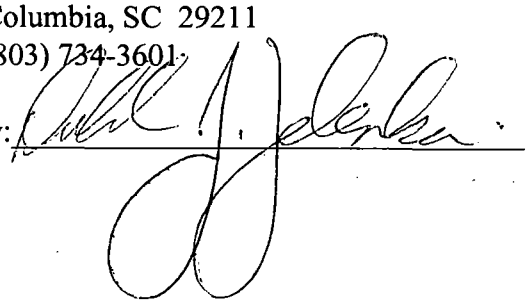
By: 

March 6, 2000

## CERTIFICATE OF SERVICE

**I, Donald J. Zelenka,** hereby certify that I have served the ***Opening Brief 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 6th day of March, 2000.

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