

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

October 19, 2012

Melanie Huggins-Ward
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: James Nathaniel Bryant, III v. The State
Lower Court Case No. 2007CP2605062
Appellate Case No. 2010-181666

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CHIEF DEPUTY CLERK

cc:

S. Creighton Waters
Alphonso Simon, Jr.
Diana L. Holt

Post Office Box 6454
Columbia, South Carolina 29260
Voice 803.782.1663
Fax 803.787.0374
Email DianaHolt@utexas.edu

October 9, 2012
The Honorable Daniel E. Shearouse
Clerk of South Carolina Supreme Court
ATTN: Ms. Debbie Hopkins
P.O. Box 11330
Columbia, S.C. 29211-1330

RECEIVED

OCT 11 2012

S.C. SUPREME COURT

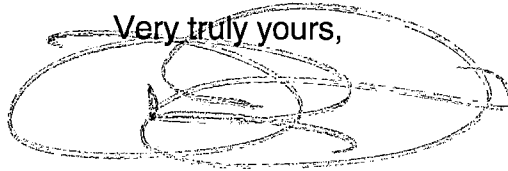
Re: *James Nathaniel Bryant v. State*, Appellate case: 2010-181666

Dear Ms. Hopkins:

The purpose of this letter is to confirm our conversation this afternoon in which I notified you that I would continue my representation of Mr. Bryant into the federal court system. However, Mr. Lominack will be teaching school full-time and will not continue as Mr. Bryant's counsel. Mr. Bryant has been made aware of all of this information and is in agreement with it. Please let me know if I need to do anything further at this point. As always, thanks for your gracious professionalism.

With highest personal regards, I remain

Very truly yours,



Diana L. Holt

(CC recipients electronically only)

cc: S. Creighton Waters, Esq. AGCwater@scag.gov
Al Simon, Jr., Esq. (Asimon@scag.gov)
Robert Lominack, Esq. (robert@robertlominack.com)

The Supreme Court of South Carolina

James Nathaniel Bryant III, Petitioner,

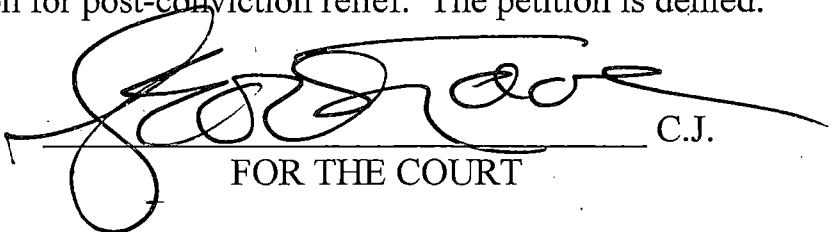
v.

State of South Carolina, Respondent.

Appellate Case No. 2010-181666

ORDER

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



C.J.
FOR THE COURT

Columbia, South Carolina

October 3, 2012

cc:

S. Creighton Waters

Alphonso Simon, Jr.

Robert Edward Lominack

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

RECEIVED

JUN 2 2011

Case No. 2007-CP-26-5062

S.C. Supreme Court

James Nathaniel Bryant, III Petitioner,

v.

South Carolina Respondent.

PETITION FOR WRIT OF CERTIORARI

Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271

Attorney for Petitioner

Table of Contents

TABLE OF AUTHORITIES	v
ISSUES PRESENTED.....	viii
PROCEDURAL HISTORY	1
STATEMENT OF THE CASE.....	2
I. THE EVIDENCE OF THE CRIME AND THE DEFENSE THEORIES AT TRIAL.....	2
A. Defense theory that Mr. Bryant was misidentified	3
B. Defense theory that Cpl. Lyden was the aggressor	4
C. Defense theory that Cpl. Lyden engaged in misconduct	5
II. SENTENCING PHASE EVIDENCE.....	6
A. Evidence regarding the conditions of confinement.....	7
B. Evidence of a rumored escape plan	11
III. REVELATION THAT ONE OF THE JURORS SUFFERED FROM A SIGNIFICANT HEARING IMPAIRMENT.....	12
A. Jones' hearing impairment was substantial and had existed for a long time.....	12
B. Indications of hearing impairment during jury selection	13
C. Indications of Jones' inability to hear testimony in the guilt-or-innocence phase	14
D. Jones admits that she did not hear testimony during both portions of the trial, but trial counsel kept her on the jury because of her race	16
REASONS WHY THE WRIT SHOULD BE GRANTED.....	18
I. TRIAL COUNSEL FAILED TO PROTECT MR. BRYANT'S RIGHT TO A FAIR AND COMPETENT JURY	20
A. The constitutional right to a fair and impartial jury was not met in Mr. Bryant's case, because Jones was not able to hear all the testimony	21
B. Archer based his decision to keep Jones on the jury on the very racial stereotype that the Supreme Court has found unlawful	25

C. In finding that trial counsel performed reasonably the lower court simply made up a “strategic” reason without any evidentiary support	26
II. TRIAL COUNSEL – IGNORANT OF THE LAW – FAILED TO ENSURE THAT THE PENALTY PHASE WAS AN INDIVIDUALIZED ASSESSMENT OF THE APPROPRIATE PUNISHMENT BASED ON RELEVANT EVIDENCE	27
A. Evidence about the conditions of confinement is inadmissible	27
B. Trial counsel – unaware that they could preclude the state from introducing conditions of confinement evidence – tried to head off the state’s presentation with one of their own	28
C. Mr. Bryant’s trial became a referendum on prison life rather than the individual assessment of the appropriate punishment for Mr. Bryant.....	31
D. The PCR court ruled that trial counsel performed reasonably based on the erroneous finding that the law at the time of the trial did not prohibit evidence regarding the conditions of confinement	32
III. TRIAL COUNSEL FAILED TO PROTECT MR. BRYANT FROM THE ADMISSION OF IRRELEVANT AND INFLAMMATORY EVIDENCE ABOUT A RUMORED ESCAPE PLAN OF ANOTHER INMATE	33
IV. TRIAL COUNSEL ALIENATED THE JURY BY RELYING ON INCONSISTENT THEORIES OF DEFENSE DURING THE GUILT PHASE DESPITE THERE BEING NO DOUBT OF MR. BRYANT’S GUILT	36
V. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE ADMISSION OF EVIDENCE REGARDING CONDITIONS OF CONFINEMENT, WHICH INJECTED AN ARBITRARY FACTOR INTO MR. BRYANT’S TRIAL.....	42
VI. MR. BRYANT’S RIGHT TO DUE PROCESS WAS VIOLATED BY THE USE OF A JUROR WHO DID NOT HEAR ALL THE TESTIMONY	44

VII. MR. BRYANT’S RIGHT, AS GUARANTEED BY THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, TO DUE PROCESS AND A FAIR TRIAL FREE FROM ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY WAS VIOLATED BY THE INTRODUCTION OF CONDITIONS OF CONFINEMENT EVIDENCE	45
CONCLUSION.....	46

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991)	21
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986)	25, 26
<i>Duckett v. Mullin</i> , 306 F.3d 982 (10 th Cir. 2002)	32
<i>Edmonson v. Leesville Concrete Co.</i> , 500 U.S. 614 (1991)	25
<i>Florida v. Nixon</i> , 543 U.S. 175, (2004)	36, 38
<i>Georgia v. McCollum</i> , 505 U.S. 42 (1992)	25
<i>Gray v. Mississippi</i> , 481 U.S. 648 (1987)	21
<i>Green v. Nelson</i> , 595 F.3d 1245 (11 th Cir. 2010)	29
<i>In Re Murchison</i> , 349 U.S. 133 (1955)	20
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	21
<i>Jordan v. Massachusetts</i> , 225 U.S. 167 (1912)	21
<i>Kimmelman v. Morrison</i> , 477 U.S. 365 (1986)	29
<i>Le v. Mullin</i> , 311 F.3d 1002 (10 th Cir. 2002)	32
<i>Murphy v. Florida</i> , 421 U.S. 794 (1975)	21
<i>Nix v. Whiteside</i> , 475 U.S. 157 (1986)	25
<i>Noble v. Kelly</i> , 89 F.Supp.2d 443 (S.D.N.Y. 2000), <i>aff'd</i> 246 F.3d 93 (2d Cir. 2001)	28
<i>Reynolds v. United States</i> , 98 U.S. 145 (1878)	21
<i>Robinowitz v. United States</i> , 366 F.2d 34 (5 th Cir. 1955)	21
<i>Rose v. Clark</i> , 478 U.S. 570 (1986)	21
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	passim
<i>Sullivan v. Fogg</i> , 613 F.2d 465 (2d Cir. 1980)	21

<i>Tumey v. Ohio</i> , 273 U.S. 510 (1927).....	21
<i>United States v. (Angela) Johnson</i> , 495 F.3d 951 (8 th Cir. 2007).....	32
<i>United States v. (John) Johnson</i> , 713 F.Supp.2d 595 (E.D. La. 2010).....	32
<i>Wiggins v. Smith</i> , 539 U.S. 510 (2003)	19, 41
<i>Wilson v. Butler</i> , 813 F.2d 664 (5 th Cir. 1987)	37
<i>Wilson v. Mazzuca</i> , 570 F.3d 490 (2nd Cir. 2009)	41

STATE CASES

<i>Commonwealth v. Greiner</i> , 455 A.2d 164 (Pa. 1983).....	22
<i>Henry v. State</i> , 604 S.E.2d 826 (Ga. 2004).....	34
<i>In re Wilson</i> , 838 P.2d 1222 (Cal. 1992).....	29
<i>People v. Guay</i> , 898 N.Y.S.2d 353 (N.Y. 2010)	24
<i>People v. Trait</i> , 527 N.Y.S.2d 920 (N.Y. 1988).....	37
<i>State v. Berberian</i> , 374 A.2d 778 (R.I. 1977)	22
<i>State v. Bowman</i> , 366 S.C. 485, 623 S.E.2d 378 (2006)	33, 34, 43
<i>State v. Bryant</i> , 354 S.C. 390, 581 S.E.2d 157 (2003)	1
<i>State v. Bryant (II)</i> , 372 S.C. 305, 642 S.E.2d 582 (2007).....	1, 43
<i>State v. Burkhardt</i> , 371 S.C. 382, 640 S.E.2d 450 (2007)	27
<i>State v. Copeland</i> , 278 S.C. 572, 300 S.E.2d 63 (1982)	27
<i>State v. Gregory</i> , 147 P.3d 1201 (Wash. 2006).....	35
<i>State v. (Jeffrey) Jones</i> , 343 S.C. 562, 541 S.E.2d 813 (2001).....	36
<i>State v. Miller</i> , 722 P.2d 1131 (Kan. Ct. App. 1986)	23
<i>State v. Moorman</i> , 358 S.E.2d 502 (N.C. 1987)	36
<i>State v. Motts</i> , 391 S.C. 707 S.E.2d 804 (2011).	42

<i>State v. Pace</i> , 316 S.C. 71, 447 S.E.2d 186 (1994)	37
<i>State v. Plath (Plath II)</i> , 281 S.C. 1, 313 S.E.2d 619 (1984)	passim
<i>State v. Simmons</i> , 267 S.C. 479, 229 S.E.2d 597 (1976)	37
<i>State v. Turner</i> , 521 N.W.2d 148 (Wisc. 1994).....	23
<i>Turpin v. Helmeci</i> , 518 S.E.2d 887 (Ga. 1999)	29

S.C. CODE SECTIONS

S.C. Code Ann. §14-7-810	22
S.C. Code Ann. § 16-3-25(C) (1).....	42

RULES

Rule 403, SCORE.....	34
----------------------	----

OTHER AUTHORITIES

American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.11.5 (2003)	30
--	----

Issues Presented

- I. Mr. Bryant had the right to a fair and competent jury. Because of a hearing impairment, a juror did not hear testimony in both phases of the trial yet defense counsel kept her on the jury because of her race. In denying relief the lower court did not address the actual race-based rationale of trial counsel. Was it reasonable for defense counsel to keep a partially deaf juror because she was black?
- II. Twenty years prior to Mr. Bryant's retrial this Court deemed conditions of confinement evidence inadmissible. Ignorant of this law, Mr. Bryant's trial counsel introduced evidence about the conditions of confinement. The prosecution followed suit and the penalty phase focused on the amenities available to an SCDC inmate. The lower court found that trial counsel was not ineffective because at the time of the retrial the law did not preclude the admission of this type of evidence. Is this finding correct as a matter of law?
- III. This Court has previously held that testimony about the attempted escape of another inmate was inadmissible. Here, the prosecution introduced evidence of a rumored escape plan without any evidence linking Mr. Bryant to this plan. The lower court found that trial counsel's failure to object to this evidence was reasonable, because the evidence did not relate to Mr. Bryant. Is the irrelevance of evidence a reasonable basis for not objecting to its admission?
- IV. Deploying a defense theory that lacks evidentiary support risks alienating the jury. At the first phase, trial counsel believed that a guilty verdict was a foregone conclusion but nevertheless suggested that: (1) Mr. Bryant had been misidentified; (2) Mr. Bryant was acting in self-defense, and; (3) the victim had engaged in misconduct. The lower court found that trial counsel performed reasonably because these theories were not inconsistent with one another and were used to "hold the State to its Burden of proof." Is this finding supported by the evidence?
- V. Conditions of confinement evidence represents an arbitrary factor that is subject to appellate review whether or not trial counsel objected to the evidence. Appellate counsel did not raise this issue on direct appeal, and the lower court found that absent an objection at trial appellate counsel was precluded from raising it. Was this legal finding

correct?

- VI. Mr. Bryant had a due process right to a fair and competent jury. A juror admitted to not hearing all the testimony, but the lower court found that she had not missed material testimony. Does the record support this finding?
- VII. Due process requires that the death penalty not be imposed in an arbitrary and capricious manner. The introduction of conditions of confinement evidence injected an arbitrary factor into the jury's decision-making process. The lower court ruled that Mr. Bryant benefitted from the introduction of this evidence and that, in any event, this Court on direct appeal had found this evidence to be permissible. Does the record evidence support the lower court's findings?

Procedural History

In June of 2000, James Bryant killed Corporal Dennis Lyden after being pulled over for a traffic violation. In 2001, Mr. Bryant was convicted of murder and armed robbery and sentenced to death. This Court reversed the convictions and death sentence based on the prosecution's improper contact with potential jurors. *State v. Bryant*, 354 S.C. 390, 581 S.E.2d 157 (2003).

The state retried Mr. Bryant in 2004 before the Honorable Paula H. Thomas and the jury again sentenced Mr. Bryant to death. The convictions and sentence were affirmed on direct appeal. *State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582 (2007). Mr. Bryant filed a timely application for post-conviction relief, which he amended on October 30, 2009. On January 25, 2010, an evidentiary hearing was held. Seven months later the PCR court announced its intention to deny relief and asked Respondent to draft an order consistent with general findings set out by the court. The lower court then denied relief in an 87-page order drafted entirely by Respondent. App. 3354. Thereafter, Mr. Bryant objected to the lower court's use of Respondent's proposed order. App. 3442. The Court granted the motion and stated that it would "evaluate the matter, review the transcripts on [its] own, and . . . do the administerial [sic] duty of drafting an order." App. 3454. On November 15, 2010, the PCR court issued a 14-page order denying relief.

Statement of the Case

I. The evidence of the crime and the defense theories at trial

There was never any question as to Mr. Bryant's guilt. In June of 2000, Corporal Dennis Lyden pulled Mr. Bryant over for coasting through a stop sign near a night club from which Mr. Bryant and some friends had just left. App. 1033-34, 1022-26. After determining that Mr. Bryant did not have a valid driver's license, Cpl. Lyden initiated an arrest. Mr. Bryant and Cpl. Lyden began to argue, but Mr. Bryant nevertheless turned around as if he was preparing to be handcuffed. App. 1039-40, 1068-69, 1328-29. Before Cpl. Lyden could get the handcuffs on him, Mr. Bryant turned back around. The two men grabbed each other and fell to the ground. Mr. Bryant hit Cpl. Lyden repeatedly and then shot him to death. App. 1069.

Mr. Bryant fled the scene before police officers arrived. He washed up and changed clothes at a friend's house before setting out alone. App. 1107-11, 1116-17, 1123-27, 1334-35. The next morning he was discovered in a backyard shed. Mr. Bryant initially attempted to flee from the police, but then complied with instructions to stop and drop the gun he was holding. Mr. Bryant was arrested without further incident. App. 1136-39, 1141-48.

Both trial counsel recognized that there "was no question of [Mr. Bryant's] guilt" and that they "didn't have a defense in the guilt phase." App. 2811, 2731. Indeed, lead counsel, Paul Archer, acknowledging the certainty of a guilty verdict, told the jury in his guilt phase closing argument that it

would hear from Mr. Bryant later in the trial. App. 1366-67. Nevertheless, at the guilt phase of the trial Archer pursued at least three identifiable theories: Mr. Bryant was misidentified, Cpl. Lyden was the initial aggressor, and Cpl. Lyden had engaged in misconduct.

A. Defense theory that Mr. Bryant was misidentified

Ignoring the overwhelming evidence of guilt, Archer first suggested that Mr. Bryant had been misidentified. Earl and Jane Deaton, who lived across the street from the location of the crime, testified for the state. Mr. Deaton actually witnessed the shooting of Cpl. Lyden. The purpose of Deaton's testimony was not to establish that Mr. Bryant was the person who committed the crime – since this was not reasonably in dispute – but rather to testify about the circumstances of the murder. Deaton described seeing a man fitting Mr. Bryant's description beating Cpl. Lyden while on top of him and then shooting him. App. 976-85.

Nevertheless, Archer cross-examined Mr. Deaton in a manner suggesting that Mr. Bryant was not the perpetrator. "You didn't identify [the perpetrator] as James Nathaniel Bryant; is that correct?" App. 997. Archer admitted at the PCR hearing that his cross-examination of Deaton was designed to show that Deaton "didn't really see who did it." App. 2834. Similarly, when questioning Ms. Deaton, he elicited one fact – Ms. Deaton did not actually see who shot Cpl. Lyden. App. 1008.

Continuing to pursue this theory, Archer argued in closing that the state's ballistics evidence failed to tie Mr. Bryant to the crime. When Mr. Bryant was arrested, he had Cpl. Lyden's gun. However, the prosecution's ballistics expert was unable to definitively match the bullet that killed Cpl. Lyden with this gun. Archer – attempting to cast doubt on the state's case that Mr. Bryant shot Cpl. Lyden – argued that “[t]here was no proof that that bullet found in Officer Lyden came from Officer Lyden's gun.” App. 1369. The implication was that another gun – not the one in Mr. Bryant's possession – was used to kill Cpl. Lyden.

B. Defense theory that Cpl. Lyden was the aggressor

Taking a different approach and implicitly conceding that Mr. Bryant was present, Archer suggested that Cpl. Lyden was the aggressor. Under this theory Mr. Bryant was merely defending himself.

Q: Sir, when you said that you saw a big man beating someone; is that correct?

A: Yes, sir.

Q: Officer Lyden is a big man; isn't he?

[App. 995]

Archer went on to suggest that Mr. Deaton's testimony that he heard a black man say, “You won't do this to me again,” was inaccurate and that Cpl. Lyden – not Mr. Bryant – made the statement. App. 995-96. These lines of cross-examination suggested that (1) Cpl. Lyden was actually the person on top of Mr. Bryant and (2) Cpl. Lyden was the one yelling, not Mr. Bryant.

Archer also attempted to use Mr. Bryant's injuries to suggest that he was merely defending himself. The state presented evidence establishing that Mr. Bryant only suffered bruises to his knuckles. The evidence tended to show that these injuries were the result of hitting Cpl. Lyden with his fists. Nevertheless, Archer attempted to get the state's pathologist to opine that these injuries were defensive wounds. App. 1204. After the pathologist described the injuries to Mr. Bryant as consisting of bruises to his knuckles, Archer asked, "in your opinion could these be defensive wounds?" *Id.* The pathologist agreed that generally wounds on the hand could be defensive but in this case clearly were not. *Id.*

C. Defense theory that Cpl. Lyden engaged in misconduct

Finally, Archer argued that Cpl. Lyden had engaged in misconduct in stopping Mr. Bryant. Under this theory, Mr. Bryant had not coasted through a stop sign; rather, Cpl. Lyden pulled him over because he was black. Archer cross-examined Lance Clarke, who was in the car with Mr. Bryant when they were pulled over, about whether or not he had noticed Mr. Bryant cruising through a stop sign. App. 1336. Later, in his closing argument Archer argued that Mr. Bryant had not failed to stop at the stop sign. In his PCR testimony Archer confirmed that he was trying to show that Cpl. Lyden had engaged in "racial profiling," and that it was Mr. Bryant's anger over being stopped for no reason that caused him to snap and kill Cpl. Lyden. App. 2839.

As defense counsel expected, the jurors did not buy Archer's various theories and found Mr. Bryant guilty.

II. Sentencing phase evidence

At the penalty phase the state alleged four statutory aggravating factors: murder of a law enforcement officer, murder during the commission of a robbery while armed with a deadly weapon, murder during the commission of a larceny with the use of a deadly weapon, and murder during the commission of physical torture. App. 1307-08. The state also presented evidence of Mr. Bryant's prior record – including instances during which Mr. Bryant was pulled over for traffic violations and one instance during which he began to resist arrest – and victim impact testimony relating the impact of Cpl. Lyden's death on his family, as well as the Horry County police department. App. 1426-1612.

The defense relied primarily on establishing that (1) Mr. Bryant would not pose a risk of danger to inmates or staff if sentenced to life in prison¹, (2) Mr. Bryant had a genuine religious commitment², (3) life in prison was a harsh sentence, and (4) Mr. Bryant was loved by his family and others. The evidence supporting these theories was generally undisputed.

¹ Several jail guards and prison correctional officers described Mr. Bryant's institutional behavior as exemplary, including an incident in which Mr. Bryant thwarted an inmate-on-inmate assault. App. 1839, 1850-51.

² For example, a prison chaplain, Durward Van Bebbber testified that Mr. Bryant was "attentive," "energetic," and "one of the few guys [he] didn't have to talk to about talking during the worship services." App. 1795.

A. Evidence regarding the conditions of confinement

Unaware that they could have prevented the state from introducing evidence about the conditions of confinement, Archer and Johnston – in an apparent attempt to head off a contrary prosecution portrayal – introduced testimony describing a life sentence as a harsh punishment. App. 2825.

Neither attorney had ever read *State v. Plath* and both were unfamiliar with its holding that evidence regarding the conditions of confinement were not admissible. App. 2744, 2821. Before the trial began, Archer and Johnston believed that Bailey would try to demonstrate that prison was easy. App. 2740-41. Indeed, in a pretrial letter to the defense risk assessment expert, Archer indicated his belief that the prosecution would “try to show the niceties of prison and make prison look easy.” App. 2818. Therefore, Archer and Johnston presented evidence to rebut what they believed would be the inevitable prosecution presentation.

Archer and Johnston’s effort to establish life in prison as a severe sentence rested primarily with the testimony of a social worker, Lorita Whitaker, who was qualified as an “expert in human behavior in prisons.” App. 1732. To support her ultimate conclusion that a life without parole sentence was severe, Johnston asked her to “explain to the jury what prison life is basically like for the average prisoner who is serving time.” App. 1741. Whitaker described the physical dimensions of a prison cell as well as what she characterized as the high level of fear within prisons. App. 1741-42. She went on to describe family visits as non-contact visits through glass windows.

App. 1743. Finally, Whitaker described the food prisoners eat, the clothes they wear, and the general lack of privacy they endure. App. 1744-45.

In his cross-examination, Bailey focused on Whitaker's testimony about the conditions of confinement. Early in his cross-examination, however, Bailey learned that Whitaker had never actually visited to a South Carolina prison, had only been to three prisons in Georgia, and none more recently than "a few years ago." App. 1772. Based on Whitaker's complete lack of knowledge about South Carolina prisons, Bailey moved to strike her testimony. App. 1771. This motion was denied. Despite Whitaker's ignorance of South Carolina prisons, Bailey had her testify that the prisoners have access to dieticians, televisions, basketball courts, baseball teams, medical care, and, in Georgia at least, the ability to crochet. App. 1772-75.

The defense also presented the testimony of a risk assessment expert, James Aiken, who had evaluated Mr. Bryant and was prepared to offer his assessment that Mr. Bryant would not be a danger in prison. However, as with Whitaker's testimony, Archer veered into the area of conditions of confinement by asking Aiken to describe: the psychological effect of prison, effect on family relationships, lack of contact visits, exposure to "bullying" guards, prison food, noisy environment, and lack of privacy. App. 1947-54. In the end, the primary reason for Aiken's testimony – that Mr. Bryant did not pose an undue risk of harm to staff or other inmates if sentenced to life in

prison – gave way to evidence not about Mr. Bryant but about prison conditions.

Presumably because of Mr. Bryant's exemplary conduct for the three years preceding his second trial, Bailey chose to focus his cross-examination of Aiken on the availability of prison amenities rather than his risk assessment. Bailey questioned Aiken about the following items or activities available to an inmate serving a life – or less-than-life – sentence:

- Presence of a dietician at the prison, App. 1959.
- Three meals each day, *Id.*
- Sporting activities such as basketball and intramural softball, App. 1959-60.
- Access to a library, App. 1961,
- Televisions, *Id.*
- Radios, *Id.*,
- Work opportunities, App. 1962,
- Cigarettes, *Id.*,
- Food – coca-cola, candy bars, Cracker Jacks, and peanuts, *Id.*,
- Contact visits, App. 1966.

Defense counsel did not object to this line of questioning.

Finally, in an effort to establish the genuine religious commitment that Mr. Bryant exhibited in prison, Johnston presented the testimony of Lieber Correctional Institution's chaplain, Derward Van Bebber. Despite the fact

that the chaplain was asked no questions about the conditions of confinement for an inmate serving a life sentence, Bailey's cross-examination honed in on this area. Proceeding through a laundry list of items or activities afforded inmates housed in general population, Bailey had Van Bebber agree that the following are allowed:

- Cigarettes
- Canteen, where you can "get about anything you can get from Piggly Wiggly or Bi-Lo's," App. 1800-01, including candy bars, peanuts, and popcorn.
- Work opportunities
- Playing cards,
- Watch television,
- Availability of basketball courts,
- Access to a library,
- Ability to play hand ball,
- For some inmates, ability to have a television in their cell.

[App. 1800-01.]

As with the cross-examination of Aiken, defense counsel did not object to this testimony. Both defense counsel recognized that descriptions of prison "amenities" and a portrayal of life in prison as a "country club" would be prejudicial. App. 2826. Archer conceded that had he known the law, he would have objected to Bailey's introduction of the conditions of confinement

evidence which was “making it sound like prison was a piece of cake.” App. 2826.

B. Evidence of a rumored escape plan

Bailey used one of Mr. Bryant’s mitigation witnesses to inject the unsupported suggestion that Mr. Bryant – or someone on death row – was involved in a rumored escape attempt. One of the primary penalty phase theories of mitigation focused on Mr. Bryant’s sincere religiosity. In support of this mitigating factor, the defense presented the testimony of witnesses who vouched for Mr. Bryant as genuinely thoughtful and religious. As mentioned *supra*, one of these witnesses was Derward Van Bebber, the Lieber Correctional Institution chaplain.

The prosecution did not cross-examine Van Bebber specifically about Mr. Bryant and did not contest Van Bebber’s characterizations of Mr. Bryant’s religious sincerity. However, Bailey did question Van Bebber about the intentions of other inmates concerning attendance at religious services. For example, Bailey asked, “[i]nmates would have potential motivations other than religious conviction to go to chapel; wouldn’t they?” App. 1798. Bailey questioned Van Bebber about one Easter service in particular. This service – according to Van Bebber – was cancelled due to a rumor that some inmates were planning an escape. App. 1799. At first Bailey suggested that the escape rumor involved inmates who had signed up to attend the Easter service but Van Bebber refuted this. Bailey then made sure to emphasize the fact that

the planned escape rumor emanated from death row, which had already been clearly established as Mr. Bryant's place of incarceration. App. 1799-1800. The prosecution never established that an escape plan actually existed nor did it demonstrate – or even attempt to show – that Mr. Bryant had any role in the purported escape plan.

III. Revelation that one of the jurors suffered from a significant hearing impairment

Shirley Jones was qualified and selected to be on the jury despite early indications that she had a hearing problem. During jury selection, no real effort was undertaken to discover the true nature of her hearing disability and it was not until the penalty phase that the full extent of her impairment was disclosed. But despite frequent indications that Jones could not hear the testimony and her own admission that she had missed some testimony, she remained on the jury.

A. Jones' hearing impairment was substantial and had existed for a long time.

At the time of Mr. Bryant's retrial, Jones had suffered from a significant hearing impairment for almost 20 years. App. 2802. Judge Thomas – based on her own observations – became concerned about Jones' ability to hear the testimony and at one point was so worried that she tried to contact Jones' doctor. App. 2063. She was not able to reach him and no one contacted Jones' husband who testified at the PCR hearing and would have informed them that (1) Jones' hearing impairment was substantial, (2) Jones

suffered from this disability for a long period of time, and (3) Jones minimized and concealed her impairment, because she did not want others to know about it. App. 2802-05.

Jones' hearing impairment affected her everyday life despite her desire to hide it. For example, Mr. Jones indicated that their preacher – who knew Jones could not hear – would always ask Jones to move up to the front row. Even then, Mr. Jones testified that she could not hear what the preacher was saying. App. 2802. At home, Mr. Jones revealed that his wife had trouble hearing him even when they were only a few feet apart. App. 2803. Despite the impact of her hearing impairment, Jones did not want people to be aware of her disability. Indeed, at any suggestion that she may need a hearing aid, Mr. Jones reported that his wife would “get furious.” App. 2804.

B. Indications of hearing impairment during jury selection

Jones indicated on her questionnaire that she had difficulty hearing.

Solicitor Bailey questioned her about this during *voir dire*.

Q: Okay, all right, and I notice that in the last question there about whether you had a mental or physical condition that might make you unable to serve you said that you had a hearing problem with your right ear.

A: Yes, sir; yes.

Q: And I noticed a couple of times when the Judge was talking to you you kind of put your hand up there.

A: Yeah, so I can focus.

Q: All right, and can you tell us – can you hear at all out of that hear?

A: Yeah, I can hear.

[App. 828]

Jones was not questioned further about her hearing and she was qualified – and ultimately selected – as a juror. After the jury was chosen, Judge Thomas instructed the jurors to go home, pack their bags and return to the courthouse. Jones was the only juror who failed to return with her bags packed. Judge Thomas later recognized that Jones had not heard the instruction. App. 1092.

C. Indications of Jones' inability to hear testimony in the guilt-or-innocence phase

During the guilt-or-innocence phase, Judge Thomas observed Jones behaving as if she could not hear the testimony. Jones conceded that she was having trouble hearing and, for the first time, revealed that she relied on lip reading to understand what was being said. App. 1081. Judge Thomas seemed to recognize this as a potential problem:

The Court: All right, so you really have to read lips to understand?

Ms. Jones: Yes, ma'am.

The Court: Because there's been plenty of times that [the witnesses] have turned away. Have you heard all of the evidence and testimony in this trial?

Ms. Jones: I heard.

[App. 1081-82]

In an apparent attempt to assist Jones, Judge Thomas instructed the attorneys to ensure that the witnesses were looking in Jones' direction and asked Jones to indicate whenever she was having a problem hearing testimony. App. 1082. Judge Thomas would later discover that Jones had not complied with this request.

Despite these remedial measures, Judge Thomas remained uneasy. "I have concerns that it was not brought to light that she really needed to lip read when we were doing individual *voir dire*." App. 1095. Nevertheless, Judge Thomas decided to accommodate – or at least, attempt to accommodate – Jones while assuring counsel that she would monitor the situation.

Later in the guilt-or-innocence phase, in an attempt to gauge how Jones was faring, Judge Thomas conducted her own "hearing test" by asking the jurors to raise their hand if they were *not* having difficulty hearing the testimony. Jones was slow to respond. Her delayed response caught Judge Thomas's attention.

The Court: All right, all right, no, ma'am, you delayed. Can you hear, are you able to hear?

Ms. Jones: (Indicates affirmatively.) Yeah.

The Court: Have you been able to hear all of the testimony?

Ms. Jones: I heard them all.

[App. 1278]

Despite Judge Thomas's concerns, Jones remained on the jury. That jury convicted Mr. Bryant of murder and armed robbery. As discussed *infra*, Jones would later admit that she had not heard portions of the testimony during this phase of the trial.

D. Jones admits that she did not hear testimony during both portions of the trial, but trial counsel kept her on the jury because of her race.

Judge Thomas's concerns continued in the sentencing phase. On her own initiative, Judge Thomas conducted another "hearing test" by asking the jurors to stand depending on the color of their clothing. App. 1847. Based on his observations of this test, Solicitor Bailey noted that Jones needed a nudge from another juror to stand at the appropriate time. Due to what he characterized as Jones' "apparent deafness," Bailey moved to have her excused from the jury. App. 2059. While Judge Thomas remained concerned, she was not certain of the results of her *sua sponte* hearing test. But she agreed that the evidence warranted further investigation and acknowledged that "there have been some things that have brought or caused the Court some concern, times when it looks like maybe she's, she's not watching back and forth and she's not able to hear." App. 2059.

Judge Thomas administered one final test, which Jones failed. The court asked every juror dressed in blue to stand. Despite the fact that she was wearing blue, Jones did not stand. App. 2062-63. The judge and defense counsel discussed the possibility that Jones had been confused by the

question or believed that her clothing was black, not blue. Judge Thomas, recognizing that “it’s so important for both the State and the Defendant that she’s heard everything,” App. 2065, decided to inquire further. In response to additional questioning Jones indicated that she believed her clothing was blue, and she finally admitted that she had missed some portions of testimony in both phases of the trial. App. 2068-69.

Bailey immediately renewed his motion that Jones be removed. App. 2069. Defense counsel requested that the judge ask Jones whether she had heard the request to stand. App. 2070. In response to more questions from Judge Thomas, Jones confessed that she had not heard the judge even though she was trying to read her lips. Again, Judge Thomas expressed concern that Jones did not hear her even when they were looking directly at one another. App. 2072. “Okay, I’m going to note there’s no question. She has indicated she just flat did not hear and I was looking directly at her and talking and even now she’s having difficulty hearing me and I’m raising my voice and there’s been a lot quieter voices than mine during the trial of this matter.” App. 2073.

Judge Thomas and counsel met in her chambers. This meeting was not on-the-record but the PCR testimony of Archer, Johnston, and Bailey suggests that during this meeting everyone realized that since Jones had participated in the guilty verdict, she could not simply be replaced by an alternate juror. If Jones were excused, Judge Thomas would be forced to

grant a mistrial. App. 2748. Johnston, Archer, and Bailey recalled that Judge Thomas discussed the issue of a mistrial during this meeting. App. 2748, 2814, 2875. Indeed, Archer and Johnston believed that Judge Thomas would grant a mistrial if one were requested. App. 2748. Johnston left it to Archer to deal with this issue. App. 2752, 2782. After this meeting in chambers and the recognition that Jones could not simply be replaced with an alternate, Bailey withdrew his request to have Jones removed from the jury. App. 2075

Despite the recognition that Jones had not heard all the testimony and Judge Thomas's indication that a mistrial – if requested – would be in order, Archer did not move for a mistrial. He kept Jones on the jury for one reason – because she was black. App. 2858-59, 2861. “I’m saying the reason was is [sic] because if that were a white woman there’s no doubt I probably would have – I would have done it differently, but at least we got one black on the jury.” App. 2861. Archer later felt that he should have asked for a mistrial and that the color of the juror’s skin did not justify his decision. App. 2863-64. According to Archer, “[Jones] should have never been on that jury.” App. 2863. Jones remained on the jury and – despite not hearing some testimony – was one of the jurors who sentenced Mr. Bryant to death.

Reasons Why the Writ Should be Granted

Most, though not all, of Mr. Bryant’s claims are based on the failure of trial counsel to fulfill their constitutional obligation to provide effective assistance of counsel. Because of the prevalence of this claim throughout

petition, counsel provides a general overview of the law in this area.

“An ineffective assistance claim has two components: A[n applicant] must show that counsel’s performance was deficient, and that the deficiency prejudiced the defense.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). “To establish deficient performance, a[n applicant] must demonstrate that counsel’s representation ‘fell below an objective standard of reasonableness.’” *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 687). Under this standard, a reviewing court must “conduct an objective review of [counsel’s] performance, measured for ‘reasonableness under prevailing professional norms,’ . . . which includes a context dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time[.]’” *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 688). And when counsel’s challenged conduct is purportedly attributable to “tactical judgment,” that judgment and the “investigations supporting” it must themselves be objectively reasonable. *Wiggins*, 539 U.S. 521.

An applicant establishes prejudice by demonstrating a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 695. This standard requires a showing by less than a preponderance of the evidence, and is satisfied where “there is a reasonable probability that at least one juror would have struck a different balance.” *Wiggins*, 539 U.S. at 537. “[T]he

question is whether “[counsel’s deficient performance] could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

I. Trial counsel failed to protect Mr. Bryant’s right to a fair and competent jury.

As set out above, while Judge Thomas and counsel knew early on that Jones had some type of hearing impairment, they did not discover the severity of the problem until Jones admitted – almost at the end of the trial – that she had missed portions of testimony during both phases of the trial. While a trial court has discretion to assess jurors’ ability to perform their duties, this case presents the unique situation in which there was no dispute about Jones’ ability to hear – she admitted that she had not heard testimony. Of course, by the very nature of Jones’ disability, it is impossible to know exactly how much testimony she missed. But Judge Thomas recognized that Jones had difficulty hearing her even when she was speaking loudly and directly at her. Moreover, based on her apparent desire to appear normal, her frank admission is noteworthy and suggests that she missed a significant portion of the trial testimony.

A. The constitutional right to a fair and impartial jury was not met in Mr. Bryant’s case because Jones was not able to hear all the trial testimony.

“A fair trial in a fair tribunal is a basic requirement of due process.” *In Re Murchison*, 349 U.S. 133, 136 (1955). “The constitutional standard of

fairness requires that a defendant have ‘a panel of impartial, ‘indifferent’ jurors.” *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)); see also *Reynolds v. United States*, 98 U.S. 145, 146 (1878). “Because the impartiality of the adjudicator goes to the very integrity of the legal system,” the error resulting from the seating of a juror who is not impartial cannot be harmless. *Gray v. Mississippi*, 481 U.S. 648, 668 (1987), see also *Rose v. Clark*, 478 U.S. 570, 578 (1986); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927); *Arizona v. Fulminante*, 499 U.S. 279, 307-10 (1991).

This right to a jury requires that jurors be free from physical infirmities that would interfere with their competency. *Sullivan v. Fogg*, 613 F.2d 465, 467 (2d Cir. 1980). “Due process implies a tribunal both impartial and mentally competent to afford a hearing.” *Jordan v. Massachusetts*, 225 U.S. 167, 176 (1912). In addition to being mentally competent, jurors must be able to actually understand the testimony on which they will base a verdict. “[T]he constitutional guaranty of trial by jury necessarily requires a jury which is able to *comprehend* and intelligently resolve the factual issues submitted to its verdict.” *Robinowitz v. United States*, 366 F.2d 34, 92 (5th Cir. 1955) (Coleman, J., concurring in part and dissenting in part) (emphasis added).³

³ Consistent with the presumption that jurors must be competent to be fair and impartial, the state juror statute sets out specific requirements that every juror must meet. In relevant part this statute states that:

Courts have unhesitatingly reversed convictions after concluding that a juror's inability to hear all the evidence violates a defendant's jury trial right. In these cases the trial courts – like Judge Thomas here – tried to overcome the disability with prophylactic measures. The appellate courts dismissed these efforts as futile:

- *State v. Berberian*, 374 A.2d 778 (R.I. 1977): During the polling of the jury, it became clear that one juror was having trouble hearing. The trial court examined the juror and learned that the juror had difficulty hearing the court's questions and was relying on lip reading. Nevertheless, the juror indicated that he had heard all of the testimony. Finding the juror's self-assessment unpersuasive since he would not know what he had not heard, the court reversed the conviction holding that the defendant had been deprived his right to a fair and impartial jury.
- *Commonwealth v. Greiner*, 455 A.2d 164 (Pa. 1983): During testimony a juror asked a witness to speak up. Subsequently, the judge learned that this juror was having some difficulty

No person is qualified to serve as a juror in any court in the State if:

-
- (3) He is incapable by reason of mental or physical infirmities to render efficient jury service. Legal blindness does not disqualify an otherwise qualified juror.

[S.C. Code Ann. §14-7-810]

By the very terms of the statute – and like the constitutional requirements – jurors must be able to “render efficient jury service.” A juror who cannot hear the testimony cannot satisfy this requirement. While § 14-7-810 specifically exempts legally blind jurors from disqualification, this section does not except hearing-impaired jurors from the requirement that every juror be able to physically perform the job. Because a juror's ability to hear testimony is essential to efficient jury service, it is not surprising that the Legislature has treated hearing-related disabilities differently.

hearing the testimony. The trial court had the witness repeat the testimony, moved the juror, and instructed him to indicate whenever he could not hear testimony. The appellate court framed the issue as follows: “whether a new trial is required when a juror does not hear some testimony due to his being hard of hearing.” The court found that the trial court’s attempts to mitigate the juror’s hearing problem “in vain.” Moreover, the appellate court noted that the juror’s admission that he had not heard some testimony left no room for the trial court to exercise its discretion and keep the juror on the jury. “By forthrightly admitting that he had not heard some of the testimony, the juror in this case removed the issue from the purview of the trial court’s discretion”

- *State v. Miller*, 722 P.2d 1131 (Kan. Ct. App. 1986): After the first day of trial, a juror informed the court that he had not heard the testimony of two witnesses as well as questions from counsel. The trial court moved the juror to the front row. The appellate court reversed. Acknowledging the general rule that the competency of a juror is a matter of judicial discretion, the appellate court found that a trial court cannot substitute her opinion regarding the juror’s ability to hear in the face of clear evidence to the contrary – here, the juror indicated that she had not heard everything. This admission required excusal and a grant of a mistrial.
- *State v. Turner*, 521 N.W.2d 148 (Wisc. 1994): Finding that a jury trial guarantees jurors who can comprehend the testimony, the court noted that a juror’s inability to hear goes beyond simply understanding the words but also impacts the juror’s ability to judge credibility through cues like tonal quality, volume and speech patterns.

That Jones did not hear all the testimony presented at either phase of the trial can not reasonably be disputed. Every participant at the trial shared a concern that Jones was unable to hear and Jones herself eventually admitted that she had not heard all the testimony.

Because of her concern about Jones’ hearing, Judge Thomas tried to mitigate the effects of Jones’ impairment. As Judge Thomas later recognized,

these measures were unsuccessful. First, Judge Thomas directed Jones to notify the court if she was having trouble hearing a witness. Jones ignored this instruction as evidenced by her belated disclosure that she had missed some testimony. Second, Judge Thomas requested that the lawyers and witnesses face Jones when speaking. It is unlikely that lawyers and witnesses consistently looked at Jones when speaking.⁴ But more importantly, the record proves this “solution” to be as ineffectual as the first. Even when the Judge Thomas was looking at, and speaking directly to, Jones, she could not comprehend what was being said. App. 2073.

Because Jones could not have known what she did not hear, it is impossible to know exactly how much testimony she either misunderstood or did not hear at all, but the record suggests that her problem was significant. First, Judge Thomas could tell from Jones’ body language that she was having difficulty hearing. *See People v. Guay*, 898 N.Y.S.2d 353 (N.Y. 2010) (observation of juror’s nonverbal reaction to questions indicated that the juror had more difficulty hearing than he had expressed). Second, Judge Thomas also recognized that Jones had difficulty hearing the judge when they were looking directly at one another and when Judge Thomas was speaking loudly. Finally, Jones’ husband described a long-standing and substantial impairment that Jones herself was intent on hiding.

⁴ Indeed, Judge Thomas acknowledged this very fact. App. 2073.

B. Archer based his decision to keep Jones on the jury on the very racial stereotype that the Supreme Court has found unlawful.

As discussed *supra* at 18, despite Jones' hearing impairment, Archer kept her on the jury for one reason: she was black. "[T]he reason [we kept her on the jury] is that we had a person of color on the jury." App. 2864. Even more explicitly, Archer admitted that Jones' race was the deciding factor in his decision not to challenge her ability to remain on the jury. "[I]f that were a white woman there's no doubt I probably would have – I would have done it differently, but at least we got one black on the jury." App. 2861.

A "strategic decision" must be an objectively reasonable one that is based on readily-available information. It cannot be based on race, because "a person's race simply 'is unrelated to his fitness as a juror.'" *Batson v. Kentucky*, 476 U.S. 79, 87 (1986). The Supreme Court has consistently condemned the premise that a juror will be more or less inclined to vote a certain way because of their race. "[I]f race stereotypes are the price for acceptance of a jury panel as fair,' . . . Such a 'price is too high to meet the standard of the Constitution.'" *Georgia v. McCollum*, 505 U.S. 42, 57 (1992) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991)). In other words the Supreme Court has found unreasonable the assumption that somehow a juror's race by itself says enough about that person that counsel can base a decision on this factor.

Defense counsel is limited to "legitimate, lawful conduct." *Id.* (quoting *Nix v. Whiteside*, 475 U.S. 157, 166 (1986)). Consequently, no reasonable

attorney can properly decide to forfeit a valuable right – like the right to a competent jury – based upon an illegal racial stereotype. Approval of Archer’s rationale for keeping Jones on the jury in this case would not only violate *Batson* but would also create an intolerable disparity: an African-American defendant whose counsel, in these circumstances, failed to move for a mistrial would not receive a new trial, but a white defendant would.

Archer’s race-based decision was impermissible and failed to protect Mr. Bryant’s right to a competent jury. “[T]he deficient performance of counsel denied [the defendant] an impartial jury, leaving him with one that could not constitutionally convict, perforce establishing *Strickland* prejudice with its focus upon reliability.” *Virgil v. Dretke*, 446 F.3d 598, 614 (5th Cir. 2006).

C. In finding that trial counsel performed reasonably the lower court simply made up a “strategic” reason without any evidentiary support.

Concluding that trial counsel had performed reasonably the PCR court ignored the race-based rationale that Archer adopted and simply concluded that Archer kept Jones on the jury because “he did not like the alternate jurors who would replace Juror Jones.” App. 3465. This finding contains no citation to the record and is the only basis for denying relief on this claim. But contrary to the lower court’s finding, Archer indicated that his concern over the alternates did not play a role in his decision to keep Juror Jones because he correctly recognized that the only potential remedy at that point

was a mistrial. “I don’t think we particularly cared for the alternate, but I don’t think the alternate came into – in the penalty phase she’s already voted so that didn’t come into it. It would have to be a mistrial.” App. 2854. So the PCR court took Archer’s concern about the alternates and elevated it to the status of a strategy that Archer never endorsed and, in fact, specifically discounted. Indeed, as Archer and Judge Thomas realized, the alternate jurors were irrelevant since the only remedy at that point – after Jones had already participated in the guilty verdict – was a mistrial, not a substitution of Jones with another juror. So, in addition to being an inaccurate statement of the PCR evidence, the lower court’s rationale was legally irrelevant.

II. Trial counsel – ignorant of the law – failed to ensure that the penalty phase was individualized assessment of the appropriate punishment based on relevant evidence.

A. Evidence about the conditions of prison is inadmissible.

Evidence admitted in the sentencing phase of a capital trial must be relevant to the “character of the defendant or the circumstances of the crime.” *State v. Burkhardt*, 371 S.C. 382, 487, 640 S.E.2d 450, 453 (2007) citing *State v. Copeland*, 278 S.C. 572, 300 S.E.2d 63 (1982). Prison conditions are not appropriate considerations in the sentencing phase. “Such determinations as the time, place, manner, and conditions of execution *or incarceration* . . . are reserved . . . to agencies other than the jury.” *Id.* quoting *State v. Plath (Plath II)*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984). Having set clear boundaries in this regard some 20 years prior to Mr. Bryant’s trial, this Court stated, “It

should not be necessary in the future for this Court to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial.” *State v. Plath (II)*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).

Therefore, at Mr. Bryant’s trial, the law was clear – evidence about the manner of his incarceration was off limits.

B. Trial counsel – unaware that they could preclude the state from introducing conditions of confinement evidence – tried to head off the state’s presentation with one of their own.

The Supreme Court in *Strickland v. Washington* recognized that only those strategic choices made “after thorough *investigation of law and facts*” were owed deference. *Strickland* at 690 (emphasis added). Recognizing that trial counsel have a “duty to make reasonable investigations,” the Supreme Court held that in the absence of an attempt to investigate, deference is owed only to the extent that “reasonable professional judgments support the limitations on investigation.” *Id.* In other words, the failure to act must itself be reasonable. But errors resulting from counsels’ self-imposed unfamiliarity with relevant legal principles can never be reasonable. “Errors caused by counsel’s ignorance of the law are errors that run afoul of the objective standard of reasonableness.” *Noble v. Kelly*, 89 F.Supp.2d 443 (S.D.N.Y. 2000), *aff’d* 246 F.3d 93 (2d Cir. 2001).

The Supreme Court and other courts have addressed counsel’s lack of knowledge in a variety of contexts. These courts have consistently held that

decisions uninformed by readily-available information were not strategic decisions.

- *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986): Trial counsel did not seek pretrial discovery and then claimed to be surprised by, and unprepared for, the state's admission of certain evidence. Trial counsel's reason for not seeking discovery was based on the mistaken belief that the state was obliged to provide discovery even without a request. This "startling ignorance of the law" was no basis for a strategic decision and the Supreme Court found that the attorney performed deficiently.
- *Green v. Nelson*, 595 F.3d 1245, 1251 (11th Cir. 2010): The Eleventh Circuit Court of Appeals held that trial counsel's failure to file a motion to suppress was not "strategic" when it was due to his lack of understanding of the evidence. "Strategic decisions are ones that, among other things, involve a weighing of competing positive and negative consequences that may flow to the defendant from a particular choice."
- *Turpin v. Helmeci*, 518 S.E.2d 887, 889 (Ga. 1999): The Georgia Supreme Court similarly held that a defense attorney's failure to move to suppress evidence based on lack of preparation was unreasonable. "[C]ounsel did not adequately research the law." The right to reasonably effective counsel is violated when errors are made due to "inadequate preparation."
- *In re Wilson*, 838 P.2d 1222, 1229 (Cal. 1992): The Supreme Court of California held that the failure to seek exclusion of evidence because of either ignorance or a misinterpretation of controlling United States Supreme Court precedent constituted deficient performance.

Here, Archer and Johnston did not make a strategic decision that they were better off presenting conditions of confinement evidence rather than simply ensuring that no such evidence was admitted. Indeed, neither Archer nor Johnston were aware that they could have kept this evidence out. In this

context, they could not make a *strategic* decision about the merits of presenting conditions of confinement evidence and opening the door to otherwise inadmissible rebuttal evidence.⁵ Counsels' failure to research the law on this point robbed them of the knowledge required to weigh their options. Without this knowledge, counsel were left to assume that such evidence was coming in.

C. Mr. Bryant's trial became a referendum on prison life rather than the individual assessment of the appropriate punishment for Mr. Bryant.

The evidence about the available amenities and the conditions of confinement in the South Carolina Department of Corrections consumed the penalty phase testimony. Once Archer had opened the door to this evidence, Bailey focused the jury's attention on it at every turn. Indeed, the state

⁵ Moreover, trial counsel have a professional duty to ensure that the defense does not open the door to the admission of otherwise inadmissible evidence.

In determining what presentation to make concerning penalty, counsel should consider whether any portion of the defense case will open the door to the prosecution's presentation of otherwise inadmissible aggravating evidence. Counsel should pursue all appropriate means (*e.g.*, motions *in limine*) to ensure that the defense case concerning penalty is constricted as little as possible by this consideration . . .

[American Bar Association: Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 10.11.5 (2003)]

Here, because of counsels' fundamental ignorance of controlling law, they unwittingly opened the door to evidence that was otherwise inadmissible.

emphasized the conditions of confinement evidence in its closing argument and told the jury that the defense was “begging” for a life sentence which was the “best thing [the jury could] do for James Bryant.” App. 2130.

First of all you’ve got three meals a day supervised by a dietician. You’ve got medical and dental care for whatever goes wrong for the rest of your life. You get your clothing given to you. You can work or not work at your discretion. If you work you get paid. If you don’t feel like working there’s 12 hours of television you can watch a day. You have a canteen you can go to. Your family can send you money or you can work and get that money. You can go to that canteen. You can buy cigarettes, candy, Coca-Cola, potato chips, snacks, whatever you want. You get tired of eating you can to [sic] go the library and you can read a book or two. You can get your walk-man, listen to whatever music you want to listen to, go to a movie. They’ve got an athletic director there, you know, maybe you’re tired of reading, don’t want to work, ‘Let’s go play handball. Let’s play softball.’ They’ve got intramural teams, you know. ‘Here’s our dorm we can play your dorm, you know, let’s play a game here.’ They’ve got an athletic director supervising all that, and in the meantime Corporal Dennis Lyden is in his grave and that’s why life in prison is not an acceptable alternative punishment to the death penalty in this case.

[App. 2124-25.]

The prosecution explicitly argued to the jury that it should not sentence Mr. Bryant to life because of the amenities in prison. This argument distracted the jury from its central mission – assessing the circumstances of the crime and the character of the defendant – and focused it on evidence that was both irrelevant and inflammatory. As presented by the prosecution

the jury could sentence Mr. Bryant to death or send him to a place that sounded like home. This is a false choice and its presentation to the jury prejudiced Mr. Bryant. This argument is precisely what this Court has been trying to avoid.⁶

D. The PCR court ruled that trial counsel performed reasonably based on the erroneous finding that the law at the time of the trial did not prohibit evidence regarding the conditions of confinement.

In rejecting Mr. Bryant's claim that his attorneys were wrong to turn the sentencing phase into a referendum on the conditions of confinement the PCR court simply found that "in light of the applicable law at the time of this trial, this Court finds that the trial counsel was [sic] not deficient in failing to object to the State's eliciting information about prison conditions." App. 3466-67. The court went on to conclude that trial counsel would have to had foreseen a change in the law to protect Mr. Bryant from this evidence. *Id.*

As a matter of law, the lower court's conclusion is wrong. As discussed *supra*, this Court in *Plath* made it clear that conditions of confinement

⁶ Moreover, courts have found that comparisons between the conditions of life in prison and the victim's death were improper appeals to passion. Recently, in a federal capital prosecution, the district court granted a new sentencing hearing based on the prosecution argument juxtaposing the defendant's life sentence complete with privileges, meals, and visitors with the victim who would never have a visitor again. *United States v. (John) Johnson*, 713 F.Supp.2d 595, 631 (E.D. La. 2010) (court found improper the prosecution argument that the defense counsel "essentially asks you to send the defendant to his room where he gets privileges, three squares, and the ability to have visitors. The only visitors that [the victim] will have come to his grave site."); *see also Le v. Mullin*, 311 F.3d 1002 (10th Cir. 2002) (same); *Duckett v. Mullin*, 306 F.3d 982 (10th Cir. 2002) (same); *United States v. (Angela) Johnson*, 495 F.3d 951 (8th Cir. 2007) (same).

evidence was not relevant because it did not touch on the crime or the character of the defendant. Contrary to the lower court's finding that trial counsel would have had to anticipate changes in the law, all trial counsel had to do was be aware the law as it had existed for years. This Court ought to review this clear legal error.

III. Trial counsel failed to protect Mr. Bryant from the admission of irrelevant and inflammatory evidence about a rumored escape plan of another inmate.

Consistent with its insistence that penalty phase evidence be relevant to the defendant's character or the circumstances of the crime, this Court has previously held that injecting the specter of escape is inappropriate when there was no evidence that the defendant had attempted to escape. In *State v. Bowman*, the prosecutor attempted to cross-examine the defense risk assessment expert about the possibility that the defendant would escape. There – as opposed to here – defense counsel objected and the trial court sustained the objection and gave a curative instruction. *State v. Bowman*, 366 S.C. 485, 497, 623 S.E.2d 378, 384 (2006). This Court recognized that since the defendant had “never been an escapee and there was no evidence he had ever attempted to escape confinement,” the prosecutor's questions about escape were inappropriate. *Bowman*, 366 S.C. at 497, 623 S.E.2d at 385. Implicitly acknowledging the prejudice of this evidence, this Court went on to find that the trial court's curative instruction was sufficient to cure the harm.

As discussed *supra*, Bailey elicited testimony about an unconfirmed rumor that a death row inmate planned to escape. Despite recognizing that this testimony was not relevant, Johnston did not object to this improper line of questioning. App. 2740. During his PCR testimony Johnston offered the somewhat circular reasoning that he didn't object to this testimony because it had nothing to do with Mr. Bryant. Of course, by Johnston's reasoning, there would never be a reason to object to evidence under Rule 403, SCRE since by its very terms, such evidence would be irrelevant.

But what occurred here was far worse than the scenario in *Bowman* where the prosecutor was simply trying to ask a generic question about the possibility of escape. Here, Bailey – by trying to connect the escape rumor to the religious service and then to death row – insinuated that Mr. Bryant had something to do with the rumored escape. Or, at the very least, he planted that seed in the jurors' minds. But there was no evidence to back up this implication and that is precisely why Johnston should have objected.

Absent an objection and at least a curative instruction as in *Bowman*, the jury was left to speculate. Nothing can be more prejudicial than the belief that a capital defendant – if sentenced to life in prison – may some day escape and harm another person. This type of evidence is sufficiently prejudicial that other courts have found its unwarranted admission to constitute reversible error. *See, e.g., Henry v. State*, 604 S.E.2d 826 (Ga. 2004) (argument that defendant would escape or kill again was improper since not

supported by the evidence). Moreover, an argument that there was always the possibility that the defendant would escape prison combined with “images of [the defendant] watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction.” *State v. Gregory*, 147 P.3d 1201, 1257 (Wash. 2006). A defense attorney – charged with the professional obligation to protect the defendant from prejudicial and inadmissible evidence – cannot sit idly by while the state insinuates that a defendant planned an escape for which there is no evidence.

The PCR court found that (1) it was not unreasonable for trial counsel to sit by while this evidence was introduced because the testimony did not link the plan directly to Mr. Bryant and (2) Mr. Bryant was not prejudiced by this evidence “because of the egregious nature of the offense.” App. 3469. In other words the PCR court held that because the evidence was irrelevant, it was not prejudicial. But if it was irrelevant – which it was – then it was inadmissible. And the lower court failed to acknowledge the harmful effect of Bailey’s insinuation that somehow Mr. Bryant was connected to this rumored escape plan since he was on death row and attended the Easter Sunday religious service. Moreover, the lower court’s alternative finding that this crime was simply too terrible for the admission of this evidence to matter ignores the substantial and generally undisputed mitigating evidence presented. Despite the crime, there was nevertheless a lot of evidence on

which a jury could have based a sentence of life. Indeed, the evidence regarding Mr. Bryant's character was that he was a genuinely religious inmate who had matured since his arrest. But in light of the escape testimony the jury could have felt that the possibility that Mr. Bryant may escape was simply too great a risk to take. The evidence does not support the PCR court's prejudice finding.

IV. Trial counsel alienated the jury by relying on inconsistent theories of defense during the guilt phase despite there being no doubt of Mr. Bryant's guilt.

"It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney."

[*Florida v. Nixon*, 543 U.S. 175, 190-91 (2004) quoting Lyon, *Defending the Death Penalty Case: What Makes Death Different?* 42 Mercer L.Rev. 695, 708 (1991)]

Trial counsels' reliance on unsupported and mutually exclusive theories accompanied by equally baseless accusations of victim misconduct destroyed their credibility in the eyes of the jury. "A cardinal tenet of successful advocacy is that the advocate be unquestionably credible. If the fact finder loses confidence in the credibility of the advocate, it loses confidence in the credibility of the advocate's cause." *State v. Moorman*, 358 S.E.2d 502, 510 (N.C. 1987); see also *State v. (Jeffrey) Jones*, 343 S.C. 562, 578, 541 S.E.2d 813 (2001) (court's decision to excise "hesitate to act" phrase from reasonable doubt instruction diminished the defense attorney's

credibility in the eyes of the jury since the defense attorney had relied on court's previous ruling that it would give such an instruction and had repeated this phrase throughout its closing argument); *State v. Pace*, 316 S.C. 71, 74, 447 S.E.2d 186, 187 (1994) (impugning remarks by judge about defense counsel undermined counsel's effectiveness and prejudice is apparent because "[appellant's] attorney's credibility was crucial to his defense. . ."); *State v. Simmons*, 267 S.C. 479, 483, 229 S.E.2d 597, 598 (1976) (counsel's ability to provide effective representation was impaired by court's comments which diminished trial counsel in the eyes of the jury); *People v. Trait*, 527 N.Y.S.2d 920, 921 (N.Y. 1988) (counsel who engage in excessive and purposeless cross-examination alienated the jury to such an extent that reversal was required).

In fact, numerous courts have found it appropriate for attorneys to concede facts or forego arguing an unsubstantiated theory to avoid losing credibility. *See, e.g., Wilson v. Butler*, 813 F.2d 664, 671 (5th Cir. 1987) (court found that it was reasonable for trial counsel to avoid arguing client's innocence because to do so in the face of overwhelming evidence would have alienated the jury). However, the clearest authority on this point is the United States Supreme Court's opinion in *Florida v. Nixon*, 543 U.S. 175 (2004).

The *Nixon* Court lauded counsel's decision – based on the recognition that guilt could not be reasonably contested – not to contest guilt in the first

phase of a death penalty trial. This strategy allowed counsel to focus all efforts on convincing the jury to spare the defendant's life.

[T]he gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus. Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. See Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U.L.Rev. 299, 329 (1983). FN6 In such cases, "avoiding execution[may be] the best and only realistic result possible." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases § 10.9.1, Commentary (rev. ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).

[*Nixon*, 543 U.S. at 190-91.]

Archer and Johnston recognized that Mr. Bryant would be found guilty and that they could only hope to convince the jury to spare his life. Indeed, Archer claimed to embrace the same defense theory that the *Nixon* Court held was reasonable: to demonstrate to the jury that applicant was generally a good guy who just "snapped" that day, App. 2759, with the ultimate goal of convincing the jury that he was remorseful and would be no threat to others if given a life sentence in the second phase. But recognizing what the theory should have been and actually pursuing the theory in both phases of the trial proved to be two very different matters.

Trial counsel's "strategy decision" was botched by the disconnect between the strategy and trial counsel's implementation of it. As noted *supra* at 12-16, the record is replete with defense cross-examination questions during the guilt phase that outright challenged the reliability of witnesses who inculpated Mr. Bryant and sought to elicit testimony that smeared the victim.

For example, Archer attacked Earl Deaton's credibility by suggesting that (1) the victim attacked Mr. Bryant and (2) Mr. Deaton's testimony about a statement made by Mr. Bryant was based on a racially prejudiced stereotype regarding the sound of a black person's voice. App. 996, 2834. These insinuations were false, and trial counsel knew it, and both of these false insinuations tanked trial counsel's credibility.

Similarly, trial counsel's cross-examination of the forensic pathologist about whether injuries to applicant's hand might be defensive in nature, not only failed to cast a positive light on applicant's character, it elicited additional damning evidence against applicant. The forensic pathologist testified in response to that inquiry that viewing the applicant's injury in comparison with the victim's wounds made it all the more likely that applicant's injuries were not defensive but self-inflicted when he beat his fists against the victim's head.

Contrary to every shred of evidence, Archer attempted to cast doubt on the state's case regarding Mr. Bryant's guilt. Indeed, at the evidentiary

hearing the lower court recognized – and appeared to endorse – that this seemed to be the aim of Archer’s cross-examination. App. 2842. But in this case where there was no doubt – much less any reasonable doubt – about Mr. Bryant’s guilt, this performance was unreasonable.

What is now clear is that despite Archer’s recognition that Mr. Bryant would be found guilty, he simply did not have – or chose not to utilize – a unified defense theory. Indeed, according to Archer,

I don’t necessarily have to have a theory in guilt phase. I listen to the witnesses and I cross-examine them. Basically there were just a lot of inconsistencies in the witnesses, and when I cross-examined them I brought out the inconsistencies.

[App. 2831.]

Archer’s candid confession that he had, in fact, approached and handled the guilt phase of the trial without a theory establishes his failure to recognize the rather evident fact that counsel’s credibility matters and that it is not good enough to simply cross-examine witnesses just for the sake of cross-examining them.

When confronted with the reality of the accusatory cross-examination tactics, trial counsel could not explain how any of these and other similarly antagonistic cross-examination tactics he utilized furthered the defense theory in any way. In fact, what trial counsel actually did bears little-to-no resemblance to trial counsel’s theory or goal during the guilt-or-innocence phase. As such, where trial counsel’s “conclusory representation that he had a

defense strategy, while understandable in the heat of trial, was not borne out by his testimony” in post-conviction proceedings, it is not worthy of credibility. *Wilson v. Mazzuca*, 570 F.3d 490, 507 (2nd Cir. 2009) (holding lower court’s reliance on trial counsel’s justifications and assertions of strategic decisions that were unsupported by the record was error and required a new trial). When pressed to explain how many of the areas of cross-examination were consistent with the stated theory of defense, trial counsel admitted that he sometimes asked questions just to point out inconsistencies in witnesses’ testimony, even though doing so would not advance the defense strategy of directing all efforts toward a life sentence. App. 2832-35. The court may not give credence to trial counsel’s claim of strategy in pursuing a theory of the case, when it is not supported by the record and when in actuality trial counsel’s tactics only undermined their stated theory. *Wiggins v. Smith*, 539 U.S. 510, 527-28 (2003). By the time the case reached the penalty phase, the jurors would have rightly been skeptical of defense counsel given their willingness to push the boundaries of common sense in the first phase.

Without citing to the record or acknowledging the inconsistencies in Archer’s various theories, the PCR court found that Mr. Bryant had not established that trial counsel presented inconsistent theories and, in any event, trial counsel was pursuing a strategy of “hold[ing] the State to its Burden [sic] of proof.” App. 3469. As discussed *supra*, the theories were

certainly inconsistent with one another since one cannot be mis-identified but also present and acting in self-defense. Moreover, the PCR court did not explain how Archer's theories held the state to its burden of proof, or more importantly, how these theories helped – rather than harmed – Mr. Bryant.

Finally, the lower court simply restated *Strickland's* second prong and found that Mr. Bryant had failed to establish prejudice. App. 3469-70. As with its other lack-of-prejudice findings, this finding was not accompanied by a discussion of the evidence presented at the trial nor with a discussion of the potential harm caused by Archer's approach to the first phase of the trial. The mitigation evidence focusing on Mr. Bryant's good character was surely more difficult for the jurors to credit in light of the baseless suggestions of innocence or that the victim had somehow done something wrong.

V. Appellate counsel was ineffective for failing to raise on direct appeal the admission of evidence regarding conditions of confinement, which injected an arbitrary factor into Mr. Bryant's trial.

In every capital case this Court must “determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.” S.C. Code Ann. § 16-3-25(C) (1). This duty is independent of an objection at trial. *See State v. Motts*, 391 S.C. 707 S.E.2d 804 (2011).

Appellate counsel, Robert Dudek – despite recognizing that the introduction of conditions of confinement evidence was subject to this review – did not raise this issue on direct appeal. Dudek candidly admitted that he did not have a strategic reason for this failure. App. 2980-81. Appellate

counsel had an obligation to present this claim to the Court on direct appeal and his failure to ensure that Mr. Bryant's death sentence was fully reviewed pursuant to the capital sentencing statute prejudiced Mr. Bryant.

The PCR court held that appellate counsel could not have raised the introduction of conditions evidence as an arbitrary factor because trial counsel had not preserved the issue. App. 3472. Furthermore, the court found that this Court's failure to reverse Mr. Bryant's death sentence on direct appeal demonstrated that this Court believed "the defense as a whole received more benefit from the evidence than the State." App. 3472. Of course, neither of these bases is correct. First of all, the lack of an objection is not a basis for rejecting this claim since appellate counsel could have raised this issue as an arbitrary factor whether or not an objection was lodged below. Moreover, on direct appeal this Court did not engage in an analysis of the conditions of confinement evidence and certainly did not find that Mr. Bryant benefitted from its introduction.⁷ The lower court erred as a matter of law by ruling that review of this issue required an objection and as a factual matter by concluding that this Court had somehow already addressed this claim.

⁷ Indeed, in its direct appeal opinion in this case this Court recognized that the testimony presented here was "nearly indistinguishable" from that in *State v. Bowman*. Because of this similarity, this Court went on to reiterate its admonishment in *Bowman* and emphasized that it "remain[ed] firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally." *State v. Bryant (II)*, 372 S.C. 305, 642 S.E.2d 582, 589 (2007).

VI. Mr. Bryant's right to due process was violated by the use of a juror who did not hear all the testimony.

Mr. Bryant's due process right to a fair and competent jury was violated by the seating and use of a juror who did not hear all the testimony.⁸ The lower court denied this due process claim by making the unsupported factual finding that Jones did not actually miss material testimony. The court did not cite to the record or explain how it came to this conclusion. Indeed, given that Juror Jones – who admitted to not hearing testimony in both phases of the trial – would not have known what she had not heard, this finding is nothing more than wishful thinking. Moreover the record at trial establishes that Jones' hearing problem was substantial. As discussed *supra*, everyone in the courtroom at one time or another acknowledged Jones' hearing problem. For her part, Jones tried to conceal her hearing problem until the evidence was simply overwhelming. By the time she conceded that she had not heard testimony in both phases of the trial, she had repeatedly failed "hearing tests" conducted by the trial judge. The fact that Jones could not make out what the trial court was saying when the judge was speaking to, and looking directly at, her certainly suggests that she did not understand significant portions of the testimony of the witnesses. In short, the lower court's finding has no evidentiary support and is nothing more than

⁸ The facts and law supporting this claim are discussed *supra* at 12-22 and do not need to be repeated.

speculation, which is inconsistent with the evidence presented at trial and the post-conviction hearing.

VII. Mr. Bryant's right, as guaranteed by the Fifth, Sixth, and Eighth Amendments to the United States Constitution, to Due Process and a fair trial free from arbitrary and capricious imposition of the death penalty was violated by the introduction of conditions of confinement evidence.

After trial counsel unwittingly opened the door to evidence regarding the conditions of confinement, the penalty phase of Mr. Bryant's trial focused on daily life in prison rather than Mr. Bryant's character or the crime. The facts supporting this claim are discussed *supra* at 7-11. Moreover, the legal principles – well articulated by the time of Mr. Bryant's retrial – are discussed *supra* at 27.

The lower court rejected this claim finding that: (1) Mr. Bryant “on the whole” benefited from the introduction of the confinement conditions evidence; (2) the state only “moderately responded” to the conditions evidence presented by the defense, and; (3) this Court had addressed this issue on direct appeal. App. 3464. Like the rest of its findings the lower court did not once cite to the record or to any evidence in support of these conclusions. A review of the record reveals that these findings have no support or, as in the case of the first finding, are little more than speculation. For example, the court's characterization of Bailey's response to the defense conditions evidence as “moderate” is a remarkable understatement. Once Archer opened the door to conditions of confinement evidence, Bailey focused on this topic

and never let up. He even cross-examined a witness about this issue despite the fact that the witness had not touched on this evidence on direct examination. App. 1800-01. There was nothing “moderate” about the prosecution response. Bailey saw this open door for what it was – an opportunity to distract the jury with inflammatory evidence portraying prison as an almost desirable place to live. It is difficult to imagine how Mr. Bryant was not harmed by this presentation.

Conclusion

Mr. Bryant’s trial was remarkable for the failure of defense counsel to protect their client from the prejudicial effects of irrelevant evidence. And all the while, a partially deaf juror was allowed to remain on the jury solely because she was black. In light of the substantial issues presented below the lower court’s order is inadequate and not supported by the facts. This Court should grant certiorari to review the PCR court’s denial of relief in this case.

Respectfully submitted,

Robert Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271

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

Attorney for Mr. Bryant

June 2, 2011

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

RECEIVED

JUN 2 2011

S.C. Supreme Court

Case No. 2007-CP-26-5062

James Nathaniel Bryant, III..... Petitioner,

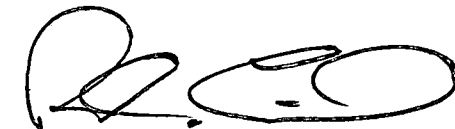
v.

South Carolina Respondent.

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the Petition for Writ of Certiorari and the Appendix in the above-referenced case by personally delivering a copy of both to Assistant Attorneys General Alphonso Simon, Jr. and S. Creighton Waters at their office, 1000 Assembly Street, Columbia, SC 29201 on this day, June 2, 2011.

June 2, 2011



Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271
Attorney for Mr. Bryant

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

Michael G. Nettles, Circuit Court Judge

RECEIVED

OCT - 6 2011

JAMES NATHANIEL BRYANT, III

PETITIONER, S.C. Supreme Court

V.

STATE OF SOUTH CAROLINA

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211-1549
(803) 734-6305
ATTORNEYS FOR RESPONDENT

INDEX

INDEX	I
QUESTIONS PRESENTED	III
ARGUMENT	1
I. THE PCR COURT’S PROPERLY REJECTED PETITIONER’S CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN ADDRESSING THE JUROR ISSUE WHERE COUNSEL’S ACTIONS WERE REASONABLE STRATEGIC DECISIONS, PETITIONER FAILED TO SHOW HE WAS PREJUDICED, AND THERE WAS NO MERIT TO THE UNDERLYING DUE PROCESS CLAIM.....	1
II. THE PCR COURT PROPERLY REJECTED A CLAIM OF INEFFECTIVENESS REGARDING COUNSEL’S ADMISSION OF CONDITIONS EVIDENCE, WHERE THE DECISION WAS REASONABLE AT THE TIME OF TRIAL, AND THERE WAS NO PREJUDICE	7
III. THE PCR COURT PROPERLY REJECTED A CLAIM OF INEFFECTIVENESS REGARDING EVIDENCE OF ANOTHER INMATE’S ESCAPE PLAN, WHERE COUNSEL THOUGHT THE EVIDENCE WAS HELPFUL AND WHERE THERE WAS NO PREJUDICE IN ANY EVENT GIVEN THE BREVITY OF THE REFERENCE.	15
IV. THE PCR COURT’S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR RELYING UPON INCONSISTENT THEORIES OF DEFENSE DURING THE GUILT PHASE IS SUPPORTED BY THE RECORD.	17
V. THE PCR COURT PROPERLY REJECTED A CLAIM APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CONDITIONS EVIDENCE, GIVEN THE STATE OF THE LAW AT THE TIME OF THE APPEAL AND THE LACK OF AN OBJECTION BELOW.	20
VI. PETITIONER WAS NOT ENTITLED TO RELIEF ON THE DUE PROCESS CLAIM; HE FAILED TO ESTABLISH HE WAS ENTITLED TO RELIEF ON THE MERITS, AND THE CLAIM SHOULD SUCH A FREESTANDING CLAIM WAS IMPROPER FOR PCR.	22
VII. ANY FREESTANDING CLAIM AS TO THE CONDITIONS EVIDENCE IS NOT ONLY PROCEDURALLY IMPROPER FOR PCR, BUT WITHOUT MERIT GIVEN THAT THE DEFENSE INTRODUCED THE EVIDENCE AND HAD FREE REIGN ON IT, AND THERE IS NOTHING AS A CONSTITUTIONAL MATTER THAT MAKES CONDITIONS EVIDENCE SOME SORT OF “SUPER ERROR” INCAPABLE OF ANALYSIS.	23

CONCLUSION.....	25
-----------------	----

QUESTIONS PRESENTED

- I. The PCR Court's properly rejected Petitioner's claims of ineffective assistance of trial counsel in addressing the juror issue where counsel's actions were reasonable strategic decisions, Petitioner failed to show he was prejudiced, and there was no merit to the underlying due process claim.
- II. The PCR Court properly rejected a claim of ineffectiveness regarding counsel's admission of conditions evidence, where the decision was reasonable at the time of trial, and there was no prejudice.
- III. The PCR Court properly rejected a claim of ineffectiveness regarding evidence of another inmate's escape plan, where counsel thought the evidence was helpful and where there was no prejudice in any event given the brevity of the reference.
- IV. The PCR Court's finding that trial counsel was not ineffective for relying upon inconsistent theories of defense during the guilt phase is supported by the record.
- V. The PCR Court properly rejected a claim appellate counsel was ineffective for failing to raise the conditions evidence, given the state of the law at the time of the appeal and the lack of an objection below.
- VI. Petitioner was not entitled to relief on the due process claim; he failed to establish he was entitled to relief on the merits, and the claim should such a freestanding claim was improper for PCR.
- VII. Any freestanding claim as to the conditions evidence is not only procedurally improper for PCR, but without merit given that the defense introduced the evidence and had free reign on it, and there is nothing as a constitutional matter that makes conditions evidence some sort of "super error" incapable of analysis.

ARGUMENT

This is the appeal from the denial of post-conviction relief arising from the capital conviction of James Bryant for the brutal murder of Horry police officer Dennis Lyden during a late night traffic stop.

I. THE PCR COURT'S PROPERLY REJECTED PETITIONER'S CLAIMS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN ADDRESSING THE JUROR ISSUE WHERE COUNSEL'S ACTIONS WERE REASONABLE STRATEGIC DECISIONS, PETITIONER FAILED TO SHOW HE WAS PREJUDICED, AND THERE WAS NO MERIT TO THE UNDERLYING DUE PROCESS CLAIM.

In the PCR action, Petitioner raised this claim as two separate claims. First, he asserted trial counsel was ineffective in the guilt phase in not requesting Juror Jones be removed because of her hearing difficulties. Second, he asserted trial counsel was ineffective in the sentencing phase for the same reason. In addressing these claims, the PCR Court found counsel's decision was a strategic one. Counsel explained that he did not excuse Juror Jones because he did not like the alternate jurors who would replace Juror Jones. Counsel also stated he did not approve of the selection process because it was conducted as a paper strike. Overall, Petitioner failed to show counsel's reasons for keeping Juror Jones was not a valid, strategic decision.

The PCR Court found Petitioner failed to establish trial counsel was ineffective in not requesting that Juror Jones be removed during either the guilt or innocence phase of this trial. For the same reasons, the PCR Court found trial counsel was also not ineffective in the sentencing phase for not requesting Juror Jones be excused. {App. 3465-66}.

The PCR Court's denial of relief is supported by the record. At the evidentiary hearing, Archer testified that he did not move to have Juror Jones excused for several reasons. Archer testified that he did consider the fact that she was a person of color when deciding to retain her as a juror. {App. 2854}. Archer admitted that Bryant himself also indicated that he wanted Juror

Jones to remain on the jury at trial. {App. 2864}. Petitioner was concerned at trial about the racial makeup of the jury in part because he believed that he was racially profiled by Officer Lyden. {App. 2865}. While counsel testified that he disagreed with that assessment of Officer Lyden's conduct, he did want Petitioner to have a diverse jury.¹

Second, Archer testified that the defense did not like the alternate jurors who would possibly replace Juror Jones. {App. 2854}. Archer testified he was angry about the way the jury was selected. {App. 2856}. Most of the jurors that the defense wanted were in the last groups that were qualified. {App. 2856}. According to Archer, Judge Thomas refused to put all of the qualified jurors' names in the hopper because the solicitor objected. {App. 2856}. Archer indicated that this meant people who were in the latter groups would never get picked because the jury would be selected from the earlier groups of qualified jurors. {App. 2856}. Archer implicitly stated that Juror Jones was part of the group of jurors that the defense did like. In all, Archer testified that the jurors they wanted were all in the end pools. {App. 2856-57}. He also complained about the paper strike, which was affirmed on appeal. {App. 2858}.

Archer did eventually admit that he tried to keep Juror Jones on the jury panel.

I tried to keep her then, I mean, if that's what you're getting at, yes, I did. But in hindsight I -- I don't think any of us considered the fact that how do you go in and deliberate, and I only thought of that when I'm reading the transcript.

{App. 2861}.

Paul Archer testified that all of the parties noticed her hearing issue at Petitioner's criminal trial. Archer testified that Judge Thomas noticed it first, and she called it to the

¹This is unlike the issues presented in Batson v. Kentucky, 476 U.S. 79, 82, 106 S. Ct. 1712, 1715 (1986) and Georgia v. McCollum, 505 U.S. 42, 43, 112 S. Ct. 2348, 2350, 120 L. Ed. 2d 33 (1992). In those cases, the United States Supreme Court found the Constitution prohibited the use of peremptory challenges in a racially discriminatory way to prevent jurors from sitting. Here, there was no allegation that any other juror was struck for a racially discriminatory reason.

attorneys' attention. Juror Jones had indicated that she used lip reading as a way to understand. {App. 2813}. Archer stated that he thought Judge Thomas should have removed Juror Jones then. He remarked that Judge Thomas should have removed Jones not just because she could not understand what people were saying. Archer noted that since the trial, he started to think about it and realized that she may have issues in the deliberation room because she would have difficulty hearing what other jurors were saying. {App. 2813}. Archer thought Judge Thomas kept trying to rehabilitate Juror Jones. {App. 2814}. He mentioned Judge Thomas gave the jurors a number of hearing tests. {App. 2814}. He believed one time Juror Jones indicated she could not hear. {App. 2814}. During cross-examination, Archer indicated that in hindsight, it was clear that Jones did not belong on the jury. {App. 2854}. However, when refreshed with the transcript, he admitted the defense repeatedly argued at trial to keep Juror Jones on the jury. {App. 2859-62}.

Solicitor Bailey also testified at the evidentiary hearing. He remembered the juror issue. Bailey testified that it was an ongoing issue at trial. Both the judge and the attorneys tried to ascertain the extent of Juror Jones' hearing loss, and what impact that might have had on her ability to be a juror. {App. 2875}. He indicated that the issue came up about what to do with the guilt verdict if the court were to decide that Juror Jones was not qualified to continue during the sentencing phase. {App. 2875}. He did state there were two concerns that were raised in the event they let the juror go. {App. 2876}. First, there was the issue that could be raised on appeal as to whether there should have been a mistrial if the court were to dismiss the juror and replace her with one of the alternate jurors. Second, the defense was arguing to keep the juror. By the end, Bailey was also arguing to keep Juror Jones. At that point, he indicated that he was trying to protect the record. {App. 2876}. He was also concerned about the fact that the defense could attempt to make a Batson type argument if Juror Jones was dismissed and she was replaced with

a white alternate juror. {App. 2876-77}. Bailey was also concerned about what replacing Juror Jones in the sentencing phase would do to the guilt verdict. {App. 2877}. Bailey noted that it was hard to grasp the extent of Juror Jones' hearing problem because she kept insisting that she was able to hear and follow the testimony, but she also admitted that she missed out on certain things. No decision was ever made by the judge that Juror Jones was not qualified to serve. {App. 2877}. Everyone recognized that a juror does not have to be a perfect specimen, and they never crossed the point where anyone ever decided that she was not qualified. {App. 2878}.

Counsel's decision not to request Juror Jones be removed was the result of a reasonable strategic decision by counsel. When counsels' argument to keep Juror Jones is viewed in the context of how the jury was selected in this case, it is clear that Juror Jones was selected for more than her race. In all, Petitioner failed to establish that counsel's reasons for keeping Juror Jones were not valid, strategic reasons. Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack); Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991) (tactical decision sustainable unless it is both incompetent and prejudicial). See generally Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel, and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy). In all, these claims of ineffective assistance of counsel were properly dismissed in light of counsels' strategic decision to keep Juror Jones on the jury for the remainder of the trial. Devier v. Zant, 3 F.3d 1445, 1454 (11th Cir. 1993) ("The decision not to object was based on a reasonable strategic choice. The fact that such a stratagem,

viewed from hindsight, may have been imprudent does not . . . provide the basis for a claim of ineffective assistance of counsel.").

Petitioner also failed to show that he was prejudiced by Juror Jones not being dismissed from his jury. It was never established at trial that Juror Jones was not qualified to continue serving on the jury. While she indicated that she may have missed some of the testimony during the sentencing phase, it was never determined what parts of the testimony she missed, or whether she missed any material portions of either the guilt or sentencing phase.

Furthermore, Petitioner did not establish he was entitled to relief upon the due process claim that underlies this ineffective assistance of counsel claim. South Carolina courts have held that a person who has difficulty hearing is not *per se* disqualified from serving as a juror. Safran v. Meyer, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916). "A 'defendant has a constitutional right to be tried by competent jurors,' which 'implies a tribunal both impartial and mentally competent to afford a hearing.'" State v. Hurd, 325 S.C. 384, 389, 480 S.E.2d 94, 97 (Ct.App.1996) (quoting Tanner v. United States, 483 U.S. 107, 134, 107 S.Ct. 2739, 2755, 97 L.Ed.2d 90 (1987) (Marshall, J., dissenting)). A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion. State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265 (Ct.App.1999). "[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999). "[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences or whatever kind and nature." State v. Bryant, 354 S.C. 390, 395, 581 S.E.2d 157, 160 (2003) (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d 10, 12 (Ct. App. 1993)). Consistent with these principles, "a juror who has not heard all

the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict.” People v. Valerio, 529 N.Y.S.2d 350, 351 (NY 1988).

“[I]t is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified,” and “the court must not speculate ... but must ascertain the juror's state of mind and must place its reasons for excusing or retaining the juror on the record.” Valerio, 529 N.Y.S.2d at 351. State v. Reevey, 159 N.J.Super. 130, 387 A.2d 381 (App.Div.1978). Cf. State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973) (stating that “[i]t is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial”).

Hurd, 480 S.E.2d at 97 (addressing situation where juror was believed to fall asleep during trial).

Petitioner did not establish that his due process rights were violated in this case. Here, the trial court made several attempts to determine if Juror Jones was qualified to continue serving in Petitioner’s case once the trial court became aware that Juror Jones may have had some difficulty hearing. During the guilt phase, the trial court asked Juror Jones several times if she had any difficulty hearing at various points during the proceedings. {App. 1082, 1095-96, 1114, 1277-78}. Juror Jones maintained that she heard and understood the evidence and testimony presented during trial when asked during the guilt phase. Furthermore, once the trial court became aware that Juror Jones may not have been at full attention during the sentencing phase of Petitioner’s trial, the trial court engaged in several tests to ascertain whether Juror Jones was hearing and comprehending the testimony at trial. The record clearly indicates that those tests were inconclusive. It was apparent that Juror Jones may have missed some testimony at trial, but it was not clear how much and what testimony that included. It was never determined by the trial court that Juror Jones missed material testimony. It was also never determined that Juror Jones was not qualified to serve on the jury. By the end of the inquiry during the sentencing phase of Petitioner’s trial, the State, defense counsel, and Petitioner all agreed that Juror Jones was qualified to continue. {App. 2075-77}. There was not a sufficient showing that Juror Jones

missed material testimony at trial or that her hearing difficulty was of such a degree as to indicate she missed material testimony. As a result, the underlying due process claim was without merit. U.S. v. Sadeeh,² 61 F.3d 510, 525 (7th Cir. 1995); see Lyda v. U.S., 321 F.2d 788, 791 (9th Cir. 1963)(denying motion for new trial where trial judge found juror to be competent and incidents used to show juror was deaf occurred in courtroom in judge's view).

II. THE PCR COURT PROPERLY REJECTED A CLAIM OF INEFFECTIVENESS REGARDING COUNSEL'S ADMISSION OF CONDITIONS EVIDENCE, WHERE THE DECISION WAS REASONABLE AT THE TIME OF TRIAL, AND THERE WAS NO PREJUDICE.

Petitioner contends his counsel was ineffective for allowing conditions of confinement evidence in to the penalty phase. The PCR court found that given the state of the law at the time of trial, counsel was not deficient for electing to present conditions evidence. {App. 3466-67}.

1. Facts

In opening statement in the sentencing phase, Johnston introduced the concept of the severity of life in prison as an acceptable alternative to death, noting that the death penalty and life without parole were "as extreme as you can get." {App. 1416-17; 1420; 1422-23}.

At no time during the solicitor's sentencing phase case did he ever introduce any evidence regarding conditions of confinement in prison. During its case, the defense called a social worker and prison expert James Aiken, and introduced through them on direct extensive testimony as to the extreme deprivations of life in prison without parole – depicting it as a hopeless condition with bad food, mean guards, and a predatory population that psychologically and physically ages a man before his time. {App. 1741-52; 1944-57}.

² But see Commonwealth v. Brown, 231 Pa.Super. 431, 332 A.2d 828 (1974); Wisconsin v. Turner, 186 Wis.2d 277, 521 N.W.2d 148 (1994).

Predictably, once this door was opened, the solicitor engaged in some limited cross-examination of the social worker, prison expert, and prison chaplain, in which he pointed out that while prison was not a “country club”, prisons do have canteens, recreational opportunities, work opportunities, medical care, and visitation. **{App. 1768-78; 1797-1808; 1957-67}**.

The solicitor did not present any reply case on conditions. In closing, the solicitor only briefly addressed the issue, noting that while being in prison was NOT “like being at the Hilton or Club Med”, Petitioner would still get some amenities. **{App. 2124-25}**.

In contrast, a centerpiece of the defense presentation in closing was the stark reality of life without parole, with defense counsel arguing that it was a “rotten, horrible, miserable existence”, hardly ameliorated by “basketball courts and the bag of peanuts”. The defense concluded its remarks by saying:

DEFENSE COUNSEL: He will live a lonely, miserable, desolate, pathetic life in a small cramped jail cell by himself with nobody to blame but himself and there he will die.

{App. 2136; 2151-52}.

At PCR, once refreshed with the transcript, counsel Johnston testified that from opening statement the defense was trying to “soothe” the jury that if it gave life it was not “giving [Petitioner] a break”. Counsel felt that the issue favored the defense because “the horrible negative aspects of prison far greatly outweighed the amenities of being able to play a game of cards.” **{App. 2760-63, 2765, 2767-69, 2778-79}**.

Similarly, defense counsel Archer admitted that while he had not read State v. Plath, a 1984 case that disapproved of evidence of conditions of confinement in a capital sentencing phase, the defense planned to show “miserable prison factors” because he felt the issue as a whole benefitted the defendant. Moreover, on cross, he flatly stated part of the defense strategy

was to show that Petitioner's life in prison would be so difficult that it was sufficient as punishment for his crime. He identified letters he sent to defense experts Lori Whitaker and James Aiken prior to trial in which he asked them to be prepared to describe the difficulties of life in prison. {App. 2818-2821, 2824-25, 2849-53}.

1. Counsel was not deficient.

Given the time in which this trial took place, counsel was not deficient by introducing evidence of conditions of confinement. At the time of this trial, State v. Plath was on the books. 281 S.C. 1, 313 S.E.2d 619 (1984). In the relevant portions of Plath, the capital inmate first claimed on appeal that the solicitor improperly cross-examined the defense expert on escape or release. The court held that since the expert had testified that a life-sentenced inmate would not leave prison and was in a condition of slavery, it was permissible for the State to pursue the extent of the expert's knowledge with examination about an incident in which a life-sentenced inmate escaped while on an errand outside of the prison. 281 S.C. at 13, 313 S.E.2d at 626.

Plath declined relief on a claim that the solicitor improperly cross-examined a defense social worker on a letter she wrote to the solicitor in which she complained that serial killer Pee Wee Gaskins was allowed to move too freely about the prison. *This Court specifically rejected a claim that such an examination interjected an arbitrary factor.* In doing so, Plath noted that the defense strategy on one part sought to show that the death penalty was an ineffective deterrent and counterproductive, and on the other part sought to show that life imprisonment was a "condition of irretrievable loss". 281 S.C. at 13-14, 313 S.E.2d at 626. The court disapproved of such sentencing defenses, noting that policy and penology were not for the jury, and concluded:

In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to

be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. The State was entitled to make this response.

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (emphasis added).

Thus, Plath stands for three points of particular relevance as to the state of the law under which counsel here operated: (1) that defendants had even since the early 80s attempted to show as a strategic matter that life imprisonment was so difficult as to be a sufficient alternative to death; (2) the court rejected a contention that the cross-examination interjected an arbitrary factor; and (3) the State was entitled to respond in kind. Indeed, Plath ultimately affirmed the sentence despite the presence of conditions evidence and policy discussions.

One other significant change in the law happened two years prior to Petitioner's trial in 2004 -- Kelly v. South Carolina, 534 U.S. 246 (2002). There, the United States Supreme Court broadly defined the evidence of "future dangerousness" that would require a jury charge that a life sentence meant life without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Thus, counsel here were going to have the benefit of a judicial charge to support their contentions that Petitioner would never have another day outside of the stark reality of prison.

It was not until *after* Appellant's trial in 2004 that this Court's relatively recent opinions on conditions evidence were issued. In State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005), this Court pointed out that "[g]enerally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment", but affirmed because the issue was not preserved.

In State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007), the *solicitor* preemptively called a witness who testified over objection as to conditions of confinement. Justices Moore

and Waller, joined by Justice Pleicones in concurrence, cited Plath for the proposition that evidence was inadmissible in sentencing regarding conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. The Court concluded that evidence of conditions of confinement “invited the jury to speculate about irrelevant matters” and injected an arbitrary factor in the proceedings in violation of section 16-3-25(C)(1) (2003). In dissent, Chief Justice Toal and Justice Burnett applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. They concluded that the issue was fully joined by both sides and used by the defendant to his advantage. 640 S.E.2d at 454-57.

In Petitioner’s own direct appeal, this Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject. Thus, it affirmed. State v. Bryant, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (“We . . . remain firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment is improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally”).

Therefore, counsel here operated in this shifting legal landscape, as one of the first capital cases after Kelly in which the jury was definitely going to know about the absence of parole. Like other defense lawyers in cases around this same time that have similar issues, such as Marion Bowman (presently pending before the PCR judge), and John Richard Wood (presently pending before this Court on PCR certiorari), defense counsel elected to focus the jury on the severity of every day life for one with a “no parole” life sentence, in an attempt to offer it as a sufficient punishment without need for the death penalty.

Although counsel may not have read Plath at the time of trial, this ultimately does not matter. Counsel was undoubtedly aware that the defense would get a LWOP charge, and

therefore thought as a strategic matter that the conditions evidence on the whole inured to the benefit of the defense. This strategy was reasonable, and other lawyers in similar situations were making the same decision, as the Bowman and Wood cases reflect. Indeed, lawyers were making this same strategic judgment in the early 80s with Plath, where they did not even have the added benefit of a specific “without parole” charge.

Moreover, while Plath was the law at the time, nothing in Plath precluded the parties from not objecting and essentially trying the issue by consent – indeed, that is precisely what happened in Plath, which affirmed the conviction and sentence on that basis. Plath also expressly rejected the contention that the conditions evidence interjected an arbitrary factor into the sentencing phase. It was not until years *after* Petitioner’s trial that this Court found conditions evidence to be an “arbitrary factor” under S.C. Code Ann. § 16-3-25(C)(1) (2010), which is certainly a step beyond the handling of the issue in Plath. See Burkhart, 371 S.C. at 492 & n.6, 640 S.E.2d at 455 & n.6 (Toal, CJ, dissenting) (“Plath’s discussion of this type of evidence is best interpreted as resolving a traditional appeal of a question of the admission of evidence”). Indeed, this very Court on direct appeal in Petitioner’s case engaged in proportionality review which includes assessing arbitrary factors, but affirmed anyway – thus weighing against any contention that defense counsel should have recognized based on Plath that conditions evidence was necessarily an arbitrary factor.

Counsel’s decision was reasonable, as both lawyers testified that they felt the conditions issue on the whole benefitted the defendant, since “basketball courts and the bag of peanuts” hardly could compete with the harsh descriptions offered by Aiken and Whitaker. Moreover, the law is clear that counsel are not required to foresee changes in the law. As such, their decision was not deficient given the context in which it was made.

2. There was no prejudice.

While the State would respectfully hold firm to the view that Chief Justice Toal in dissent in Burkhart correctly analyzed the nature of the error when conditions evidence is introduced, even if conditions evidence is an arbitrary factor, there is still no basis for reversal here. While Burkhart was on direct appeal and phrased its issue as a statutory one – that introduction of evidence of conditions of confinement injected an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Petitioner here in PCR is raising, as he must, a *constitutional* issue of ineffective assistance of counsel – that he was effectively denied his Sixth Amendment right to counsel based on counsel’s omission. As such, he must show prejudice, like any Strickland claim of ineffectiveness. See Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001) (applying prejudice analysis to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial, because *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues; thus, a finding of *per se* reversible error was no longer warranted).

Both counsel were adamant that they thought they had the better hand on this issue, and the record bears that out. Through Whitaker and Aiken, the defense presented pages and pages of testimony as to the bad food, mean guards, uncomfortable surroundings, spartan rules, and dangerous community full of intimidation and violence. They spoke of rapes, beatings, gangs, shanks, razors, racial issues, strip searches, and even the use of snipers of kill an inmate. They also talked of the stark psychological impact, describing it as completely isolated, helpless, and hopeless, and spoke of the trauma of living in a place full of constant screams and a dull roar. Aiken even theorized that this “deteriorates” inmates and makes them old very quick, and concluded that knowledge of the effect of their crimes combined with the daily life around a

“dysfunctional, dispassionate, violent” inmate population is so profound that “remorse is not a good word for it.” This evidence was the centerpiece of their closing. See {App. 2136} (defense states life is not a reward and will “rotten, horrible, and miserable”); **{App. 2145}** (defense states its “you’ve seen how he will be punished in prison”); **{App. 2151}** (defense argues prison is “psychological and emotional turmoil, constant fear, no safety whatsoever, lonely, no privacy, seclusion from society, the absolute non-stop feeling of worthlessness . . . no self esteem, constant deprivation . . . dangerousness. . . predators . . . racial turmoil . . . gangs . . . there’s screams . . . there’s rapes”); **{App. 2152}** (defense implies that there is no gain in a death sentence, and states a life sentence is “lonely, miserable, desolate, pathetic life in a small cramped jail cell . . . and there he will die”).

On the other side of this extensive and stark presentation was the state’s rather limited response on candy and sports and work prospects and visitation. The solicitor only argued the issue for a mere two pages in closing, preferring instead to rely on the extreme brutality of this murder of a police officer, and Petitioner’s history of violence and misbehavior to women, a teenager, and other officers and guards. Indeed, the solicitor even said in closing: “I’m not going to get up here and tell you [prison is] like being at the Hilton or Club Med because it’s not.” **{App. 2124-25}**. The solicitor’s main argument following his brief discussion of conditions was one he could have made anyway regardless of the conditions issue: that while Petitioner would be alive in jail, Cpl. Lyden would be dead in a grave. See State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (in case with no conditions of confinement evidence, holding that Solicitor’s closing argument in sentencing phase, that state trooper’s family could not go to see him, but they could only visit him at grave, was relevant on impact of crime on family).

And all of this is in a case where Petitioner brutally murdered a Horry officer as he lay on the ground begging for his life, and had a history of other violent run-ins with women, teenagers, police and guards through his life. The absence of the conditions issue would simply not create a reasonable probability of a different result.

III. THE PCR COURT PROPERLY REJECTED A CLAIM OF INEFFECTIVENESS REGARDING EVIDENCE OF ANOTHER INMATE'S ESCAPE PLAN, WHERE COUNSEL THOUGHT THE EVIDENCE WAS HELPFUL AND WHERE THERE WAS NO PREJUDICE IN ANY EVENT GIVEN THE BREVITY OF THE REFERENCE.

Petitioner next contends his counsel was ineffective for failing to object to evidence of another's inmate's escape plan. The PCR Court found no ineffectiveness, noting that trial counsel explained the evidence did not implicate Petitioner, and that there was no prejudice given the nature of this crime. {App. 3469}.

During testimony of a prison chaplain, defense counsel introduced a number of documents from the prison showing Petitioner's participation in religious services, for which he had 92% attendance. {App. 1793-95}. On cross, the solicitor asked if the Easter service referred to in one of them was canceled, and Van Bebber answered – before the solicitor had ever mentioned escape – that the service had been cancelled because of rumors of an escape attempt. Van Bebber stated that the rumor was that some inmates on death row were going to attempt escape, but it was not necessarily the ones who were going to the worship service. {App. 1799-1800}. There was no further mention of or argument by the solicitor on the subject. Instead, he discussed Petitioner's own bad record and misbehavior in jail. {App. 2119-22}.

At PCR, Johnston testified the request to go to the Easter service helped to buttress his presentation that Petitioner's religious participation, which supported counsel's prison

adaptability presentation. Counsel stated he was not concerned about the solicitor's cross on escape because it was clear it did not involve Petitioner. Indeed, it was actually helpful:

JOHNSTON: That didn't hurt [Petitioner] whatsoever. A planned escape that has nothing to do with my client is not gonna surprise the jury that somebody wants to escape from prison. And all it does is furthers the point that it's a dangerous place.

{App. 2773-76}.

Undoubtedly, counsel was reasonable in deciding to present evidence of Petitioner's religious activities in prison. This is not only classic prison adaptability evidence but also classic "good character" evidence such that it would have been an allegation of ineffectiveness had counsel NOT presented it. And, once he did, responsive cross-examination was permissible based on the law in effect at the time, Plath. State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (State's cross-examination about another inmate's escape was permissible *response*).

Regardless of whether the evidence was admissible prior to Bowman and Burkhart, though, counsel's decision not to object was still reasonable, given that the witness quickly explained the escape evidence did not implicate Petitioner, and the evidence just went to further support the defense presentation that prison was a dangerous place and thus no cakewalk as punishment. Again, it is important to note that the Strickland standard does not require that this Court decide it would have done the same thing if it was in counsel's shoes, but only that counsel made a reasonable decision among various choices.

Moreover, there was no prejudice under Strickland for the same reasons. There was no evidence in the record tying Petitioner to the rumored escape attempt. If anything, the evidence in this case corroborated the evidence from defense prison expert James Aiken that SCDC had the resources and procedures in place to safely contain Petitioner for the rest of his life regardless

of his behavior. {App. 1945-46; 1950-52; 1955}. When coupled with the fact that Petitioner was not involved, but only wished to go to church on Easter, the lack of prejudice is apparent.

The mention was very brief, encompassing but two pages in a nearly 800 page sentencing phase transcript, and was not discussed in closing. {App. 1799-1800}. Under these circumstances there was no prejudice, given the egregious nature of this crime as well as Petitioner's other violent run-ins with women, teenagers, police and guards through his life. See, e.g. Smith v. State, 386 S.C. 562, 689 S.E.2d 629 (2010) (failure to object to improper testimony particularly prejudicial where State relied heavily on it in closing); Randall v. State, 356 S.C. 639, 591 S.E.2d 608 (2004) (improper argument not reversible where it was but 10 lines).

IV. THE PCR COURT'S FINDING THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR RELYING UPON INCONSISTENT THEORIES OF DEFENSE DURING THE GUILT PHASE IS SUPPORTED BY THE RECORD.

The PCR Court denied relief upon this claim. In doing so, the PCR Court found Petitioner failed to establish that trial counsel presented inconsistent theories for the guilt-or-innocence phase and the sentencing phase. The PCR Court noted that based on counsel's testimony and review of the trial record, it was clear that counsel's overall strategy for the guilt phase was to hold the State to its burden of proof. The defense strategy at the sentencing phase was to show the Petitioner was remorseful, would adapt well to prison, had become a religious man, had a good family, and a life sentence would be sufficient to punish him. See Glass v. State, 227 S.W.3d 463, 473 (Mo.2007) (finding counsel's strategy was reasonable in arguing that the state had not presented evidence beyond a reasonable doubt to establish that defendant had deliberated prior to killing during guilt phase, and in the sentencing phase argued defendant was remorseful and that this one act was out of character.). The PCR Court found that since the two strategies were not inconsistent, Petitioner failed to show he was prejudiced by the interaction

between the two strategies. Furthermore, even if the two strategies were inconsistent, Petitioner failed to show that but for counsel's error, there was reasonable probability that the outcome at trial would have been different. **{App. 3469-70}**.

The PCR Court's denial of relief is supported by the testimony at the evidentiary hearing and the trial court record. Johnston testified the defense had a theory for the penalty phase. They wanted to lay out all of the mitigating factors they could and present it to the jury for their consideration. **{App. 2729}**. Prison adaptability was one. According to Johnston, Petitioner had a remarkable history in prison. Johnston indicated a second part of their strategy was presenting Petitioner's family. He had a large family filled with people who were all dedicated to him. **{App. 2730-31}**. The defense's argument was that sentencing Petitioner to death would cause his family to needlessly suffer as a result. **{App. 2731}**. Johnston indicated they attempted to show that Petitioner did not have the worst past of anyone. They also wanted to show he had a religious commitment, and there were good things that could be said of his character.

Johnston testified that he could not say they had a defense for the guilt phase of Petitioner's trial. **{App. 2731}**. The State had extremely strong evidence of guilt, and he believed that the result of the guilt phase of trial would be the same if the case was tried 1000 times. **{App. 2732}**. Johnston also indicated that it could alienate the jury in a case of overwhelming guilt to suggest Officer Lyden had engaged in misconduct by pulling Petitioner over on the night of the murder.³ **{App. 2733}**.

In all, Johnston did not specifically recall discussing the theory of the guilt phase with Archer. **{App. 2730}**. He was sure that he did, but he did not specifically recall. **{App. 2730}**. During cross-examination, Johnston noted that they did consider the possibility of Petitioner

³ Johnston initially stated that it would not alienate the jury. **{App. 2733}**.

pleading guilty; Petitioner did not want to do so. {App. 2766}. They knew they had no fighting chance in the guilt phase, and they had to do the best with what they had. {App. 2767}.

Paul Archer testified that he did not necessarily have to have a theory in the guilt phase. {App. 2831}. Basically, he saw his job as pointing out the inconsistencies within the State's case. {App. 2831}. He noted that the circumstances around the traffic stop contained a bunch of inconsistencies. {App. 2831-32}. Archer testified that he knew Petitioner was going to be found guilty. {App. 2832}. Archer noted that he did challenge the armed robbery charge at trial. {App. 2833}. He noted that Petitioner was not armed when he attacked Officer Lyden, and the item stolen in the alleged robbery was Lyden's pistol. {App. 2833}.

Petitioner asked Archer a series of questions asking about his intentions during the cross examination of several witnesses during the guilt phase of trial. Archer indicated that he tried to point out that one of the eyewitnesses, Mr. Deaton, did not really see as much as he testified he saw. {App. 2834}. He was trying to show that Deaton was exaggerating. {App. 2834}. Archer also testified that he asked a series of questions about Petitioner's injuries. {App. 2835}. He indicated that he was trying to show to the jury that this whole incident happened very quickly. He wanted to present that

[i]t was more that if it was a real big struggle and this thing took place over 10, 15 minutes it would have been a lot more wounds on him, on Mr. Bryant. And there'd probably be a lot more wounds on Officer Lyden besides his face. He was pretty beat up.

{App. 2836-37}. Archer also testified that when he asked the questions regarding racial profiling, he was trying to convey to the jury Petitioner's state of mind at the time of the incident. {App. 2839-40}. While Archer did not believe that Lyden had engaged in racial profiling, it was necessary to get the jury to understand that Petitioner felt like he was unfairly stopped, and that contributed to his actions on the night of the murder. {App. 2839-40}. Archer stated

[w]hat I'm really doing is I'm laying something that the jurors are gonna hear for the penalty phase, and then maybe he would not get the death penalty if the juror s thought he snapped; that he's really -- didn't go out that night and say, I think I'll kill a police officer. Didn't happen that way.

{App. 2841-42}. Archer further argued that what he was trying to do was to show that Petitioner was not necessarily an evil person who went out with the intention of killing a police officer. He wanted the jury to think that Petitioner just snapped. {App. 2843}.

It is clear that counsel's overall strategy for the guilt phase was to hold the State to its burden of proof. At the same time, trial counsel also attempted to show that there was no evidence presented at trial that indicated that Petitioner had acted upon a pre-existing plan to kill a law enforcement officer on the night of the murder. Counsel was very careful not to assert that Petitioner was not guilty in the guilt phase of the trial. During closing arguments, counsel argued that it was his job to ensure Petitioner received a fair trial and to see that the State proved its case beyond a reasonable doubt. {App. 1368}. This guilt phase strategy was not inconsistent with the defense's penalty phase strategy. As already noted, the defense strategy for the sentencing phase was to show that Petitioner was remorseful; Petitioner would adapt well to prison; Petitioner had become a religious man as a result of what he had done; and a sentence of life in prison would have been more than sufficient to punish Petitioner. The guilt phase theory dovetailed into the sentencing phase theory.

V. THE PCR COURT PROPERLY REJECTED A CLAIM APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CONDITIONS EVIDENCE, GIVEN THE STATE OF THE LAW AT THE TIME OF THE APPEAL AND THE LACK OF AN OBJECTION BELOW.

Petitioner next contends his appellate counsel was ineffective for not raising on direct appeal the admission of conditions evidence as an arbitrary factor. The PCR court found no ineffectiveness, given that at the time of the appeal Burkhart was not yet decided, the issue was

not preserved, and this Court did a mandatory review for arbitrary factors on direct appeal anyway. {App. 3471-72}.

Many of the facts behind this issue and the development of the law have been already discussed. Plath came out in 1984, and while it disapproved of evidence regarding conditions of confinement, it affirmed because the defense opened the door. No reference was made in Plath to such evidence being an arbitrary factor. In 2002, the United States Supreme Court issued Kelly v. South Carolina. Petitioner was tried in 2004, and appellate defender Robert Dudek filed his initial brief in Petitioner's direct appeal on November 9th, 2005. On November 28th, 2005, *after* Dudek filed his brief, this Court issued the first of the "new" cases on conditions, State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). Bowman, though, did not refer to conditions evidence as constituting an arbitrary factor. It was not until Burkhart came out on January 8th, 2007, that three members of the South Carolina Supreme Court first referred to conditions of confinement evidence as constituting an arbitrary factor.

Dudek testified that the arbitrary factor language in S.C. Code Ann. § 16-3-25(C)(1) (2003) is part of a mandatory review that the South Carolina Supreme Court is supposed to do on its own in death cases. He stated he had no strategic reason for not asserting an arbitrary factor claim to the Court, but pointed out there was no objection on that basis to preserve it. He questioned whether one was necessary given the mandatory nature of the review, but he noted that generally an issue must be raised to and ruled on by the trial court. {App. 2980-82}. Dudek stated, that at the time he filed his brief, there had been no ruling from the state supreme court regarding conditions being an arbitrary factor under the statute, and the only case he had to argue from was Plath, which he relied on and discussed extensively in his brief. {App. 3003-07}.

Given this situation, it cannot be said appellate counsel was deficient. Of course, appellate counsel cannot be deficient for failing to assert an unpreserved issue. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991). Moreover, as noted before, counsel is not required to anticipate changes or developments in the law, and there was no case out there at the time counsel filed his brief that had found conditions evidence to be an arbitrary factor. See Plath, 371 S.C. at 492 & n.6, 640 S.E.2d at 455 & n.6 (Toal, CJ, dissenting) (“Plath's discussion of this type of evidence is best interpreted as resolving a traditional appeal of a question of the admission of evidence”). Counsel here appropriately relied on the best case he had – Plath.

Indeed, Petitioner's direct appeal was decided on February 27th, 2007, only about a month and a half after Burkhart was decided. If this “arbitrary factor” doctrine is as Petitioner contends it is, and could be raised regardless of objection and indeed should be raised by this Court *sua sponte* under the statute, then there would be no reason why this Court affirmed Petitioner's sentence on direct appeal a month and a half later, even though his case was full of conditions evidence. Moreover, the fact that this Court did not reverse Petitioner's sentence, but rather took the time to point out that defense evidence on the subject was just as impermissible as State's evidence, shows a conclusion that the defense certainly got the better end of the stick in Petitioner's case. Bryant, 372 S.C. at 317, 642 S.E.2d at 589 (“testimony seeking to portray life imprisonment as preferable to capital punishment is improper”).

VI. PETITIONER WAS NOT ENTITLED TO RELIEF ON THE DUE PROCESS CLAIM; HE FAILED TO ESTABLISH HE WAS ENTITLED TO RELIEF ON THE MERITS, AND THE CLAIM SHOULD SUCH A FREESTANDING CLAIM WAS IMPROPER FOR PCR.

First, as noted in response to the underlying merits of Petitioner's claim of ineffective assistance of counsel for failing to protect Petitioner's right to a fair and competent jury,

Petitioner failed to establish that he is entitled to relief upon this claim on the merits. Petitioner cannot establish that his due process rights were violated in this case. {RPWC at pp. 5-7}.

Furthermore, Petitioner's claim that his right to due process was violated by the fact the trial court did not dismiss Juror Jones because of her hearing difficulty should have been dismissed because it was not properly raised in this application for post-conviction relief. The claim should have been dismissed as a matter of law. As a freestanding claim, it was not proper for PCR. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in a PCR application absent a claim of ineffective assistance of counsel). See also S.C. Code Ann § 17-27-20(b) (Rev. 2003) (PCR is not a substitute for remedies available at trial or on direct review).

VII. ANY FREESTANDING CLAIM AS TO THE CONDITIONS EVIDENCE IS NOT ONLY PROCEDURALLY IMPROPER FOR PCR, BUT WITHOUT MERIT GIVEN THAT THE DEFENSE INTRODUCED THE EVIDENCE AND HAD FREE REIGN ON IT, AND THERE IS NOTHING AS A CONSTITUTIONAL MATTER THAT MAKES CONDITIONS EVIDENCE SOME SORT OF "SUPER ERROR" INCAPABLE OF ANALYSIS.

Petitioner finally makes the freestanding claim that his due process rights were violated by introduction of the conditions of confinement evidence. The PCR court rejected the claim, finding the defense elected to go into the evidence and on the whole benefitted from it, given the State's moderate response. The PCR court also noted this Court affirmed after doing its mandatory review for arbitrary factors. {App. 3464}.

First, Petitioner's freestanding claim is not proper in PCR unless somehow tied to ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

Even if there was a viable freestanding claim, it would be without merit. “In order to avoid arbitrary and capricious sentencing and to ensure that capital punishment is applied consistently and fairly, the Eighth Amendment requires the States to institute procedures that narrow the class of persons eligible for the death penalty.” Roach v. Angelone, 176 F.3d 210, 216 (4th Cir. 1999). Here, there is nothing about introduction of conditions evidence that changed the necessity of finding aggravators or considering mitigators in Petitioner’s case. Indeed, it is hard to find something arbitrary under the Eighth Amendment or a violation of due process where the *defense* first took on the issue, had free reign, and introduced a far greater amount of evidence on the subject than the limited State response. Such would allow the defense to try a strategy, and if it fails seek a second bite at the apple based on its own evidence. In the freestanding context, this does not work.

Further, there is nothing about conditions evidence itself that would place it on a pedestal beyond a normal Eighth Amendment or due process analysis. The undersigned could find no federal caselaw that holds conditions evidence is necessarily an arbitrary factor so poisonous it simply cannot be analyzed – to the contrary, while most courts do not, some courts reason that it or similar evidence is *relevant* to the sentencing determination.¹ There is simply no reason to

¹ See Ramdass v. Angelone, 530 U.S. 156, 170 (2000) (“Evidence of potential parole ineligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled, he may escape to murder again, he may be pardoned; he may benefit from a change in parole laws; some other change in the law might operate to invalidate a conviction once thought beyond review; or he may be no less a risk to society in prison.”); People v. Rowland, 841 P.2d 897, 921 (Cal. 1992) (cross and argument on conditions evidence “comprised an unproblematic argument to the effect that life imprisonment without possibility of parole was not the appropriate punishment in this case”) (issue also rejected in federal habeas corpus in Rowland v. Cullen, 2010 WL 3629693 (N.D.Cal. 2010) (unpublished); State v. Rhines, 548 N.W.2d 415 (S.D. 1996) (“In this context, the jury’s questions about work release and “distraction from punishment” do not show that they considered irrelevant or arbitrary factors in rendering a verdict. Their questions directly relate to conditions of confinement under a sentence of life without parole. Prison life was an appropriate topic for discussion when weighing the

make conditions evidence some sort of “super-error” which defies a normal analysis. Indeed, the statute itself speaks of “influence” of an arbitrary factor, not merely “presence”. Indeed, the this Court already engaged in its proportionality review which includes assessing arbitrary factors, but affirmed anyway despite the defense’s conditions evidence.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court to deny Bryant’s Petition for Writ of Certiorari.

Respectfully submitted,

ALAN WILSON
Attorney General

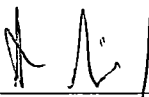
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEYS FOR RESPONDENT

By: 

Alphonso Simon Jr.

October 6, 2011.

alternatives of life imprisonment and the death penalty.”); People v. White, 870 P.2d 424 (Colo. 1994) (“with respect to any other evidence of mitigation, the district court considered: (1) the testimony offered by White and other inmates regarding prison conditions at Centennial”).

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED
OCT - 6 2011

JAMES NATHANIEL BRYANT, III,

Petitioner, S.C. Supreme Court

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert E. Lominack, Esq., P.O. Box 5508, Columbia, SC 29250.

I further certify that all parties required by Rule to be served have been served.

This 6th day of October, 2010.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

OCT - 7 2011

Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge
S.C. Supreme Court

JAMES NATHANIEL BRYANT, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

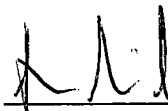
Respondent.

AMENDED PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert E. Lominack, Esq., P.O. Box 5508, Columbia, SC 29250.

I further certify that all parties required by Rule to be served have been served.

This 6th day of October, 2011.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

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

**Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge**

JAMES NATHANIEL BRYANT, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

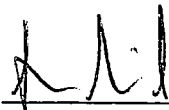
Respondent.

AMENDED PROOF OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Return to Petition for Writ of Certiorari on Petitioner by depositing two (2) copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Robert E. Lominack, Esq., P.O. Box 5508, Columbia, SC 29250.

I further certify that all parties required by Rule to be served have been served.

This 6th day of October, 2011.



ALPHONSO SIMON, JR.

Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

OCT - 7 2011

S.C. Supreme Court

October 7, 2011

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

Re: *James Nathaniel Bryant, III vs. State of South Carolina*

Dear Mr. Shearouse:

Enclosed for filing please find the original and six (6) copies of an Amended Proof of Service for the Return to Petition for Writ of Certiorari in the above-referenced case.

Thank you for your assistance in this matter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert E. Lominack, Esq. (w/two (2) copies of encls.)
The Honorable J. Gregory Hembree, Solicitor, 15th Judicial Circuit (w/copy of encls.)
Ms. Sandi Wofford, Victim Services (w/copy of encls.)

The Supreme Court of South Carolina

James Nathaniel Bryant III, **Petitioner,**

v.

State of South Carolina, **Respondent.**

The Honorable Michael G. Nettles
Horry County
Trial Court Case No. 2007-CP-26-05062

ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until October 6, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

September 7, 2011

cc: Robert Edward Lominack, Esquire
Senior Assistant Attorney General S. Creighton Waters
Assistant Attorney General Alphonso Simon Jr.



ALAN WILSON
ATTORNEY GENERAL

September 6, 2011

RECEIVED

SEP - 6 2011

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

S.C. Supreme Court

Re: *James Nathaniel Bryant, III vs. State of South Carolina*
Appeal from Horry County

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. The Return is currently due to be served and filed today, September 6, 2011. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Return.

Therefore, I am enclosing an original and six (6) copies of a Petition for Extension of Time to File Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert E. Lominack, Esq.. (w/two (2) copies of encls.)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge

RECEIVED

SEP - 6 2011

JAMES NATHANIEL BRYANT, III,

S.C. Supreme Court
Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel would respectfully request a seven (7) day extension in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. This is Respondent's third extension request. Respondent's Return is due to be served and filed today, September 6, 2011, this Court having granted Respondent's second request for an extension filed on August 8, 2011.

The South Carolina Supreme Court's *Order Re Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that: "(3) [a] third extension may be granted upon a showing of good cause. The facts supporting the good cause shall be set forth in the motion. If filed by the Division of Appellate Defense or the Office of the Attorney General, the motion shall be signed by the attorney involved and his or her immediate supervisor. If filed by a private lawyer, the motion shall be signed by the attorney involved and, if lawyer is not a sole practitioner, by

another member of the firm. The signatures on the motion shall be a certification by these attorneys that they believe that the extension is warranted and that there is good cause to seek the extension.” In compliance with that Order and in support of this motion, counsel would respectfully show the Court the following:

Counsel drafted and filed the Motion for Summary Judgment and Return and Memoranda of Law in Support of Motion for Summary Judgment in Roger Ashworth, #218399 vs. Warden Cartledge, McCormick, C.I., C/A No.: 6:11-1472-JMC-KFM. Counsel has also reviewed the files and done a substantial amount of work on the Motions for Summary Judgment and Returns and Memoranda of Law in Support of Motion for Summary in the matters of James A. Bryant, #315781 v. Warden, Broad River Corr. Inst., C/A. No. 4:11-1315-RBH-TER; Herman Joseph Daniels, #302463 vs. Anthony Padula, Warden of Lee Correctional Institution, C/A No. 3:11-1445-JFA-JRM; Cedric Woods, #265789 vs. John Pate, C/A No.: 3:11-1353-JMC-JRM, all federal habeas actions pending before the United States District Court for the District of South Carolina.

Counsel also completed the Final Brief of Respondent in State v. Tremaine Rashon Wray, a direct appeal in a Richland County murder case. Counsel also filed Respondent’s Response in Opposition to Motion to Stay Habeas Corpus Proceedings in the matter of Kenneth Matthew Durrah, #221137 vs. Wayne McCabe, Warden, C/A No.: 8:11-589-JFA-JDA.

Counsel has nearly completed the Return, but need additional time to finish parts of a couple of the responses to arguments raised in the Petition. Counsel has been in contact with opposing counsel regarding this request, and opposing counsel has no objection to this request. The seven (7) day extension requested will make the Return to

Petition for Writ of Certiorari due on September 13, 2011. I understand the desire of the Court and Petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

ALAN WILSON
Attorney General

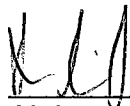
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305



Alphonso Simon, Jr.
Assistant Attorney General



DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

September 6, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge

JAMES NATHANIEL BRYANT, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

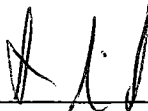
Respondent.

PROOF OF SERVICE

I, Alphonso Simon, Jr., do hereby certify that on this date, I served the *Petition for Extension of Time to File Return to Petition for Writ of Certiorari* in the foregoing action on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, first-class, postage prepaid, and addressed as follows:

Robert Lominack, Esq.
Law Offices of Robert E. Lominack, P.C.
P.O. Box 5508
Columbia, South Carolina 29250

This 6th day of September, 2011.

By: 
ATTORNEYS FOR RESPONDENT

The Supreme Court of South Carolina

James Nathaniel Bryant III, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Michael G. Nettles
Horry County
Trial Court Case No. 2007-CP-26-05062

ORDER

For good cause shown, the request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until September 6, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY


CLERK

Columbia, South Carolina

August 8, 2011

cc: Robert Edward Lominack, Esquire
Assistant Attorney General Alphonso Simon Jr.



ALAN WILSON
ATTORNEY GENERAL

August 4, 2011

RECEIVED

AUG 05 2011

S.C. SUPREME COURT

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

Re: *James Nathaniel Bryant, III vs. State of South Carolina*
Appeal from Horry County

Dear Mr. Shearouse:

I hereby request an extension of thirty (30) days in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. The Return is currently due to be served and filed today, August 4, 2011. However, because of my involvement in other matters in state and federal court, I have been unable to timely complete the Return.

Therefore, I am enclosing an original and six (6) copies of a Petition for Extension of Time to File Return to Petition for Writ of Certiorari. I am informing opposing counsel of my request by copy of this letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd

Enclosures

cc: Robert E. Lominack, Esq.. (w/two (2) copies of encls.)

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge

JAMES NATHANIEL BRYANT, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

Respondent.

RECEIVED

AUG 08 2011

S.C. SUPREME COURT

PETITION FOR EXTENSION OF TIME TO FILE
RETURN TO PETITION FOR WRIT OF CERTIORARI

The undersigned counsel would respectfully request a thirty (30) day extension in which to file the Return to Petition for Writ of Certiorari in the above-referenced case. This is Respondent's second extension request. Respondent's Return is due to be served and filed today, August 4, 2011, this Court having granted Respondent's first request for an extension filed on July 6, 2011.

The South Carolina Supreme Court's *Order Re Extension Requests in Criminal Direct Appeals and Post-Conviction Relief Certiorari Proceedings* provides, in pertinent part, that: "(2) [a] second extension request may be granted upon a showing of good cause. The facts supporting good cause shall be set forth in the motion. The signature of the attorney on the motion shall be a certification that the attorney believes that the extension is warranted and that there is good cause to seek the extension." In compliance

with that Order and in support of this motion, counsel would respectfully show the Court the following:

Counsel attended a status conference on July 7, 2011 before the Honorable Benjamin H. Culbertson regarding the matter of Louis Michael Winkler v. State, an Horry County capital post-conviction relief action. Counsel prepared and filed Respondent's Motion to Alter or Amend Judgment in the matter of Kevin Mercer v. State, a Lexington County capital post-conviction relief action.

Counsel also completed the Initial Brief of Respondent in State v. Taurus Watts, a direct appeal in a Richland County murder case. Counsel also completed the Initial Brief of Respondent in State of South Carolina v. Brandon Heath Clark, a direct appeal in a Greenville County murder case.

Counsel drafted and filed the Motions for Summary Judgment and Returns and Memoranda of Law in Support of Motion for Summary Judgment in Gilbert Bowie, #281647 v. Robert Stevenson, Warden, BRCI, C/A No. 4:11-00716-HFF-TER, Cedrick Clinkscales, #286356 v. Robert M. Stevenson, III, C/A No. 6:11-1160-HFF-KFM, Travis Devar Pollard, #252081 vs. Michael McCall, C/A No.: 0:11-540-TLW-PJG, and Ricky L. Hatcher, #305505 vs. Gregory Knowlin, C/A No.: 6:11-1319-RMG-KFM, all federal habeas actions pending before the United States District Court for the District of South Carolina. Counsel has also reviewed the files and done a substantial amount of work on the Motions for Summary Judgment and Returns and Memoranda of Law in Support of Motion for Summary Judgment in the matters of Roger Ashworth, #218399 v. Warden Cartledge, McCormick, C.I., C/A No. 6:11-01472-JMC-KRM, and James A. Bryant, #315781 v. Warden, Broad

River Corr. Inst., C/A. No. 4:11-1315-RBH-TER, federal habeas matters pending in the United States District Court for the District of South Carolina.

I have been in contact with opposing counsel regarding this request, and opposing counsel has no objection to this request. The thirty (30) day extension requested will make the Return to Petition for Writ of Certiorari due on September 6, 2011.¹ I understand the desire of the Court and Petitioner's counsel for a speedy resolution of this case, but I reasonably believe this extension is essential to allow me to complete the Return to Petition for Writ of Certiorari with reasonable effectiveness.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ALPHONSO SIMON, JR.
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

August 4, 2011.



Alphonso Simon, Jr.
Assistant Attorney General
ATTORNEYS FOR RESPONDENT

¹Thirty days from today would be September 3, 2011. September 3 is a Saturday. September 5 is Labor Day.

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

**Appeal from Horry County
Honorable Michael G. Nettles, Circuit Court Judge**

JAMES NATHANIEL BRYANT, III,

Petitioner,

vs.

STATE OF SOUTH CAROLINA,

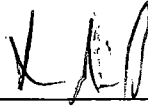
Respondent.

PROOF OF SERVICE

I, Alphonso Simon, Jr., do hereby certify that on this date, I served the *Petition for Extension of Time to File Return to Petition for Writ of Certiorari* in the foregoing action on counsel for the Petitioner by depositing two (2) copies of the same in the United States mail, first-class, postage prepaid, and addressed as follows:

Robert Lominack, Esq.
Law Offices of Robert E. Lominack, P.C.
P.O. Box 5508
Columbia, South Carolina 29250

This 4th day of August, 2011.

By: 

ATTORNEYS FOR RESPONDENT

The Supreme Court of South Carolina

James Nathaniel Bryant III, Petitioner,

V.

State of South Carolina, Respondent.

The Honorable Michael G. Nettles
Horry County
Trial Court Case No. 2007-CP-26-05062

ORDER

The request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until August 4, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

July 6, 2011

cc: Robert Edward Lominack, Esquire
Senior Assistant Attorney General S. Creighton Waters

ALAN WILSON
ATTORNEY GENERAL



July 5, 2011

RECEIVED

JUL - 5 2011

S.C. Supreme Court

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

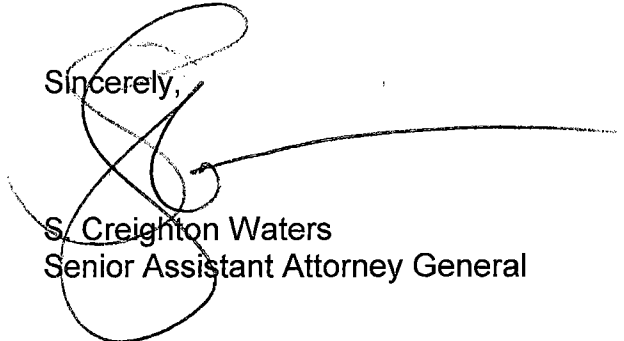
Re: The State v. James Bryant
Appeal from Horry County—Capital PCR Appeal

Dear Mr. Shearouse:

The Return to the Petition for Writ of Certiorari in the above-referenced action is due to be filed and served today, July 5, 2011. Due to my heavy caseload, I have not been able to complete the return. Therefore, I respectfully request thirty (30) days within which to complete and file the Return to the Petition for Writ of Certiorari.

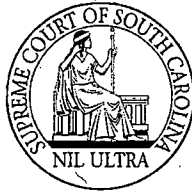
By copy of this letter I am informing opposing counsel of this request. Thank you for your consideration.

Sincerely,


S. Creighton Waters
Senior Assistant Attorney General

SCW/arb

cc: Robert E. Lominack, Esquire
Diana Holt, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 3, 2011

Robert Edward Lominack, Esquire
P.O. Box 5508
Columbia, SC 29250

Re: Bryant, James Nathaniel III v. The State
Case Tracking No. 2010-181666

Dear Mr. Lominack:

This office has received your Petition for a Writ of Certiorari in the above matter. It has been assigned the Case Tracking Number that appears above. Please use this number on all future correspondence relating to this matter.

I do wish to call the attention of the parties to the attached order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

Very truly yours,

CLERK

DES/dmh

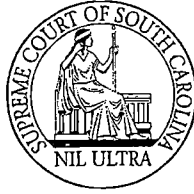
Enclosure

Bryant, James Nathaniel, III v. State

Page Two

June 3, 2011

cc: Senior Assistant Attorney General S. Creighton Waters
Assistant Attorney General Alphonso Simon Jr.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 19, 2011

Robert Edward Lominack, Esquire
Law Offices of Robert E. Lominack, P.C.
P.O. Box 5508
Columbia, SC 29250

Re: Bryant, James Nathaniel III v. The State

Dear Counsel:

The following Order has been endorsed on your Motion to Exceed Page Limit in the above entitled case on appeal.

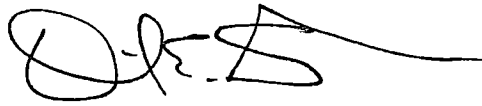
“Granted.

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

May 19, 2011.”

Please be advised the Petition for a Writ of Certiorari and Appendix should be served and filed within thirty (30) days of the date of this letter.

Very truly yours,



CLERK

DES/dmh

Bryant, James Nathaniel III v. The State
Page Two
May 19, 2011

cc: Senior Assistant Attorney General S. Creighton Waters
Assistant Attorney General Alphonso Simon Jr.

LAW OFFICES OF ROBERT E. LOMINACK, P.C.

ROBERT LOMINACK
ATTORNEY AT LAW

Post Office Box 5508
Columbia, SC 29250

Tel. 803.771.7271
Fax. 803.937.1707
robert@lominacklaw.com

May 6, 2011

Hon. Daniel Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: *James Nathaniel Bryant, III v. South Carolina*

Dear Mr. Shearouse,

Please find enclosed the original and 6 copies of Petitioner's Motion to Exceed Page Limit. I have also enclosed the original Certificate of Service.

If you need further information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'RL' or similar initials, enclosed in a circular flourish.

Robert Lominack

cc: S. Creighton Waters
Alphonso Simon

RECEIVED

MAY 09 2011

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

MAY - 9 2011

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Michael G. Nettles

Case No. 2007-CP-26-5062

James Nathaniel Bryant, III, ...Petitioner,

v.

State of South Carolina, ...Respondent.

MOTION TO EXCEED PAGE LIMIT

Undersigned counsel for James Bryant hereby moves for authorization to exceed the 25-page limit prescribed by Rule 243(e)(3), SCACR for his Petition for Writ of Certiorari in the above-referenced case. Counsel for Respondent have no objection to this request.

The record in this case is substantial, almost 3000 pages, and counsel anticipates raising several significant issues. Indeed, Respondent's post-hearing briefing before the lower court spanned approximately 90 pages. Therefore, counsel request leave to file a petition for certiorari not to exceed 50 pages.

In addition to the adequate presentation of the issues to this Court, petitioner will need to file an oversized petition in order to adequately preserve all issues for federal habeas corpus proceedings in the event this Court should deny relief. Pursuant to 28 U.S.C. Section 2254(b), a federal court will not review an issue that has not been “exhausted” in state court. In order to exhaust a claim, that claim must be “fairly presented” to the state’s highest court, *Brown v. Allen*, 344 U.S. 443, 447 (1953), either on direct appeal or in state post-conviction proceedings, *Castille v. Peoples*, 489 U.S. 346, 351 (1989). Exhaustion also requires pursuit of all available avenues of discretionary review deemed to be part of the ordinary appellate process. *O’Sullivan v. Boerckel*, 526 U.S. 838 (1999). Exhaustion requires that the state court be presented with the facts and the specific legal arguments necessary for consideration of the issue. *Anderson v. Harless*, 459 U.S. 4 (1982); *Picard v. Connor*, 404 U.S. 270 (1971). If petitioner fails to exhaust his claims by presenting them in his petition for certiorari, he will be procedurally barred from obtaining merits review in any future federal habeas corpus proceeding. *See generally Coleman v. Thompson*, 501 U.S. 722 (1991). Thus, to avoid defaulting his claims, petitioner must present all facts and legal arguments to this Court in the petition, which simply cannot be done in 25 pages.

Undersigned counsel is mindful of this Court’s interest in encouraging the submission of concise documents, rather than full briefs, at the certiorari

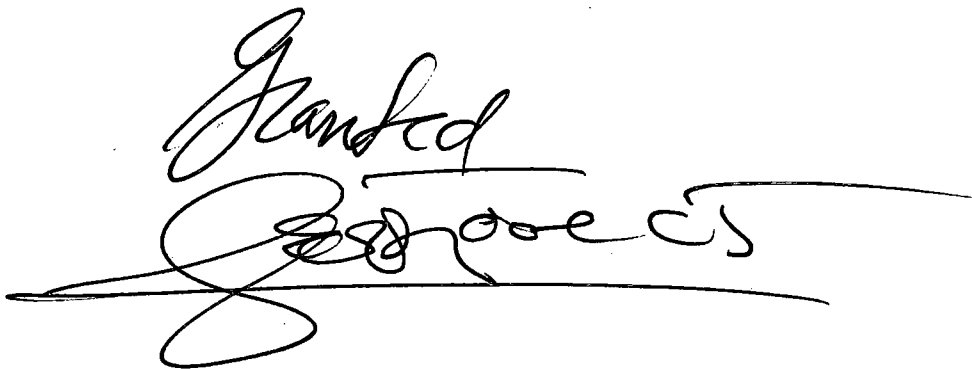
stage, and he has every intention of preparing his petition in a manner consistent with this interest. Counsel submits that a limit of 50 pages represents a reasonable accommodation of these interests.

WHEREFORE, counsel for Petitioner requests an extension of thirty days in which to file the Petition for Writ of Certiorari and further that the page limit be increased from 25 to 50 pages.



Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271
Attorney for Petitioner

May 6, 2011



May 19, 2011

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles

Case No. 2007-CP-26-5062

James Nathaniel Bryant, III, ...Petitioner,

v.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Robert Lominack, hereby certify that I have served the Petitioner's Motion to Exceed Page Limit in the above-referenced case by depositing two copies in the United States mail, postage prepaid, to S. Creighton Waters and Alphonso Simon, Post Office Box 11549, Columbia, SC 29211 on this 6th day of May, 2011.



Robert Lominack

RECEIVED

MAY 09 2011

S.C. SUPREME COURT

The Supreme Court of South Carolina

James Nathaniel Bryant III, Petitioner,

V.

State of South Carolina, Respondent.

The Honorable Michael G. Nettles
Horry County
Trial Court Case No. 2007-CP-26-05062

ORDER

Petitioner seeks a second extension of time to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter. The request for an extension is granted and extended until June 3, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
CLERK

Chief Deputy

Columbia, South Carolina

April 27, 2011

cc: Robert Edward Lominack, Esquire
Senior Assistant Attorney General S. Creighton Waters
Assistant Attorney General Alphonso Simon Jr.

LAW OFFICES OF ROBERT E. LOMINACK, P.C.

ROBERT LOMINACK
ATTORNEY AT LAW

Post Office Box 5508
Columbia, SC 29250

Tel. 803.771.7271
Fax. 803.937.1707
robert@lominacklaw.com

April 26, 2011

Hon. Daniel Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

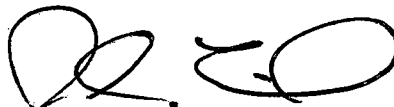
Re: *James Nathaniel Bryant, III v. South Carolina*

Dear Mr. Shearouse,

Please find enclosed the original and 6 copies of Petitioner's Motion for Extension of Time. I have also enclosed the original Certificate of Service.

If you need further information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to be 'R. Lominack', written over a horizontal line.

Robert Lominack

cc: S. Creighton Waters
Alphonso Simon

RECEIVED

APR 27 2011

S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 27 2011

APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Michael G. Nettles

Case No. 2007-CP-26-5062

James Nathaniel Bryant, III, ...Petitioner,

v.

State of South Carolina, ...Respondent.

MOTION FOR EXTENSION OF TIME

Undersigned counsel for James Bryant hereby moves that the Court grant an extension of time in which to file the Petition for Writ of Certiorari and appendix in the above-referenced case.

The Petition for Writ of Certiorari and appendix are currently due on May 4, 2011. Counsel request that the date be extended by thirty days. Counsel has consulted with opposing counsel, Creighton Waters and Alphonso Simon, and they have advised that the Respondent does not object to this request.

Counsel requests additional time to prepare the petition for a number of reasons. This death penalty case presents a number of significant issues.

Indeed, Respondent's post-hearing briefing spanned almost 100 pages. Moreover, the record is substantial, approximately 3000 pages. Lastly, demands on counsel's time imposed by other capital cases have prevented counsel from completing the petition.

WHEREFORE, counsel for Petitioner requests an extension of thirty days in which to file the Petition for Writ of Certiorari and appendix.

A handwritten signature in black ink, consisting of stylized, overlapping loops and curves, positioned above a horizontal line.

Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
803-771-7271
Attorney for Petitioner

April 26, 2011

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Michael G. Nettles

Case No. 2007-CP-26-5062

James Nathaniel Bryant, III, ...Petitioner,

v.

State of South Carolina, ...Respondent.

CERTIFICATE OF SERVICE

I, Robert Lominack, hereby certify that I have served the Petitioner's Motion for Extension of Time in the above-referenced case by depositing two copies in the United States mail, postage prepaid, to S. Creighton Waters and Alphonso Simon, Post Office Box 11549, Columbia, SC 29211 on this 26th day of April, 2011.



Robert Lominack

RECEIVED
APR 27 2011
S.C. SUPREME COURT

The Supreme Court of South Carolina

James Nathaniel Bryant III, Petitioner,

v.

State of South Carolina, Respondent.

The Honorable Michael G. Nettles
Horry County
Trial Court Case No. 2007-CP-26-05062

ORDER

The request for an extension to serve and file the Petition for a Writ of Certiorari and Appendix is granted and extended until May 4, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

April 1, 2011

cc: Robert Edward Lominack, Esquire
Appellate Defense
Senior Assistant Attorney General S. Creighton Waters
Assistant Attorney General Alphonso Simon Jr.

LAW OFFICES OF ROBERT E. LOMINACK, P.C.

ROBERT LOMINACK
ATTORNEY AT LAW

Post Office Box 5508
Columbia, SC 29250

Tel. 803.771.7271
Fax. 803.937.1707
robert@lominacklaw.com

March 30, 2011

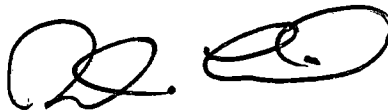
Hon. Daniel Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: *James Bryant v. South Carolina*

Dear Mr. Shearouse,

The petition for writ of certiorari in the above case is due to be filed on April 4, 2011. I am requesting an extension of 30 days to file and serve the petition. Due to my heavy caseload and professional commitments, I have been unable to prepare the petition and appendix in a timely manner. By copy of this letter I am informing opposing counsel of this request.

Sincerely,



Robert Lominack

cc: Alphonso Simon, Jr.
S. Creighton Waters

RECEIVED

MAR 31 2011

S.C. SUPREME COURT



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

March 22, 2011

RECEIVED

MAR 22 2011

S.C. Supreme Court

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

The transcript listed below was requested by this office. Pursuant to Rule 207(a)(2), SCACR, the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

Court Reporter

Ms. Frances A. Bakis-Ray

Due Date

3/7/11

Case Name

James Nathaniel Bryant, III

Trial Date: October 22, 2010

I would appreciate your confirming in writing as to the status of the above-referenced transcript. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Lauren E. Cruse
Legal Assistant

cc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

RECEIVED

MAR 22 2011

S.C. Supreme Court

March 22, 2011

Ms. Desiree Allen
S.C. Court Administration
1015 Sumter Street, 2nd Floor
Columbia, South Carolina 29201-3739

Dear Ms. Allen:

The transcript listed below was requested by this office. Pursuant to Rule 207(a)(2), SCACR, the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Frances A. Bakis-Ray	3/7/11	James Nathaniel Bryant, III

Trial Date: July 27, 2010

I would appreciate your confirming in writing as to the status of the above-referenced transcript. If you should have any questions, please do not hesitate to contact me.

Sincerely,

Lauren E. Cruse
Legal Assistant

cc: S.C. Supreme Court
Attorney General's Office

The Supreme Court of South Carolina

James Nathaniel Bryant III, Petitioner,

v.

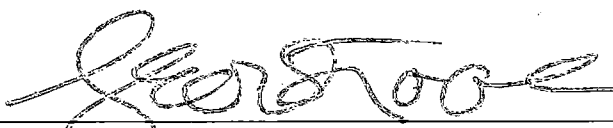
State of South Carolina, Respondent.

ORDER

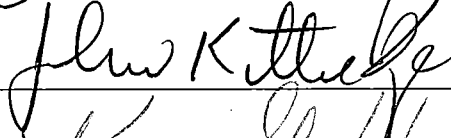
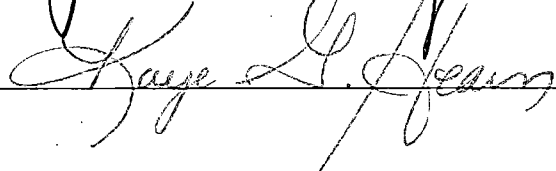
Robert Lominack asks that he and Diana Holt be appointed as counsel for petitioner in this capital post-conviction relief (PCR) proceeding because the Commission on Indigent Defense, Division of Appellate Defense has a conflict of interest. Mr. Lominack and Ms. Holt represented petitioner before the circuit court in this matter.

There is no requirement that an inmate petitioning for a writ of certiorari in a capital PCR matter have two attorneys appointed to represent him. Accordingly, Mr. Lominack is hereby appointed to represent petitioner in this matter. Ms. Holt may also represent petitioner if she agrees to do so on a *pro bono* basis.

IT IS SO ORDERED.


C.J.

J.

J.

J.

J.

Columbia, South Carolina

February 2, 2011

cc: Robert E. Lominack, Esquire
Diana L. Holt, Esquire
Appellate Defense
Assistant Attorney General
Alphonso Simon, Jr.

LAW OFFICES OF ROBERT E. LOMINACK, P.C.

ROBERT LOMINACK
ATTORNEY AT LAW

Post Office Box 5508
Columbia, SC 29250

Tel. 803.771.7271
Fax. 803.937.1707

robert@lominacklaw.com

January 11, 2011

RECEIVED
JAN 12 2011
S.C. SUPREME COURT

Hon. Daniel Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

Re: *James Nathaniel Bryant v. South Carolina*
Case No.: 2007-CP-26-5062

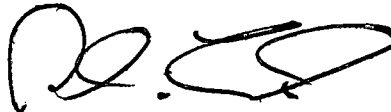
Dear Mr. Shearouse,

I am writing to request that I along with Diana Holt be appointed – as lead counsel and co-counsel, respectively – to represent the above applicant in his appeal of the denial of post-conviction relief from his death sentence. The notice of appeal has been served on Respondent and filed with this Court.

The PCR court denied a claim that Bob Dudek, applicant's appellate counsel and now the Chief Appellate Defender of the Division of Appellate Defense, provided ineffective assistance of counsel. Mr. Dudek provided testimony during the post-conviction proceedings regarding this claim. Obviously, it would now be a conflict of interest for lawyers from Mr. Dudek's office to assume responsibility for the litigation of this claim. I have spoken with the Division of Appellate Defense about this issue and that office agrees that its representation would constitute such a conflict.

If you have any questions or need further information, please do not hesitate to contact me. Thank you in advance for your assistance in this matter.

Sincerely,



Robert Lominack

cc: Diana Holt
Bob Dudek
Alphonso Simon, Jr.



Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

January 6, 2011

RECEIVED

JAN 06 2011

S.C. Supreme Court

Ms. Frances A. Bakis-Ray
Circuit Court Reporter
555 Jeffries Lane
Florence, SC 29505-2733

Dear Ms. Bakis-Ray:

Our office has been requested to perfect the appeal arising out of:

James Nathaniel Bryant, III v. State

Case #:

County: Florence

Date of Trial: October 22, 2010

Presiding Judge: Michael G. Nettles

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

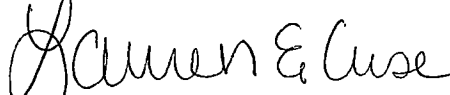
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Frances A. Bakis-Ray
January 6, 2011
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Lauren E. Cruse".

Lauren E. Cruse
Legal Assistant

cc: S.C. Supreme Court
Attorney General's Office



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

January 6, 2011

RECEIVED

JAN 06 2011

S.C. Supreme Court

Ms. Frances A. Bakis-Ray
Circuit Court Reporter
555 Jeffries Lane
Florence, SC 29505-2733

Dear Ms. Bakis-Ray:

Our office has been requested to perfect the appeal arising out of:

James Nathaniel Bryant, III v. State

Case #:

County: Florence

Date of Trial: July 27, 2010

Presiding Judge: Michael G. Nettles

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

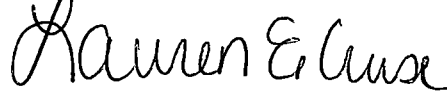
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Frances A. Bakis-Ray
January 6, 2011
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Lauren E. Cruse". The signature is written in a cursive style with a large, stylized 'L' at the beginning.

Lauren E. Cruse
Legal Assistant

cc: S.C. Supreme Court
Attorney General's Office

LAW OFFICES OF ROBERT E. LOMINACK, P.C.

ROBERT LOMINACK
ATTORNEY AT LAW

Post Office Box 5508
Columbia, SC 29250

Tel. 803.771.7271
Fax. 803.937.1707
robert@lominacklaw.com

December 28, 2010

Hon. Daniel Shearouse
Clerk
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

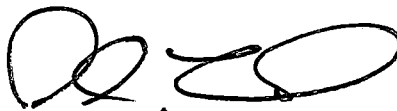
Re: *James Nathaniel Bryant, III v. South Carolina*
Case No.: 07-CP-26-5062

Dear Mr. Shearouse,

Please find enclosed the Notice of Appeal and Proof of Service in the above case. I have also enclosed the Order of Dismissal with Prejudice.

If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,



Robert Lominack

cc: Diana Holt
Alphonso Simon, Jr.

RECEIVED

DEC 30 2010

S.C. Supreme Court

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Judge Michael G. Nettles, Circuit Court Judge

Case No. 07-CP-26-5062

RECEIVED

DEC 30 2010

S.C. Supreme Court

James Nathaniel Bryant, III, ...Appellant,

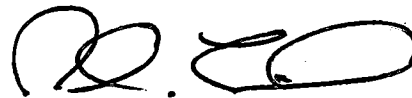
v.

State of South Carolina, ... Respondent

NOTICE OF APPEAL

James Nathaniel Bryant, III, appeals the Order of Dismissal with Prejudice of the Honorable Michael G. Nettles. The Order was filed on November 16, 2010, and was received by Appellant on November 30, 2010.

December 28, 2010



Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
Attorney for Appellant

Other Counsel of Record:

Diana Holt
Diana Holt, LLC
Post Office Box 6454
Columbia, SC 29260
Attorney for Appellant

Alphonso Simon, Jr.
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
Attorney for Respondent

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Judge Michael G. Nettles, Circuit Court Judge

Case No. 07-CP-26-5062

James Nathaniel Bryant, III, ...Appellant,

v.

State of South Carolina, ... Respondent

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on December 28, 2010, addressed to the attorney of record, Alphonso Simon, Jr., PO Box 11549, Columbia, SC 29211.

December 28, 2010



Robert E. Lominack
Law Offices of Robert E. Lominack, P.C.
Post Office Box 5508
Columbia, SC 29250
Attorney for Appellant

RECEIVED

DEC 30 2010

S.C. Supreme Court

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

JAMES NATHANEIL BRYANT, III

Applicant,

v.

STATE OF SOUTH CAROLINA

Respondent.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT

07-CP-26-5062

**ORDER OF DISMISSAL
WITH PREJUDICE**

CLERK OF COURT
SECTION 16
JANIE HUGGINS-WARD
AH 10:30
HORRY COUNTY

This matter is before this Court on the application for post-conviction relief (APCR) filed by James Nathaniel Bryant, III (Applicant), who was convicted of murder and armed robbery. For the following reasons, this Court denies and dismisses the application with prejudice.

I

PROCEDURAL HISTORY

In December of 2000, the Horry County Grand Jury indicted Applicant for murder and armed robbery (00-GS-26-3326). Applicant was initially convicted and sentenced to death in June of 2001, but the South Carolina Supreme Court reversed the guilt and sentencing phases of that trial. State v. Bryant, 354 S.C. 390, 581 S.E.2d 157 (2003).

Jury selection began before the Honorable Paula H. Thomas on September 29th, 2004. Paul Archer and Robert Johnston represented Applicant at this jury trial, and the attorney General's office appointed former First Circuit Solicitor Walter Bailey to represent the State. On October 5, 2004 the jury convicted Applicant on both charges.

The sentencing phase of his trial began on October 7th, 2004, and Judge Thomas submitted the following aggravating factors to the jury: 1) the murder was committed while in the commission of a robbery while armed with a deadly weapon; 2) the murder was committed while in the commission of larceny with use of a deadly weapon; 3) the murder was committed

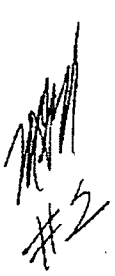
while in the commission of physical torture; and 4) the murder of a local law enforcement officer during or because of the performance of his official duties. On October 9th, 2004 the jury recommended the death penalty, and on that same day, Judge Thomas sentenced Applicant to death.

Applicant filed and served a timely Notice of Appeal with the South Carolina Supreme Court. Assistant Appellate Defender Robert M. Dudek represented Applicant during his direct appeal, and continues to represent him before this Court. On October 3, 2006, Dudek filed a Final Brief of Appellant with the South Carolina Supreme Court. The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on October 19th, 2006.

The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on February 27th, 2007. State v. Bryant, 642 S.E. 2d 582 (S.C. 2007). The Court denied a petition for rehearing on April 4th, 2007.

Applicant was granted a stay of execution to file a petition for writ of certiorari with the United States Supreme Court. Applicant filed his certiorari petition on July 2, 2007, and on October 1, 2007 the United States Supreme Court denied the certiorari petition.

While the certiorari petition before the United States Supreme Court was pending, Applicant filed this APCR. On October 15th, 2007 Applicant filed with the South Carolina Supreme Court a Motion for Appointment of PCR Judge and Stay of Execution. On October 31, 2007 the South Carolina Supreme Court granted the stay of execution and appointed this Court to preside over the PCR action. On November 15th, 2007 this court appointed Bentz Kirby and Donna Taylor to represent Applicant. Ultimately, Robert E. Lominack and Diana Holt took over the representation from Kirby and Taylor.



Applicant filed his Second Amended Application for Post-Conviction Relief, which was the subject of the evidentiary hearing on this case that took place on January 25, 2010. This Court has heard the testimony, reviewed the record, and reviewed the post-trial briefing of counsel, and rules as follows.

II

GROUND FOR RELIEF

Pursuant to the familiar doctrine in Strickland v. Washington, 468 U.S. 668 (1984), Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Competency is measured against what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 598 (4th Cir. 1996).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984); See Also Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) (holding that the prejudice prong in a capital sentencing proceeding is established when there is a reasonable probability that, but for the counsel's errors, the sentencer would have concluded the circumstances did not warrant death.)

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 417 S.E. 2d 594 (1992).

A. Use of Proposed Order

As a preliminary matter, this Court must address concerns raised by Applicant as to the proposed orders. Due to the use of the term "proposed order" in an email to the parties, the State submitted a proposed order while the Applicant submitted a post-trial brief. The Applicant

objected by letter and the State responded by letter, explaining the miscommunication and pointing out that the substantive text would not change much regardless of format. This Court agrees, and reviewed the States submission as if it were a post-trial brief. The applicant objected to this Court signing a proposed order prepared by the State. This Court granted applicant's motion for reconsideration and drafted this order.

B. Grounds for Relief

a. Applicant was denied his right to Due Process and an impartial and competent jury as guaranteed by the Fifth and Sixth Amendment to the United States Constitution and South Carolina law.

Applicant contends that one juror, Shirley Jones, had substantial hearing impairment and the judge was required to remove the juror.

This Court finds that Juror Jones was qualified to serve on the jury without objection. Juror Jones testified she heard all testimony during the guilty phase and was able to compensate for her hearing deficiencies. The trial court also took specific measures to ensure that Juror Jones was able to hear the testimony. Additionally, South Carolina Courts have held that a person who has difficulty hearing is not per se disqualified from serving as a juror. Safran v. Meyer, 103 S.C. 356, 364, 88 S.E. 3, 4 (1916).

 This Court finds there was not a sufficient showing that juror Jones missed material testimony at trial or that her hearing difficulty was of such degree as to indicate she missed material. Therefore, this due process claim is denied.

b. Applicants right, as guaranteed by the Fifth, Sixth, and Eighth Amendments to the United States Constitution and South Carolina law, to Due Process and a fair trial free from arbitrary, capricious imposition of the death penalty, was violated by the introduction of

irrelevant and prejudicial evidence regarding the conditions of confinement in the South Carolina Department of Corrections.

During the sentencing phase the Defense called social worker Lorita Whitaker, who was qualified as an expert in clinical social work and human behavior in prisons. Defense counsel requested Whitaker describe prison life for an average prisoner. Whitaker described the dangers of prison life, the inability of inmates to touch loved ones, and the details of everyday life in prison. Whitaker also testified as to the psychological effects of prison, the harshness of prison guards, and the general lack of privacy. Defense later asked James Aiken, a corrections expert, to describe what prison was like for someone serving life without parole.

This Court finds that Applicant's Due Process claim is without merit. The defense clearly elected to raise the issue of confinement conditions first, and on the whole benefited from the evidence. In contrast, the State only moderately responded, which was permissible because the defense opened the door. It is difficult to find something arbitrary under the Eighth Amendment or a violation of due process where the defense first took on the issue, had free reign, and introduced a far greater amount of evidence on the subject than the limited State response.

Furthermore, the South Carolina Supreme Court has already considered the fact that this case had evidence of prison conditions, and affirmed the sentencing anyway, stating "after reviewing the entire record, we conclude that the sentence in this case was not the result of passion, prejudice, or any other arbitrary factor. Furthermore, a review of similar cases illustrates that imposing the death penalty would be neither excessive nor disproportionate in light of the crime and the defendant." State v. Bryant, 372 S.C. 305, 318, 642 S.E. 2d. 582, 589 (2007).

c. Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the guilt-or-innocence phase of his trial.

The Applicant claims that trial counsel was deficient by not requesting Juror Jones be removed due to a hearing impairment that was discovered during the trial.

In Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065, the United States Supreme Court stated,

"A fair assessment of counsel's performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Counsel's decision not to request Juror Jones excused was a strategic decision. Counsel explained that he did not excuse Juror Jones because he did not like the alternate jurors who would replace Juror Jones. Counsel also stated he did not approve of the selection process because it was conducted as a paper strike. Overall, Applicant failed to show counsel's reasons for keeping Juror Jones was not a valid, strategic decision.

This Court finds that the Applicant has failed to establish that trial counsel was ineffective in not requesting that Juror Jones be removed during either the guilt or innocence phase of this trial.

d. Applicant was denied the right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law at the sentencing phase of his trial.

1) Applicant again states trial counsel was ineffective in failing to request Juror Jones be removed because of her hearing disability, however this attempt is aimed at the sentencing phase.

Due to reasons stated above, this Court finds Applicant failed to establish that trial counsel was ineffective in not requesting Juror Jones be removed during the sentencing phase.

2) Applicant next contends trial counsel introduced irrelevant and prejudicial evidence regarding the conditions of confinement in the South Carolina Department of Corrections, and failed to object to certain irrelevant testimony elicited by the state.

This Court finds that Applicant's counsel was not deficient in raising issues of conditions of confinement. This trial occurred after Kelly v. South Carolina, 534 U.S. 246 (2002), but before State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007), and prior to its own direct appeal State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). The Kelly decision caused the state General Assembly to pass a law requiring life without parole to be charged in all death penalty cases. The Bowman decision held that prison conditions are not relevant to the question of whether a defendant should be sentenced to death, and are inappropriate in the penalty phase of a capital case. After Bowman, South Carolina Supreme Court held in Burkhardt that it was reversible error for the solicitor to introduce the conditions evidence.

As noted previously, the Bowman and Burkhardt decisions were not law at the time of this trial. It is clear that Strickland does not require counsel to anticipate changes in the

developments in the law, and thus counsel is not required to have foreseen the State Supreme Court would subsequently call conditions evidence arbitrary. Therefore, this Court finds that given the time period and the then existing law, the trial counsel was not deficient in presenting conditions evidence.

Applicant further contends that trial counsel was deficient in failing to object to testimony elicited by the state that focused on the jury's attention on irrelevant information i.e. the conditions of the prison. Given the state of the law when this trial took place, applicant's counsel was correct that they would not have had a valid objection to the solicitor's limited responsive questioning. See State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) (holding that once the defense entered evidence about prison conditions, the State was allowed to submit evidence that "life imprisonment was not the total abyss which the defendant portrayed it to be.")

In light of the applicable law at the time of this trial, this Court finds that the trial counsel was not deficient in failing to object to the State's eliciting information about prison conditions.

3) Applicant next contends that trial counsel erroneously believed that discovery rules required defense experts to draft a report, which were then given to the prosecution.

 Applicant fails to show that counsel was deficient by providing the expert reports to the State. State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873 (2007) held that the trial court could not require experts for the defense to produce reports under Rule 5 of SCRPC. But, the opinion also noted Rule 5 requires reports that were created for the defense to be provided to the State. Here, because the defense was in possession of reports from their experts, he was obligated under Rule 5 to provide them to the State. Furthermore, Applicant fails to establish he was prejudiced as a result of counsel requesting the reports and providing them to the prosecution. Applicant has not

shown the result of the trial would have been different but for counsel providing the solicitor with the expert's report. Additionally, Applicant failed to introduce the report into evidence in this proceeding, thus it is unclear what information the report contained that would have been useful to the solicitor and prejudiced the Applicant. Therefore, Applicant fails to show trial counsel was ineffective.

4) Applicant next contends the trial counsel failed to object to the use of both larceny and robbery as aggravating factors.

In State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993), the South Carolina Supreme Court held that it was not an error for the trial court to submit both larceny and armed robbery as aggravating circumstances during the sentencing phase of the trial. Thus, Applicant failed to establish trial counsel was deficient. Applicant has also failed to establish he was prejudiced as a result of trial counsel not objecting to the use of both larceny and robbery as aggravating. Even if it was improper for the jury to consider robbery and larceny, the jury found beyond a reasonable doubt two other aggravating circumstances: the murder was convicted while in the commission of physical torture, and the murder was of a law enforcement officer during or because of the performance of his official duties. Any error by Applicants counsel in failing to object to the use of larceny and robbery was harmless. Therefore, this Court finds the trial counsel was not ineffective in failing to object to the use of larceny and robbery as aggravating factors.

5) Applicant next contends trial counsel failed to object when the state elicited information about allegations of a planned escape by a death row inmate.

Trial counsel was not deficient in failing to object to statements made by a witness about an alleged planned escape that did not implicate the Applicant. Trial counsel reasoned there was no harm because the witness quickly explained the escape evidence did not implicate Applicant. Furthermore, there was no prejudice in failing to object to information about the planned escape because of the egregious nature of this offense. Therefore, this Court finds the trial counsel was not ineffective in failing to object to testimony about an alleged planned escape not implicating the Applicant.

6) Applicant next contends that trial counsel presented a theory of defense in the guilt-or-innocence phase that was supported by no evidence, and which was entirely inconsistent with the theory of the sentencing phase defense.

This Court finds that Applicant has failed to establish that trial counsel presented inconsistent theories for the guilt-or-innocence phase and the sentencing phase. Based on counsel's testimony and review of the trial record, it is clear that counsel's overall strategy for the guilt phase was to hold the State to its Burden of proof. The defense strategy at the sentencing phase was to show the applicant was remorseful, would adapt well to prison, had become a religious man, had a good family, and a life sentence would be sufficient to punish him. See Glass v. State, 227 S.W.3d 463, 473 (Mo.2007) (finding counsel's strategy was reasonable in arguing that the state had not presented evidence beyond a reasonable doubt to establish that defendant had deliberated prior to killing during guilt phase, and in the sentencing phase argued defendant was remorseful and that this one act was out of character.)

Because the two strategies were not inconsistent, the Applicant also fails to show that he was prejudiced by the interaction between the two strategies. Furthermore, even if the two

strategies were inconsistent, Applicant fails to show that but for counsel's error, there was reasonable probability that the outcome at trial would have been different.

7) Applicant next contends that trial counsel failed to object to victim impact testimony that exceeded the bounds of Payne v. Tennessee, 501 U.S. 808 (1991).

Trial counsel testified that as a general rule they are hesitant to interfere with victim impact witnesses for fear of offending the jury. It cannot be said that counsel was unreasonable in deciding that any risks in offending the jury from interrupting the testimony of a brother officer outweighed anything that might be gained in limiting the officer's testimony on one small point or another. Therefore, there was no deficiency.

In Payne the United States Supreme Court held that victim impact evidence is relevant for a jury to meaningfully assess the defendant's moral culpability and blameworthiness and is only inadmissible where it is so unduly prejudicial that it renders the trial fundamentally unfair. Thus, the evidence in question was admissible as a matter of law, and any objection was ineffective.

Furthermore, the Applicant failed to show that the sentencer would change the sentence of death but for the victim impact testimony.

8) The Applicant next contends that trial counsel presented testimony of an expert social worker regarding the conditions of confinement in the South Carolina Department of Corrections.

The issue the Applicant brings to the attention at the PCR Hearing is whether counsel was ineffective in using Whitaker witness for conditions of confinement when she had never been in a South Carolina prison. This court finds that counsel was not ineffective

Ms. Whitaker earned a master's in social work and presides as the mental health coordinator at Georgia County Detention Center responsible for mental health assessment of all inmates. Furthermore, fellow defense attorneys who previously presented Ms. Whitaker's testimony in a capital trial recommended her to counsel. Therefore, trial counsel was not deficient in presenting testimony of Ms. Whitaker.

There was also no prejudice caused to Applicant in using Ms. Whitaker as an expert witness. Whitaker testified to prisons in general, and did not undermine her testimony as to Applicant's family life and social history.

For the above stated reasons, this Court finds that Applicant was not denied effective assistance of counsel.

e. 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 denied as a result of appellate counsel's failure to raise on direct appeal the introduction of testimony regarding the conditions of confinement which injected an arbitrary factor into the trial proceeding.

 Applicant finally contends that his appellate counsel was ineffective in failing to assert on direct appeal that the State's introduction of evidence of conditions of confinement was an arbitrary factor. For the following reasons, this Court finds that appellate counsel was not ineffective in failing to assert the introduction of evidence of conditions of confinement was an arbitrary factor.

As previously noted the Plath decision was rendered in 1984 and disapproved of evidence of conditions of confinement, but did not forbid the introduction of such evidence. In 2002 the

United States Supreme Court issued Kelly v. South Carolina, which essentially required life without parole to be charged in every capital case. The Applicant's trial occurred in 2004, and his appellate brief filed on November 9th 2005. It was not until January 8, 2007 that three members of the South Carolina Supreme Court first referred to conditions of confinement as arbitrary factor in violation of S.C. Code Ann. 16-3-25(C)(1)(2003).

Appellate counsel stated the arbitrary factor language in S.C. Code Ann. 16-3-25(C)(1)(2003) is part of a mandatory review that the South Carolina Supreme Court does on its own in death penalty cases. Furthermore, as a general rule, an issue cannot be argued on appeal unless it was raised to and ruled upon by the trial court. Thus appellate counsel cannot be found deficient for failing to assert an unpreserved issue. Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991). Finally, as previously stated, counsel is not required to anticipate changes or developments in the law, and no case at the time counsel filed his brief had found conditions evidence to be an arbitrary factor under the statute.

Moreover, the fact that the South Carolina Supreme Court did not reverse Applicant's sentence shows they thought the defense as a whole received more benefit from the evidence than the State.

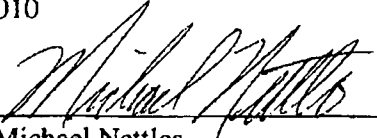
III

For the foregoing reasons, Applicant's APCR is **DENIED AND DISMISSED WITH PREJUDICE**. Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203 and 243 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore it is **ORDERED** that:

- 1) The application for post-conviction relief is denied and dismissed with prejudice.
- 2) Applicant is remanded to the custody of the State of South Carolina.

This 15 day of Nov, 2010



Michael Nettles
Presiding Judge
Twelfth Judicial Circuit

Florence, South Carolina



Lominack, P.C.

US POSTAGE AND FEES PAID
DEC 28 2010 Mailed from ZIP 29250
4.62 First-Class Flat Rate

Happy Holidays
COLUMBIA SC 292
TUE 28 DEC 2010

30383
3 endicia.com/mac 071M00622329

James
Nathaniel
Bryant III

|||||
Daniel Shearouse
South Carolina Supreme Court
PO Box 11330
Columbia SC 29211-1330