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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

John C. Few, Circuit Court Judge

Case No. 00-CP-32-3470

GARY DUBOSE TERRY Petitioner,

v.

STATE OF SOUTH CAROLINA Respondent.

APPENDIX
VOLUME VII OF VII

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would have gained, rather than forfeited, some credibility with the jury.

Essentially what counsel Fullwood suggested during PCR is that the jurors would resent Mr. Terry blaming the victim. This is a curious position given that the jury already knew that Mr. Terry alleged provocation. In fact, as respondent conceded in Ground 11 of the RPO at pp. 62-63, both defense counsel tried to have the statement admitted in order to get a voluntary manslaughter charge.

Respondent cannot have it both ways. If counsel was reasonable for trying to have Mr. Terry's statement admitted in the guilt phase, then it was unreasonable for them to neglect using this evidence to benefit Mr. Terry during his sentencing phase. This court should reject respondent's contention to the contrary, and grant applicant a new sentencing phase trial.

GROUND 11 & 12³

Applicant objects to respondent's proposed fact findings and conclusions of law concerning counsel's failure to present corroborative evidence of voluntary manslaughter. Additional evidence was available at the time of trial that would have allowed defense counsel to bolster Mr. Terry's only viable defense, that Ms. Jackson's killing was an act of manslaughter, rather than murder.

Respondent maintains that the testimonies of counsel, their private investigator and the solicitor's investigator, Scottie Frier, disprove and discredit the testimonies of Louanne Smith and Patricia Terry. Respondent proposes this conclusion based on alleged inconsistencies between these sets of witnesses; however, the PCR record is devoid of

³ Applicant combines these grounds because they are both essentially dealing with the issue of counsel's failure to offer a voluntary manslaughter defense.

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any such inconsistencies.

The PCR record establishes the following. Counsel Stone could not recall speaking with either Louanne Smith or Patricia Terry. PCR pp. 36-39; 43; 51-52; 73-75. The defense investigator, Thomas J. Davis, did not recall interviewing either Louanne Smith or Patricia Terry. That investigator Frier never established a connection between Mr. Terry and Ms. Jackson is irrelevant. Defense counsel had an independent duty to thoroughly investigate the case. Likewise, that Samantha Jackson and Diane Gibson were unaware of Mr. Terry's prior efforts to repair Ms. Jackson's phone box is irrelevant. Neither of these women were even alleged to have been present at the time of the telephone repair attempt by Mr. Terry, and there is no independent reason why they would have known about it.

Louanne Smith and Patricia Terry had valuable information to contribute to Mr. Terry's defense. There is no evidence that anyone spoke to these women about anything related to the guilt phase. Rather they were interviewed concerning what they could say on behalf of Mr. Terry during the *sentencing* phase. Obviously, the relevant time for eliciting evidence of Mr. Terry retrieving a crimping iron from Ms. Smith's home was during the *guilt-or-innocence* phase. This evidence would have refuted the state's claim that Mr. Terry disabled Ms. Jackson's phone on the night of her death, and provided a non-criminal explanation for how Mr. Terry's fingerprint came to be found on Ms. Jackson's phone box. Moreover, it would have corroborated Mr. Terry's claim that he knew Ms. Jackson more intimately than a casual neighbor acquaintance.

Of course, defense counsel was left in the dark about the photograph Samantha Jackson admitted having, showing Gary and Diane inside Ms. Jackson's home. The

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state's failure to reveal the existence of this photo--and its subsequent loss--mitigates somewhat counsels' failure to investigate this angle of the case. Mr. Terry's family was willing and able to provide corroborative information, but were never questioned about their knowledge of Mr. Terry's relationship with the victim. While mitigated, counsels' failure to interview Mr. Terry's family members about their knowledge of his relationship with the victim was clearly deficient.

Additionally, counsel failed to point out to the trial court certain pieces of uncontested evidence that would have served as a basis for admitting Mr. Terry's statement. According to Dr. Carter there was no evidence of any sexual injury or abuse to Ms. Jackson. This fact corroborated Mr. Terry's statement that he had consensual sex with Ms. Jackson. Likewise, counsel failed to argue that Mr. Terry's statement about breaking Ms. Jackson's back door was consistent with the uncontested evidence presented by the state.

Based on the foregoing, this Court should reject respondent's proposed denial of relief and grant applicant a new trial.

GROUND 13

Respondent's proposed basis for denying applicant's claim that counsel unreasonably failed to present evidence of a prior romantic relationship between Mr. Terry and Ms. Jackson so as to establish consensual sex between them is patently absurd. In effect, respondent asks this Court to deny this claim because (a) the victim's daughter claimed none existed, (b) investigators for the state and the defense never discovered evidence of a prior relationship, (c) if Ms. Terry had spoken with Ms Jackson "someone would have uncovered it well before the PCR hearing." RPO p. 73. None of these

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reasons are logical.

First, that Urai Jackson did not share the details of her sex life with her own daughter is neither surprising nor relevant. For her to have done so would have been odd, to say the least. Second, that neither Thomas Davis nor Scottie Frier discovered evidence of the relationship between Ms. Jackson and the applicant is also not particularly meaningful. Scottie Frier, worked for the prosecution and, while he did indicate he would have wanted to know about one if it did exist, he never sought out the existence of such a relationship. Thomas Davis, the defense investigator, according to his own testimony during PCR, never spoke to Patricia Terry. Finally, the "someone would've found it if it existed" argument is circular and absurd. If this type of reasoning is adopted by the courts, then after discovered evidence claims will become extinct. This is clearly not the type of result the law intends.

As an additional matter, this court cannot adopt respondent's wholesale dismissal of the evidence (a photograph depicting Mr. Terry and Diane Gibson socializing with Ms. Jackson in her own home) Samantha Diane Gibson admitted she gave to some member of the prosecution team. Respondent proposes finding Ms. Gibson credible insofar as all of her other testimony is concerned, yet not credible insofar as her turning over evidence. The respondent does not set forth any basis for these conflicting findings about her credibility, and none exist. This information should have been, but was not, disclosed to applicant's trial counsel. Alternatively, even when the state evidently misplaced the evidence, counsel should have been advised that a state's witness had personal knowledge of the existence of the photograph and further told what the photo depicted.

For all of the foregoing reasons, this Court should reject respondent's proposed

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fact findings as to this claim. There is no legitimate basis upon which to reject the testimonies of Patricia Terry and Louanne Smith, or upon which to find their testimonies false.

Respondent argues further that, even if Ms. Smith's testimony concerning a sexual relationship between applicant and Ms. Jackson were deemed credible, that this testimony would not have been admissible because it was hearsay. Applicant disagrees. The state took great pains to establish that Ms. Jackson was a loner who did not date. Clearly this testimony opened the door to rebuttal testimony on this issue.

Samantha Jackson did not live with her mother and could not testify from her personal knowledge what Ms. Jackson did in her free time. (Tr. p. 1527). On direct examination, the stated elicited that "to her knowledge," her mother, Ms. Jackson, never dated. (Tr. P. 1527). This testimony was based in speculation. Moreover, testimony concerning Ms. Jackson's romantic life was arguably irrelevant since this issue is not connected to any of the charges, at least not until the defense introduced evidence that Ms. Jackson dated.

In fairness, the defense should have been allowed to offer both the pictorial evidence (that was withheld by the state) and the testimony from Ms. Smith concerning Mr. Terry's romantic relations with Ms. Jackson. See *State v. Stroman*, 281 S.C. 508 (1984); *State v. McFadden*, 318 S.C. 404 (Ct. App. 1995). This Court should reject respondent's proposed findings of fact and conclusions of law and grant applicant a new trial.

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GROUND 14 AND 21

Respondent proposes that this Court dismiss applicant's claim of ineffective assistance of counsel based on counsel's failure to present evidence in support of his statement/rebuttal of the burglary and telephone tampering charges alleged against Mr. Terry. Respondent's reasoning is flawed and does not support the conclusion that counsel acted reasonably. For the following reasons, applicant objects.

First, respondent notes only two witnesses provided information concerning the broken door glass and telephone system/fingerprint evidence--Agent Steve Derrick with SLED and Louanne Smith. Applicant takes no issue with the testimony of Agent Derrick, as it was wholly consistent with the facts set forth in Mr. Terry's statement. As for Louanne Smith, applicant objects to respondent's proposed finding as to her credibility. Her testimony was unrebutted and there is simply no evidentiary basis to conclude Ms. Smith was lying about Mr. Terry having retrieved the crimping iron from her home.

As with Ground 13, Ms. Terry's testimony is admissible as to this issue in rebuttal of Samantha Jackson's testimony that applicant had only a "passing type" [acquaintance] relationship with Ms. Jackson. Tr. P. 1536. While Ms. Smith could not have testified prior to Ms. Jackson's testimony, after Samantha testified, the door was wide open on the issue of Mr. Terry's prior relationship with the victim. See *State v. Stroman*, 281 S.C. 508 (1984); *State v. McFadden*, 318 S.C. 404 (Ct. App. 1995).

Respondent further proposes this Court find fault with Ms. Smith for not unilaterally providing the crimping iron information to counsel. It is counsel's job to investigate the case, and it would be absurd to hold that anyone other than counsel has a duty to make reasonable efforts at investigating the case. This court should not fault Ms.

Smith for failing to provide guilt-phase information when she was only contacted regarding her ability to give information for the penalty-phase.

Respondent's analysis of the prejudice prong is fundamentally flawed. Respondent opines that there was no prejudice to applicant due to the absence of Ms. Smith's testimony regarding the crimping iron "would show Terry knew precisely where the phone box was located." RPO at 77. However, the jury already knew Terry knew where the box was located because his fingerprint was found on it. The crimping iron testimony established an innocent explanation for how the print came to be found on the telephone box. That is why failure to reasonably investigate and discover the crimping iron information was prejudicial to Mr. Terry.

Respondent notes the wires were "pulled out" of the box. This fact is of no consequence, as it does not negate that Mr. Terry attempted to repair the phone system. It is difficult to imagine how one could repair a broken phone system without temporarily disassembling it and investigating what needed to be fixed.

This Court should reject respondent's proposed conclusions of law. Louanne Smith's testimony was admissible after the state opened the door with Samantha Jackson's testimony. Applicant should be granted a new trial.

GROUND 15

Respondent proposes that this Court deny applicant's claim that counsel failed to adequately argue and preserve the issue of a directed verdict as the charge of criminal sexual conduct. Further, respondent proposes that this court should find applicant abandoned his claim that counsel was also deficient in inadequately arguing for a directed verdict on the charge of burglary. Applicant relies on his Memorandum insofar as

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criminal sexual conduct is concerned.

Applicant objects to the finding of his having abandoned his claim concerning burglary. Mr. Terry's application set forth facts sufficient to establish a prima facie case of ineffectiveness. That neither counsel offered an explanation for their conduct as to this allegation is irrelevant for preservation purposes. This Court should reach the merits of applicant's claim and base its decision on the record evidence.

The strongest evidence of burglary was the broken window pane. Ms. Jackson's backdoor was partially made of glass, and one pane was found in pieces on her kitchen floor. There was no testimony as to when and how the glass pane was broken. Further, the fact that the telephone system was inoperable is irrelevant to the question of whether someone unlawfully entered the victim's home, or entered with intent to commit a crime therein.

To prop up the state's marginal case for burglary, respondent cites the gory details of the way in which Ms. Jackson's body was found. As with the damaged telephone system, the question of whether Ms. Jackson was raped or had consensual sex with Mr. Terry has no relevance as whether he was permitted entry to the home or had an intent to commit a crime.

Evidence that creates a mere suspicion of the defendant's guilt is not enough evidence to survive a motion for directed verdict. *State v. Frazier*, 375 S.C. 575 (2007). Here, the circumstantial evidence of burglary was insufficient to do anything more than create suspicion. This Court should reverse applicant's conviction for burglary.

3009
3009GROUND 16

Respondent seeks dismissal of applicant's claim that counsel were ineffective for failing to object to the excessive bad character evidence brought out during the penalty phase of Mr. Terry's trial. Respondent may not now claim for the first time that applicant's claim is so vague or lacking in specificity as to require its dismissal. If this were the case, respondent could have filed a Motion for More Definite Statement pursuant to Rule 12(e), SCRE. Respondent further seeks to have applicant's claim dismissed based on the absurd argument that it was waived because trial counsel did not respond to the allegations. Applicant set forth a prima facie case in his pleadings and the only evidence necessary to properly litigate this claim is that contained in the trial record, which is available to all parties.

Respondent proposes also that this Court conduct a post-hoc analysis of counsel's conduct so as to conclude that their failure to object to the inflammatory testimonies of Diane Gibson and Angela Fedorchak morphs into a strategic maneuver that "dovetailed into counsel's evidence in mitigation." RPO p. 90. This is absurd. Neither respondent nor an appellate court is permitted to reverse-engineer a "strategy" for trial counsel.

As for the substance of Mr. Terry's claim, he relies on his arguments as set forth in his Memorandum and objections set forth in Ground 6 of this document.

GROUND 17

Respondent proposes as reasonable trial counsel's decision to tell Mr. Terry's sentencing phase jury that he was a rapist, murderer, thief, and invader of homes. There is no plausible basis upon which this Court can adopt respondent's view. Defense counsel Stone was Mr. Terry's legal advocate and his job during the penalty phase was to

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try to convince the jury to spare Mr. Terry from the death penalty.

As respondent concedes, counsel Stone had no answer concerning what his strategic purpose was for calling his own client a rapist, murderer, invader of homes and thief. Respondent urges this Court to craft an explanation for counsel's dereliction. Obviously, neither respondent nor this Court can supplement counsels' testimony.

The argument that counsel wanted to maintain "credibility" with the jury makes no sense. Counsel's name-calling argument did nothing other than reinforce the state's position. The presentation of mitigating evidence does not require arguing with the jurors' guilt phase verdict. It does, however, require counsel to place his client in the best light possible. Here, counsel did just the opposite by reinforcing the state's position--that Mr. Terry was a murderer, rapist, invader of homes, and thief.

This Court should reverse applicant's death sentence.

GROUND 18

Applicant withdraws his request for relief on this ground.

GROUND 19

Respondent proposes that this Court should dismiss his claim of ineffectiveness predicated on inadequate witness preparation. Applicant's claim is that it was unreasonable for trial counsel not to admonish mitigation witnesses to avoid the topic of parole eligibility. Respondent argues Louanne Smith's comment on parole eligibility was not due to counsel's inadequate preparation, but rather was "gratuitous" on Smith's part. This is precisely the point. Ms. Smith should have been warned beforehand to avoid the topic so she would not have made an off-hand comment that harmed Mr. Terry. Ms. Smith was clearly trying to help Mr. Terry during the sentencing-phase of his trial. And,

despite respondent's commentary about Ms. Smith, RPO p. 99, fn. 54, there is no evidence to support the conclusion that Ms. Smith lacked credibility on this issue. Ms. Smith's ambivalent and mixed feelings of "love" for her ex-husband are not, given the circumstances, especially surprising or relevant, and they should not be used as a basis to assess her credibility.

Witness preparation is essential because, in the usual case, most witnesses are not trained lawyers. They are lay people or experts in fields other than the law. While no two cases are alike, the issue of parole eligibility is inherent in capital cases. Capital defense counsel strenuously seek to avoid the issue arising during the penalty phase because they realize how alarmed jurors get when contemplating their client's release. Hence, the case-law on "plain and ordinary meaning" and the push that was made by the defense bar to have the law changed to provide for a life without parole instruction to the jury. Counsel's failure to advise Ms. Smith to avoid parole eligibility was deficient, and the injection of parole into the jury's deliberative process was prejudicial.

This Court should reverse applicant's death sentence.

GROUND 20

Applicant withdraws his request for relief on this ground.

GROUND 22

Applicant relies on his Memorandum to address this ground for relief.

GROUND 23

Respondent's proposed basis for dismissing applicant's claim that the state violated *Brady v. Maryland*, 373 U.S. 83 (1963) should be rejected by this Court. Respondent predicates its proposed dismissal on an absurd proposition, that being that the

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state's own witness, Diane Gibson (Smith), made up a lie about the existence of a photograph that would be of benefit to Mr. Terry. This makes no sense. As of the time of trial, Ms. Gibson and Mr. Terry were no longer involved and she was a prosecution witness. Further, there is no evidence Ms. Gibson has developed a motive to assist Mr. Terry since the conclusion of his trial.

Alternatively, respondent contends that, assuming the photo existed, the defendant was responsible for finding it. Respondent reasons that, because he was present when the photo was taken, the applicant could have found it on his own. This argument misses the mark. Once the photo was provided to law enforcement, it was no longer available to Mr. Terry through any other independent source.

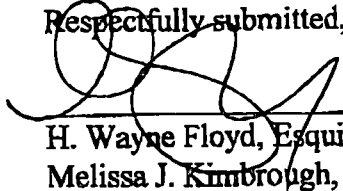
This Court should not adopt respondent's shifting credibility assessment of the state's witnesses. Ms. Gibson's testimony cannot logically be deemed credible one minute and completely incredible the next. Likewise, this Court should not adopt respondent's position that his claim fails because he did not produce the photo Diane Gibson provided law enforcement. Ms. Gibson's testimony alone is sufficient to establish the existence of the photograph, that somehow mysteriously disappeared after it was turned over to the prosecution. That law enforcement either lost the evidence or destroyed it cannot be held against the applicant. Indeed, it is that one of these events occurred that entitles applicant to relief. And, whether intentional or inadvertent, the result is the same: applicant is entitled to a new trial.

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CONCLUSION

For the foregoing reasons, and for all of those set forth in his Memorandum, the applicant asks this Court to reject the respondent's proposed order of dismissal and grant him a new trial and/or sentencing phase.

Respectfully submitted,



H. Wayne Floyd, Esquire
Melissa J. Kimbrough, Esquire
Attorneys for Applicant.

This ____ day of December, 2008.

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STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Gary Dubose Terry,

2000-CP-32-3470

Applicant,

v.

The State,

Respondent.

ORDER OF DISMISSAL

FILED
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This matter is before the Court pursuant to an Application for Post-Conviction Relief (PCR) filed on or about November 30, 2000. Respondent submitted a Return dated December 28, 2000. The Court held an evidentiary hearing into the matter on July 10-12, 2006, at the Lexington County Courthouse. Applicant, Gary Dubose Terry (Terry), was present at the hearing. H. Wayne Floyd and Melissa J. Kimbrough, Esquires, represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Melody J. Brown represented Respondent.

At the hearing, Terry presented testimony from his trial attorneys, J. McDuffie Stone, III, Esquire, and Elizabeth C. Fullwood, Esquire. He also presented testimony from Francis A. Humphries, Esquire; Dr. John Carter; Steve Derrick; Nancy Skraba; Lilly S. Gallman; Diane Gibson Smith; Louanne R. Smith; and Patricia R. Terry. Respondent presented testimony from G. Thomas Chase, Esquire; Thomas J. Davis; and Scottie R. Frier. In addition to the testimony of these witnesses, the exhibits introduced at trial and the exhibits introduced at the hearing, the Court also had before it the following materials: (1) the Record on Appeal from the direct appeal; (2) the Final Brief of Appellant; (3) the Final Reply Brief of Appellant; (4) the Final Brief of



Respondent; (5) the March 13, 2000 Opinion of the South Carolina Supreme Court from the direct appeal; (6) the Petition for Rehearing; (7) the Order filed on April 19, 2000 denying rehearing; (8) the Petition for Writ of Certiorari to the South Carolina Supreme Court; (9) the Brief in Opposition to the Petition for Writ of Certiorari to the South Carolina Supreme Court; and (10) the unpublished decision of the United States Supreme Court denying Certiorari.

I. Procedural History

Terry is currently confined on death row at Lieber Correctional Institution, of the South Carolina Department of Corrections (S.C.D.C.) pursuant to commitment orders from the Lexington County Clerk of Court. The Lexington County Grand Jury indicted him at the July 1995 term of court for murder, burglary in the first degree, criminal sexual conduct in the first degree and malicious injury to telephone system. The State thereafter timely served a Notice of Intent to Seek the Death Penalty as well as a Notice of Evidence in Aggravation of Punishment. Following Motions hearings on May 28, August 22, September 3 and September 8, 1997, before the Honorable Gary E. Clary, Terry received a jury trial before Judge Clary on September 15-21, 1997. On September 18, 1997, the jury found him guilty of all charges.

Following Terry's exercise of his statutory right to a twenty-four (24) hour waiting period, the sentencing phase was held on September 19-21, 1997. The State relied upon the statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree. S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 1997). The trial judge charged the jury on the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6) & (7).¹ The jury found the presence of both

¹ With respect to the last mitigating circumstance, the trial judge did not charge the jury on Terry's age but did charge the jury on his mentality.

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alleged statutory aggravating circumstances and recommended a sentence of death. Finding that the evidence presented warranted imposition of the death penalty, and that its imposition was not the result of prejudice, passion or any other arbitrary factor, Judge Clary imposed the sentence of death for murder. He also sentenced Terry to life imprisonment for burglary in the first degree, to thirty years imprisonment for criminal sexual conduct in the first degree and to ten years imprisonment for malicious injury to a telephone system. Each of these sentences was imposed consecutive to the sentence for murder. **R. pp. 2128-30.** Lexington County Public Defender Elizabeth C. Fullwood and Isaac McDuffie Stone, III, Esquire, represented Terry at trial.

A timely Notice of Appeal was served and filed. Terry's direct appeal was consolidated with the South Carolina Supreme Court's review of his sentence pursuant to S.C. Code Ann. § 16-3-25(C) (1985). Terry filed a Final Brief of Appellant and a Final Reply Brief of Appellant on May 4, 1999. The State filed a Final Brief of Respondent on the same date. Terry's "Statement of Issues on Appeal" presented the following grounds for relief:

1. Whether the judge denied Due Process, as guaranteed by the Fourteenth Amendment to the United States Constitution, by refusing to admit appellant's statement against interest into evidence during cross-examination pursuant to Rule 804(B)(3), SCRE, since its exclusion denied appellant the right to present a complete defense?
2. Whether the judge erred by ordering disclosure of appellant's Charter Rivers Behavioral Health Hospital records to the solicitor, since these records were confidential by statute, by this Court's precedents, and were effectively used by the state as evidence to have appellant executed?
3. Whether the judge impermissibly limited appellant's cross-examination of Investigator Frier when he refused to allow the defense to elicit from Frier that appellant had given the police a statement, since this was relevant evidence, and its exclusion unfairly prejudiced appellant?
- 4.

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Whether the judge erred by admitting a gruesome photograph of the victim, State's Exhibit #55, since it was calculated to inflame the jury, and its probative value was substantially outweighed by its prejudicial effect?

Final Brief of Appellant at 1.

The South Carolina Supreme Court affirmed his conviction and sentence in a published Opinion filed on March 13, 2000. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000). A timely Petition for Rehearing was denied in an unpublished Order filed on April 19, 2000. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Terry on direct appeal.

On June 28, 2000, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. His certiorari petition presented the following question for relief:

Did the exclusion of Petitioner's statement against penal interest, and cross-examination about it, violate due process where the court ruled it would not admit the statement unless Petitioner testified, and the State did not want the statement admitted until the penalty stage to prevent jury consideration of a lesser-included offense?

Petition for Writ of Certiorari, at 1. The State filed a Brief in Opposition on July 31, 2000. The United States Supreme Court denied certiorari in an unpublished Order filed on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). Mr. Dudek again represented Terry before the United States Supreme Court.

Mr. Dudek filed a Petition for Stay of Execution on Terry's behalf on October 6, 2000, and the State did not oppose this request. Therefore, on October 18, 2000, the South Carolina Supreme Court filed an Order staying Terry's execution pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could pursue state PCR remedies.

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In the stay Order, the South Carolina Supreme Court appointed the Hon. Marc H. Westbrook to preside over this case and gave him exclusive and statewide jurisdiction over the matter. In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's October 18, 2000, Order and S.C. Code Ann. § 17-27-160 (Supp. 1999), Judge Westbrook convened a hearing at the Lexington County Courthouse on Thursday, November 9, 2000. Mr. Terry was present at this hearing as were H. Wayne Floyd, Esquire, and Melissa Reed Kimbrough, Esquire. Senior Assistant Attorney General William Edgar Salter, III, represented the State at the hearing.

The Court ascertained that Terry wished for counsel to be appointed, so that he may pursue state PCR; and that Mr. Floyd and Ms. Kimbrough met qualifications set forth in S.C. Code Ann. § 12-27-160(B). On November 30, 2000 an Order Appointing Counsel was filed, by which Mr. Floyd and Ms. Kimbrough were appointed to represent Terry, with Mr. Floyd being lead counsel.

Terry filed his original PCR Application on or about November 30, 2000. Terry raised the following grounds for relief in his PCR Application:

9(a) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately explore and present a defense of alibi.*

10(a) Counsel failed to present any defense during applicant's trial despite the existence of witnesses who observed applicant around the time of the victim's killing, and would have testified he was not at or near the place where she was killed. Counsel's failure to offer a defense of alibi was deficient and deprived him of due process, a full and fair trial, and the effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws. Strickland v. Washington, 466 U.S. 668 (1984); Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). This ground entitles applicant to a new trial.



9(b) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution, and laws because trial counsel failed to establish sufficient evidence of criminal sexual conduct, first degree.*

10(b) After the State concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In order to survive a motion for directed verdict as to a charge of criminal sexual conduct, the state must prove beyond a reasonable doubt a lack of consent by the victim. See State v. Taylor, 57 S.C. 483, 488-89, 35 S.E.2d 729, 731 (1900). During applicant's trial, the state adduced absolutely no evidence the victim had been *forced* into having sex with applicant. Thus, trial counsel's failure to make a more specific motion based on sufficiency of the state's evidence as to criminal sexual conduct, first degree, was ineffective and prejudiced the outcome of applicant's trial and sentencing proceeding. This ground entitles applicant to a new sentencing phase proceeding.

9(c) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution, and laws because appellate counsel failed to raise the trial court's erroneous denial of trial counsel's motion for a directed verdict based on the state's failure to establish sufficient evidence of criminal sexual conduct, first degree.*

10(c) After the state concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). However, assuming this ground was adequately available for appellate review, appellate counsel was ineffective for failure to argue it on direct appeal, as it was a sufficient basis for overturning applicant's conviction on this count, as well as his sentence of death. Thus, applicant was



prejudiced by appellate counsel's dereliction, and he is entitled to a new sentencing phase proceeding.

9(d) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to make a Batson v. Kentucky, 476 U.S. 79 (1986) motion in response to the state using all of its strikes against female jurors.*

10(d) During voir dire, the state used its strikes to eliminate six potential jurors, all of whom were female, and one of whom was African-American. In J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), the United States Supreme Court extended its earlier holding in Batson, ruling it violated due process, equal protection and the right to a fair trial for the state to peremptorily exclude jurors based on gender. Here, the state's strike pattern clearly established a prima facie violation under J.E.B., and trial counsel's failure to make a Batson challenge deprived applicant of the fair jury selection and trial to which he was entitled. Counsel's errors require vacation of applicant's convictions.

9(e) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately investigate and challenge the physical evidence adduced by the state.*

10(e) Despite the absence of any direct evidence of guilt, trial counsel presented no defense on applicant's behalf and failed to adequately investigate and challenge the physical evidence presented during the guilt phase of his trial. Counsel's failure to conduct an adequate investigation is inexplicable in light of the numerous items of fiber evidence, which did not "match" applicant. Counsel's omissions were unreasonable and prejudiced the outcome of applicant's trial, entitling him to a new trial. Strickland v. Washington, *supra*.

9(f) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to investigate possible defenses.*



10(f) As detailed in 10(e), the state's evidence of guilt against applicant was paltry. At most, the state's evidence indicated applicant knew the victim and had had sex with her sometime prior to her death. However, applicant renounced his alleged confessions, and there was no direct evidence of his guilt. Under these circumstances, counsel acted unreasonably in failing to investigate and explore potential defenses, and there is a reasonable likelihood that the result of the proceeding would have been different had counsel adequately researched and presented possible defenses. Strickland v. Washington, supra.

9(g) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel erroneously told the jury applicant "confessed" to the crimes charged when in fact applicant's alleged confession amounted to, at most, an admission of manslaughter.*

10(g) During his opening statement to the jury, trial counsel told the jury applicant had "confessed" to the victim's murder. However, because applicant's alleged confession amounted, at most, to manslaughter, this statement was neither a "confession" to the charges against him nor an admission against interest. State v. Terry, 2000 WL 282450. Consequently, when trial counsel sought to have this statement admitted, which would have allowed the jury to hear evidence applicant was guilty of manslaughter rather than murder, trial court refused. Trial counsel's unreasonable action in informing the jury applicant "confessed" was extremely prejudicial, denied applicant the effective assistance of counsel, and entitles him to a new trial. Strickland v. Washington, supra; State v. Terry, supra.

9(h) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" when this statement had not been ruled admissible by either the trial court or applicant's jury.*

10(h) During his guilt phase opening statement, trial counsel told applicant's jury he confessed to the crimes charged. Not only was this statement inaccurate, as detailed in ground 9(f),

but it also resulted in the withholding of the statement from evidence, which denied applicant a determination of its admissibility by the trial court and by his jurors, who would have been required to determine its voluntariness prior to accepting the statement as evidence. Counsel's actions served no strategic purpose, and clearly worked to applicant's disadvantage, as the jurors were left with the erroneous impression that applicant had voluntarily acknowledged guilt to capital murder. Counsel's unreasonable actions were extremely prejudicial and require that applicant's convictions be vacated a new trial granted. Strickland v. Washington, supra.

9(i) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" based on his erroneous assumption that the state would seek to introduce the statement during trial.*

10(i) As detailed more fully in 10(g) and (h), trial counsel's statement to law enforcement was not an admission of guilt to murder, rape, and burglary. In fact, the statement was exculpatory as to capital murder in that, at a minimum, it negated the aggravating circumstances of criminal sexual conduct, first degree, and burglary, first degree. Nonetheless, trial counsel told the jury applicant confessed to the crimes for which he was then on trial. Counsel not only prejudicially misconstrued the contents of applicant's statement, thereby casting it in the worst possible light, but - - in an apparent attempt to lessen the impact of its later admission--also prevented the jury from being able to hear and consider its actual contents. Counsel's decision to tell the jury applicant confessed was based purely on his assumption the statement would be admitted, which was not sound trial strategy. But for this unreasonable assumption, there is a reasonable probability that the jury would have come back with a more favorable guilt verdict of less than murder, criminal sexual conduct, first-degree, and burglary, first-degree. For these reasons, applicant's convictions should be vacated. Strickland v. Washington, supra.

9(j) *Applicant was denied his right to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws when the state improperly misrepresented its intention to rely*

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on his alleged confession, which was deemed voluntary and admissible during a Jackson v. Denno hearing.

10(j) Prior to applicant's trial, a Jackson v. Denno hearing was held during which the state contested applicant's attempt to have his alleged confession excluded as evidence at trial. During opening statements, trial counsel told the jury that applicant "confessed." The offering of the confession by the state at applicant's Jackson v. Denno hearing constituted a representation by the state that the confession would be admitted into evidence at trial. This representation caused defense counsel to advise the jury of the confession in an apparent attempt to soften the blow of this evidence. Because the jury had already been informed of the existence of the confession, which was in fact exculpatory as to the charges of rape, murder and burglary, the state then chose not to enter it into evidence. And, because of its exculpatory nature, applicant could not introduce it. Trial counsel's statement to the jury was clearly made in reliance on the state's representations. Accordingly, applicant was denied essential exculpatory evidence because of defense counsel's reliance. In light of the position taken during the Jackson v. Denno hearing, the state acted improperly in withholding this evidence through courtroom chicanery at trial. The state's actions constitute prosecutorial misconduct and is the type of conduct historically condemned by our State Supreme Court. Torrence, supra; Terry, supra.

The case was thereafter reassigned to the undersigned. The Court permitted Terry to amend his PCR Application during the hearing.²

II. Allegations

Terry alleged the following grounds for relief in his "Applicant's Final Amendments":

Ineffective Assistance of trial counsel:

1. Opening statement contained prejudicial error to the extent that the defense conceded guilt of murder, criminal sexual conduct and burglary, first-degree, based on applicant's statement that admitted neither burglary nor criminal sexual conduct, and contained a confession only as to manslaughter;

² He had previously notified Respondent of most of these allegations and Respondent did not object to most of the amendments. The Court overruled the objection to the allegation to which there was an objection.

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2. For failure to raise a *Batson/J.E.B.* challenge to the solicitors use of all strikes against all female and one black juror;
3. For failure to move to strike for cause juror Georgia Miller, whose statement that her punishment would be death for any intentional killing was a basis for disqualification;
4. For failure to object to the judge's jury charge on implied malice;
5. For failure to object to the portion of the trial judge's jury charge on the facts surrounding the death of Ms. Jackson;
6. For failure to object to or move *in limine* prevent the introduction of excessive and uncorroborated character evidence used by the state in the penalty phase;
7. For failure to object to hearsay evidence from Lt. Brown detailing the applicant's alleged theft of items from a construction site;
8. For failure to object to hearsay testimony by Officer Wilkerson regarding the statement of Ann Lomax, who was not present to testify;
9. For opening the door in cross-examination of Officer Wilkerson as to the statement of Ann Lomax who was not present to testify;
10. For failure to request a charge on provocation by the victim as a mitigating circumstances as set forth in 16-3-20[(C)(b)](8);
11. For failure to develop and present corroborating testimony that would have allowed introduction of defendant's statement during the guilt phase;
12. For failure to present any evidence or argument to the jury in support of defendant's statement that the killing was manslaughter rather than murder;
13. For failure to present any evidence or argument to the jury in support of defendant's statement that sex with the victim was consensual;
14. For failure to present any evidence or argument to the jury in support of defendant's statement that he did not burglarize the victim's residence;

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15. For failure to make any argument at the directed verdict stage even though the evidence failed to establish criminal sexual conduct or burglary first-degree;
16. For failing to object to "character" evidence in the penalty state that was far more prejudicial than probative;
17. In arguing to the jury during closing that defendant was a "rapist", "murderer," "invader of homes" and "thief";
18. In failing to present evidence to the jury that defendant was left-handed even though the state's forensic evidence established that the killer was right-handed;
19. For failure to object and move for a curative instruction when Louanne Terry testified Gary could get out in thirty years, and, in the alternative, for not advising this witness not to mention parole eligibility;
20. For failure to object to officer Phillips testimony that the defendant had an appointment with the Sheriff's Department, but failed to show up;
21. For failure to present any argument or evidence to the Court or the jury that the defendant was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that the defendant's fingerprint was placed on the victim's telephone box based on innocent conduct;

Ineffective assistance of appellate counsel:

22. For failing to argue that the trial court erred in denying defendant's motion for a directed verdict as to all charges.

Brady violation

23. The State failed to disclose photograph of Diane Gibson and Applicant.

III.

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In **Grounds 1-21**, Terry alleges that he received ineffective assistance of counsel from his trial attorneys. In **Ground 22**, he alleges that appellate counsel was ineffective. In **Ground 23**, he alleges that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963). The Court finds that he is not entitled to relief on any of these allegations.

GROUND 1

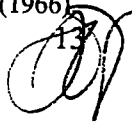
Terry's first allegation is that trial counsel Stone was ineffective for telling the jury, in his guilt phase opening statement, that Terry had confessed to the victim's murder. Terry alleges that the statement was "at most, an admission of manslaughter," and the statement was never introduced into evidence. The Court finds that trial counsel was not deficient for making this comment, and that Terry was not prejudiced by counsel's performance.

At the State's request, the trial judge held a pre-trial *Jackson v. Denno*³ hearing to determine the admissibility of Terry's January 17, 1995 non-custodial statement and his March 24, 1995 statement, which he gave after he was arrested for the victim's murder. At the conclusion of this hearing, the trial judge ruled that both statements were admissible. **R. pp. 1133-95.** Terry's trial counsel specifically objected to introduction of his March 24, 1995 statement because the State had allegedly failed to prove a knowing and voluntary waiver of his *Miranda*⁴ rights, since he was ill at the time he made the statement and he had been sick several days previously. **R. pp. 1191-92.**

The trial judge ruled that the March 24, 1995 statement was freely and voluntarily given after Terry had been advised of and made a knowing and intelligent waiver of his rights under the Fifth and Sixth Amendments, and his *Miranda* rights. He further found that the statement was admissible. **R. pp. 1193-95.**

³ See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774 (1964).

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).



Mr. Stone began his opening statement as follows:

Ladies and Gentlemen, Gary Terry over here told the police that he did it. He told the police that he had sexual intercourse with Urai Jackson. He told the police that he killed her, okay. It's called a confession and he made one. He told the police he did it. So what in the world are we doing here? Why are we even having one of these guilt phases?

R. p. 1281, ll. 16-22.

He answered this rhetorical question by explaining that there was a guilt phase because everyone was entitled to a fair trial, and the State had to prove Terry guilty beyond a reasonable doubt. Mr. Stone also emphasized that the jury would "hear evidence that doesn't talk about reasonable doubt, it doesn't talk about any of that." **R. pp. 1281-83.** He then urged jurors that:

I would submit to you Ladies and Gentlemen, by the time you end up listening to everything that you will hear in this case. . . I will submit to you. . . that you will know two things..

One is that Gary Terry told the police he did it. Also, you will know that Gary Terry tried to tell the police he committed another murder. Another murder that he's not charged with and he never will be prosecuted for.

I would submit to you, Ladies and Gentlemen, that for whatever reason, if you ask Gary right, he will admit to just about anything. They have a confession. They have that statement. Parts of which they don't even believe. They're going to ask you to believe it. You may understand by the end of this case that Gary is different. That he is somebody that will confess to a crime that he didn't commit. But because somebody is different, Ladies and Gentlemen, doesn't make him guilty.

R p. 1283, l. 23-p. 1284, l. 15. He concluded by asking the jurors to pay "very close attention" to the evidence and to "come back with a verdict that speaks the truth." **R. p. 1284, ll. 16-18.**

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Inv. Scotty Frier, of the Lexington County Sheriff's Department, was one of the two officers to whom Terry had made the statements. Before presenting his testimony, the State informed the trial judge *in camera* that it had decided not to introduce Terry's March 24 statement. The State also moved *in limine* to prohibit Terry from introducing any evidence concerning the statement. **R. pp. 1373-80.** The State explained that:

The State's position is that [the statement] . . . is inculpatory to a certain extent, [but] exculpatory in the grand scheme of things; that is, as to aggravating circumstances and actually attempts to move the charge of murder to voluntary manslaughter and no criminal sexual conduct and no burglary.

We are not required to elicit it and they can't elicit it under the rules as they are now.

R. p. 1375, ll. 10-17.

Following a recess, Terry argued that the statement would be admissible under Rule 804(b)(3), SCRE, as a statement against his penal interest. He also claimed that the statement was admissible as a matter of due process and cited *Chambers v. Mississippi*, 410 U.S. 204 (1973) and *Green v. Georgia*, 442 U.S. 95 (1979). He further argued that the statement "contains sufficient indicia of reliability to take it outside of the hearsay exception. . . ." **R. pp. 1377-79.**

The State responded by noting that Terry's opening statement suggested to the jury that Terry had given a false confession. Moreover, the State had not elicited evidence of any statements. Specifically, it did not introduce evidence of the statement denying involvement out of fairness to Terry because "we didn't want to be in the position of appearing overbearing in regard to statements made by the defendant." However, the State noted that its trial strategy not to introduce Terry's statements did not effect Terry's ability to assert a defense. **R. pp. 1379-80.**

Although the trial judge questioned whether Terry was unavailable, he took the matter under advisement overnight. **R. pp. 1380-82.**

The following morning, the trial judge ruled that the statement was inadmissible under Rule 804(b)(3) because, although Terry's assertion of his Fifth Amendment right not to testify may make him unavailable as a witness for the State,⁵ this did not allow him to introduce a statement that the State did not introduce in its case-in-chief, in order to circumvent the requirement that he could not present his own statements unless he testified. **R. pp. 1386-87.**

The trial judge also ruled that Terry would be unable to elicit evidence that he had given a statement to police. **R. pp. 1387-89.** Based on this ruling, no evidence was presented to the guilt phase jury concerning either statement Terry had given to police. However, the State introduced both statements in the sentencing phase of his trial. **R. pp. 1810-19; State's Exhibits 67-68.**⁶

Both of Terry's trial attorneys testified extensively about their work history prior to their involvement in this case. Ms. Fullwood testified that she had been Lexington County Public Defender since 1991 and, in that capacity was appointed to represent Terry at trial. She was in private practice briefly before becoming the Public Defender; and she had previously she worked at the South Carolina Office of Appellate Defense for eight years. She had handled a number of felony trials, "including at least two death penalty cases" at the time of her appointment. She and co-counsel divided their responsibilities based upon several considerations, including trying

⁵ The trial judge apparently agreed with the State's position (**R. pp. 1373-74**) that any statement of Terry that it chose to admit was admissible under Rule 801(d)(2). *See R. pp. 1386-87.*

⁶ The South Carolina Supreme Court affirmed the trial judge's rulings on direct appeal. *Terry*, 339 S.C. at 355-58, 529 S.E.2d at 276-77.



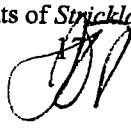
to make the workload even and assigning work based upon areas of experience or interest. PCR Tr. pp. 186-87; 195-96.⁷

Ms Fullwood testified that the defense's theory in the guilt phase was to point out any gaps or inconsistencies in the State's case to establish reasonable doubt. The defense did not have any evidence to introduce in an effort to show that Terry was not guilty, and "we had to always be mindful of the need to stay credible to the jurors when we reached the second phase of the trial." PCR Tr. p. 207.

Ms Fullwood did not recall whether she and co-counsel discussed whether Terry's statement should be addressed in the opening statement; but she testified, "we probably did." She did recall that the *Jackson v. Denno* hearing and testified that the defense operated under the assumption that the State was planning to introduce the March 24, 1995 statement in the guilt phase of the trial. The statement would not have been mentioned in the opening statement if the defense had known otherwise. Also, the State did not make any representation that it would present the confession in the guilt phase. Rather, it was the defense's assumption that the statement would be introduced because it was a "confession" and the *Jackson v. Denno* hearing was held pretrial. PCR Tr. pp. 187-88; 207-09.

She also did not recall whether there had been a preliminary decision on whether or not Terry would testify. However, this is a matter she would always discuss with a client well in advance of trial, with the idea of maintaining some flexibility based on the events in the trial itself. Also, the trial judge's ruling on State's motion to prevent the defense from introducing the March 24, 1995 statement would have been a factor discussed in connection with Terry's

⁷ Counsel's extensive pretrial investigation and efforts to corroborate the March 24th statement and Terry's other versions of what had occurred, including a purported alibi, are addressed in **Grounds 11-14**. The Court finds that counsel's efforts more than satisfied the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984).



decision on whether or not to testify. **PCR Tr. pp. 207-09.** Although she did not have any independent recollection, she felt "sure that our advice was not to testify "based on his criminal record and counsel's observations of him, his general demeanor and their assessment of how well he would "most likely stand up under cross-examination." **PCR Tr. p. 209.**

This case was the first murder case Mr. Stone had tried. However, he began working at the Fifth Circuit Solicitor's Office in 1989. There, he tried "just about any type of case that came along" for roughly a year and one-half. Then, he became one of two drug prosecutors in the Office. His unit at that point handled "probably 35% of the whole docket." When he left the Solicitor's Office and went into private practice, he did both civil and criminal cases, including complex civil litigation. By the time of this case, he had roughly seven years of felony trial experience. **PCR Tr. pp. 34-36; 69-72.**

Mr. Stone testified that the State had very good guilt case. He met with co-counsel "a number of times" to figure out the best way to approach the case. They wanted to maintain credibility with jurors in the guilt phase for when they reached the sentencing phase. They split their responsibilities in the guilt phase. He attacked the fingerprint evidence, and Ms Fullwood attacked the DNA evidence. The "confession" was a little more difficult. In the statement, Terry said that he had consensual sex with the victim. She thereafter got mad and there was a fight. Mr. Stone felt that the statement raised issue of manslaughter and eliminated the statutory aggravator of burglary. **PCR Tr. pp. 38-39.**

There had been a pretrial *Jackson v. Denno* hearing held to determine the admissibility of the statement. Although no one from the prosecution told him that the State planned to introduce Terry's statement in the guilt phase, Mr. Stone was under the impression that the State was going to introduce it; and he operated under that assumption when he made his opening statement. He

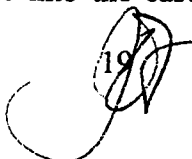
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would not have made the remark that Terry had confessed if he had not thought State was going to introduce the March 24th statement in guilt phase. **PCR Tr. pp. 39-42; 83-85; 100-01.**

"I did it because I was trying to be the first one to say it. I was again trying to buy credibility with the jury and I was also trying to call attention to the fact that he had confessed to another case that we knew for a fact and that law enforcement knew for a fact he didn't do." In what Mr. Stone testified was a "unique situation," there was evidence (that was ultimately presented in the sentencing phase) of a discussion between Terry and another inmate, wherein Terry agreed to take the blame for the crime that the other inmate had committed, so that the other inmate could be freed. So, "we were trying to bring that out as yeah, sure, he confessed to this case, but he also confessed to something else that everybody else knows that he didn't do." **PCR Tr. pp. 39-42; 83-85; 100-01.**

Mr. Stone testified that the decision of whether or not Terry should testify was Terry's to make. However, Mr. Stone did not think Terry should testify because he did not think Terry would be a credible witness. He based his decision, in large part, on his dealings with Terry. Also, the defense was going to present expert testimony regarding a SPEC scan that showed Terry was brain damaged. If Terry had testified, then he would not have come across as brain damaged even if the jury found that he was credible because he would have sounded clear. **PCR Tr. pp. 85-87.**

Mr. Humphries testified that he thought that the defense had requested the *Jackson v. Denno* hearing, but he acknowledged the need for a hearing because the State intended to introduce the statement into the sentencing phase. The way cases were prepared in the Eleventh Circuit Solicitor's Office at the time of this trial, the second chair would prepare the case up to a point. Then, the Solicitor would come into the case. They would later discuss specific trial



strategies. The State decided that it did not need the March 24, 1995 statement in the guilt phase because the statement was self-serving and contrary to most of what the State was attempting to prove. Because Terry's statement attempted to establish a defense to one or more charges and mitigate the murder to manslaughter, the State decided strategically that it did not want to present it in its guilt phase case-in-chief, so that Terry would have to testify if he wanted it before the jury in the guilt phase. Also, Terry had the right to testify. This is why the State moved *in limine* to bar the defense from introducing it. The State made the strategic decision well in advance of trial to use the statement in the penalty phase. **PCR Tr. pp. 107-108; 112-14; 115-18.**

Mr. Francis Humphries testified that Mr. Stone independently reach a conclusion about the State's intention to introduce the March 24, 1995 statement in the guilt phase. The defense opening statement appeared to be strategic; and Terry could have testified, as the trial judge's ruling on the State's *in limine* motion made clear. **PCR Tr. pp. 116-18.**

Mr. Thomas Chase testified that he and Mr. Humphries had discussed whether or not to present the March 24, 1994 statement in the guilt phase of Terry's trial, and they made the strategic decision not to use it in the guilt phase, unless Terry testified. "From a strategic standpoint, we did not need the statement to have Mr. Terry at the scene," since "very solid scientific evidence" established Terry's presence. Also, the statement was somewhat "exculpatory." Mr. Chase and Mr. Humphries decided that if they introduced the statement, "we would essentially be . . . putting in self-serving hearsay that could benefit [Terry] potentially in the case." Therefore, they decided that they would not use the statement in the guilt phase, unless Terry testified and could be cross-examined with it. If Terry wished to put that version of the crime before the jury, he would have to testify. **PCR Tr. Pp. 288-90.**

However, the State felt it needed a pretrial ruling on the question of whether or not the statement was admissible, so that they could formulate their strategy for cross-examining Terry if he testified. The State also planned to introduce the statement in the sentencing phase, to show that he had denied committing the acts that the jury had convicted him of in the guilt phase. Therefore, they requested a pretrial *Jackson v. Denno* hearing. Mr. Chase was not aware that Mr. Stone was going to make the comments he made in his opening statement, but the opening statement did not play any role in the State's decision to introduce the statement in its case-in-chief. Also, neither Mr. Chase nor Mr. Humphries told defense counsel either that the State was planning to introduce the statement in the guilt phase, or that their actual trial strategy was to not introduce the statement. In fact, Mr. Chase testified that he would not have disclosed the State's strategy to Mr. Stone even if asked. **PCR Tr. pp. 288-93; 295-96.**

A PCR applicant bears the burden of proving the allegations in his application for post-conviction relief. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985); Rule 71.1, SCRPC.

Further, a criminal defendant is entitled to effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759 (1970). To establish that he received ineffective assistance of counsel, an inmate must make a twofold showing. See *Wiggins v. Smith*, 539 U.S. 510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Counsel's assistance is not unconstitutionally ineffective merely because trial counsel's defense strategy was unsuccessful. *Id.* at 689; *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 2533 (1996) "Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time." *Id.* at 689. See also *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight"). Further, there is a strong presumption that the actions taken by counsel were sound trial strategy. *Strickland*, 466 U.S. at 690.

Even if an inmate establishes that counsel's performance was deficient, he is only entitled to relief if he can also demonstrate that he was prejudiced by his attorneys' ineffectiveness, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. See also *Palacio v. State*, 333 S.C. 506, 511 S.E.2d 62 (1999). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also



Wiggins, 539 U.S. at 537; *Jones v. State*, 332 S.C. 329, 333, 504 S.E2d 822, 823 (1998) (citing *Strickland*, 466 U.S. at 695).

When these principles are applied to the present case, the Court finds that Terry clearly cannot meet his burden of proof. The Court first finds that Terry has not proven that counsel's decision to make the challenged comments in his opening statement was deficient performance, even though the information about Terry's statement was not presented to the jury in the guilt phase.

An opening statement is intended to inform the jury of the facts that the party intends to prove at trial. *Thompson v. People*, 139 Colo. 15, 21, 336 P.2d 93, 97 (1959). The course of a trial can affect and alter an original defense strategy, and may lead to reasonable decisions not to call witnesses who were mentioned in the opening statement. *See, e.g., Williams v. Bowersox*, 340 F.3d 667, 671-72 (8th Cir.2003).

It is not deficient performance *per se* for counsel to promise something in opening statement, but fails to deliver on that promise during the defense's case. *Turner v. Williams*, 35 F.3d 872, 903-04 (4th Cir.1994). *People v. Burnett*, 110 Cal.App.4th 868, 885 (Cal.App. 2003) ("Making promises about the defense evidence in opening statement and then failing to deliver does not constitute ineffective assistance *per se*"); *See also United States v. McGill*, 11 F.3d 223, 227-28 (1st Cir.1993) (holding that failure to deliver on opening promise to put on expert witness was not ineffective assistance);⁸ *Schlager v. Washington*, 887 F.Supp. 1019, 1026-27 (D.Ill.1995), *aff'd* 113 F.3d 763 (7th Cir.1997) (holding that strategic decision not to introduce

⁸ In *McGill*, the First Circuit Court of Appeals concluded that, "although a failure to produce a promised witness may under some circumstances be deemed ineffective assistance, *see, e.g., Anderson v. Butler*, 858 F.2d 16, 19 (1st Cir.1988), the determination of inefficacy is necessarily fact based. '[N]o particular set of rules can be established to define effective assistance....' " *Id* at 227 (emphases added) (quoting *United States v. Natanel*, 938 F.2d 302, 310 (1st Cir.1991), *cert. denied*, 502 U.S. 1079 (1992)).



witnesses promised in opening statement was not ineffective assistance). *See also People v. Goodloe*, 263 Ill.App.3d 1060, 1076, 636 N.E.2d 1041, 1052, 201 Ill.Dec. 609, 620 (Ill.App. 1994). “[A]ssuming that counsel does not know at the time of the opening statement that he will not produce the promised evidence, an informed change of strategy in the midst of trial is ‘virtually unchallengeable.’ ” *Turner*, 35 F.3d at 904 (citation omitted).

The Court finds that the testimony of both trial counsel and both prosecutors is credible. Based upon the testimony discussed above, the Court finds that trial counsel made an objectively reasonable strategic decision to inform Terry’s jury that Terry had given a statement to police, in which he admitted both that he had sexual intercourse with the victim and that he had killed her. Counsel did this to “buy credibility” with Terry’s jury by being the one who first acknowledged the existence of the “confession,” and to set the stage for later pointing out Terry’s willingness to take responsibility for a crime that even law enforcement did not believe he had committed.⁹

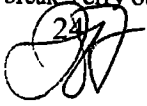
In *Florida v. Nixon*, 543 U.S. 175, 191-192 (2004), the United States Supreme Court recognized that:

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). 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).

Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his

⁹ The State introduced evidence of this plot with another murderer, Johnny Ray Brewer, in the sentencing phase. *R. pp. 1727-35*. At that time, Mr. Stone did establish on cross-examination of Inv. Hite that Terry was never charged with the murder to which he had planned to admit, so that Brewer would be released from the Lexington County Detention Center. The plan was then for Brewer to break Terry out of jail. *R. pp. 1735-37*.

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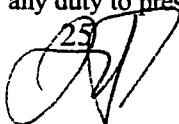
client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. See Lyon, *Defending the Death Penalty Case: What Makes Death Different?* 42 Mercer L.Rev. 695, 708 (1991) ("It is not 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."); Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 Cornell L.Rev. 1557, 1589-1591 (1998) (interviews of jurors in capital trials indicate that juries approach the sentencing phase "cynically" where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense); *id.*, at 1597 (in capital cases, a "run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt" can have dire implications for the sentencing phase). In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in "a useless charade." See *Cronic*, 466 U.S., at 656-657, n. 19, 104 S.Ct. 2039. Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: "I do not know how much salvage there is in these two boys. ... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large." *Attorney for the Damned: Clarence Darrow in the Courtroom* 84 (A. Weinberg ed.1989); see Tr. of Oral Arg. 40-41 (Darrow's clients "did not expressly consent to what he did. But he saved their lives."); cf. *Yarborough v. Gentry*, 540 U.S. 1, 9-10, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) (per curiam).

(Footnote omitted).

Here, the Court finds that the decision to try and maintain credibility with the jury was reasonable, particularly in light of the overwhelming forensic evidence establishing that Terry was guilty of tampering with the telephone line, first-degree burglary, first degree CSC and murder.¹⁰ It was likewise not unreasonable for trial counsel to anticipate that the State would

¹⁰ This evidence included both D.N.A. from the vaginal wash and anal swab, Terry's fingerprint on the telephone box where the telephone lines had been pulled and expert testimony on bloodstain and blood spatter analysis. See Ground 15, *infra*. Further, the State was not under any duty to present the statement in the guilt phase.

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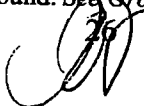


introduce State's Ex. 68 in the guilt phase, even though the statement¹¹ was self-serving, since this has been done in any number of capital and non-capital cases.

Moreover, even when it became clear to counsel that the prosecution was not going to introduce Terry's statement in the guilt phase, counsel made reasonable arguments to convince the trial judge to deny the prosecution's motion *in limine* to bar Terry from introducing the statement without testifying. Counsel argued, albeit unsuccessfully, that Terry was an unavailable witness and that his statement was admissible under Rule 804(b)(3) as a statement against interest. Counsel likewise raised a constitutional argument that the statement should be introduced without Terry having to testify, and counsel thereby sought to place the statement before the jury through cross-examination of Mr. Frier. Although South Carolina law prior to adoption of the South Carolina Rules of Evidence was contrary to this position, the Court finds that Mr. Stone's efforts were reasonable because the South Carolina Supreme Court had never ruled on the question of whether a defendant who has procured his own unavailability by invoking his protection against self-incrimination is "unavailable" as a witness for purposes of Rule 804(b)(1), SCRE. *See Terry*, 339 S.C. at 356-58, 529 S.E.2d at 276-77.

Nor was counsel's opening statement deficient, even though the statement never was introduced. The only other way to present the guilt phase jury with the information in the March 24th statement was for Terry to testify and subject himself to cross-examination. However, the Court finds that Terry decided not testify. Counsel so advised him, and he does not raise any allegation that counsel's advice was ineffective.

¹¹ The Court does not view the statement as a confession because Terry does not confess to murder in it. Rather, he presents a version of what occurred that explains why his D.N.A. was found and why the victim was beaten so badly. His statement, however, does not explain his fingerprint on the telephone box or evidence showing that he broke into the victim's home. His statement also does not explain why the victim was found in a position suggesting that the sexual activity occurred where she was found. *See Grounds 10 and 15, infra.*



Under these circumstances, the Court finds that the only way one can conclude that counsel's performance was deficient is to assess it with the benefit of hindsight, which is clearly contrary to *Strickland*. See 466 U.S. at 689. Other cases have found that counsel's performance was not deficient in similar circumstances. For instance, in *Goodloe*, trial counsel said in his opening statement that evidence of cocaine usage would be presented. However, no such evidence was ever presented.

On appeal, the Illinois Court of Appeals rejected the defendant's claim that counsel was ineffective. The Court found that because "the admissibility of evidence is a matter within the sound discretion of the trial court and that determination may not be overturned on appeal absent a clear abuse of discretion, we do not find trial counsel's representation to have been ineffective where he made several good faith attempts to introduce the evidence that he promised in his opening statement, and the trial court, in its discretion, properly kept it out, finding said evidence irrelevant. Defendant could not have been prejudiced by counsel's brief mention of the deceased's cocaine use in his opening statement." *Goodloe*, 263 Ill.App.3d at 1076, 636 N.E.2d at 1052.

In *Turner*, defense counsel had intended, at the outset of the sentencing proceeding, to introduce mitigating evidence. As a result, he told the jury in his opening statement that he would produce certain mitigating testimony and other evidence. However, he rested without putting in that evidence. The Fourth Circuit Court of Appeals rejected the petitioner's claim that his attorney's failure to present the evidence described in the opening statement, in and of itself, was ineffective assistance. The Court found that counsel had "changed his trial strategy because he thought the Commonwealth rested prematurely and because the court indicated that the scope of rebuttal would be quite broad."

The Court in *Turner* held that "his strategic decision to withhold evidence promised in the opening statement was not unreasonable. Nor was it unreasonable for him to mention mitigating evidence in his opening statement. This, again, was a strategic decision; had [counsel] not described mitigating evidence in the opening statement, we suspect that [petitioner] would have challenged that omission." 35 F.3d at 904.¹² See also *McGill, supra*; *Bowersox*, 340 F.3d at 672 (upholding the state court's finding that counsel did not render ineffective assistance in failing to call two witnesses who were identified during opening statement); *Yancey v. Hall*, 237 F.Supp.2d 128, 135 (D. Mass. 2002) (concluding it was not ineffective assistance for petitioner's attorney to promise that petitioner would testify and that the evidence would show petitioner was not the person who committed the crime, even though petitioner ultimately did not testify and his counsel rested without adducing all of the promised evidence.); cf. *Howard v. Davis*, 815 F.2d 1429, 1432-33 (11th Cir.1987) (holding that a change of strategy in the midst of a trial did not constitute ineffective assistance, even where defense counsel asserted an "insanity defense initially, knowing that he might withdraw the defense at a later time"); *People v. Hill*, 257 Mich.App. 126, 139-40, 667 N.W.2d 78, 86 (Mich.App. 2003); *People v. Witkin*, 2007 WL 1378383, *4-6 (Cal.App., May 11, 2007). The Court further finds that the present case is far different from cases where courts have found counsel ineffective.¹³ Therefore, counsel's performance was not deficient under *Strickland*.

¹² The Court also rejected the Petitioner's allegation that the opening statement was made without the benefit of adequate pretrial preparation because the Court had concluded that counsel's pretrial preparation was adequate. *Id.*

¹³ For instance, in *State v. Zimmerman*, 823 S.W.2d 220 (Tenn. Cr.App. 1991), a prosecution for second-degree murder, defense counsel's failure to present any evidence constituted ineffective assistance of counsel. Unlike the present case, in his opening statement, defense counsel explicitly promised the jury that defendant, the defendant's psychologist, and others would testify that defendant was a battered wife who had killed victim in self-defense. Defense counsel failed to call witnesses or introduce evidence which would have supported defendant's version of events which transpired night of murder, and defense counsel advised defendant not to testify in her own behalf despite fact that only victim and defendant were present when offense was committed and only defendant could present full version of her theory of facts. *Id.* In *Zimmerman*, counsel failed to present a defense set out in his

The Court further finds that Terry cannot show prejudice resulting from counsel's alleged error. Despite Terry's argument and trial counsel's testimony concerning the March 24th statement, the Court finds that the statement does not support a jury instruction on voluntary manslaughter. In order to reasonably be viewed as supporting a manslaughter charge, the Court would have to parse out the statement from the prosecution's other evidence. This is improper. *E.g., State v. Foxworth*, 269 S.C. 496, 499, 238 S.E.2d 172, 173 (1977) (possibility that the jury might have disbelieved the State's evidence as to the circumstances of aggravation in ABHAN trial and on the remaining evidence found defendant guilty of the lesser offense of simple assault and battery did not entitle him to have the lesser offense submitted to the jury where all the evidence admitted at trial pointed to the appellant's guilt of ABHAN); *State v. Funchess*, 267 S.C. 427, 229 S.E.2d 331 (1976) ("the [p]resence of evidence to sustain the crime of a lesser degree determines whether it should be submitted to the jury and the 'mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.' ") (quoting *State v. Hicks*, 241 N.C. 156, 159-160, 84 S.E.2d 545, 547 (1954)); *State v. Geiger*, 370 S.C. 600, 608-09, 635 S.E.2d 669, 674 (Ct. App. 2006). Again, the statement does not explain

opening. However, here, counsel reasonably expected the State to introduce the statement in its case-in-chief, and he made other reasonable efforts to present this information to the jury, without requiring his client to testify, when he discovered that the State had not intended to introduce the statement.

Similarly, trial counsel here did not withhold crucial evidence without reason as in *Harris v. Reed*, 894 F.2d 871 (7th Cir.1990) where counsel failed to fulfill a promise to call eyewitnesses who saw a man other than the defendant run from the scene of the crime. Also, in *Blankenship v. State*, 23 S.W.3d 848 (Mo.Ct.App.2000), a defense counsel (whose behavior at trial was described as "fumbling, stumbling and bumbling" by the trial judge) was deemed ineffective because in his opening statement he promised to present an expert witness whom he had not yet interviewed, and upon doing so decided not to call. 23 S.W.3d at 850. The Missouri Court of Appeals held that Blankenship's defense counsel was ineffective because, due to his failure to investigate, he "really had no idea what [the expert witness's] testimony would be, prior to trial," yet, nonetheless, he promised the jury in his opening statement the expert witness would be called. *Id.* at 851. Here, there is no deficiency in counsel's investigation or preparation. Nor was this case like *Anderson, supra*, where counsel promised but failed to call an expert witness to support a theory that defendant was a "a robot" with no appreciation of his actions.

the physical evidence discussed, *supra*. Even considering this statement in isolation, the Court does not find that the victim's actions constituted sufficient legal provocation.

Additionally, when counsel's remarks were placed in the context of his entire opening statement, the court finds that he was emphasizing that Terry's March 24th statement was false, and that law enforcement did not even believe that parts of it were truthful. Thus, even though he miscalculated whether the guilt phase jury would hear the statement, he was suggesting that it was a false confession, as opposed to credible evidence.

Moreover, the trial judge instructed the jury on the State's burden of proof; the presumption of innocence; and that Terry's right not to testify could not be considered in deliberations. He also instructed jurors that they had to base their verdict solely on the testimony and evidence presented at trial, and that the arguments of counsel were not evidence. **R. pp. 192-95; 267-68; 1269-76; 1562-84.** These instructions were sufficient to preclude the guilt phase jury from relying upon either counsel's opening statement or the failure to present evidence of the statement in reaching its verdict.

Further, the record reveals that overwhelming and essentially un-controverted evidence at trial demonstrated that Terry was guilty of each of the crimes charged, and that he broke into Mrs. Jackson's home (after pulling her telephone line, so that she would be unable to call for assistance), sexually assaulted her and beat her to death with a heavy blunt object. *See Ground 15.* Therefore, the Court finds that he has not proved that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.¹⁴

¹⁴ The present allegation only involves counsel's performance in the guilt phase. There could not be any prejudice in the sentencing phase because the March 24, 1995 statement was introduced as *State's Ex. 68*.



GROUND 2

Applicant's **Ground 2** alleges that trial counsel were ineffective in failing to move for a *Batson*¹⁵ hearing based upon the State's use of five peremptory challenges to remove females from the jury and use of another challenge to remove a female alternate. He premises this argument upon *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), where the United States Supreme Court extended its earlier holding in *Batson* held that it violated equal protection and the right to a fair trial for the State to exclude jurors based on gender. The Court finds that Terry has failed to prove deficient performance because counsel made an objectively reasonable strategic decision not to challenge the jury panel although they were aware of Terry's right to raise a *Batson* motion based upon the State's use of its challenges. Terry also cannot show any prejudice because the State's reasons for the exercise of its strikes, given at the PCR hearing were gender neutral and Terry did not establish that the stated reasons were pretextual.¹⁶

The record reflects that the State used its strikes to eliminate five potential jurors and one alternate, all of whom were female, and one of whom was African-American. However, it had presented twelve female jurors before exercising its final strike on juror Leaphart, and defense counsel struck five of these women. Seven women were seated on Terry's jury before the State exercised its last peremptory challenge, and eight women ultimately sat on his jury. Trial counsel failed to request a *Batson* hearing. **R. pp. 1118-28.**

Mr. Stone testified that he was aware at the time of trial that he could raise *Batson* motion with respect to the State's use of its strikes against female jurors, and that he had made a number

¹⁵ *Batson v. Kentucky*, 476 U.S. 79 (1986).

¹⁶ The Court ruled that the Eleventh Circuit Solicitor's juror selection information is not covered by the work product privilege for those jurors whom they struck but overruled Terry's request for information as to the twelve jurors selected because defense counsel would not have had access to the information about the other jurors. Thus, the work product privilege did apply to the remaining jurors.

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of such motions when employed as a prosecutor. However, he looked at the jury and "liked what I saw." He thought that the defense had the best chance with the jury they had drawn, and that he did not see purpose in *Batson* motion because he was comfortable with the jury they had selected. **PCR Tr. pp. 43-44; 87-88.**

Likewise, Ms. Fullwood testified that she was familiar with *Batson*, even before she became a trial attorney. She was also aware that she could raise challenge to gender-based strikes. However, because the jury was struck in the order in which they were qualified, the defense could think out how to use their strikes and anticipate how the State would use their strikes. Counsel felt that they had gotten the best jury that they could select from the panel. So, the motion was not made. **PCR Tr. pp. 210-11.**

As a general rule, the failure of trial counsel to make a *Batson* objection cannot be deemed deficient, *per se*. Like any other objection, a *Batson* objection can be forgone for strategic or tactical reasons. *See Randolph v. Delo*, 952 F.2d 243, 246 (8th Cir.1991) ("the record supports the state's contention that counsel simply chose not to include the *Batson* claim in the motion as a strategic matter. ... Counsel had included discriminatory jury selection claims in new trial motions in prior cases, but did not include such a claim among the thirteen alleged errors set out in the motion in this case. Rather, he concentrated on evidentiary rulings and allegedly improper comments made by the prosecution in closing argument. Furthermore, trial counsel may have been satisfied with the ultimate racial composition of the jury, and decided not to raise the *Batson* issue on that basis") (citation omitted). The Court finds that trial counsel's testimony is credible and that this testimony reflects an objectively reasonable strategic decision not to raise a *Batson* motion because they were satisfied with the jury, as selected. *See Strickland*, 466 U.S. at 690-91 (counsel's strategic choices virtually unchallengeable); *Brownlee*

v. *Haley*, 306 F.3d 1043, 1066-67 (11th Cir.2002) (counsel was not ineffective for failing to raise *Batson* issue because it clearly lacked "merit. As the trial court found in its Rule 32 ruling, and the district court agreed, nothing in the prosecutor's remarks during the trial indicates any sign of racial bias. Furthermore, trial counsel stated in post-conviction testimony credited by the trial judge that there appeared to be no basis for a *Batson* challenge. Since [petitioner] cannot show that counsel was ineffective for failing to preserve this issue, he cannot overcome the procedural default").

Even if trial counsel's performance was deficient, the Court finds that Terry has not demonstrated any prejudice under *Strickland* because he cannot prove a reasonable probability of a different result, *i.e.*, that there is a "reasonable probability" that a *Batson* "motion would have been sustained and that the trial judge would have taken curative action before the trial began." See *Davidson v. Gengler*, 852 F.Supp. 782, 787 (W.D.Wis. 1994).

In *Batson*, the Court overruled *Swain v. Alabama*, 380 U.S. 202 (1965), and held that the equal protection clause of the Fourteenth Amendment barred the prosecution from striking *veniremen* based upon their race. In *McCullum*, 505 U.S. at 59, the Court extended *Batson* and held that criminal defendants were also barred from exercising peremptory challenges based upon race. Therefore, either the defense or prosecution could move to quash a petit jury based upon the other party's violation of the equal protection rights of a juror(s). Finally, in *J.E.B. v. Alabama*, 511 U.S. 127 (1994), the Court applied *Batson* to improper use of gender in jury selection.

As the Court explained in *State v. Rayfield*, 369 S.C. 106, 112, 631 S.E.2d 244, 247 (2006):

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"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution prohibits the striking of a venire person on the basis of race or gender." *State v. Shuler*, 344 S.C. 604, 615, 545 S.E.2d 805, 810 (2001). "The purposes of *Batson* and its progeny are to protect the defendant's right to a fair trial by a jury of the defendant's peers, protect each venireperson's right not to be excluded from jury service for discriminatory reasons, and preserve public confidence in the fairness of our system of justice by seeking to eradicate discrimination in the jury selection process." *State v. Haigler*, 334 S.C. 623, 628-29, 515 S.E.2d 88, 90 (1999). Both the State and defendants are prohibited from discriminatorily exercising a peremptory challenge of a prospective juror. *Georgia v. McCollum*, 505 U.S. 42, 58, 112 S.Ct. 2348, 2358-59, 120 L.Ed.2d 33 (1992).

We set forth the proper procedure for a *Batson* hearing in *State v. Adams*, 322 S.C. 114, 470 S.E.2d 366 (1996) (citing *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)). After a party objects to a jury strike, the proponent of the strike must offer a facially race-neutral explanation. This explanation is not required to be persuasive or even plausible. Once the proponent states a reason that is race-neutral, the burden is on the party challenging the strike to show the explanation is mere pretext, either by showing similarly situated members of another race were seated on the jury or the reason given for the strike is so fundamentally implausible as to constitute mere pretext despite a lack of disparate treatment. *Adams*, 322 S.C. at 123-24, 470 S.E.2d at 371-72; *Haigler*, 334 S.C. at 629-30, 515 S.E.2d at 90-91.

Further, "in *Batson* inquiries, 'the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed.' Because there is rarely any direct evidence of the attorney's state of mind when he made the challenge, 'the best evidence often will be the demeanor of the attorney who exercises the challenge.' This type of credibility assessment lies 'peculiarly within a trial judge's province.'" *Byram v. Ozmint*, 339 F.3d 203, 208 (4th Cir. 2003) (citing *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003)). See also *Batson*, 476 U.S. at 98 n. 21 ("Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because the finding 'largely will turn on evaluation of credibility'"); *Miller-El*, 537 U.S. at 340-41 ("Deference is necessary because a reviewing court,

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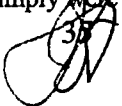
which analyzes only the transcripts from *voir dire*, is not as well positioned as the trial court is to make credibility determinations. ... In the context of direct review, therefore, we have noted that 'the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal' and will not be overturned unless clearly erroneous").

The Court finds that Terry has not even established a *prima facie* case of gender-based discrimination, as demonstrated by the State's willingness to present twelve female jurors before exercising its final peremptory challenge. However, the Court has examined the reasons proffered in light of *Adams* and *Rayfield*.

The two prosecutors in this case, Mr. Humphries and Mr. Chase, both testified as to their reasons for at the PCR hearing. PCR Tr. pp. 122-123; 130-139; 141. Both denied that there was any reason for striking female jurors, as a class; and they denied that their use of peremptory challenges was gender-based. Indeed, Mr. Humphries correctly noted that striking female jurors, categorically, is contrary to traditional thinking about jurors in a home invasion and rape case. PCR Tr. pp. 109-11; 141; 282. After having the opportunity to observe and hear them testify, the Court finds that the testimony of both prosecutors was credible;¹⁷ and that they provided sufficiently gender-neutral reasons for the State's exercise of its challenges.

Based upon their testimony, the Court finds that the jurors were struck for the following reasons. Glenda Clifton, juror 35, was the first juror struck. There was a question about whether or not her son might have been in the Eleventh Circuit's pretrial intervention program, which

¹⁷ In particular, the Court credits Mr. Chase's explanations, since he had the opportunity to review his notes of the jurors in question several days before the hearing and give the matter more thought than did Mr. Humphries, who was only provided with the notes during his testimony and had considerably less time to review them to refresh his recollection. See PCR Tr. pp. 111-12; 118-21. The Court would note, however, that Mr. Humphries' stated reasons were not inconsistent with those given by Mr. Chase. Rather, his reasons corroborated those given by his co-counsel and lend credibility to Mr. Chase's reasons. They simply were less detailed.



raised a concern about potential "animosity towards the prosecution. Also, early during voir dire, she hesitated about her ability to impose a death sentence. This likewise gave the prosecution concern. PCR Tr. pp. 123; 130-31; 282-83.¹⁸

The Court finds that both reasons are gender-neutral. Obviously, a juror's views on capital punishment are neutral. See *State v. Evins*, 373 S.C. 404, 417, 645 S.E.2d 904, 910 (2007) ("Where the Solicitor perceives a person will have difficulty imposing the death penalty, he may exercise a peremptory challenge against that juror upon this ground as a racially neutral reason"); *State v. Bell*, 305 S.C. 11, 406 S.E.2d 165 (1991) (vacillating responses to voir dire questions regarding the death penalty will support the use of a peremptory strike against a *Batson* challenge). The remaining reason is likewise gender-neutral. See *State v. Ford*, 334 S.C. 59, 65, 512 S.E.2d 500, 504 (1999) (it is legitimate to strike potential jurors because of their employment). See also *Adams*, 322 S.C. at 125, 470 S.E.2d at 372 (finding potential juror's employment as a court reporter is a valid reason for exercising a peremptory strike); *State v. Dyar*, 317 S.C. 77, 452 S.E.2d 603 (1994) (prior prosecution by that particular Solicitor's Office).

Karen Moore, juror 170, the fourteenth juror drawn, was struck for several reasons. First, Mr. Humphries observed that Ms. Fullwood examined the juror first and appeared to have developed a rapport with her. There were also concerns because she worked in a cardiac ward. As a result, she was caring for people and trying to prevent them from dying on a daily basis. This gave the prosecution concerns that she might have problems signing a death verdict. The State was also concerned that she might not be able to sign the verdict if confronted with a

¹⁸ Mr. Humphries noted that he had a question mark about whether she was a category 3 juror and stated that his impression was that she was only marginally able to sign verdict form. PCR Tr. pp. 123; 130-31. Ms. Clifton's voir dire is on R. pp. 278-310.

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mental health case in mitigation. Further, Mr. Chase testified that the State “definitely had the feeling that she was not disclosing everything” on voir dire; and “you definitely don’t want that type of juror sitting on [a capital jury].” **PCR Tr. pp. 131-132; 283-84.** The Court finds that each stated reason for striking juror Moore is gender-neutral. *See Evitts, supra; Matthews v. Evatt*, 105 F.3d 907 (4th Cir.1997) (the State is allowed to consider tone, demeanor, facial expression, and any other race-neutral factors when striking jurors); *State v. Wright*, 304 S.C. 529, 405 S.E.2d 825 (1991) (struck juror had disinterested attitude and demeanor).

Cheryl Kirkpartrick, juror 137,¹⁹ was struck because she was very hesitant when questioned about her ability to impose the death penalty, which again gave the State concerns about her ability to impose the death penalty. Mr. Chase also felt that she seemed to differentiate between her ability to say that she could impose the death penalty when questioned by the court and counsel and her emotional ability to impose it. She could do so theoretically but not emotionally. **PCR Tr. pp. 133; 284-86.** Again, under *Bell* and *Evitts*, the Court finds that the stated reasons were gender-neutral.

Juror 139, Sandra Kizer, was struck because there was a note on her information to “see S. R. H.’s file.” This refers to the file in a case prosecuted by Rick Hubbard, of the Eleventh Circuit Solicitor’s Office. She was being prosecuted for “cruelty to animals” and the State was concerned that she might harbor animosity to the Office. **PCR Tr. pp. 133-134; 286-87.** This was a gender-neutral reason. *Dyar, supra.*

Cassandra Leaphart, juror 141,²⁰ was struck because she had to be brought to court by the Sheriff’s Office. Also, she was confused by the trial judge’s questions, even though the trial judge’s questioning was very clear. Mr. Chase noted that the trial judge almost had to

¹⁹ Her voir dire is on **R. pp. 506-21.**

²⁰ Her voir dire is on **R. pp. 881-93.**

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rehabilitate the juror because her answer seemed to make her disqualified for cause. Further, Mr. Humphries felt that she was a questionable juror on the death penalty. PCR Tr. pp. 134-35; 287-88.

The Court finds that the stated reasons for striking this juror was gender-neutral. Striking a juror who is weak on the death penalty is such a neutral reason. *See Bell and Evitts, supra*. The other reasons for striking juror Leaphart were because she had to be brought to Court, and because her confused answer to the trial judge's questioning suggested that she might be subject to challenge for cause.²¹ Both reasons satisfy *Batson E.g., State v. Wilder*, 306 S.C. 535, 413 S.E.2d 323 (1991) (two black males struck because they were late); *United States v. Smith*, 324 F.3d 922, 927 (7th Cir. 2003) (prosecution excused juror because he had made several mistakes on his juror questionnaire that suggested an inability to follow simple instructions).

Terry argues that the proffered reason of views on the death penalty was pretext because a male, Jerry Jumper, was seated although he was supposedly weak on his ability to impose capital punishment. However, with the exception of Ms. Kirkpatrick, each juror struck because of her views on the death penalty was also struck for other reasons that were likewise gender-neutral. The Court further finds that it is unable to find that any of the stated reasons were pretextual based upon the record before it, even when the struck jurors' voir dire responses are compared to those of Mr. Jumper. *See R. pp. 810-26*. Therefore, the Court finds that there was no prejudice under *Strickland* because Terry did not prove a reasonable probability a *Batson* would have been granted but for counsel's failure to make one.

GROUND 3

²¹ Specifically, she twice stated "[n]o" when asked if she would be able to apply the law as instructed by the trial judge if she disagreed with it. The record supports Mr. Chase's testimony that the trial judge thereafter rehabilitated the juror. R. pp. 883-84.

The Court finds that trial counsel's testimony was credible and, based upon Ms. Fullwood's testimony, the Court finds that counsel had made an objectively reasonable strategic decision that they wanted Juror Miller as a juror in Terry's case because the juror had simply been confused when she made the response at issue and the juror was actually "soft on the death penalty."

Further, the failure to make a motion is not ineffectiveness if making the motion would be futile. *E.g.*, *James v. Borg*, 24 F.3d 20, 27 (9th Cir. 1994) (failure to move to strike special circumstance). In *Adams v. Texas*, 448 U.S. 38 (1980), and *Wainwright v. Witt*, 469 U.S. 412 (1985), the United States Supreme Court held that the appropriate test for exclusion of a juror in a capital case was simply whether the juror's views on capital punishment would "prevent or substantially impair" her ability to follow her oath and the trial court's instructions on the law. *Wainwright* specifically indicated that the test for exclusion required neither automatic decision-making by the juror nor "unmistakable clarity" as to the juror's beliefs. *Id.* at 424-25. *See also Morgan v. Illinois*, 504 U.S. 719, 729-30 (1992); § 16-3-20(E) (juror may not be excused in a death penalty case unless his beliefs or attitudes against capital punishment would render him unable to return a verdict according to law); *State v. Lindsey*, 372 S.C. 185, 642 S.E.2d 557 (2007); *State v. Sapp*, 366 S.C. 283, 621 S.E.2d 883 (2005) (citing *Wainwright*).

When reviewing the trial judge's qualification or disqualification of prospective jurors, the responses of the challenged juror must be examined in light of the entire voir dire. *Id.* The trial judge's determination of a juror's qualification for a capital trial is within his sole discretion, and his decision may not be reviewed on appeal unless wholly unsupported by the evidence. "The ultimate consideration is that the juror be unbiased, impartial, and able to carry out the law as explained to him." *State v. Council*, 335 S.C. 1, 10, 515 S.E.2d 508, 512-13 (1999).

Terry's third allegation is that trial counsel were ineffective because they failed to move to have Georgia Miller, juror 163, for cause. The Court finds that he has failed to prove either deficient performance or any resulting prejudice under *Strickland*.

This allegation is based upon the juror's response to questioning by Mr. Stone designed to determine whether the juror could impose the death penalty if it was appropriate under the evidence presented. She stated that "if he did ... intentionally murder somebody and knew it was wrong, I don't want to give him death, but that's what would happen. But I can't say now because I don't know." R. p. 373, ll. 4-7.

When Mr. Stone was asked about Juror Miller, he initially did not recall her. After he had reviewed the response at issue, he testified that he felt the response needed clarification. On cross-examination, he again reviewed portions of Juror Miller's responses. He then observed that there was "a good bit of confusion" on the challenged comments, and that he did not understand her responses she would not "want to give him death, but that's what would happen." However, she indicated in response to Mr. Stone's further questioning, R. p. 374, ll. 17-23, that she could give either punishment. So, he concluded that the juror had simply been confused. Also, Mr. Stone did not get the impression from the transcript that she would be a leader, if she served on the jury; and there was nothing in her responses that would have caused him to worry. PCR Tr. pp. 44-48; 89-91; 99.

Mrs. Fullwood testified that she had looked through her notes on Juror Miller. She had noted Ms. Miller high on her juror list. Juror Miller did make the comment at issue, which Ms. Fullwood had in her notes. However, "it seemed like she didn't really understand the question," and that the juror was actually "soft on the death penalty." Therefore, she was a juror that the defense would want. PCR Tr. pp. 214-16.

In this case, the Court finds that Juror Miller's responses to voir dire, when considered in their entirety, reflect that she was properly qualified under the above-stated authority; and that it appears that the response quoted by Terry simply shows some confusion on her part. On other questioning, both before and after the comments at issue, she testified that she could listen to and follow the law as instructed by the trial judge; that she could decide the case based solely on the evidence presented in the courtroom; that she could listen to both evidence in aggravation and evidence in mitigation; and that she could give either life imprisonment or the death penalty, depending upon the circumstances. **R. pp. 362-79.**

Also, the United States Supreme Court held just last year that:

Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors. [citations omitted]. Leading treatises in the area make much of nonverbal communication. *See, e.g., V. Starr & M. McCormick, Jury Selection* 389-523 (3d ed.2001); J. Frederick, *Mastering Voir Dire and Jury Selection* 39-56 (2d ed.2005).

Uttecht v. Brown, 127 S.Ct. 2218, 2224 (2007). The trial judge, who had ample opportunity to view the witness' demeanor and the tone of her voice in making these responses, did not *sua sponte* disqualify her for cause. Neither this Court nor any other reviewing court has the ability to assess her demeanor. This Court, therefore, concludes that Terry failed to prove either deficient performance or any resulting prejudice because the Court finds that the record of Juror Miller's voir dire responses does not support a challenge for cause.

GROUND 4-5

In **Ground 4**, he alleges that counsel were ineffective because they did not object to the judge's jury charge on implied malice because this instruction supposedly shifted the burden of proof to Terry by using the word "implied." In **Ground 5**, he maintains that counsel were

ineffective for not objecting to the portion of the trial judge's implied malice instruction that if the jury found that "a blow delivered ..." caused death. **R. p. 1574, l. 24-p. 1575, l. 2.** He contends that this was a charge on the facts surrounding the death of the victim. The Court finds that he has failed to prove deficient performance or prejudice as to either allegation.

The trial judge gave a lengthy jury instruction on implied malice in the guilt phase of Terry's trial. His instructions are set forth at **R. pp. 1571-75.**

Ms. Fullwood testified at the PCR hearing that she had previously worked at Appellate Defense for eight years. Part of her duties at Appellate Defense included reviewing transcripts of jury charges for error, and she had between seven and nine appeals of death penalty cases while she was there. In her estimation, the trial judge's implied malice instruction was a "straight out of the charge books" and part of a standard charge. She likewise did not perceive the reference to if the jury found that "a blow caused death" as a comment on the facts. **PCR Tr. pp. 186-87; 193-96; 213.** Mr. Stone testified that he did not recall what the law would have been at the time of the trial. However, Mr. Stone did not perceive the language challenged in **Ground 5** as a comment on the facts of the case. **PCR Tr. pp. 58-60.**

A. Ground 4

The appropriate inquiry that this Court must make is set forth in the South Carolina Supreme Court's decision *Lowry v. State*, 376 S.C. 499, 505-506, 657 S.E.2d 760, 763 (2008):

The relevant inquiry for the Court in this matter is whether there is a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); *Todd v. State*, 355 S.C. 396, 403, 585 S.E.2d 305, 309 (2003). In order to make this determination, the challenged instruction must be examined in the context of the trial court's entire charge to the jury and not in isolation. *Francis v. Franklin*, 471 U.S. 307, 315, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Todd*, 355 S.C. at 402, 585 S.E.2d at 308. A jury instruction violates due process if it is reasonably likely that the jury understood the charge to create a mandatory

presumption requiring it to infer an element of the offense if the State proved certain predicate facts, thereby relieving the State's burden of proof on an element of the offense. *Francis*, 471 U.S. at 314, 105 S.Ct. 1965; *Sandstrom*, 442 U.S. at 521, 99 S.Ct. 2450. The ultimate question for the Court to determine is "whether the ailing instruction ... so infected the entire trial that the resulting conviction violates due process." *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004) (quoting *Estelle*, 502 U.S. at 72, 112 S.Ct. 475).

Despite Terry's challenge to the implied malice charge, the Court finds that the charge given was proper. The South Carolina Supreme Court has suggested that trial judges instruct jurors that "the law says if one intentionally kills another with a deadly weapon, the implication of malice may arise. If facts are proved beyond a reasonable doubt, sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be taken into consideration by you, the jury, along with other evidence in the case, and you may give it such weight as you determine it should receive." *State v. Elmore*, 279 S.C. 417, 421, 308 S.E.2d 781, 784 (1983). The Court finds that the trial judge's instruction in this case comports with *Elmore*. **R. pp. 1571-75.**

The Court rejects Terry's argument that the instruction was constitutionally defective because the trial judge used the term "implied" as opposed to "inferred." His argument ignores that the very definition of the crime of murder. "'Murder' is the killing of any person with malice aforethought, either express or *implied*." S.C. Code Ann. § 16-3-10 (2003) (emphasis added). Thus, it was necessary for the trial judge to use the term "implied" to define the crime of "murder."

More importantly, the trial judge thoroughly charged the jury that the burden of proof was on the State; he repeatedly emphasized the permissive inference of malice; he emphasized that the jurors were "free to accept or reject" the permissive inference; and he never suggested that Terry was required to overcome any inference of malice. At no time does the charge use the

words "rebuttable" or "presumption." *Contra Plyler v. State*, 309 S.C. 408, 410-411, 424 S.E.2d 477, 478 (1992); *State v. Peterson*, 287 S.C. 244, 335 S.E.2d 800 (1985). Therefore, the Court finds that the charge as a whole was sufficient. See *State v. Patrick*, 289 S.C. 301, 345 S.E.2d 481 (1986), *overruled on other grounds*, *Casey v. State*, 305 S.C. 445, 409 S.E.2d 391 (1991). As a result, he cannot show either deficient performance or prejudice. The absence of prejudice is buttressed by the overwhelming evidence - discussed throughout the Order -, which established that the killing was malicious.

B. Ground 5

Terry also contends that counsel were ineffective because they failed to object to the judge's instruction that "[i]f the evidence should show under what circumstances a blow delivered which took the life of another, then you the jury, would have to determine whether under such circumstances the act was malicious." R. p. 1574, l. 24-p. 1575, l. 2. He contends that this was a charge on the facts surrounding the death of the victim.

The South Carolina Constitution prohibits a trial judge from charging the jury on the facts. See S.C. Const. art. v, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law."); *State v. Kennedy*, 272 S.C. 231, 250 S.E.2d 338 (1978) (the trial judge must refrain from all comment which tends to indicate his opinion as to the weight or sufficiency of the evidence, the credibility of witnesses, the guilt of the accused or as to controverted facts); *State v. Simmons*, 209 S.C. 531, 41 S.E.2d 217 (1947) (a judge cannot intimate in his charge any opinion as to the facts at issue).

The Court disagrees with Terry's construction of the trial judge's jury instruction and finds that this was not a comment upon the facts of the case. The challenge comment did not tend to indicate the trial judge's opinion as to the weight or sufficiency of the evidence, the credibility

of witnesses, the guilt of the accused or as to controverted facts. Rather, it clearly emphasized, once again, the permissive nature of the jury's finding as to any blow. Thus, it was part of a constitutionally proper malice instruction and conformed to the facts of the case. See *State v. Brown*, 274 S.C. 48, 260 S.E.2d 719 (1979) (trial judge's inclusion of lack of consent was not impermissible charge on facts of case, but rather correct statement of law, in conformity with the evidence).²² Counsel were not deficient for failing to object, and Terry cannot show any prejudice. Particularly in light of the overwhelming proof of guilt of each of the charged offenses, the Court finds that Terry's argument lacks merit because he cannot prove a reasonable probability of a different result but for counsel's failure to object to this portion of the trial judge's instructions. *Strickland*.

GROUND 6

Terry further alleges that his attorneys were ineffective because they did not object to or move *in limine* to prevent the introduction of excessive and uncorroborated character evidence used by the State in the sentencing phase of his trial. He predicates this allegation upon Rule 404, SCRE, and upon the fact counsel had not placed his character in issue. Once again, the Court finds that he has failed to prove deficient performance or prejudice.

Mr. Stone testified that the State presented a lot of evidence reflecting upon Terry's bad character in the sentencing phase, trying to make look bad. He did not recall whether or not he had made a motion *in limine* to keep out this evidence. Also, the defense had not presented any evidence in the guilt phase and it had not placed the defendant's character in issue. However,

²² Terry's argument ignores that the trial judge had previously instructed jurors that "I do not have the right to pass upon the facts or even to express any opinion I have as to them, nor may I intimate in any way what I may think about the guilt or the innocence of the defendant." The trial judge also instructed the jury that they were the sole judges of the facts. R. p. 1568. Terry's argument likewise ignores the very permissive nature of the challenged charge.

Mr. Stone did not make a motion *in limine* or generally object to this evidence because his understanding of the law is that the defendant's character and the circumstances of the crime may be introduced in sentencing phase of a capital trial. PCR Tr. pp. 61-62; 92.

Mrs. Fullwood likewise testified that her understanding was that the prosecution has a much broader ability to introduce evidence of a defendant's bad character in the penalty phase of a capital trial. PCR Tr. p. 213.

Trial counsel's assessment of the State's right to present evidence of a defendant's bad character in the sentencing phase of a capital trial is correct. Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime. See *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979) (same); see also *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion); *State v. Skipper*, 285 S.C. 42, 328 S.E.2d 58 (1985), *rev'd. on other grounds*, 476 U.S. 1 (1986) ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase. E.g., *State v. Rosemond*, 335 S.C. 593, 518 S.E.2d 588 (1999); *State v. Gardner*, 332 S.C. 389, 505 S.E.2d 338 (1998).

Therefore, the Court rejects Terry's reliance upon Rule 404, SCRE, and the Court finds that trial counsel did not render deficient performance by failing to move *in limine* to prevent the introduction of character evidence used by the State in the sentencing phase because this is

inherently a strategic part of trial strategy and because counsel correctly recognized that a motion for the blanket exclusion of this evidence would not have been meritorious. *Id*; *Hitchcock, supra*. See also *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir.2000) ("counsel cannot be ineffective for failing to raise a meritless claim"); *Cedillos v. State*, 250 S.W.3d 145, 154 (Tex.App. 2008) (counsel cannot be found ineffective for failing to make an objection unless the record establishes that an objection would have been successful); *Jones v. Stotts*, 59 F.3d 143, 146 (10th Cir. 1995) (counsel's failure to make an *in limine* motion was not ineffective because an *in limine* motion is inherently a strategic part of trial strategy).

Further, Terry cannot show prejudice resulting from counsel's failure to make an *in limine* motion as to the State's evidence reflecting upon his bad character because it would not have been meritorious. Further, he only raises four specific allegations related to the counsel's failure to object or opening the door to the admission of sentencing phase evidence by the prosecution. The Court has rejected each of those allegations for the reasons stated therein. Finally, given the overwhelming evidence establishing the murder and the statutory aggravating circumstances, the Court finds that there is no reasonable probability of a different result but for counsel's failure to make a motion *in limine*. The Court, therefore, finds that he has not proved that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 *Strickland*, 466 U.S. at 695.

GROUND 7

Terry maintains that trial counsel was ineffective for not objecting to hearsay evidence from Lt. William Brown, in the sentencing phase, concerning Terry's theft of items from a

construction site. The Court finds that Terry has failed to prove either deficient performance or resulting prejudice.

Lt. William Brown, of the Richland County Sheriff's Department, was an investigator with that agency on May 4, 1985. He investigated a burglary and grand larceny at a business called "Imports Plus." "About eighteen items ... [were taken]." These included sanders and other items that could be used in a car body shop. He eventually developed Terry as a suspect. Terry admitted his involvement in the burglary and led Lt. Brown to a number of the stolen items that were recovered. Counsel did not object or cross-examine the witness. **R. pp. 1610-12.**

Initially, the Court finds that Terry cannot overcome *Strickland*'s strong presumption that counsel's performance was competent because he failed to elicit any testimony from trial counsel concerning why counsel did not raise an objection under Rule 403, SCRE. *See Strickland*, 466 U.S. at 689; *Hughes v. Borg*, 898 F.2d 695, 702 (9th Cir. 1990) ("We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions [that he] made"). The Court further finds that no hearsay was admitted.

Furthermore, after reviewing the above evidence, the Court finds that any objection to this testimony would not have been meritorious because this testimony was proper in the sentencing phase of Terry's capital trial to show his character. *Hitchcock, supra*. When the Court considers that the expanded scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase, e.g., *Gardner, supra*, the Court finds that Terry cannot show either deficient performance in failing to object or prejudice resulting from the failure to raise a Rule 403 objection. *See Clark v. Groose*, 16 F.3d 960, 963-64 (8th Cir. 1994) (Because the Court found no basis for counsel to object to the evidence that was admitted,

counsel's failure to object was not deficient performance);²³ *Werts*, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *United States ex rel. Link v. Lane*, 811 F.2d 1166, 1170 (7th Cir. 1987) (there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

The Court further notes that the trial judge properly charged Terry's jury that it could only recommend a death sentence if it unanimously found that the State had proven the existence of one or both statutory aggravating circumstances beyond a reasonable doubt, and he instructed the jury that the statutory aggravating circumstances were burglary in any degree and CSC in any degree. **R. pp. 2104-21**. Finally, the Court notes that there was overwhelming proof that Terry was guilty of the murder and the two statutory aggravating circumstances. In light of the foregoing, the Court finds that he has not proved that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 8-9

Terry's next two allegations are that trial counsel Stone was ineffective because he failed to object to hearsay testimony by Sgt. Wilkerson regarding the statement of Ann Lomax, who was not present to testify (**Ground 8**); and that Mr. Stone was ineffective because his cross-examination of Sgt. Wilkerson about the statement of Ms. Lomax permitted the introduction of hearsay evidence, *i.e.*, Ms. Lomax's entire statement. **Ground 9**. The Court finds that Terry has failed to prove either that counsel's performance was deficient or that he was prejudiced by counsel's performance as to these allegations.

²³ The Court of Appeals further concluded that even if evidence is erroneously admitted but its introduction constitutes, at most, harmless error, then no ineffective performance is shown. *Id* at 964. The Ninth Circuit Court of Appeals reaches the same harmless error result, *i.e.*, no ineffectiveness, in *LePage v. Idaho*, 851 F.2d 251, 257 (9th Cir. 1988), but the Court relies solely upon a prejudice analysis.

On direct examination, Sgt. Mitch Wilkerson testified that, on November 14, 1985, he was an investigator with the City of Columbia Police Department's major crimes unit. On that date, he was called to Beltline Blvd., near Two Notch Rd., where Ann Lomax had been stabbed in the throat with a knife.²⁴ She initially was in the median of the road, but she was transported to the hospital. Terry was developed as a suspect and ultimately pled guilty to assault and battery of a high and aggravated nature (ABHAN), on November 14, 1985. He received a Youthful Offender Act sentence not to exceed six years. This sentence was suspended to six months, or the payment of \$ 750.00 and court costs, as well as two years probation. **R. pp. 1613-16; State's Ex. 22.**

On cross-examination, Mr. Stone initially attempted to elicit that "after the stabbing took place, ... Mr. Terry was so confused that he couldn't actually figure out how to get out of the house that he was in." (Sic). Although Sgt. Wilkerson acknowledged that this is what Terry had claimed in his statement, he denied that the victim had corroborated this version. **R. pp. 1616-17.** Mr. Stone then refreshed Sgt. Wilkerson's recollection by showing him **Defendant's Ex. 2**, which Sgt. Wilkerson indicated was the statement he took from Ms. Lomax. **R. pp. 1617-18.**

The following exchange then occurred, which gives rise to Terry's ninth and tenth allegations:

- Q. Is it fair to say, sir, that after the stabbing took place, Mr. Terry just walked to the door like nothing had happened? He was so calm, but he couldn't get out of the door. In fact, the victim had to show him how to open the door?
- A. Yes. He was having trouble opening the door, but I was referring to the fact that he was calm, acted like nothing had happened. He didn't show any confusion there.

²⁴ "Admission of testimony that a defendant has attempted a similar crime or crimes to that for which he is on trial is proper because such testimony indicates a defendant's individual characteristics and predisposition to commit similar crimes." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162-63 (1990) (citations omitted).

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Mr. Chase: Your Honor, at this time, under Rule 106, he's referring to a portion of the statement, we would ask that the entire statement be published to the jury so that there's not any confusion there.

The Court: All right, sir.

Mr. Stone: I appreciate that, Your Honor, but I specifically asked him if he needed this to refresh his memory. He did and I asked the same question over again. And that's ... all he's done is refreshed his memory and I asked him specifically about the statement.

R. p. 1618, l. 20-p. 1619, l. 13. After the trial judge reviewed the statement, he held that "pursuant to the Rule, the entire statement will be published." **R. p. 1619, ll. 22-23.**

The jury then heard that Lomax's statement indicated that she and Terry went to her Beltline Blvd. house after they made "a deal." Once there, Terry asked her to put out the candle because he was concerned that someone else was in the house. So, Lomax walked him around her house to prove that no one was there. "As soon as we got to the first room, he stabbed me. He just slowly walked to the door like he hadn't done anything. He was just so calm." **R. p. 1620, ll. 1-18.**

However, Terry could not open the door. Therefore, Lomax told him how to open the door. She locked the door as soon as he was outside, and she went for help after he left. She also explained that she was working as a prostitute, and she said that Terry had told her that he had smoked marijuana and how it affected his head. She had never seen him before; and she did not know with what he had stabbed her, but she said it looked like the broken end of a big knife. Finally, he was in her house for roughly fifteen minutes. **R. pp. 1620-22.** Mr. Stone's further cross-examination reiterated that Lomax had described Terry slowly walked to the door "like he hadn't done anything" after the stabbing, and that no one else was present. **R. pp. 1622-23.**

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At the PCR hearing, Mr. Stone testified that Sgt. Wilkerson had put on "pretty damaging evidence already" that Terry had stabbed the prostitute in the neck. Mr. Stone elicited that Terry had not been able to find the door after the stabbing; and that Terry turned and looked at that victim as if nothing had happened. This was the sentencing phase; and the point of the cross-examination was to establish that there was some mitigation on the part of Gary Terry, by showing that there was some mental problem with Terry. Mr. Stone felt that this came from the prostitute's statement. The prostitute did not testify and her statement was not admissible, but for counsel's cross-examination of Sgt. Wilkerson. Mr. Stone could not recall why he did not object to the State publishing her statement. **PCR Tr. pp. 65-66; 92-94.**

The Court finds that Terry has not established that counsel's performance was deficient for either of the alleged reasons advanced by Terry. With respect to his **Ground 8**, the Court finds that Mr. Stone's failure to object to the publication of Ms. Lomax's statement was not deficient because an objection would not have been meritorious. The trial judge found, and this Court agrees, that under Rule 106, SCRE, the State had the right, during counsel's cross-examination of Sgt. Wilkerson, to require the introduction of any other part of Ms. Lomax's statement, "which ought in fairness to be considered contemporaneously with it." *Id.* Here, that would be her entire statement.

"Rule 106 is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 525 (2004) (citation omitted).²⁵ As the Court of Appeals

²⁵ This is consistent with South Carolina law before the adoption of the South Carolina Rules of Evidence. See *State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975). In *Cabrera-Pena*, the Court held that the common law of this state extends the rule of completeness to oral communications. 361 S.C. at 380, 605 S.E.2d at 526 (citation omitted).

later explained in *State v. Patterson*, 367 S.C. 219, 226-28, 625 S.E.2d 239, 243-44 (Ct. App. 2006):

Adverting to the merits, we find the trial court properly ruled Richardson's statement to police was admissible. Rule 106, SCRE provides:

When a writing, or recorded statement, or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 106 was promulgated by Order of the Supreme Court and became effective September 3, 1995. *See* Editor's Note, Rule 106, SCRE. The Rule restates the common law rule of completeness with one significant change. Prior to the enactment of Rule 106, when part of a document, writing, or conversation was introduced into evidence, the opposing party could introduce the remainder of the communication. *See Dukes v. Smoak*, 181 S.C. 182, 186 S.E. 780 (1936). However, whereas under common law the opposing party was required to wait until cross-examination to complete the communication, under Rule 106, the party can now require introduction of the remainder of the statement contemporaneous with the original proffer. *See* Rule 106, SCRE.

As the South Carolina Supreme Court explained in *State v. Taylor*, "The text of Rule 106, SCRE, is substantially similar to Rule 106 of the Federal Rules of Evidence. Rule 106, Fed.R.Evid., is based on the rule of completeness and seeks to avoid the unfairness inherent in the misleading impression created by taking matters out of context." 333 S.C. 159, 170, 508 S.E.2d 870, 876 (1998) (internal quotation marks omitted) (quoting *Rainey v. Beech Aircraft Corp.*, 784 F.2d 1523, 1529 (11th Cir.1986)). The rule applies to oral communications as well as written statements. *State v. Cabrera-Pena*, 361 S.C. 372, 379, 605 S.E.2d 522, 526 (2004); *State v. Jackson*, 265 S.C. 278, 284, 217 S.E.2d 794, 797 (1975).

In *Cabrera-Pena*, the State elected to use a witness to elicit portions of the defendant's conversation. 361 S.C. at 380, 605 S.E.2d at 526. Our supreme court found the rule of completeness required the defendant to be permitted to inquire into the full substance of the conversation. *Id.* Similarly, defense counsel, by asking Richardson whether her statement to police included

Patterson's admission, opened the door for the State to inquire into the full substance of her statement.

Patterson argues that because the inquiry referred to an alleged omission by Richardson as opposed to an affirmative declaration in the statement, Rule 106 does not apply. We disagree.

After eliciting testimony from Richardson regarding how careful she was in giving police a correct depiction of the events that led to Clark's murder, defense counsel in essence insinuated Richardson's statement to police was incomplete. The defense put Richardson's statement to police at issue, and fundamental fairness required the entire statement be admitted into evidence. Patterson would have us construe Rule 106 in such a way that inquiries that probed at alleged omissions from a statement would not open the door to the admission of the statement. The purpose behind Rule 106 would be frustrated if the rule's application in a given case depended upon whether an alleged oral assertion was or was not in a written statement. We find the rule of completeness applies to insinuations, innuendos, and omissions. Thus, the trial judge properly admitted Richardson's statement.

Based upon *Cabrera-Pena* and *Patterson*, this Court finds that counsel's cross-examination of Sgt. Wilkerson about Ms. Lomax's comment concerning Terry's conduct after the stabbing was such that the remainder of Ms. Lomax's statement should "in fairness ... be considered contemporaneously" with the statements elicited. Thus, counsel was not deficient in failing to object to the trial judge's ruling that permitted introduction of the entire statement because the objection would have been overruled. *Id.* See also *Clark*, 16 F.3d at 963-64 (because no basis for an objection was present, the Court found that failing to object was not deficient performance); *Werts*, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Lane*, 811 F.2d at 1170 (there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

Likewise, the Court finds that Mr. Stone's chosen line of cross-examination of Sgt. Wilkerson was not deficient performance, even though it permitted the introduction of the

hearsay statement of Ms. Lomax. **Ground 9.** Generally, "decisions whether to engage in cross-examination and if so to what extent and in what manner, are . . . strategic in nature" and will not support an ineffective assistance claim. See *United States v. Nersesian*, 824 F.2d 1294, 3121 (2d Cir. 1987). See also *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978) (*Marzullo v. Maryland* standard was not intended to promote judicial second-guessing on questions of strategy as basic as handling of a witness). The Court finds that the Mr. Stone's decision to engage in the chosen line of cross-examination was the result of an objectively reasonable trial strategy.

The Court notes that Sgt. Wilkerson was a sentencing phase witness. More importantly, the Court finds that the most damaging aspect of his testimony from trial counsel's perspective was already before the jury, without any explanation or mitigation: Terry had pled guilty to ABHAN and received a relatively lenient sentence for stabbing a woman in the neck. Because Terry was being sentenced for murdering the victim while in the commission of a burglary and a sexually assault of her, evidence that he had previously stabbed another woman in the neck would obviously be exceptionally damaging proof of his violent character.

However, Mr. Stone's strategy demonstrated that there was possible some mental problem with Terry and thereby established some mitigation for Gary Terry, in connection with this offense, that was not otherwise present. This was entirely reasonable under *Strickland*. The Court finds that the reasonableness of Mr. Stone's chosen strategy is further demonstrated by the fact counsel's decision was made with the obvious knowledge that the defense would present evidence in mitigation that Terry has an "an organic explosive disorder," which was offered to explain his violent actions. **R. pp. 1995-2043; 2054-64.**

The Court further finds that counsel's strategy did not prejudice Terry. Again, the most damaging aspect of Sgt. Wilkerson's testimony was already before the jury, without any explanation or mitigation. This evidence would not have been mitigated, at all, if counsel had not elicited the information he did on cross-examination. The Court also finds that the minor hearsay details of the incident were not prejudicial. First, the jury learned that the victim of the ABHAN was a prostitute, as opposed to a victim of a burglary or someone chosen at random. The evidence he had told Lomax that he had used marijuana was both cumulative to other sentencing phase evidence that he used drugs and explainable by the defense's case in mitigation.

The Court further finds that the description of the weapon used was also not prejudicial, since the jury knew that he had stabbed her. Further, publication of the entire statement re-emphasized that portion of the statement which counsel had previously elicited. When these aspects of the hearsay in question are considered against the overwhelming evidence proving the murder and both statutory aggravating circumstances, the Court finds that the Court finds that he has not proved that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 10

Next, Terry alleges that trial counsel were ineffective because they failed to request a charge on provocation by the victim as a mitigating circumstance, as set forth in §16-3-20(C)(b)(8) ("The defendant was provoked by the victim into committing the murder"). The Court finds that Terry has failed to prove either that counsel's performance was deficient or that

he was prejudiced by counsel's failure to request an instruction on this statutory mitigating circumstance.

The only evidence to arguably support this mitigating circumstance is Terry's March 24, 1995 statement (**State's Ex. 68**). In this statement, he admitted breaking into the house but he denied the intent to commit a crime therein because he allegedly had been engaged in an ongoing affair with the victim. He also claimed that he had consensual intercourse with the victim as he was leaving, and she struck him from behind. Only then did he lose his temper and strike her - picking up the nearest object he could find and beating her with it - because he had a bad temper. He did not remember pulling the telephone lines and he claimed he could not remember what he had done with the object he used to beat the victim. **R. pp. 1156-71; pp. 1814-18; State's Exhibit 68.**

Mr. Stone testified that he did not request the mitigating circumstance that victim had provoked her death, even though this statement was introduced in sentencing phase. **PCR Tr. pp. 66-67.** However, he explained that he met with co-counsel, Ms. Fullwood a number of times to figure out the best way to approach the case. They decided that they wanted to maintain credibility with the jury in the guilt phase for sentencing phase. **PCR Tr. pp. 37-39; 82-83.**

Ms. Fullwood testified that that the defense made requests to charge on mitigators in the sentencing phase, and she is familiar with §16-3-20(c)(b)(8). She agreed that there was some evidence that the victim had provoked Terry because the statement was in evidence. "However, under the facts and circumstances of this case I do not believe it would have been wise to try to argue provocation. The jury had already found him guilty of [murder, criminal sexual conduct with first degree and burglary in the first degree]. To try to come in at the penalty phase and basically say this woman asked for it would probably be very offensive to the jury and would not

be the type of argument that would persuade them to recommend life as a sentence.” Counsel probably considered this mitigator, but she could not recall, and she would not have raised an argument that, in her professional judgment, she did not feel was persuasive to a jury. **PCR Tr. pp. 191-93.**

She reiterated on cross-examination that the defense did not request the mitigation of the victim’s provocation. The defense presented evidence in the penalty phase that Terry “had a psychological abnormality that made it difficult for him to control his emotions,” and the statement was in evidence. However, it was her belief that the defense could not argue with the guilty verdicts in the penalty phase. Also, there was nothing to corroborate that the victim provoked Terry, other than the statement, which Ms. Fullwood acknowledged could reasonably be viewed as self-serving.²⁶ “You’ve really got to be careful when you’re at the penalty phase of the trial trying to shift the blame for the crime itself from the defendant and shift the blame to the victim after the jury has already convicted him of the killing.” **PCR Tr. pp. 219-21.**

The Court find that trial counsel’s testimony is credible; and accepts Ms. Fullwood’s testimony as establishing a reasonable, strategic decision not to request a jury instruction on the statutory mitigating circumstance in §16-3-20(C)(b)(8) because it would not have been wise to argue with the jury’s verdicts based solely upon the self-serving statement made by Terry. *Cf. Greiner v. Wells*, 417 F.3d 305, 319 (2nd Cir. 2005) (observing that the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance is not overcome by counsel’s inability to recall reason for actions where record reasons appear, noting also counsel’s experience). The Court finds that the position Terry advocates in these proceedings of trying to shift the blame to the murder victim would have been offensive to the

²⁶ As discussed in **Ground One**, this was why the prosecution strategically decided not to introduce the March 24, 1995 statement in the guilt phase.

sentencing phase jury, which had already convicted him of first degree burglary, first degree CSC, murder and malicious injury to telephone system.

This is especially true since the statement was not corroborated by other evidence and, instead, was inconsistent with the physical evidence. The Court finds the statement cannot explain either why he would have pulled the telephone lines or why the victim was found in a position that suggested that the sexual intercourse occurred after the brutal attack on her with a blunt object, or while that savage beating was still being administered. It also does not explain the evidence that Terry had to break into the house or why no murder weapon could be found.²⁷

Even assuming that trial counsel's performance is deficient because Ms. Fullwood did not specifically recall whether counsel considered this statutory mitigator, the Court finds that the various reasons just discussed support the conclusion that counsel's failure to request this instruction was not prejudicial. When the flimsy and self-serving evidence of her provocation is considered against the overwhelming evidence proving the murder and the statutory aggravating circumstances, the Court cannot find that he has proved that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 11

Terry also alleges that he received ineffective assistance of counsel because his trial attorneys failed to develop and present corroborating testimony that would have allowed

²⁷ Moreover, the Court finds that Terry's statement does not support an instruction pursuant to §16-3-20(C)(b)(8). There are no state court cases construing the mitigator. Further, the March 24, 1995 statement indicates that the victim struck him from behind; and that he then lost his temper and strike her - picking up the nearest object he could find and beating her with it - because he had a bad temper. However, the defense offered expert testimony that a SPEC scan showed that Terry was brain damaged. The defense also presented other evidence that he was neurologically impaired and urged that this impairment, "an organic explosive disorder," explained his actions. *R. pp. 1995-2043; 2054-64; PCR Tr. pp. 85-86; 219-21*. Thus, rather than showing provocation by the victim, the defense sought to establish that the murder was caused neurological impairment and §16-3-20(C)(b)(8) did not apply.

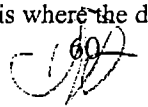
introduction of Terry's statement during the guilt phase. The Court finds that he has not established either deficient performance or resulting prejudice.

Mr. Stone testified that he met with Terry several times before trial, but he could not recall the number of times that they had met. He first met with Terry shortly after he was appointed. Also, he met with Terry after Terry was housed at Broad River Correctional Institution, as a safe-keeper. He also sent the defense psychiatrist (Dr. Donna Schwartz-Watts) and the private investigator (Tommy Davis) to meet with Terry "numerous times." He had received a copy of Terry's statement in discovery. The State had very good guilt case. However, if Terry had legitimate reason for being at the victim's house, other than the crimes for which he was on trial, the D.N.A. and fingerprint evidence establishing his presence would not be harmful to the defense. Mr. Stone did not recall whether he, personally, spoke to Patricia Terry (Terry's mother) or Luann Terry (Smith), Terry's estranged wife. PCR Tr. pp. 36-39; 43; 51-52; 73-75.

Mr. Stone testified, "the very first time I met with him, though the statement [he gave me] was inconsistent with his actual written statement." On another occasion, Terry said that "he could not imagine how the semen got there" and he suggested that his wife, girlfriend or someone had planted it, using a condom. This was close in time to when the book "*Presumed Innocent*" was published; and this story sounded much like the book. Also, Mr. Stone found it was problematic because it was "a particularly unusual defense angle" that was inconsistent with Terry's statement.

Mr. Stone discussed strategic matters with Terry, continuing through the trial. Terry had a number of physical complaints²⁸ and complaints about S.C.D.C. that he wanted Mr. Stone to help handle. Mr. Stone did not think that he was getting a lot of good information to help with

²⁸ Because Terry constantly complained about headaches, the defense hired "just about every psychologist and psychiatrist that he could get our hands on". This is where the defense was headed at sentencing.



the case. So, Mr. Stone sent Dr. Schwartz-Watts, to speak to Terry. The investigator, Mr. Davis likewise met with Terry about various matters. **PCR Tr. pp. 73-76.**

Counsel also sent Mr. Davis to a number of places. Mr. Stone knew that Mr. Davis met with several family members, a Mr. Boozer and others who appeared in the incident report, and other persons who might have dealt with Terry in days before the murder. Mr. Davis spoke to Boozer and a Ms. DeBerry, "trying to establish an alibi that Mr. Terry was somewhere on the lake at the time of the murder." However, they could not establish an alibi. Mr. Stone did not recall any witnesses providing helpful information. **PCR Tr. pp. 76-78.**

Counsel also had an expert, former SLED Agent Donald Girndt, available for crime scene analysis, including blood splatter and fingerprints. Mr. Stone worked very closely with him. Mr. Girndt was taken to the crime scene. The State's evidence concerning the telephone box (including Terry's print) was damaging because it was very difficult to explain this to the jury. This evidence made it tough to get around malice and intent. So, Mr. Girndt tested an unidentified print he found on the telephone box. He eliminated Terry's' left hand on the unknown print, but said it could be Terry's right hand. Also, a D.N.A. expert assisted Ms. Fullwood. Counsel had filed *Brady* and Rule 5 motions, and they had the State's responses before trial. **PCR Tr. pp. 72-73; 78-80.**

Counsel did not just want to give up on the guilt phase, but they were concerned about maintaining their credibility for the sentencing phase. They tried to plant the notion of residual doubt in minds of jurors, *i.e.*, that the case was not a "slam dunk" and that the investigation had not been thorough as it should have been. Mr. Stone thought this and organic brain damage were the best defenses in sentencing. **PCR Tr. pp. 82-83**

Although the decision was Terry's, Mr. Stone did not think that Terry should testify because he did not think Terry would be a credible witness based, in large part, on his dealing with Terry. Also, they were going to present expert testimony regarding a SPEC scan that showed Terry was brain damaged. If Terry had testified, he would not have come across as brain damaged, even if the jury found that he was credible, because he would have sounded clear. Terry had also given a November 17, 1995 statement to police in which he denied any involvement in the murder. **PCR Tr. pp. 86-87.**

After the State failed to introduce Terry's March 24, 1995 statement, the defense unsuccessfully attempted to get the statement into evidence. *See Ground 1.*²⁹ Mr. Stone thought that the defense wanted the statement in because it would somewhat help the defense get a voluntary manslaughter charge because, although Terry admitted killing victim, his statement provided an argument for a manslaughter charge. The trial judge ruled it was not admissible through Inv. Frier, who took statement. **PCR Tr. pp. 49-50.**

Ms. Fullwood testified that she met with Terry more than six times, but she could not remember how many times.³⁰ Counsel discussed all aspects of the case with Terry, as to both phases of the trial; and they kept him informed of the progress of their investigation. In addition to her and Mr. Stone meeting with Terry, a mitigation specialist that Ms. Fullwood had utilized in the past, Vivian Massey, also met with Terry "on a number of occasions." Ms. Massey's main responsibility was to gather background and social history information from Terry, but she also spoke to him about anything that he wished to discuss, including the facts of the crime. Counsel relied on the information provided by Terry to Ms. Massey. **PCR Tr. pp. 196-99.**

²⁹ For the reasons stated in **Ground 1**, the Court finds that counsel's efforts were objectively reasonable.

³⁰ She met with him at the Lexington County jail, the Richland County Detention Center, and at S.C.D.C. She also confirmed that Terry preferred to focus on any number of physical complaints, rather than on the litigation. **PCR Tr. p. 198.**

In addition to Terry's March 24th statement and his earlier statement to police, he provided the defense with at least four additional versions of what had occurred. These ranged from a claim that he had used crack that morning and four hits of acid on the afternoon of the offense, to blaming the former husband of the victim's daughter, to claiming that he was having an affair with the victim and that he had been at her house around the time of her death, having consensual intercourse with her. While he was there, he heard a car drive by the residence. The sound of the vehicle was like that of his live-in girlfriend. He later opined that the girlfriend (Gibson) "had snuck back and killed Ms. Jackson out of jealousy." At some point, he admitted that he had been in the victim's home on the day of the murder. **PCR Tr. pp. 199-203.**

Ms. Fullwood was aware of the contents of Terry's March 24, 1995 statement, and she felt that this statement raised the possibility of a voluntary manslaughter argument. Counsel had their investigator, Ms. Davis, and his associate interview all of the people that Terry had mentioned, "and there was nothing that developed that we could have used either . . . to point the finger at someone else or to corroborate the version of . . . the statement that it was a manslaughter situation." Likewise, counsel's investigation was unable to corroborate that he had an alibi - that he had been with his live-in girlfriend, and that he had gone fishing with her father the next day. Terry's changing statements made counsel's investigation more time consuming because each account had to be investigated.³¹ **PCR Tr. pp. 203-04.**

She explained that "[w]e had the guilt/innocence phase very thoroughly investigated. We talked to all of the people that at one point or another in time he had identified as potential alibi witnesses. We interviewed Ms. Jackson's neighbors as far as her habits and associations. We were unable to develop any evidence that corroborated his statement to the police or any

³¹ Diane Gibson, the live-in girlfriend, was interviewed, as were the people who lived at the lake.

other subsequent statements he made to us insofar as a defense might go." The defense did not put up a defense to get the statement introduced because "[t]he only way we could have done that was through [Terry's] testimony." PCR Tr. pp. 190-91.

In addition to the experts who testified, counsel had Mr. Girndt, the former SLED Agent, who was a crime scene expert with expertise in fingerprints, blood spatter and trace evidence. Likewise, Ms. Fullwood worked with Ron Oetrawski, a D.N.A. expert. Neither of these experts testified because neither had testimony that would have been helpful to Terry's defense. PCR Tr. pp. 204-205. Also, a discovery motion and supplemental motions that counsel had filed were ruled on before trial. PCR Tr. p. 206.

The defense's theory in the guilt phase was to point out any gaps or inconsistencies in the State's case, to establish reasonable doubt. Counsel were aware that the State had not tested a number of evidentiary items.³² Counsel discussed the possibility of having these items tested, but they decided not to do so because the State's failure to "test" was a hole that we could punch in their case. Several experts were able to assist with cross-examination, even though not utilized as witnesses. Also, the defense did not have any evidence to introduce in effort to show that Terry was not guilty, and "we had to always be mindful of the need to stay credible to the jurors when we reached the second phase of the trial." PCR Tr. pp. 205-07.

Although she did not have any independent recollection, she felt "sure that our advice was not to testify based on his criminal record and counsel's observations of him, his general

³² After the defense had received the report of SLED Agent Joseph Powell regarding hairs found at the scene (Respondent's Ex. 3), she did not recall any of the defense expert's suggested further testimony. She also explained that residual doubt is a factor jurors consider in recommending life sentences, but it is a psychological force and it not something that counsel can argue or on which counsel may request a jury instruction. PCR Tr. pp. 216-17.

demeanor and their assessment of how well he would "most likely stand up under cross-examination." **PCR Tr. p. 209.**

Respondent also presented defense counsel's private investigator, Thomas J. Davis. Mr. Davis testified that he has been a private investigator since 1993, with the exception of two years when he worked in the security division of the South Carolina Lottery Commission. Prior to becoming a private investigator, he was an F.B.I. agent for twenty-eight years. Mr. Stone sought his services in this case "during the latter part of 1996." **PCR Tr. pp. 297-99.**³³

Mr. Stone told him that the defense "was working up against" a statement, and both a fingerprint and D.N.A. were involved. (The Court infers that he was referencing Terry's March 24th statement). Mr. Davis was also asked to investigate a supposed alibi. Both he and another investigator spoke to a number of people.³⁴ However, they were unable to corroborate either the statement or the alibi. They reported their findings to trial counsel. **PCR Tr. pp. 299-303.**

The Court in *Strickland* explained the deference owed counsel's strategic judgments in terms of the adequacy of the investigations supporting those judgments:

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

³³ The Court overruled work product and hearsay objections by Terry.

³⁴ For instance, they interviewed an elderly couple, Mr. and Mrs. Boozer, who lived near Terry on the lake. They also spoke to Teresa DeBerry, who allowed Terry to use her electricity for his residence. They likewise spoke to Diane Gibson; several other people at the lake; the victim's son; several of the victim's neighbors; and several officers and jail officials involved in the case.

Strickland, 466 U.S. at 690-691. *See also Wiggins*, 539 U.S. at 521-22.

“[T]he reasonableness of counsel’s actions may be determined or substantially influenced by the defendant’s own statements or actions.” *Strickland*, 466 U.S. at 691. In assessing counsel’s investigation, this Court “must conduct an objective review of their performance, measured for ‘reasonableness under prevailing professional norms,’ *Strickland*, 466 U.S., at 688, [...], which includes a context-dependent consideration of the challenged conduct as seen ‘from counsel’s perspective at the time,’ *id.*, at 689 [...] (‘[E]very effort [must] be made to eliminate the distorting effects of hindsight’)” *Wiggins*, 539 U.S. at 523.

In support of this allegation, Terry relies upon the deficiency in counsel’s cross-examination of the pathologist, Dr. Carter, and testimony from his mother, Patricia Terry and his former wife, Louanne Smith (Terry). For the reasons set forth in **Grounds 12-14** and **Ground 21**, the Court finds that he has failed to establish either deficient performance or prejudice, as to those specific allegations.

Once again, the Court finds that the testimony of trial counsel is credible. The Court likewise finds that Mr. Davis is credible. The Court rejects the testimony of Louanne Smith and Patricia Terry and finds that their testimony, even assuming its admissibility, is not credible or believable because their testimony is inconsistent with the testimony of counsel and Mr. Davis, as well as the trial testimony of Sandra Jackson and the trial and PCR testimony of both Diane Gibson Smith and Lt. Scottie Frier.

Based upon the credible evidence before the Court, the Court finds that trial counsel’s performance was not deficient. The Court finds that counsel’s pretrial investigation – with the assistance of Mr. Davis, his associate and the social worker – went beyond the constitutional mandate of *Strickland* and its progeny. Counsel made reasonable efforts to corroborate the

March 24, 1995 statement, as well as Terry's purported alibi. The Court further finds that Terry actively hindered and impeded their efforts by repeatedly changing his version of what had occurred at the time of Mrs. Jackson's death.

Counsel unsuccessfully investigated these other versions as well. The reasonableness of counsel's investigation is corroborated by Mr. Frier's testimony that the Lexington County Sheriff's Department was unable to uncover any evidence of a purported relationship between Mrs. Jackson and Terry, apart from his March 24th statement.³⁵

Despite a reasonable investigation under *Strickland* and *Wiggins*, counsel were unable to discover any evidence corroborating the account given by Terry in his March 24th statement. Therefore, the Court finds that no such credible, admissible evidence exists, separate and apart from Terry's self-serving account (which only the State could introduce without Terry testifying) and the limited evidence that trial counsel elicited on his cross-examination of prosecution witness, Dr. Carter.³⁶ As a result, the Court finds that the pretrial investigation by Terry's trial attorneys was not deficient under *Wiggins* and *Strickland*.

Likewise, Terry made a knowing and intelligent decision not to testify, and he has not raised any claim in this Court that trial counsel's advise not to testify was ineffective under *Strickland*. Obviously, he could have testified and presented the jury with the version of the crime as contained in his March 24th statement. Having elected not to testify, the Court finds that Terry must live with the consequence of his decision: the favorable information in the March 24th

³⁵ Lt. Frier testified that the Lexington County Sheriff's Department made extensive inquiry into the victim's "personal life and any relations and acquaintances she had;" but the only evidence of a relationship between her and Terry was in Terry's March 24, 1995 statement. He had previously not claimed this when questioned before he was arrested and told that D.N.A. linked him to the crime. Lt. Frier testified that if they had developed information about a relationship between the victim and Terry, "we would have been all over that." PCR Tr. pp. 308-11; 318-19.

³⁶ That evidence, however, did not establish that the killing was manslaughter.

statement was inadmissible hearsay.³⁷ As a result, he cannot prove that counsel was deficient in failing to have his statement introduced.

Also, the Court finds that counsel made objectively reasonable efforts to introduce **State's Ex. 68**, without the necessity of Terry testifying, upon learning that the prosecution was not going to introduce it in the State's case-in-chief. Further, counsel's cross-examination of Dr. Carter elicited precisely the testimony that Terry now faults him for not presenting. For these reasons, the Court finds that Terry has failed to prove deficient performance with respect to counsel's investigation and efforts to establish evidence corroborating the March 24th statement.

Moreover, the Court finds that there is no prejudice in the current record. Even if there was credible, admissible evidence that corroborated the statement and further assuming that counsel should have uncovered it and presented it to the guilt phase jury, the March 24th statement was still inadmissible, self-serving hearsay because Terry could not create his own unavailability as a witness under Rule 804. *See Terry*, 339 S.C. at 356, 529 S.E.2d at 277 ("Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield" and create his own unavailability). *See also Cabrera-Pena*, 361 S.C. at 377, 605 S.E.2d at 524 ("*Terry* involves the issue of whether a statement against penal interest may be admitted by a non-testifying defendant pursuant to Rule 804(b)(3), SCRE. There, we held that Terry, who had elected not to testify, could not thereafter admit the self-serving statement he made to the police. The rationale for this holding ... was that a defendant may not claim 'unavailability' as a witness by virtue of exercising his fifth amendment privilege against self-incrimination. *Terry*

³⁷ Again, the Court notes that this statement was uncorroborated and was inconsistent with the physical evidence. The Court finds the statement cannot explain either his reason for pulling the telephone lines or why the victim was found in a position that suggested that the sexual intercourse occurred after the brutal attack on her with a blunt object, or while that savage beating was still being administered. It also does not explain the evidence that Terry had to break into the house, on what happened to the weapon used on the victim.

stands ... for the proposition that such an exculpatory statement may not be admitted by a non-testifying defendant pursuant to Rule 804(b)(3)"). As a result, there is absolutely no reasonable probability that Terry could have introduced the statement but for counsel's failure to present sufficient corroborating evidence because it was inadmissible unless and until Terry testified and subjected himself to cross-examination.

Further, there was overwhelming evidence of Terry's guilt of murder, first-degree burglary, first-degree CSC and malicious injury to telephone system. Thus, the Court finds that Terry has failed to prove prejudice resulting from any alleged error under *Strickland*. There is simply no reasonable probability of a different result but for counsel's supposed error. *Id.*

GROUND 12

Terry next maintains that trial counsel were ineffective because they failed to present any evidence to support the March 24th statement that the killing was voluntary manslaughter. However, the Court finds that counsel were not deficient and that Terry cannot show any prejudice resulting from counsel's supposed deficiency because the record from the guilt phase of Terry's trial does not contain any evidence that he was guilty of manslaughter; and the only evidence presented at trial was his statement, which the State introduced in the penalty phase. Rather, the evidence overwhelmingly demonstrates that he was guilty of murder, burglary in the first degree and first degree CSC, as well as malicious injury to telephone system.³⁸

Terry's March 24th statement simply was not introduced until the sentencing phase of Terry's trial. By that time, he had already been convicted of murder, and the failure to argue for a

³⁸ The Court again notes that counsel's cross-examination of Dr. Carter establishes that Dr. Carter's findings upon examining of the victim's vaginal area did not confirm a sexual assault took place. However, Dr. Carter opined that these findings as to the position of the victim's body at the crime scene are very characteristic of "sexual activity or sexual assault at the time." R. pp. 1472-73. See Grounds 13 and 15, *infra*.

manslaughter verdict at that point cannot possibly satisfy either prong for relief under *Strickland*.

GROUND 13

Terry's **Ground 13** is that counsel were ineffective because they failed to present any evidence or argument to the jury in support of the contention in Terry's March 24th statement that the sex with the victim was consensual. The Court finds that Terry has failed to prove either deficient performance or prejudice resulting from counsel's performance because the physical evidence from the autopsy that he claims should have been argued to the jury was, in fact, presented through cross-examination and closing argument. The remaining testimony Terry proffered in connection with this allegation is inadmissible, completely lacking in credibility or both.

Mr. Stone testified at the PCR hearing that Mrs. Fullwood actually cross-examined the pathologist, Dr. Carter; and she established that he did not find evidence of bruises, scrapes, tears or cuts in the victim's vaginal area. Dr. Carter's finds were consistent with sexual activity in a sexual assault, but he could not opine that a sexual assault had occurred. Mr. Stone did not recall whether or not he argued that the sex was consensual. **PCR Tr. pp. 52-57.**

Mrs. Fullwood disagreed with collateral counsel's characterization of the evidence as not showing that there had been a sexual assault, simply because of Dr. Carter's found at autopsy that there had not been any vaginal tearing, bruising or cutting. She acknowledged that such an argument could be made, but she felt that it would be "tenuous." Despite Dr. Carter's testimony she felt that the following facts suggested that the sex was forced: (1) the position in which the victim's body was found; (2) the position of the victim's clothing; and (3) the blood patterns on the carpet. **PCR Tr. pp. 189-90; 221.**

Terry presented Dr. Carter, who is Director of the clinical laboratories at Lexington Medical Center and the pathologist who performed the autopsy on the victim. Dr. Carter examined the victim's vaginal area; and he did not find any evidence of "bruises, scrapes, tears, or cuts," in the vaginal or anal areas. Semen-like fluid, however, was present the victim vaginal vault. Dr. Carter testified that his findings showed that there was "evidence of a sexual act[,] ... [a]nd there was evidence of a massive assault with the victim attempting to defend herself." However, he could not say that both occurred at the same time. **PCR Tr. pp. 143-48.**

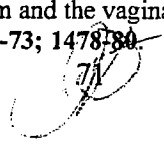
He explained that the absence of any visible trauma to the victim's vaginal area was not unusual, even where someone has been sexually assaulted in a homicide; and that he had worked on a number of cases without any bruises, abrasions or lacerations. In the present case, the victim was found lying on her back, and her nightgown had been pulled up to expose her breasts. **PCR Tr. pp. 152.**

At trial, Ms. Fullwood cross-examined Dr. Carter. She elicited that he did not find evidence of bruises, scrapes, tears or cuts in the victim's vaginal area. **R. p. 1479.**³⁹

In closing argument, Mr. Stone argued that "[w]e know that there's no evidence of rape. The doctor who took the stand and he testified that there w[ere] no cuts, no lacerations, nothing around the vaginal area to indicate a rape. No evidence of it." **R. pp. 1557, ll. 4-7.**

Based upon the present record, the Court finds that Terry has failed to prove either deficient performance or prejudice resulting from counsel's performance because the physical

³⁹ However, the State's examination of him established that Dr. Carter had visited the scene. He described finding a deceased individual on her back, with one or both legs lifted up and cocked back, and with a small trace of fluid externally on the pubic hairs that appeared very similar to semen. He opined that these findings are very characteristic of "sexual activity or sexual assault at the time." **R. pp. 1472-73.** At autopsy, he took swabs from the posterior portion of the victim's mouth, the rectum and the vaginal canal. Internally, he found a reasonable amount of mucoid fluid in the vaginal canal. **R. pp. 1471-73; 1478-80.**



evidence from autopsy that he claims should have been argued to the jury was, in fact, presented through cross-examination and closing argument.

The only other evidence presented by Terry at the PCR hearing to support his contention that he and the victim were involved in a relationship was testimony concerning the photograph of him in the victim's home, which the Court rejects for the reasons stated in **Ground 23**, and testimony proffered through his mother and his ex-wife, Louanne Smith.

Patricia Terry (his mother) testified that she had a telephone conversation with the victim "a few moths before she passed away." The victim "identified herself" as "the mother of Samantha and John [Jackson]." When Mrs. Terry asked if she wished to speak to one of her children, the victim said, "No, I want to speak to Gary." However, no one else was home. **PCR Tr. p. 246.**

The victim also called one other time. When Mrs. Terry told her that Terry was not home, the victim hung up the phone. **PCR Tr. p. 247.** Over Respondent's objection, Mrs. Terry testified that she had a conversation with Terry before the murder, in which she asked him what was his relationship with the victim. He told her that "they had a good relationship, ... and I took it from what he was saying they did have a loving relationship." It was Mrs. Terry's belief that she had told the defense about her telephone conversations with the victim. **PCR Tr. pp. 250-51.**

On cross-examination, she testified that she drew the conclusion about a loving relationship because "the way he said it, it was like they had relations." She also implied that he was romantically involved with all of the women in his life. **PCR Tr. p. 252.** The Court finds that her testimony about conversations with the victim simply was not credible and that no such conversations took place. The Court bases this finding upon the Court's earlier conclusions

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about the extent of counsel's investigation to support the details in the March 24th statement, and the inability of the prosecution to discover any evidence to support an ongoing relationship between the victim and Terry, as well as Samantha Jackson's trial testimony and Diane Gibson Smith's PCR testimony. If Mrs. Terry had such conversations with the victim, someone would have uncovered it well before the PCR hearing.

The Court makes the same findings with respect to her purported conversation with Terry about his relationship with the victim. Her testimony simply was not credible and the Court finds that no such conversations took place. This testimony is simply inconsistent with the credible evidence about the victim's lifestyle: that she was a loner who was not involved in a relationship. If Mrs. Terry had such conversations with her son, either counsel's investigation or that of law enforcement would have uncovered it well before the PCR hearing. Further, Mrs. Terry did not testify that she told trial counsel about this conversation, and counsel could not be deficient for failing to discover a conversation, which was withheld from them.

The Court permitted Louanne Smith to testify, over Respondent's hearsay objection,⁴⁰ about a conversation she allegedly had with Terry when they were talking about reconciling. She claimed that he told her that he previously had sex with the victim. Mrs. Smith allegedly told several members of the defense team about this conversation, including the social worker and Ms. Fullwood. **PCR Tr. pp. 237-42.**

The Court finds that her testimony about this conversation simply was not believable and that no such conversation occurred. The Court bases this finding upon the Court's earlier conclusions about the extent of counsel's investigation to support the details in the March 24th statement, and the credible evidence that neither the defense nor the Sheriff's Department were

⁴⁰ The Court finds that the objection would have been sustained at trial, but it was permitted for purposes of this PCR allegation.

able to find any evidence to corroborate this aspect of the May 24th statement. Indeed, her testimony that she imparted information about this conversation to Ms. Fullwood squarely conflicts with Ms. Fullwood's credible testimony to the contrary. The Court likewise rejects her testimony because it is inconsistent with Samantha Jackson's trial testimony and Diane Gibson Smith's PCR testimony about the victim's lifestyle, that she was a loner who was not involved in a relationship.

Based upon these findings, the Court finds that Terry has not proved that counsel were deficient in failing to discover the existence of these conversations and utilize them as part of their defense of Terry. The Court further finds that Terry has not proved that he was prejudiced by counsel's failure to discover the existence of these conversations and present them at trial, even assuming *arguendo* that they had actually taken place. First, all of these conversations would be inadmissible at trial. This is particularly true of the supposed conversation Mrs. Terry had with her son and Louanne Smith's conversation with him, since the South Carolina Supreme Court held in *his* direct appeal that he could not create his own unavailability by exercising his right to not testify. *Terry*, 339 S.C. at 356, 529 S.E.2d at 277 ("Terry could not use his fifth amendment privilege against self-incrimination as both a sword and a shield" and create his own unavailability). *See also West v. State*, 53 Fla. 77, 43 So. 445, 446 (1907) ("Evidence of self-serving declarations and conduct ... when they form no part of the conduct or conversations introduced by the prosecution, should not, as a rule, be admitted in a criminal prosecution...."); *Williams v. State*, 536 So.2d 169, 170 (Ala.Cr.App. 1988) ("The admission of such evidence

would allow the accused to make evidence for himself. ... 'As a general rule, one charged with crime cannot make evidence for himself, by proof of his own declarations'" (citation omitted).⁴¹

Moreover, none of these conversations, except Smith's, establishes that the victim and Terry were romantically involved. This is true in spite of Mrs. Terry's conjecture and speculation about what Terry had meant in her conversation with him. The Court finds that presenting this evidence and arguing that it supported evidence of a romantic relationship may have been insulting to the guilt phase jury, since there was significant evidence of a break-in and that the sexual activity took place at or near the time of death. *See R. pp. 1419-23; 1472-73.* Particularly in light of the State's overwhelming proof that Terry was guilty of the crimes for which he was charged and convicted, the Court finds that he has failed to prove a reasonable probability of a different result, but for counsel's failure to discover the existence of these conversations and present them at trial.

GROUND 14 & 21

In **Ground 14**, Terry asserts that his attorneys were ineffective for failing to present any evidence or argument to the jury in support of the information in Terry's March 24th statement that he did not burglarize the victim's residence. In **Ground 21**, he contends that counsel were ineffective because they did not present any argument or evidence to the trial judge or the jury that Terry "was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that [Terry's] fingerprint was placed on the victim's telephone box based on innocent conduct." The Court finds that Terry has failed to prove either deficient performance or prejudice resulting from counsel's performance as to either allegation.

⁴¹ Indeed, such statements are "dripping with motivations to misrepresent." *See Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir.1942).

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The only two witnesses to give testimony related to these allegations were SLED Agent Steven Derrick and Louanne Terry Smith. Agent Derrick was a senior examiner in SLED's latent print and crime scene lab at the time of the offense. At trial, he testified that glass from a window in the side or rear door had been broken out from the exterior of the house. This was the closest point to the knob and lock on the door. **R. pp. 1419-22.**

Respondent questioned Agent Derrick at the PCR hearing about the glass from the side door, which was found on the floor in the interior of the house. He again opined that the glass (shown in photographs introduced at trial as **State's Exs. 4-6**) on the kitchen floor was consistent with a forced entry. Although he could not determine when the glass was broken, it would have left broken glass on the floor. **PCR Tr. pp. 158-63; 174-75.**

Terry also presented his ex-wife, Louanne Terry Smith, at the PCR hearing. When Terry attempted to introduce hearsay statements he had allegedly made to her, the Court sustained the State's hearsay objection. *See Terry, supra*. He then proffered her testimony that he had told her on several occasions that he had done odd jobs for the victim, such as "fixing the washing machine, [and] fixing a lawn mower." Sometime in mid-May 1994, he allegedly went to Mrs. Smith's Winnsboro home. He "got a telephone crimping tool which we had previously bought for one of our residences whe[n] we had to install our own telephone line. ... And he indicated to me that he needed the tool to try to fix Mrs. Jackson's telephone line." **PCR Tr. pp. 230-33; 235.**

For the reasons discussed, *supra*, the Court finds that trial counsel's investigation was reasonable under *Strickland*. In fact, counsel's reasonable investigation resulted in them discovering additional evidence, undisclosed to the prosecution, that further supported the conclusion Terry had tampered with the telephone box and then burglarized the victim's home:

the fingerprint developed by Mr. Girndt. Agent Derrick's credible testimony on this issue is consistent with his trial testimony. Also and as discussed, the Court finds that Mrs. Smith is not a credible witness. Her testimony that Terry had borrowed a telephone-crimping tool to repair the victim's phone line is likewise not credible.

Further, she never claimed that she informed counsel about the existence of the alleged conversation. Therefore, the Court finds that counsel's performance with respect to the current allegations was not deficient.

Moreover, the Court finds that Terry has not met his burden of establishing prejudice resulting from counsel's alleged errors. First, the Court was not presented with any credible, admissible evidence to support these allegations. Second, the Court finds that no competent defense attorney would present testimony that he got the crimping tool to repair or fix the victim's telephone line. This evidence would show that Terry knew precisely where the phone box was located and it would establish his intent to do something to it, as well as premeditation. It would also permit an inference that he knew how to disable it. The problem with offering this testimony is that, instead of repairing or fixing the telephone line, it was pulled out - with an obvious intent to disable the phone service and isolate the victim from the outside world. Thus, the Court finds that presentation of this testimony would amount to ineffective assistance under *Strickland*.

Further, and assuming that such evidence had been presented, there is not a reasonable probability of a different result because it would not explain the evidence that the telephone line had been pulled out and disabled. Because Terry's print is on the telephone box, the inference is that he disabled the phone service. Mrs. Smith's testimony likewise does not explain why there was evidence of a break-in, or why the victim was found in a manner suggesting that the sexual

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activity took place at or near the time of her death and after Terry had begun savagely beating her. Mrs. Smith's testimony also does not explain why Terry's D.N.A. was found in the vaginal wash and anal swab. In light of the overwhelming evidence proving that Terry was guilty of the crimes for which he stood trial, the Court finds that there is no reasonable probability of a different result but for counsel's supposed error. *Strickland*, 466 U.S. at 694.

GROUND 15

Terry's next allegation is that trial counsel were ineffective because counsel allegedly failed to specifically move for a directed verdict on the ground that the prosecution's evidence failed to establish sufficient evidence of criminal sexual conduct (CSC) in the first degree. In particular, he alleges that counsel failed to specifically argue the State did not prove the lack of the victim's consent. The Court finds that Terry cannot show either deficient performance or resulting prejudice based upon the present record.⁴²

At the close of State's case, trial counsel Fullwood moved for a directed verdict as follows:

Ms. Fullwood: Your Honor, at this time, we would move for a directed verdict on all charges contained in the indictment on the grounds that the evidence taken as a whole in the light most favorable to the State is insufficient to convince a rational trier of the facts beyond a reasonable doubt that the State has proved every element of the offenses charged.

R. p. 1537, ll. 10-16. The trial judge denied this motion. **R. p. 1538, ll. 2-11.**

Ms. Fullwood testified that she had worked at the South Carolina Office of Appellate Defense for eight years before she went to the Public Defender's Office, and she had handled

⁴² Although he alleged counsel was ineffective for not moving for a directed verdict on the charge of first-degree burglary, he did not present any evidence thereon and his questioning of Ms. Fullwood centered upon her alleged failure to adequately move for a directed verdict on the charge of CSC in the first degree. The Court finds that he therefore abandoned this portion of **Ground 15**. The Court will address this portion of his argument, in the alternative, *infra*.

between seven and nine appeals of death penalty cases while she was there. PCR Tr. pp. 186-87; 195-96. When Terry's PCR counsel showed the directed verdict motion to her, she testified that she believed that it was sufficient to preserve a challenge to the sufficiency of the State's evidence against Terry on the charge of CSC in the first degree. Mrs. Fullwood also disagreed with counsel's characterization of the evidence as not showing that there had been a sexual assault, simply because of Dr. Carter's findings at autopsy that there had not been any vaginal tearing, bruising or cutting. She acknowledged that such an argument could be made, but felt that it would be "tenuous." PCR Tr. pp. 189-90.⁴³

In relevant part, South Carolina law provides that any person who commits a sexual battery upon a victim is guilty of first degree CSC, if the State proves one or more of the following circumstances:

- (a) The actor uses aggravated force to accomplish sexual battery.
- (b) The victim submits to sexual battery by the actor under circumstances where the victim is also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar offense or act....

S.C. Code Ann. § 16-3-652(1) (a)-(b) (Supp.2008). See also *State v. McFadden*, 342 S.C. 629, 539 S.E.2d 387 (2000).

The trial judge is required to submit an offense to the jury if there is "any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced." *State v. Edwards*, 298 S.C. 272, 379 S.E.2d 888 (1989). In reviewing a directed verdict motion, the trial judge as well as the appellate court must view the

⁴³ Terry's counsel on direct appeal, Mr. Dudek, testified that, in his opinion, Ms. Fullwood's motion did not preserve the issue because he did not "think an appellate court would think that was a very serious motion." PCR Tr. pp. 270-73. See Ground 22, *infra*.

evidence in the light most favorable to the State. *State v. Childs*, 299 S.C. 471, 385 S.E.2d 839 (1989).

Applying this standard of review to the case at bar, the Court finds that there was sufficient evidence of lack of consent to submit the offense of CSC in the first degree to the jury because, when the direct and circumstantial evidence is viewed in the light most favorable to the prosecution, it cannot be said that "no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). First, and notwithstanding Terry's allegation to the contrary, the Court finds that counsel's challenge of the prosecution's failure to prove "every element of the offenses charged" was sufficient to preserve the question for appellate review of whether there was sufficient evidence of the victim's lack of consent to intercourse, *see State v. Taylor*, 57 S.C. 483, 488-89, 35 S.E.2d 729, 731 (1900), to send the charge of CSC in the first degree to the jury.

Even assuming *arguendo* that trial counsel's performance was deficient, however, the Court finds that Terry cannot show any conceivable prejudice because the record conclusively demonstrates that a directed verdict motion on the charge of first degree CSC predicated upon the victim's lack of consent, would have been utterly meritless in light of the evidence.

The State's guilt phase evidence reasonably tended to show that in May 1994, Urai Jackson, the victim, lived alone in West Columbia, South Carolina. She and her husband had divorced in 1974 and she was not romantically involved with anyone at the time of her murder. Her daughter, Samantha A. Jackson, testified that the victim was "a loner" and did not have any close acquaintances with whom she kept in touch frequently, other than speaking to her neighbors. R. pp. 1526-28;1536.

Samantha had maintained very frequent contact with her mother. She often assisted with her mother's finances and she often did her laundry at her mother's house on the weekends. Samantha first met Terry in 1986 or 1987, when was dating her best friend at the time, Diane Gibson. Gibson lived across the street from Samantha's mother. Terry lived with Diane for some period of time, but Samantha lost contact with Diane in 1993. Terry was not living across the street from the victim at the time of the murder, and he only knew the victim "in a passing type sense." **R. pp. 1528-30.**

On Saturday, May 29, 1994, Samantha called the victim and left a message on the victim's answering machine for the victim to call her back. However, the victim did not return her call. On Sunday, Samantha called her mother several times. She did not get an answer and the answering machine did not pick up. Still, Samantha was not worried because it was the Memorial Day weekend and the victim frequently went to Lake Murray on holidays.⁴⁴ When Samantha could not reach her mother on Tuesday, May 31, 1994, however, she became concerned. She drove to her mother's house and noticed that the outdoor light was on, even though it was the middle of the day. This was very odd because the victim was an early riser and she would not have left the light on after she had awakened. As Samantha approached the house, she noticed that the carport door was ajar and there was "glass everywhere." Inside, the kitchen was in disarray, and there was garbage on the floor. Again, this was unusual. Samantha walked into the hall and living room area and saw her mother lying on the floor, dead. She tried to call 911 but could not get a dial tone. Therefore, she immediately ran out of the house and called 911 from a neighbor's residence. A Lexington County Deputy Sheriff arrived on the scene several minutes later. **R. pp. 1529-35.**

⁴⁴ She always went alone.

Officers responding to the scene indicated that the glass pane on the carport door window nearest to the doorknob had been broken out from the exterior of the house. The officers corroborated that the kitchen area was in disarray, but the rest of the house appeared to be reasonably neat. Also, the victim was lying in the area described by Samantha. Her head was facing the hallway and her feet were facing the living room area. The victim had either a T-shirt or gown across part of her body, but her breasts and her genitalia were exposed. Also, her legs were spread and her left leg was up at an angle with the bottom of her left foot on the floor. **R. pp. 1284-98; 1308-09; 1332-36; 1342-43; 1353-58; 1419-22.**

There was dried blood on her face and head. **R. p. 1306.** Agent Derrick gave expert testimony in the area of crime scene analysis and in the area of determining whether the force that resulted in the broken glass from the door came from the outside or inside of the house. He opined that it had come from the outside. Where that glass had been broken, an intruder had the closest point of access to the door handle and the lock mechanism. **R. pp. 1420-22.**

Agent Derrick was also qualified as an expert in blood spatter analysis. There were two pools of blood on the floor. The first was in or near the hallway, and the second blood pool was underneath the victim's head. There was medium velocity spatter on the corner walls that was associated with the first pool of blood; and there was a transfer pattern of blood on the wall, which had been left by something with blood on it coming into contact with the wall. There was also blood that the victim had "coughed up or expired out" on the wall. All of the blood spatter that was noted on both walls around where the victim was found ranged from two inches above the floor to nine inches above the floor, in a parallel pattern. "Therefore, the blows were delivered while the [victim] was at or on the floor." **R. pp. 1424-30.**

Samantha Jackson testified that the victim kept a number of items around the house for protection, including the bottom of a two-piece pool cue. While officers found the top portion of the pool cue, the bottom portion was never recovered. Outside the house, officers discovered the telephone lines had been pulled from the telephone box. A latent fingerprint matching Terry's right ring finger was lifted from the telephone box. **R. pp. 1309-12; 1330-32; 1336-1337; 1343-44; 1356-57; 1430-37; 1534-35.**⁴⁵

Dr. John Carter, the forensic pathologist who performed the autopsy on the victim, testified that he found at least four, and possibly more, blunt trauma wounds where a blunt, heavy, club-like object hit the victim just above and behind her right ear. These blows were struck with sufficient force to split the scalp and crush the skull bone, thereby exposing some brain tissue behind the right ear. These blows would have likely caused immediate unconsciousness and would have quickly resulted in death. He also found a number of superficial lacerations, which may have occurred when the victim was falling. The appearance of the wounds he found indicated that she was struck from behind and possibly from above and behind with a blunt instrument. **R. pp. 1464-70.**

He also found two blunt trauma lacerations on the top of the victim's shoulder that appeared to have been caused by the same instrument. At least two "slap-type injuries" in different directions on the side of the victim's right upper arm were defensive wounds, as were the wounds to the left forearm. These wounds were consistent with **State's Exhibit 13**, but Dr. Carter opined that the head injuries were more likely caused by a heavier instrument, such as a club or a baseball bat that had a rounded end. He also explained that the victim's thumb was

⁴⁵ A latent fingerprint from one of two beer cans found in the victim's sink did not match either the victim or Terry. However, it was impossible to determine when the print was left; and it could have been left by *anyone* who handled the beer can. **R. p. 1442; 1460-61.**

"almost smashed" and opined this could have been a defensive injury or it could have been caused by the perpetrator stomping on her thumb. **R. pp. 1464-70.**

Dr. Carter had visited the scene and described finding a deceased individual on her back, with one or both legs lifted up and cocked back, and with a small trace of fluid externally on the pubic hairs that appeared very similar to semen. He opined that these findings are very characteristic of "sexual activity or sexual assault at the time." **R. pp. 1472-73.** At autopsy, he took swabs from the posterior portion of the victim's mouth, the rectum and the vaginal canal. Internally, he found a reasonable amount of mucoid fluid in the vaginal canal. **R. pp. 1471-73; 1478-80.**

Subsequent testing by SLED's forensic serology and DNA laboratory revealed the presence of semen in the vaginal wash and the rectum swab. A blood standard from Terry showed that he had ABO blood type "group A and the secretor status is non-secretor, Lewis A positive." **R. pp. 1488-91.** His DNA profile matched the DNA extracted from the semen found on the vaginal wash and the anal swab. "[T]he probability of selecting an unrelated individual at random from the population having a DNA profile matching [these items] . . . is approximately one in one hundred ten billion blacks and one in thirty-three billion Caucasian." **R. pp. 1493-98.**

To convict a defendant of first-degree CSC based upon his use of aggravated force at the time of the assault under S.C. Code Ann. § 16-3-652(1)(a), there must be proof that the defendant overcame the victim through the use of physical force, physical violence of a high and aggravated nature, or the threat of the use of a deadly weapon. The evidence must show the actual use of aggravated force occurred near in time and place to the assault, such that the effect of the aggravated force caused the victim to submit to the assault. *State v. Lindsey*, 355 S.C. 15, 20-22, 583 S.E.2d 740, 742-743 (2003) (affirming denial of defendant's directed verdict motion

on charge of first-degree CSC where record contained evidence defendant physically forced victim to submit to assault by confining her in automobile, grabbing her hands, getting on top of her, and holding her down as she kicked, pushed and fought to get him off of her). This Court finds that the manner in which the victim's body was found, the extensive nature of the injuries inflicted upon her and the evidence of bloodstains and blood spatter demonstrates that the prosecution's evidence clearly met that requirement. *Id*; see also *State v. Frazier*, 302 S.C. 500, 397 S.E.2d 93 (1990) (affirming attempted first-degree CSC conviction where State presented evidence that defendant grabbed victim, forced her into woods, and ripped her clothes off in effort to commit sexual battery).

The Court further finds that the State's evidence was also sufficient to show that the battery occurred during a burglary. See S.C. Code Ann. § 16-3-652(1)(a). In addition to the broken glass found inside of the house that came from the back or side door, there was a latent fingerprint matching Terry's right ring finger lifted from the telephone box, where the telephone lines had been pulled. In this regard, the Court agrees with Mr. Stone's assessment that the fact Terry's fingerprint was found on phone box was extremely damaging because it is very difficult to explain a legitimate reason for it to be there to a jury. **PCR Tr. pp. 78-80**. When coupled with the evidence found at the scene and the vicious beating suffered by the victim, it also creates a very compelling inference that the home was burglarized after the victim was isolated from the rest of the world.

All of this evidence reasonably tended to prove an absence of consent; and this evidence creates, *at the very least*, a jury question as to whether the victim consented to intercourse with Terry. Therefore, even if trial counsel's directed verdict motion was deficient under *Strickland*,

this Court finds that Terry still cannot prove a reasonable probability of a different result but for counsel's failure to make a more specific directed verdict motion. *See Childs and Edwards*.⁴⁶

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GROUND 16

Terry's sixteenth allegation is that trial counsel were ineffective because they did not "object to 'character' evidence in the penalty state that was far more prejudicial than probative." He contends that unspecified evidence presented through Diane Gibson Smith and Angela Fedorchak, about bad acts "in their presence or to them" for which there was no conviction (PCR Tr. vol. 2, pp. 12-13), should have been excluded under a Rule 403, SCRE, analysis. The Court finds that he is not entitled to relief. Initially, the Court denies relief because Terry has failed to specify what portion(s) of each witness' testimony to which counsel should have but did not object. The Court finds that he has therefore abandoned this allegation. Alternatively, the Court denies relief because he has not proved either deficient performance or any prejudice resulting from counsel's failure to make the objection.

S.C. Code Ann. § 16-3-20(B) provides that during the sentencing phase, "the jury or judge shall hear additional evidence in extenuation, mitigation or aggravation of the punishment." Before a death sentence is imposed, the sentencing jury's attention must be directed to the specific circumstances of the crime and the characteristics of the person who committed

⁴⁶ Likewise, the Court concludes that he has not established either deficient performance or prejudice from the failure to more fully argue the motion with respect to the charge of burglary in the first degree for the reasons stated, *supra*, but the Court reiterates that he has abandoned the allegation. In South Carolina, "[a] person is guilty of burglary in the first degree if the person enters a dwelling without consent and with intent to commit a crime in the dwelling, and (1) when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime ... (b) causes physical injury to a person who is not a participant in the crime; or ... (3) the entering or remaining occurs in the nighttime." S.C. Code Ann. § 16-11-311(A)(1)(b) & (3) (Supp. 2008). *See also State v. Brooks*, 277 S.C. 111, 283 S.E.2d 830 (1981) (one may be guilty of burglary if there is a breaking and entering of a residence in the nighttime with intent to commit either a felony or a misdemeanor); *State v. Thompson*, 374 S.C. 257, 647 S.E.2d 702 (Ct.App. 2007). "Dwelling house," as used in the arson and burglary statutes, is defined as "any house, outhouse, apartment, building, erection, shed or box in which there sleeps a ... person who lodges there with a view to the protection of property." S.C. Code Ann. § 16-11-10 (Supp. 2008). The Court finds that the State's evidence clearly tended to prove Terry's guilt of burglary in the first degree and that the charge was properly submitted to the jury. So, there cannot be any conceivable prejudice under *Strickland*.

the crime. *See Hitchcock, supra* (in the penalty phase, the sole function of the jury is to decide which sentence to impose upon the defendant: either life or death. This determination must be based upon the specific circumstances of the case and the individual characteristics of the defendant). *Shaw, supra* (same); *see also Woodson*, 428 U.S. at 305 (plurality opinion); *Skipper, supra* ("What is essential is that the jury have before it all relevant information about the individual defendant whose fate it must determine") (internal quotes and citation omitted). Further, the scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase. *E.g., Rosemond, supra; Gardner, supra.*

The Court has reviewed the testimony of each witness. Mrs. Smith testified that Terry had a "[v]ery hot temper, quick temper," and he would throw or break things when he got mad at her; that he once threw her kitten against a wall because he was mad at her; that he once threw an object at her truck because he was mad at her; that he was very controlling of her "emotionally and mentally," to the point that she did not have any friends and she lost contact with her family after she moved away from them; that he did not have a legitimate job while they were together and he would steal boat and car trailers; that he would take money from her and buy crack with it; that he told her of a fight he had gotten into with another man, where he continued to beat the man after the man was down; that he did not pay child support for a child with his first ex-wife; that he once "poured lighter fluid [o]n the dash of [her truck] and set it on fire" when she attempted to end their relationship; and that, at his request, she once shot him in the leg, so that he would not have to go to court. **R. pp. 1738-55.**

Mrs. Smith also testified about other violent behavior by Terry when she attempted to end their relationship. He once threatened to burn the house she owned that was near the victim's residence. On another occasion, he tried to punch out the window of her vehicle, even though he

had a cast on his hand; and he ripped "the coil wire and something else off my distributor." After he repaired the truck, Mrs. Smith went to her boyfriend's home and telephoned her roommate, Angela Fedorchak. She asked Angela to follow her home. Shortly after they reached the residence, Terry arrived and exhibited violent behavior towards both women. Law enforcement ultimately arrived. **R. pp. 1755-60.**

Ms. Fullwood's cross-examination of Mrs. Smith focused upon Smith's own bad character, such as her willingness to shoot Terry in the leg, the fact she continued her relationship even after discovering that he was already married, and her failure to call police and report that they were living in a trailer that Terry had stolen or that he was purchasing crack. Ms. Fullwood also established that Mrs. Smith also went with Terry to buy crack on at least one occasion. More importantly, Ms. Fullwood's cross-examination established that Terry was nice to her at times; and that Smith only saw irrational behavior from him when he was angry. Indeed, he had threatened to harm himself in her presence. **R. pp. 1763-69.**

Angela Fedorchak also testified about the August 11, 1994 violent incident involving her, Mrs. Smith and Terry.⁴⁷ Mrs. Smith had telephoned her and warned her that Terry was riding around the neighborhood, waiting for Smith to return. Angela Fedorchak saw the vehicle that Smith had described to her. Because Terry had threatened Mrs. Smith, Angela Fedorchak called the Lexington County Sheriff's Department; and they promised to send someone to the house. Then, Angela Fedorchak received the call from Smith, asking her to follow Smith home. **R. pp. 1700-03.**

Angela drove out to a gas station off of Piney Grove Rd. and followed Smith to their residence. Smith went into the house; and Terry arrived while Angela was outside on the porch,

⁴⁷ She was not married at the time of this incident.

with the cordless phone. When he asked whether Smith was home, Angela lied and told him no because she was afraid that he would hurt Smith. He then asked if Smith's truck was parked in the back yard. Angela lied again and said no. He ran immediately to the backyard, pushing Angela out of his way. She ran towards the front door, trying to dial -911 as she ran. 1703-06.

Terry caught Angela before she could get into the house, and he then began a violent struggle with her on the porch. He opened the screen door and slammed her into the brick wall. By the time Angela slammed the screen door into him, he had already opened the front door. He fell to the floor. Then, he knocked the bottom of the screen door with his feet and cracked the glass. She called -911, as Terry went in and found Smith; and the Sheriff's Department eventually arrived. Angela went to the hospital the following day with internal bleeding. **R. pp. 1706-08.** Ms. Fullwood established that Angela had been told that Terry was drinking that day, and this was the reason that she was afraid. **R. p. 1708.**

Initially, the Court finds that because Terry failed to elicit any testimony from trial counsel concerning why counsel did not raise an objection under Rule 403, SCRE, he cannot overcome *Strickland's* strong presumption that counsel's performance was competent. *See Strickland*, 466 U.S. at 689; *Hughes*, 898 F.2d at 702 ("We strongly presume that counsel's conduct was within the wide range of reasonable assistance, and that he exercised acceptable professional judgment in all significant decisions [that he] made"). Also, the Court finds that only a minimal amount of hearsay was admitted, and that no prejudice could result from its introduction since the declarants all testified and they were subject to cross-examination by trial counsel.

Furthermore, after reviewing the above evidence, the Court finds that a Rule 403 objection would not have been meritorious because this testimony was proper in the sentencing

phase of Terry's capital trial to show his character. *Hitchcock, supra*. Moreover, his violent behavior directed towards women, along with evidence of his violent behavior as a bouncer and evidence of his behavior while incarcerated, showed his extremely violent nature and his future dangerousness. Evidence of a defendant's future dangerousness is a legitimate interest at sentencing. *Dawson v. Delaware*, 503 U.S. 159 (1992).

Further, the Court finds that trial counsel's examination of these witnesses established that his irrational and violent conduct dovetailed into counsel's evidence in mitigation, i.e., that he has an "an organic explosive disorder," which was offered to explain his violent actions. **R. pp. 1995-2043; 2054-64.** When the Court considers that the expanded scope of the probative value of evidence in the sentencing phase is much broader than at the guilt or innocence phase, e.g., *Gardner, supra*, the Court finds that Terry cannot show either deficient performance in failing to object or prejudice resulting from the failure to raise a Rule 403 objection. *See Clark*, 16 F.3d at 963-64 (Because the Court found no basis for counsel to object to the evidence that was admitted, counsel's failure to object did not constitute deficient performance); *Werts*, 228 F.3d at 203 ("counsel cannot be ineffective for failing to raise a meritless claim"); *Lane*, 811 F.2d at 1170 (there is no prejudice from failure to object unless there is a legally supportable argument for exclusion of the evidence).

The Court further notes that the trial judge properly charged Terry's jury that it could only recommend a death sentence if it first unanimously found that the State had proven the existence of one or both statutory aggravating circumstances beyond a reasonable doubt, and he instructed the jury that the only statutory aggravating circumstances were burglary in any degree and CSC in any degree. **R. pp. 2104-21.** Finally, the Court notes that there was overwhelming proof that Terry was guilty of the murder and the two statutory aggravating circumstances. In

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light of the foregoing, the Court finds that he has not proved that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 17

Terry contends that Mr. Stone's closing argument in the sentencing phase was ineffective because he referred to Terry as a "rapist", a "murderer," an "invader of homes" and a "thief." The Court finds that he is not entitled to relief because he has not proved either deficient performance or any prejudice resulting from these comments.

Mr. Stone began his sentencing phase argument by acknowledging that the jury had to think about two things. First, the jury had to think "about the tragedy of the crime." When placed in proper context, Mr. Stone then argued that:

The second part of your job, Ladies and Gentlemen, is also to consider something else. In any type of sentencing situation, you've got the crime and in this case, its horrendous. And when you all came in here and took the witness stand and answered the questions, we asked you, if you get to the sentencing phase of a trial and you have already found somebody to be a murderer and a rapist and a burglar, as Mr. Humphries put it, an invader of homes, can you still give somebody a life sentence. You still have that choice. Why do you have that choice?

If the question is just is this a horrendous crime, there's no need for this hearing. This is a horrendous crime, Ladies and Gentlemen, and you decided that two days ago and you're right. You were right then and you're right now. Gary Terry is a rapist. He is a murderer. He's an invader of homes. All of that is true. We are not going to sit here and ask you to ignore that. That would be lying to you and I'm not going to do it.

But we have a sentencing hearing for just the reason of what we have heard, what we heard yesterday. This is why we have a sentencing phase because your choice is between life in prison and death. It doesn't give you a lot of leeway, just one of two choices. We have decided and you have decided this two days ago that the crime itself was horrible and no matter how many pictures you see, nothing is going to take away from that.

Now, the determination is, folks, is there mitigation here, is there a reason to give Gary Terry life?

R. pp. 2098-99. The remainder of Mr. Stone's argument focused upon the mitigating evidence that the defense had presented which, he urged, warranted a life sentence. **R. pp. 2099-2102.**

Initially, Mr. Stone did not recall arguing this portion of his closing argument, until it was shown to him. By the time of Mr. Stone's closing argument, Terry had already been convicted of murder, CSC in the first degree and first-degree burglary; and the jury "had already found all [of] those to be true." Mr. Stone recalled Mr. Humphries using term "home invader,"⁴⁸ which was not a common expression at the time. He surmised that his own argument may have simply been to mimic the State's argument and suggest that the jury needed to move on to what was important at sentencing - those things in the case that are aggravating or mitigating - because State likes to continue to focus on the facts of the crime in the sentencing phase. Also, in sentencing, "you're still trying to build some type of credibility." **PCR Tr. pp. 67; 94-95; 97-100.**

The Supreme Court's decision in *Yarborough, supra*, emphasizes that deference to counsel's tactical decisions in closing is particularly important because of the broad range of legitimate defense strategy at that stage. 540 U.S. at 4. Moreover, where counsel focuses on some issues to the exclusion of others, there is a strong presumption that counsel did so for tactical reasons rather than sheer neglect. 540 U.S. at 5. Counsel has wide latitude in closing under *Yarborough* and courts are reluctant to find ineffectiveness for omitting matters. *Knight v. Spencer*, 447 F.3d 6, 18 (1st Cir. 2006).

⁴⁸ See **R. pp. 2091-92.**

Despite counsel's inability to recall his strategy, the record reflects that his argument was in keeping with his theory, as also testified to by Ms. Fullwood, to maintain credibility with the jury and not argue at sentencing with the guilty verdict *See Ground 10. See Greiner v. Wells*, 417 F.3d 305, 319 (2nd Cir. 2005) (presumption that counsel's performance was reasonable is not overcome by counsel's inability to recall reason for actions where record reasons appear, noting also counsel's experience). At the same time, however, Mr. Stone urged jurors to recognize that the evidence in mitigation had to be considered when they imposed their sentence. These remarks also were in response to the prosecutor's argument.

Indeed, if counsel had not made remarks such as these, it might have insulted the jury or it might have appeared that counsel was arguing with the verdict. In light of the overwhelming evidence presented that supported the jury's guilt phase verdict, as well as the other evidence in aggravation, the Court finds that this was not deficient performance. *Hicks v. Collins*, 384 F.3d 204, 216 (6th Cir. 2004) (characterizing the client's crimes as dastardly and heinous was not ineffective but a candid recognition of the brutality of the crimes); *Roberts v. State*, 910 P.2d 1071, 1079 (Okla. Cr. 1996) ("Based on the record before us, we are not convinced trial counsel attempted to distance himself from Petitioner. To tell the jurors counsel was court-appointed or to describe Petitioner as a criminal, illegitimate or below normal intelligence could as easily be interpreted as an attempt to show the jurors counsel was being frank and not misleading them. Additionally, when taken in context, the statements are entirely proper").⁴⁹ *Cf. Nixon, supra*.

The Court further finds that there is absolutely no reasonable probability that the jury would have imposed a life sentence but for these challenged comments in closing argument.

⁴⁹ The Court in *Roberts* also found no ineffectiveness in "counsel's telling the jury in the first stage of the trial that the decision as to punishment is an issue to be dealt with in the second stage of trial. In the same manner, to refer to the victim as an unfortunate victim could be considered sound trial strategy: counsel would not be serving his client well by attacking or attempting to discredit an 80-year-old dead woman." *Id.*

First, these remarks did not tell the jurors anything that they did not already know, since they had convicted Terry of murder, first-degree burglary and first-degree CSC.⁵⁰ Further, there was overwhelming evidence of Terry's guilt of murder and both statutory aggravating circumstances. Therefore, he failed to prove that "there is a reasonable probability that ... the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537.

GROUND 18

Terry next alleges that trial counsel was ineffective for failing to present the jury with evidence that he is left-handed because this would have supposedly been inconsistent with the pathologist's testimony that the victim's assailant was right-handed. The Court disagrees and finds that he has failed to prove any prejudice resulting from counsel's performance. *Strickland*, 466 U.S. at 687 ("a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed").

In support of this allegation, Terry presented Dr. John Carter, the Director of Clinical Laboratories of Lexington Medical Center and the pathologist who performed the autopsy on the victim. Dr. Carter opined that the victim's death resulted from a series of blows to the back, rear portion of her head from a blunt, heavy club-like object. The blows fractured the victim's skull. The blows, "more likely than not, were administered. . . from behind the victim. And . . . It would be more likely than not [that] if the assailant is behind a victim hitting the victim with a club that it be more convenient, more likely for the blows to be struck by a right-handed

⁵⁰ Although the jury had also convicted him of malicious injury to telephone system, the Court has only considered proof of the statutory aggravating factors in its prejudice analysis.

individual.” However, his opinion that this was done with the right hand did not mean that the assailant is right-handed, just that “it would have been more easily inflicted if someone used their right hand as opposed to their left hand.” Someone with enough strength could have inflicted the blows even if he was left-handed. **PCR Tr. pp. 143-145; 149-50.**

Very similar testimony was elicited at trial. Also, the record reflects that defense counsel elicited that the assailant “most likely” would have used his right hand. **R. p. 1466-68; 1478-79.**

Mr. Stone testified that he believed Terry was left-handed. He and co-counsel had discussed how best to get this information before the jury. Counsel had thought, at one point, of having Terry walk up and write his name on a note pad. However, Mr. Stone was afraid that Terry would be subject to cross-examination if he did that,⁵¹ and counsel had made a strategic decision that Terry should not testify. So, counsel had Terry write during Mr. Stone’s closing argument; and Mr. Stone attempted to direct the jury’s attention to this by looking at Terry when he told jury assailant was right-handed. Ms. Fullwood did not recall whether nor not Terry ever told her that he was right-handed or left-handed. **PCR Tr. pp. 52-54; 85-87; 206-07.**

The Court finds that Terry has failed to prove that he was prejudiced by counsel’s failure to present the jury with evidence that he is left-handed. First, the Court finds that Terry has failed to establish that he, in fact, is left-handed. His mother, his ex-wife and his girlfriend at the time of Mrs. Jackson’s murder all testified at the PCR hearing. These three women presumably would know whether he was right-handed or left-handed. However, none of these witnesses testified that he was left-handed. **PCR Tr. pp. 223-40; 246-53.** He also did not testify to this, which he clearly had the right to do. *See, e.g., Griffith v. Griffith*, 332 S.C. 630, 641, 506 S.E.2d 526, 532 (Ct.App. 1998) (“it is permissible for the fact finder to draw an adverse inference in a

⁵¹ The Court agrees that this action would have subjected Terry to cross-examination. Again, however, it is unnecessary to address *Strickland*’s first prong because Terry cannot meet the second prong.

civil case against a party invoking the Fifth Amendment privilege against self-incrimination"); *Crocker v. Weathers*, 240 S.C. 412, 126 S.E.2d 335 (1962) (failure of a defendant to testify in civil case raises an inference that his testimony, if it had been submitted, would have been unfavorable to his position); *Bean v. Calderon*, 166 F.R.D. 452, 453 (E.D. Cal. 1996) (habeas corpus petitioner, who invoked the court's process to overturn an otherwise valid conviction, was permitted to invoke the Fifth Amendment; however, the court could draw an adverse inference from its invocation if the questions to which the privilege was asserted directly related to an allegation made by petitioner in his verified petition, and the questions were otherwise not objectionable). In fact, the only evidence that he is left-handed came from Mr. Stone, who thought that Terry was. Thus, the Court finds that he did not establish that he is left-handed.

Even assuming that he is left-handed, the Court finds that evidence does not entitle him to relief. It is clear that he is capable of using both hands because the prosecution presented evidence that a latent fingerprint matching Terry's right ring finger was lifted from the telephone box. **R. pp. 1309-12; 1330-32; 1336-1337; 1343-44; 1356-57; 1430-37; 1534-35.** Also, Mr. Stone testified that his expert, Mr. Girndt, found another print on the telephone box that could have been made by a finger on Terry's right hand. **PCR Tr. pp. 78-80.**

More importantly, Dr. Carter's opinion was not that the assailant was right-handed. Rather, he simply testified that "it would have been more easily inflicted if someone used their right hand as opposed to their left hand." However, an individual with enough strength could have inflicted the blows with his right hand, even if he was left-handed. Particularly given the overwhelming evidence of guilt of murder and the aggravating circumstances of criminal sexual conduct and burglary, as well as the telephone tampering charge, the Court concludes that Terry cannot prove a reasonable probability of a different result but for counsel's failure to present

evidence that he is left-handed. *See Griffin v. Delo*, 33 F.3d 895, 901 (8th Cir. 1994) (failure to introduce evidence that the defendant was left-handed was not ineffectiveness where the witness was not sure and the defendant was otherwise persuasively identified).

GROUND 19(a)-(b)

Next, Terry alleges that trial counsel Fullwood was ineffective for failing to advise Terry's estranged wife, Louanne Terry not to mention parole eligibility when she testified in the sentencing phase (**Ground 19(a)**) and for failing to object and move for a curative instruction when the witness testified that Terry could get out of prison in thirty years if he received a life sentence. (**Ground 19(b)**). As to both allegations, the Court finds that Terry has failed to prove either deficient performance or resulting prejudice.

During Louanne Terry's sentencing phase testimony, she testified in part that his children (that she had during their marriage) loved him very much; and that it was difficult for her to explain to them that "it might be a very long time before Daddy got to come home." **R. pp. 1929-30.** Then, the following colloquy occurred about which Terry now complains:

Q. Did you have to tell the children something real hard- -

A. Yes --

Q. --- this week ---

A. --- Thursday night. The hardest thing I ever had to do in my life [was] to go home and tell those four children that the jury had returned guilty verdicts on all four counts and that *at best Daddy would not get to come home for thirty years*. That there would be no cub scout projects, that there would be no time to spend with them, that there would be no camping trips, no fishing trips, no vacations. That he would probably not get to walk his daughter down the aisle, the daughter he hoped for so long.

R. p. 1930, ll. 11-24 (emphasis added).

Mrs. Louanne Smith testified at the PCR hearing that she had previously been married to Terry and that they were estranged at the time of Terry's trial.⁵² She claimed that she only met with Ms. Fullwood "[v]ery briefly" during a "general meeting of the defense team" before Terry's trial, and that she was never told not to mention her ex-husband's parole eligibility or anything about the possibility of him coming home. She claimed that she would not have made the statement in question if she been so advised. **PCR Tr. p. 233.**

Ms. Fullwood testified that the defense felt that it was strategically important for his estranged wife, Louanne Terry, to testify because it might have looked funny if a capital defendant's wife did not testify on his behalf, even if they were estranged. Ms. Fullwood worked with Mrs. Terry for several hours on the day before she testified,⁵³ to prepare her testimony; and Ms. Fullwood was under the impression that Mrs. Terry would be able to present favorable mitigation testimony. However, when she actually testified, she was "all over the place." **PCR Tr. pp. 211-14; 222.**

Ms. Fullwood did not tell the witness to mention Terry's parole eligibility and did not mention parole in the preparation of her testimony. In her estimation, the challenged response was gratuitous and unresponsive to the question asked. Terry would have been parole eligible if sentenced to life imprisonment, and Ms. Fullwood believed that Mrs. Terry's testimony injected parole eligibility. Ms. Fullwood requested and received a "plain and ordinary meaning" jury charge, in light of Mrs. Terry's testimony. **Respondent's Ex. 2.** Ms. Fullwood did not move to strike the testimony in question because it would have drawn further attention to Mrs. Terry's testimony.

⁵² She testified that they divorced in December 1997. **PCR Tr. p. 210.**

⁵³ This was during the twenty-four hour waiting period after the jury had convicted Terry of murder.

The Court has elsewhere found that Mrs. Terry is not a credible witness⁵⁴ and that both trial attorneys were credible. The Court again resolves any discrepancies in the testimony of Ms. Fullwood and Mrs. Terry in favor of finding only counsel's testimony credible. Based upon Ms. Fullwood's testimony, the Court finds that trial counsel did not intend for Mrs. Terry to inject parole eligibility into the trial; and that the statement in question was gratuitous and unresponsive to trial counsel's intended inquiry. Instead, Mrs. Terry apparently injected it for reasons known only to her. Therefore, the Court finds that trial counsel was not ineffective for failing to warn her to inject her husband's parole eligibility in her testimony.

The Court further finds that Terry has failed to prove that counsel's failure to object to her response or move for a curative instruction was not deficient performance because counsel made a reasonable, strategic decision not to do so, since any such reaction to this testimony would have simply focused the jury's attention on this statement. The Court finds that this was a reasonable strategic decision. *See United States v. Nguyen*, 504 F.3d 561, 575-76 (5th Cir. 2007) (trial counsel for defendant whose alleged role in fraudulent home buying scheme was to procure straw buyers was not ineffective for failing to object to straw buyer's testimony that he pleaded guilty to role in fraudulent real estate transaction where his plea agreement was not accepted, or to the court's decision not to inform jury about withdrawn plea; objecting to decision not to inform jury about withdrawn plea would have highlighted straw buyer's testimony, and the jury was specifically cautioned not to conclude one could be guilty of conspiracy without intent to defraud); *Nixon v. Epps*, 405 F.3d 318, 328 (5th Cir. 2005) ("Because an objection by Nixon's counsel would have been fruitless, there can be no claim of deficient performance under

⁵⁴ As an example, the Court would note her willingness to admit at the time of the trial that she loved Terry. **R. p. 1922.** Yet, she only admitted at the PCR hearing that she loved him as the father of her children. She also only made this admission very reluctantly, in spite of repeated efforts by Respondent to elicit this simple response. **PCR Tr. p. 242.**

Strickland"); *Phyle v. Leapley*, 66 F.3d 154, 159 (8th Cir. 1995) (where the Court recognized recognizing the "virtually unchallengeable" broad subjective factors that lawyers take into account as they make repeated, instantaneous judgments whether to object, to move to strike or to move for a mistrial, factors that cannot be duplicated on a transcript. These factors include the witnesses' demeanor, the desire not to emphasize, and the jury's apparent reaction to the testimony).

More importantly, the Court finds that Terry cannot show any prejudice with respect to either counsel's failure to advise Mrs. Terry not to mention parole eligibility, or counsel's failure to object and move for a curative instruction when the witness testified that Terry could get out of prison in thirty years if he received a life sentence. First, the Court finds that despite this unresponsive injection of Terry's parole eligibility, the witness' testimony was generally beneficial and provided mitigation for the sentencing phase jury. Indeed, when the challenged comments are viewed in the context of the rest of her testimony, she clearly was emphasizing the significant impact of a guilty verdict and life sentence on Terry's children. Also, she then did "the second hardest thing" that she had ever done and begged her estranged husband's jury to sentence him to life, as opposed to death. **R. p. 1930-31.**

The Court further finds that counsel also was able to provide the jury with information about the good qualities of Terry that she saw during their marriage through her testimony. **R. pp. 1925-29.** More importantly, the Court finds that neither the State (**R. pp. 2077-91**) nor the defense (**R. pp. 2092-2103**) argued that Terry would be parole eligible. Therefore, Mrs. Terry's unresponsive remark was the only time his possible release was mentioned. Trial counsel, however, requested and received a "plain and ordinary meaning" jury charge, in light of Mrs. Terry's testimony. **R. pp. 2073-74; Respondent's Ex. 2.** This instruction was proper under state

law, and it precluded the jury's speculation about parole if Terry received a life sentence. *See Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

Finally, the Court would note that there was overwhelming evidence presented at trial supporting the statutory aggravating circumstances found by the jury. Based upon the current record, the Court concludes that Terry has not established "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" if the jury had not heard the isolated remark. In other words, he has failed to prove that "there is a reasonable probability that ... the [jury] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; see also *Wiggins*, 539 U.S. at 537; *Jones*, 332 S.C. at ___, 504 S.E.2d at 829-30 (concluding that petitioner did not meet burden).

GROUND 20

Terry further alleges that his attorneys were ineffective because they failed to object to Officer Phillips testimony that Terry did not show for a scheduled appointment with the Sheriff's Department. The Court finds that Terry abandoned this allegation because he did not present any evidence thereon at the PCR hearing. At most, therefore, he has a conclusory, self-serving allegation that will not support a claim of ineffective assistance of counsel. *E.g., Ellis v. Lynaugh*, 873 F.2d 830, 838-39 (5th Cir. 1989) (habeas petitioner's "mere conclusory allegations of discriminations" in grand jury selection were "insufficient to entitle an individual to relief"); *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) ("a petitioner is *not* entitled to an evidentiary hearing, however, when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible") (internal quotations omitted) (emphasis in original). Alternatively, the Court finds that he has failed to prove either

deficient performance or, more importantly, any conceivable prejudice resulting from counsel's performance because he has not shown either why the testimony was objectionable or how he was prejudiced by its introduction.

Lt. H. E. Phillips testified in the guilt phase of Terry's trial that concerning his involvement in the investigation. By January 1995, Terry had become a suspect; and Lt. Phillips felt it was important to talk with him, and obtain his consent draw bodily fluids and hair for D.N.A. testing. Inv. Frier contacted Terry and "he advised [Frier] that he would be in Lexington [on January 17, 1995,] and he would come by the Sheriff's Department and talk to us." However, he did not show up that day. When contacted in at his Winnsboro, South Carolina residence, Terry said that he did not have any transportation. So, the officers went to Winnsboro and obtained his consent. **R. pp. 1358-61.**

It is well settled that the prosecution is prohibited from using a defendant's post-*Miranda* silence to impeach that defendant's testimony providing an exculpatory version of the events in question. *See Doyle v. Ohio*, 426 U.S. 610, 619 (1976). "However, states may use a defendant's pre-*Miranda* silence, whether it occurred before or after arrest, to do so." *Buckner v. Polk*, 453 F.3d 195, 208 (4th Cir. 2006) [citing *Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (per curiam) (concerning post-arrest, pre-*Miranda* silence) and *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980) (Stevens, J., concurring) (concerning pre-arrest silence)].

In the present case, the Court finds that Terry has failed to establish that the questioned testimony was inadmissible under *Doyle* because there was no comment upon Terry's post-*Miranda* silence. Further, he has not argued or proved that Phillips' testimony was irrelevant.⁵⁵ Nor has he advanced any other theory that would support an objection to Inv. Phillips'

⁵⁵ It is relevant to explaining the course of law enforcement's investigation, and how his consent was given so officers could obtain samples from him for D.N.A. testing.

testimony. Thus, he has failed to prove that counsel's failure to object constituted deficient performance.

More importantly, he cannot show any conceivable prejudice from the introduction of this testimony. First, testimony presented through Inv Phillips, immediately after that now challenged by Terry, presented the jury with unchallenged evidence that Terry had cooperated with law enforcement during the course of the investigation by providing the officers with blood, saliva and pubic hair samples on January 17, 1995 (**R. pp. 1362-1363; State's Exhibit 14**), even though the officers, while informing him that they were investigating the victim's murder, did not tell him he was a suspect. According to the officers, Terry told them that he had been the victim's neighbor; that he knew the victim; that he was a friend of her two children; and that he had been over to the victim's house. **R. pp. 1364-66; 1403-04**. In fact, Inv. Phillips testified that Terry "consented to anything [we] wanted" after being informed that the Sheriff's Department was investigating the victim's murder; and he described Terry as "very cooperative." **R. p. 1371, ll. 10-22.**⁵⁶

Evidence of his cooperation was consistent with counsel's strategy of putting the State to its burden of proof by pointing out any deficit in the State's case, while attempting to maintain credibility with the jury for the sentencing phase. Moreover, in light of the overwhelming proof establishing Terry's guilt of each of the crimes of which he was convicted, the Court finds that he cannot prove a reasonable probability of a different result but for counsel's failure to object to Lt. Phillips' testimony.

⁵⁶ Likewise, Inv. Frier described Terry as "very cooperative" and "pleasant to deal with" even though he was aware the officers were investigating Urai Jackson's murder. **R. p. 1404, ll. 4-22**. Similarly, counsel elicited that Terry had provided SLED Agent Derrick with a clear set of his fingerprints. **R. p. 1459, ll. 17-25**. Moreover, defense counsel skillfully argued Terry's cooperation with law enforcement in closing argument. **R. pp. 1560-62**.

GROUND 22

Terry alleges in **Ground 22** that appellate counsel was ineffective for failing to raise on direct appeal the trial judge's denial of the directed verdict motion on the charge of first degree CSC. This allegation is predicated upon the alleged absence of evidence that the victim did not consent to intercourse. The Court finds that Terry cannot show either deficient performance or, more importantly, any conceivable prejudice resulting from appellate counsel's failure to make this argument because such an argument would not have been meritorious, for the reasons found in **Ground 15**.

A defendant is constitutionally entitled to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). A PCR applicant has the burden of proving appellate counsel's performance was deficient. *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, *Tisdale v. State*, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." *Jones v. Barnes*, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. *Id.*

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate "that his counsel was objectively unreasonable in failing" to identify and argue present significant and obvious issues on appeal, and "a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal." *Smith v. Robbins*, 528 U.S. 259, 285 (2000)

(citation omitted).⁵⁷ Although recognizing that "[n]otwithstanding *Barnes*, it is still possible to bring a *Strickland* claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." *Robbins*, 528 U.S. at 288. "Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Id.* (quoting *Gray*, 800 F.2d at 646. See also *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir.2000) (en banc).

In the present case, Assistant Appellate Defender Robert M. Dudek represented Terry on direct appeal. Mr. Dudek testified that he has worked at Appellate Defense for approximately seventeen years at the time of the hearing. He and one other attorney in his Office handled all of the death penalty appeals at the time of Terry's appeal; and he had handled several death penalty appeals before he was appointed to represent Terry.⁵⁸ He explained that he prepares an appellate brief by first ensuring that he has a copy of all transcripts in the case. Next, he "always" goes to the courthouse and views all of the exhibits, he orders all of the paper exhibits and he reads the entire record. He keeps two sets of notes of the record and he records all objections and motions in one set of notes. **PCR Tr. pp. 266-69.**

In his opinion, Ms. Fullwood's motion did not preserve the issue because he did not "think an appellate court would think that was a very serious motion." Although he could not recall whether he considered raising the directed verdict issue on appeal, he noted that he was not

⁵⁷ *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) (When a claim of ineffective assistance of counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal"). Indeed, "[w]innowing out weaker arguments on appeal and focusing on 'those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy.'" *Smith v. Murray*, 477 U.S. 527, 536 (1986) (quoting *Jones*, 463 U.S. at 751); see also *Smith v. South Carolina*, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed "to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims").

⁵⁸ He handles a total of roughly one hundred appeals a year. **PCR Tr. p. 267.**

constitutionally required to raise every issue that is preserved for appellate review. PCR Tr. pp. 270-73.

Again, the Court finds that there is no merit to Terry's argument that he was entitled to a directed verdict on the charge of first degree CSC. Because the allegation lacks any merit, the Court finds that he cannot meet either prong for relief under *Strickland*.⁵⁹

GROUND 23 (a)-(b)

Terry's **Ground 23** raises two allegations. First, he asserts that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to provide a photograph to defense counsel that was supposedly taken in the victim's home and which depicted the victim seated in his lap.⁶⁰ Alternatively, he maintains that trial counsel were ineffective because they failed to discover this photograph and utilize it at trial. The Court finds that both allegations lack merit.

Trial counsel Mr. Stone testified at the PCR hearing that the defense had filed *Brady*/Rule 5 motions, and that the defense had the State's responses before trial. PCR Tr. pp. 80-81. Counsel sent the investigator, Tommy Davis, to number of places. Mr. Davis met with several family members, a Mr. Boozer and others who appeared in the incident report. However, Mr. Stone did not recall witnesses providing helpful information. PCR Tr. pp. 76-78

⁵⁹ The Court finds that Terry has abandoned any claim that appellate counsel should have argued that he was entitled to a directed verdict on the burglary charge. See **Ground 15**. For the reasons stated in **Ground 15**, the Court further finds neither deficient performance nor prejudice resulting from the failure to argue that issue as well. The Court finds that trial counsel's motion preserved a challenge to the sufficiency of the evidence to convict Terry of burglary in the first degree but Terry was not entitled to a directed verdict because there was sufficient evidence to submit that charge to the jury. See **Ground 15**.

⁶⁰ Terry's witnesses gave conflicting accounts of what the picture depicted. As will be more fully discussed, Terry did not introduce the photograph at the PCR hearing. However, it was clear from collateral counsel's questioning of Mr. Humphries, Mr. Chase and Diane Gibson that Terry alleged that the photograph depicts the victim sitting in his lap.

Mr. Humphries testified that, to his knowledge, no one produced photos of the victim sitting on Terry's lap to the prosecution. Also, he did not recall any such photograph. The State was aware that Terry had previously been in the house. However, this was in connection with the victim's daughter. **PCR Tr. pp. 105-06.** Although he did not recall any such photograph, he was sure that he would have disclosed such a photograph, if he had it, because it was his Office's policy to always disclose every photograph, including those involving victim impact evidence. **PCR Tr. pp. 117-18.**

Ms. Fullwood testified that the counsel's pre-trial discovery motion and supplemental motions had been ruled on before trial. Further, the defense's investigation did not reveal any information that could corroborate Terry's statement that he and the victim had an affair, and that he had consensual sex with the victim on the night of her murder. Also, he had given the defense team several different accounts as to his version of what he did around the time of the murder. Each account was unsuccessfully investigated. **PCR Tr. pp. 190-91; 196-204; 206.**⁶¹

Terry also presented testimony on this allegation from Diane Gibson Smith. Mrs. Smith testified that she was involved in a relationship with Terry at the time of the victim's death. She testified that she provided an investigator for the State with a photograph depicting her and Terry that had been taken in the victim's home. However, she could not recall to whom she had given the photograph or when she had done so. She, the victim's daughter and Terry were all friends; and she lived across the street from the victim at the time of the crime. **PCR Tr. pp. 223-26.**

However, she testified that she and Terry had only been in the victim's home, together, one or twice; and she had never seen Terry and the victim together. She described the victim as not "very social" and said that the victim "kept to herself". Also, she denied that she had told

⁶¹ Trial counsel's testimony was corroborated by the defense's private investigator, Mr. Davis. Also, Terry had given Mr. Stone an account in which he suggested that he had been framed. **PCR Tr. pp. 75-76.**

Terry's mother, Patricia, that she had given the Solicitor's Office a picture showing the victim and Terry together, with the victim sitting in Terry's lap. When asked to describe the photograph, she indicated that it was taken in the victim's kitchen, and she (Mrs. Smith) is sitting in Terry's lap. The victim, however, was not in the photograph. PCR Tr. pp. 225-27.

Patricia Terry, Terry's mother, attempted to testify about this issue, but the Court sustained Respondent's hearsay objection to what Diane Smith had told her. PCR Tr. pp. 247-48. Terry then proffered testimony from her that she had spoken to Diane Gibson Smith about photographs that Ms. Gibson had provided to the State. Mrs. Smith allegedly told Mrs. Terry that one photograph showed the victim, Terry and Gibson sitting on the couch; and that the victim was sitting in Terry's lap. PCR Tr. pp. 249-50.

Mr. Chase testified that he did not have any recollection of anyone showing him a photograph depicting the victim sitting in Terry's lap. However, if one existed, "I'm sure we would have provided it." PCR Tr. p. 291.

A. Alleged *Brady* violation (Ground 23(a))

In *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999), the United States Supreme Court stated the applicable law under *Brady* as follows:

"In *Brady* this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.' . . . We have since held that the duty to disclose such evidence is applicable even though there has been no request by the accused, . . . and that the duty encompasses impeachment evidence as well as exculpatory evidence. . . . Such evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' . . . Moreover, the rule encompasses evidence 'known only to police investigators and not to the prosecutor.' In order to comply with *Brady*, therefore, 'the individual prosecutor

has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.”

(Citations omitted).⁶² See also *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); *State v. Taylor*, 339 S.C. 159, 508 S.E.2d 870, 879 (1999); *Fradella v. Town of Mount Pleasant*, 325 S.C. 469, 479, 482 S.E.2d 53, 58 (Ct. App. 1997).

The Court in *Strickler*, however, observed that “the term ‘Brady violation’ is sometimes used to refer to any breach of the broad obligation to disclose exculpatory evidence;” however, “strictly speaking, there is never a real ‘Brady violation’ unless the non-disclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.” 527 U.S. at 281. Thus, the Court recognizes three components of a true *Brady* violation. “The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” *Id.* at 282.

The Court later explained the materiality prong under *Brady* as follows:

As we made clear in *Kyles*, the materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. . . . Rather, the question is whether ‘the favorable evidence could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.’

Id. at 290 (citations omitted).

⁶² The Court in *Strickler* found that the petitioner could not show prejudice resulting from the procedural default of his *Brady* claim because the suppressed evidence was not material. *Id.* at 292-96.

In the present case, the Court finds that Terry has failed to prove that any photograph exists which was taken in the victim's home and depicts the victim sitting in his lap. There was no admissible testimony presented to substantiate this claim, and Terry did not introduce any photograph at the PCR hearing. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1999) ("The applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice") (citing *Glover v. State*, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995)); *Underwood v. State*, 309 S.C. 560, 425 S.E.2d 20 (1992); *Jackson v. State*, 329 S.C. 345, 495 S.E.2d 768 (1998). See also *Beaver v. Thompson*, 93 F.3d 1186, 1995 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present mitigation evidence family members, where there was no proffer of this testimony).⁶³ Even if Mrs. Patricia Terry's testimony concerning the conversation she supposedly had with Diane Gibson Smith was admissible, the Court finds it was not credible.⁶⁴

Assuming that such a photograph exists, it was available to Terry through another source: his girlfriend at the time, Diane Gibson Smith. Indeed, he not only would have had at least equal access to the witness, he would know or reasonably should know that the photograph he claims was taken actually existed, since he was in it. "[W]here the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have

⁶³ The Court would note that he had access to all of the contents of the Solicitor's file, except those this Court ruled were protected as work product. None of the contents over which the work product privilege was asserted were photographs. He also had the right to civil discovery under S.C. Code Ann. § 17-27-130 (Supp. 2008). However, no photograph was introduced at the hearing.

⁶⁴ As discussed elsewhere, the Court finds that she was not a credible witness. The Court finds that her testimony about the victim, both generally and specifically as to the current issue is contradicted by Samantha Jackson's testimony and Mrs. Smith's testimony about the victim not having a close relationship with Terry. It is likewise inconsistent with Lt. Frier's testimony before this Court that the Lexington County Sheriff's Department made extensive inquiry into the victim's "personal life and any relations and acquaintances she had;" but the only evidence of a relationship between her and Terry was in Terry's March 24, 1995 statement. He had previously not claimed this when questioned before he was arrested and told that D.N.A. linked him to the crime. Lt. Frier testified that if they had developed information about a relationship between the victim and Terry, "we would have been all over that." PCR Tr. pp. 308-11; 318-19. Based upon his testimony as well as Ms. Jackson's trial testimony, the Court finds that no affair took place.

looked, a defendant is not entitled to the benefit of the Brady doctrine.” *United States v. Wilson*, 901 F.2d 378, 381 (1990). *See also Bagley*, 473 U.S. at 675; *Barnes v. Thompson*, 58 F.3d 971, 975-76 (4th Cir. 1995).

The Court further finds that, at most, Terry has established that a photograph was provided to the prosecution depicting he and his former girlfriend, Diane G. Smith, together in the victim’s house. Assuming that such a photograph does exist even though Terry failed to introduce it at the hearing, the Court does not find that failing to disclose this photograph was such that it “could reasonably be taken to put the case in such a different light as to undermine confidence in the verdict.” *Strickler*, 527 U.S. at 290 (citations omitted). At most, the Court finds that any such photograph would demonstrate that he and his girlfriend were in the house. This was known to counsel for both the State and the defense, and it was never disputed that he had lived across the street from the victim or that Diane G. Smith and Samantha Jackson were friends. It does not establish any relationship between the victim and Terry, whatsoever, much less corroborate either his March 24, 1994 statement or any possible guilt phase defense based upon a theory that he and the victim were having an affair, and that the killing was the result of her provocation of him. Thus, the *Brady* claim fails, because the photograph is not material.

B. Trial counsel’s failure to discover the photograph (Ground 23(b))

The Court likewise rejects Terry’s ineffective assistance of counsel claim predicated upon trial counsel’s supposed failure to discover and use a photograph of the victim sitting on his lap, at trial. First, the Court finds that the efforts trial counsel made to corroborate his claim that he was romantically involved were more than reasonable under *Strickland*. Second, the Court finds that Terry has failed to prove that any photograph exists which was taken in her home and depicts the victim sitting in his lap. There was no admissible testimony presented to substantiate

this claim, and Terry did not introduce any photograph at the PCR hearing. *See Bannister, supra; Underwood, supra.* Therefore, the Court finds that Terry has failed to establish that trial counsel's performance was deficient.

He likewise has failed to establish Sixth Amendment prejudice. At most, Terry has merely established that a photograph was provided to the prosecution depicting he and his former girlfriend, Diane G. Smith, together in the victim's house. Assuming that such a photograph does exist, even though Terry failed to introduce it at the hearing, the Court does not find that he prejudiced by his attorneys' deficient performance, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. At best, the Court finds that any such photograph would demonstrate that he and his girlfriend were in the house.

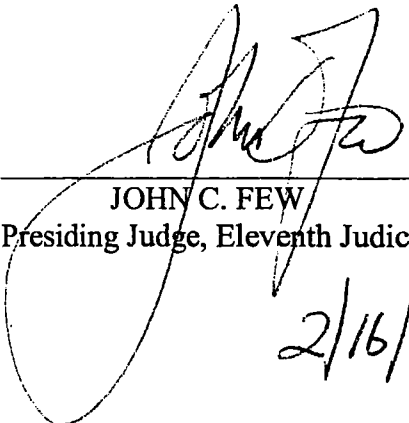
This was known to counsel for both the State and the defense, and it was never disputed that he had lived across the street from the victim or that Diane G. Smith and Samantha Jackson were friends. It does not establish any relationship between the victim and Terry, whatsoever, much less corroborate either his March 24, 1994 statement or provide evidence supporting a guilt phase defense of manslaughter; that he and the victim were having an affair and the killing was the result of her provocation of him. Particularly in light of the overwhelming evidence of guilt of murder and the statutory aggravating circumstances, he has failed to meet his burden of showing any conceivable prejudice. For the above-stated reasons, the Court finds that this allegation is without merit.

IT IS, THEREFORE, ORDERED:

1. That the Application for Post-Conviction Relief in this matter is dismissed with prejudice; and
2. That Applicant is remanded to the custody of Respondent.

AND, IT IS SO ORDERED this ____ day of _____, 2008.

Greenville, South Carolina



JOHN C. FEW
Presiding Judge, Eleventh Judicial Circuit

2/16/09

SCANNED

3126

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Gary Dubose Terry,

2000-CP-32-3470

Applicant,

v.

**APPLICANT'S MOTION FOR
RECONSIDERATION IN RE:
FINAL ORDER OF
DISMISSAL.**

The State,

Respondent.

After thoroughly reviewing this Court's signed order of dismissal, Counsel has found no additional basis for objection other than those previously set forth in Applicant's post-trial memorandum of law and objections to proposed order of dismissal. Having previously provided to this Court applicant's objections, and in lieu of filing an additional set of objections to this Court's final ruling denying and dismissing his application for post-conviction relief, Applicant relies on all of the arguments set forth in the prior specifically and attached documents. And, for all of those reasons set forth in his Memorandum of law objections to the respondent's proposed order of dismissal, the applicant again asks this Court to rescind its order of dismissal and grant him a new trial and/or sentencing phase.

Respectfully submitted,

H. Wayne Floyd, Esquire
Melissa J. Kimbrough, Esquire
Attorneys for Applicant

This 17 day of March, 2009.

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

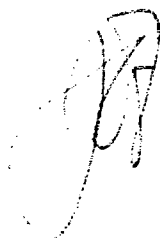
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STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF LEXINGTON	)	COURT OF COMMON PLEAS
	)	
Gary Dubose Terry,	)	2000-CP-32-3470
	)	
Applicant,	)	
	)	
v.	)	ORDER DENYING MOTION FOR
	)	NEW TRIAL
	)	
The State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Applicant is a death row inmate from Lexington County, South Carolina. This Court denied Applicant's Application for Post-Conviction Relief (PCR), as amended, in an Order of Dismissal that was filed on February 18, 2009. On March 10, 2009, counsel for Applicant moved for the Court to reconsider its judgment for the reasons set forth in Applicant's post-trial memorandum of law and his objections to Respondent's proposed Order.

"The purpose of Rule 59(e), SCRPC, to alter or amend the judgment [...] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200 (1988)). Based upon the Court's careful reconsideration of the all of the evidence presented in this case, and the arguments in both Applicant's post-trial memorandum of law and his objections to Respondent's proposed Order, the Court denies Applicant's motion.



BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

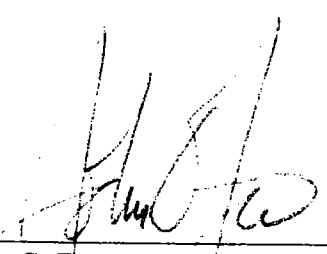
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IT IS THEREFORE ORDERED that Applicant's Motion to Alter or Amend the Judgment is denied.

IT IS SO ORDERED.



John C. Few
Circuit Court Judge

March 10, 2009

Gary DuBose Terry, Petitioner,
v.
State of South Carolina, Respondent.

ORDER

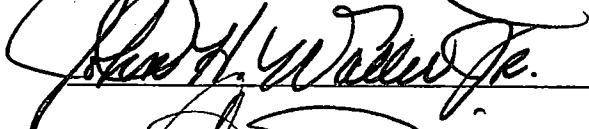
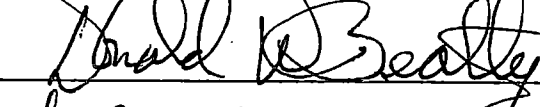
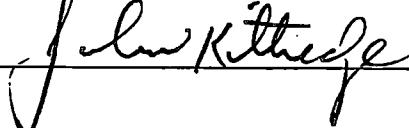
This capital case is before the Court by way of a notice of appeal from an order denying petitioner's application for post-conviction relief (PCR). Robert M. Dudek, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, is currently representing petitioner in this matter.

Mr. Dudek has moved for the appointment of outside counsel due to a conflict of interest arising from petitioner's allegation in his PCR application that Mr. Dudek was ineffective in his representation of petitioner on direct appeal. The allegation was addressed in the order of dismissal. The State does not oppose the motion.

The motion is granted. Teresa Norris is hereby appointed to represent petitioner in this matter. The Division of Appellate Defense shall

remain associated for the limited purpose of paying for any necessary transcript(s) and providing copies of the petition, appendix and briefs.

IT IS SO ORDERED.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

May 14, 2009