

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

John R. Wood,

Petitioner,

vs.

William R. Byars, Jr., *Commissioner, South Carolina*
Department of Corrections;
Wayne C. McCabe, *Warden of Lieber Correctional*
Institution,

Respondents.

) C/A No. 0:12-MC-427-DCN-PJG

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ORDER

RECEIVED

DEC 14 2012

S.C. Supreme Court

This matter is before the Court on a Motion for Stay of Execution and Appointment of Counsel

("Motion for Stay") filed on behalf of John R. Wood ("Petitioner") on December 7, 2012. (ECF No. 1).

Respondents filed a Response to the Motion on December 12, 2012. (ECF No. 7). Petitioner filed a Reply to the Response on December 13, 2012. (ECF No. 10).

The Clerk of Court shall list the parties on the docket as they are listed in the caption of this order. Specifically, the Clerk of Court shall add "Wayne C. McCabe, *Warden of Lieber Correctional Institution*" as a Respondent because a prisoner's custodian is the proper respondent in a habeas corpus action. *Rumsfeld v. Padilla*, 542 U.S. 426, 434-35 (2004).

Review of the pleadings discloses that Petitioner's convictions arise out of the December 6, 2000 murder of South Carolina Highway Trooper Eric Nicholson. The Court of General Sessions for Greenville County sentenced Petitioner to death for murder and possession of a weapon during the commission of a crime on February 16, 2002. *State v. Wood*, Case No. 01-GS-23-3106. Petitioner fully pursued his state court remedies, and, on Friday, December 7, 2012, the Supreme Court of South

Carolina issued an order setting Petitioner's date of execution on **Friday, January 4, 2013**. Petitioner asks this Court to stay his execution to allow him to fully pursue a § 2254 federal habeas corpus petition, and Respondents do not oppose the requested stay. (ECF No. 7, Resp. 1).

A stay of execution for a sentence of death imposed by a court of a state is governed by 28 U.S.C. § 2251(a)(3) and the holding in *McFarland v. Scott*, 512 U.S. 849 (1994).¹ "The federal habeas corpus statute grants any federal judge 'before whom a *habeas corpus proceeding is pending*' power to stay a state-court action 'for any matter involved in the habeas corpus proceeding.'" *McFarland*, 512 U.S. at 857 (citing 28 U.S.C. § 2251) (emphasis in original). When a capital defendant invokes his or her right to counsel under 28 U.S.C. § 2251, a federal court has jurisdiction to issue a stay of execution. *McFarland*, 512 U.S. at 858 ("once a capital defendant invokes his right to appointed counsel, a federal court also has jurisdiction under § 2251 to enter a stay of execution"). Further, "[i]f the district court cannot dismiss the [first federal habeas] petition on the merits before the scheduled execution, it is obligated to address the merits and must issue a stay to prevent the case from becoming moot." *Lonchar v. Thomas*, 517 U.S. 314, 320 (1996).

In his Motion to Stay, Petitioner also requests that this Court appoint counsel and that they be directed to submit a petition on his behalf. Thus, Petitioner has invoked his right to appointed counsel and, therefore, this "federal court also has jurisdiction under § 2251 to enter a stay of execution." *McFarland*, 512 U.S. at 858.

The Court finds that there is insufficient time before the scheduled execution for counsel who might be appointed to "meaningfully . . . research and present [Petitioner's] habeas claims." *McFarland*,

¹ Chapter 154 of Title 28 contains special habeas corpus procedures in capital cases if specified criteria are met, *see* 28 U.S.C. §§ 2261–66, but the parties agree these provisions do not apply in this case.

512 U.S. at 858. Also, the Court finds that it will be impossible for the Court to consider the merits of Petitioner's habeas petition, which has not yet been filed, until after his scheduled execution date.

Accordingly, Petitioner's Motion for Stay of Execution is **granted**.

An order appointing counsel will issue separately.

The Clerk of Court shall assign a civil action number to this case.

This matter is referred to the assigned United States Magistrate Judge for preliminary proceedings.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read 'David C. Norton', written over a horizontal line.

David C. Norton
United States District Judge

December 14, 2012
Charleston, South Carolina

Donna D'Alessio

From: Creighton Waters
Sent: Friday, December 14, 2012 10:41 AM
To: Donna D'Alessio; Don Zelenka
Subject: Fwd: Activity in Case 0:12-mc-00427-DCN-PJG Wood v. Byars Order on Motion to Stay

Sent from my Verizon Wireless 4G LTE DROID

----- Original Message -----

Subject: Activity in Case 0:12-mc-00427-DCN-PJG Wood v. Byars Order on Motion to Stay
From: SCDEfilingstat@scd.uscourts.gov
To: scd_ecf_nef@scd.uscourts.gov
CC:

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

*****NOTE TO PUBLIC ACCESS USERS*** There is no charge for viewing opinions.**

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 12/14/2012 at 10:38 AM EST and filed on 12/14/2012

Case Name: Wood v. Byars
Case Number: [0:12-mc-00427-DCN-PJG](#)
Filer:
Document Number: [13](#)

Docket Text:

ORDER granting [1] Motion for Stay of Execution. Signed by Honorable David C Norton on 12/14/2012.(jpet,)

0:12-mc-00427-DCN-PJG Notice has been electronically mailed to:

Samuel Creighton Waters agcwaters@ag.state.sc.us

Elizabeth Anne Franklin-Best elizabeth.a.franklin@gmail.com, betsy@blumelaw.com

Emily Paavola emily@deathpenaltyresource.org

0:12-mc-00427-DCN-PJG Notice will not be electronically mailed to:

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp_ID=1091130295 [Date=12/14/2012] [FileNumber=5337965-0] [c325234c0a04a2ae773d5006a130d9c7e39423db04b0c76f1c47e507fc216370bb cba377414d68156c8119cce784f76bfc2db2189e0f9383f44498a3e6587aa]]

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
OFFICE OF GENERAL COUNSEL
MEMORANDUM

TO: Institution

FROM: Dayne Haile, Office of General Counsel

DATE: December 10, 2012

RE: Service of Pleadings

RECEIVED

DEC 13 2012

S.C. Supreme Court

Please follow the below procedures for service of the Order and Petition on
Inmate John Richard Wood, SCDC #6005:

1. Serve packet on inmate
2. Complete Affidavit of Service, sign & notarize
3. Make a copy of Affidavit of Service for Warden
4. Make a copy of Affidavit of Service for inmate
5. Return original Affidavit of Service to the Office of General Counsel as well
as two of the original packets

If you have any questions regarding this matter, please do not hesitate to contact
me at 896-2380. Thank you.

S/ Dayne Haile
Dayne Haile

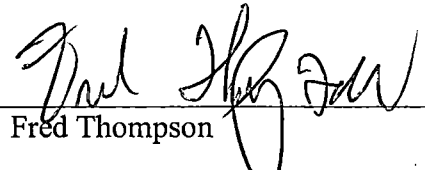
Attachments

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787, Columbia, South Carolina 29221

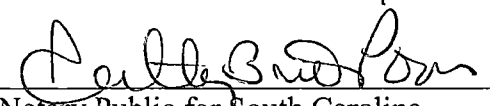
Pursuant to Code Section 17-25-400, Code of Laws of South Carolina, 1976, the
Director of the South Carolina Department of Corrections has designated Associate
Warden Fred Thompson as his duly authorized agent for the purpose of making service of
the Notice of Execution on the below named individual.

STATE OF SOUTH CAROLINA)
) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF DORCHESTER)

On the 11th day of December, 2012, I served the Notice of Execution dated
December 7, 2012, on John Richard Wood, SCDC #6055 by delivering personally and
leaving a copy of the same at Lieber Correctional Institution, 136 Wilborn Avenue,
Ridgeville, South Carolina. Deponent is not a party to this action.

S/ 
Fred Thompson

SWORN TO AND SUBSCRIBED before
me this December 11, 2012

 (L.S.)
Notary Public for South Carolina

My Commission Expires: 5/1/2017

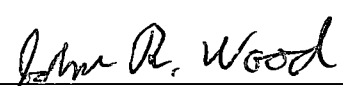
RECEIVED

DEC 13 2012

S.C. Supreme Court

ACCEPTANCE OF SERVICE

Service of a copy of the within Notice of Execution is accepted at Lieber
Correctional Institution, 136 Wilborn Avenue, Ridgeville, South Carolina, this 11th day
of December, 2012.

S/ 
John Richard Wood

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

NOTICE OF ELECTION

I, John Richard Wood, pursuant to Section 24-3-530, South Carolina Code of Laws, 1976 as amended, hereby elect lethal injection as the method for execution.

S/ John R. Wood
John Richard Wood

Dated: 12/11/12

WITNESSES:

[Signature]
[Signature]

RECEIVED

DEC 13 2012

S.C. Supreme Court

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)

NOTICE OF ELECTION

I, John Richard Wood, pursuant to Section 24-3-530, South Carolina Code of
Laws, 1976 as amended, hereby elect electrocution as the method for execution.

S/ _____
John Richard Wood

Dated: _____

WITNESSES:

The Supreme Court of South Carolina

The State, Respondent,

v.

John Richard Wood, Appellant.

Appellate Case No. 2002-022661

The Honorable John W. Kittredge
Greenville County
Trial Court Case No. 2001-GS-23-03106

EXECUTION NOTICE

TO THE HONORABLE *WILLIAM R. BYARS, JR.*, DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the above case from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court of South Carolina and the remittitur has been sent to the Clerk of the Court of General Sessions.

IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.


CLERK

Columbia, South Carolina
December 7, 2012

cc: S. Creighton Waters, Esquire
Robert Michael Dudek, Esquire
Emily C. Paavola, Esquire
David Tatarsky, Esquire
Governor Nikki Haley



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DEC 07 2012

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

S.C. SUPREME COURT
JOHN R. WOOD

Petitioner,

v.

WILLIAM BYARS, Commissioner,
South Carolina Department of Corrections

Respondent.

CIVIL ACTION NO. 9:12-MC-427-DCN-BM

**MOTION FOR STAY OF EXECUTION
AND APPOINTMENT OF COUNSEL**

THIS IS A CAPITAL CASE.

JOHN WOOD IS SCHEDULED TO BE EXECUTED ON JANUARY 4, 2013*

John R. Wood is an indigent prisoner under sentence of death imposed by the Greenville County, South Carolina, Court of General Sessions. He is scheduled to be executed on January 4, 2013. Through undersigned counsel, Mr. Wood requests that this Court stay his imminent execution and appoint counsel to represent him in the preparation, presentation, and litigation of his first federal petition for a writ of habeas corpus. Specifically, Mr. Wood requests that this Court appoint Elizabeth Franklin-Best and Emily C. Paavola of Columbia, South Carolina to represent him. In support of this Motion, counsel submit the following facts and argument.¹

I. RELEVANT PROCEDURAL HISTORY.

Mr. Wood was charged with murder of a highway patrol officer and possession of a weapon during the commission of a violent crime. The jury found Mr. Wood guilty as charged and sentenced him to death. The South Carolina Supreme Court affirmed his convictions and

* This date is calculated based on undersigned counsel's reading of the execution notice, which states that the sentence of death shall be imposed "on the fourth Friday after the service upon you or receipt of this notice." There is, however, some ambiguity about the proper calculation, given that the execution notice was issued today, on a Friday. If one counts the date of issuance as the first Friday following service, then Mr. Wood's execution will take place on December 28, 2012.

¹ Mr. Wood has completed an Application to Proceed Without Prepayment of Fees and files it simultaneously with this motion, along with a motion to proceed *In Forma Pauperis* in accordance with Rule 3(a) of the Rules Governing Section 2254 Cases.

death sentence on December 6, 2004. *State v. Wood*, 362 S.C. 135, 607 S.E2d 57 (2004). The United States Supreme Court denied certiorari on June 20, 2005. *Wood v. South Carolina*, 545 U.S. 1132, 125 S.Ct. 2942, 162 L.Ed.2d 873 (2005). Mr. Wood filed an application for state post-conviction relief on July 28, 2005. The lower court denied post-conviction relief, and the South Carolina Supreme Court denied Mr. Wood's petition for a writ of certiorari to review the lower court's denial on October 31, 2012. At that time, twenty-seven days (27) had elapsed on the one year limitations period for filing a federal habeas corpus petition as prescribed by 28 U.S.C. §2244(d).²

II. THE COURT MUST ENTER A STAY AND APPOINT COUNSEL TO REPRESENT MR. WOOD IN HIS FIRST FEDERAL HABEAS CORPUS PROCEEDING.

Pursuant to 18 U.S.C. § 3599, indigent death-sentenced prisoners are "entitled to the appointment of one or more attorneys" in order to pursue federal habeas corpus remedies.³ The right to counsel conferred by section 3559 attaches prior to the filing of a prisoner's habeas petition. As the Supreme Court has explained, absent this pre-petition right to counsel, condemned prisoners would not have meaningful access to the remedy of habeas corpus:

Congress' provision of a right to counsel under [§3559] reflects a determination that quality legal representation is necessary in

² Twenty-seven (27) days elapsed between the date on which the judgment became final on direct review with the denial of the writ of certiorari by the U.S. Supreme Court on June 30, 2005, and the filing of the application for post-conviction relief on July 28, 2005, which tolled the time for filing in this Court. See 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection"); see also *Artuz v. Bennett*, 531 U.S. 4 (2000) (construing the statutory phrase "properly filed application"). Mr. Wood's limitations period began to run again following the South Carolina Supreme Court's October 31, 2012 denial of his petition for writ of certiorari. Thus, Mr. Wood has until October 4, 2013 to file his federal habeas corpus petition.

³ This statutory provision was formerly located at 21 U.S.C. § 848(q)(4)(B). Effective October 12, 2008, Congress moved this provision to 18 U.S.C. § 3599.

capital habeas corpus proceedings in light of “the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.” An attorney’s assistance prior to the filing of a capital defendant’s habeas corpus petition is crucial because “the complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law.”

McFarland v. Scott, 512 U.S. 849, 855-856 (1994) (quoting *Murray v. Giarratano*, 492 U.S. 1, 14 (1989) (Kennedy, J., joined by O’Connor, J., concurring in the judgment)).

In construing section 3599 to require appointment of counsel prior to the filing of the petition, the Supreme Court explained that Congress provided for investigative and expert resources to be made available to counsel upon request and a showing of need. Since these services “may be critical in the pre-application phase of a habeas corpus proceeding, when possible claims and their factual bases are researched and identified,” Congress clearly intended counsel to be appointed prior to the filing of the habeas petition. *McFarland*, 512 U.S. at 855. It is thus plain that the right to counsel conferred by section 3599 is a right to assistance in identifying, developing, and pleading all available claims for relief, including the record-based claims already raised in the state trial and appeal proceedings, as well as the claims not raised in those proceedings because they are derived from non-record facts which require access to investigative and expert resources.

Moreover, “the right to counsel necessarily includes a right for that counsel meaningfully to research and present a defendant’s habeas claims. Where this opportunity is not afforded, “[a]pproving the execution of a defendant before his [petition] is decided on the merits would clearly be improper.” *Id.* at 858 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 889 (1983)). Accordingly, once a capital defendant invokes his right to appointed counsel, this Court has

jurisdiction to enter a stay of execution. *Id.*; *see also, id.* at 857 (“Even if the District Court had granted McFarland’s motion for appointment of counsel and had found an attorney to represent him, this appointment would have been meaningless unless McFarland’s execution also was stayed.”).

The appointment provision of 18 U.S.C. § 3599 requires appointment of at least one attorney who has been admitted to practice in the court of appeals for not less than five years and who has not less than three years experience in the handling of appeals in that court in felony cases. §3599(b). Alternatively, for good cause, this Court may appoint counsel “whose background, knowledge, or experience would otherwise enable him or her to properly represent the defendant, with due consideration to the seriousness of the possible penalty and to the unique and complex nature of litigation.” §3599(d).

Emily C. Paavola is the current Executive Director of the Death Penalty Resource & Defense Center. The Death Penalty Resource & Defense Center was formerly known as the Center for Capital Litigation, and was designated by this Court as a Community Defender Organization authorized to provide representation, assistance, information and other matters related to federal death penalty habeas corpus cases. *See In re: Amendments to the Plan of the United States District Court for the District of South Carolina for Implementing the Criminal Justice Act*, filed May 25, 2010. Ms. Paavola is a 2005 graduate of Cornell Law School. She is licensed and admitted in New York, Indiana, South Carolina, the United States District Court for the Southern District of Indiana, and the United States District Court for the District of South Carolina. After law school, she served as a Project Fellow for the Cornell Death Penalty Project in Ithaca, New York, and then practiced as an associate in the business litigation practice group at Baker & Daniels LLP in Indianapolis, Indiana, where she handled civil matters primarily in

federal court and also provided *pro bono* representation to death sentenced inmates in capital post-conviction proceedings. Ms. Paavola moved to South Carolina in 2008, and has since been appointed to represent six death-sentenced inmates in state post-conviction proceedings in South Carolina. She was also appointed by this Court to represent James Robertson, a death sentenced inmate pursuing federal habeas relief pursuant to 28 U.S.C. § 2254. Ms. Paavola has provided investigative, research and consultation services in numerous other capital cases. She has served as a faculty member and speaker at multiple state and national capital training conferences and has authored several publications designed to assist other attorneys in their representation of clients facing the death penalty in state and federal court.

Elizabeth Franklin-Best is licensed and admitted in New York, South Carolina, the United States District Court for the District of South Carolina, the United States Court of Appeals for the Fourth Circuit and the United States Supreme Court. She has worked as a part-time public defender for Washington County, New York, the Richland County Public Defenders Office, as an associate for Jack Swerling, and since September 16, 2007, an assistant appellate defender with the South Carolina Commission on Indigent Defense, Appellate Division. As an appellate attorney, she was second counsel on the following capital appeals: Angel Vazquez, Norman Starnes, John Weik, Brad Sigmon, Louis Winkler, Bayan Aleksey, and Steven Barnes, in addition to numerous other appeals. She has argued twenty-six cases before the South Carolina Supreme Court, and the South Carolina Court of Appeals. On May 1, 2012, she joined the firm of Blume Norris & Franklin-Best, LLC as a partner, where she limits her practice primarily to capital litigation. Ms. Franklin-Best was recently appointed by this Court to represent Gary D. Terry in his capital habeas proceeding. She has attended the North Carolina Capital Defender program in December 2011; the Supreme Court Practice Institute (focusing on

the death penalty) at New York University in June 2010; Life in the Balance, National Legal Aid and Defender Association, Florida, 2011; Persuasion Institute, Advanced Training Program Workshop in Narrative Construction for Post-conviction Litigators in Ithaca, New York, September 11-13, 2009; Life in the Balance in Atlanta, Georgia, 2008; the National Criminal Defense College, Macon, Georgia, July 15-28, 2006; and the New York State Defender Association Basic Trial Skills Program, Rensselaer Polytechnic Institute, Troy, June 1-7, 2003.

Thus, although neither Ms. Paavola nor Ms. Franklin-Best have been admitted to practice in the court of appeals for not less than five years, they both have extensive capital experience and are otherwise qualified by their "background, knowledge, or experience" to represent Mr. Wood in this matter. 18 U.S.C. § 3599(d). Moreover, attorneys John H. Blume and Keir M. Weyble have offered to supervise, assist and monitor the case at all times. Mr. Blume and Mr. Weyble are nationally recognized experts and frequent lecturers and consultants on federal habeas corpus law, and both have extensive experience handling capital habeas cases before this Court and numerous other federal courts. Alternatively, either Mr. Blume or Mr. Weyble is willing to be appointed as third counsel on this case with the understanding that they will have limited time to work on the petition and will serve primarily to consult, assist, and supervise in the filing of the petition for writ of habeas corpus due to be filed on October 4, 2013, and in future proceedings before this Court.

III. CONCLUSION.

Wherefore, for the foregoing reasons, this Court should enter an order staying Petitioner's execution, and appointing Emily C. Paavola and Elizabeth Franklin-Best to assist Mr. Robertson in the preparation and filing of a timely petition for habeas relief. Alternatively, this Court

9:12-mc-00427-DCN-DIV Date Filed 12/07/12 Entry Number 1 Page 7 of 8

should enter an order staying the execution and appointing Ms. Paavola and Ms. Franklin-Best along with either Mr. Blume or Mr. Weyble as third counsel.

Respectfully submitted,

ELIZABETH FRANKLIN-BEST Fed. ID # 9969
Blume Norris & Franklin-Best LLC
900 Elmwood Ave., Suite 101
Columbia, SC 29201
(803) 765-1044

EMILY C. PAAVOLA Fed. ID #11488
Death Penalty Resource & Defense Center
900 Elmwood Ave., Suite 101
Columbia, SC 29201
(803) 765-1044

BY: s/Elizabeth Franklin-Best

12/7/2012.

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA

JOHN R. WOOD

Petitioner,

v.

WILLIAM BYARS, Commissioner,
South Carolina Department of Corrections
Respondent.

CIVIL ACTION NO. _____

I, Elizabeth Franklin-Best, hereby certify that I have this date served the Motion for Stay of Execution and Appointment of Counsel in the above-captioned case upon counsel for respondent via ECF.

s/Elizabeth Franklin-Best

12/7/12.

The Supreme Court of South Carolina

The State, Respondent,

v.

John Richard Wood, Appellant.

Appellate Case No. 2002-022661

The Honorable John W. Kittredge
Greenville County
Trial Court Case No. 2001-GS-23-03106

EXECUTION NOTICE

TO THE HONORABLE *WILLIAM R. BYARS, JR.*, DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS:

This is to notify you that the sentence of death imposed in the above case from which an appeal has been taken has been affirmed and finally disposed of by the Supreme Court of South Carolina and the remittitur has been sent to the Clerk of the Court of General Sessions.

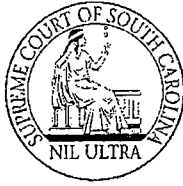
IT IS, THEREFORE, required of you by Section 17-25-370 of the Code of Laws of South Carolina to execute the judgment and sentence of death imposed on said appellant on the fourth Friday after the service upon you or receipt of this notice.

Let a copy of this notice be served immediately upon the appellant.


CLERK

Columbia, South Carolina
December 7, 2012

cc: S. Creighton Waters, Esquire
Robert Michael Dudek, Esquire
Emily C. Paavola, Esquire
David Tatarsky, Esquire
Governor Nikki Haley



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

November 26, 2012

Paul B. Wickensimer
305 E North St
Greenville SC 29601-2121

REMITTITUR

Re: John Richard Wood v. State
Lower Court Case No. 2005-CP-23-04737
Appellate Case No. 2009-118466

Dear Clerk of Court:

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

Very truly yours,

CHIEF DEPUTY CLERK

cc:

S. Creighton Waters
Robert Michael Dudek

The Supreme Court of South Carolina

John Richard Wood, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2009-118466

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition is denied.


C.J.
FOR THE COURT

Kittredge, J., not participating

Columbia, South Carolina

October 31, 2012

cc:

S. Creighton Waters

Robert Michael Dudek

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Larry R. Patterson, Circuit Court Judge

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NOV -5 2010

S.C. Supreme Court

JOHN RICHARD WOOD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

JOSEPH L. SAVITZ, III
Senior Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEYS FOR PETITIONER

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1.

The post-conviction relief court erred by ruling that defense counsel was not ineffective for failing to object to general prison conditions evidence purporting to show that prison was like “a city” with many amenities, since this evidence was inadmissible and improper because it did not focus on Petitioner’s character or the circumstances of his crime, and this Court years ago held such prison conditions evidence and circumstances of execution evidence was improper in *State v. Plath*.....6

2.

Defense counsel were ineffective at sentencing when they failed to object to the Solicitor’s closing argument that, if the jury sentenced Petitioner to life imprisonment, he would “rise in the hierarchy of the prison” and be the “leader” and “king” of a prison gang, as this argument was not supported by the evidence or any reasonable inference drawn therefrom and so infected the proceeding with unfairness as to make the resulting death sentence a denial of due process. 19

3.

Defense counsel were ineffective at sentencing by failing to secure the testimony of Petitioner’s sister, Connie, who would have pleaded for mercy on his behalf and for the sake of his infant son, and would have corroborated the limited expert mitigation testimony counsel did present. 22

CONCLUSION	30
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ISSUE PRESENTED

1.

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

2

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

3.

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

STATEMENT OF THE CASE

Procedural History

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

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

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

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

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

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

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

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

ARGUMENT

1.

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

Petitioner alleged he was ineffectively represented as follows:

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

Supp. App. 15.

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

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

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

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

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

App. 1882, l. 23-1883, l. 7.

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

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

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

“In order to serve breakfast we release each living unit individually. They go in and eat and come back, and there’s four or five that go out. Once breakfast is served then the inmates are released in a controlled environment to either go to work or school or whatever their situation is. We only allow inmates to move once an hour.” App. 1887, ll. 4-17.

Sligh told the jurors that at lunch time the inmates returned to their units and were fed and then went back to work. “The work day ends for the normal inmates late in the afternoon. They return to their units. They are fed supper.” App. 1887, ll. 14-24.

Sligh elaborated that inmates being “locked into their units” did not mean that they were locked inside their cells. “They can move around a little bit at that point. We have day rooms and we have televisions in a common area on each side of the wings.” Usually around 9:30 then they are locked into their cells for the rest of the night.” App. 1888, ll. 6-24.

Sligh confirmed to the solicitor that inmates were allowed to play cards, and basketball. They also read books. App. 1888, ll. 6-24. Each inmate was allowed to have “ten books or magazines, letters and pictures and that kind of thing.” App. 1890, l. 9-1891, l. 8.

Sligh testified that each inmate was permitted to have fifteen individuals on his visiting list at any one time. Visitors could be added or subtracted by the inmate. An inmate with full privileges was allowed eight visits per month. The visitations were Friday from 3:00 p.m. to 9:00 p.m. and Saturdays and Sundays “they usually do it by the first letter of the last name and you get one or the other, and it rotates like that through the month.” App. 1890, l. 9-1891, l. 8. Sligh acknowledged that inmates were permitted to hug their visitors “when they come in for the visit and when they leave,” and that children could sit in the lap of their inmate parent during the visit. App. 1891, l. 9-1892, l. 1.

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

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

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

Q. And I’m just going to ask you, the wardens at the Department of Corrections, they can handle these facilities, can’t they?

A. Absolutely. Yes, sir.

Q. And they sign their names on life and death decisions every day?

A. They make tough decisions every day.

Q. And they—and they’ll do whatever it takes, whatever it takes, to protect not only the inmates but their folks, including deadly force?

A. To protect the property, protect our employees and protect the inmates, yes, sir. That’s our mission.

Mr. Richey: And y’all do a good job. Thank you.

Witness: Thank you.

App. 1911, ll. 3-16.

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

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

Q. [A]re you aware of any strategic reason, strategic reason that an objection was not made to that line of [Jimmy Sligh's] testimony?

A. I don't know, but like I said, I'm not the one that's doing the strategy, but I don't know of any reason why. But I mean, John [Mauldin] could have had a reason, but I don't know.

Q. Okay. And if you spoke to him you don't remember what it was?

A. No, I don't remember. If I did, I don't know.

App. 3370, ll. 8-17.

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

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

App. 2191, l. 24 – 2192, l. 14.

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

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

The legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is of no concern of theirs.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), this Court clearly stated that the Department of Corrections controls the conditions of imprisonment and not the defendant. This Court also wrote it was highly improper for the defense to paint a picture of life imprisonment as slavery and capital punishment as “an ineffective instrument of deterrence, a crude device for expressing social approval, and even a counter-productive approach to control of crime.” State v. Plath, 313 S.E.2d at 626.

This Court also stated that “a jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison].” State v. Plath, 313 S.E.2d at 627. These clearly stated principles on the purpose of a capital sentencing phase trial have anchored our state’s capital jurisprudence for many years before Wood’s case was called to trial.

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

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

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

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

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

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

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

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

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

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

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

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

App. 2037, ll. 16-21. Moreover:

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

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

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

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

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

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

In the order of dismissal, the PCR judge wrote:

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

App. 3709. Also:

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

App. 3710, quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974).

A Solicitor's closing argument must be confined to the evidence in the record and reasonable inferences drawn from the evidence. Vasquez v. State, 388 S.C. 447, 698 S.E.2d 561 (2010). "A solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony." Randall v. State, 356 S.C. 639, 591 S.E.2d 608, 610 (2004). "The relevant question is whether the solicitor's comment so infected the trial with unfairness as to make the resulting conviction a denial of due process." State v. Northcutt, 372 S.C. 207, 641 S.E.2d 873, 881(2007), citing Donnelly v. DeChristoforo.

The Sixth Amendment to the United States Constitution guarantees a defendant effective assistance of counsel. In Strickland v. Washington, 466, U.S. 668 (1984), the United States Supreme Court established a two-pronged test to establish ineffective assistance of counsel, by which a PCR applicant must show (1) counsel's performance was deficient and (2) this deficiency prejudiced the defendant. See, also, Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a death penalty case, errors which occur during sentencing are much more likely to be prejudicial. See Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738, 746 (2004) ("If it is difficult to determine the precise impact of the solicitor's argument on the jury's deliberation of the sentence."); State v. McClure, 342 S.C. 403, 537 S.E.2d 273, 275 (2000) ("We note the evaluation of the consequences of an error in the sentencing phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all."); State v. White, 246 S.C. 502, 144 S.E.2d 481, 483 (1965) ("[I]n view of the absolute

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

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

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

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

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

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

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

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

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

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

He [Wood] was shooting at them, and they [the police] were shooting at him, and I was praying “Please don’t let them hurt my baby. Please don’t let them hurt my baby.”

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

Q. [Y]ou say that at the time of this incident you were about four and a half months pregnant?

A. Yes, sir.

Q. And I assume you have had your baby?

A. Yes, sir.

Q. And your baby is well?

A. Yes, sir.

App. 1468, ll. 9-15.

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

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

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

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

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

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

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

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

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

Q. [W]hen did you hear from any of the attorneys from Mr. Wood?

A. I never heard from any of them.

Q. And how about from their mitigation team?

A. No, you're the first one to ever call me about it. The only news I ever heard was through the news after that, via my sister.

Q. When I called what did you think? What thoughts were going through your head?

A. I was shocked. I thought you were calling and going to tell me my brother was being executed.

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

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

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

Q. Now, if you had been called before the jury, would you have informed them that if they spared John's life, you would have encouraged a relationship between John and his child?

A. Yes.

...

Q. Would you have done so because you believe your brother John has redeeming qualities which he could convey to his own son?

A. I believe so.

...

Q. Would you have asked the jury to spare your brother?

A. Yes.

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

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

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

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

App. 3699.

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

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

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

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

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

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

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

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

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

Rosemond v. Catoe, 383 S.C. 320, 680 S.E.2d 5, 9 (2009), quoting Wiggins v. Smith, 539 U.S. 510, 538 (2003) (interior quotation marks omitted). See, also, Council v. State 380 S.C. 159, 670 S.E.2d 356 (2008), and Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

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

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

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

CONCLUSION

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

Respectfully submitted,

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

Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellant Defense

ATTORNEYS FOR PETITIONER

This 5th day of November, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

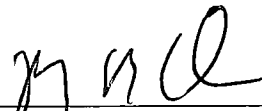
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix in this case have been served on S. Creighton Waters, Esquire and a copy of the petition for writ of certiorari and a copy of the appendix and supplemental appendix have been served on John Richard Wood, #6005 at Leiber Correctional Institution this 5th day of November, 2010.

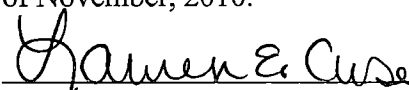


Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of November, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

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Certiorari to Greenville County
Honorable Larry R. Patterson, Circuit Court Judge

S.C. Supreme Court

THE STATE,

Respondent,

v.

JOHN RICHARD WOOD,

Petitioner

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STATEMENT OF THE ISSUE ON APPEAL

I. WERE COUNSEL INEFFECTIVE FOR EXPRESSLY DECIDING NOT TO OBJECT TO CONDITIONS OF CONFINEMENT EVIDENCE, WHERE GIVEN THE LEGAL LANDSCAPE AT THE TIME OF TRIAL THEY REASONABLY DECIDED TO JOIN THE ISSUE, AND WHERE IN ANY EVENT THERE WAS NO PREJUDICE?

II. WERE COUNSEL INEFFECTIVE FOR NOT OBJECTING TO PROSECUTION ARGUMENT REGARDING APPLICANT'S LIKELY PLACE IN PRISON HIERARCHY, THAT WAS BASED IN A COMMON SENSE INFERENCE FROM EVIDENCE IN THE RECORD AND DIRECTLY RESPONSIVE TO DEFENSE EVIDENCE ON THE SUBJECT?

III. WERE COUNSEL INEFFECTIVE FOR NOT CALLING APPLICANT'S SISTER, WHERE THEY MADE EFFORTS TO CONTACT HER BUT THE SISTER DID NOT RESPOND AND DISPLAYED NO INTEREST IN HER BROTHER'S PLIGHT?

STATEMENT OF FACTS

It was undisputed at trial that Applicant repeatedly shot and killed State Highway Patrolman Eric Nicholson with a Glock 9mm. Along with his pregnant girlfriend, Appellant then led police on a high speed chase in which he shot another officer, took multiple shots at many other deputies, ran civilians off of the road, and commandeered a utility pickup truck from its driver to continue his flight. The chase finally ended when Applicant was shot by police in a farmer's field.

A. The facts of the incident

In the opinion on direct appeal, this Court summarized the facts as follows:

Trooper Eric Nicholson, while patrolling I-85 in the Greenville area, called to inform the dispatcher that he was going to stop a moped. After Nicholson activated his lights and siren, appellant, who was riding the moped, did not immediately stop. Two other troopers subsequently heard Nicholson scream on the radio and they rushed to the scene whereupon they found Nicholson had been shot five times. The driver's side window of Nicholson's car was completely shattered. Both of his pistols were secured in their holsters. Eight shell casings were found at the scene.

There were several eyewitnesses to Nicholson's murder. Witnesses recalled seeing a moped being followed by a trooper with activated lights and siren. The moped took the off-ramp *138 to leave I-85 and then took a right down a frontage road. As the two vehicles got on the frontage road, the trooper sped up to get beside the moped and then veered to the left to stop at an angle against a raised median in order to block the moped's progress. The moped came to a stop close to the driver's side window.

Immediately upon stopping, appellant stood up over the moped and raised his arm towards the driver's side window of Trooper Nicholson's car. Some witnesses saw a weapon in appellant's hand and heard gunshots. After firing several shots in the driver's side window of Nicholson's car, appellant backed the moped up, turned it around, and fled at a high rate of speed.

After the shooting, some concerned citizens (the Wheelers) chased appellant. Appellant entered a parking lot and then jumped into the passenger's seat of a Jeep, driven by a woman. The Wheelers subsequently called in the tag number to police.

Once law enforcement officers began chasing the Jeep, appellant opened fire

on the pursuing officers. One officer was struck in the face by a bullet fragment. He survived the injury. After subsequently hijacking a truck, appellant was eventually stopped and taken into custody.

The jury convicted appellant of murder and possession of a weapon during the commission of a violent crime and sentenced him to death.

State v. Wood, 362 S.C. 135, 137-138, 607 S.E.2d 57, 58 (2004).

B. The sentencing phase case

The state presented fellow officers and widow Misty Nicholson to testify about their relationship with Eric “Tigger” Nicholson. {R. 1864-77; 1950-58}. Deputy Charles Blackburn testified that during his stay in the hospital, Appellant described being shot as “the coolest feeling in the world. It’s like being turned off like a light.” {R. 1931-32}. The utility truck driver testified about having his truck commandeered at gunpoint by Applicant, and Deputy Mike Grant described being shot by Applicant during the pursuit in Anderson. {R. 1935-46}. Jimmy Sligh from the state Department of Corrections described conditions of confinement in prison. {R. 1878-1922}.

The defense first called social worker Jeff Youngman to testify about Applicant’s strict but inconsistent upbringing. {R. 1964-2025}. Greenville County Detention Officer Ted Kinsler introduced videotapes of Applicant’s interaction with guards at the county jail. {R. 2026-27}. Former warden James Aiken theorized that Applicant would have not trouble adapting and could be easily contained by the Department of Corrections. {R. 2030-49}. Finally, psychiatrist Dr. Donna Schwartz-Watts diagnosed Applicant with bipolar disorder not otherwise specified, and paranoid personality disorder. {R. 2054-2101}.

The state called Dr. Pratap Narayan, who disputed Dr. Schwarz-Watts’s testimony and discussed his diagnosis of antisocial personality disorder. {R. 2136-62}.

ARGUMENT

I. COUNSEL WERE NOT INEFFECTIVE FOR EXPRESSLY DECIDING NOT TO OBJECT TO CONDITIONS OF CONFINEMENT EVIDENCE, WHERE GIVEN THE LEGAL LANDSCAPE AT THE TIME OF TRIAL, THEY REASONABLY DECIDED TO JOIN THE ISSUE, AND WHERE IN ANY EVENT THERE WAS NO PREJUDICE.

Applicant contends that counsel were ineffective for failing to object to the prosecution's introduction of evidence of conditions of confinement in the sentencing hearing of this case.

A. Facts relevant to the issue

During the defense opening statement in sentencing, defense counsel Mauldin argued that "people say that life without parole is perhaps a more punishing penalty", and reminded the jury of the "girl over in Union who drowned her children", pointing out that "every day she lives with that guilt in her miserable imprisoned life". Defense counsel stated Applicant would suffer "every day . . . see[ing] . . . the mark of sin emblazoned on his own face." {R. 1856 II. 4-13}.

During the State's sentencing phase case, the solicitor indicated his intent to call Jimmy Sligh from the South Carolina Department of Corrections. The solicitor noted that Sligh would be called to testify as to "what life in prison without parole means", as well as "the difference between life in prison without parole versus the punishment of death". The solicitor argued the evidence was relevant since the United States Supreme Court had held the jury needed to know a life sentence was without parole.

The court then inquired of the defense whether it had an objection. After a brief discussion with the Court, the transcript reflects that defense counsel had an off-record conversation with co-counsel. Lead counsel Mauldin then told the court:

DEFENSE COUNSEL: If our understanding of the summary proffer is that a Department of Corrections personnel will testify as to conditions of life without

parole, if that's what this really is being offered as, then we're not going to enter an objection at this point to that witness.

{R. 1876-77}. The trial court then found the evidence relevant and admissible.

Jimmy Sligh was then called by the solicitor. On direct, Sligh testified about custody levels, security classifications, the prison cafeteria, the prison laundry, work opportunities in prison, the day to day routine in general population, recreational opportunities, cell sizes, visitation and communication with the outside world, religious opportunities, violence in prison, the more limited opportunities for visitation, recreation, and education on death row, and the lesser amount of violence on death row. **{R. 1878-1904}**.

On cross, the defense elicited that if sentenced to life Applicant would be in a high security environment, with the inmates convicted of violent crimes. The defense pointed out Applicant would not be allowed to work outside the facility, and that he would always be classified at the highest level of security. Sligh testified that there are gangs in prison, that life in general population is "a tough place with tough people", that there was no assurance one would wake up in morning, and that prison officials are authorized to use deadly force on inmates. **{R. 1905-10}**.

During its sentencing phase case, the defense called former SCDC Warden James Aiken. Aiken testified that he had no concerns about Wood and stated Wood was not likely to be a predator in prison. Aiken stated that death row was a far more preferable and safer place to be than general population, because a death row inmate has his own cell and does not have to worry about security threats from other inmates. He noted there were a lot of "predator groups" in general population, and that prison was a very dangerous place. He theorized that Applicant would be more likely to be subjected to violence in prison from predators given his smaller size and older age. Aiken concluded

that SCDC would have no problem safely containing Wood for the rest of his life. Finally, Aiken saw nothing that would indicate Applicant would ever rise in the *de facto* hierarchy among inmates. {R. 2033-44}. The solicitor had no cross.

In closing, defense counsel argued that prison was not “soft”; that Applicant would die in prison after spending the rest of his life in a small cell under the highest security classification, and that prisons contain violent, dangerous people. {R. 2205-08}.

At PCR, defense counsel Mauldin initially testified on direct by the Applicant that he thought Sligh was only going to testify as to the specific adaptability of Wood personally, and the Applicant was already planning to call Aiken on that issue. Mauldin claimed he was completely surprised when Sligh ventured down the road of conditions of confinement. {App. 3044-50}. However, on cross by the State, Mauldin was shown the transcript reflecting the defense was clearly aware Sligh was going to testify to conditions of confinement, but expressly decided on the record not to object after an off-the-record discussion among the defense lawyers. Mauldin then stated he could not recall what he and the other attorneys were discussing during the off-the-record moment, and could not recall the strategic basis for the decision not to object to evidence on conditions of confinement. Mauldin admitted, though, that the defense lawyers would have been discussing whether as a strategic matter to object or not during the off-the-record conference. He admitted the defense obviously made a “conscious decision” to allow the testimony, although in hindsight he now believed that decision was error. {App. 3108-14}.

Defense counsel Jim Bannister likewise could not specifically remember what the defense lawyers were discussing during the off-the-record conference, but also agreed they would have been discussing as a strategic matter whether to object or not to Sligh’s testimony on conditions of

confinement. {App. 3306-07; 3309-11}. Richey's testimony was similar to Bannister's in that he could not recall the discussion, but it would have been strategic. {App. 3370; 3373-74}.

The PCR Court found deficiency but no prejudice under Strickland, noting that both sides fully explored the issue in a case where the evidence in aggravation was overwhelming and the mitigation weak. {App. 3712-25}.

B. Plath, Kelly, Bowman, Burkhart, and Bryant

The reason this issue is problematic stems from four South Carolina cases – one that existed prior to this case and three that were handed down after Applicant's trial.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984), this Court *affirmed* a death sentence despite issues related to the State's cross-examination and evidence responsive to a defense presentation "[demonstrating] the permanence and deprivation entailed in life imprisonment". Plath, 281 S.C. at 12, 313 S.E.2d at 626. In doing so, the court rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy", or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss". Plath, 281 S.C. at 14, 313 S.E.2d at 626-27. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment", and concluded that "determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury." Plath, 281 S.C. at 14-15, 313 S.E.2d at 627. However, the Plath court concluded the State's challenged questioning was only proper response to the defense presentation which brought up the subject matter in the first place. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28.

Nearly two decades later, and a month *before* Applicant's trial, the United States Supreme

Court issued Kelly v. South Carolina, 534 U.S. 246 (2002), which so broadly defined “future dangerousness” that it effectively ended years of litigation in South Carolina over whether a capital inmate could have the specific charge that a life sentence would be without parole. Indeed, shortly after Kelly, the General Assembly passed a law requiring life without parole to be charged in all death penalty cases. 2002 Act. No. 278 § 1. Regardless, Kelly as a practical matter ensured Applicant at trial would get a charge that his life sentence would be without parole. It was in this new legal setting that Applicant went to trial a mere one month later.

Three years *after* Applicant’s trial, this Court decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). There, the defendant contended that the solicitor’s questioning was improper about movies, television, and books in prison. This Court found the issue was not preserved, but added a cautionary instruction to both sides:

We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005).

Two years after that, and some five years after Applicant’s trial, this Court addressed a case where the solicitor preemptively called a witness who testified as to the conditions of confinement for a inmate serving life. State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007). In Burkhardt, *the defense objected* to the state’s evidence. Justice Moore was joined by Justice Waller and wrote the

opinion of the Court. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence involving conditions of incarceration, the process of execution, or the deterrent effect of capital punishment was inadmissible. Burkhart, 640 S.E.2d at 453. Justice Moore noted that while the case at issue was tried before Bowman, its result was consistent with the “long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime”. Id. Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement “invited the jury to speculate about irrelevant matters” and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-25(C)(1) (2003).

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that “once improper evidence of any kind injects an arbitrary factor into the jury’s consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1)”. Burkhart, 640 S.E.2d at 454.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. The Chief concluded that the issue was fully joined by both sides and used by the defendant to his advantage. Finally, the Chief noted that the standard in § 16-3-25(C)(1) was merely a recitation of the Eighth Amendment requirements, and coextensive with the Eighth Amendment – which is subject to a harmless error analysis. 640 S.E.2d at 454-57.

Subsequently, this Court decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 58 (2007), where the defense called an expert that testified in great detail as to the “dismal conditions of prison life in general”. The Court reiterated that *defense* evidence on conditions of confinement is just as

improper as State evidence on the subject.

C. Counsel was not deficient in agreeing to and entering conditions evidence, given they were operating in a legal landscape where *Kelly* had been decided one month before trial, and *Burkhart* was years from issuance.

Respondent would first assert that counsel were not deficient for allowing evidence of conditions of confinement, and this Court can affirm for that reason alone. Rule 220(c), SCACR (court may affirm for any reason appearing in the record). This case was tried one mere month after Kelly but before Bowman, Burkhart, and Bryant were issued. Counsel was operating in one of the vanguard cases after LWOP became a mandatory charge in every case, and it is apparent counsel was strategically using the burdensome “without parole” aspect of that sentence as the centerpiece of the defense strategy. Since neither Bowman, Burkhart, or Bryant had been issued yet, counsel’s strategy was reasonable.

Unfortunately, none of the three lawyers could remember their reasoning. Fortunately, we have a transcript where the solicitor specifically set forth his intent to introduce conditions evidence, followed by an express notation that defense counsel were conferring, followed by counsel Mauldin’s agreement to allow the conditions evidence. {R. 1876-77}. All the lawyers agreed at PCR that they would have been discussing strategy as to the solicitor’s proffer during the notated break. {App. 3108-14; 3306-07; 3309-11; 3370; 3373-74}. Thus, it is undisputable that a strategic decision was made to allow the evidence; questions remain as to the precise strategy discussed and its reasonableness.

Fortunately, the strategy is apparent from the defense’s argument and evidentiary presentation. As noted before, in sentencing opening, defense counsel argued life without parole was a worse penalty as it involved a lifetime of suffering. Defense counsel called James Aiken who

testified extensively as to a dangers and deprivations of life without parole. {R. 2033-44}. In closing argument, defense counsel brought it all home:

DEFENSE COUNSEL: I think I asked enough of you – to be pretty satisfied that the world outside this courthouse believes life without parole is a serious penalty. I mean, I've never heard such testimony from the government. It almost made me want to go write my Senator and say what the heck is going on here? But I'll talk to you a minute about how deceiving that was.

A plea for life in prison is not a plea for leniency. And if somehow out of this record of this case you have somehow come to that conclusion, then there is nothing I'm going to be able to do to change your mind. It is beyond my comprehension that the government is now telling you as jurors when you are faced with perhaps the most important decision you will ever make that life in prison without parole is not a serious penalty. It's – that is almost scandalous.

We are dealing, folks, with the most – the two most serious penalties that mankind knows of. Bar none. You execute them or you banish them forever. I mean, that's – I mean, what else are we going to do? So if they're saying we've only got one serious penalty and that's the death penalty, then we are really in serious trouble. That is real serious. We ought to go down to Columbia and start pounding the doors if that's how bad it is.

* * *

When Mr. Sligh came to the witness stand I was sitting there trying, scratching my head, why in the world are they bringing in the prison guy? That's kind of unusual. It's kind of unusual for the prosecutor to be bringing in somebody from the prison. That'd be what I'd do. And I did. But I figured, that's kind of a surprise.

They called him because they knew that we had the jail videos. They called him because they knew that John Wood had complied and done everything he was supposed to do while he was in jail. That's why they called that guy. That's why they called that witness. They wanted to make jail sound soft.

They – but I'll tell you a couple of things that I thought were important about his testimony, come to think of it. His testimony was that in this soft prison that the prosecutor gives you, his testimony is that three inmates will be living in a space half the size of that jury box. That's not my words. Those came from the witness stand. He also said that when a person is convicted of murder and sentenced to life in our State they go into the prison system classified a number three maximum security, which is the highest classification for security purposes that there is, and they die in prison when classified a number three maximum security. It don't matter how good

he is. It don't matter how good they behave or what they do or how much they beg. Their security level never changes.

* * *

We brought Jim Aiken to you. And I'll tell you what – this is one of the last comments I want to make about this jail business – Jim Aiken, I think Mr. Ariail said he was a veteran of the – Jim Aiken has an impeccable reputation, an illustrious career. In fact, when I put – when Rodney Richey questioned Jim Aiken and said, “No further questions. Answer any questions the prosecutor has for you,” no questions.

Mr. Ariail knew better than to question Jim Aiken, because Jim Aiken had concluded the following things that Mr. Ariail was not going to be able to assault. He said that John Wood could be housed in the prison without causing any risk of any harm to any staff. He said that the prisons had the facilities, the staff, the security systems and the authorization of law to control inmates. He said that John Wood would be assigned to a cell, in fact, the other fellow told you about that too. He said that prisons contain violent, dangerous people for long periods of time. He said that John Wood could and would be placed in closest confinement in maximum security behind bars and fences with guns on the corner regardless of how he acted. And the final thing was that John Wood had no history of violence against any person in prison in his prior – the federal time he served or in the community prior to December the 6th.

And, you know, that brings me to the point, how does the prosecutor reconcile his speech to you about an inherently evil person and then also say that this person is adaptable to prison life with no questions for the witness: I mean, how does he – is he claiming this person has a – is a future danger? Because if he is, he ain't saying it.

{App. 2198; 2205 I. 23 - 2206 I. 23; 2208 I. 3 - 2209 I. 7}.

It is apparent that counsel's strategy was twofold: (1) to show that life in prison until death was particularly onerous and thus sufficient punishment without having to hasten it with the death penalty, and (2) to highlight Applicant's prison adaptability while at the same time belittling the solicitor's presentation as overreaching.

Of course, in reviewing deficiency, “every effort [must] be made to eliminate the distorting effects of hindsight”, and one must “evaluate the conduct from counsel's perspective at the time”.

Strickland, 466 U.S. at 689. These strategies were not deficient when one considers the time period and the then-existing state of the law in which counsel operated. Kelly v. South Carolina, 534 U.S. 246 (2001), which ended the debate about charging LWOP and essentially required such charges in every case, had come out just one month before Applicant's trial, and both sides in this trial were obviously deciding how to best operate in this new legal landscape.

Admittedly, Plath was on the books since 1984, in which the Court had disapproved of defenses based on conditions of confinement. However, in Plath the Court did NOT call such evidence an "arbitrary factor", but simply held that it was irrelevant. But, like any irrelevant evidence, it held that since one side elected to put it in, the other side had the right to respond. The "arbitrary factor" determination did not come until later, in Burkhart, which came out long after Applicant's trial. Many times in trial parties try something by consent in which one or both sides could have objected but did not, and unlike Burkhart, there was nothing about Plath that would indicate the evidence was "arbitrary". Indeed, Plath *affirmed* on that issue in a death case even though the sentencing phase was full of conditions evidence far more than the case at issue. Added to this is the fact that Kelly had changed the rules and the "either/or" choice addressed in Plath was a statutory and legal framework different from the one counsel faced. Unlike Plath, the jury was now going to know about the absence of parole.

Thus, counsel reasonably decided that the many physical and psychological difficulties of life without parole so far outweighed and inmate's small comforts or recreation that the issue inured to their benefit. Particularly in the time period merely one month after Kelly and prior to Burkhart, this judgment was reasonable to use the LWOP charge to their advantage in this manner, given the amount of evidence in this very record that the defense was able to bring out on the subject.

Indeed, counsel admitted he “did not have the benefit of [the] wisdom” of Burkhart when he made his decisions at trial. {App. 3046}. Strickland plainly does not require counsel to anticipate changes and developments in the law, and thus counsel is not required to have foreseen that the state supreme court would subsequently call conditions evidence an “arbitrary factor”. See Schneider v. Day, 73 F.3d 610 (5th Cir. 1996) (holding that while Victor is retroactive, counsel cannot be ineffective for failing to foresee changes in the law subsequent to the Petitioner’s trial).

Moreover, it is worth pointing out that if the “arbitrary factor” nature of conditions evidence was a self-evident premise necessarily arising from Plath, then this Court itself would have reversed back in 2002 when it did its statutory review during the direct appeal. Thus, counsel cannot be faulted for failing to see this subsequent change in the law.

D. Regardless of whether conditions evidence is an “arbitrary factor”, a prejudice analysis is necessary because the present issue is before the Court through the vehicle of ineffective assistance under *Strickland*.

As an initial matter, the State would respectfully assert that Chief Justice Toal and Justice Burnett in Burkhart correctly analyzed S.C. Code Ann. 16-3-25(C)(1) by finding it coextensive with the Eighth Amendment and Due Process Clause – for which a prejudice analysis is appropriate, like any constitutional claim. See State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450, 455-57 (2007) (Toal, C.J. dissenting). The mandatory appellate review provisions of S.C. Code Ann. 16-3-25(C)(1) are a virtual copy of the Georgia statute that was held sufficient as a modern death penalty structure in Gregg v. Georgia, 428 U.S. 153 (1976). Gregg was only concerned with the *fact* of meaningful appellate review, noting that the provision “serves as a check against the random or arbitrary imposition of the death penalty”, which would violate the Eighth Amendment. Id. at 205-06. Nothing about Gregg indicates the provision was intended to establish new substantive standards for

alleged error in the imposition of the death penalty. Indeed, since the provision was meant to avoid Eighth Amendment concerns and is a copy of the Georgia statute, there is nothing about the provision that indicates it was legislatively intended to create a new class of undefined or unlisted “factors” for which there is no prejudice analysis unlike every other Eighth Amendment error.

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

There is simply no reason to make conditions evidence some sort of “super-error” which defies a normal analysis. Indeed, the statute itself speaks of “influence” of an arbitrary factor, not merely “presence”.

Regardless, even if conditions evidence is an “arbitrary factor”, a normal Strickland analysis

¹ See Ramdass v. Angelone, 530 U.S. 156, 170 (2000) (“Evidence of potential parole ineligibility is of uncertain materiality, as it can be overcome if a jury concludes that even if the defendant might not be paroled, he may escape to murder again, he may be pardoned; he may benefit from a change in parole laws; some other change in the law might operate to invalidate a conviction once thought beyond review; or he may be no less a risk to society in prison.”); People v. Rowland, 841 P.2d 897, 921 (Cal. 1992) (cross and argument on conditions evidence “comprised an unproblematic argument to the effect that life imprisonment without possibility of parole was not the appropriate punishment in this case”) (issue also rejected in federal habeas corpus in Rowland v. Cullen, 2010 WL 3629693 (N.D.Cal. 2010) (unpublished); State v. Rhines, 548 N.W.2d 415 (S.D. 1996) (“In this context, the jury’s questions about work release and “distraction from punishment” do not show that they considered irrelevant or arbitrary factors in rendering a verdict. Their questions directly relate to conditions of confinement under a sentence of life without parole. Prison life was an appropriate topic for discussion when weighing the alternatives of life imprisonment and the death penalty.”); People v. White, 870 P.2d 424 (Colo. 1994) (“with respect to any other evidence of mitigation, the district court considered: (1) the testimony offered by White and other inmates regarding prison conditions at Centennial”).

necessarily still applies to a claim that counsel did not object to its introduction. Unlike Burkhart, Bowman, or Bryant, which were direct appeals, this case is in PCR, and on collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel). Of course, the familiar standard in Strickland v. Washington that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice – a reasonable probability of a different result at trial.

In the sentencing phase, prejudice is phrased somewhat differently. In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the South Carolina Supreme Court described it as “a reasonable probability that, absent [counsel’s] errors, 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,” citing Strickland.

There are only limited exceptions where prejudice is presumed under Strickland – none of which apply here. See Nance v. Ozmint, 367 S.C. 547, 626 S.E.2d 878 (2006) (rare three exceptions are: (1) denial of counsel at critical stage; (2) failure of counsel to subject case to meaningful adversarial testing; and (3) extremely prejudicial circumstances surrounding trial where no lawyer could be effective). Nance concluded that “[a]bsent these narrow circumstances of presumed prejudice under Chronic, defendants must show actual prejudice under Strickland.” Id. at 880.

This conclusion is consistent with the language of Strickland itself, despite Burkhart’s view of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered

final – during collateral attack concerns of finality are of “profound importance”. See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, this Court held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial – despite the fact that prior cases had not engaged in a prejudice analysis. Franklin noted the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74; 552 S.E.2d at 723-24. Finally, the Court noted that it and the United States Supreme Court have repeatedly held that “a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*”. Franklin, 346 S.C. 563 at 575 n.8, 552 S.E.2d at 725 n.8 (emphasis original).

And that last statement precisely raises the final point why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. While Burkhart phrases its issue as a statutory one – that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. § 16-3-25(C)(1) – Applicant here in PCR is raising, as he must, a *constitutional* issue – that he was effectively denied his Sixth Amendment right to counsel based on counsel’s omission. Applicant must filter his statutory claim through the

constitutional one – as a fundamental and legal matter, the claim he pled is constitutional. As Franklin specifically notes, this overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis – – like any other constitutional claim.

E. There was no prejudice.

It is clear that reversal is not warranted. Again, in the sentencing phase, Applicant must show “there is a reasonable probability that, absent [counsel’s] errors, 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.” Jones, 504 S.E.2d at 823-824 (citing Strickland).

Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson; however, Applicant’s subsequent wild chase provides an incredible amount of further aggravation – where Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record and had been in prison before, and the victim impact evidence in this case was particularly moving – especially from Trooper Nicholson’s widow and his partners on the Highway Patrol. Compared to this we have limited mitigation – not through any fault of counsel – with no family members, and relatively mild mental health testimony with no findings of psychosis or delusion at the time of the offense itself. Indeed, there was evidence in rebuttal that Applicant was anti-social.

As to the conditions of confinement evidence itself, the defense was able to score as many points if not more as the prosecution. Through cross of Sligh and presentation of James Aiken, the

defense elicited how tough prison is, how Applicant would be far more susceptible to danger in general population, and how Applicant would likely be at the mercy of predator groups inside the general population of prison given his small stature and older age. The issue was fully joined by both sides and both sides were able to make headway.

Given this relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there would be a reasonable probability of a different result. Had counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well.² In his brief, Applicant makes much of the fact that the jury went into a second day of deliberation and required an Allen charge – however, he fails to mention that the jury requested to rehear the testimony of Dr. Narayan, Dr. Schwartz-Watts, and the social worker Jeffrey Youngman – NOT the testimony of Jimmy Sligh or James Aiken. The jury's deliberation on those points does nothing to show that the conditions evidence was central.

Given the overwhelming evidence in aggravation and the limited evidence in mitigation, had both the State's and defense evidence of conditions of confinement been excluded, Strickland prejudice still would not be established.

II. COUNSEL WERE NOT INEFFECTIVE FOR NOT OBJECTING TO PROSECUTION ARGUMENT REGARDING APPLICANT'S LIKELY PLACE IN PRISON HIERARCHY, AS IT WAS BASED IN A COMMON SENSE INFERENCE FROM EVIDENCE IN THE RECORD AND DIRECTLY RESPONSIVE TO DEFENSE EVIDENCE ON THE SUBJECT.

Applicant next contends counsel were ineffective for failing to object to prosecutorial

² It is worth pointing out that not only would James Aiken's description of the horrors of life in prison be off limits, but his usual spiel about the capability of SCDC to effectively secure and contain Applicant regardless of how he behaves would be improper as well. See Morva v. Commonwealth, 683 S.E.2d 553, 564-666 (Va. 2009) ("The generalized competence of the Commonwealth to completely secure a defendant in the future is not a relevant inquiry.").

argument in the sentencing phase that since the most despised thing to an inmate in prison is the “cop that put him there”, Applicant would be a “king” or “leader” in prison, and would rise in the hierarchy of inmates. {R. 2189-92}.

Of course, a solicitor in argument must stay within the record and its reasonable inferences. State v. Huggins, 325 S.C. 103, 481 S.E.2d 114 (1997) (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so). Here, the solicitor’s argument was within the evidence and inferences. During the defense sentencing phase case, Applicant elicited from his prison expert James Aiken that Applicant does not fit the profile of a predator in prison, and that although there is a hierarchy among inmates, “there is nothing that would indicate [Applicant] would ever be allowed into an unofficial hierarchy in a prison setting”. {R. 2043}.

Obviously, the solicitor was merely raising his own contrary inference in response to this defense evidence, by arguing the common sense point that a “cop killer” might very well be highly regarded by his fellow criminals, of which all most likely had their freedom taken away by law enforcement. See generally, e.g. State v. New, 338 S.C. 313, 526 S.E.2d 237 (Ct. App. 1999) (solicitor’s argument that testifying accomplice was credible and had nothing to gain by testifying as he would be considered a “rat” in prison was permissible and based in the reasonable inferences of the record, and was a matter of common knowledge within the permissible bounds of advocacy). See also Darden v. Wainwright, 477 U.S. 168, 181 (1986) (rejecting claim of improper argument in part because it was invited response to defendant’s argument). Indeed, at PCR, counsel Mauldin stated he still did not think he would object to the argument today. {App. 3107}. Since the argument was permissible, counsel could not have been deficient nor Applicant prejudiced.

Even if the comment was error, there was no prejudice. One mere comment in the context of an entire sentencing hearing for an extremely aggravated crime with limited mitigation would not have “so infected the trial with unfairness as to make the resulting conviction a denial of due process”. Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

III. COUNSEL WERE NOT INEFFECTIVE BECAUSE THEY DID NOT CALL APPLICANT’S SISTER, WHERE THEY MADE EFFORTS TO CONTACT HER BUT THE SISTER DID NOT RESPOND AND DISPLAYED NO INTEREST IN HER BROTHER’S PLIGHT.

Applicant finally contends his counsel was ineffective for not calling his sister Connie Jantz ask for mercy and testify about Applicant’s infant son.

At trial, no family members testified on Applicant’s behalf. During the defense case in sentencing, social worker Youngman testified that in doing his investigation he talked to Applicant’s sister Elizabeth (or “Betsy”) and Applicant’s wife Karen McCall, but he did not talk to Connie. When asked why, Youngmen testified that he thought Jantz lived in Maryland, but no one could locate her because “none of the family knows where she’s at”. Youngman admitted that Applicant’s mother and Betsy were both codefendants with Applicant in the federal fraudulent checks case. {R. 1991-92}. Youngman stated he had not actually talked with the mother because she would not cooperate with him, and had to rely on information from the mitigation investigator. {R. 1996-97}.

During her direct examination, Dr. Schwartz-Watts testified that she made “numerous attempts” to speak with Applicant’s parents, but after they spoke with the mitigation investigator, they changed their phone number and refused further contact with the defense. Dr. Schwartz-Watts did meet with Betsy and Karen McCall. {R. 2067-68}.

At PCR, Connie Jantz testified that she first learned of Applicant’s arrest from a reporter who

contacted her in Harper's Ferry, WV. She testified that she never heard from any member of the defense team until she was contacted by PCR counsel. {App. 2785-87; 2790}.

However, on cross, Ms. Jantz admitted: (1) that when she moved to Harper's Ferry she did not want their mother to know where she had gone; (2) that she was living in Harper's Ferry when the trooper was murdered; (3) that she then moved to Knoxville, Maryland, and she did not like to give out her address due to the threat of her mother finding out where she was; (3) that she did not talk to her family about the case and only talked to Betsy a little about the case the day after the murder; (4) that she did not even know when Applicant was convicted until she later found news articles; (5) that she did not attempt to contact Applicant in prison; (6) that her only correspondence with Applicant was a few years later while he was in custody; and (7) that while she was not on speaking terms with her sister, her sister Betsy knew she was in Maryland and their mother could have contacted her through family. {App. 2797-2802}. On redirect, Ms. Jantz stated that she in fact had moved a little after Applicant was arrested {App. 2803}, and on recross, Ms. Jantz admitted she never attempted to contact the defense team because she was in shock. {App. 2805}.

Dr. Donna Schwartz-Watts testified at PCR that she remembered defense counsel Mauldin tried to contact Jantz but was unable. She further noted that Applicant would not cooperate with her interview, would not allow a video, and admitted he faked symptoms of mental illness. She stated it was very difficult to get a history from Applicant. {App. 2826; 2845}.

On cross, Dr. Schwartz-Watts noted she had worked with Mauldin before, and that he was very organized about preparing mitigation. She stated there would be periodic meetings that would include her, the defense team, and the mitigation investigator Paige Tarr. She also agreed that she had plenty of notice and time to prepare, but that it was just difficult to find family members despite

the fact that the mitigation investigator and Mauldin tried their best. **{App. 2856-59}**.

Mauldin testified that efforts were made to contact Connie Jantz. He stated that no response was made to letters sent to the Harper's Ferry address, and that the phone was disconnected. In seeking assistance, the defense team advised sister Betsy that they were unable to contact Jantz. Moreover, Paige Tarr was told to contact all mitigation witnesses she could. **{App. 3027-31}**.

On cross, Mauldin testified that his defense team included both co-counsel, as well as a private investigator, the social worker Jeffrey Youngman, attorney Jeff Bloom for jury selection, and Paige Tarr for mitigation investigation. Mauldin testified that he had worked with Paige Tarr before and she was very experienced and competent. **{App. 3053-57}**. Mauldin stated he was of course aware as a capital litigator of the need to develop the defendant's history, and he was concerned at the difficulty they were having in locating such a history despite the effort being made. Mauldin did not remember why Applicant's sister Betsy Martinez was not called as a witness, although he stated he "must have had reasons then". As far as subpoenaing Jantz, Mauldin did not think that forcing a family member to come to SC to testify for her brother was a reasonable way of trying to get favorable mitigation testimony. **{App. 3093-3104; 3115-18}**.

Jim Bannister recalled one sister did not want to participate, and the defense could only get in touch with one of the sisters. He also stated that if Betsy was the sister present during trial, they made a specific decision not to call her, as they did not think she would be favorable. **{App, 3292-94; 3297; 3336-41}**. Rodney Richey testified that in his experience working with Mauldin and Dr. Schwartz-Watts they worked well together and were on the same mission, and that Paige Tarr was an experienced mitigation investigator. **{App. 3371-72}**.

In its Order, the PCR Court specifically found that Ms. Jantz was attempting to avoid contact

with her mother by hiding her whereabouts, and despite being aware that Applicant was in trouble, Ms. Jantz made no effort to contact Applicant or the defense team. The PCR Court found counsel's efforts to contact Ms. Jantz were reasonable, given that they attempted phone calls, letters, and contact through Applicant's other sister Ms. Martinez, all to no avail. The Court also found reasonable counsel's decision that a forcible subpoena to Jantz was hardly an effective way to get favorable mitigation testimony. {App. 3699-3704}.

As shown by the record cites set forth above, the PCR court's decision has support in the record and in the law. See, e.g. Timberlake v. Davis, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features."). Moreover, the PCR Court also correctly found no prejudice, given that much of the background was introduced at trial, including that Applicant had a son, and that this crime was extremely aggravated. It is hard to see prejudice from the absence of a sister who had little recent contact with her brother, and who did not even have custody of the son at the time of trial anyway {App. 2799. 3297}. Indeed, this is the same son that Applicant callously took along *in utero* during his high-speed chase and duel with police to the death, and it is only by grace or luck that his unborn son was not struck by the fusillade of police defensive gunfire set in motion by Applicant's actions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari should be denied.

Respectfully submitted,

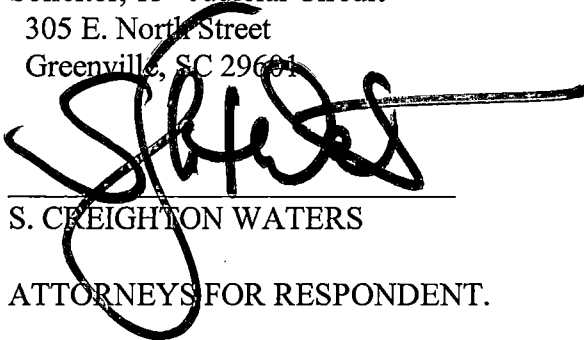
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S. CREIGHTON WATERS

ATTORNEYS FOR RESPONDENT.

March 9, 2011.

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

Certiorari to Greenville County
Honorable Larry R. Patterson, Circuit Court Judge

THE STATE,

Respondent,

v.

JOHN RICHARD WOOD,

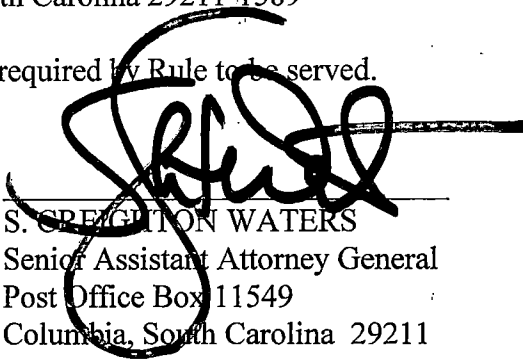
Petitioner

PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the **Return to Petition for Writ Certiorari** dated March 9, 2011, on Petitioner by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
South Carolina Office of Appellate Defense
PO Box 11589
Columbia, South Carolina 29211-1589

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



S. CREIGHTON WATERS
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

MAR - 9 2011

S.C. Supreme Court

March 9, 2011

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

Re: The State v. John Richard Wood
Appeal from Greenville County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Return to Petition for Writ of Certiorari** in the above-entitled action, along with a **Proof of Service**. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

S. Greighton Waters
Senior Assistant Attorney General

SCW/epj

cc: Robert M. Dudek, Chief Appellate Defender
W. Walter Wilkins, Solicitor, thirteenth Judicial Circuit
Sandi Wofford, Victim Services

The Supreme Court of South Carolina

John Richard Wood,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Larry R. Patterson
Greenville County
Trial Court Case No. 2005-CP-13-04737

ORDER

Respondent seeks a third extension of time to serve and file the Return to Petition for a Writ of Certiorari in the above entitled matter. The request for an extension is granted and extended until March 21, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy
Chief Deputy CLERK

Columbia, South Carolina

February 22, 2011

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General S. Creighton Waters

ALAN WILSON
ATTORNEY GENERAL



RECEIVED

FEB 18 2011

February 18, 2011

S.C. Supreme Court

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

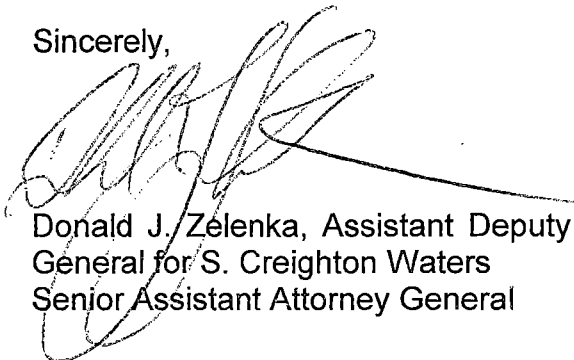
Re: The State v. John Richard Wood
Appeal from Greenville County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Motion for an Extension of Time to File Return to Petition for Writ of Certiorari**, dated February 18, 2011, together with the Certificate of Service, in the above-captioned case.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,



Donald J. Zelenka, Assistant Deputy Attorney
General for S. Creighton Waters
Senior Assistant Attorney General

SCW/epj
Enclosures

cc: Robert M. Dudek, Esquire

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

Appeal from Greenville County
Honorable Larry R. Patterson, Circuit Court Judge

RECEIVED

FEB 18 2011

John Richard Wood,

Petitioner,

S.C. Supreme Court

v.

State of South Carolina,

Respondent.

**MOTION FOR AN EXTENSION OF TIME TO
FILE RETURN TO PETITION FOR WRIT OF CERTIORARI**

The Respondent, above-named, hereby makes a motion to this Court to extend the time for filing the Return to Petition for Writ of Certiorari from February 18, 2011, for a period of thirty (30) days.

This request is based on counsel's caseload, which has precluded timely completion of the return. For example, has a trial in Greenville County next Tuesday in a State Grand Jury prosecution, and is currently in Greenville for trial preparation.

Wherefore Appellant respectfully requests an extension of a period of time of thirty (30) days, until March 21, 2011, to complete this return.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

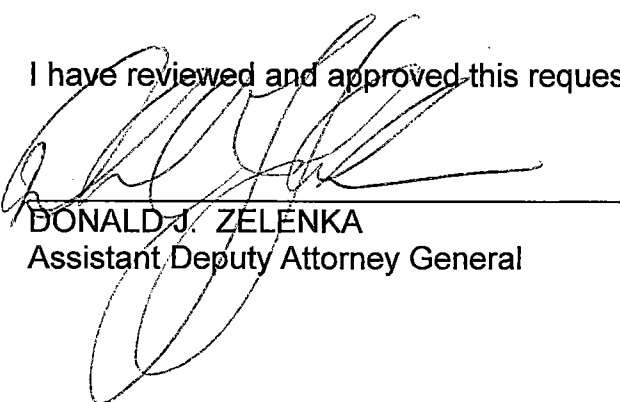
S. CREIGHTON WATERS
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT

BY: S. Creighton Waters
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

February 18, 2011.

I have reviewed and approved this request.


DONALD J. ZELENKA
Assistant Deputy Attorney General

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County
Honorable Larry R. Patterson, Circuit Court Judge

John Richard Wood,

Petitioner,

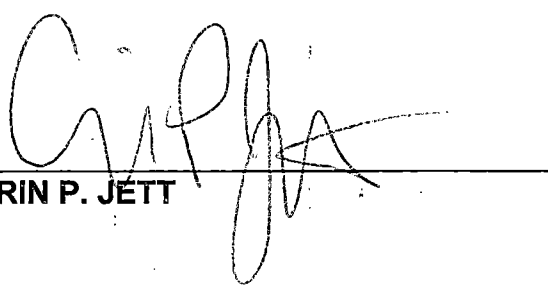
v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, Erin P. Jett, hereby certify that I have served Respondent's **Motion for Extension of Time to file Return to Petition for Writ of Certiorari** on Robert M. Dudek, Esquire, South Carolina Office of Indigent Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 by depositing two (2) copies in the United States Mail, postage prepaid this 18th day of February, 2011.


ERIN P. JETT

The Supreme Court of South Carolina

John Richard Wood,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Larry R. Patterson
Greenville County
Trial Court Case No. 2005-CP-13-04737

ORDER

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

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

Brenda J. Shady
CLERK
Chief Deputy

Columbia, South Carolina

January 20, 2011

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General S. Creighton Waters



ALAN WILSON
ATTORNEY GENERAL

RECEIVED

JAN 19 2011

January 19, 2011

S.C. Supreme Court

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

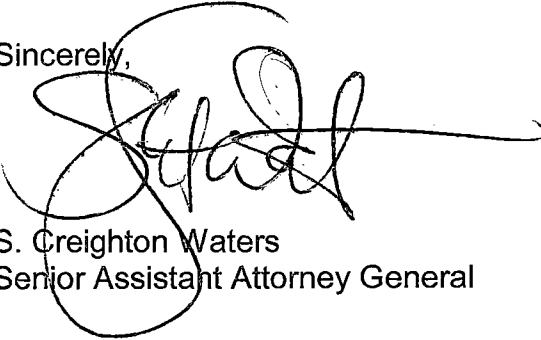
Re: The State v. John Richard Wood
Appeal from Greenville County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Motion for an Extension of Time to File Return to Petition for Writ of Certiorari**, dated January 19, 2011, together with the Certificate of Service, in the above-captioned case.

Thank you for your assistance in this matter. Please call this office if you need any additional information.

Sincerely,



S. Creighton Waters
Senior Assistant Attorney General

SCW/epj
Enclosures

cc: Robert M. Dudek, Esquire

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County
Honorable Larry R. Patterson, Circuit Court Judge

RECEIVED

JAN 19 2011

S.C. Supreme Court

John Richard Wood,

Petitioner,

v.

State of South Carolina,

Respondent.

**MOTION FOR AN EXTENSION OF TIME TO
FILE RETURN TO PETITION FOR WRIT OF CERTIORARI**

The Respondent, above-named, hereby makes a motion to this Court to extend the time for filing the Return to Petition for Writ of Certiorari from January 19, 2011, for a period of thirty (30) days.

This request is based on counsel's caseload, which has precluded timely completion of the return. For example, yesterday, January 18, 2011, counsel had an oral argument in the Supreme Court of South Carolina (**Gregory Duncan**), has a hearing in Greenville County today in a State Grand Jury prosecution, and is filing pleadings in the United States Supreme Court in a capital murder case (**Norman Starnes**) tomorrow, January 20, 2011.

Wherefore Appellant respectfully requests an extension of a period of time of thirty (30) days, until February 18, 2011, to complete this return.

Respectfully submitted,

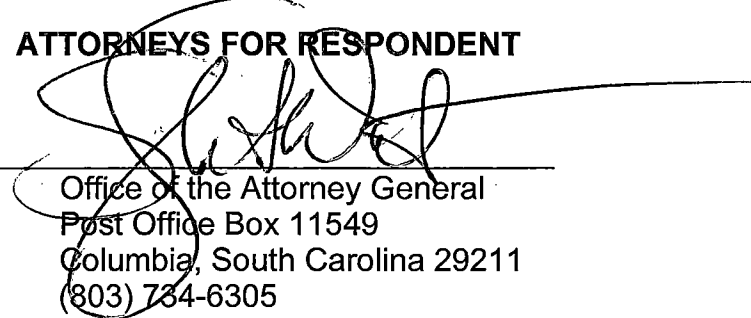
ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General

ATTORNEYS FOR RESPONDENT

BY: 

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

January 19, 2011.

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Greenville County
Honorable Larry R. Patterson, Circuit Court Judge

John Richard Wood,

Petitioner,

v.

State of South Carolina,

Respondent.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, hereby certify that I have served Respondent's **Motion for Extension of Time to file Return to Petition for Writ of Certiorari** on Robert M. Dudek, Esquire, South Carolina Office of Indigent Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 by depositing two (2) copies in the United States Mail, postage prepaid this 19th day of January, 2011.



S. CREIGHTON WATERS

The Supreme Court of South Carolina

John Richard Wood,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable Larry R. Patterson
Greenville County
Trial Court Case No. 2005-CP-13-04737

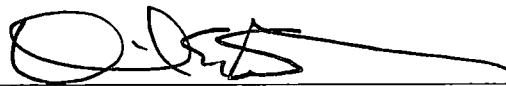
ORDER

The request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until January 19, 2011. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

December 21, 2010

cc: Chief Appellate Defender Robert M. Dudek
Senior Appellate Defender Joseph L. Savitz, III
Senior Assistant Attorney General S. Creighton Waters



HENRY McMASTER
ATTORNEY GENERAL

December 20, 2010

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

RECEIVED
DEC 20 2010
SCC Supreme Court

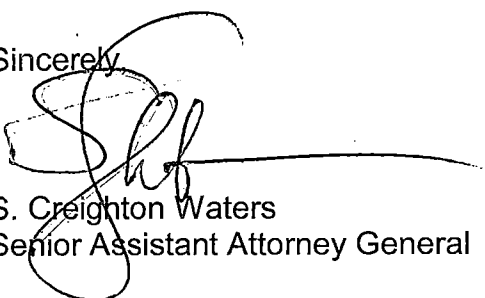
Re: The State v. John Richard Wood
Appeal from Greenville County

Dear Mr. Shearouse:

The return to petition for writ of certiorari in the above-entitled action is due to be filed and served on December 20, 2010. Due to my heavy caseload, I will not be able to complete this return in a timely fashion. For this reason, I respectfully request an extension of thirty (30) days in which to file the return to petition for writ of certiorari.

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

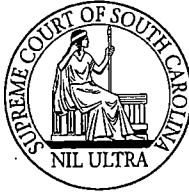
Sincerely,



S. Creighton Waters
Senior Assistant Attorney General

SCW/epj

cc: Robert M. Dudek, Chief Appellate Defender



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 4, 2010

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Wood, John Richard v. State

Dear Counsel:

The following Order has been endorsed on your Petition to Exceed Twenty-Five Page Limit for a Petition for a Writ of Certiorari in the above entitled case on appeal.

“Granted.

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

November 4, 2010.”

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,



CLERK

DES/dmh

cc: Senior Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

RECEIVED

NOV 02 2010

JOHN RICHARD WOOD,

S.C. Supreme Court

PETITIONER,

V.

THE STATE,

RESPONDENT

PETITION TO EXCEED TWENTY-FIVE
PAGE LIMIT FOR A PETITION FOR
A WRIT OF CERTIORARI

The undersigned counsel would respectfully request an order allowing him to file a petition for writ of certiorari in this case in excess of the twenty-five page limit imposed by Rule 227(e)(3), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and appendix in this case are due to be served and filed in this Court on Friday, November 5, 2010. The Appendix is in excess of three thousand twenty-five pages, and three very numerous meritorious issues were raised during post-conviction hearing that are being raised in the petition for writ of certiorari.

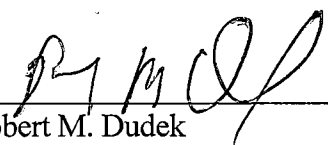
2. Counsel does not think that justice to these three issues under the unusual facts of this death penalty case can be done in the twenty-five pages authorized by Rule 227(e) (3), SCACR.

3. Consequently, counsel respectfully moves that this Court allow him to file a petition for a writ of certiorari in excess of twenty-five pages. Counsel will make every effort for brevity, and hopefully the petition will be about thirty-five pages in the final analysis.

4. S. Creighton Waters, of the Office of the Attorney General, does not oppose this motion

WHEREFORE, undersigned counsel would respectfully request an order from this Court granting him the right to exceed the twenty-five page limit of Rule 227(e)(3), SCACR.

Respectfully submitted,



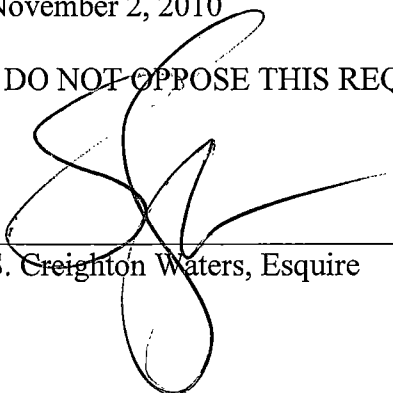
Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

ATTORNEYS FOR PETITIONER

November 2, 2010

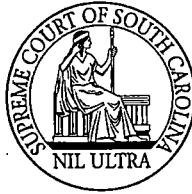
I DO NOT OPPOSE THIS REQUEST:



S. Creighton Waters, Esquire

GRANTED.


C.J.
For the Court
November 4, 2010



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 27, 2010

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Wood, John Richard v. State

Dear Counsel:

The following Order has been endorsed on your Petition for Extension to File Petition for Writ of Certiorari and Accompanying Appendix in the above entitled case on appeal.

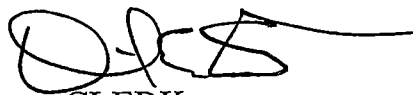
“Granted.

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

October 27, 2010.”

Please be advised the Petition for a Writ of Certiorari and Appendix should be served and filed on or before November 5, 2010.

Very truly yours,


CLERK

DES/dmh

John Richard Wood v. State

Page Two

October 27, 2010

cc: Senior Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

RECEIVED

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

OCT 22 2010

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND ACCOMPANYING APPENDIX**

The undersigned counsel respectfully requests a **final two week extension until November 5, 2010 or such lesser time as the Court is willing to grant** in which to file the petition for writ of certiorari and accompanying appendix in the above-referenced **death-penalty case**. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The petition for writ of certiorari and accompanying appendix in this case is due to be served and filed today. The certiorari petition will include three very meritorious issues.

2. Counsel was away from the office last Thursday and Friday and this Monday on a long-planned trip to Wisconsin with his son which was his vacation for this year. Counsel had an oral argument in State v. Yancey Thompson on Wednesday, October 20, 2010 before this Court in the place of Celia Robinson. Counsel has had

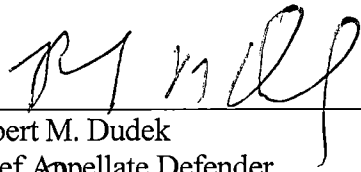
numerous administrative duties which have included interviewing for two open positions in the office of Appellate Defense and working on the proposed new computer case management system. Counsel filed the petition for rehearing in the murder case State v. Adams Gibson in the Court of Appeals on Wednesday, October 13, 2010. Counsel also filed a stay for execution in Charles Christopher Williams v. State with this Court that same day, October 13, 2010. Counsel filed the initial brief of appellant and designation of matter in State v. Nathaniel McGee and the stay of execution in State v. Louis Michael Winkler, Jr. on September 23, 2010 which was subsequently granted. Counsel filed a petition for rehearing, September 22, 2010 in this Court from the 3-2 decision in the murder case of State v. Marlon Rivera. Counsel filed the initial brief of appellant and designation of matter in the murder case of State v. Tommy McKnight with the Court of Appeals on Monday, September 20, 2010. Counsel also filed a three issue brief with the Court of Appeals in the murder case of State v. Garvin Duvall on September 10, 2010. Counsel filed a twenty-two page petition for rehearing in the death penalty case of State v. Steven Bixby with this Court on Tuesday, September 7, 2010, and subsequently a petition for stay of execution which was granted.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested. Counsel regrets having to make this **final extension request** but he assures the Court it is absolutely necessary to do justice to this case.

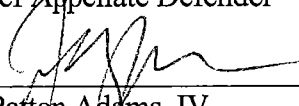
4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a **final two week extension until November 5, 2010 in which to file the petition for a writ of certiorari and the accompanying appendix. In the alternative, counsel would request such lesser time as the Court is willing to grant** in which to file the petition for writ of certiorari and accompanying appendix in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and accompanying appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender



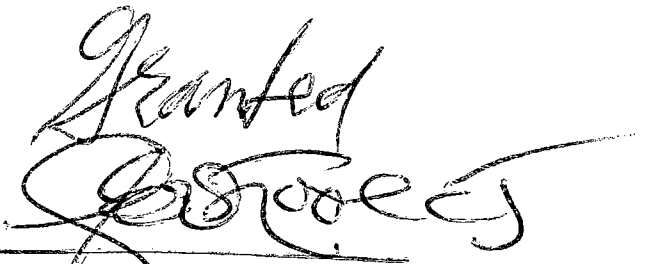
T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

October 22, 2010

I DO NOT OPPOSE:



S. Creighton Waters



S. Creighton Waters

October 27, 2010

Columbia, South Carolina

September 23, 2010

cc: Chief Appellate Defender Robert M. Dudek
Senior Appellate Defender Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

V.

THE STATE,

RECEIVED
SEP 22 2010
S.C. SUPREME COURT
PETITIONER,

RESPONDENT

PETITION FOR EXTENSION TO FILE
THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX BASED ON
EXTRAORDINARY CIRCUMSTANCES

The undersigned counsel would respectfully request **a final thirty-day extension until October 22, 2010, or such lesser time as the Court is willing to grant**, within which to file the petition for writ of certiorari and appendix in the above-referenced **death penalty case**. In support of this motion, counsel would respectfully show the Court the following:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today in this capital case, having been extended by prior orders of this Court. The appendix is over 3,728 pages long. Counsel has been working on the case, but since the last extension request Appellate Defender Celia Robinson gave her notice and counsel has been narrowing a list of applicants and is interviewing for the position. Counsel is today, September 22, 2010 filing a petition for rehearing with this Court in the murder case of State v. Marlon

Rivera. Counsel tomorrow plans to file the initial brief in the murder case of State v. Nathaniel McGee tomorrow with the Court of Appeals.

2. Counsel also filed a three issue brief with this Court in the murder case of State v. Garvin Duvall on September 10, 2010. Counsel filed a twenty-two page petition for rehearing in the death penalty case of State v. Steven Bixby with this Court Tuesday, September 7, 2010. Counsel is also filed a petition for rehearing that same day in the murder case of State v. Damon Jones with the Supreme Court. Counsel filed the brief in the murder case of State v. Jeremy Wright with the Court of Appeals Court on Monday, August 30, 2010. Counsel filed the petition for rehearing in the death penalty cases of State v. Louis Winkler on Tuesday, August 31, 2010 with this Court. Counsel filed the initial brief in the death penalty case of State v. William Dickerson on August 11, 2010 with this Court. That brief was 46 pages long, and the transcripts were 4,261 pages long. Counsel also filed the Brief in Opposition in the United States Supreme Court's in the case of State v. Kenneth Navy on July 31, 2010. Counsel and co-counsel filed a brief in the death penalty case of State v. Jerry Buck Inman on Monday, June 28, 2010, with the Supreme Court as well. Counsel also has many administrative duties as Chief Appellate Defender in addition to his heavy caseload of death penalty and murder cases, including the present job search for an assistant appellate defender. Counsel is also preparing for a presentation at the Public Defender Conference next week, September 27-29, 2010. Finally, counsel has a repaid weekend trip to Wisconsin from October 14-17, 2010 with his son.

3. Co-counsel is presently working on the following death penalty case:

State v. Roger Dale Johnson (6835 pages).

In the past month, co-counsel has filed briefs or petitions for rehearing in the

following cases:

State v. Jason Ervin Black
State v. Zachary Marquis Fowler
State v. Ron O. Finklea
State v. Christopher Calvin Ellis
State v. William M. Washington

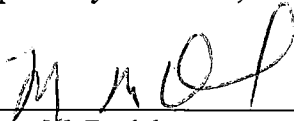
During that time period, counsel has also attended and testified in the post-conviction relief hearing in the following cases:

Luzenski Cottrell v. State (Florence County)
Freddie Owens v. State (Greenville County)

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request. Counsel intends to work on cases with three extensions or more first to lessen the number of extensions requested. This final thirty day extension request is made out of absolute necessity and not for purposes of delay.

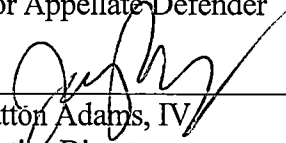
WHEREFORE, the undersigned counsel would respectfully request **a final thirty-day extension, until October 22, 2010 or such lesser time as the Court is willing to grant** within which to file the petition for writ of certiorari and appendix in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

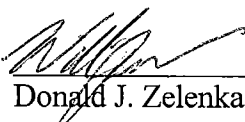
Joseph L. Savitz, III
Senior Appellate Defender



T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

September 22, 2010

I DO NOT OBJECT:



Donald J. Zelenka, Esquire

Columbia, South Carolina

August 27, 2010

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

RECEIVED

AUG 23 2010

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT

PETITION FOR EXTENSION TO FILE
THE PETITION FOR WRIT OF CERTIORARI
AND APPENDIX BASED ON
EXTRAORDINARY CIRCUMSTANCES

The undersigned counsel would respectfully request a thirty-day extension within which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by prior orders of this Court. The appendix is over 3,728 pages long. Counsel **hopes this will be a final extension** request but in addition to what is below counsel must file petitions for rehearing with this Court in the death penalty cases of State v. Steven Bixby and State v. Louis Winkler next Tuesday, August 31, 2010. Counsel is presently working on both of these cases.

2. Counsel filed the brief in the case of State v. Jimmy McKerley with co-counsel Charles Grose on Friday, August 20, 2010 in the Court of Appeals. This brief was fifty pages

long. Counsel filed the brief in the death penalty case of State v. Jeffrey Motts in this Court on Thursday, August 19, 2010. Counsel filed the petition for rehearing in the case of State v. Roger Parker on Tuesday, August 17, 2010 with the Court of Appeals. Counsel filed the reply to the state's return in the death penalty case of Brad Keith Sigmon v. State on Monday, August 9, 2010. Counsel also filed the brief in the death penalty case of State v. William Dickerson on Wednesday, August 11, 2010. The transcripts in this case was 4,261 pages long. The brief was four issues, one of them a novel issue. Counsel filed the petition for rehearing in the case of State v. Perry Strickland with this Court yesterday, Thursday, August 5, 2010. Counsel also filed the brief of petitioner pursuant to White v. State in the case of State v. Roger Bostick on Wednesday, August 4, 2010 with the Supreme Court. Counsel filed the brief in opposition in the United States Supreme Court from the state's petition for a writ of certiorari petition from the State Supreme Court in the case of State v. Kenneth Navy on July 30, 2010. Counsel filed the petition for rehearing in the murder case of State v. Darian Robinson with this Court on Tuesday, July 27, 2010. Counsel filed a petition for rehearing in the case of State v. Brandon V. Johnson on Wednesday, July 14, 2010 with this Court. Counsel and co-counsel filed a brief in the death penalty case of State v. Jerry Buck Inman on Monday, June 28, 2010, with the Supreme Court as well. Counsel filed a petition for writ of certiorari in the United States Supreme Court in the death penalty case of State v. Charles Christopher Williams on Wednesday, June 23, 2010. Counsel had an oral argument in the death penalty case of State v. Louis Winkler and in the murder case of State v. Damon Jones in the Supreme Court on Thursday, June 24, 2010. Counsel also has many administrative duties as Chief Appellate Defender in addition to his full and heavy caseload of death penalty and murder cases.

3. Counsel is presently working on the following death penalty case:

State v. Roger Dale Johnson (6835 pages).

In the past month, co-counsel has filed briefs or petitions for rehearing in the following cases:

State v. Jason Ervin Black
State v. Zachary Marquis Fowler
State v. Ron O. Finklea
State v. Christopher Calvin Ellis
State v. William M. Washington

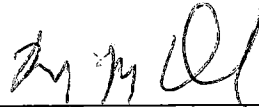
During that time period, counsel has also attended and testified in the post-conviction relief hearing in the following cases:

Luzenski Cottrell v. State (Florence County)
Freddie Owens v. State (Greenville County)

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension within which to file the petition for writ of certiorari and appendix in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

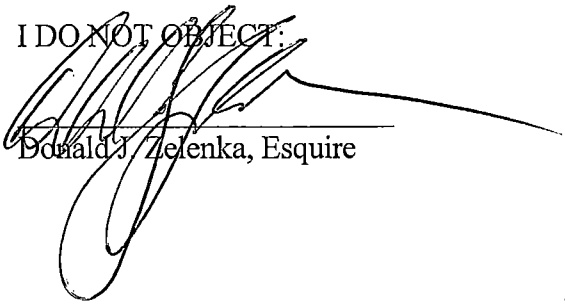
Joseph L. Savitz, III
Senior Appellate Defender



T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

August 23, 2010

I DO NOT OBJECT:



Donald J. Zelenka, Esquire

Columbia, South Carolina

July 26, 2010

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General S. Creighton Waters



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

July 26, 2010

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

RECEIVED
JUL 26 2010
S.C. SUPREME COURT

Re: John Richard Wood v. The State (Capital Case)

Dear Mr. Shearouse:

On Friday, July 23, 2010 a petition for an extension of time in the above death penalty case was filed. Debbie Hopkins with your office contacted me and stated that the last paragraph stated that "we would respectfully request a thirty day extension in which to serve the initial brief of appellant and designation of matter" and "to hold the time limits in abeyance in which to file the initial brief of appellant and designation of matter pending the ruling of this motion." The last paragraph should state that "we request a thirty day extension in which to serve the petition for writ of certiorari and appendix" and "to hold the time limits in abeyance in which to file the petition for writ of certiorari and appendix pending the ruling of this motion."

Please accept this letter as an addendum to the last paragraph of the petition that was filed on Friday, July 23, 2010. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

Sincerely,

Melinda W. Long
Legal Assistant

Donald J. Zelenka, Esquire

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

RECEIVED

JUL 23 2010

JOHN RICHARD WOOD,

S.C. SUPREME COURT

PETITIONER,

V.

THE STATE,

RESPONDENT

PETITION FOR EXTENSION TO FILE
THE PETITION FOR WRIT
OF CERTIORARI AND APPENDIX

The undersigned counsel would respectfully request a thirty-day extension within which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by two prior orders of this Court. The appendix is over 3,728 pages long.
2. Counsel is working on the death penalty case of State v. William Dickerson. The transcripts in that case are 4,261 pages long. The brief will consist of at least three issues, one of them a novel issue. Counsel is also working on the seven issue brief in the case of State v. Jimmy McKerley with co-counsel Charles Grose for the Court of Appeals. That brief is presently forty-five pages long and is in the rewriting stage. Counsel also has to file the brief in

opposition in the United States Supreme Court from the state's certiorari petition from this Court in the case of State v. Kenneth Navy on August 2, 2010. In addition counsel must file the White v. State brief in the murder case of State v. Roger Bostick with this Court on July 28, 2010. Counsel also must file the petition for rehearing in the murder case of State v. Darian Robinson with the Court of Appeals on Tuesday, July 27, 2010. Counsel filed a petition for rehearing in the case of State v. Brandon V. Johnson on Wednesday, July 14, 2010 in the Court of Appeals. Counsel and co-counsel filed a brief in the death penalty case of State v. Jerry Buck Inman on Monday, June 28, 2010, with this Court as well. Counsel filed a petition for writ of certiorari in the United States Supreme Court in the death penalty case of State v. Charles Christopher Williams on Wednesday, June 23, 2010. Counsel had an oral argument in the death penalty case of State v. Louis Winkler and in the murder case of State v. Damon Jones in this Court on Thursday, June 24, 2010. Counsel filed a merit brief in the murder case of State v. William J. Henry on Friday, June 18, 2010 with the Court of Appeals. On Wednesday, June 16, 2010, counsel filed a merit brief in the homicide by child abuse case of State v. Kathy Salley with the Court of Appeals. Counsel also assisted the client, Quincy Allen, with filing an application for post conviction relief in the Richland County Court of Common Pleas that same day, June 2, 2010. Counsel also has many administrative duties as Chief Appellate Defender in addition to his full and heavy caseload of death penalty and murder cases.

3. Co-counsel is presently working on the following death penalty case:

State v. Roger Dale Johnson (6835 pages).

In the past month, co-counsel has filed briefs or petitions for rehearing in the following cases:

State v. Keion Griffin (418 pages)

State v. Carlton McFadden (557 Pages)
State v. Charles Lawrimore (957 pages)
State v. David Rocquemore (557 pages)

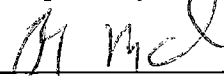
During that time period, counsel has also attended and testified in the post-conviction relief hearing in the following cases:

Luzenski Cottrell v. State (Florence County)
Freddie Owens v. State (Greenville County)

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension within which to file the Initial Brief and Designation of Matter in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the Initial Brief and Designation of Matter be held in abeyance pending a ruling on this motion.

Respectfully submitted,



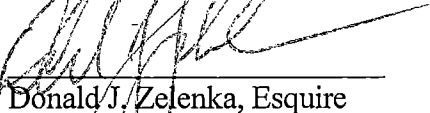
Robert M. Dudek
Chief Appellate Defender



T. Patton Adams, IV
Executive Director of
J. Hugh Ryan, III
General Counsel

July 23, 2010

I DO NOT OBJECT:


Donald J. Zelenka, Esquire

cc: Chief Appellate Defender Robert M. Dudek
Senior Assistant Attorney General S. Creighton Waters

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT

PETITION FOR EXTENSION TO FILE
THE PETITION FOR WRIT
OF CERTIORARI AND APPENDIX

The undersigned counsel would respectfully request a thirty-day extension within which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following:

1. The petition for writ of certiorari and appendix in this case are due to be served and filed today, having been extended by one order of this Court.
2. Counsel is filing the petition for writ of certiorari in the United States Supreme Court in the death penalty case of State v. Charles Christopher Williams today. Counsel has an oral argument in the death penalty case of State v. Louis Winkler with this Court tomorrow at 9:30 and an oral argument in the case of State v. Damon Jones in this Court tomorrow at 10:00. Counsel filed a merit brief in the murder case of State v. William J. Henry on Friday, June 18, 2010 with the Court of Appeals. On Wednesday,

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JUN 23 2010
S.C. SUPREME COURT

June 16, 2010, counsel filed a merit brief in the homicide by child abuse case of State v. Kathy Salley with the Court of Appeals. Counsel filed a merit brief in the murder case of State v. Harold Lee Jackson on June 10, 2010. Counsel had an oral argument before this Court in the case of State v. Amos Mattison on June 8, 2010. Counsel then argued the murder case of State v. Perry Strickland before the Court of Appeals at 12:30 p.m. that same day. In addition, counsel filed a two issue merit brief in the murder case of State v. Richard Gagnon on Friday, June 4, 2010 with the Court of Appeals. Counsel also filed a stay of execution with this Court in the death penalty case of State v. Quincy Allen on June 2, 2010. Counsel also assisted the client, Quincy Allen, with filing an application for post conviction relief in the Richland County Court of Common Pleas that same day, June 2, 2010.

2. Co-counsel is presently working on two death penalty cases:

State v. Jerry Buck Inman (975 pages); and,
State v. Roger Dale Johnson (6835 pages).

In the past month, co-counsel has filed briefs or certiorari in the following cases:

State v. Russell Lee Sims (431 Pages)
State v. Phillip Tapp (459 pages)
State v. Bobby Alexander Gilbert (557 pages)
Chris Anthony Liverman v. The State (1586 pages)
State v. Stephen Corey Bryant (1395 pages)
State v. Jimmy Lee Sessions (1040 pages)
State v. Amber Portwood (407 pages)
State v. William Andrew Lee (327 pages)
State v. James W. Bodenstein (30 pages)
State v. Terrell Antonio Addison (1246 pages)
State v. Joshua Lee Phillips (848 pages)

During that time period, co-counsel has also orally argued the following cases:

State v. Charles Lawrimore

State v. Norman Starnes (death penalty)
State v. Angle Vasquez (death penalty)
State v. Jason Black
State v. David Rocquemore
State v. Jason Buncum

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension within which to file the petition for writ of certiorari and appendix in this case based upon the above circumstances. Counsel respectfully requests that the time limits for filing the petition for writ of certiorari and appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

June 23, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

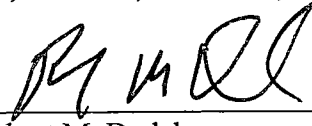
V.

THE STATE,

RESPONDENT

CERTIFICATE OF SERVICE

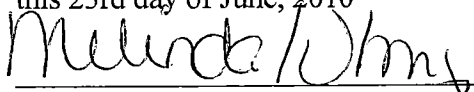
The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon S. Creighton Waters, Esquire, Assistant Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 23rd day of June, 2010.


Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

Attorneys for Petitioner

SUBSCRIBED AND SWORN TO before me
this 23rd day of June, 2010

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018.

RECEIVED

JUN 23 2010

S.C. SUPREME COURT



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
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Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

May 24, 2010

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

RECEIVED
MAY 24 2010
S.C. SUPREME COURT

Re: John Richard Wood v. The State (capital case)

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above referenced case are due to be served and filed today. However, because of my current caseload, I have been unable to complete this petition for service. Therefore, I am requesting a thirty day extension in which to file and serve the petition.

By copy of this letter, I am informing S. Creighton Waters, Esquire, of the Attorney General's Office, of my request.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

Joseph L. Savitz, III
Senior Appellate Defender

RMD/mwl

cc: S. Creighton Waters, Esquire



SCCID

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

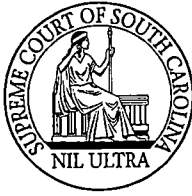
RECEIPT

I, Debbie M. Hopkins, of the South Carolina Supreme Court, have received the following original trial transcript(s) in the death penalty case of John Richard Wood v. The State

1. January 8, 2007 (Mary E. Digirolamo)
2. September 30, 2005 (Mary E. Sprague – Mary E. Digirolamo)
3. March 6 – 8, 2007 (Mary E. Digirolamo)

Date: May 7, 2010

Debbie M. Hopkins
(Name)



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 22, 2010

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Wood, John Richard v. State

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

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

Very truly yours,

CLERK

DES/dmh

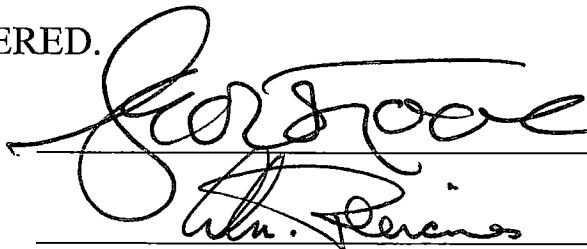
Enclosure

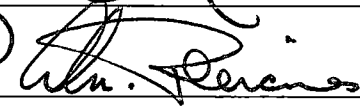
cc: Assistant Attorney General S. Creighton Waters

the record of the hearing is unnecessary because the State's motion was denied and the order denying the motion sets forth what happened at the hearing. Essentially, the State asserts, everything ultimately went petitioner's way on the issues addressed at the hearing; therefore, there is no "basis for appeal." However, the State leaves a decision on the motion in the discretion of this Court.

We find petitioner has failed to show that the hearing is relevant, stating only that "it appears" a transcript of the hearing "may" be needed on at least one issue he plans to raise. Moreover, petitioner prevailed on the motion, and the order denying the motion states what occurred at the hearing. Accordingly, we deny the motion to remand without prejudice to petitioner's right to file another motion seeking a remand for reconstruction of the record of the motion hearing if he determines the transcript is in fact necessary for a full presentation of his issues to this Court. See State v. Ladson, 373 S.C. 320, 644 S.E.2d 271 (Ct. App. 2007)(appellant must show prejudice from incomplete record).

IT IS SO ORDERED.


C. J.


J.

Donald W. Beatty J.
Kurt L. Peam J.
Kittredge, J., not participating

Columbia, South Carolina

April 22, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Greenville County

Larry R Patterson, Circuit Court Judge

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APR - 6 2010

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT

**REPLY TO THE RETURN TO REMAND
FOR A RECONSTRUCTION HEARING**

Petitioner, replying to the state's return would show this court:

1. Upon information and belief trial counsel, James Brown, was not served with the state's motion for summary judgment prior to the hearing before Judge Patterson. Therefore the PCR court's statement that it would have granted the motion had this not been a death penalty case should be considered in that context.

2. Further, trial level PCR counsel's repeated requests for transcripts in this case were denied by the PCR court. Consequently, PCR counsel was hindered in his efforts to write his post-hearing brief, and he was unable to cite to the record although there were several factual assertions in the state's proposed order that did not comport with counsel's memory.

WHEREFORE, counsel would respectfully request that undersigned counsel and opposing counsel for the Attorney General's Office be given ten days to agree to a

stipulation as to what occurred at the September 28, 2006 or that the lower court be ordered to hold a reconstruction hearing if a stipulation is not agreed upon within ten days.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'R M Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

April 6, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R Patterson, Circuit Court Judge

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APR - 6 2010

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

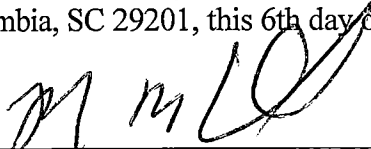
V.

THE STATE,

RESPONDENT

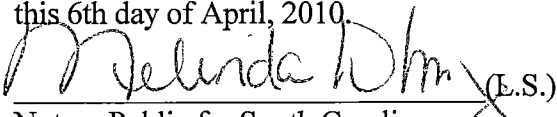
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies the reply to the return to remand for a reconstruction hearing in the above referenced case has been served upon S. Creighton Waters, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 6th day of April, 2010.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2010.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: October 30, 2018.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAR 29 2010

Appeal from Greenville County
Larry R. Patterson, Circuit Court Judge

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT.

**RESPONSE TO MOTION
TO REMAND FOR A RECONSTRUCTION HEARING**

The State hereby responds as follows to the Motion to Remand for a Reconstruction Hearing, filed by Petitioner on March 24th, 2010.

In its return to the original PCR application, the State moved to dismiss or for summary judgment on the allegations raised in that document. The judge subsequently set deadlines for an amended application to be filed. After Petitioner let two deadlines pass without filing an amended application, the State asked for a hearing on the substantive motions in its original return.

This hearing took place on September 28th, 2006 in open court, with the judge on

the bench, the lawyers at counsel table, and Petitioner present. Thus, it should have been transcribed. In an order dated October 12th, 2006 (attached), the judge essentially ruled that because this was a capital case, he was not going to dismiss the application as a matter of law, but set an evidentiary hearing date in January 2007, for which no further amendments would be allowed. However, the evidentiary hearing date in January 2007 was continued as Petitioner claimed at that hearing he wanted to waive his PCR remedies – a desire which he later rescinded. Moreover, amendments were ultimately allowed prior to the March 2007 hearing.

Thus, given that: (1) the State's motion to dismiss or for summary judgment was denied; (2) a continuance of the January 2007 hearing date took place to March 2007 because of Petitioner's fleeting desire to waive his PCR remedies; (3) the judge ultimately allowed amendments prior to the March 2007 evidentiary hearing; and (4) the order signed by Judge Patterson set forth what happened at the hearing, the State does not believe reconstruction is necessary in this case. Said another way, everything ultimately went Petitioner's way on the issues addressed at the hearing, so it could not be a basis for appeal.

Accordingly, while the State would leave the decision to the Court's discretion, the State would merely point out that a reconstruction hearing may not be necessary in this case given the manner in which the issues were resolved.

Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

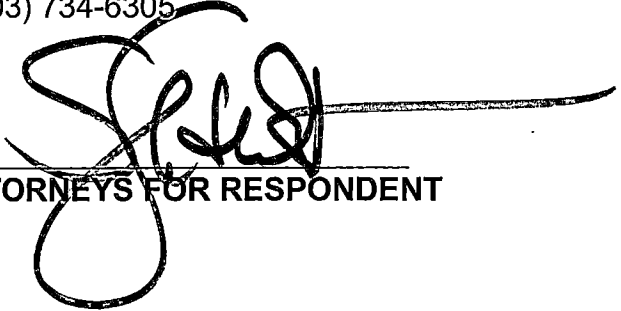
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

S. CREIGHTON WATERS
Senior Assistant Attorney General
(Counsel of Record)

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

By:


ATTORNEYS FOR RESPONDENT

March 29, 2010.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

John Richard Wood, #6005)
Applicant,)
v.)
The State of South Carolina,)
Respondent.)

C/A No. 2005-CP-23-4737

ORDER

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENHAUSER
2005 OCT 20 A 9:36

An initial application for post-conviction relief ("APCR"), filed by John Richard Wood ("Applicant") on July 28th, 2005. This APCR was technically *pro se*; although Applicant stated at the appointment of counsel hearing that it was prepared by his appellate defender from the direct appeal, Robert Dudek. The State, through Assistant Attorney General S. Creighton Waters filed a Return, Motion to Dismiss, or motion for summary judgment as to the allegations raised in the APCR.

A hearing to appoint counsel was held on September 30th, 2005. Applicant was present, as was James A. Brown and Symmes Culbertson, Esquire. At the hearing, Applicant and Attorneys Brown and Culbertson agreed to representation in Applicant's PCR action. The State noted that it had a pending motion for resolution as a matter of law as to the specific allegations in the initial APCR, and requested that this Court therefore set a reasonable deadline for the filing of a Final Amended Application, which would set forth the specific claims to be raised in the PCR. Accordingly, in this Court's Order appointing counsel dated October 14th, 2005, this Court provided:

Mr. Waters of the Attorney General's Office has agreed to provide both of Applicant's lawyers as well as this Court with copies of the trial transcript. Once Applicant's lawyers receive the transcript, they shall have one hundred and twenty (120)



days in which to file their Amended Application. The State shall then have thirty (30) days to file an Amended Return, and within thirty (30) days of that responsive filing the parties and this Court shall convene a status hearing to set the case for a final evidentiary hearing on the merits, if necessary. See S.C. Code Ann. § 17-27-160(C) (2003).

The State sent a transcript to both parties on October 6th, 2005, thus creating a deadline for the Amended Application of February 6th, 2006.

On June 2nd, 2006, the State wrote both parties noting that no Amended Application had been filed, and requesting an update on the status of the action. Initially, there was a claim from Mr. Culbertson that he had not filed an Amended Application because he had never received a transcript; Mr. Culbertson subsequently realized that claim was error and he had in fact received the transcript back in October of 2005. Also in June of 2006, the defense upon inquiry from the South Carolina Supreme Court sent a status letter noting that it was in the process of reviewing the evidence and preparing the case.

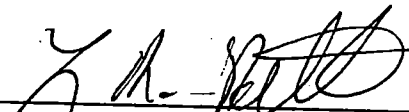
On July 7th, 2006, this Court issued an Order *sua sponte* giving Applicant forty-five (45) days in which to file an Amended Application. No Amended Application was filed, and on August 30th, 2006, the State sent a letter in which it noted it considered the pleadings closed and requested a hearing on its motions to dismiss and for summary judgment as to the allegations in the original APCR.

A hearing was held in the matter before this Court at the Greenville County Courthouse on September 28th, 2006. Applicant was present and represented by counsel Brown and Culbertson; the State was represented by Assistant Attorney General S. Creighton Waters. At the hearing, the parties and this Court discussed the procedural issues as well as the substantive issues in the State's Motions to Dismiss and for summary

judgment. The State contended that the action could be dismissed as a matter of law like any other civil action – particularly in a death penalty case, which contemplates a full-fledged civil trial. Substantively, the State contended that the issues raised in the original APCR could be rejected by reference to the record of the trial, the record of the appeal, and the law.

This Court believes the State made good arguments as to its motion; however, given that this is a death penalty case and summary judgment is unusual or nonexistent in a PCR, this Court declines to grant summary judgment. However, an evidentiary hearing shall be held in this case beginning on January 10th, 2007. Moreover, the time for amendment of the application is long past, and no further amendments will be accepted. This evidentiary hearing will be limited to the allegations set forth in the original petition.

IT IS SO ORDERED.



LARRY R. PATTERSON
Circuit Court Judge

Greenville, South Carolina

October 12, 2006.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

John Richard Wood, #6005

Applicant,

v.

The State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS

C/A No. 2005-CP-23-4737

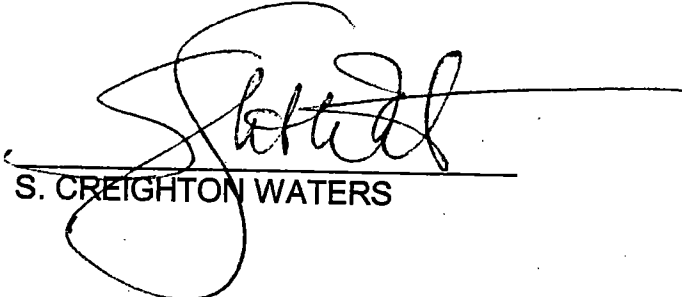
CERTIFICATE OF SERVICE

I, S. Creighton Waters, Counsel for the Respondent, certify that I have today served the attached **Order** on Applicant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorneys of record as follows:

James A. Brown, Esquire
Post Office Box 592
Beaufort, South Carolina 29901

Symmes W. Culbertson, Esquire
9 Toy Street
Greenville, South Carolina 29601

This 17th day of October, 2006.


S. CREIGHTON WATERS

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSHER

2006 OCT 20 A 9:36

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT.

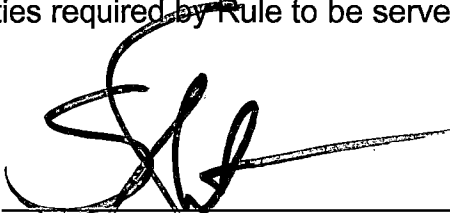
PROOF OF SERVICE

I, S. Creighton Waters, Counsel for Respondent, certify that I have this date served the ***Response to Motion to Remand for a Reconstruction Hearing***, dated March 29, 2010, on Appellant by depositing two copies of the same in the United States mail, first class postage prepaid, addressed to his attorney of record:

Robert M. Dudek, Chief Appellate Defender
South Carolina Office of Indigent Defense
1330 Lady Street, Ste. 401
Columbia, SC 29201

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

This 29th day of March, 2010.



S. CREIGHTON WATERS
Senior Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R Patterson, Circuit Court Judge

ORIGINAL

RECEIVED

MAR 24 2010

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT

**MOTION TO REMAND
FOR A RECONSTRUCTION HEARING**

1. Petitioner, John Richard Wood, was indicted by the Greenville County grand jury for the offense of murder. The state served its notice of intent to seek the death penalty.

Petitioner's case came on for trial on February 8, 2002, before the Honorable John W. Kittredge and a jury. The solicitors were Robert M. Ariail, Betty C. Strom and Mindy Herverly. John Mauldin, James Bannister and Rodney Richey represented petitioner.

The jury found petitioner guilty of murder. At the conclusion of the penalty stage, the jury recommended a sentence of death. The trial judge then imposed a sentence of death.

Petitioner filed a PCR application with the Greenville County Clerk of Court's Office. A hearing was held on March 6 – 8, 2007 before the Honorable Larry R. Patterson. Prior hearings were held on September 28, 2006, January 8, 2007 and an appointment hearing was held on September 30, 2005.

2. Counsel for petitioner has been informed that on September 28, 2006 there was a summary judgment and motion to dismiss motion hearing before Judge Patterson. Court Reporter Mary DiGirolamo notified this Office that she did not have any record of this September 28, 2006 hearing, and she apparently was the court reporter for Judge Patterson at the other hearings. Ms. DiGirolamo also stated that she contacted the Greenville County Clerk's Office and they have no record of a hearing on September 28, 2006.

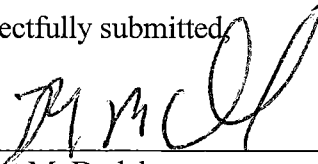
3. Counsel contacted Creighton Waters with the Attorney General's Office about this hearing and requested the proposed orders regarding the September 28, 2006 hearing. I have attached a copy of the order which states that a hearing was held in the matter before this court at the Greenville County Courthouse on September 28, 2006. Petitioner was present and represented by counsel James Brown and counsel Symmes Culbertson and the state was represented by Assistant Attorney General S. Creighton Waters.

4. Since it appears that this hearing may be needed for the post-conviction relief appeal on at least issue, counsel is requesting that this case be remanded to the Circuit Court for a reconstruction hearing.

5. Counsel and Assistant Attorney General Waters have discussed this case and undersigned counsel is hopeful this remand can be solved with a stipulation. However, this motion is necessary out of an abundance of caution on at least one issue.

WHEREFORE, petitioner moves that this Court remand this case to the Greenville County Court of Common Pleas for a reconstruction hearing.

Respectfully submitted,

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

Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

March 24, 2010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

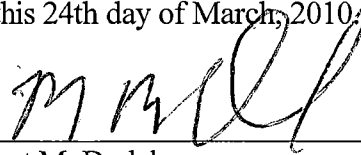
V.

THE STATE,

RESPONDENT

CERTIFICATE OF SERVICE

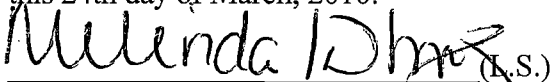
The undersigned attorney hereby certifies the motion to remand for a reconstruction hearing in the above referenced case has been served upon S. Creighton Waters, Esquire, Assistant General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 24th day of March, 2010.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 24th day of March, 2010.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2018.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	
	)	
John Richard Wood, #6005	)	C/A No. 2005-CP-23-4737
	)	
Applicant,	)	
v.	)	ORDER
	)	
The State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

An initial application for post-conviction relief ("APCR"), filed by John Richard Wood ("Applicant") on July 28th, 2005. This APCR was technically *pro se*; although Applicant stated at the appointment of counsel hearing that it was prepared by his appellate defender from the direct appeal, Robert Dudek. The State, through Assistant Attorney General S. Creighton Waters filed a Return, Motion to Dismiss, or motion for summary judgment as to the allegations raised in the APCR.

A hearing to appoint counsel was held on September 30th, 2005. Applicant was present, as was James A. Brown and Symmes Culbertson, Esquire. At the hearing, Applicant and Attorneys Brown and Culbertson agreed to representation in Applicant's PCR action. The State noted that it had a pending motion for resolution as a matter of law as to the specific allegations in the initial APCR, and requested that this Court therefore set a reasonable deadline for the filing of a Final Amended Application, which would set forth the specific claims to be raised in the PCR. Accordingly, in this Court's Order appointing counsel dated October 14th, 2005, this Court provided:

Mr. Waters of the Attorney General's Office has agreed to provide both of Applicant's lawyers as well as this Court with copies of the trial transcript. Once Applicant's lawyers receive the transcript, they shall have one hundred and twenty (120)

days in which to file their Amended Application. The State shall then have thirty (30) days to file an Amended Return, and within thirty (30) days of that responsive filing the parties and this Court shall convene a status hearing to set the case for a final evidentiary hearing on the merits, if necessary. See S.C. Code Ann. § 17-27-160(C) (2003).

The State sent a transcript to both parties on October 6th, 2005, thus creating a deadline for the Amended Application of February 6th, 2006.

On June 2nd, 2006, the State wrote both parties noting that no Amended Application had been filed, and requesting an update on the status of the action. Initially, there was a claim from Mr. Culbertson that he had not filed an Amended Application because he had never received a transcript; Mr. Culbertson subsequently realized that claim was error and he had in fact received the transcript back in October of 2005. Also in June of 2006, the defense upon inquiry from the South Carolina Supreme Court sent a status letter noting that it was in the process of reviewing the evidence and preparing the case.

On July 7th, 2006, this Court issued an Order *sua sponte* giving Applicant forty-five (45) days in which to file an Amended Application. No Amended Application was filed, and on August 30th, 2006, the State sent a letter in which it noted it considered the pleadings closed and requested a hearing on its motions to dismiss and for summary judgment as to the allegations in the original APCR.

A hearing was held in the matter before this Court at the Greenville County Courthouse on September 28th, 2006. Applicant was present and represented by counsel Brown and Culbertson; the State was represented by Assistant Attorney General S. Creighton Waters. At the hearing, the parties and this Court discussed the procedural issues as well as the substantive issues in the State's Motions to Dismiss and for summary

judgment. The State contended that the action could be dismissed as a matter of law like any other civil action – particularly in a death penalty case, which contemplates a full-fledged civil trial. Substantively, the State contended that the issues raised in the original APCR could be rejected by reference to the record of the trial, the record of the appeal, and the law.

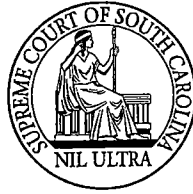
This Court believes the State made good arguments as to its motion; however, given that this is a death penalty case and summary judgment is unusual or nonexistent in a PCR, this Court declines to grant summary judgment. However, an evidentiary hearing shall be held in this case beginning on January 10th, 2007. Moreover, the time for amendment of the application is long past, and no further amendments will be accepted. This evidentiary hearing will be limited to the allegations set forth in the original petition.

IT IS SO ORDERED.

LARRY R. PATTERSON
Circuit Court Judge

Greenville, South Carolina

October ____, 2006.



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 8, 2010

Chief Appellate Defender Robert M. Dudek
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Wood, John Richard v. State

Dear Counsel:

The following Order has been endorsed on your Petition to File Reply to the Return to Remand for a Reconstruction Hearing Out of Time in the above entitled case on appeal.

“Granted.

Jean H. Toal C.J.
For the Court

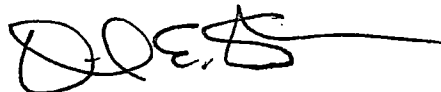
By s/ Daniel E. Shearouse
Clerk

April 8, 2010.”

Please be advised the reply received in this office on April 6, 2010 is being filed as of the date of this order.

Chief Appellate Defender Robert M. Dudek
Page Two
April 8, 2010

Very truly yours,


CLERK

DES/dmh

cc: Assistant Attorney General S. Creighton Waters

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R Patterson, Circuit Court Judge

RECEIVED

APR - 6 2010

S.C. SUPREME COURT

JOHN RICHARD WOOD,

PETITIONER,

V.

THE STATE,

RESPONDENT

PETITION TO FILE THE REPLY TO THE
RETURN TO REMAND FOR A
RECONSTRUCTION HEARING OUT OF TIME

Pursuant to Rule 224 of the South Carolina Appellate Court Rules, the undersigned counsel requests leave in which to file the reply to the return to remand in this case out of time. In support of this motion counsel submits the following.

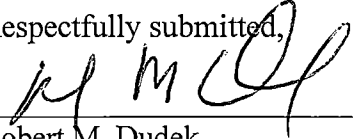
1. Counsel filed a Motion to Remand for a Reconstruction Hearing on March 24, 2010. Counsel for petitioner has been informed that on September 28, 2006 there was a summary judgment and motion to dismiss motion hearing before Judge Patterson. Court Reporter Mary DiGirolamo notified this Office that she did not have any record of this September 28, 2006 hearing, and she apparently was the court reporter for Judge Patterson at the other hearings. Ms. DiGirolamo also stated that she contacted the Greenville County Clerk's Office and they have no record of a hearing on September 28, 2006.

2. The state filed a return to this motion on March 29, 2010. Counsel for petitioner thought he had ten days to file a reply to this return, but his assistant Melinda Long learned that he only had five days to file the reply. The reply was due to be served and filed with this Court yesterday, April 5, 2010.

3. Counsel is filing the reply to the state's return today in this Court and would respectfully ask that this Court accept the reply out of time.

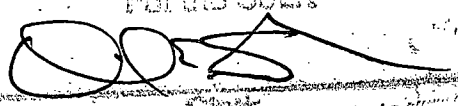
WHEREFORE, the undersigned counsel requests that this Court grant counsel's motion to accept the reply to the state's return in the above-referenced case out of time.

Respectfully submitted,


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

April 6, 2010

GRANTED.
APR 8 2010
FOR THE COURT

CLERK
April 8, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
Larry R Patterson, Circuit Court Judge

RECEIVED

APR - 6 2010

JOHN RICHARD WOOD,

S.C. SUPREME COURT

PETITIONER,

V.

THE STATE,

RESPONDENT

CERTIFICATE OF SERVICE

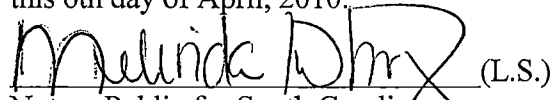
The undersigned attorney hereby certifies that a true copy of the reply to the return to remand in this case out of time in the above referenced case has been served upon S. Creighton Waters, Esquire this 6th day of April, 2010.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of April, 2010.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2018



HENRY McMASTER
ATTORNEY GENERAL

March 29, 2010

RECEIVED

MAR 29 2010

S.C. SUPREME COURT

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

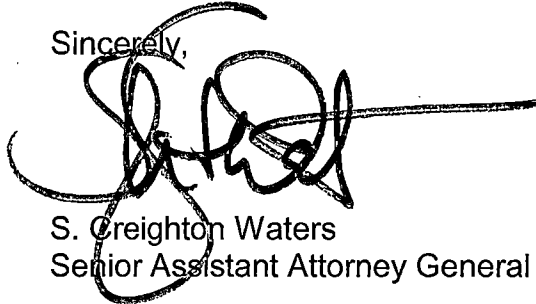
Re: The State v. John Richard Wood
Appeal from Greenville County

Dear Mr. Shearouse:

Enclosed please find the original and six (6) copies of the **Response to Motion to Remand for a Reconstruction Hearing**, dated March 29, 2010, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,



S. Creighton Waters
Senior Assistant Attorney General

Enclosures

cc: Robert M. Dudek, Chief Appellate Defender
Sandi Wofford, Victims' Services



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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

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

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

January 8, 2010

RECEIVED

JAN - 8 2010

S.C. SUPREME COURT

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

Dear Ms. Allen:

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

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. DiGirolamo	11/14/09	John Richard Wood

Trial Date: March 6, 2007 - March 8, 2007

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

Sincerely,

Melinda W. Long
Legal Assistant

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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Facsimile: (803) 734-1397

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

November 30, 2009

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

Dear Ms. Allen:

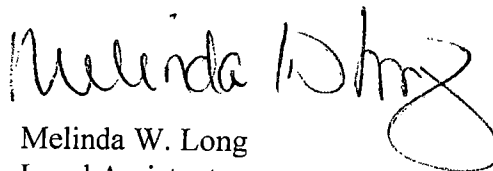
The transcript listed below was requested by this office. Pursuant to Rule 207(a)(2), SCACR, the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. DiGirolamo	11/14/09	John Richard Wood

Trial Date: March 6, 2007 - March 8, 2007

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

Sincerely,



Melinda W. Long
Legal Assistant

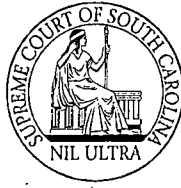
xc: S.C. Supreme Court
Attorney General's Office

RECEIVED

NOV 30 2009

S.C. SUPREME COURT

RECEIVED



OCT 21 2009 South Carolina Court Administration

South Carolina Supreme Court

S.C. SUPREME COURT

Columbia, South Carolina

ROSALYN FRIERSON
DIRECTOR

1015 SUMTER STREET,
SUITE 200
COLUMBIA, SOUTH
CAROLINA 29201
PHONE: (803) 734-1800
FAX: (803) 734-0269

MEMORANDUM

TO: Sharon Graham, Melinda Long
FROM: Desiree R. Allen *DA*
RE: Status Request - Late letters - September 23, 30, October 7, 2009
DATE: October 21, 2009

Pursuant to your letters, I was able to confirm the status of the following transcripts:

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>	<u>Status</u>
Danette Hanks	9.6.09	James Robert Nash	Ext to 11.6.09
Mary DiGirolamo	10.14.09	John Richard Wood	Ext to 11.14.09
Anne Bouley Meyer	9.8.09	Vince Neal Way	Del. 10.9.09

CC: S.C. Supreme ✓
S.C. Court of Appeals
Office of Attorney General



ORIGINAL

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

Joseph L. Savitz, III, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

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Telephone: (803) 734-1330
Facsimile: (803) 734-1397

September 30, 2009

RECEIVED

SEP 30 2009

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

S.C. SUPREME COURT

Re: John Richard Wood v. The State (Capital Case)

Dear Mr. Shearouse:

The above-referenced capital case is on appeal with this office. I have received notification from the court reporter and the Greenville County Clerk of Court's Office that there was no hearing on September 28, 2006. However, I am still waiting on the transcript from the March 6, 2007 – March 8, 2007 hearing.

I will inform the Court when this transcript has been delivered to our office. Please do not hesitate to contact me if you have any questions.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc: Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

September 30, 2009

RECEIVED

SEP 30 2009

S.C. SUPREME COURT

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

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. DiGirolamo	8/13/09	John Richard Wood

Trial Date: March 6, 2007 - March 8, 2007

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

Sincerely,

Melinda W. Long
Legal Assistant

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

Hopkins, Debbie

From: Melinda W. Long [MLong@sccid.sc.gov]
Sent: Friday, August 21, 2009 9:10 AM
To: Hopkins, Debbie
Subject: RE: The State v. John Richard Wood

I am still waiting on 2 transcripts - - - September 28 and March 6- 8. Yes the extension request expired on August 13 which was just a week ago - - however, they are at a conference this week - so therefore, I will need to give them a least another week especially if she did an extension with Court Administration.

From: Hopkins, Debbie [mailto:DHopkins@sccourts.org]
Sent: Thursday, August 20, 2009 11:08 AM
To: Melinda W. Long
Subject: The State v. John Richard Wood

Melinda,

Do you have all of the transcripts in this case? I have not received a 60 day letter and the CR ext I have expired August 13th.

Debbie M. Hopkins
South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

(803) 734-1080



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

August 13, 2009

RECEIVED

AUG 13 2009

S.C. SUPREME COURT

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

Re: John Richard Wood v. The State (Capital Case)

Dear Mr. Shearouse:

This is just to inform your office that we have received the following transcripts in the above-captioned case.

September 30, 2009
January 8, 2007

Received August 11, 2009
Received August 11, 2009

I will let you know when I receive the other transcripts that were requested. Please contact me if you have any questions or need any other information.

Sincerely,

Melinda W. Long
Legal Assistant

/mwl

cc: Donald J. Zelenka, Esquire



SCCID

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Division of Appellate Defense
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Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

JUN 24 2009

June 23, 2009

S.C. SUPREME COURT

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

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. Sprague	5/4/09	John Richard Wood

Trial Date: September 30, 2005

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

Sincerely,

Melinda W. Long
Legal Assistant

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



SCCID

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Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

JUN 24 2009

S.C. SUPREME COURT

June 23, 2009

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

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. DiGirolamo	5/4/09	John Richard Wood

Trial Date: March 6, 2007 - March 8, 2007

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

Sincerely,

Melinda W. Long
Legal Assistant

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



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Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

JUN 24 2009

June 23, 2009

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

S.C. SUPREME COURT

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. DiGirolamo	5/11/09	John Richard Wood

Trial Date: January 8, 2007

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

Sincerely,

Melinda W. Long
Legal Assistant

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



SCCID

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Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

JUN 24 2009

June 23, 2009

S.C. SUPREME COURT

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

Dear Ms. Allen:

Below is a list of transcript(s) that were requested by this office. Pursuant to Supreme Court Rule 206(e), the allotted time of sixty (60) days has lapsed to either receive the transcript or an extension to deliver same.

<u>Court Reporter</u>	<u>Due Date</u>	<u>Case Name</u>
Ms. Mary E. DiGirolamo	5/11/09	John Richard Wood

Trial Date: September 28, 2006

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

Sincerely,

Melinda W. Long
Legal Assistant

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



SCCID

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

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

March 10, 2009

RECEIVED

MAR 10 2009

Ms. Mary E. DiGirolamo
Circuit Court Reporter
PO Box 171
Reidville, SC 29375

S.C. SUPREME COURT

Dear Ms. DiGirolamo:

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

John Richard Wood v. The State

Indictment #: 2005-CP-13-4737

County: ross

Date of Trial: September 28, 2006

Presiding Judge: Larry R. Patterson

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

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

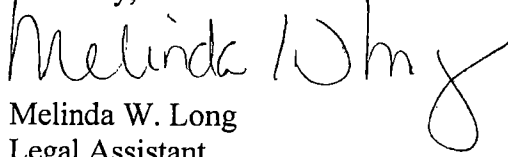
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's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

Ms. Mary E. DiGirolamo
March 10, 2009
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,


Melinda W. Long
Legal Assistant

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



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

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

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

March 5, 2009

Ms. Mary E. Sprague
Circuit Court Reporter
P O Box 171
Reidville, SC 29375

Dear Ms. Sprague:

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

John Richard Wood v. The State

Indictment #:

County: Greenville

Date of Trial: September 30, 2005

Presiding Judge: Larry R. Patterson

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

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MAR - 5 2009

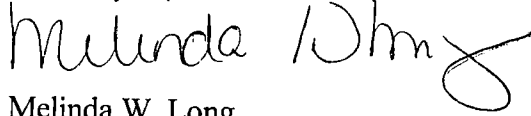
S.C. SUPREME COURT

Ms. Mary E. Sprague
March 5, 2009
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely, \

A handwritten signature in cursive script that reads "Melinda W. Long". The signature is written in black ink and is positioned to the right of the typed name.

Melinda W. Long
Legal Assistant

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



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

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

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

March 5, 2009

RECEIVED

MAR - 5 2009

S.C. SUPREME COURT

Ms. Mary E. DiGirolamo
Circuit Court Reporter
PO Box 171
Reidville, SC 29375

Dear Ms. DiGirolamo:

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

John Richard Wood v. The State

Indictment #:

County: Greenville

Date of Trial: January 8, 2007

Presiding Judge: Larry R. Patterson

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

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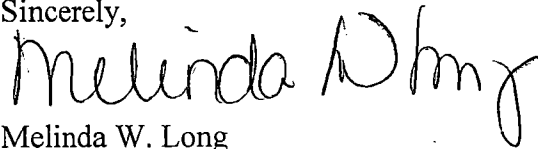
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Ms. Mary E. DiGirolamo
March 5, 2009
Page Two

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

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink that reads "Melinda W. Long". The signature is written in a cursive, flowing style.

Melinda W. Long
Legal Assistant

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



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

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

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

March 5, 2009

RECEIVED

MAR - 5 2009

S.C. SUPREME COURT

Ms. Mary E. DiGirolamo
Circuit Court Reporter
PO Box 171
Reidville, SC 29375

Dear Ms. DiGirolamo:

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

John Richard Wood v. The State

Indictment #:

County: Greenville

Date of Trial: March 6, 2007 - March 8, 2007

Presiding Judge: Larry R. Patterson

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

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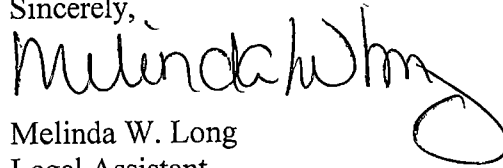
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Ms. Mary E. DiGirolamo
March 5, 2009
Page Two

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Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with a large loop at the end of the last name.

Melinda W. Long
Legal Assistant

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Non Jury

Larry R. Patterson, Circuit Court Judge

Case Number: Case No. 05-CP-13-4737

RECEIVED

FEB 24 2009

S.C. SUPREME COURT

John R. Wood, ...Appellant.

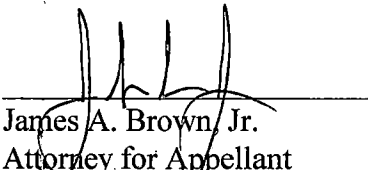
v.

The State, ...Respondent.

Notice of Appeal

John R. Wood appeals the judgment of the Circuit Court, the Honorable Larry R. Patterson presiding, denying applicant's request for post conviction relief. The Order was signed on January 28, 2009 and received by counsel for the applicant on January 30, 2009.

February 20, 2009


James A. Brown, Jr.
Attorney for Appellant
1111 Bay Street
P.O. Box 592
Beaufort, South Carolina 29901-0592
(843) 470-0003

Other Counsel of Record:

S. Creighton Waters
Asst. Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas, Non Jury

Larry R. Patterson, Circuit Court Judge

RECEIVED

FEB 24 2009

S.C. SUPREME COURT

Case Number: 05-CP-13-4737

John R. Wood, ...Appellant.

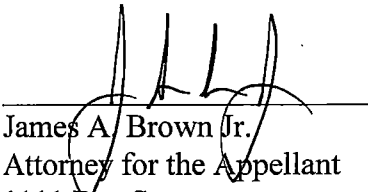
v.

The State, ...Respondent.

Proof of Service

I certify that I have served a copy of the Notice of Appeal on the State of South Carolina by depositing a copy of this Notice in the United States Mail, postage prepaid, on February 20, 2009, addressed to the State's attorney of record, S. Creighton Waters, Assistant Attorney General, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

February 20, 2009


James A. Brown Jr.
Attorney for the Appellant
1111 Bay Street
P.O. Box 592
Beaufort, South Carolina 29901-0592
(843) 470-0003

Other Counsel of Record:

S. Creighton Waters
Asst. Attorney General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Attorney for the Respondent

Law Offices of Jim Brown, P.A.

1111 Bay Street • P.O. Box 592

Beaufort, SC 29901-0592

Phone: (843) 470-0003 Fax: (843) 470-0004

jimbrownlaw@hargray.com

PCR(?)
need order

February 20, 2009

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

RECEIVED

FEB 24 2009

S.C. SUPREME COURT

Re: Notice of Appeal and Proof of Service, John R. Wood v. State, 05-CP-13-4737

Dear Mr. Shearouse:

Under cover of this letter, please find enclosed for filing in your court a Notice of Appeal and Proof of Service in the above-referenced matter. Because I was appointed to represent Mr. Wood in circuit court, I will ask that the Office of Appellate Defense assume representation of Mr. Wood unless I am appointed to represent him during his appellate proceedings. Please contact me if you have any questions.

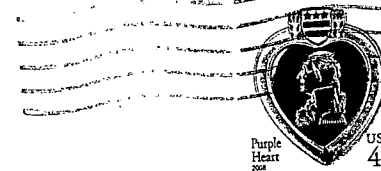
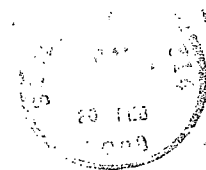
Sincerely,

Jim Brown

w/ enclosures

cc: S. Creighton Waters, Office of the Attorney General, w/ enclosures
John R. Wood w/ enclosures

Law Offices of Jim Brown, P.A.
1111 Bay Street P.O. Box 592
Beaufort, SC 29901-0592



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

Offices of Jim Brown, P.A.
Bay Street PO Box 592
ort, SC 29901



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S.C. Supreme Court
Attn: Tina Bryant
P.O. Box 11330
Columbia, SC 29211

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2005CP2304737

John Richard Wood vs. South Carolina State Of

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 28th day of Jan, 2009, and a copy mailed first class this 28th day of Jan, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

✓ James Arthur Brown Jr. P.O. Box 592
Beaufort, SC 29901
Symmes W. Culbertson Culbertson Law Firm 9
Toy St. Greenville, SC 29601
E. P. Bill Godfrey Jr. Godfrey Law Firm, LLC
10 East Ave. Greenville, SC 29601

Samuel Creighton Waters SC Attorney
Generals Office P.O. Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)
John Richard Wood, #6005,)
Applicant,)
vs.)
The State of South Carolina,)
Respondent.)

In the Court of Common Pleas
Thirteenth Judicial Circuit

C/A No.: 2005-CP-23-04737

**ORDER ON MOTION TO
RECONSIDER**

2009 JAN 23 A 10:05
CLERK OF COURT

This matter is before the Court on the Motion of the Applicant, through his counsel, to reconsider the Court's Order of December 19, 2007 denying and dismissing, with prejudice, his application for post-conviction relief.

Post-conviction relief requires that the Applicant demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064 (1984). The objective standard of reasonableness is what an objectively reasonable attorney would have done under the circumstances existing at the time of the representation. *Savino v. Murray*, 82 F.3d 593, 599 (4th Cir. 1996). An unsuccessful trial strategy does not cause trial counsel's assistance to be constitutionally ineffective. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995).

Applicant must also show prejudice to obtain relief. *Strickland*, 466 U.S. at 693. This showing requires "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Supreme Court of South Carolina says that prejudice is established when "there is reasonable probability that, absent [counsel's] errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating

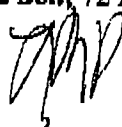
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circumstances did not warrant death....A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998) (citing *Strickland*, 466 U.S. at 694).

The Court, in accordance with the above-cited principles of law, reviewed Applicant's application for post-conviction relief thoroughly. The Court found that the Applicant had excellent representation at trial and that the representation did not fall below the objective standard set forth in *Strickland*. Therefore, the Court denied Applicant's petition for post-conviction relief on all grounds included in the petition. After a thorough review of the file and the Order denying the petition, the Court further denies the Motion to Reconsider the Order on all grounds put forth for reconsideration. Each ground is further addressed individually as follows:

Ground A

Applicant requests that the Court reconsider its ruling that Applicant's trial counsel were not deficient in failing to impeach the testimony of Karen McCall with the results of the gunshot residue test (GSR) in order to contest identity. Counsel made a strategic decision, based on the overwhelming evidence of identity, that the defense was better served by attempting to raise manslaughter than contesting identity. That strategy would fit more fluidly with the presentation of mitigating evidence regarding a fear of police and a "perfect storm" theory. Furthermore, this ground is at odds with the claim that counsel should have conceded guilt and was ineffective given the overwhelming evidence of the Applicant's guilt. Applicant's counsel made a reasonable and calculated decision, though ultimately unsuccessful, to pursue a strategy of manslaughter and mitigation rather than identity, which does not render them constitutionally ineffective in assisting Applicant at trial. See *Bell*, 72 F.3d at 429. The motion to reconsider on


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this ground is denied.

Ground B

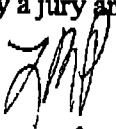
Petitioner has withdrawn Ground B, pursuant to his Motion to Reconsider, and thus the Court need not address it. To the extent a ruling is necessary, however, the Court declines to reconsider its ruling and denies the motion to reconsider on this ground.

Ground C

Applicant requests that the Court reconsider its ruling that Applicant's trial counsel were not deficient in failing to concede guilt of murder instead of pursuing a manslaughter defense. The Court found that counsel made a reasonable and calculated decision, though ultimately unsuccessful, that it would be more beneficial to make the jury think about guilt of murder, even if he was ultimately found guilty of murder, because during the penalty phase it might make a juror hesitate to impose the sentence of death. Furthermore, the testimony of trial counsel was that, after his consultations with the Applicant, he could not concede guilt in this case. The Court has already addressed and denied Applicant's arguments regarding the concession of guilt, and finds no reason to believe that counsel were deficient in failing to concede guilt when they believed that they were unable to after consultation with the Applicant. The Court finds that it was a reasonable trial strategy to attack guilt of murder rather than concede it, and finds there is no evidence the outcome of the sentencing portion of the trial would have been different had guilt been conceded. The motion to reconsider on this ground is denied.

Ground D

Applicant requests that the Court reconsider its ruling that Applicant's trial counsel were not deficient in failing to accept the trial court's offer to instruct the jury that the Applicant wished to plead guilty but be sentenced by a jury and that South Carolina law requires that guilt

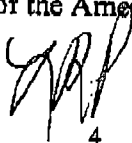

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in a capital case be submitted to a jury before sentencing may be so submitted. Counsel was clear at the hearing, as noted by the Court in its Order, that he would not want a charge of this nature but would prefer a more passive charge that does not specifically engage this Defendant and the facts of this case. The charge offered by the trial judge amounts to a charge on the facts of this case, as conceded by the Applicant, and is not something he is entitled to under the South Carolina State Constitution. S.C. Const. art. V, §21 (stating that "[j]udges shall not charge juries in respect to matters of fact"). Counsel cannot be deficient for failure to accept a charge to which the Applicant was not entitled to in the first place and which would constitute a violation of South Carolina law.

Furthermore, given the reasonable trial strategy pursued in this case to contest guilt of murder, a charge of the nature at issue in this ground would create the same issue of credibility raised by the prospect of having to plead not guilty in the face of overwhelming evidence to receive jury sentencing. Here, the Applicant would have contested guilt thoroughly at the trial only to have his credibility brought to issue when he told the jury he wanted to plead guilty. The Court finds that it was not prejudicial to reject this charge because of this credibility issue. The Court finds that counsel were not deficient for failing to accept a charge to which the Applicant was not entitled, and finds that it was not deficient performance to refuse a charge that could have caused credibility issues. The motion to reconsider on this ground is denied.

Ground E

Applicant requests that the Court reconsider its finding that Applicant's trial counsel were not deficient in failing to object to the testimony from medical providers of the South Carolina Department of Mental Health. The Court declines to reconsider its ruling on this ground. First, the Court cannot consider the standards of the American Academy of Psychiatry as attached to


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the motion because they were not put into issue before the Court at the hearing on the application. A party may not raise an issue on a motion for reconsideration that it could have raised before the Court issued its judgment. See *Anderson Memorial Hosp., Inc. v. Hagen*, 313 S.C. 497, 498, 443 S.E.2d 399 (Ct. App. 1994).

Beyond the inability to consider the attached documents, the Court declines to reconsider on other grounds. The Court finds that counsel were not deficient for failing to object to the testimony from the medical providers because their own mental health presentation opened the door to such testimony and rendered the testimony from the providers admissible. See Rule 705, SCRE. Defense experts stated at sentencing that they had relied upon the report in question as a basis for their opinions. At that point, as counsel conceded, any further objection to the report being disclosed to the State was improper because South Carolina law permits the exploration of the basis for an expert's opinion. Rule 705, SCRE. Counsel objected to the evaluation being conducted, and counsel objected, successfully, to the report being disclosed to the State until well into the defense presentation at the sentencing phase of the trial. Applicant requested the evaluation of his own accord, and clearly understood his rights and the possible consequences of such an evaluation. Counsel were faced with the strategic dilemma, created by the Applicant himself, to either not present mental health testimony or present the testimony and risk disclosure of a report of an evaluation to which they strongly objected. They decided it was better to take the risk. This was not ineffective assistance of counsel, see *Bell*, 72 F.3d at 429, and did not prejudice the defendant such that the sentencing must have had a different outcome had they objected to the report being disclosed. The motion to reconsider on this ground is denied.

Ground F

Applicant requests that the Court reconsider its finding that Applicant's trial counsel were

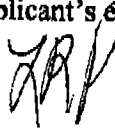
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not deficient for failing to deny access by the South Carolina Department of Mental Health to the Applicant. The evaluation by the Department only took place after Applicant requested such an evaluation *pro se*, after Applicant fired his Greenville lawyers from the Anderson case because of their refusal to consent to the evaluation, after Anderson counsel consented to an evaluation, and after the Court said it would have ordered the evaluation. Counsel tried to prevent an evaluation, and after the evaluation was completed, were able to agree with the Anderson counsel and object to further access to Applicant. Applicant opposed counsel's efforts to prevent access to Applicant before this. Objections to the evaluation and access personally requested by the Applicant cannot be lodged against counsel as ineffective assistance nor can the access be held prejudicial when the Applicant made himself available over counsel's objection.

Furthermore, the attempt to divide the evaluation into two parts is wholly unsupported since the events in Anderson and Greenville took place on the same day as part of the same chain of events, and the whole point of the extensive pretrial discussion was whether the evidence of Applicant's mental health "stopped at the Saluda River." The trial court ruled such evidence was not divisible by any logical sense despite counsel's repeated attempts to prevent access by the Greenville prosecutor. Counsel effectively represented Applicant, given Applicant's own actions in opposition to counsel's efforts, and was not constitutionally ineffective. The motion to reconsider on this ground is denied.

Ground G

Applicant requests that the Court reconsider its finding that Applicant's trial counsel were not deficient for failing to expose that Dr. Narayan misdiagnosed Applicant. Dr. Narayan diagnosed the Applicant with "anti-social personality disorder," a diagnosis that was at odds with that of defense mental health experts. Applicant's experts diagnosed him with "bipolar disorder



not otherwise specified" and "paranoid personality disorder."

First, the Court cannot consider the documents included with the motion to reconsider in support of this ground because they were not placed into evidence at the post-conviction relief hearing. See *Anderson Memorial Hosp., Inc.*, 313 S.C. at 498. The Court thoroughly reviewed this issue in its Order, and finds no plausible or credible reason for reconsidering its findings. Dr. Narayan, in the face of a thorough cross-examination at the post-conviction relief hearing, held to his opinion that Applicant suffered from "anti-social personality disorder." This was the second time he had been extensively examined by Applicant's attorneys regarding this diagnosis; the first was during the sentencing where trial counsel also offered counter-opinions and diagnoses of the Applicant's conditions from other experts. The major issue from the DSM-IV criteria for "anti-social personality disorder" was the need of a conduct disorder prior to age 15. Counsel specifically addressed this issue regarding the diagnosis with Dr. Narayan at trial and it was addressed again at the post-conviction relief hearing. Dr. Narayan stated that the criteria for "anti-social personality disorder" from the DSM-IV were not to be read like a recipe from a cookbook. He held firm to his diagnosis throughout all proceedings.

Counsel is merely able to elicit the diagnosis of an expert, the basis for his opinion, and to challenge him, through cross-examination and the presentation of competing expert testimony, on any weaknesses that appear in the diagnosis or basis. Counsel did just this. They cannot force a witness to testify a certain way. Counsel made great effort to produce more evidence of the Applicant's upbringing to challenge the diagnosis, but found uncooperative witnesses at many turns. They made a strategic decision not to call one potential family member witness about youthful anti-social behavior because they believed she might be unfavorable to the defense. Counsel were not ineffective for making this strategic decision. See *Bell*, 72 F.3d at

JAP

429. Applicant also cannot show prejudice from a failure to produce more evidence regarding weaknesses in Dr. Narayan's diagnosis because his own experts conceded that he had antisocial personality traits. He is therefore unable to carry his burden of proof regarding this issue. The motion to reconsider on this ground is denied.

Ground H

Applicant requests that the Court reconsider its finding that Applicant's trial counsel were not deficient for failing to present mitigating evidence at the sentencing phase of the Applicant's trial. The Court, having fully addressed this issue in its Order, finds no reason to reconsider its findings on this issue. The Court may not consider the affidavit and school records submitted with the motion to reconsider as they were not placed before the Court at the hearing on this post-conviction relief application. See *Anderson Memorial Hosp., Inc.*, 313 S.C. at 498.

Counsel were not constitutionally deficient in the preparation and presentation of the mitigation case regarding Applicant. There was overwhelming evidence of aggravation in this case. No family members testified on behalf of Applicant at sentencing. The Court does not find that the family member testimony presented to the Court at the post-conviction relief hearing carries the Applicant's burden of proof to show prejudice such that the sentencing outcome would have been different. The Court does find that Applicant has not carried his burden of proof as to family members not testifying at the post-conviction relief hearing because their testimony was not presented to the Court either in person or in some other way consistent with the rules of evidence. See *Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (citing *Pauling v. State*, 331 S.C. 606, 610, 503 S.E.2d 468, 471 (1998); *Glover v. State*, 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995); and *Underwood v. State*, 309 S.C. 560, 562, 425 S.E.2d 20, 22 (1992)).

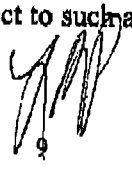


The Court notes that counsel for Applicant are highly skilled at preparing a mitigation presentation and conducting the accompanying investigation. Family members of the Applicant were generally hard to locate, and actively tried to avoid contact with the defense. The family history of the Applicant was presented at trial by the defense experts. The Court, as it stated in its Order, is not persuaded that the plea for mercy from Mrs. Jantz and the talk of Applicant's child would alter the outcome given the overwhelming evidence of aggravation. Furthermore, the defense's failure to call one family member was a reasonable strategic decision, one which does not constitute the ineffective assistance of counsel. See *Bell*, 72 F.3d at 429. Applicant was not denied the effective assistance of counsel in preparing a mitigation case and the motion to reconsider on this ground is denied.

Ground I

Applicant requests that the Court reconsider its finding that Applicant's trial counsel were not deficient in failing to object to an allegedly improper closing argument by the solicitor during both phases of the trial. Applicant contests three parts of the closing arguments: a burden-shifting argument on intent during the guilt phase, a cop-killer in prison reference during the sentencing phase, and a Susan Smith reference during the sentencing phase. The Court finds that the failure to object to these arguments was not ineffective assistance of counsel.

Regarding the alleged burden-shifting argument where the solicitor told the jury that it was looking for factual support that the Applicant did not have the requisite intent, the solicitor was clear that he was merely anticipating the argument that the defense would present during the guilt phase of the trial. In the context of the solicitor's entire argument and along with the charge to the jury, it is clear that this argument is not enough to constitute error, and counsel are not constitutionally ineffective for failing to object to such argument. See *State v. Brown*, 333 S.C.



185, 191, 508 S.E.2d 38, 41 ("any alleged impropriety must be examined on appeal in light of the entire record") (citing *State v. Johnson*, 306 S.C. 119, 131, 410 S.E.2d 547, 555 (1991) *cert. denied* 503 U.S. 993, 112 S.Ct. 1691 (1992)). The State, just moments later in its argument, referred to having the burden of proof. The solicitor's argument exactly anticipated and told the jury what the defense was planning to argue during its closing. The Court will not look at the comment in isolation, but considers the argument as a whole. See *Brown*, 333 S.C. at 191. The comment did not infect the trial with unfairness. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871 (1974) (In order for a solicitor's comments to warrant a new trial, the defendant must show that the solicitor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process.") Counsel were not ineffective for failing to object to the argument and the Court declines to reconsider its reasoning and ruling on this ground.

Regarding the reference to a cop-killer in prison, the solicitor stayed within the evidence presented during the trial and the reasonable inferences therefrom. See *State v. Huggins*, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (arguments should be confined to the record and the reasonable inferences that may be made from the record). The Applicant's case at sentencing included testimony that he would not be very high in the prison hierarchy, to which the solicitor made a contrary inference. The failure to object to permissible argument is not ineffective assistance of counsel and petitioner is not entitled to relief on this ground.

Finally, regarding the reference to Susan Smith, the solicitor made his comments in direct response to defense comments during the sentencing phase opening statements. Failing to object to this reference is not failure to provide effective assistance of counsel under an objectively reasonable standard.



Having delineated its reasoning fully in the Order and in summary above, the Court finds that Counsel were not deficient for failing to object to the above-referenced comments during closing argument and that Applicant was not prejudiced such that his trial would have come out differently had the objections been lodged. The motion to reconsider on this ground is denied.

Ground J

Applicant requests that the Court reconsider its finding that Applicant's trial was not prejudiced by trial counsel's deficiency in failing to object to the prosecution's introduction of evidence of conditions of confinement in the sentencing phase of this case. The defense made the most of the introduction of the evidence of general conditions of confinement, eliciting testimony during cross-examination on the dangers of prison life. Both sides presented roughly equal testimony on this matter; had the defense objected, it would not have been able to present this evidence. Given the overwhelming aggravation in this case and the roughly equal presentation by both sides, the Court is not satisfied that the burden of proving the outcome would have been different was met. See *Strickland*, 466 U.S. at 694. The Court declines to reconsider its reasoning on this ground and denies the motion.

Ground K

Applicant requests that the Court reconsider its finding that Applicant's trial counsel were not deficient for failing to object, on equal protection grounds, to the statutory aggravator regarding the murder of a law enforcement officer during or because of the performance of his official duties. Other courts, as cited in the Order, have rejected a similar claim and have also held that the same crime does not require the same sentence for two different individuals. See *Commonwealth v. Travaglia*, 723 A.2d 190 (Pa. Super. Ct. 1998), *Ex parte Cade*, 521 So.2d 85 (Ala. 1987), and *Williams v. Illinois*, 399 U.S. 235, 243 (1970). The Court determined that this

JP

was not an equal protection violation because the statute deters violence against those who risk their lives for the greater good and creates and grows respect for the authority of those who enforce our laws. The Court declines to reconsider its reasoning and denies the motion to reconsider on this ground.

Conclusion

Having fully addressed each ground, the Court denies relief on each and every ground specified and declines to reconsider its prior rulings. The Motion to Reconsider is DENIED. IT IS SO ORDERED.


Larry R. Patterson, Presiding Judge
13th Judicial Circuit

Greenville, SC
January 27, 2009

RECEIVED DEC 21 2007

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

CASE NO. : 2005CP2304737

IN THE COURT OF COMMON PLEAS

John Richard Wood vs. South Carolina State Of

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this _____ day of _____, 20____.

Court Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the _19_ day of _____ 12____, 2007, and a copy mailed first class this _19_ day of _____ 12____, 2007 to attorneys of record or to parties (when appearing pro se) as follows:

✓ **James Arthur Brown Jr.** P.O. Box 592 Beaufort, SC 29901
Symmes W. Culbertson Culbertson Law Firm 9 Toy St.
Greenville, SC 29601
E. P. Bill Godfrey Jr. Godfrey Law Firm, LLC 10 East Ave.
Greenville, SC 29601

Samuel Creighton Waters SC Attorney Generals Office P.O.
Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4 (Rev. 6/02)

Paul B. Wickensimer - Clerk of Court

RECEIVED

MAR - 3 2009

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
)
John Richard Wood, #6005,)
)
Applicant,)
vs.)
)
The State of South Carolina,)
)
Respondent.)

In the Court of Common Pleas
Thirteenth Judicial Circuit

C/A No.: 2005-CP-23-04737

**ORDER OF DISMISSAL
WITH PREJUDICE**

FILED-CLERK OF COURT
GREENVILLE, S.C.
DATE: 12/19/01

2001 DEC 19 PM 3:34

This matter is before this Court on the Application for Post-Conviction Relief (APCR") filed by John Richard Wood ("Applicant"), who was convicted of murder and sentenced to death. For the following reasons, this Court denies and dismisses the application with prejudice.

I.

Procedural History

At the May 2001 term, the Greenville County Grand Jury indicted Applicant, John Richard Wood, for murder and possession of a weapon during the commission of a violent crime (01-GS-23-3106). (R. at 2516-17). The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

Voir dire in the case began on February 4, 2002 before The Honorable John W. Kittredge. Public Defender John I. Mauldin, Attorney James Bannister, and Attorney Rodney Richey represented Applicant at his jury trial. Solicitor Robert M. Arial, Deputy Solicitor Betty C. Strom, and Assistant Solicitor Mindy Hervey were the prosecutors at trial. On February 11, 2002, Applicant's jury convicted him of both charges.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of

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the Code of Laws of South Carolina. The sentencing phase of his trial began on February 13, 2002.

Judge Kittredge submitted the following statutory aggravating factor to the jury:

The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

(R. at 2221-22). Judge Kittredge submitted the following statutory mitigating factors to the jury:

- (1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person.
- (2) The murder was committed while the defendant was under the influence of mental or emotional disturbance.
- (3) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
- (4) The age or mentality of the defendant at the time of the crime.

(R. at 2223-24).

On February 16, 2002, Applicant's jury found the existence of the statutory aggravating factor and recommended a sentence of death for the murder conviction. That same day, Judge Kittredge sentenced Applicant to death for murder. (R. at 2259).

Applicant filed and served a timely notice of appeal with the Supreme Court of South Carolina. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Indigent Defense, represented Applicant during his direct appeal. On July 22, 2004, Dudek filed a Final Brief of Applicant in which he asserted the following issues on behalf of Applicant:

- (1) Whether the judge erred by excusing Juror Smith for cause, where she testified she could vote for the death penalty, and sign the form imposing the death sentence, since Smith was a qualified juror?
- (2) Whether the court erred by refusing to instruct the jury on the law of voluntary manslaughter where there was evidence the trooper engaged in an "aggressive" traffic

stop which endangered appellant, who was on a motorcycle, while the trooper was in a patrol car, since this created the heat of passion and legal provocation necessary for an instruction on voluntary manslaughter?

(3) Whether the judge erred by ruling South Carolina's death penalty statute was constitutional where it mandated that appellant, seeking the mitigating evidence attendant to pleading guilty, and accepting responsibility, must waive jury sentencing, since this procedure denied appellant his right to present mitigating evidence to a sentencing jury?

(4) Was the court without subject matter jurisdiction to sentence appellant to death, pursuant to Jones v. United States, Apprendi v. New Jersey, and Ring v. Arizona where the indictment issued by the Greenville County Grand Jury did not allege an aggravating circumstance?

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 22, 2004. Dudek followed with a Final Reply Brief of Applicant also dated July 22, 2004.

The Supreme Court of South Carolina held oral argument in the case on October 5, 2004. An opinion was issued affirming the convictions and death sentence on December 6, 2004. State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (S.C. 2004). The court denied a petition for rehearing on January 20, 2005, and a death warrant issued on January 21, 2005.

Applicant filed a stay request with the Supreme Court of South Carolina on January 25, 2005 in order to pursue review by the United States Supreme Court. The State filed a Return to the stay request on February 1, 2005. The Supreme Court of South Carolina granted a stay by Order dated February 2, 2005.

Applicant, through counsel Dudek, filed a Petition for Writ of Certiorari with the United States Supreme Court on April 15, 2005, in which he raised the following issue:

Whether the South Carolina Supreme Court erred by holding that the trial judge's disqualification of a black juror who stated she could

impose the death penalty was justified under Wainwright v. Witt, 469 U.S. 412 (1985), since an appeal for a cross-section of the community was not condemned in Wainwright v. Witt, and the trial court did not rule the potential juror was not credible?

The State, through Assistant Attorney General Waters, filed a Brief in Opposition to the Petition for Writ of Certiorari on May 19, 2005. The United States Supreme Court denied the Petition for Writ of Certiorari on June 20, 2005.

Applicant, on July 1, 2005, filed with the Supreme Court of South Carolina a second Petition for Stay of Execution so he could seek his state post-conviction relief (PCR) remedies. The State filed a Return to the Petition for a Stay of Execution on July 11, 2005. By Order dated July 21, 2005, the Supreme Court of South Carolina granted a stay and appointed this Court to preside over the case.

Applicant filed a *pro se* Application for Post-Conviction Relief on July 28, 2005. The State filed a Return dated August 29, 2005. On October 15, 2005, this Court appointed counsel and gave Applicant 120 days to file an Amended Application. Applicant filed no Amended Application. On July 7, 2006, this Court *sua sponte* issued an Order giving Applicant 45 additional days to file an Amended Application. Again, Applicant filed no Amended Application. On September 28, 2006, this Court held a hearing as to the State's motion for summary judgment. While this Court believed the State had good arguments, it declined to grant summary judgment. This Court ruled, however, that no further amendments would be allowed.

As the initial hearing of January 8, 2007 approached, Applicant filed a motion for continuance and motion to amend, which this Court denied. Despite this, Applicant served on the State a First Amended Application for Post-Conviction Relief in which he asserted the following

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claims:

Ground A.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-13-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Ground B.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, 466 U.S. 668 (1984).

Ground C.

As an alternative ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

Ground D.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that the defendant is required to plead not guilty in order to obtain jury sentencing. Strickland v. Washington, 466 U.S. 688 (1984).

Ground E.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of

the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 688 (1984).

Ground F.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground G.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Ground H.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Ground I.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to improper closing argument of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

At the hearing on January 8th, 2007, the State indicated it would not oppose the late amendments if a delay of some weeks could be had for the State's case after the Applicant presented his case. This Court agreed. However, as testimony began, Applicant stood up and requested to withdraw his APCR. The Court took a recess for Applicant to discuss this with his attorneys and to place a phone call to his sister. Applicant held firm to this desire, so this Court issued an Order requiring an evaluation of Applicant on his competence to waive his APCR.

Prior to the evaluation, Applicant changed his mind and through counsel indicated he wished to go forward with his APCR. The evaluation proceeded, however, without Applicant's cooperation. The evaluation noted no mental issues.

On February 9, 2007, Applicant filed a Second Amended Application for Post-Conviction Relief in which he raised the following issues:

Ground A.

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v. Washington, 466 U.S. 668 (1984).

Ground B.

Application was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, 466 U.S. 668 (1984).

Ground C.

As an alternative ground to Ground B, Applicant was denied the effective assistance of

counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

Ground D.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain jury sentencing. Strickland v. Washington, 466 U.S. 668 (1984).

Ground E.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground F.

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Ground G.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code §16-3-26 (B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical

providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Ground H.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Ground I.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to improper closing arguments of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

Ground J.

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

Ground K.

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. Strickland v. Washington, 466 U.S. 668 (1984).

The Court held an evidentiary hearing in the case from March 6, 2007 to March 8, 2007.

Applicant was present and represented by his counsel Brown and Godfrey, and Assistant Attorney

General Waters represented the State. Applicant called psychiatrist Dr. Thomas Cobb, his sister Connie Jantz, computer expert Jeffrey Naylor, psychiatrist Dr. Donna Schwartz-Watts, Dr. John Steedman, psychologist Dr. Camilla Tezza, social worker Carlos Torres, Investigators Paul Silvaggio and Tim Jones, United States Probation Agent Bryan Bowen, psychiatrist Dr. Pratep Narayan, and the trial attorneys: John Mauldin, Jim Bannister, and Rodney Richey. Applicant also called his Anderson County trial counsel Bruce Byrholdt. The State called no witnesses.

This Court has heard the testimony and reviewed the record and now rules as follows:

II.

Grounds for Relief

None of the Applicant's grounds are sufficient for relief. Appellant raises eleven (11) grounds of ineffective assistance of counsel. Pursuant to the familiar doctrine in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), Applicant must first demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight, and counsel may reasonably choose from a wide range of acceptable strategies. Id. at 689; Burket v. Angelone, 208 F.3d 172, 189-190 (4th Cir. 2000).

The law measures competency by what an objectively reasonable attorney would have done under circumstances existing at the time of the representation. Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996). The court should "decline to allow an ineffective assistance of counsel claim to create a situation where post-conviction attorneys stroll in with the full benefit of hindsight to second-guess trial lawyers who professionally discharge their duties to their clients under the manifold pressures of a state trial." Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The mere

fact that trial counsel's strategy was unsuccessful does not render counsel's assistance unconstitutionally ineffective. Strickland, 466 U.S. at 689. Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995).

In addition to deficient performance, Applicant must also establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. It is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding because virtually every act or omission of counsel would meet that test. Id. at 693. "The Petitioner bears the 'highly demanding' and 'heavy burden' in establishing actual prejudice." Williams v. Taylor, 529 U.S. 362, 394, 120 S.Ct. 1495, 1514 (2000).

In Jones v. State, 332 S.C. 329, 504 S.E.2d.822 (1998), the Supreme Court of South Carolina stated the prejudice prong in a capital sentencing proceeding was established when "there is a reasonable probability that, absent [counsel's] errors, 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. . . . A reasonable probability is a probability sufficient to undermine confidence in the outcome." Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

A PCR Applicant has the burden of proving his claims for relief by a preponderance of the evidence. Jeter v. State, 308 S.C. 230, 232, 417 S.E.2d 594, 596 (1992).

A. Ground A

Applicant's first ground for relief is as follows:

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Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. Strickland v Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective in both the guilt and sentencing phases for allegedly failing to examine Karen McCall on her involvement in the crime and failing to introduce a gunshot residue (GSR) test showing round lead particles on the backs and palms of both hands. Applicant contends that Ms. McCall's testimony portrayed her as a victim of his criminal actions rather than a willing co-participant, and that counsel should have dispelled this notion.

1. Facts

Applicant's girlfriend Karen McCall gave a statement to police the night of the shooting. At trial, she testified that she had been in the Jeep following Applicant on I-85 as they were going to Greenville for lunch. When Trooper Nicholson got in between them and blue-lighted the scooter, she thought that Applicant would try to elude the police because he had always said he could. She got off at the Woodruff exit when she saw Applicant come by on the scooter. She quickly followed him to the gymnastics center parking lot where he parked the scooter, jumped in the Jeep, and told her to "drive, now". Karen claimed she only thought Applicant had escaped from the trooper, not that he had killed him. (R. at 1424-25, 1430-34, 1452-53).

Applicant directed Karen to make certain turns, but did not seem upset. He talked to her about vacationing for Christmas in Mexico or Alabama. They stopped at a gas station, where Applicant took their Glock 9mm and put it on the console. As they continued on, Applicant received a call from his sister and made dinner plans. (R. at 1435-40).

Once Deputy Jones got on their tail, though, Applicant's demeanor changed to "cold", "hard", and "possessed". Applicant put his foot on Karen's to mash the gas pedal to the floor, and he told her, "Drive, bitch, drive, I shot the son of a bitch!" Applicant waved the gun at her and forced her to drive. He then reached over, flipped the switch to lower the rear glass window, and began shooting at police. Throughout the drive, he would occasionally reach over and snatch the wheel, saying, "We're going to die today." (R. at 1441-46).

When the jeep simply would not go anymore, Applicant said, "I'm going to get us another vehicle. When I tell you to, get your ass up here and bring that bag." After commandeering the utility truck, Applicant called for Karen, who then ran to the passenger seat and crawled into the floorboard. Eventually, Karen heard Applicant inhale and slump over, and the police ordering her out of the car. (R. at 1447-52).

The State tried and convicted Ms. McCall in Anderson County for her part in the crimes. During her direct appeal, McCall argued for dismissal of the charges based on the doctrine of judicial estoppel, since the State, in Greenville County, elicited her testimony in Applicant's trial during which she testified she was under duress. The trial court and the South Carolina Court of Appeals rejected this claim, with the appellate court finding that even if the doctrine of judicial estoppel applied, McCall could not meet its elements. State v. McCall, 364 S.C. 205, 210, 612 S.E.2d 453, 455 (2005).

At the PCR hearing before this Court, trial counsel Mauldin testified that he saw no strategic advantage to trying to "trash" or "make a liar" out of Karen McCall under the circumstances of this case. Applicant was on trial for murdering Trooper Nicholson and, by all accounts, McCall was not around when the murder happened. Counsel stated he was aware of the information of McCall's



activities in the jeep during the escape attempt, and was aware of the SLED GSR report (introduced at PCR as Applicant's Exhibit #3), but none of that changed his position that attempting to show McCall was more involved in the crime would have done nothing to aid the defense in this case. Trying to "trash" McCall was not what the defense "was trying to do," and counsel Mauldin wanted to reduce the Anderson evidence as much as possible, not discuss it more. He stated he made the decision not to impeach her unless what she stated was entirely inconsistent with the evidence.

Counsel Bannister added that the defense strategy was to go ahead and allow Anderson evidence to come out in the guilt phase to try to lessen its effect in the event of a sentencing phase by putting distance between it and an eventual sentencing decision. Indeed, prior to trial the defense specifically gave notice to the trial court that they wanted to rescind their objection to admission of the Anderson evidence in the guilt phase, and that in the defense's judgment the evidence was fair game for both sides. (R. at 8-9, 997, 1020).

2. Analysis

a. Deficient Performance

Applicant's first claim before this Court - that his counsel was ineffective for not doing a "better" job cross-examining Karen on whether she was assisting him rather than under his dominion at the time of the crime, or for failing to introduce a GSR report with regard to Karen - is without merit. "In hindsight, there are few, if any, cross-examinations that could not be improved upon. If that were the standard of constitutional effectiveness, few would be the counsel whose performance would pass muster." Willis v. United States, 87 F.3d 1004, 1006 (8th Cir. 1996). The extent of examination and cross-examination of witnesses is an area of trial tactics left to the discretion of counsel. Yarrington v. Davies, 779 F.Supp. 1304, 1308 (D. Kan. 1991). Counsel is not required to

raise every conceivable issue or pursue every avenue of inquiry, but is required only to exercise normal skill, judgment, and diligence. Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980).

As to the guilt phase, counsel was not unreasonable strategically in expressly deciding there was nothing of value to be gained in attacking Karen to show she may have been more of a participant in the escape than she claimed on the stand. Even if trial counsel had shown that Karen was more of a willing partner in Applicant's Anderson County escape attempt rather than a person acting under duress, this would do nothing to diminish or remove Applicant's own personal guilt for killing Trooper Nicholson in Greenville County, particularly considering the McCall was not involved in the murder. (R. at 1584). Moreover, even if it could be shown that Karen was more of a willing participant during the escape, the evidence still shows that Applicant was the one who repeatedly fired shots at the pursuing police throughout the chase and that by the end of the chase Karen was huddling in the floorboard of the cab while Applicant continued to drive aggressively and shoot at police. (R. at 1541-43). Further, as the SLED agent testified at trial, having found lead particles on one's hand merely means that one was in the vicinity of a weapon when it was fired and not that the person fired the weapon; thus, the GSR report does not conclusively establish that Karen fired the weapon at any time during the pursuit. (R. at 1622). Counsel made the reasonable strategic decision to allow the Anderson County evidence to be elicited in the guilt phase in order to mute its effect in the event of a later sentencing phase. Their judgment was also reasonable that nothing could be gained by "trashing" McCall where it would not serve to diminish Applicant's guilt by any measurable amount.

Also, counsel used Karen's testimony as part of their strategically reasonable but ultimately unsuccessful defense theory that Applicant's extreme fear of police and belief that he could outrun

the officer on his motorbike led to a situation of voluntary manslaughter, or at least lack of malice, when the officer pulled his cruiser in front of Applicant's motorbike. (R. at 1712-19; 1745-56). See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel."). Counsel elicited from Karen not only Applicant's fear of police and belief that he could outrun the police, but also that he behaved that day in an extremely uncharacteristic manner that was entirely different from the sweet, non-violent man he normally was. (R. at 1456-57, 1467-68, 1474, 1478-80). Counsel Mauldin also testified at PCR that Applicant's paranoia of police and his accompanying perceptions at the time of the stop were part of the justification the defense offered to support its voluntary manslaughter charge.

Although counsel was ultimately unsuccessful in getting a voluntary manslaughter charge, a risk of which they were aware, they still decided it was their best option. Indeed, counsel Mauldin testified that even if the voluntary manslaughter "defense" was unsuccessful, in his view it was worth it in that it might convince at least one juror to hesitate during the sentencing phase decision. Moreover, counsel Bannister used this evidence to make arguments as to lack of malice during the guilt phase (R. at 1745-56), which the trial court noted was particularly clever given there was not much with which the defense could work. (R. at 1838-40). Further, the evidence elicited from Karen about the chase allowed the defense to use a prosecution witness in the guilt phase to set the stage for its mitigation case, which included the theme that a number of factors all combined, "like the blowing of air into a balloon until December the 6th when the balloon exploded," to result in the murder of Trooper Nicholson. (R. at 1858). In deciding to use Karen to their advantage in attempting to show an uncharacteristic crime brought on by a sudden confluence of factors, counsel

was strategically reasonable and not deficient in either the guilt or the penalty phase.

Counsel's strategic decisions were reasonable and not deficient. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); United States v. Lively, 817 F. Supp. 453, 462 (D. Del. 1993) (mere criticism of a strategy or tactic is insufficient for relief).

c. Prejudice

There was no possible prejudice in this case. First, Applicant never called Karen to testify at PCR and engaged in the cross-examination he asserts counsel should have done; thus, his claim is speculative and he has not met his burden of proof. See Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002) (speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued).

Regardless, there is no prejudice even assuming that some headway as to her participation could have been made with Karen had counsel gone on the attack with cross and the GSR report. The evidence of Appellant's guilt was overwhelming in this case, and, as noted before, whether Karen was more of a participant in the subsequent Anderson County pursuit does nothing to reduce Applicant's legal or moral guilt for killing the trooper. As such, Applicant could not have been prejudiced in the guilt phase with regard to such a legally insignificant issue. See generally Reed v. Norris, 195 F.3d 1004, 1006 (8th Cir. 1999) (failure to raise Batson issue not prejudicial under Strickland given overwhelming evidence); Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) (if there exists no reasonable probability that a possible defense would have succeeded at trial, the

alleged error in failing to disclose or pursue it cannot be prejudicial); Bell v. Evatt, 72 F.3d 421, 427 (4th Cir. 1995) (decision to recommend GBMI verdict was reasonable given overwhelming evidence and desire to reduce possible sentencing outcomes).

For similar reasons, there was no prejudice in the penalty phase. In the sentencing phase, Applicant must show “there is a reasonable probability that, absent [counsel’s] errors, 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.” Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson. Applicant’s subsequent wild chase, however, provides an incredible amount of further aggravation. The Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record, having served time in prison. The victim impact evidence in this case was particularly moving, especially from Trooper Nicholson’s widow and his partners on the Highway Patrol. Compared to this there was limited mitigation with no family members and relatively mild mental health testimony without findings of psychosis or delusion at the time of the offense itself. There was evidence in rebuttal that Applicant was anti-social.

Given these circumstances, trying to show that McCall was a little bit more involved in Applicant’s crimes than she claimed on the stand would have done little if anything to reduce the extremely aggravated nature of this crime. Indeed, trying to attack Karen might be just as likely to

offend the jury in that it displayed an attempt to shift blame or limit responsibility when Applicant clearly was the reason these crimes occurred.

The issue is without merit and is denied.

B. Ground B

Applicant's second allegation is as follows:

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. Strickland v. Washington, U.S. 668 (1984).

Applicant contends that counsel was ineffective for failing to produce testimony that alleged Trooper Nicholson conducted the traffic stop other than in accordance with law enforcement guidelines to support the claim that Applicant was only guilty of voluntary manslaughter.

1. Facts

As noted before in the Statement of Facts, evidence suggested Trooper Nicholson conducted an "aggressive" stop by pulling in front of Applicant's scooter to force him to stop when Applicant initially refused to comply. The defense requested a charge on voluntary manslaughter, contending that the trooper mistakenly believed the scooter was illegally on the highway, and that the trooper's cutting Applicant off at the curb was sufficient legal provocation. The trial court rejected this argument, finding that the officer did what was reasonable and necessary when Applicant fled the lights and siren, and that the officer's legal action could not constitute sufficient legal provocation. (R. at 1712-17).

Applicant raised this issue on direct appeal, contending the trial court's denial of the charge



was error. The court recognized Applicant's claim that the trooper's action in cutting off Applicant's moped meant that Applicant was forced to avoid hitting either the trooper's car, the curb, or the bushes, but still found the case inappropriate for voluntary manslaughter. Unlike State v. Lindler, 276 S.C. 304, 307-308, 278 S.E.2d 335, 337 (1981), where the court found a voluntary manslaughter charge was appropriate because the defendant alleged the officer knocked his motorcycle to the ground with a patrol car and then came out firing, the court in this case reasoned "there was no evidence that Trooper Nicholson acted in an unlawful manner in discharging his duties" and no evidence that Nicholson bumped Applicant's scooter or fired on Applicant. See State v. Wood, 362 S.C. 135, 142-143, 607 S.E.2d 57, 61 (2004).

At PCR, counsel Mauldin testified that the defense tried to show an unlawful and aggressive stop of the scooter to support their voluntary manslaughter claim. Mauldin saw Applicant's Exhibit 4, a police report reflecting that the tag on the scooter belonged to a different vehicle, and Applicant's Exhibit 5, which reflected witness statements referring to an "aggressive stop" and the patrol car "cutting the person off." Mauldin testified he would have had these reports in his file.

Counsel Bannister testified that he thought the testimony from the prosecution's eyewitnesses at trial as to the aggressive stop was very favorable to the defense. Bannister was asked about his assertion to the trial court during argument for a voluntary manslaughter charge that there was no evidence in the record the tag was illegal (R. at 1712-13) when in fact the trial court pointed out there was in fact evidence from Karen the tag on the scooter did not belong to it. (R. at 1459, 1483). Bannister testified that in making his argument for a charge he was relying on the fact that the inferences should be considered in his favor.



2. Analysis

The specific claim raised to this Court in the Application is that counsel failed to introduce evidence the stop was not conducted in accordance with guidelines promulgated by law enforcement. Applicant produced no evidence at the hearing to support this claim, and thus has failed in his burden of proof. Jeter v. State, 308 S.C. 230, 417 S.E.2d 594 (1992) (PCR Applicant has the burden of proving his claims by a preponderance of the evidence).

Moreover, Applicant at the PCR hearing presented no additional evidence about the circumstances of the stop that would call into question this result or add a new factual element that would require reassessment of the voluntary manslaughter decision. While the police reports referred to witness statements calling the stop "aggressive," or stating the trooper cut Applicant off, that type of information was more than sufficiently presented at trial. (R. at 1265-66, 1274-75, 1289-90, 1294-96, 1300-01, 1306, 1310, 1338, 1353). See generally Jones, 332 S.C. 329, 338 (no prejudice shown where mitigation evidence presented at PCR was not that different from evidence presented at trial). The Supreme Court of South Carolina has already ruled as a matter of law that these facts simply do not rise to the level of voluntary manslaughter.

As to the evidence the tag was illegal, if Applicant in PCR is merely criticizing counsel Bannister for stating there was no evidence the tag was illegal when in fact there was such evidence in the record, that provides no assistance in proving any claim for relief. Even if counsel was mistaken about one particular fact in his argument as to voluntary manslaughter, this is of no moment as counsel's supposed misstep during argument does not add any new facts to the calculus in a record that the Supreme Court of South Carolina has already held was insufficient to require a charge on voluntary manslaughter. The trial court considered the issue and the Supreme Court of

South Carolina found the issue preserved and considered it on appeal, and there was nothing about counsel's one possible misstep during argument that was fatal to the issue. This decision was fact driven, and counsel's argument cannot change the facts.

Indeed, whether or not the tag was illegal would not be determinative of this issue anyway as there was no evidence Trooper Nicholson called in the tag and then attempted to stop the scooter because the tag came back illegal; the only evidence was that Trooper Nicholson believed the scooter itself was not highway-legal in the first place. (R. at 1076-77). See generally Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) ("[I]f there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial.").

Since Applicant has offered no additional evidence of proper police procedures or any other unrepresented facts that might change the binding decision already made by the Supreme Court of South Carolina, then Applicant has failed his burden of proof and there was neither deficient performance nor prejudice. See generally Bassette v. Thompson, 915 F.2d 932, 940-941 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witness's favorable testimony).

C. Ground C

Applicant's third ground for relief is as follows:

As an alternate ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. Florida v. Nixon, 543 U.S. 175, (2004) and Strickland v. Washington, 466 U.S. 668 (1984).

As an “alternative” to the preceding ground, Applicant contends his counsel was ineffective for failing to concede guilt during the first phase of the trial. Apparently, Applicant is contending that counsel was unreasonable in even attempting the voluntary manslaughter “defense” at all, if this Court concludes that counsel was not ineffective in the manner in which they asserted that defense. Applicant asserts that counsel set forth a “he didn’t do it” defense during the guilt phase, and followed that with a “he is sorry he did it” mitigation presentation, which Applicant asserts is deficient.

1. Facts

At PCR, counsel Mauldin testified that he specifically chose to not concede guilt as he wanted to challenge the jury and make them “work” to find all the elements of murder. Counsel hoped that even if the efforts were unsuccessful in the guilt phase, at least making the jurors think about Applicant’s guilt of murder in first phase would be beneficial in the sentencing phase inasmuch as it might create residual doubt or cause a juror to hesitate. When asked if his defense at trial was a “he didn’t do it” defense, counsel stated the defense was that Applicant was not guilty of *murder*. Counsel Mauldin stated that he is aware of the “healthy debate” among the defense bar of the wisdom of conceding guilt, but pointed out he has his own opinion on the subject.

On cross, counsel confirmed that his opinion on the strategy of conceding guilt was that it was not the correct way to handle things. Regardless, counsel Mauldin added that based on his conversations with Applicant, he did not believe he could concede guilt in the case.

Counsel Bannister echoed similar sentiments on the defense strategy in this case, stating that if they could not achieve a lesser-included offense, they might at least get the jury thinking about it during the sentencing phase. Counsel Bannister stated the defense fully consulted Applicant during

discussions of the defense strategy.

2. Analysis

This Court finds the claim to be without merit, and finds counsel's decision not to concede guilt to be neither deficient nor prejudicial. This claim can only be directed to the sentencing phase because the failure to concede guilt could by no means be deficient or prejudicial in the first phase since the jury convicted Applicant.

First, Applicant's apparent objection to concession of guilt precludes counsel from being deficient in mounting the "voluntary manslaughter" guilt phase defense. As noted before, counsel Mauldin testified that based on his conversations with Applicant, he did not believe he could concede guilt. It is true that in Florida v. Nixon, 543 U.S. 175, 188-189, 125 S.Ct. 551, 561-562 (2004), the Court held that the Florida Supreme Court erred in finding automatically deficient and prejudicial counsel's decision to concede guilt without the capital defendant's express consent. In Nixon, counsel attempted to consult with his client about the strategy of conceding guilt in the first phase, but the defendant there was purposefully nonresponsive. Id. at 189.

Nixon first noted that while an attorney has a duty to consult on "important decisions" and questions of "overarching defense strategy," counsel does not have to obtain the defendant's consent for every tactical decision. Id. at 187. Similarly, Rule 1.4 of our South Carolina Rules of Professional Conduct require counsel to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and the Comment to that rule notes that some tactical decisions are so important that the consultation must occur prior to action. Undoubtedly, something as significant as conceding guilt to a capital crime is one of those important decisions that requires prior consultation. See Rule 1.4(a)(2), Rule 407, SCACR. See also Nixon, 543 U.S. at 189

("[Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.").

Nixon next noted, though, that the client has ultimate authority "to determine whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Nixon, 543 U.S. at 187. Our South Carolina Rules of Professional Conduct also codify virtually these same points. Rule 1.2(a), Rule 407, SCACR. Despite this latter provision, though, Nixon held that the Florida Supreme Court erred in concluding that counsel's decision to concede guilt in the first phase of a capital trial with the express permission of the defendant amounted to a guilty plea for which the client had absolute control. Id. at 188. The Court noted that unlike a guilty plea the defendant did in fact have his jury trial. Id. Moreover, it concluded that in the two-phase context of a capital trial, a decision to concede guilt in a case of overwhelming evidence and focus instead on the penalty phase did not amount to a "failure to function in any meaningful sense as the Government's adversary." Id. at 190. Given that avoiding execution might have been the only realistic expectation possible, counsel reasonably decided to focus on the sentencing phase and avoid the credibility issues in the sentencing phase that might come with attacking the prosecution's overwhelming case in the guilt phase. Id. at 190-92.

However, there is a difference between a situation where a defendant is purposefully nonresponsive to counsel's consultation, and a situation where the defendant expressly objects to such an important decision as whether to admit guilt before the jury to an offense carrying the death penalty. While Nixon commands that situations in which counsel concedes guilt over a nonresponsive defendant should still be subjected to the normal deficiency and prejudice analysis of Strickland, nothing in Nixon supports the view that counsel can concede a defendant's guilt to

capital murder over that defendant's express objection. Nixon notes that the lawyer "was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon." 543 U.S. at 189. Other post-Nixon decisions have noted that it would be ineffective (and perhaps unethical) for counsel to concede guilt over a defendant's express objection. See, e.g. United States v. Thomas, 417 F.3d 1053, 1060 (9th Cir. 2005) (Fletcher, J., concurring) (it is "entirely inappropriate" for a lawyer to concede guilt without prior consultation to give the client the opportunity to object; unlike the situation in Nixon, where the defendant is cooperative, counsel should obtain express consent before conceding guilt); Sleeper v. Spencer, 453 F.Supp.2d 204, 220 fn. 8 (D. Mass. 2006) (noting that "[c]ourts have found that where a trial counsel openly concedes guilt over a defendant's objections, such actions may amount to a constitutionally deficient performance"); Frascone v. Duncan, 2005 WL 1404791, *2 (S.D.N.Y. 2005) (defendant bears the burden of showing he objected to counsel's strategy of concession to a lesser offense and his will was overborne by counsel). Cf. People v. Arko, 159 P.3d 713, 723 (Colo. Ct. App. 2006) (decision to request a lesser nonincluded offense is akin to conceding guilt, and the decision whether to submit such a charge and create additional exposure to culpability should rest with the defendant). Indeed, while a number of cases have wrestled with the ineffectiveness of counsel's decision to concede guilt in a capital trial, this Court is unaware of any decision faulting counsel for refusing to concede his client's guilt for a crime that might subject him to the death penalty.

Here, without deciding whether or not a lawyer would be *per se* ineffective (and in violation of the Rules of Professional Conduct) for overruling his client's wishes against a strategy of conceding guilt, this Court does find that counsel here was not deficient for honoring his client's apparent decision that guilt not be conceded to a capital offense. Since after conversations with

Applicant about the case Mauldin believed he could not concede guilt, he was not deficient in proceeding with the voluntary manslaughter "defense".

However, even if counsel could permissibly concede guilt in the first phase over the objection of the defendant, or even if Applicant had not objected or was incommunicative, counsel's decision to mount a guilt phase defense in this case was still not deficient. Applicant cites a law review article that was quoted in Nixon to support the Court's conclusion that a lawyer can reasonably decide to concede guilt in the first phase and focus instead on the penalty phase: "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." See Lyon, *Defending the Death Penalty Case: What Makes Death Different?*, 42 Mercer L. Rev. 695, 708 (1991) (quoted in Nixon, 543 U.S. at 191).

However, in this case, counsel Mauldin declined to characterize the defense as a "he didn't do it" defense, but stated rather they were attempting to prove Applicant was not guilty of *murder* when he killed Trooper Nicholson. Of course, in this case there was overwhelming evidence of identity, but counsel did not challenge it; counsel never contended "he didn't do it." Instead, counsel sought a lesser-included offense and ultimately challenged mental state, which is almost always inferential and leaves more room for argument regardless, or even in spite of, how strong the evidence of identity is. Thus, even if the Mercer Law Review article is now the gold standard *requiring* lawyers to concede guilt in capital cases whenever evidence of identity was overwhelming, that is precisely what the defense did, never once contending Applicant was not the shooter.

Unlike that suggested by Applicant in his citation of the law review article, counsel thought their guilt phase and sentencing phase presentations dovetailed nicely, and making the jury think

about the mental state necessary for murder might have worked to their advantage when adding the mitigation presentation on Applicant's mentality from Dr. Schwartz-Watts, Jeffrey Youngman, and Jim Aiken. This Court agrees, as set forth earlier in the discussion of Ground A regarding counsel's use of Karen's testimony to set up Applicant's extreme fear of police and uncharacteristic behavior on the day of the incident. Moreover, this Court finds counsel's strategic judgment reasonable that making the jury "work" on the elements of murder in the guilt phase might have had a beneficial effect in causing a juror to hesitate before giving the death sentence in the penalty phase.

Thus, this Court finds counsel's strategic performance was intelligent and professional in view of the difficult hand dealt. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) ("Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel," and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would have conflicted with alibi defense). See also Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision cannot be second-guessed by court reviewing a collateral attack).

Moreover, this Court finds no prejudice under Jones's recitation of the standard for prejudice in alleged sentencing phase errors. Given the extremely aggravated nature of the murder of Trooper Nicholson and the subsequent escape, and the limited mitigation that was available in this case, it simply cannot be said that there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death had counsel just conceded guilt of murder in the first phase rather than conceding Applicant was the shooter but

continuing to argue mental state.

The issue is denied.

D. Ground D

Applicant's fourth ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain a jury sentencing. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to agree to the trial court's offer to instruct the jury he wished to plead guilty but under the law has to plead not guilty to obtain jury sentencing.

1. Facts

In a pretrial motion, Appellant moved to quash the state's death penalty notice on the basis that he could not plead guilty and receive jury sentencing. Applicant argued that this denied him equal protection and due process inasmuch as it was "fundamentally unjust and results in undue pressure on the Defendant to seek a trial." (R. at 2510). The State filed a response in which it generally asserted that the court had previously rejected jury sentencing after a guilty plea and that the United States Supreme Court had upheld judge-sentencing capital schemes. (R. at 2511-12).

At a pretrial hearing, Appellant argued that pleading not guilty to receive jury sentencing forces the defendant into an "obvious untruth" that destroys the defendant's credibility. The defense also complained that the jury would penalize Appellant for his failing to accept responsibility. The judge ruled that the statute was constitutional. (Supp. R. at 11-12).

The judge subsequently issued a written order in which he "appreciate[d] the practical

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considerations," but noted that the defense cited no authority supporting a constitutional violation. The court noted that it was willing "to address these concerns during jury *voir dire* if Defendant so requests." (R. at 2513-14).

At trial, the defense re-raised the issue as it went through pre-trial motions. The following then occurred:

Mr. Mauldin: All right. The next one, your Honor, was motion filed in November the 21st where we requested a quashing of the death notice where the Defendant - under statutory scheme the defendant was required to enter a plea of not guilty and the sentence - - do you remember that motion?

The Court: I do.

Mr. Mauldin: All right.

The Court: And I also remember either I told you on the bench or put it in a footnote in the order that that struck me as a very sound argument. I don't believe it's constitutionally infirm to have - -

Mr. Mauldin: I'll hand you my note, your Honor. What I wrote you said, and I think that's exactly what you said.

The Court: It doesn't rise to a constitutional violation. But from a practical standpoint I can understand the benefit a party would seek to obtain by that initial admission on the front end in the inability to plead guilty to a Judge and then submit sentencing to a jury.

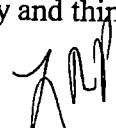
Mr. Mauldin: Yes, sir.

The Court: And I offered from the bench and/or in writing to address that and to handle that during jury selection if defense counsel so desired.

Mr. Mauldin: Yes, sir.

The Court: So I was willing to tell the jury that the individual wished to plead guilty, but in order to submit the sentencing issue to them we would go through the process of a trial first. And then if you had desired that, we would have had long discussions of how we could approach that with the jury and things of that nature.

Mr. Mauldin: Yes, sir.



The Court: I specifically remember that one. It struck a chord with me.

Mr. Mauldin: Yes, sir. And the way our statement is set up is just the way it's set up. But we don't believe that it's appropriate the way it's set up where it requires - - well, I'm not going to through and rehash the argument.

The Court. Right. My ruling stands on that.

Mr. Mauldin: Yes, sir. The next motion, your Honor, that would be appropriate at this time which was held in abeyance, if I'm not mistaken. At the time of the hearing, was the sequestration of witnesses.

(R. at 1004-1006).

On direct appeal, Applicant contended the South Carolina statutory death penalty scheme was unconstitutional inasmuch as it requires a defendant to plead not guilty if he wants a jury to sentence him. He asserted the scheme denied him the mitigating evidence of an admission of guilt, and that he had a right to jury sentencing pursuant to the intervening decision of Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002). The Supreme Court of South Carolina rejected this issue, finding Ring inapplicable to South Carolina's death penalty procedure. See State v. Wood, 362 S.C. 135, 143, 607 S.E.2d 57, 61 (2004).

At PCR, counsel Mauldin testified that he was "shocked" he did not take up the judge's offer to charge on the necessity of pleading not guilty in order to get jury sentencing and stated he wanted the trial court to instruct it and it was error for him to have not ensured the trial court gave the instruction. On cross, however, Mauldin admitted he would not have wanted the charge as the trial court ultimately phrased it - that "the individual wished to plead guilty, but in order to submit the sentencing issue to [the jury] we would go through the process of a trial first." (R. at 1005). As noted before in the discussion of the preceding ground, counsel Mauldin also testified that after



conversations with Applicant he did believe he could not concede guilt, that in his opinion conceding guilt was not good strategy, and that he preferred to make the jury “work” on the mental elements during the guilt phase in the hopes that it would cause hesitation in the event of a sentencing phase. The defense vigorously challenged the mental state element throughout trial and sought the lesser-included offense of voluntary manslaughter. Applicant’s other trial counsel testified that Mr. Mauldin handled this issue.

2. Analysis

This Court finds that counsel was neither deficient nor Applicant prejudiced with regard to this issue. Admittedly, counsel stated he was shocked he did not ask for the instruction, but the trial court did not offer the instruction Mauldin wanted. Mauldin’s requested instruction would be to the more “passive” effect that in order to have a jury sentence him, a capital defendant must plead not guilty. The specific charge the trial court offered, that Applicant “wished to plead guilty but in order to submit the sentencing issue to [the jury] we would go through the process of a trial first,” is different, and Mauldin was clear he would not want this charge as it definitively states Applicant wanted to plead guilty. As noted in the discussion of the previous ground and incorporated here, the defense could not and did not plead guilty or concede guilt, based not only on counsel’s reasonable strategic judgment to challenge guilt of murder in the first phase, but also based on Applicant’s own representations that precluded such a concession or plea. See generally Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995) (“Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel,” and petitioner must overcome presumption that the challenged actions was an appropriate and necessary trial strategy); Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would

have conflicted with alibi defense).

In any event, Applicant offers no authority that requires such a charge, and this Court is unaware of any. Cf. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981) (the portion of the death penalty statute addressing what happens when a sentencing jury is hung is addressed to the trial judge only and “need not be divulged to the jury”). There is no mandatory legal requirement that the trial court give the charge as Mauldin would phrase it as opposed to the way the trial court phrased it. This alone is sufficient to defeat Applicant’s claim because there is no legal rule requiring such a charge and thus no denial to Applicant of anything to which he had a right. Since the only charge offered by the trial court was one unacceptable to the defense strategy, and Applicant had no legal right to a differently phrased charge, then counsel could not have been deficient or Applicant prejudiced from either the declination of the offered charge or the failure to request the desired one. See, e.g. United States v. Roane, 378 F.3d 382, 399 (4th Cir. 2004) (counsel could not have been ineffective for failing to seek an instruction that the jurors must be unanimous as to the five people supervised in a continuing criminal enterprise, because the law did not require such unanimity on that issue); Nichols v. Scott, 69 F.3d 1255, 1288 (5th Cir. 1995) (counsel not ineffective for failing to request a charge on a point that was not yet clearly required by federal or state law).

Indeed, the only allegation expressly raised to this Court in the Second Amended Application is a claim that counsel failed to take the trial court’s version of the charge. Since that charge expressly stated Applicant wanted to plead guilty, and counsel stated he would not want that charge because it was entirely inconsistent with the defense presented during the guilt phase, then counsel could not have been deficient for refusing it. See Bean v. Calderon, 163 F.3d 1073, 1082 (9th Cir. 1998) (finding counsel not ineffective where diminished capacity defense would have conflicted with

alibi defense).

Finally, there can be no prejudice. This issue only goes to the sentencing phase, as the failure to have the judge tell the jury Applicant wanted to plead guilty by no means could be deficient or prejudicial in the first phase where the jury convicted Applicant anyway. Again, Jones commands this Court to assess whether there is a reasonable probability that the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. 332 S.C. at 332-333 (citing Strickland, 466 U.S. at 694). If the trial court gave the charge it offered, it would have actually been prejudicial to Applicant as it would have been directly contradictory to the defense Applicant mounted at trial. Indeed, a jury might be more likely to have credibility problems with the defense that continued into the sentencing phase if told Applicant wanted to plead guilty but then the defense team challenged his guilt.

This Court is not convinced that the Jones standard for sentencing phase prejudice is met even if Mauldin's version of the charge is considered. Telling the jury that a defendant is forced to plead not guilty to get jury sentencing in a case where the defense vigorously seeks a lesser-included offense or argues against malice would either be of no effect or it would be prejudicial to the defendant in that it still suggests he is engaging in an extensive charade before the jury during the guilt phase. However phrased, the charge is simply not congruent with the defense's chosen strategy in this case. Regardless, given the extremely aggravated nature of Applicant's crime spree and the limited mitigation, this Court concludes that the charge, given in any form, would not create a reasonable probability of a different result pursuant to Jones.

The issue is denied.

A handwritten signature in black ink, appearing to be 'KRL' or similar, is written below the text 'The issue is denied.'

E. Ground E

Applicant's fifth ground for relief is as follows:

Applicant was denied effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to use of the competency and criminal responsibility evaluation in sentencing.

1. Facts (events at trial)

Submitted at the PCR hearing before this Court was a transcript from September 21, 2001 hearing before the trial court in this case. At the hearing, the State requested that the competency and criminal responsibility evaluation to take place for the Anderson County charges also be available for the same issues in the Greenville County case.

The defense responded that the Greenville solicitor had not moved for an evaluation, and that the defense had concerns the evaluation process would open the door to the use of the information as a discovery tool by the government. The court noted that the Anderson County court already signed the order directing an evaluation and it was taking place the following week. The defense then contended that the State was, by a "back door," getting the Applicant to waive his Fifth and Sixth Amendment rights, and getting support for a later request for an independent examination by a State expert. (9/21/01 R. at 3-7).

Next, the defense requested placement of any evaluation report and communications or

records obtained for the evaluation under seal and provided only to the court. Defense counsel specifically wanted to put on the record that the court relieved them as Anderson County counsel on August 9th and Anderson County counsel did not consult them about the evaluation. Finally, defense counsel argued that if the court was ordering an evaluation based on detecting a mental disability in Applicant, then it should appoint a guardian *ad litem*. (9/21/01 R. at 3-7).

In response, the court noted that it received from Applicant personally a written *pro se* motion in Anderson County for an evaluation, and that Anderson County counsel had also sought an order for the evaluation.¹ The court pointed out that it did not understand the logic of preventing usage of the evaluation at the county line for events that happened on the same day. The court also had concerns that if mental issues in fact arose at trial, lack of access to the Defendant would disadvantage the State. The defense responded that at the present juncture they were simply objecting to any use of the process as a discovery tool for the Government. (9/21/01 R. at 7-10).

As the conversation continued, defense counsel again asked that since there was no moving party in Greenville for the evaluation, that the court make the results of it for the court's "eyes and ears only," and prevent the Anderson County prosecutor from disclosing the report to the Greenville prosecutor. The defense noted this would not interfere with the process in Anderson since the trial in the Anderson case was not for several months. The State responded that it did not understand how evidence of incompetence could "stop at the Saluda River." The prosecutor assured the judge he was not interested in discovery; he just wanted to make sure a previously undisclosed mental health issue did not delay the trial at the last minute. The prosecutor had no objection to a sealed report as long

¹ Anderson County counsel consented to the evaluation order. And, in September 2001, Applicant also personally wrote the Greenville Clerk requesting that new counsel be appointed and that he receive a mental evaluation. Applicant described "earreckensiable [sic] difference of opinion [with counsel] that can not [sic] be worked out."

as he was not sandbagged the day before trial. The defense responded that the court should decide about release of the information. (9/21/01 R. at 10-13).

The court then ordered that "based on the defendant's request through Anderson County counsel" for an evaluation, any result from that evaluation would also be considered in the Greenville case. The court also directed that the Department of Mental Health submit the report directly to the court "for both counties," and that the parties would revisit later the matter of disclosure. (9/21/01 R. at 14).

The record reflects that the court's psychiatrist tasked with determining Applicant's criminal responsibility and competence to stand trial called the judge prior to trial to express his frustration that the defense refused to respond to his request for consent to get Applicant's updated medical records from the jail. The defense responded to this by telling the trial court they have been objecting to the evaluation process since the beginning, and did not want to give their file information to the doctor. The court noted it would find out from the doctor, Dr. Narayan, what he needed to complete his evaluation. (R. at 720-23).

After a break, the trial court noted that he had talked to the doctor, who was concerned that he would be unable to give an opinion as to competency because he could not get any information or cooperation from the defendant. The judge noted he simply told the doctor he would have to do the best he could, as the judge did not feel like he could order family members to talk to the doctor or order blood tests of the defendant. (R. at 723-24).

Prior to the competency hearing, the trial court noted it did receive Mauldin's letter stating Applicant would not meet with the designated examiner, Dr. Narayan. (R. at 950). At the competency hearing, Dr. Narayan was examined by the trial court. During the examination the court

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specifically noted that it "want[ed] to limit our discussion to the issue of competency." Dr. Narayan testified that he interviewed Applicant on two prior occasions, that he advised Applicant of his Miranda rights each time, and that Applicant waived them after reciting them back in a paraphrased form. Applicant also signed the waiver of rights form on two separate occasions. (Tr. Ct. Ex. 16). Applicant also indicated his understanding that information gained from him could be used in determination of sentence.

Dr. Narayan believed Applicant understood those rights and was competent to stand trial at the time of his evaluations. The court noted Dr. Narayan's report included findings placed under seal and filed with the clerk. However, Dr. Narayan was unable to give an opinion as to competency at the time of the hearing because he had no access to the defendant or information about him since those initial interviews. (R. at 952-62).

Under examination by the solicitor, Dr. Narayan noted that during their earlier meetings Applicant told him that he was not on nor had he ever been on any psychiatric medications. Dr. Narayan said he could not render as opinion as to the present time because they received information that Applicant's psychiatric situation may have changed because detention staff had told Dr. Narayan that a doctor hired by Applicant had placed him on medication. Dr. Narayan requested further information about that but had no access by Applicant to his records or to Applicant himself. (R. at 963-66).

On cross by the defense, Dr. Narayan reiterated that in light of information that the situation may have changed, he was simply unable to give an opinion at the present time. Dr. Narayan noted that he called the jail and received the information about the medications, but no information was received from Applicant or his lawyers. Dr. Narayan noted he had no access to the detention records.

Dr. Narayan stated, however, that at the time of the initial evaluation, Applicant, after being advised of his rights, still agreed to a release of his medical information. During the cross-examination, counsel Mauldin showed medical records to Dr. Narayan that he had not seen with the specific reservation that he was not disclosing it to the State through the examination. The defense requested that Dr. Narayan make them a copy of his entire file, and the trial court ordered it.

As the examination continued, Dr. Narayan noted that during their conversation on October 29, Applicant told Narayan that he was planning on firing his Greenville attorneys and having his Anderson counsel represent him in both jurisdictions. Applicant also indicated he had written a letter to the Clerk of Court attempting to fire Mauldin and Bannister. Dr. Narayan noted he had contact with the Anderson County lawyer, Bruce Byrholdt. (R. at 965-83).

At the conclusion of cross, the defense made a motion for every piece of paper relating to Applicant at the State Hospital. The court agreed. The solicitor then requested that he receive a copy, but the court denied that without prejudice, ruling instead that the court should receive a copy. (R. at 982-83, 990-92).

During reexamination by the trial court, Dr. Narayan noted that no one from the defense team called him and offered to assist in the evaluation, although that has happened in the past. Dr. Narayan noted that he felt he had plenty of information to find Applicant competent at the prior time, and described Applicant's waiver of rights prior to the interviews. (R. at 981-86).

A psychologist named Dr. Tezza also testified about Applicant's decision to execute the waiver of rights at the prior interviews, including the declination to have his attorney present. (R. at 986-89).

The trial court then found Applicant competent to stand trial. The court noted that Applicant

had the burden, and there was no real effort to challenge competence. The court also noted that it might have to revisit the issue of providing the mental health information to the State. (R. at 993-95). Moreover, the court made part of the record letters reflecting Dr. Narayan's attempt to get further information from Applicant and his attorneys, as well as the letter from defense counsel in which the defense declined to allow such access. (R. at 995-96; Tr. Ct. Ex. 17).

Following Applicant's cross-examination of Karen McCall during the guilt phase on Applicant's fear of police, headache, and uncharacteristic behavior on the day of the incident, the State again requested that it receive Dr. Narayan's full report from his evaluation of Applicant at the State Hospital and moved for an independent mental health examination. The solicitor argued that capacity had been made an issue before the jury by the cross, and he contended that there were statements by Applicant in the report that the State should be allowed to use.

The trial court denied the motion, responding that there was no notice of insanity or a GBMI defense. The solicitor complained that the defense was attempting to use his mental condition to support a lesser-included offense, but the trial court did not yet think they had arrived at the point where it would require full disclosure of the state psychiatrist's report. The solicitor complained that he was at a disadvantage because the defense was barring him access to any mental health records, and the court noted it would not allow the defense to introduce mental health issues through the "back door" with an attack on intent. (R. at 1490-97).

At the close of the State's guilt phase case, the defense stated it had no intention of calling any psychiatric witnesses. Accordingly, the trial court ordered the State's mental health expert to leave the courtroom pursuant to the sequestration order and also denied the State's renewed request to see the rest of Dr. Narayan's file or for an independent mental health examination. (R. at 1662-

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65). The State then raised that under state law diminished capacity is never a defense to murder. The defense replied all they were going to do was call lay witnesses to describe the defendant at the time of the offense. (R. at 1679-81).

During pre-sentencing phase motions, the State again renewed its request that it receive Dr. Narayan's entire report rather than just the redacted portion. The State also again asked for an independent examination, asserting the defense's scenario in guilt phase argument that Applicant reacted with such fear and panic put mental issues in play. The solicitor noted he was not going to call Dr. Narayan in his case-in-chief, but may call him in reply, put him up, subpoena the jail records the defense would not provide, and let Dr. Narayan look at them on the stand. (R. at 1822-27).

The defense responded that it had objected to the evaluation all along, and that criminal responsibility and GBMI were already "out of the way" with the guilt phase verdict. The defense argued it did not ask for any mental health instructions nor did it bring any mental health testimony before the jury in the guilt phase. (R. at 1827-29).

The court responded that it was likely the defense would present some mental health expert in the sentencing phase, and it would be unfair to allow the defense to do so with its hired experts without the State being able to look at Dr. Narayan's report that might have contrary information. The court noted it was trying to be fair to both sides, but if the defense called a mitigation expert to support some of the mental health mitigators, then the State was only entitled to be privy to possibly contradictory information in the report. (R. at 1830-31).

The defense responded that the evaluation was only for criminal responsibility and competency, and there was no authority to order the defendant to submit to an evaluation if he was merely claiming entitlement to mitigators in the sentencing phase. (R. at 1831-33).

The trial court then noted that the defense's recitation of the procedural history was not accurate, and that the State had no way of knowing what the defense had represented to the trial court in *ex parte* funding requests and other communications. The court simply believed that if Applicant made a statement to Dr. Narayan after a waiver of rights, it simply was not fair for the State to be unaware of it, given the factual scenario the defense attempted to elicit from Karen McCall. (R. at 1833-34).

With regard to funding requests, defense counsel noted that he has his clients evaluated for mental health issues in every single capital case. The defense stated that the State's position would essentially allow for preemptive evaluations just based on the likelihood that the defense was going to present mental health mitigation.

Ultimately, the court decided that it was not going to disclose the report at the time, and it would wait until the defense presented its case to reassess the decision. (R. at 1836-38).

In opening during the sentencing phase case, the defense argued it was going to present evidence of "mental impairment," and of "a spiral pattern of acts and circumstances . . . almost like the blowing of air into a balloon until December the 6th when that balloon exploded." (R. at 1858).

As its second witness, the State called Dr. Narayan. The defense objected, arguing again that Blair issues were already decided and Dr. Narayan had no relevance. The State contended that the defense's opening argument clearly put mental impairment into play, and that Dr. Narayan told the solicitor that there are things in the report Dr. Narayan needs to use to support his opinion that have not been disclosed to the solicitor. The court sustained the objection to Dr. Narayan's report, finding argument is not evidence, and stating again that the defense presentation needed to occur first to finally decide the issue. (R. at 1871-75).



During its sentencing phase case, the defense called social worker Jeffrey Youngman, who testified: (1) Applicant's social and emotional functioning was affected by his family's dysfunction; (2) his social environment played a role in his level of functioning; (3) his behavior is consistent with someone suffering from mental illness; and (4) he has no significant prior history of criminal convictions involving violence. (R. at 1975). Later, Youngman theorized Applicant had paranoid personality disorder. (R. at 1988). On cross, Youngman admitted he reviewed the state mental health evaluation as part of his opinion in the case. (R. at 1992-93, 2016-17).

The solicitor then asked to review all documents upon which Youngman relied in forming his opinion. Defense counsel noted that it had been objecting to disclosure from the beginning, but conceded:

On the other hand, if Mr. Youngman, who said that it was part of the material he looked at, I really don't think an objection is appropriate, quite frankly, Judge.

(R. at 1997-98). The judge noted he appreciated defense counsel's candor, and stated, "[W]hen an expert says he or she relied on certain documents, the rules unequivocally permit cross examination on the sources of the expert's opinion." (R. at 1998).

Defense counsel then asserted that there should be a distinction between statements merely contained within a report the expert reviewed and statements actually relied upon by the expert. The court noted that potential hearsay information in reports is not offered for the truth of the matter asserted but only for the jury's consideration as to the adequacy of the expert's opinion, and suggested a limiting instruction might be in order. (R. at 1999-2001).

Youngman then returned to the courtroom with the state hospital report, and the State then had the opportunity to review Dr. Narayan's report in its entirety. (R. at 2002-03). Following an



examination of Youngman outside of the presence of the jury, the court overruled the defense objection to examination on certain statements relied upon by Youngman, but gave a limiting instruction that examination on statements relied upon by the expert were only to be considered as to the assessment of the expert's opinion, not for the truth of the matter asserted. (R. at 2003-15). The solicitor then examined Youngman on the state mental health report, including inconsistencies in the two stories Applicant told the examiners on separate occasions. (R. at 2017-19).

The defense also called former warden James Aiken, who testified that Applicant would be adaptable to prison, that he would not be a danger to staff or other inmates, and that he in fact would be at the mercy of the prison predator population. (R. at 2037-44).

Following Aiken's testimony, the solicitor advised the court that since he had now had a chance to review the entire evaluation report, it was his intention to discuss the previously redacted portions with Dr. Narayan and Dr. Crawford from Department of Mental Health. The court declined, stating that for the moment the prior ruling remained in effect until the court could see the entire "parameters of the defendant's effort in mitigation" and until the court has had an opportunity to discuss with the defense what mitigators they think the evidence supports. The solicitor then noted that he would need expert help to assist him with cross-examination of the defense's mental health expert the following day, and the court stated it would give the solicitor the necessary time if needed. (R. at 2045-49).

The next day, Applicant called his mental health expert, Dr. Schwartz-Watts. Dr. Schwartz-Watts testified that the results of Applicant's neurological exam were completely normal. (R. at 2066). Dr. Schwartz-Watts diagnosed Applicant with "bipolar disorder not otherwise specified" and "paranoid personality disorder." (R. at 2070). She noted that bipolar disorder is only "a problem



with the way you feel,” although she claimed Applicant has hallucinated. (R. at 2071, 2077). Dr. Schwartz-Watts also testified that since Applicant had been on medication that she prescribed, he was more stable, less grandiose, and “able to process things” in a slower and more deliberate fashion. (R. at 2087).

After direct examination of Dr. Schwartz-Watts concluded, the parties discussed the parameters of cross-examination. Ultimately, the court instructed the witness that while the solicitor was going to ask general questions about Applicant’s alleged grandiosity or hallucinations, the witness was not to mention Applicant’s claim that God told him to blow up the Pentagon, which Karen McCall told to Dr. Narayan. (R. at 2094-2102).

During cross, Dr. Schwartz-Watts testified that she reviewed Dr. Narayan’s report and absolutely agreed that Applicant was not only competent to stand trial but also criminally responsible for the murder. (R. at 2118-21). At the end of cross, the solicitor asked and the court agreed for time to review the notes. (R. at 2124).

In reply, the State called Dr. Narayan, who testified to a reasonable degree of medical certainty that Applicant was not only competent to stand trial but also criminally responsible. (R. at 2146-48). Dr. Narayan disagreed with the defense doctor’s diagnosis, though, and said Applicant only had antisocial personality disorder. (R. at 2148-51). Dr. Narayan also noted that there was no evidence of Applicant displaying any abnormal behavior. (R. at 2152-53). Dr. Narayan stated that his diagnostic impression, confirmed by psychological testing, was that Applicant began to malingering his supposed symptoms. (R. at 2157-58).

During the examination, the defense objected and the court sustained the objection to questioning about Dr. Narayan’s attempt to get further information in the case. The court gave a

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curative instruction on the defendant's right to remain silent. (R. at 2141-43). Dr. Narayan did note, however, that he had recently had the opportunity to review information from Dr. Schwartz-Watts' file. (R. at 2151).

At the close of reply, the defense requested the mitigators referring to mental or emotional disturbance, substantial impairment of the defendant to appreciate the criminality of his conduct or to conform his conduct with the law, and the age or mentality of the defendant at the time of the crime. (R. at 2176).

During closing, defense counsel repeatedly argued that Applicant had a mental illness, and that his capacity to conform to the law was substantially impaired. (R. at 2202-05, 2207, 2209-10). The trial court charged the jury on the statutory mitigating circumstances that refer to "mental and emotional disturbance," "substantial impairment of the capacity to conform," and the "age and mentality of the defendant at the time of the crime." The court also charged the jury on its right to consider any non-statutory mitigating factors. (R. at 2223).

During deliberations, the jury requested that the court play back the testimony of defense psychiatrist Dr. Schwartz-Watts and court's psychiatrist Dr. Narayan. Defense counsel reasserted its objection to the reference to Appellant's right to remain silent during Dr. Narayan's testimony and requested direction of a life sentence. The court denied the motion. (R. at 2236-40).

As the jury continued to deliberate, counsel Mauldin put on the record his contention that the decision of Anderson counsel to consent to the evaluation was *per se* ineffective assistance of counsel because it led to the sentencing phase testimony of Dr. Narayan that the jury asked to rehear. The judge noted that while it did not intend to rehash the issue yet again, Applicant personally through his Anderson counsel had requested an evaluation, "which started the process." The judge

then went on to say that his own dealings with Applicant at the August 2000 hearing and Applicant's letters to the Clerk's Office in both counties "convinced me that absent the initiation by Mr. Wood himself I would have been duty bound to require a state evaluation as to competency." The court noted that subsequent *ex parte* communications with Greenville counsel and Dr. Schwartz-Watts "confirmed" this conclusion because they told the court the defendant needed to be treated for mental illness. The judge finished by noting his "firm judgment" that ordering the evaluation was "the appropriate thing to do," which he would have done *sua sponte* had Applicant not requested it. (R. at 2250-52).

2. Facts (evidence at PCR)

At the PCR hearing before this Court, counsel Mauldin testified on direct by Applicant that he was very opposed to the evaluation of Applicant from the beginning. He testified he did not attend the evaluation, stating he could not recall why but it may have been his other commitments. Admitted into evidence during Mauldin's testimony were a copy of Applicant's *pro se* request for an evaluation, dated September 13, 2001, a memorandum from the trial judge setting a hearing on the request, and the Anderson County order setting the evaluation. Mauldin stated he requested the hearing on the evaluation prior to it taking place, as already described above.

On cross, Mauldin stated that one of the major disagreements he had with Applicant was whether to have an evaluation done. He strongly advised Applicant not to go and talk to any state mental health officials. As to whether he personally advised Applicant of his rights, counsel was adamant that he told Applicant that he did not want Applicant to do the evaluation and that it would be used against him. Counsel admitted he simply could not remember why he did not attend the evaluation. Discussed during Mauldin's testimony at this point was Court's Exhibit 16 from the



trial, which was the advice of rights form executed by Applicant prior to his evaluation at the South Carolina Department of Mental Health (DMH).

Mauldin also testified that, subsequent to the conducting of the evaluation, they considered the danger of the State being able to use what was in the report. However, they decided to go forward anyway with their own mental health testimony from Dr. Schwartz-Watts and Jeffrey Youngman.

Counsel Bannister testified that the defense did not want any DMH testimony introduced at the trial. Initially, the court appointed he and Mauldin on the Anderson case as well, and the defense team was ready to go inasmuch as it looked like the Anderson solicitor was going to try that case prior to the death penalty case in Greenville. However, Applicant insisted he wanted an evaluation. Mauldin and Bannister refused, and on cross by the State Bannister testified the defense specifically advised Applicant that in their judgment nothing good for the defense could come of the evaluation process. However, since Mauldin and Bannister would not agree to the evaluation, Applicant had them relieved in Anderson County.

Anderson County counsel, Bruce Byrholdt, testified at the PCR hearing as well. He stated that he consented to an evaluation of Applicant for criminal responsibility and competency, but that he did not recall advising Applicant on his right to remain silent. On cross by the State, Byrholdt stated that after the release of John Mauldin as Anderson counsel, he met with Applicant who advised Byrholdt that he wanted an evaluation. Moreover, Byrholdt testified that his observations of Applicant and Applicant's behavior warranted an evaluation.

Dr. Narayan from DMH testified that he had Applicant execute an advice of rights form prior to any session of an evaluation. Court's Exhibit #16 was the advice of rights form signed by Applicant prior to his evaluation. Dr. Narayan testified he normally gives the form to the subject,

requests that the subject read it, and then asks the subject if he has any questions.

3. Analysis

Applicant's contention with this ground for relief is that his counsel "failed to object to the testimony from medical providers of the South Carolina Department of Mental Health." Applicant argues that counsel was "unaware" information from the evaluation could be used since no issue as to criminal responsibility or competency was raised at trial, and further asserts that counsel "failed to object to the presentation of this evidence outside of the limited purpose for which the evaluation was ordered."

Of course, this record is clear that Greenville counsel objected to the evaluation process throughout the proceedings, both to their client in private and the judge at various hearings, because of their expressed concern that the information would ultimately be used in aggravation against Applicant. Since Greenville counsel objected to the evaluation process from the start both to their client and the judge, Applicant's claim really starts at the decision of Anderson counsel to agree to Applicant's repeated demand for an evaluation for criminal responsibility and competency to stand trial.

However, as an initial matter, this aspect of the claim is not even proper for consideration in the present action. First, of course, this is not the pled claim. Applicant filed this PCR action in Greenville County challenging his murder and possession of a weapon convictions from Greenville County, for which only Mauldin, Bannister, and Richey were appointed. Indeed, in section 16 of his Second Amended Application, Applicant only lists Mauldin, Bannister, and Richey as the counsel who represented him at trial, and the text of the present allegation only refers to what "trial counsel" or "capital trial counsel" did or failed to do. Thus, Applicant has only expressly alleged a claim

against his Greenville counsel. Applicant filed this Second Amended Application long after missing two deadlines of this Court for Final Amended Applications, and the State requested and this Court was clear that only the pled allegations would be before the Court at the hearing. Moreover, the State was adamant throughout the hearing that it was not trying anything by consent. Accordingly, inasmuch as the present allegation attacks the decisions or actions of Anderson counsel, this Court finds it is not pled properly and timely.

Even if it was properly and timely pled, however, it is still questionable whether an allegation against Anderson counsel is proper in this Greenville case. As has been repeatedly set out, this Greenville PCR challenges actions of Greenville counsel in an attempt to seek relief from Greenville convictions, and it was Greenville counsel who objected to the evaluation process from the start. The fact of the matter is Anderson counsel never represented Applicant in the Greenville case. This procedural impediment prevents a claim of ineffective assistance of counsel on this ground. See generally Comm. v. Carpenter, 725 A.2d 154, 164 (Pa. 1999) (question of whether guilty plea was knowing and voluntary for a prior conviction in a different county used as aggravation in a capital trial was not properly before the post-conviction court for the capital trial); Poyner v. State, 720 N.W.2d 194 (Iowa Ct. App. 2006) (since claim of ineffective assistance of PCR counsel only related to counsel's performance in a different case, the claim was without merit).

Thus, if a claim against Anderson counsel is improper in this action, Applicant's claim in reality would have to be that the *judge* erred in allowing the evaluation ordered for Anderson County be "transferred" to Greenville over Greenville counsel's objection. This is a freestanding claim that, even if pled properly, is not proper for PCR but rather is for direct appeal. See, e.g. Drayton v. Evatt, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or on direct

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appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel).

However, even if a claim against Anderson counsel for consenting to the evaluation is proper in this action, it is without merit. As noted before, Applicant himself requested the evaluation, and Anderson counsel testified that, after speaking with Applicant and observing his behavior, in counsel's judgment he believed Applicant should be evaluated. This Court finds no reason to question Anderson counsel's judgment on this point. Indeed, ultimately Anderson counsel's decision to consent to the evaluation is of no consequence, because the trial court specifically noted on the record that had Anderson counsel not consented, the court would have been duty bound to order the evaluation based on Applicant's conduct and communications. See S.C. Code Ann. §44-23-410 (2002) (noting the judge "shall" order an evaluation whenever a judge "has reason to believe" a person facing a criminal offense is not fit to stand trial).

Since there is no viable issue with regard to the decision to proceed with the evaluation in the first place, the issue next turns as to counsel's handling of the information at trial. Applicant contends that trial counsel was "unaware" that the information was to be used at sentencing, and "failed to object to the presentation of this evidence outside of the limited purpose for which this evaluation was ordered." However, the record is clear that counsel was *very* aware and very concerned that the evaluation would ultimately be used by the State for purposes other than competency or criminal responsibility.

As exhaustively set forth in factual description, Greenville counsel strongly advised their client against evaluation until the point that he had them removed from the Anderson case; Greenville counsel then objected at a hearing prior to the evaluation in an attempt to prevent it from being used in the Greenville proceedings; Greenville counsel prevented Dr. Narayan from getting

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further information about Applicant from the jail after Applicant went to see the evaluators against Greenville counsel's advice; Greenville counsel successfully prevented the State from reviewing the complete report throughout much of the trial despite the State's repeated request to do so; Greenville counsel objected to admission of statements made by Applicant to his wife and achieved a limiting instruction from the judge; and Greenville counsel successfully prevented Dr. Narayan from testifying during the State's sentencing phase case despite claims that the defense had crossed the line into arguing mental health. It was only after the defense in the sentencing phase presented mental health information from experts who admitted they had reviewed Dr. Narayan's report in its entirety that the court allowed the State to review the report in its entirety and communicate freely with Dr. Narayan as to the findings.

Thus, the only viable issues with regard to Greenville counsels' handling of this issue were the decision to proceed with their own mental health presentation despite the risk that it could open the door to the State's use of the evaluation report and the ultimate concession that the defense had no valid objection once their own expert admitted he had reviewed the report. Once counsel proceeded with their mental health mitigation no further objection to the State's use of the report was valid, and counsel's decision to proceed despite this fact was reasonable and made with full knowledge of this risk.

Of course, in Estelle v. Smith, 451 U.S. 454, 462-463, 101 S.Ct. 1866, 1873 (1981), the Court held that it was a violation of the Fifth Amendment privilege against self-incrimination for a state doctor to be allowed to testify as to future dangerousness in a sentencing phase where the defendant was not advised at the competency evaluation of his right to remain silent and that any statements could be used against him. The Court also found a violation of the Sixth Amendment

right to counsel, inasmuch as counsel were not notified in advance the evaluation would encompass the issue of future dangerousness, and thus the defendant was denied the opportunity to consult with counsel about whether to submit to examination. Id. at 469-470. Importantly, the Court expressly did not decide whether there was any right for counsel to be present at the examination, noting that the lower court had recognized such presence might be disruptive. Id. at 470 n. 14. Moreover, the Court pointed out that a “different situation” would exist “where a defendant intends to use psychiatric evidence at the penalty phase,” noting the question was left open whether a defendant could introduce his own psychiatric evidence without being subject to an examination by a State psychiatrist. Id. at 466 n.10, 471.

Along these lines, in Buchanan v. Kentucky, 483 U.S. 402, 422, 107 S.Ct. 2906, 2917-2918 (1987), the Court specifically noted that “if a defendant requests an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested.” The Court in Buchanan found no Fifth or Sixth Amendment violation where the defense joined in the motion for an evaluation, and the “entire defense strategy was to establish the ‘mental status’ defense of extreme emotional disturbance.” Id. at 423-24. In addressing the Sixth Amendment claim, the Court specifically pointed out that the focus was the opportunity for consultation with informed counsel about the scope and nature of the proceeding, not the ultimate use to which the prosecution was to put the information. Id. at 424.

In Powell v. Texas, 492 U.S. 680, 683-686, 109 S.Ct. 3146, 3149-3150 (1989), the Court held that a defendant did not waive his Sixth Amendment right to notification by putting up psychiatric evidence of insanity, particularly where the Sixth Amendment right to notification was violated in the first place because the examination took place without notice to counsel or the

defendant that the examination would encompass the issue of future dangerousness.

In Hudgins v. Moore, 337 S.C. 333, 337-338, 524 S.E.2d 105, 106 (1999), the Supreme Court of South Carolina held that it was error under state law for the court to permit the prosecutor to impeach the defendant during guilt phase on answers he gave to the state psychologist during testing for the competency evaluation. Defense counsel did not object, and thus was ineffective. Id. at 338. The court, while finding no constitutional violation because voluntary statements obtained in violation of Miranda or the Sixth Amendment right to counsel are still admissible for impeachment, nevertheless found a violation of State v. Myers, 220 S.C. 309, 67 S.E.2d 506 (1951), which held that confessions made to examiners at the State Hospital would not be permitted to be revealed over objection of the defendant. Id.

In the present case, the fact that testifying defense experts reviewed it and relied upon it placed the complete report in play. Of course, Rule 705, SCRE, provides that an expert may be required to disclose during cross-examination the underlying facts and data upon which he or she relied. Once defense expert Jeffrey Youngman admitted on cross that he had read and relied upon the State evaluation in forming his opinions, defense counsel conceded there was no further valid objection to the State being privy to the report. The court agreed, noting the rules clearly allowed exploration of the bases underlying the expert's opinion. (R. at 1997-98). Defense psychiatric expert Dr. Schwartz-Watts also testified she reviewed and relied on the report in preparing her opinions offered in mitigation.

This Court finds no deficiency on the part of defense counsel in conceding that no further valid objection could be made to the State's review of the evaluation report following the defense expert testimony. As noted in State v. Slocumb, 336 S.C. 619, 628, 521 S.E.2d 507, 512 (Ct. App.



1999), Rule 705 allows the cross-examiner “to ask the expert to reveal otherwise inadmissible underlying information to the jury,” and also permits counsel to cross-examine the expert “with respect to material reviewed by the expert but upon which the expert does not rely.” Slocumb, 336 S.C. at 628 (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 705.05 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1999) and 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 13, at 56-57 (John William Strong ed., 4 ed. 1992), respectively). Slocumb held that the trial court did not err in allowing the prosecution to cross-examine the defense’s mental health expert on reports of misconduct in DJJ, where the expert testified he had reviewed DJJ reports in forming his opinion and they were relevant in allowing the State to explore the basis for the expert’s opinion of insanity. Id. at 631-632. Moreover, Slocumb held the reports were not inadmissible character evidence under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923), as they were not admitted to prove propensity but rather elicited as part of cross-examination on an expert opinion. Slocumb, 336 S.C. at 632.

The same or similar justification exists here given the defense presentation from Youngman and Dr. Schwartz-Watts. Since the cross-examination using the full evaluation report was permissible, then counsel could not have been deficient nor Applicant prejudiced from the concession or failure to object. See Hough v. Anderson, 272 F.3d 878, 898 (7th Cir. 2001) (“ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails *both* prongs of the Strickland test,” as it was neither deficient nor prejudicial).

Similarly, there was no valid objection with regard to the solicitor’s presentation of Dr. Narayan in reply after the defense case in mitigation. Once Applicant’s mitigation expert testified on

direct that Applicant did not have anti-social personality disorder, and that he was not malingering his symptoms of mental illness, it was permissible for the state to rebut this mental health presentation with the contrary opinions of Dr. Narayan without any violation of the Fifth Amendment. Moreover, there could be no violation of the Sixth Amendment right to counsel based on notification as Greenville counsel was expressly aware and concerned that the State could ultimately use the evaluation report for sentencing and told Applicant that as they futilely attempted to prevent him from agreeing to the evaluation. The applicant personally requested the evaluation, and he was made aware by Dr. Narayan of his rights and the consequences of speaking.

No further objection to Dr. Narayan's testimony was proper, as seen in the language from the United States Supreme Court in Estelle and Buchanan, but there are quite a number of cases from other jurisdictions that have sustained use of such evidence in similar situations. See, e.g. Schneider v. Lynaugh, 835 F.2d 570, 577-578 (5th Cir. 1988) (defendant who requests evaluation and then puts his mental state into issue with psychological evidence cannot then use the Fifth Amendment as a bar to State rebuttal, even though State was using evaluator to rebut on issue of rehabilitative potential; also, there was no Sixth Amendment notification violation where the prosecution was merely rebutting defense evidence); Coffey v. Messer, 945 S.W.2d 944, 948 (Ky. 1997) (Kentucky Rules, which are based on Federal Criminal Procedure Rules specifically crafted to protect defendant's rights under Estelle v. Smith, are not unconstitutional, as since the State can only use the evidence in rebuttal, defendant can prevent introduction of such evidence by declining to call mental health evidence itself); Evans v. State, 725 So.2d 613, 686-689 (Miss. 1997) (no Fifth Amendment error in allowing State to use competency evaluator in rebuttal, because, in part, the defense called a mental health expert, and since the defendant did not testify, there was no other way for the prosecution to



rebut the defense presentation; there likewise was no Sixth Amendment violation of "notification" even though the evaluation order specified that the information could not be used in sentencing, where the defense intended to introduce psychiatric evidence and obviously could anticipate the use by the prosecution); See also State v. Davis, 506 S.E.2d 455, 476-479 (N.C. 1998) (no Fifth Amendment error in allowing State to cross-examine defense expert on information from State competency evaluation, even though this was a different purpose for which the evaluation was ordered, where defense expert testified at trial he relied on the information in forming his opinion; no Sixth Amendment error, where defendant had the opportunity to discuss the evaluation with counsel, and counsel should have anticipated that the State would attempt to use the report if the defense put on a mental status defense).

Here, this Court finds Greenville counsel vigorously pursued this issue as well as any lawyer could. Ultimately, as counsel Mauldin testified, they eventually made the strategic choice that it was better to proceed with their own mental health defense despite the fact that this would likely open the door for the State with the DMH information. This Court finds this strategic decision was reasonable, especially given the difficult hand counsel were dealt in this case, with an extremely aggravated crime and limited mitigation. See Strickland, 466 U.S. at 689 (reasonable trial strategy is not basis for ineffective assistance); Sexton v. French, 163 F.3d 874, 887 (4th Cir. 1998) (tactical decision can not be second-guessed by court reviewing a collateral attack). This Court finds it hard to imagine what more Greenville counsel could have done to keep out the DMH information; counsel kept it away from the State as long as possible. Ultimately, the evaluation took place on Applicant's own motion and the agreement of his Anderson counsel, and this could hardly be attributed as constitutional fault to Greenville counsel who opposed it from the start. Applicant's



own personal and repeated efforts at obtain a competency evaluation place the consequences of having the evaluation done in the first place upon him and him alone.

The issue is without merit and is denied.

F. Ground F

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. Estelle v. Smith, 451 U.S. 454 (1981); Buchanan v. Kentucky, 483 U.S. 402 (1987); Powell v. Texas, 492 U.S. 680 (1989), Hudgins v. Moore, 524 S.E.2d 105 (S.C. 1999); Thomas-Bey v. Nuth, 67 F.3d 296 (Unpublished, 4th Cir. 1995); and Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends counsel was ineffective for failing to "deny access" of the Department of Mental Health to Applicant.

As noted before in the discussion of facts in the preceding subsection and incorporated here, Applicant insisted on a psychological evaluation over the objection and against the advice of Greenville counsel, to the point where Applicant had Greenville counsel removed from the Anderson case and new counsel appointed. Anderson counsel consented to Applicant's evaluation request, and the trial counsel issued an order for the evaluation. The evaluation result was "transferred" to the Greenville County case over the objection of trial counsel. However, after the initial evaluation report issued finding Applicant competent and criminally responsible, and as trial approached, counsel sent a letter in February 2002 precluding further access of DMH to Applicant and his jail records. This led to Dr. Narayan complaining immediately before trial that he could not update his conclusions for the Blair hearing. Ultimately, the trial court told Dr. Narayan to do the best he could,

and Dr. Narayan simply testified that at the time of his evaluation he had no concerns about Applicant's competency or criminal responsibility.

Applicant complains that if counsel could have prevented DMH access prior to February 2002, then they were ineffective for not preventing access prior to February 2002. For many of the reasons discussed in the preceding ground and incorporated here, this allegation is without merit. First, since Applicant wilfully sought an evaluation over the strenuous objection of Greenville counsel to the point where Applicant had Greenville counsel removed, Applicant cannot now blame Greenville counsel for that evaluation. Second, as set forth in the ruling on the previous ground, even if a claim against Anderson counsel was procedurally proper in this action, Anderson counsel was not ineffective for consenting to the evaluation based on his observations of Applicant. The trial court stated it would have been duty bound to have ordered the evaluation even if Anderson counsel had not consented. There was nothing more Greenville counsel could have done to "prevent" DMH access when an evaluation occurred based on Applicant's personal request, the reasonable judgment of Anderson counsel, and the trial court's independent view, despite Greenville counsel's best attempts to prevent it at every turn.

Obviously, after the evaluation came back with an "unfavorable" result to Applicant and the death penalty trial approached, Greenville counsel and Applicant came back to terms, and counsel was able to send out the letter precluding further access after the defense hired mental health experts who met with Applicant at the jail in anticipation of a mitigation case. The fact that counsel was able to send out the letter at this point does nothing to establish that they could or should have sent out the letter earlier. Indeed, Applicant cannot show prejudice because such a letter earlier would have been fruitless given that Anderson counsel and Applicant himself were cooperating with the

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evaluation.

The issue is without merit and is denied.

G. Ground G

Applicant next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-13-26(B)(1) and §17-23-60 by trial counsel's failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to "expose" that no evidence allegedly supported the diagnosis of the DMH examiners that Applicant has anti-social personality disorder, or ASPD.

1. Facts

As noted before, at the sentencing phase defense expert Dr. Schwartz-Watts diagnosed Applicant with "bipolar disorder not otherwise specified" and "paranoid personality disorder." (R. at 2070). Counsel asked her, on direct, to define ASPD, and then asked whether the diagnosis of ASPD depended on information from childhood. Dr. Schwartz-Watts testified that one had to have a pattern of antisocial behavior before age 16 to meet the criteria, and then asserted that Applicant did not have such a history at a young age. She asserted there was "no history before he was 16 of being in trouble;" denied that Applicant was ever in a boy's home noting he was only there because his parents worked there; and stated that, according to his sister, the only fight Applicant had ever been in was when he finally stood up to an older boy who was picking on him. Dr. Schwartz-Watts continued:

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So he certainly . . . has antisocial traits. He had a pattern of breaking the law as an adult. He has - certainly, he has been in prison a few times. He's been a thief. He had done fraudulent things in terms of the Wal-Mart check scam and that sort of thing. But he does not meet the criteria [of ASPD].

In reply, Dr. Narayan disagreed with the defense doctor's diagnosis of paranoid personality disorder, finding only one of the seven criteria when three were needed. Dr. Narayan said Applicant only had ASPD. (R. at 2148-51). Dr. Narayan noted that the psychiatrist who saw Applicant five days after the crime also diagnosed him as a sociopath, which "is pretty much what [ASPD] is." (R. at 2151-52).

On cross, defense counsel Mauldin asked Dr. Narayan if one of the "absolute necessities" for ASPD was that there had to be a conduct disorder prior to age 15, and then asked Dr. Narayan what evidence he had that Applicant had such a conduct disorder prior to the age of 15. Dr. Narayan testified that Applicant said he shoplifted and destroyed property as a child. After a discussion of whether Dr. Narayan considered this self-reporting reliable, defense counsel pointedly asked Dr. Narayan if he had heard the prior witnesses say there was no prior juvenile history. At this point, Dr. Narayan pointed out that the evidence of conduct disorder did not have to include "adjudications, legal charges, arrests or any kind of sentencing." Defense counsel then asked if Dr. Narayan had Applicant confused with his mother, and Dr. Narayan answered no. (R. at 2170-73).

At PCR, Applicant first called Dr. Thomas Cobb, a psychiatrist who treated Applicant on death row beginning in 2002 or 2003. Dr. Cobb stated that while some of Applicant's diagnoses of bipolar disorder, depression, intermittent explosive disorder, and others were treatable, the only treatment for anti-social personality disorder was incarceration. He stated that over the years as he has treated Applicant, Applicant has improved on medication but deteriorated when not on



medication. In Dr. Cobb's opinion, these differing reactions showed Applicant was responding to the medical treatment.

On cross, Dr. Cobb admitted that mental condition could be fluid and new problems could develop, and indeed that a sentence of death and placement on death row at Lieber Correctional Institution could cause new psychological problems. Dr. Cobb admitted that intermittent explosive disorder could be part of ASPD. Counsel showed Dr. Cobb various SCDC medical records over recent years that he conceded repeatedly mentioned the diagnosis of ASPD by the treatment teams for Applicant.

Later, Applicant called other witnesses who were involved in the DMH evaluation of Applicant. Dr. John Steadman testified that he relied on the patient (Applicant) for the report that he shoplifted as a child. Dr. Camilla Tezza testified that Dr. Narayan advised her that he had evidence of conduct disorder behaviors prior to the age of 15, but she did not have those reports in her notes. She admitted she was relying on self-reports. Social worker Carlos Torres testified that he obtained a social history including the legal history, but could not recall activity prior to age fifteen. United States Probation Agent Bryan Bowen testified that he prepared the pre-sentence report for Applicant's federal convictions. He spoke with Applicant's older sister, Connie Jantz, for a personal history, and ultimately provided this report to the solicitor's office. He also interviewed Applicant as part of his report. His report did not reflect any convictions or adjudications prior to age fifteen.

Connie Jantz also testified at PCR. She generally described aspects of Applicant's life growing up, including the inconsistent education and "abysmal" parenting of Applicant's mother. She noted their mother would shoplift and believed their mother lost a job for stealing from one of her employers. According to Jantz, the only trouble Applicant got into as a child was when he stole a

toy gun from K-Mart, possibly when he was younger than 10. She stated Applicant had learned shoplifting from his mother.

Ms. Jantz stated that she first learned of Applicant's arrest from a reporter who contacted her in Harper's Ferry, WV. According to Ms. Jantz, her sister used her as a reference on a rental agreement. She testified that she never heard from any member of the defense team until PCR counsel contacted her.

However, on cross, Ms. Jantz admitted: (1) that when she moved to Harper's Ferry she did not want her mother to know where she had gone; (2) that she was living in Harper's Ferry when the trooper was murdered; (3) that she then moved to Knoxville, Maryland, and she did not like to give out her address because of the threat of her mother finding out where she was; (3) that she did not talk to her family about the case and only talked to Betsy a little about the case the day after the murder; (4) that she did not even know when Applicant was convicted until she later found news articles; (5) that she did not attempt to contact Applicant in prison; (6) that her only correspondence with Applicant was a few years later while he was in custody; and (7) that while they were not on speaking terms, her sister Betsy knew she was in Maryland and their mother could have contacted her through family. On redirect, Ms. Jantz stated that she in fact had moved after Applicant's arrest, but on recross, Ms. Jantz admitted she never contacted the defense team or Applicant because she was just in shock after the arrest.

Dr. Donna Schwartz-Watts testified at PCR that she never spoke to Ms. Jantz, but that she remembered defense counsel Mauldin unsuccessfully tried to contact Jantz. She never met with Applicant's parents but did meet once with Applicant's sister, Betsy Martinez. She noted, as she testified at trial, that she had concerns that Applicant did not meet the criteria for ASPD because of

the lack of a childhood history of conduct disorder. She conceded that Applicant clearly has antisocial traits. She further noted that Applicant would not cooperate with her interview, would not allow a video, and admitted he faked symptoms of mental illness. She stated it was very difficult to get a history from Applicant. Finally, she agreed that she had reviewed the SCDC mental health records, which also contained diagnoses of ASPD.

On cross, Dr. Schwartz-Watts noted she worked with Mauldin before, and that he was very organized in preparing a mitigation investigation. She stated there were periodic meetings that would include her, the defense team, and the mitigation investigator, Paige Tarr. She also agreed that she had plenty of notice and time to prepare, but that it was difficult to find family members despite the fact that the mitigation investigator and Mauldin tried.

Trial counsel Mauldin testified about efforts made to locate and contact Connie Jantz. He stated that no response came to letters sent to the Harper's Ferry address and that the phone there was not in service. In seeking assistance, the defense team advised Betsy Martinez that they were unable to contact Jantz. Moreover, counsel advised Paige Tarr to contact all mitigation witnesses she could.

On cross, Mauldin testified that his defense team included both co-counsel, a private investigator, the social worker Jeffrey Youngman, attorney Jeff Bloom for jury selection, and Paige Tarr for mitigation investigation. Mauldin testified that he had worked with Paige Tarr before and she was very experienced and competent.

Mauldin stated he was aware as a capital litigator of the need to develop the defendant's history, but he was concerned at the difficulty they were having in locating such a history despite the effort being made. Mauldin did not recall why they did not call Applicant's sister Betsy Martinez as a witness. As far as subpoenaing Jantz, Mauldin did not think that sort of measure would be

effective in obtaining a favorable witness for the defense, as "dysfunctional" as the family was.

Jim Bannister testified that despite their investigative efforts, they knew they were "slim on mitigation" as trial approached. Bannister recalled one sister did not want to participate, and the defense could only get in touch with one of the other sisters. He also stated that if Betsy was the sister in the courtroom during trial, they made a specific decision not to put her up on the stand as they did not think she would be favorable.

Rodney Richey testified that in his experience working with Mauldin and Dr. Schwartz-Watts, they worked well together and were on the same mission, and that Paige Tarr was an experienced and very good mitigation investigator.

Finally, Dr. Narayan from DMH testified at PCR. He first noted that while the DSM-IV TR does require evidence of a conduct disorder prior to age fifteen, the DSM-IV expressly states that it is not a "cookbook" with regard to individual criteria. According to Dr. Narayan, in the clinical setting what the expert is really looking for is a pervasive pattern of anti-social behavior, which Applicant clearly evidenced.

Dr. Narayan stated he received information from Applicant himself that he had engaged in stealing as a child. Moreover, he had information from Applicant's wife Karen McCall to that effect as well. Dr. Narayan noted that actual adjudications or convictions were not necessary, and that only one instance or symptom was necessary to meet the criteria because there were likely other instances in which the subject was not caught or charged. He noted that had Connie Jantz testified (as she did at PCR) about the one instance of shoplifting at Kmart, this would have been enough to support a conclusion of conduct disorder prior to age fifteen. Dr. Narayan was unpersuaded that his diagnosis of ASPD was incorrect or unsupported, and, like Dr. Schwartz-Watts at trial and in PCR, noted that



regardless of whether Applicant technically met the criteria for ASPD or not he clearly evidenced a personality disorder with antisocial traits.

2. Analysis

This Court finds counsel was neither deficient nor Applicant prejudiced with regard to their handling of the ASPD issue.

To start this analysis, we must first incorporate the discussion in the preceding subsection to the effect that Applicant insisted on an evaluation over the repeated objection of Greenville counsel, and, had Applicant listened to Greenville counsel, there would not have been a diagnosis by Dr. Narayan of ASPD. Thus, even if we assume Applicant suffered any prejudice with regard to this allegation, it was not because of any deficiency of counsel but is chargeable to Applicant based on his own conduct. Applicant does not get to ignore his counsel's advice on an issue and then achieve a windfall in PCR on the very same issue.

Regardless, counsel was not deficient inasmuch as counsel at trial elicited from Dr. Schwartz-Watts her contrary opinion on ASPD and flatly challenged Dr. Narayan on evidence supporting the existence of a conduct disorder at an early age. Counsel raised the very point of which Applicant now complains with not only the presentation of his own expert's contrary opinion on the issue of conduct disorder prior to age 15, but also cross-examination of the State's expert on the fact that other witnesses stated there was no such evidence. Counsel cannot "force" an expert witness to testify to a particular opinion, and even in PCR Applicant did not get Dr. Narayan to abandon his view that Applicant exhibited ASPD. This Court finds that even if counsel could have done more to present evidence or cross-examine Dr. Narayan on this issue, what counsel did do was more than adequate to be above the standard for constitutional deficiency. See generally Kavanaugh v. Berge,

73 F.3d 733 (7th Cir. 1996) (finding no deficiency in the failure to exhaustively cross-examine expert on his use of leading questions when interviewing the victim, where counsel presented an expert to testify generally on the subject and argued the issue extensively in closing).

Moreover, counsel was not deficient with regard to obtaining information from Applicant's sister, Ms. Jantz. This Court finds that Ms. Jantz was attempting to avoid contact with her mother by hiding her whereabouts, and, despite being aware that Applicant was in trouble, Ms. Jantz made no effort to contact Applicant or the defense team. This Court finds counsel's efforts to contact Ms. Jantz were reasonable given that they attempted phone calls, letters, and contact through Applicant's other sister, Ms. Martinez. The trial court record supports this, as defense social worker Youngman admitted on cross that while they think Ms. Jantz lived in Maryland, the defense could not contact her. He said, "[N]obody could locate her. None of the family knows where she's at." (R. at 1991-92). When asked if he could have subpoenaed Ms. Jantz, counsel responded that he would question what of value he could have gained by subpoenaing a reluctant family member in the hopes that family member would provide mitigating evidence. This Court agrees, and overall finds counsel made reasonable and constitutionally sufficient efforts to obtain Ms. Jantz's help that were frustrated by Ms. Jantz's own unwillingness to have contact with her family at the time and be involved in the defense of her brother. See, e.g. Timberlake v. Davis, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features.").

As far as Ms. Martinez, counsel Bannister testified the defense made a strategic decision not to put her on the stand. Applicant has presented nothing to call this decision into question. Indeed, Applicant presented no testimony from Ms. Martinez about any testimony she could have offered or

even if she was willing to testify; thus, Applicant has failed to meet his burden of establishing both deficiency and prejudice. See generally Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present as mitigation evidence family members where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent a proffer of the supposed witness's favorable testimony).

However, even if counsel was somehow constitutionally deficient in not doing more than counsel did to challenge Dr. Narayan's view on ASPD, this Court finds no prejudice. Despite the evidence presented in PCR, Dr. Narayan held firm that his diagnosis of ASPD was correct. This Court finds credible Dr. Narayan's testimony that the DSM IV is not to be a "cookbook", and that in the clinical setting the practitioner is looking for a pervasive pattern of antisocial behavior that Applicant clearly exhibited. Dr. Narayan's testimony also persuades the Court that he received information from Applicant himself as well as Applicant's wife as to the commission of crimes or wrongs by Applicant prior to the age of fifteen, and, as Dr. Narayan pointed out, the evidence does not need to involve convictions, charges, or adjudications since Applicant may not have been caught, charged, or convicted on a particular incident. Dr. Narayan pointed out that Ms. Jantz's description of a shoplifting incident was enough to meet the criteria precluding the possibility of any prejudice on the issue from the failure to find and talk her into testifying.

Although Dr. Cobb testified as to his treatment of Applicant once Applicant entered SCDC under a death sentence, he also admitted that one's psychological makeup is fluid and can change, that being sentenced to death and incarcerated could trigger new psychological problems that did not exist before, and that in any event the medical records from SCDC contained repeated references to

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the diagnosis of ASPD. Thus, this Court finds that sufficient evidence supports the diagnosis of ASPD. There is enough to support it that this Court cannot say it is an "incorrect" diagnosis.

Given the examination of both the defense expert and the state expert on this very issue at trial, and that this Court finds Dr. Narayan credible in his continued diagnosis of ASPD despite the testimony in PCR, this Court cannot find Applicant's presentation at PCR creates a reasonable probability that the sentencing jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694). Even if Applicant had succeeded in convincing this Court (or the jury) that the diagnosis of ASPD was "incorrect" based on the lack of evidence of a conduct disorder at an early age, Applicant's experts conceded he still had antisocial traits, namely "personality disorder not otherwise specified with antisocial traits." This Court concludes that the difference between ASPD and antisocial traits is not such that it would create a reasonable probability of a different result in sentencing.

Applicant has not met his burden of proof and the issue is denied.

H. Ground H

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.); Wiggins v. Smith, 539 U.S. 510 (2003), Rompilla v. Beard, 125 S. Ct. 2456 (2005); Strickland v. Washington, 466 U.S. 688 (1984).

Applicant contends that his counsel was ineffective for failing to present pleas of mercy from family members or other information that Applicant would be of emotional value to others.

1. Facts

At trial, no family members testified on Applicant's behalf. During the defense case in sentencing, social worker Youngman testified that in doing his investigation he talked to Applicant's sister Elizabeth (or "Betsy") and Applicant's wife Karen McCall, but he did not talk to Connie. When asked why, Youngman testified that he thought Jantz lived in Maryland, but no one could locate her because "none of the family knows where she's at." Youngman admitted that Applicant's mother and Betsy were both codefendants with Applicant in the federal fraudulent checks case. (R. at 1991-92). As cross proceeded, Youngman admitted he had not actually talked with the mother, but relied on information passed on to him from the mitigation investigator. (R. at 1996-97).

On redirect, Youngman testified under questioning by defense counsel that because of the frequency of moves in the Wood family, the home schooling, and the lack of meaningful relationships, it was "virtually impossible" to obtain documents and find people to interview. (R. at 2021). On recross, Youngman admitted that he relied on the mitigation investigator because Applicant's mother would not make herself available to him. (R. at 2024).

Defense investigator Richard Kearns introduced into evidence a picture of Applicant as a young child. He noted Betsy Martinez had brought the picture to him yesterday. (R. at 2054).

During her direct examination, Dr. Schwartz-Watts testified that she made "numerous attempts" to speak with Applicant's parents, but after they spoke with the mitigation investigator, they changed their phone number and refused further contact with the defense. Dr. Schwartz-Watts did meet with Betsy and Karen McCall. (R. at 2067-68).

As noted in the previous subsection, Applicant's sister Connie Jantz testified at PCR. She described the upbringing she and Applicant had, including frequent moves, inconsistent messages

from their mother who shoplifted on one hand but professed strict Christian beliefs on the other, the lack of education Applicant received from home schooling or private religious schools, the fact that Applicant's mother was very conniving, and some of the extended family history including alcoholism and depression. Jantz testified that she never heard from the defense team and that if she had been called, she could have asked the jury to spare her brother's life, and to consider the value of her brother to his child.

As noted before, Jantz admitted on cross that when she moved she was trying to prevent her mother from knowing where she was; that she did not talk to the family about the case except for Betsy a little bit the day after the incident; that she did not even know of Applicant's conviction or sentence until she later searched for news articles; that she did not attempt to contact her brother while he was in custody; that her only contact was a couple of years after the trial; that her sister Betsy knew she was in Maryland but that she was not on speaking terms with Betsy; that her mother could contact her through family; and that her sister had the P.O. Box in Maryland. Jantz stated that she was "in shock" after the arrest, but never attempted to contact the defense team.

As set forth in the previous subsection more fully and incorporated here, Dr. Schwartz-Watts testified at PCR that Mauldin tried to contact Jantz but was unsuccessful, that the attorneys tried to conduct a mitigation investigation with plenty of time but it was simply difficult to find family members, and that Applicant was not forthcoming as to history. Mauldin noted that no response was made to the letters sent to Jantz's last known address, that the phone was not in service, and that Betsy had no success enlisting Jantz's help despite defense requests that she try. Mauldin also noted he had worked with the mitigation investigator before and she was very experienced and competent.

Bannister testified that one sister did not want to participate in the defense efforts, and the



defense team made a strategic decision not to call to the stand the sister who was at trial. Richey noted that Mauldin and Tarr were very experienced in mitigation investigation.

Given these facts, this Court reiterates its earlier finding, set forth in full in the prior subsection, that counsel was not deficient with regard to seeking family help for background and possible testimony in mitigation. The fact is that for the most part the family was uncooperative. Based on the above detailed testimony from defense team members both at trial and in PCR, this Court finds that despite reasonable efforts of counsel and the defense investigators, Jantz was nonresponsive because of her desire to avoid contact with her family and her desire not to be involved with Applicant's case. Moreover, counsel cannot be faulted for not subpoenaing Jantz and seeking mitigation testimony from her against her will. See, e.g. Timberlake, 409 F.3d 819, 824 (7th Cir. 2005) ("Coerced testimony dragged out of truculent family members is unlikely to persuade a jury that a defendant has redeeming features.").

Further, this Court finds no prejudice from the fact that Ms. Jantz did not testify. Much of the background to which she testified was set forth at trial during the testimony of Youngman and Dr. Schwartz-Watts. Given the introduction of much of the background at trial and the extremely aggravated nature of this crime, this Court is not persuaded that Jantz's request to the jury to spare her brother's life and her mention of the fact that he has a child would create a reasonable probability that the jury would have concluded the balance of aggravating and mitigating circumstances did not warrant death. Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).

Again, as far as Ms. Martinez, counsel Bannister testified the defense made a strategic decision not to put her on the stand, and Applicant presented nothing to call this decision into question. Applicant presented no testimony from Ms. Martinez as to what she could have offered or

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even if she was willing to testify; thus, Applicant failed to meet his burden of establishing both deficiency and prejudice. Similarly, with regard to any other possible family or other mitigation witnesses who did not testify at PCR, Applicant failed to meet his burden of proof. See generally Beaver v. Thompson, 93 F.3d 1186, 1195 (4th Cir. 1996) (rejecting claim that counsel was ineffective for failing to present as mitigation evidence family members where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932, 940 (4th Cir. 1990) (petitioner's allegation that attorney did ineffective investigation does not support relief absent a proffer of the supposed witness's favorable testimony).

The issue is without merit and is denied.

I. Ground I

Applicant's next ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object improper closing arguments of the prosecutor. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel was ineffective for failing to object to aspects of the prosecutor's argument.

1. Alleged burden shifting argument

Applicant first contends counsel was ineffective for failing to object to the solicitor's guilt phase closing when he allegedly made a burden shifting argument.

In closing during the guilt phase at trial, the solicitor argued that since he did not have final argument, he had to anticipate what the defendant would argue. He noted that he believed the defense would assert that Applicant did not have the requisite intent because of his fear of police, the

legitimacy of the scooter on the highway, and the alleged “aggressive” stop by the trooper. The solicitor went on to argue that such a contention was not consistent with the law, but also continued that it was not supported factually either. After arguing that there was no evidence Applicant knew Trooper Nicholson was stopping him for having the scooter on the highway, the solicitor continued:

The point is that the defendant had no knowledge of why he was being stopped. So to assert that defense to you based on those facts has absolutely no factual support, and that’s what you’re looking for. You’re looking for factual support to support any suggestion he didn’t have the requisite intent.

(R. at 1735-39). A few paragraphs later, the solicitor went on to say that the defense position was “an effort to divert you from the facts and create something in your mind related to intent, that we haven’t proved that this individual . . . had the reckless intent.” The solicitor pointed out that “the only intent we [the State] have to do is show the intent to raise his arm and fire the gun.” (R. at 1738). The solicitor later argued that defense “suggestion to you he lacked intent is nothing more than an effort to escape responsibility.” (R. at 1740). Finally, the solicitor argued that “he’s presenting to you in an effort to escape responsibility one more time, and I urge you to act in accordance with the evidence and recognize that for what it is.” (R. at 1741). The trial court repeatedly and properly instructed the jury on the State’s burden of proof.

Attorney Bannister testified that since he gave the guilt phase closing, it would have been his job to object, but that it was not a hard and fast rule. When asked about the allegedly offending passage, Bannister responded that what the solicitor was saying was in fact exactly what he was asking the jury to do.

This Court finds neither deficiency nor prejudice. It is true that our state supreme court has looked with disfavor on jury instructions to “seek the truth” as potentially burden shifting. See State

v. Aleksey, 343 S.C. 20, 26-27, 538 S.E.2d 248, 251 (2000). However, Aleksey ultimately held there was no denial of due process because in the context of the entire charge there was no reasonable likelihood the jury applied the “seek” language to the detriment of the charges on the State’s burden of proof beyond a reasonable doubt. Id. at 28.

Moreover, our state appellate courts have held improper, as a comment on the right to silence, prosecutorial argument that evidence was “uncontradicted” when only the non-testifying defendant could have contradicted the evidence. See, e.g. State v. Sweet, 342 S.C. 342, 348, 536 S.E.2d 91, 94 (Ct. App. 2000). However, such a violation does not necessarily mandate reversal, and a defendant must show the argument denied him a fair trial. Id. The comments also must be viewed in the context of the entire record. Id.; See also State v. Huggins, 325 S.C. 103, 107, 481 S.E.2d 114, 116 (1997) (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so).

Indeed, in order for a solicitor’s comments to warrant a new trial, the defendant must show that the solicitor’s comments “so infected the trial with unfairness as to make the resulting conviction a denial of due process.” Donnelly v. DeChristoforo, 416 U.S. 637, 643; 94 S.Ct. 1868, 1871 (1974). “[I]t is not enough that the remarks were undesirable or even universally condemned.” Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471 (1986). In Darden, the Court found no due process violation under the Donnelly test because (1) the prosecutor’s comments were an invited response to the defendant’s argument, (2) there was overwhelming eyewitness and circumstantial evidence of guilt, and (3) the trial court instructed the jurors that argument was not evidence. State v. Tubbs, 333 S.C. 316, 321 fn. 2, 509 S.E.2d 815, 818 fn.2 (1999) (citing Darden, 477 U.S. at 181). Here, this Court finds that taken in the context of the entire record, the



argument was not burden shifting. The solicitor was clear that he was simply anticipating the defense theory of the case, as he had to since he did not have final argument, and contending that there was no evidence or factual support in the record to support the defense theory, which defense counsel conceded at PCR was aimed precisely at what they did contend to the jury in argument. As noted in the facts, the solicitor not but a few paragraphs later referred to the necessity of the State proving intent (R. at 1738). The fact that the passage in isolation *might* be possibly construed as burden shifting is at odds with the context of the rest of the solicitor's argument and simply not enough to find error. See generally Donnelly, 416 U.S. at 643 ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). See generally State v. Shuler, 353 S.C. 176, 187, 577 S.E.2d 438, 444 (2003) (solicitor's comments did not refer to defendant's right to remain silent but merely were a comment on the evidence presented by the prosecution).

Moreover, even if the comment was improper, this Court simply cannot find a denial of a fair trial. This is because of the overwhelming evidence in this case, the minimal and brief nature of the reference in the context of the entire record, the solicitor's subsequent clear reference to the State's burden to prove intent, and the trial court's correct instructions on the burden of proof. Cf. Sweet, 342 S.C. at 349 (finding error not harmless where the State's evidence was not overwhelming). Had counsel objected, perhaps the comment would have been stricken and a curative instruction given. However, because of the relatively timid nature of the comment, a mistrial was not warranted, and this Court finds the absence of such an instruction in no way prevented Applicant from a fair trial. Moreover, the trial court refused to charge voluntary manslaughter, a decision affirmed on direct



appeal. Thus, the reference was hardly prejudicial to any legally valid theory. Whether in the context of due process or in the context of ineffective assistance of counsel, this Court cannot say that the comment denied Applicant a fair trial or that a timely objection would have raised a reasonable probability of a different result.

The issue is denied.

2. Cop killer in prison

Applicant next contends counsel were ineffective for failing to object to prosecutorial argument in the sentencing phase that Applicant, as a “cop killer,” would be well-regarded by other inmates in the prison if he received a life sentence.

In arguing against the defense evidence from former warden James Aiken, the prosecutor asserted that since the most despised thing to an inmate in prison is the “cop that put him there,” Applicant would be a “king” or “leader” in prison, and would rise in the hierarchy of inmates. (R. at 2189-92).

Of course, a solicitor in argument must stay within the record and its reasonable inferences. Huggins, 325 S.C. at 107 (arguments must be confined to record and its reasonable inferences, but reversal will not automatically result from failure to do so). Here, the solicitor’s argument was within the evidence and inferences. During the defense sentencing phase case, Applicant elicited from their prison expert, James Aiken, that “there is nothing that would indicate [Applicant] would ever be allowed into an unofficial hierarchy in a prison setting.” (R. at 2043). Obviously, the solicitor was merely raising his own contrary inference in response to this defense evidence, by arguing the point that a “cop killer” might very well be highly regarded by his fellow criminals, of which all of whom most likely have had their freedom taken away by the actions of law enforcement.

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See generally, e.g. State v. New, 338 S.C. 313, 320-321, 526 S.E.2d 237, 240-241 (Ct. App. 1999) (solicitor's argument that testifying accomplice was credible and had nothing to gain by testifying as he would be considered a "rat" in prison was permissible and based in the reasonable inferences of the record, and was a matter of common knowledge within the permissible bounds of advocacy). See also Darden, 477 U.S. at 182 (rejecting claim of improper argument in part because it was invited response to defendant's argument). Since the argument was permissible, counsel could not have been deficient nor Applicant prejudiced from the failure to object. See generally Hough, 272 F.3d at 898 ("ineffective assistance claims based on failure to object is tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test," as it was neither deficient nor prejudicial).

Even if the comment was error, this Court finds neither a due process violation nor ineffective assistance from the failure to object. This one comment in the context of an entire sentencing hearing for an extremely aggravated crime with limited mitigation would not have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly, 416 U.S. at 643. Had counsel objected, perhaps the comment would have been stricken and a curative instruction given. Considering the brief nature of the comment, a mistrial was not warranted, and this Court finds the absence of such an instruction in no way prevented Applicant from receiving a fair trial.

The issue is denied.

3. Susan Smith reference

Applicant finally complains about the prosecutor's argument that Applicant was not like Susan Smith, who would have to spend the rest of her life in prison worrying about the fact that she



killed her own two children.

During the sentencing phase opening argument, defense counsel argued:

DEFENSE COUNSEL: I've heard people say that life without parole is perhaps a more punishing penalty. You know, like the girl over in Union that drowned her two children? Every day she lives with that guilt in her miserable imprisoned life. And John Wood, every day for the rest of his life when he looks in the mirror and sees the scar on his face, the mark of sin emblazoned on his own face .

(R. at 1856). At this point, the State objected, but the court agreed to give the defense some latitude.

During the State's closing argument in the sentencing phase, the solicitor argued that Applicant was "no Susan Smith," and that Applicant was not going to be sitting in prison "worrying about having killed her two children." The prosecutor pointed out that Applicant had called Trooper Nicholson a "SOB", and argued that Applicant would not be worrying or thinking about what he did if he received life in prison. (R. at 2190).

Even assuming that the argument was somehow objectionable, the prosecutorial argument was made in direct response to the defense argument on the very same point. Given the overwhelming evidence and the responsive nature of the argument, this brief reference did not deny Applicant a fair trial. Tubbs, 333 S.C. at 321 fn. 2 (citing Darden, 477 U.S. at 181) (no due process violation under the Donnelly test because (1) the prosecutor's comments were an invited response to the defendant's argument, (2) there was overwhelming eyewitness and circumstantial evidence of guilt, and (3) the trial court instructed the jurors that argument was not evidence). For the same reasons, counsel was not deficient nor Applicant prejudiced from the lack of an objection to this argument.

The issue is denied.

A handwritten signature in black ink, appearing to be 'JRP' or similar, written in a cursive style.

J. Ground J

Applicant's next ground for relief is as follows:

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

Applicant contends that counsel were ineffective for failing to object to the prosecution's introduction of evidence of conditions of confinement in the sentencing hearing of this case.

For context, the following is a summary of the relevant facts to this issue from both the trial and the PCR.

1. Facts

During the defense opening statement in the sentencing phase, defense counsel Mauldin argued that "people say that life without parole is perhaps a more punishing penalty," and reminded the jury of the "girl over in Union who drowned her children," pointing out that "every day she lives with that guilt in her miserable imprisoned life." Defense counsel then related that to the guilt Applicant would suffer, arguing he would "every day . . . see . . . the mark of sin emblazoned on his own face." (R. at 1856).

During the State's sentencing phase case, the solicitor indicated his intent to call Jimmy Sligh from the South Carolina Department of Corrections. The solicitor noted that Sligh would be called to testify as to "what life in prison without parole means," as well as "the difference between life in prison without parole versus the punishment of death." The solicitor argued the evidence was relevant since the United States Supreme Court had held the jury needed to know a life sentence was

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without parole, and concluded:

SOLICITOR: And so if Your Honor's position is that [the Sligh testimony is] premature at this point because it's been raised in opening, only raised in opening, there's no evidence of that, there is a distinction there about difference.

(R. at 1876).

The court then inquired of the defense whether it had an objection. After a brief discussion with the court, the transcript reflects that defense counsel had an off-record conversation with co-counsel. Lead counsel Mauldin then told the court:

DEFENSE COUNSEL: If our understanding of the summary proffer is that a Department of Corrections personnel will testify as to conditions of life without parole, if that's what this really is being offered as, then we're not going to enter an objection at this point to that witness.

(R. at 1876-77).

The solicitor then called Jimmy Sligh. On direct, Sligh testified about custody levels, security classifications, the prison cafeteria, the prison laundry, work opportunities, the daily routine, recreational opportunities, cell sizes, visitation and communication with the outside world, religious opportunities, violence in prison, the more limited opportunities on death row, and the lesser amount of violence on death row. (R. at 1878-1904).

On cross, the defense elicited that, if sentenced to life, Applicant would be in a high security environment with the inmates convicted of violent crimes. The defense pointed out Applicant would not be allowed to work outside the facility, and that he would always be classified at the highest level of security. Sligh testified that there are gangs in prison, that life in general population is "a tough place with tough people," that there was no assurance one would wake up in morning, and that prison officials are authorized to use deadly force on inmates. (R. at 1905-10). On redirect, the

solicitor elicited that deadly force is typically reserved for attempts to breach the security of the prison and that most guards carry batons. Sligh testified that corporal punishment is not used as a control means, that rehabilitative opportunities do exist in the prison, that most inmates make it through without being harmed by other inmates, and that they take body size in account when making room assignments. (R. at 1911-18).

During its sentencing phase case, the defense called former SCDC Warden James Aiken, who in many respects traveled down the same road as Mr. Sligh. Aiken testified that he had no concerns about Wood and stated to the jury that Wood was not likely to be a predator in prison. Aiken stated that death row was a far more preferable and safer place to be than general population, because a death row inmate has his own cell and does not have to worry about security threats from other inmates. He noted there were a lot of "predator groups" in general population, that prison was a very dangerous place, and theorized that Applicant would be more likely to be subjected to violence in prison from predators given his smaller size and older age. Aiken concluded that SCDC would have no problem safely containing Wood for the rest of his life. Finally, Aiken saw nothing that would indicate Applicant would ever rise in the *de facto* hierarchy among inmates. (R. at 2033-44). The solicitor had no cross.

In closing, counsel argued that prison was not "soft;" that Applicant would die in prison after spending the rest of his life in a small cell under the highest security classification, and that prisons contain violent, dangerous people. (R. at 2206-08).

In PCR, defense counsel Mauldin initially testified on direct by the Applicant that he thought Sligh was only going to testify as to the specific adaptability of Wood personally, and that Sligh surprised him by venturing down the road of conditions of confinement.

However, on cross by the State, Mauldin was shown the transcript reflecting the defense was clearly aware Sligh was going to testify to conditions of confinement, but expressly decided on the record not to object after an off-the-record discussion among the defense lawyers. Mauldin then stated he could not recall what he and the other attorneys were discussing during the off-the-record moment, and could not recall the strategic basis for the decision not to object to evidence on conditions of confinement. Mauldin admitted, though, that the defense lawyers would have been discussing whether as a strategic matter to object or not during the off-the-record conference.

Defense counsel Jim Bannister testified that the sentencing phase case was primarily the responsibility of Mr. Mauldin. He likewise could not specifically remember what the defense lawyers were discussing during the off-the-record conference, but also agreed they would not have been discussing baseball or some other irrelevancy. They would have been discussing whether to object or not to Sligh's testimony on conditions of confinement. Richey's testimony was similar to Bannister's in that he could not recall the discussion, but it would have involved whether or not to object as a strategic matter.

2. Plath, Bowman, Burkhart, and Bryant

The reason this issue is problematic stems from four South Carolina cases - one that was in existence prior to this case and three that were handed down after Applicant's trial.

In State v. Plath, 281 S.C. 1, 11-12, 313 S.E.2d 619, 625-626 (1984), the court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at Central Correctional Institute, and called life imprisonment "a form of slavery", a statement that the Supreme Court of South Carolina concluded was used "to

demonstrate the permanence and deprivation entailed in life imprisonment". Id. On cross, the State asked about another inmate's escape, which the court ultimately held was permissible:

Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Id. at 12.

After also rejecting a claim that the State improperly crossed a prison social worker on a complaint letter she wrote about an inmate's freedom of movement, the court very strongly rebuked sentencing phase defenses which "sought to portray life imprisonment as preferable to capital punishment as a matter of social policy," or "drew a picture of life imprisonment as slavery, a condition of irretrievable loss." Id. at 14. The court stated that such defenses improperly "invite[d] the jury to intrude upon the strictly legislative function of determining the nature of crime and punishment," and concluded:

In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury.

Id. at 14-15.

In Plath, 281 S.C. at 15, the court went on to note that while psychiatric testimony of future dangerousness was permissible, it had held that future adaptability to prison evidence was not, a conclusion subsequently overruled by the United States Supreme Court in Skipper v. South Carolina, 476 U.S. 1, 4, 106 S.Ct. 1669, 1671. Only in the context of justifying this distinction, Plath stated:

A jury needs to know how a given defendant came to commit a given aggravated murder, to include aspects of his background, his character and the setting of the crime itself which may explain or even mitigate the conduct of which he has been found guilty. A jury does not need to know how often he will take a shower or whether or not he will be lonely and withdrawn during his tenure at CCI.

281 S.C at 15.

Despite these admonitions, the Plath Court returned to how the State's challenged questioning was the only proper response to what that court considered at the time to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16 (emphasis added). See also State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Two decades later, the Supreme Court of South Carolina decided State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005). The State argued that the questioning about prison conditions was not preserved because the issue was not raised before the trial court nor was there a contemporaneous objection. The court agreed the issue was not preserved, but added a cautionary instruction to both sides that evidentiary presentations along these lines are improper:

We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison, and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the

State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

Bowman, 366 S.C. at 498-99.

Subsequent to Bowman, the Supreme Court of South Carolina addressed a case where the *solicitor* preemptively called a witness who testified extensively to the conditions of confinement for an inmate serving life without parole. State v. Burkhardt, 371 S.C. 482, 640 S.E.2d 450 (2007). The defense objected to the state's evidence, and later put in its own evidence of "bad" prison conditions. Id. at 487. Justice Waller joined by Justice Moore, who wrote the opinion of the court. Id. at 482. Justice Moore cited Plath and other cases from the 80s and 90s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. Id. at 487. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. Id. at 487-488. Justice Moore noted that while trial of the case at issue was before the decision in Bowman, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial . . . be relevant to the character of the defendant or the circumstances of the crime." Id. at 488. Thus, Justice Moore concluded that the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. §16-3-25(C)(1) (2003). Id. at 488-489.

In concurrence, Justice Pleicones wrote that he did not believe the court should apply the normal harmless error standard for constitutional violations to this issue, concluding that "once improper evidence of any kind injects an arbitrary factor into the jury's consideration, [the] Court cannot uphold the death sentence under §16-3-25(C)(1)." Id. at 490. Justice Pleicones saw no

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prejudice component once a statutory violation was established. Id.

In dissent, the Chief Justice, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant. Id. The Chief Justice concluded that both sides fully joined the issue and the defendant used the issue to his advantage. Id. at 491. Finally, the Chief Justice noted that the standard in §16-3-25(C)(1) was merely a recitation of the Eighth Amendment standard, which is subject to a harmless error analysis. Id. at 492.

Subsequent to Burkhart, the Supreme Court of South Carolina decided State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007). There, the defense called an expert that testified in great detail as to the “dismal conditions of prison life in general.” Bryant, 372 S.C. at 317. Like Bowman, the Court reiterated that *defense* evidence on conditions of confinement was just as improper as State evidence on the subject. Id. at 318.

3. Applicability of a Strickland prejudice analysis to this issue

The first hurdle that must be crossed is whether a normal Strickland prejudice analysis applies to this claim. Unlike Burkhart, Bowman, or Bryant, this case is in PCR, and in such a collateral attack Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993) (“Issues that could have been raised at trial or on direct appeal can not be raised in a PCR application absent a claim of ineffective assistance of counsel.”). The familiar standard in Strickland that applies to claims of ineffective assistance of counsel requires a showing of *both* deficient performance *and* prejudice, or a reasonable probability of a different result at trial. 466 U.S. at 689, 694.

In Jones v. State, 332 S.C. 329, 333, 504 S.E.2d.822, 823-824 (1998) (citing Strickland, 466

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U.S. at 695), the Supreme Court of South Carolina stated the “prejudice” prong in a capital sentencing proceeding as being established when “there is a reasonable probability that, absent [counsel’s] errors, 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.” “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694). Accord Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997) (quoting Strickland, 466 U.S. at 700) (“given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.”).

There are only limited exceptions presuming prejudice; none of them apply here. In Nance v. Ozmint, 367 S.C. 547, 551-552, 626 S.E.2d 878, 880 (2006), the Supreme Court of South Carolina outlined these limited exceptions:

In Cronic, the Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel “at a critical stage of his trial.” Cronic, 466 U.S. at 659, 104 S.Ct. 2039. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer “entirely fails to subject the prosecution’s case to meaningful adversarial testing,” thus making “the adversary process itself presumptively unreliable.” *Id.* Third, the Court identified certain instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is “an extremely high showing for a criminal defendant to make.” Brown v. French, 147 F.3d 307, 313 (4th Cir.1998).

The court in Nance pointed out that these situations of presumed prejudice are rare, and concluded



with this instruction:

Absent these narrow circumstances of presumed prejudice under Cronic, defendants must show actual prejudice under Strickland.

Nance, 367 S.C. at 552.

These limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant's trial, so the first exception is inapplicable. The third exception is not viable either, as it applies only when extreme circumstances external to counsel would prevent anyone from providing effective representation. The classic case, discussed in Cronic, is Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932), where in the 1930s black youths in Alabama were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under the guard of soldiers. Id. at 53. Only on the day of trial did the court appoint a lawyer, who was not only unprepared but also was from a different state and unfamiliar with local procedure. Id. Applicant's trial nowhere approaches the inherently prejudicial circumstances of Powell.

Finally, the second exception of Nance, where counsel "entirely fails to subject the prosecution's case to adversarial testing," is also inapplicable. An example of this exception is Nance itself, where lead counsel was hampered by alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. Nance, 367 S.C. at 553. The lawyers only interviewed one family member in preparation, and the mental expert received none of his requested background information. Id. The lawyer told the jury in opening argument that he did not ask for the case; counsel only called three witnesses in the guilt phase, during which they elicited prejudicial information; counsel failed to qualify their expert; and counsel called the sister at the last minute without any preparation. Id. at 554. The defense

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sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, instead describing him as a "sick" man who did "sick" things. Id. at 554-58.

Such a woeful description is of course nothing like the aggressive representation that Applicant received in this case. He had three highly qualified and active lawyers, one of whom is among the most experienced capital defense litigators in the State. Whether or not they made an individual mistake during the course of the representation, counsel in this case certainly endeavored to challenge the State's case throughout the proceedings. Clearly, this is not a Nance-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where as here there was a sufficient effort overall, any alleged individual mistakes are properly adjudged through Strickland's normal process, including the prejudice analysis.

This conclusion is consistent with the language of Strickland itself, despite the Supreme Court of South Carolina's view in Burkhart of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. During collateral attack concerns of finality are of "profound importance." See generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). Hence, on collateral attack it is appropriate to filter claims through a prejudice analysis to ensure that the extreme social cost of reversing final convictions and sentences is only borne by society where the alleged error had a reasonable probability of affecting the result of the proceedings.

An example of this principle is found in Franklin v. Catoe, 346 S.C. 563, 552 S.E.2d 718 (2001). There, the Supreme Court of South Carolina held that a prejudice analysis should be applied to claims that the defendant was not advised of and thus did not waive his right to personally give closing argument in the guilt phase of a capital trial. Franklin, 346 S.C. at 570-571. Franklin noted

the general rule that claims under Strickland include a prejudice analysis, and went on to conclude that since *in favorem vitae* review had been abolished and a PCR system of collateral attack established to explore such issues, a finding of *per se* reversible error was no longer warranted. Franklin, 346 S.C. at 571-74. Finally, the court noted that it and the United States Supreme Court have repeatedly held that “a harmless error analysis is appropriate where a capital defendant has suffered a deprivation of a *constitutional right*.” Id. at 575 n.8 (emphasis in original).

That last statement precisely raises the final point of why a prejudice analysis is appropriate to a claim that counsel failed to object to evidence of conditions of confinement. Burkhart phrases its issue as a statutory one in that introduction of evidence of conditions of confinement injects an arbitrary factor under S.C. Code Ann. §16-3-25(C)(1). Applicant in PCR raises a *constitutional* issue by stating that he was effectively denied his Sixth Amendment right to counsel based on counsel’s omission. Applicant must filter his statutory claim through the constitutional one; as a fundamental and legal matter, the claim he pled before this Court is constitutional. As Franklin specifically notes, the overriding constitutional claim upon which the statutory claim depends is subject to a harmless error analysis just like any other constitutional claim. 346 S.C. at 575 n.8.

4. There was no prejudice

This Court finds counsel were deficient for not objecting to the evidence. This deficiency does not warrant reversal, however. In the sentencing phase, Applicant must show “there is a reasonable probability that, absent [counsel’s] errors, the sentence - 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.” Jones, 332 S.C. at 333 (citing Strickland, 466 U.S. at 694).



Here, we have as extremely aggravated a crime as there could be. It would be bad enough if Applicant had merely murdered Trooper Nicholson; however, Applicant's subsequent wild chase provides an incredible amount of further aggravation. Applicant wounded another officer with a gunshot to the face, ran civilians off the road, commandeered a Blue Ridge truck at gunpoint, and only by luck or grace was not a good enough shot to kill more police officers or innocent civilians with his repeated gunfire. Applicant had a prior record and had been in prison before, and the victim impact evidence in this case was particularly moving. Compared to this, there is limited mitigation, with no family members and relatively mild mental health testimony without findings of psychosis or delusion at the time of the offense. There was evidence in rebuttal that Applicant was anti-social.

As to the conditions of confinement evidence itself, the defense was able to score as many points if not more as the prosecution. Counsel apparently believed they could score more points on the issue as they made the decision not to object. Through cross of Sligh and presentation of James Aiken, the defense elicited how tough prison is, how Applicant would be far more susceptible to danger in general population than on death row, and how Applicant would likely be at the mercy of predator groups inside the general population of prison given his small stature and older age. Both sides fully joined the issue and both sides were able to make headway.

Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State's evidence on the issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State's and defense's evidence of conditions of confinement does not establish Strickland prejudice. Since evidence from both sides came before the jury,

argument on the subject was proper as within record, and the fact that both sides made argument on this issue does not change the calculation.²

The issue is denied.

K. Ground K

Applicant's final ground for relief is as follows:

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code §16-3-26(B)(1) and §17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. Strickland v. Washington, 466 U.S. 668 (1984).

Applicant contends his counsel were ineffective for failing to lodge an equal protection violation as to the aggravator regarding the murder of a law enforcement officer during or because of the performance of his official duties.

Such an aggravator does not violate equal protection as it acts as a deterrent from killing those who risk their lives daily for public protection, fosters respect for an officer's authority and arrest powers even from those who might otherwise be committing crimes, and recognizes the greater punishment needed for a crime that displays such a complete lack of regard for that law and social order, beyond the act of murder itself, that is inherent in the murder of one of her enforcers. Thus, counsel could not have been deficient nor Applicant prejudiced from the failure to raise this

² It should be noted that it would be inappropriate to claim, as trial counsel Mauldin did on the stand, that had he objected and the trial court overruled his objection, the case would have been reversed on appeal and thus prejudice is established. Strickland is clear that the Court must "presume . . . that the judge or jury acted according to law," and "and assessment of the likelihood of result must exclude the possibility of arbitrariness, whimsy, caprice, nullification, or the like." 466 U.S. at 695. "A defendant has not entitlement to the luck of a lawless decisionmaker." Id. Although the trial court here found the evidence relevant, that was only *after* defense counsel expressly chose not to object on the record. This Court must presume that had counsel made an objection based on Plath, and articulated the issue as it was subsequently done in Bowman, that the judge would have ruled correctly and excluded the evidence.

issue.

The issue is denied. See Commonwealth v. Travaglia, 723 A.2d 190 (Pa. Super. Ct. 1998) (rejecting a similar equal protection claim); Ex parte Cade, 521 So. 2d 85 (Ala. 1987). See generally Williams v. Illinois, 399 U.S. 235, 243 (1970) (“there is no requirement that two persons convicted of same offense receive identical sentences”).

III.

For the foregoing reasons, the Court denies and dismisses with prejudice the Applicant's APCR.

Applicant is hereby advised that if he wishes to appeal this Order, a notice of intent to appeal must be filed within thirty (30) days of the receipt of this Order. Applicant's attention is also directed to Rules 203, 206, and 227 of the South Carolina Appellate Court Rules for appropriate procedures to follow after notice of intent to appeal has been timely filed.

Therefore, it is ORDERED that:

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice.
2. Applicant is remanded to the custody of the State of South Carolina.

This 19 day of December, 2007.



Larry R. Patterson
Presiding Judge
Thirteenth Judicial Circuit

Greenville, South Carolina