STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

Larry R. Patterson, Circuit Court Judge

JOHN RICHARD WOOD,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

SUPPLEMENTAL APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

JOSEPH L. SAVITZ, III
Senior Appellate Defender

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ATTORNEYS FOR RESPONDENT

INDEX

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	2007 JAN -8 A 9:39 C.A. No. 05-CP-23-4737
JOHN RICHARD WOOD, #6004)	
)	
Petitioner,)	FILED-CLERK OF COURT GREENVILLE CO. S.C. PAUL B. WICKENSIMER
v.)	
)	**FIRST AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
STATE OF SOUTH CAROLINA)	
)	
Defendant.)	

[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

2. The sentence was imposed by the Greenville County Court of General Sessions, the Honorable John W. Kittredge, presiding.

3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:

   (a) 01-GS-23-3106- Murder and Possession of a Weapon During the Commission of a Violent Crime.

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) Sentenced on February 16, 2002 to death.

5. A finding of guilty on was made on February 11, 2002 after a plea of not guilty.

6. The applicant did appeal from judgment of conviction and sentence.

7. (a) The Courts to which applicant appealed:
   (i) The South Carolina Supreme Court.

(b) The result in each Court to which applicant appealed:
(i) Conviction and sentence of death were affirmed.

(c) The date on which each Court affirmed the sentence or denied certiorari:
(i) Conviction and sentence were affirmed December 6, 2004.

(d) Citations of any written opinion or orders entered pursuant to such results:
(i) State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004)
(ii) John Richard Wood v. South Carolina, 125 S. Ct. 2942 (June 20, 2005)

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.[1]

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 Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' 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).

Supporting Facts for Ground A

(1) Karen McCall provided testimony identifying Mr. Wood as the perpetrator of the murder in response to questioning by the prosecution. Further, she testified that she "was forced to drive" the vehicle in question. This testimony portrayed Ms. McCall as the victim of Mr. Wood's activities.

(2) However, testimony elicited by agents of the State in another trial indicates that Ms. McCall voluntarily participated in the events involving Mr. Wood on December 6, 2000.

(3) Further, SLED testing of Ms. McCall's hands indicates that "Round lead particles found on the palms and backs of both hands of Karen Pittman McCall, SLED Trace Dept. Report, 3.1.01. Ila Simmons and Joseph Powell.

(4) Trial counsel failed to examine Ms. McCall regarding her involvement in the criminal activity or to correct this impression presented by the prosecution. Further, trial counsel failed to present the results of the GSR testing.

---

[1] Applicant reserves his right to amend this application.

(5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

(1) During the verdict phase of the trial, the defense requested an instruction regarding a lesser included offense of voluntary manslaughter. However, the trial court denied this request and the Supreme Court of South Carolina affirmed this decision.

(2) However, the Trial Counsel failed to present testimony that the traffic stop was conducted in contradiction of the guidelines promulgated by law enforcement.

(3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground C

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' 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).

Supporting Facts for Ground C

(1) During the verdict phase of the case, the trial counsel presented a "he didn't do it" defense.

(2) However, during the penalty phase of the proceeding, trial counsel presented a "he can act better mitigation."

(3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different. See *Nixon*, at 191-192 ("Counsel therefore may reasonably

decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. See Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.")).

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' 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).

Supporting Facts for Ground D

(1) Trial Counsel offered to instruct the jury that 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."

(2) This objection was not provided to the jury

(3) Trial counsel failed to object to the failure to charge this instruction.

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. *Estelle v. Smith*, 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (1989), *Hudgins v. Moore*, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4th cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

(1) An evaluation of Mr. Wood was conducted related to the capital matter over the objection of his capital trial counsel.

(2) This evaluation included a request for information with a view to the use of this information at sentencing.

(3) Capital trial counsel was unaware that this information could be used at sentencing or during any step during the trial process as no issue was raised concerning criminal responsibility, competency to stand trial, or ability to conform conduct to the requirements of the law.

(4) Trial counsel failed to object to the presentation of this evidence outside of the limited purpose for which this evaluation was ordered.

(5) This presentation violated Mr. Wood's right to remain silent and right to the effective assistance of counsel.

(6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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) and17-23-60 by trial counsels' failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. *Estelle v. Smith*, 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (1989), *Hudgins v. Moore*, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4th cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

(1) An evaluation of John Wood was conducted by the South Carolina Department of Mental Health.

(2) Trial counsel was able to deny access the Department access to John Wood during February, 2002 by letter notifying the trial judge of the denial of such access.

(3) Trial counsel did not prevent such access after the September 21, 2001 hearing regarding the evaluation related to the capital trial but before the February, 2002 denial of access.

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' 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).

Supporting Facts for Ground G

(1) The South Carolina Department of Mental Health diagnosed Applicant with Anti-social personality disorder.

(2) However, no evidence supports this diagnosis and the medical providers conducted a less than adequate investigation into the background of Mr. Wood.

(3) This diagnosis contradicts that of the doctors from the South Carolina Department of Corrections, who currently treat Mr. Wood

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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) and17-23-60 by trial counsels' 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 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground H

(1) During the penalty phase of the trial below, no pleas of mercy were presented by any family member of Mr. Wood nor was any information presented demonstrating Mr. Wood's "capacity to be of emotional value to others."

(2) This information was available at the time of the trial.

(3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' failure to object to improper closing argument of the prosecutor. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

(1) During prosecutor's closing of the penalty phase of this trial, the prosecutor argued that the jury was "looking for factual support to support any suggestion he didn't have the requisite intent." This shifted the burden of proof to the defendant.

(2) Further, the prosecutor argued that a cop killer is a king in prison.

(3) Trial counsel failed to object to this argument.

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.

14. N/A

15. These grounds rely on additional facts outside the record which was before the previous court.

16 & 17. (a) Applicant was represented at his trial by James Banister, Esquire, P.O. Box 10007, Greenville, SC 29603, John Mauldin, P.O. Box 10264, Greenville, SC 29603, and Rodney Richey, P.O. Box 10916, Greenville, SC 29603.

(b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.

18. Applicant seeks the vacation of his convictions and sentences and the preclusion of the right to seek the death penalty in any future proceedings.

19. Applicant is not under sentence from any other court.

Respectfully submitted,

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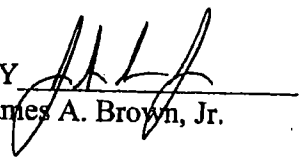
BY 
James A. Brown, Jr.

Attorneys for Applicant

January 5th, 2007.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE)	C.A. No. 05-CP-23-4737
JOHN RICHARD WOOD, #6005)	
)	
Petitioner,)	
v.)	
)	**SECOND AMENDED APPLICATION FOR POST-CONVICTION RELIEF**
)	
STATE OF SOUTH CAROLINA)	
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Defendant.)	
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[Note: This application follows SCRCP Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCP.]

1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.

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3. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed:

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4. The date upon which sentence was imposed and the terms of the sentence:

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5. A finding of guilty on was made on February 11, 2002 after a plea of not guilty.

6. The applicant did appeal from judgment of conviction and sentence.

7. (a) The Courts to which applicant appealed:
   (i) The South Carolina Supreme Court.
   (ii) The United States Supreme Court

(b) The result in each Court to which applicant appealed:
(i) Conviction and sentence of death were affirmed.
(ii Certiorari was denied.

(c) The date on which each Court affirmed the sentence or denied certiorari:
(i) Conviction and sentence were affirmed December 6, 2004.
(ii) Certiorari was denied on June 20, 2005.

(d) Citations of any written opinion or orders entered pursuant to such results:
(i) State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004)
(ii) John Richard Wood v. South Carolina, 125 S. Ct. 2942 (June 20, 2005)

8. Not applicable.

9 & 10 Grounds for Relief and Concise Statement of Supporting Facts.[1]

Ground A

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Supporting Facts for Ground A

(1) Karen McCall provided testimony identifying Mr. Wood as the perpetrator of the murder in response to questioning by the prosecution. Further, she testified that she "was forced to drive" the vehicle in question. This testimony portrayed Ms. McCall as the victim of Mr. Wood's activities.

(2) However, testimony elicited by agents of the State in another trial indicates that Ms. McCall voluntarily participated in the events involving Mr. Wood on December 6, 2000.

(3) Further, SLED testing of Ms. McCall's hands indicates that "Round lead particles found on the palms and backs of both hands of Karen Pittman McCall, SLED Trace Dept. Report, 3.1.01. Ila Simmons and Joseph Powell.

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[1] Applicant reserves his right to amend this application.

(4) Trial counsel failed to examine Ms. McCall regarding her involvement in the criminal activity or to correct this impression presented by the prosecution. Further, trial counsel failed to present the results of the GSR testing.

(5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground B

(1) During the verdict phase of the trial, the defense requested an instruction regarding a lesser included offense of voluntary manslaughter. However, the trial court denied this request and the Supreme Court of South Carolina affirmed this decision.

(2) However, the Trial Counsel failed to present testimony that the traffic stop was conducted in contradiction of the guidelines promulgated by law enforcement.

(3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground C

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' 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).

Supporting Facts for Ground C

(1) During the verdict phase of the case, the trial counsel presented a "he didn't do it" defense.

(2) However, during the penalty phase of the proceeding, trial counsel presented a "he

can act better mitigation."

(3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different. See *Nixon*, at 191-192 ("Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. See Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L.Rev. 695, 708 (1991) ("It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.")).

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' 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).

Supporting Facts for Ground D

(1) Trial Counsel offered to instruct the jury that 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."

(2) This instruction was not provided to the jury

(3) Trial counsel failed to object to the failure to charge this instruction.

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. *Estelle v. Smith*, 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (1989),

Hudgins v. Moore, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4th cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground E

(1) An evaluation of Mr. Wood was conducted related to the capital matter over the objection of his capital trial counsel.

(2) This evaluation included a request for information with a view to the use of this information at sentencing.

(3) Capital trial counsel was unaware that this information could be used at sentencing or during any step during the trial process as no issue was raised concerning criminal responsibility, competency to stand trial, or ability to conform conduct to the requirements of the law.

(4) Trial counsel failed to object to the presentation of this evidence outside of the limited purpose for which this evaluation was ordered.

(5) This presentation violated Mr. Wood's right to remain silent and right to the effective assistance of counsel.

(6) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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) and17-23-60 by trial counsels' failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. *Estelle v. Smith*, 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (1989), *Hudgins v. Moore*, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4th cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground F

(1) An evaluation of John Wood was conducted by the South Carolina Department of Mental Health.

(2) Trial counsel was able to deny access the Department access to John Wood during February, 2002 by letter notifying the trial judge of the denial of such access.

(3) Trial counsel did not prevent such access after the September 21, 2001 hearing regarding the evaluation related to the capital trial but before the February, 2002 denial of access.

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' 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).

Supporting Facts for Ground G

(1) The South Carolina Department of Mental Health diagnosed Applicant with Anti-social personality disorder.

(2) However, no evidence supports this diagnosis and the medical providers conducted a less than adequate investigation into the background of Mr. Wood.

(3) This diagnosis contradicts that of the doctors from the South Carolina Department of Corrections, who currently treat Mr. Wood

(4) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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) and17-23-60 by trial counsels' 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 US 510 (2003), *Rompilla v. Beard*, 125 S.Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground H

(1) During the penalty phase of the trial below, no pleas of mercy were presented by any

family member of Mr. Wood nor was any information presented demonstrating Mr. Wood's "capacity to be of emotional value to others."

(2) This information was available at the time of the trial.

(3) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and17-23-60 by trial counsels' failure to object to improper closing argument of the prosecutor. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground I

(1) During prosecutor's closing of the guilt phase of this trial, the prosecutor argued that the jury was "looking for factual support to support any suggestion he didn't have the requisite intent." This shifted the burden of proof to the defendant.

(2) Further, in the penalty phase, the prosecutor argued that a cop killer is a king in prison.

(3) Also, in the penalty phase closing, the prosecutor argued that "this is not Susan Smith. This is not a man who is going to be sitting in prison worrying about having killed her two children."

(4) Trial counsel failed to object to these arguments.

(5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

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 Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to object to the prosecutions 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. Burkhart*, --- S.E.2d ----, 2007 WL 80036 (SC 2007).

Supporting Facts for Ground J

(1) During the penalty phase of the proceedings, the state introduce evidence regarding the privileges available to an inmate who receives a sentence of life without parole. These privileges include access to the yard, work, education, meals, canteen, library, recreation, mail, and outside visitors. See testimony of Jimmy Sligh, p. 1878-1918.

(2) In the closing argument, the prosecution argued that 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 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 TV. You play cards and games. You've got a social structure. You've freedom of movement.... Thirty or forty acres to live in. Watch ball games on the TV. You go to school.... Based on what John Richard Wood was doing, prison is just about going to be a change of address and nothing more. He will see his baby every weekend, and that baby will sit in his lap." Trial Transcript, p. 2191-2192.

(3) This evidence and argument injected arbitrary factors into the sentencing proceeding.

(4) Trial counsel failed to object to this evidence and argument.

(5) But for counsel's deficient performance, the outcome of the trial proceedings would have been different.

Ground K[2]

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 Sections 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 circumstance making Mr. Wood death eligible. *Strickland v. Washington*, 466 U.S. 668 (1984).

Supporting Facts for Ground K

(1) During the sentencing phase of the trial, the prosecution sought the death penalty based upon one alleged aggravating circumstance, to wit: The murder of a state law enforcement officer during or because of the performance of his official duties.

(2) The designation of the murder of a law enforcement officer as an aggravating circumstance for purposes of imposing the death penalty violates equal protection

[2]This ground is added at the specific request of the applicant.

by placing higher worth on the value of officers' lives.

(3) Trial counsel failed to object to this equal protection violation.

(4) But for counsel's deficient performance, the outcome of the proceedings would have been different.

11 & 12. Applicant appealed his conviction and sentence to the South Carolina Supreme Court. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court.

13. None of the grounds set forth in (9) has been presented to this or any other Court, state or federal.

14. N/A

15. These grounds rely on additional facts outside the record which was before the previous court.

16 & 17. (a) Applicant was represented at his trial by James Banister, Esquire, P.O. Box 10007, Greenville, SC 29603, John Mauldin, P.O. Box 10264, Greenville, SC 29603, and Rodney Richey, P.O. Box 10916, Greenville, SC 29603.

(b) Applicant was represented in his direct appeal by Robert M. Dudek, S.C. Office of Appellate Defense, 1122 Lady St., Suite 940 Columbia, S.C. 29201.

18. Applicant seeks the vacation of his convictions and sentences and the preclusion of the right to seek the death penalty in any future proceedings.

19. Applicant is not under sentence from any other court.

Respectfully submitted,

February 9th, 2007.

James A. Brown, Jr.

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STATE OF SOUTH CAROLINA)		IN THE COURT OF COMMON PLEAS
)		
COUNTY OF GREENVILLE)		C.A. No. 05-CP-23-4737
JOHN RICHARD WOOD, # 6005)		
)		
Applicant,)		**NOTION OF MOTION AND**
v.)		**MOTION TO RECONSIDER**
)		**ORDER DENYING APPLICATION**
)		**FOR POST-CONVICTION RELIEF**
STATE OF SOUTH CAROLINA)		
)		
Respondent)		
)		
)		

COMES NOW THE APPLICANT, providing notice to the Court and the Respondent, of Applicant's Motion for Reconsideration of the Order of the Court dismissing Applicant's post conviction request for relief. Applicant's attorney received the Order of Dismissal on Friday, December 21, 2007. The Order was mailed, along with a form Order (SCRCP APP-24/Form 4) unsigned, but filed on December 19, 2007, from the Greenville County Clerk of Court. Because Applicant sought relief on multiple grounds and the Order of Dismissal denies relief on all grounds, this Motion requests the Court reconsider all grounds on which relief has been requested. Each ground, and the reasons for requesting reconsideration, are considered separately below. Applicant would further request the opportunity to be heard in open court regarding this Motion for Reconsideration.

Ground A (Failure to impeach testimony of Karen McCall)

Applicant requests the Court reconsider its ruling that Applicant's trial counsel was not deficient in failing to impeach the testimony of Karen McCall. Applicant believes that the Court misunderstood the significance of impeaching the testimony of Karen McCall with the gun shot residue evidence (GSR) indicating that she could have fired the fatal shots killing Trooper

Nicholson. For a proper understanding of the significance of this detrimental performance of trial counsel, one must first understand the case presented by the State and the defense offered by Wood's trial counsel.

At trial, the State offered the testimony of Karen McCall to prove the identity of the shooter. It was undisputed that only one assailant was involved in this homicide. The eyewitnesses indicated that the operator of the moped (the shooter) was fully clothed and the sex was not readily open to observation. Trial Transcript p. 731, l. 3-7. Further, the State also relied upon GSR to prove the identity of the shooter. Trial Transcript p. 1731, l. 19-22.

However, had trial counsel cross examined Karen McCall regarding the GSR tests performed by SLED, the strength of the State's case regarding identity would have been weakened. See SLED GSR Report dated 3.1.01, entered by Applicant at PCR hearing[1]. This GSR report was never offered into evidence and the jury never heard of this SLED test. Further, the finding of this GSR report implies that a person "...could have fired a weapon." Trial Transcript p. 1623, l. 1.

To the contrary, all reviewing courts have found a lack of sufficient legal provocation to provide a voluntary manslaughter argument. Further, the trial counsel's definition of malice and

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[1]PCR counsel is unable to provide effective and competent representation of applicant at this stage due to the lack of access to the trial transcript and reference to the testimony and exhibits contained therein. PCR counsel has requested authorization for funding to obtain this transcript and has requested that this matter be held in abeyance pending receipt and review of this transcript. The first such request was expressly denied by ruling from the court and the second request was in effect denied by virtue of no response or ruling from the court. Thus counsel is unable to perform its tasks as required by Hall v. Catoe, 601 SE 2d 335 (SC 2004). Further, PCR counsel is unable to perform tasks allowed and required under SCRCP Rule 15(b) and Simpson v. Moore, 627 SE 2d 701 (SC 2006).

criminal intent were found contrary to South Carolina law by the trial judge.[2]

Therefore, short of a concession of guilt, trial counsel should have investigated and presented GSR evidence providing a basis to argue that Karen McCall was the killer of Trooper Nicholson. Had trial counsel done so, there is a reasonable probability that the outcome of either the verdict or penalty phase[3] would have been different.

Ground B (Failure to sufficiently present evidence in support of and argue for a charge regarding Voluntary Manslaughter)

In light of the arguments contained in Grounds A and C and without the aid and assistance of the PCR hearing transcript, PCR counsel will withdraw Ground B. However, PCR counsel reserves the right to re-argue this matter with the assistance of the transcript and evidence presented during the PCR hearing.

Ground C (Failure to concede guilt)

This Court should reconsider the denial of relief requested in Ground C because this Court misapprehends the duty and role of counsel and client in capital cases following the United States Supreme Court ruling in Florida v. Nixon, 543 US 175 (2004). In Nixon, the Court noted that counsel acted within proper bounds when conceding guilt without client permission in the context of a two-phase capital trial. This ruling was based on the premise that avoiding execution may be the only realistic expectation in a case with overwhelming evidence of guilt. Further, the Supreme Court found such a concession could be the product of a reasonable decision to focus on sentencing and avoid credibility issues raised by contesting a strong

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[2]"This jury was invited to apply a standard of specific intent to kill far beyond what the law requires. That is the basis of the confusion." Trial Transcript p. 1773, l. 23-25.

[3]To properly assess the impact of this deficiency in the penalty phase, one should also consider the contrary arguments presented by the State in the Anderson and Greenville trials when describing the actions of Karen McCall.

prosecution case.[4]

In the Order, the Court notes that trial counsel conceded identity. This left the jury one question: whether the killing of Trooper Nicholson was murderous. South Carolina law only recognizes one degree of murder.

Further, Trooper Nicholson was shot multiple times while still in his patrol vehicle. No court has found sufficient evidence to even present voluntary manslaughter to a jury given these facts. In fact, trial counsel's feelings that this shooting was something less than murder must have been rooted in their misapprehension of South Carolina law regarding malice and criminal intent. Trial Transcript p. 1773, l. 23-25 ("This jury was invited to apply a standard of specific intent to kill far beyond what the law requires. That is the basis of the confusion.").[5]

Finally, the prejudice in the sentencing phase caused by the failure to concede guilt was obvious to both the trial judge and lead trial counsel even prior to the selection of the jury in this matter. First, trial counsel noted: "Why would any defendant enter a plea and say, I'm not guilty. By the time the trial of the case is over the defendant's credibility is also over for all intensive purposes. Not only is he penalized for non-credibility, or lack of credibility, but he is penalized for lack of acceptance and responsibility, or at least the appearance of lack of responsibility." Pre trial motion-12.7.01, page 10-12.[6] Next, the trial judge agreed: "From a practical standpoint, I

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[4]In the Order of Dismissal, the PCR court cites several cases to distinguish Nixon. However, none of the cases cited are capital cases. In fact, the only capital case listed in this portion of the Order is the case of Sleeper v. Spencer, 453 FSupp2d 204 (D.Mass 2006) which cites a pre-Nixon ruling in a non-capital case.

[5]For the full context of this statement compare trial counsel's closing: Trial Transcript p. 1747, l. 23-1748, l. 1; p. 1748, l. 18-25; 1752, l. 24-1753, l. 1 with the trial court's instruction: Trial Transcript p. 1765, l. 18-20; p. 1766, l. 6-12.

[6]A copy of this transcript was entered into the record at the PCR hearing. See Footnote 1.

can understand the benefit a party would seek to obtain by that initial admission on the front end..." Trial Transcript, p. 1005. Therefore, but for trial counsel's failure to concede guilt, there is a reasonable probability that the outcome of the sentencing proceeding would have been different.[7]

Ground D **(Failure to accept trial court's offer to instruct the jury that a defendant is required to plead not guilty in order to obtain a jury sentencing.)**

The Court should reconsider the portion of its Order which denies relief to Applicant for his claim in Ground D because the Order misapprehends trial counsel's position regarding the purpose of the jury instruction and because the Order relies upon unsupported references to testimony from the PCR hearing.[8]

In the pre-trial discussion where the trial court entertains a constitutional challenge to the death penalty framework in South Carolina, the trial court provides an offer to trial counsel. This offer purports to explain the necessity of a trial before a defendant in a capital proceeding would be entitled to a jury sentencing. In the context of this challenge and the defendant's request for separate jury panels for the two stages of trial, the trial court was merely offering the jury an explanation of the process: if a jury trial is desired in the penalty phase, then a jury trial must be had in the verdict phase, even though guilt may not be an issue. It is unlikely that the judge would have provided a charge or instruction that this defendant (John Wood) desired to plead guilty as that would have clearly been an unconstitutional charge on the facts.[9]

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[7]Trial counsel requested but were denied the opportunity to empanel separate juries for the two separate phases of the trial. Trial Transcript p. 1008, l.1-4.

[8]See Footnote 1.

[9]See S.C. Const. art. V, § 21 ("Judges shall not charge juries in respect to matters of fact, but shall declare the law.")

Furthermore, the Order in this PCR matter references testimony from Mr. Wood's trial attorneys. However, this testimony is referenced without citation to any record.[10] In fact, some of this referenced testimony is contained in quotations even though the subscriber is unaware of the existence of any copies of the transcript of the testimony from the PCR hearings. See Footnote 1. The undersigned therefore suggests that trial counsel agreed it was erroneous to not accept a constitutional jury charge which merely explained the procedural framework for a death penalty matter in South Carolina: when a jury trial is desire in the penalty phase, it must be requested and had in the guilt phase. The exact phrasing of this charge would have been worked out later. Trial Transcript p. 1005 ("...if you desired that, we would have had long discussions about how we could approach that with the jury and things of that nature.").

The failure to accept this charge was prejudicial as it forced the defense to argue that any mitigating points scored in the verdict phase amounted to evidence of a defense instead of merely providing the opportunity to front-load mitigating evidence in a legally required two stage proceeding.[11]

Ground E (Failure to object to testimony from medical providers of the South Carolina Department of Mental Health)

The Court should reconsider so much of the Order as denies relief based upon trial counsel's failure to object to testimony from medical providers of the South Carolina Department of Mental Health offered during the penalty phase of Mr. Wood's trial. The ruling in this Order

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[10]The undersigned must note an objection to the nearly wholesale adoption of the proposed Order from the State in this case. In fact, this Order was adopted without the assistance of the transcript of the contested PCR hearing. For the record, a copy of the proposed Order is attached to this Motion.

[11]It should be remembered that the defense sought to empanel two separate juries, but the court declined this request.

misapprehends the law regarding use during capital sentencing proceedings of information obtained pursuant to court-ordered competency, capacity to conform and criminal responsibility evaluations.

In South Carolina, a trial judge may order that a criminal defendant be evaluated by medical providers from the South Carolina Department of Mental Health for use in deciding issues regarding competency, capacity to conform, and criminal responsibility. However, it has long been the rule that this information may not be used outside of that context. Specifically, in State v. Myers, the Supreme Court of South Carolina noted that "the authorities of [the State Hospital for the Insane] will not be permitted, over the protest of the accused, to reveal any confession made by him in the course of such examination, or any declarations implicating him in the crime charged." 67 SE2d 506, 508 (SC 1951). Noting that the extent of this ruling encompassed more than confessions, the SC Supreme Court in Hudgins v. Moore explained "the need to protect the integrity of a court-ordered mental health examination by forbidding the use of the information obtained for purposes other that ordered by the court." 524 SE2d 105, 108 (SC 1999). In Moore, the Court found IAC when capital trial counsel failed to object to the use of information obtained following a court-ordered competency and criminal responsibility examination because this information was used for a purpose other than that consistent with the evaluation order.

Further, the US Supreme Court has reversed several death sentences when the state made use of psychiatric information ostensibly obtained for more limited purposes. To begin, in Estelle v. Smith, the Court reversed a death sentencing finding both a Fifth Amendment and Sixth Amendment violation to the use of court-ordered psychiatric testimony. 451 US 454 (1981). In Smith, the Court found that the Fifth Amendment was violated because the defendant

was not warned that any statement he made could be used against him at the sentencing proceeding[12]. Further, the Sixth Amendment was violated because counsel was not notified that the evaluation would encompass issues to be used at sentencing. The Court specifically stated that even though: "[t]he state trial judge, *sua sponte*, ordered a psychiatric evaluation of respondent for the limited, neutral purpose of determining his competency to stand trial, ...the results of that inquiry were used by the State for a much broader objective that was plainly adverse to respondent." Smith at 465.

Also, in Powell v. Texas, the US Supreme Court reversed the death sentence of an inmate because his Sixth Amendment rights to counsel were violated when information gleaned from court-ordered psychiatric evaluations were admitted at a capital sentencing without trial counsel or the defendant being notified that the results of the evaluation would be used in such a manner. Powell v. Texas, 490 US 680 (1989). The Court found that the defense introduction of an insanity defense did not alter its finding in this respect. The Court distinguished this scenario from one where counsel knows "what the scope of the examination would be before it took place." Powell, at 685 (internal citation omitted).

This is also consistent with provisions of the American Academy of Psychiatry and the Law (AAPL) which states that information or reports derived from a forensic evaluation are subject to the rules of confidentiality which apply to the particular evaluation and disclosure of the information contained therein should be restricted accordingly.[13] This is also consistent with the position of the SC Department of Mental Health. The position of SC DMH, as stated in SC

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[12]The Court also rebuked the State's argument that the information gained by the evaluation was non-testimonial in nature. Smith, at 463.

[13]See AAPL's Ethical Guidelines for the Practice of Forensic Psychiatry, attached.

Administrative Form Orders, SCAA Form 221 and 222, is that: "a Court appointed examiner is not aligned with any party before the court" and "the Court appointed report shall be inadmissible in any other proceedings except as expressly permitted by South Carolina." Concerning testimony, Form 222 indicates that "Examiners and agency staff may not be compelled to testify regarding statements made during the criminal responsibility and capacity to conform examination for any purpose other than on the issue of criminal responsibility and capacity to conform. Also, statements made during the examination may not be used to impeach the defendant at trial." [14]

Applying these rules to the case at bar, post-conviction relief is necessary. To begin, Mr. Wood did not proceed *pro se* in the Greenville death penalty case. To the contrary, the trial court declined to relieve Mr. Mauldin and Mr. Bannister of their duties during a hearing conducted in September, 2001. This hearing followed the *pro se* evaluation request of Mr. Wood. Thus, at the conclusion of the Greenville hearing on September 21, 2001, it is clear that Mr. Mauldin and Mr. Bannister represent Mr. Wood and that they objected to the psychiatric evaluation.[15]

Further, Greenville counsel were not appraised of the scope of the evaluation or that any results would be used at the sentencing of Mr. Wood.[16] In fact, Mr. Bannister told the trial judge

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[14]See SC Form Orders 221 and 222 attached. To the extent that trial counsel failed to assert the protections included in Form Orders 221 and 222 in the trial of the case at bar, then prejudice is further established under the Sixth Amendment portion of Ground E and F. See also SCRCP Rule 15 and Footnote 1. (Obviously effective counsel would not allow the use of an inferior order when a person's life is at stake.)

[15]The court order of that date indicates otherwise, however, Greenville counsel and Anderson counsel all agree that there was no consent for the Greenville evaluation. (The Anderson case was non-capital and thus does not raise the Estelle v. Smith issues).

[16]It must be noted that Dr. Narayan's entire diagnosis of ASPD hinged on the finding of conduct disorder prior to the age of 15. This finding was itself based solely upon the self-report of Mr. Wood. See Ground G. Thus, the law "protects [a criminal defendant] ... from being

exactly the opposite in pre-trial motions[17]:

> "....we take the position that the Defendant was never advised of his 5th Amendment right regarding the sentencing phase of the case, for certain....." Trial Transcript, p. 2437, 3-6
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> "....we thought– or we knew that the way the law and the statutes worked at that point was that unless we did something affirmatively during the trial phase, raised insanity, or competency, or guilty but mental illness that it just wasn't going to be an issue...." Trial Transcript, p. 2440, 2-6.
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> "And the Sixth Amendment problem that has arisen is that we weren't able to tell Mr. Wood how this mental health evaluation might effect his sentencing phase, because frankly, it just wasn't going to be an issue in the trial of this case–or the sentencing phase of the case. And we knew that it wouldn't be an issue in the trial of the case unless we brought something affirmatively forward to sort of open the door." Trial Transcript, p. 2440, 15-22

Also, Anderson counsel was clear that no advice was provided regarding the potential use of any of the information gleaned from the evaluation at the capital sentencing in the criminal case for which he did not represent Mr. Wood. Finally, Mr. Wood signed Miranda waivers, but these waivers were themselves signed in the absence of the advice of counsel. See Thomas-Bey v Nuth, 67 F3d 296 (4th Cir. Unpublished 1995)(Finding IAC where counsel unintelligently consented to psychiatric evaluation by state doctor to be used at sentencing, but failed to advise client of purpose or attend evaluation.)

Finally, the prejudice is clear. Had counsel properly objected to the introduction of the testimony of Dr. Narayan, the court would have barred this testimony under the law referenced above. The sentencing jury weighed heavily the competing opinions of Dr. Watts and Dr.

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made the 'deluded instrument' of his own execution." Smith, at 462.

[17]The September 21, 2001 Evaluation Order itself was limited to the purposes of capacity to conform conduct, criminal responsibility and competency to stand trial.

Narayan as evidence by the replaying of this testimony shortly before rendering its sentencing verdict. Thus, the outcome of the proceeding would have been different but for the deficient performance of counsel.

Ground F (Failure to prevent access to Applicant for SC DMH evaluation)

The Court should reconsider so much of its Order that dismisses this portion of the application for relief because the Order mis-construes the nature of the evaluation conducted for the Greenville case. First, the Order incorrectly references only one evaluation regarding Mr. Wood's competency. However, Dr. Narayan is clear that he evaluated Mr. Wood on different days regarding the two cases. One evaluation involved the Anderson case, upon the request of Applicant and with the consent of his Anderson attorney Bruce Bryholdt.

However, the second evaluation concerned the Greenville case. This is the only evaluation at issue in this PCR and the only evaluation with evidence relevant to the trial below. Initially in the Greenville case, applicant filed a pro se request for this evaluation. However, at a hearing in September, 2001, the trial court refused to relieve trial counsel and specifically noted that strategic decisions regarding issues such as the need for an evaluation were to be left to trial counsel. Thus, at the end of this hearing, the defense attorneys clearly voiced opposition, not consent, to any evaluation regarding the Greenville matter.

Unfortunately, the evaluation Order in the Greenville case references consent of the defendant's counsel. When questioned about this, Mr. Mauldin, Mr. Bannister, and Mr. Richey all agreed that there was no consent. Moreover, Mr. Byrholdt indicated that not only did he not consent, but he gave no advice whatsoever concerning the Greenville case, any death penalty strategy or the uses that could be made of such an evaluation during the sentencing phase of the capital proceeding in Greenville for which Mr. Byrhholdt did not represent Mr. Wood.

Next, this Order assumes trial counsel were aware that the evaluation would have an effect on their capital sentencing strategy. This assumption is incorrect. Mr. Bannister clearly indicates his understanding of the parameters of the evaluation in the pre-trial stages:

> "....we take the position that the Defendant was never advised of his 5th Amendment right regarding the sentencing phase of the case, for certain....." Trial Transcript, p. 2437, 3-6
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> "....we thought– or we knew that the way the law and the statutes worked at that point was that unless we did something affirmatively during the trial phase, raised insanity, or competency, or guilty but mental illness that it just wasn't going to be an issue...." Trial Transcript, p. 2440, 2-6.
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> "And the Sixth Amendment problem that has arisen is that we weren't able to tell Mr. Wood how this mental health evaluation might effect his sentencing phase, because frankly, it just wasn't going to be an issue in the trial of this case–or the sentencing phase of the case. And we knew that it wouldn't be an issue in the trial of the case unless we brought something affirmatively forward to sort of open the door." Trial Transcript, p. 2440, 15-22

The trial judge even agreed with Mr. Bannister's assessment and suggests that he would not have ordered disclosure of the evaluation at all had the trial attorneys informed him that there would be no issues raised concerning competency or any mental illness defense. Trial Transcript p. 2505, l. 8-12 ("Perhaps if I had been informed that Defendant did not and does not challenge competency and that the Defendant did not intend to assert a defense based on mental illness, then I might have determined that the report should not be disclosed.")

Finally, the assistant attorney general in this case conceded in the return to the original PCR application that counsel may find it appropriate to deny access to applicant for the purposes of evaluation. Specifically, the return states: "Since trial counsel had no information that his client was insane or incompetent, it was not unreasonable strategically to refuse to cooperate with the court's examiner and perhaps give the prosecution additional information to aid it in its case

against Applicant, in return for no ultimate gain." State's return, page 20, ¶ 2.

The South Carolina Department of Mental Health would not have been able to conduct any evaluation in the Greenville case without access to Mr. Wood. Mr. Mauldin indicated in letters written after the initial evaluation that he knew how to write the DMH and prevent such access. The DMH, through Dr. Narayan, indicated that it would abide by such a letter denying access. Finally, the trial court indicated that it could not make the defendant submit to such an evaluation.[18]

The prejudice from this detrimental performance is evident. The jury not only heard testimony offered to contradict the opinion of witnesses offered by the defense, but the jury also heard the testimony from DMH that Mr. Wood suffered from anti-social personality disorder. This diagnosis is particularly burdensome to a capital defendant because no treatment is available for those suffering from this malady. Thus, had trial counsel in the Greenville case prevented SC DMH from having access to Mr. Wood, there is a reasonable probability that the outcome in this matter would have been different.

Ground G (Failure to expose incorrect diagnosis)

The Court should reconsider so much of its Order as denies relief for this claim in Mr. Wood's application because the ruling flies in the face of overwhelming medical testimony that Mr. Wood suffers from a disorder other than that suggested by Dr. Narayan. Further, the ruling misconstrues the testimony offered at the PCR hearing.[19]

Dr. Narayan is the only doctor who has diagnosed Mr. Wood with anti-social personality disorder. Dr. Donna Scwartz-Watts and Dr. Thomas Cobb have both evaluated Mr. Wood and

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[18]See attached letters to this effect.

[19]See Footnote 1

found differing diagnoses. In fact, both Drs. Watts and Cobb indicated that Mr. Wood responded appropriately to the treatment they provided in accordance with their diagnoses. Positive response to treatment indicates an appropriate diagnosis.

Conversely, Dr. Narayan's diagnosis is the proverbial "kiss of death" for a capital defendant because it allows a prosecutor to tell the jury that a person with such a disorder can not function in any society, even prison. Unfortunately for Mr. Wood, Dr. Narayan's diagnosis is not consistent with the DSM-IV. According to the DSM-IV, a person only suffers from anti-social personality disorder (ASPD) when, inter alia, there is "evidence of Conduct Disorder with onset before age 15 years."[20] This manual continues by explaining that Conduct Disorder is a "...repetitive and persistent pattern of behavior in which the basic rights of other or major age-appropriate societal norms or rules are violated, as manifested by the presence of three (or more) of the following criteria in the past 12 months..."

In contrast to this requirement of a pattern of three or more violations in 12 months, Dr. Narayan only testifies that Mr. Wood said he shoplifted and broke windows. There is no indication that these events occurred prior to the age of 15 or that they occurred during a twelve month period. Further, there are not even three events to place into a twelve month time period.

In fact, Dr. Steedman was called by the applicant at the PCR hearing and only testified about a self-report of shoplifting. There is no indication that this occurred prior to the age of 15 or more than once or was accompanied by other persistent rules violations in the same 12 month period. Dr. Cobb clearly testified that he disagreed with the ASPD diagnosis and found Dr. Narayan's diagnosis to be unsupported.

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[20]Dr. Watts' testimony indicates prior to the age of 16, however, even this defense oriented testimony is inconsistent with the DSM-IV definition for ASPD. See DSM-IV-TR, American Psychiatric Association, 2000.

Mr. Carlos Torres indicated that he had no information regarding childhood misdeeds. This is consistent with the information obtained by US Probation Agent Bryan Bowen and similar to that relayed by Wood's sister Connie Jantz. Mrs. Jantz could only recall one incidence of shoplifting of a trivial item when Mr. Wood was younger than 10. This is not a pattern of activity to prove the existence of conduct disorder.

Finally, Dr. Tezza testified at the PCR hearing that she expressed her own professional concerns to Dr. Narayan regarding the lack of evidence indicating conduct disorder prior to the age of 15. In response, Dr. Narayan told her that he would take care of that. Despite the information elicited from Dr. Watts and the cross examination of Dr. Narayan, the trial jury never heard the concerns of the rest of the SC DMH medical team about the lack of evidence to support the conduct disorder and ASPD diagnosis. In fact, the jury was left with only Dr. Watts' partially correct description of conduct disorder to guide it in its battle between the dueling experts over the accurate portrayal of John Wood's mental state.

Thus, had the correct diagnosis been exposed and the incorrect and faulty diagnosis been debunked by the testimony offered at the PCR hearing, there is a reasonable probability that the outcome of the sentencing proceeding would have been different.[21]

Ground H (Failure to Investigate and Present Mitigation Information)

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[21]The SCDC teams referenced in the court Order denying PCR relief were not composed of any medical doctors. No examinations or evaluations or Mr. Wood were conducted. Instead, it appears that this review team merely examined the previous diagnosis of Dr. Narayan. Also, the timing of the review, in the weeks prior to the PCR hearing and after the service of the application including this allegation in Ground G, is suspect and raises the specter that this review was only conducted by SCDC to provide evidence to the SC Attorney General's Office. Further, the PCR hearing transcript notes that applicant's counsel was astonished to learn that SCDC provided applicant's medical records to the SC Attorney General's Office without any deference to applicant's medical privacy rights or due process rights or notice to applicant's counsel. See Footnote 1.

The Court should reconsider so much of the Order as dismisses this claim for relief because the Court's ruling is not based upon the testimony and evidence[22] presented at the PCR hearing, but instead based upon the assistant attorney general's recollection and notes of the PCR hearing.[23] Further, this portion of the Order mis-construes the holdings of Wiggins and Rompilla and misgauges the impact that the foregone mitigation evidence would have upon the decision of the sentencing jury. See Wiggins v. Smith, 539 US 510 (2003) and Rompilla v. Beard, 125 S.Ct. 2456 (2005).

To begin, the US Supreme Court has made crystal clear that trial counsel are duty bound to investigate the background of a capital defendant to discover any fact which may urge the jury to return a sentence of less than death.[24] This is true even if the counsel has been told by the defendant or his family that no significant mitigation in this area exists. In other words, the buck stops with the trial attorneys themselves and not any members of the defense team, such as mitigation specialists, neuro-psychiatrists, or even the defendant or his family members.

In the sentencing phase of Mr. Wood's trial, no family member testified regarding his dismal upbringing and family. No juror was told, first hand, about the experience of being raised in a family where crime was the glue which binds the members together. However, Connie Jantz was available and willing to testify to this effect at Mr. Wood's trial.

In contrast to the recitation of facts contained in the Order, trial counsel could easily have found Mrs. Jantz with reasonable efforts. First, she was contacted the day after the killing of

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[22]See attached Affidavit of Connie Jantz and proffered school records in support of this Motion.

[23]See Footnote 1

[24]1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), Wiggins v. Smith, 539 US 510 (2003), and Rompilla v. Beard, 125 S.Ct. 2456 (2005).

Trooper Nicholson. This contact was made by a newspaper reporter from Anderson. Further, PCR counsel was able to obtain her testimony during the PCR hearing, even without the use of any out of state subpoena power. In fact, the information about Mrs. Jantz's whereabouts was neatly filed in trial counsel Mauldin's trial file. This fact was elicited at the PCR hearing.

Further, Mrs. Jantz is married to an active duty member of the US Armed Forces. His, and thus her, whereabouts could have been obtained this way as well. Therefore, despite any debate or protestations about the ineptitude of either the mitigation specialist or Betsy Martinez, finding Mrs. Jantz and bringing her to testify on her brother's behalf was not only reasonably possible, but frankly easy.

Next, Mrs. Jantz's PCR testimony and her affidavit provides a detailed description of the upbringing of Mr. Wood. First, this description elicits the dismal nature of a young boy and his siblings living with fugitive parents in a gypsy-like lifestyle. No witness at the trial provided this detailed and first-hand knowledge to the jury. In fact, during the trial, the solicitor scored points by cross-examining the social worker and neuro-psychiatrist about their lack of direct contact with family members. Dr. Watts testified at the PCR hearing that she would have felt more comfortable in her diagnosis of Mr. Wood had she spoken with Mrs. Jantz and reviewed Mr. Wood's school records, which were only obtained by PCR counsel following interviews with Mrs. Jantz.

Specifically, Dr. Watts indicated that the family history of mental illness and alcoholism were factors which would have assisted her in her evaluation and would have assisted her in criticizing the SC DMH diagnosis. Dr. Watts indicated that Mrs. Jantz provided her with specific information regarding the Wood household (i.e. the mother's requirement that the children organize their clothes by length during the middle of the night) which confirmed a

history of bi-polar mania in the family. This is the type of concrete, historical information which the jury would have found to support Dr. Watt's diagnosis and contradicted Dr. Narayan's.[25] Finally, the information from the school records and from Mrs. Jantz allowed Dr. Watts to opine that Mr. Wood likely suffers from a previously undiagnosed learning disability.[26] The jury never heard this information.

Also, Mrs. Jantz's testimony indicates both Mr. Wood's capacity to be of emotional value to others and the negative impact his execution would have on others.[27] Specifically, Mrs. Jantz testified that John Wood would provide food and shelter to his sister's (Betsy Martinez's) children. Further, she indicated that the execution of Mr. Wood would cause a negative impact on the development and upbringing of Mr. Wood's biological child.[28] Further, Mrs. Jantz testified that a sentence of life would mean that she would allow Mr. Wood to develop a relationship with his son in prison without fear of the negative impact of the execution. This

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[25]To place in perspective, the sentencing jury requested to re-hear testimony from Dr. Watts and Dr. Narayan shortly before returning a verdict of death. This indicates the importance of the opinions of the dueling experts in this case.

[26]Dr. Watts also testified that a review of Mr. Wood's computer would have provided information to assist in her evaluation of Mr. Wood. However, PCR counsel have been prevented by this court's rulings from access to this computer even though Mr. Wood's expert testified that he could retrieve the digital information contained on this computer's hard drive. This hard drive has been in law enforcement custody since well before the trial of this matter.

[27]Oregon v. Stevens, 879 P2d 172 (OR 1994)("A rational juror could infer from the witness's testimony that she believed that her daughter would be affected adversely by defendant's execution because of something positive about his relationship with his daughter and because of something positive about defendant's character or background. Put differently, a rational juror could infer that there are positive aspects about defendant's relationship with his daughter that demonstrate that defendant has the capacity to be of emotional value to others. In that inference, a juror could find an aspect of defendant's character or background that could justify a sentence of less than death.")

[28]Mrs. Jantz testified about her role as the adopted parent of John Wood's child and Betsy Martinez's children.

specific factual information was not presented to the jury and is evidence which mitigates in favor of a sentence of something less than death.

Also, had Mrs. Jantz been called to testify at trial, she would have begged the jury to have mercy on her brother. There is absolutely no request for mercy from any family member that was heard by the sentencing jury. Instead the jury was left with the strange scenario where the family history was loosely conveyed by expert witnesses, as if Mr. Wood's childhood was something to hide instead of something to mitigate the nature of the crime.

Finally, in contrast to the Order, Mr. Mauldin never tried to contact Mrs. Jantz. In fact, he candidly held the position that he never heard of this witness before the PCR filing. Further, he and Mr. Bannister both admitted that they were not satisfied with the mitigation case developed by the defense team. They described two distinct problems which stuck out in their minds. Mr. Mauldin admitted that he desired more time to prepare for this case, had unsuccessfully moved for a continuance, and that this overload of death penalty work certainly contributed to mishaps in this case.[29] Mr. Bannister testified that he recalled Mr. Mauldin's terse discussions with the mitigation team about the slack work done in preparation for Mr. Wood's case.

Thus, the Court should reconsider the portion of the Order denying relief under Ground H. It is clear that the mitigation case presented was deficiently handled and that the outcome of the sentencing proceeding would have likely been different had this case been properly investigated and presented.

Ground I (Failure to Object to Improper Argument)

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[29]Mr. Mauldin also admits this workload prevented his attendance at the SC DMH evaluations on behalf of Mr. Wood, see Ground E.

The Court should reconsider so much of its Order as denies Ground I of the application because the prosecutor's statements referenced therein are improper and prejudicial.

To begin, wherein the prosecutor tells the jury that it is "looking for factual support to support any suggestion he didn't have the requisite intent" is clearly a burden shifting argument. This statement clearly tells the jury that it is looking for proof of the defense. Except for affirmative defense (which were not at play in this case), the defense has no burden to prove anything in a trial.

Further, under Darden v. Wainwright[30], a due process violation does exist. The prosecutor's statement was not an invited response because the state argued its closing first. Obviously, the state was anticipating the defense argument, but at the time the statement was made, there was no obvious defense to which a response could be offered. Counsel Mauldin was baffled at the PCR hearing that he had failed to object to this portion of the state's closing[31].

Next, according to the defense theory and this Court's opinion concerning Ground C, the evidence in this matter was not so overwhelming that Mr. Wood's trial counsel should have conceded guilt. If in fact the evidence was so overwhelming that this burden shifting evidence was harmless, then the Court should grant relief on Ground C and trial counsel should have conceded guilt during trial.

Also, the trial judge never provided the jury any instruction that the argument of counsel was not evidence. It is disingenuous to suggest that the burden shifting portion of the closing argument was cured by the prosecutor's own statement that he had the burden of proof. The

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[30]477 US 168, 181 (1986).

[31]It is unclear whether Attorney Bannister recognized this argument as burden shifting at all.

prosecutor actually "corrects" this burden shifting argument with another mis-statement of law: "the only intent we [the State] have to do is show the intent to raise is arm and fire the gun."[32]

Finally, this improper argument was prejudicial in the context of Strickland[33] IAC claims. To begin, this statement went to the heart of the defense claim that the state could not prove Mr. Wood's criminal intent beyond a reasonable doubt. The magnitude of this error is compounded by the further misstatement of the prosecutor that he only need show the intent to raise the arm and fire the gun. The incorrect statement of law regarding criminal intent which was argued by trial counsel for Mr. Wood completed this trifecta of erroneous legal statements. To reiterate, Wood's trial counsel provided the jury with "a standard that's not the law...[t]his jury was invited to apply a standard of specific intent to kill far beyond what the law requires. That's the basis of the confusion....I'm just very concerned that they have fallen down that path." Trial Transcript p. 1773, l. 20- p. 1774, l. 6. (Response of the trial court to a jury question regarding malice.) It is hard to see amidst this sea of incorrect statements how the burden shifting argument of the state on the most important issue in the verdict phase of the trial was not prejudicial.

Turning to the sentencing phase, the state twice provided improper argument to the jury. In the first case, the prosecutor fell into the classic legal fallacy of creating a false dichotomy. In the second case, the prosecutor argued conditions of confinement which are beyond the scope of consideration by a sentencing jury in a capital matter.

First, the prosecutor argues that a sentence of less than death will result in Mr. Wood becoming the "a king. He will rise to the hierarchy of the prison, and will be a leader." Next, the

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[32]The raising of the arm and firing of the gun do not *prove* intent, but instead only allow an inference of malice.

[33]Strickland v Washington, 466 US 668 (1984).

state argued that "[g]oing 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 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 TV. You play cards and games. You've got a social structure. You've freedom of movement.... Thirty or forty acres to live in. Watch ball games on the TV. You go to school.... Based on what John Richard Wood was doing, prison is just about going to be a change of address and nothing more. He will see his baby every weekend, and that baby will sit in his lap." Trial Transcript, p. 2191-2192.

These two improper arguments occur within moments of each other during the state's closing. They go to the heart of the state's case for death: that Mr. Wood will benefit from a prison term. Further, the breadth of these arguments, coupled with the testimony of Jimmy Sligh[34], leaves little doubt of the influence had upon the deliberations. The trial court never instructed the jury that argument of counsel was not evidence[35]. Finally, these improper comments urge the jury to make a decision based upon passion, prejudice, and arbitrary factors despite the court's admonishment otherwise. Therefore, the Court should reconsider the portion of its Order which denies relief as requested in Ground I of Mr. Wood's application.

Ground J (Failure to object to evidence and argument of an arbitrary sentencing factor-conditions of confinement.)

The Court should reconsider so much of its Order as denies relief under Ground J of the application for post-conviction relief because the court improperly applies harmless error review even though the un-constitutional nature of a death sentence based upon an arbitrary factor has

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[34]See Ground J

[35]See Darden v. Wainwright, 477 US 168 (1968) (No due process violation where, inter alia, trial court charged jury that argument was not evidence.)

been clearly established.[36] In fact, the US Supreme Court noted in Furman v. Georgia that the arbitrary infliction of a severe punishment is the very nature of cruel and unusual and thus unconstitutional. Furman v. Georgia, 408 US 238, 276 (1972)("In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause-that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." Concurring opinion of Justice Brennan).

In the Court's Order, trial counsel was determined to be deficient for failing to object to the conditions of confinement testimony. Noteworthy is the fact that the testimony disallowed in Burkhart[37] is nearly identical to the testimony in Mr. Wood's sentencing. In fact, the testimony is from the very same witness. Applicant's counsel do not seek reconsideration of this finding of detrimental performance by trial counsel.

However, Mr. Wood's sentence should be reversed for the same constitutional reasons as was Mr. Burkhart's. Even though Mr. Wood's trial counsel were operating without the assistance of the Burkhart opinion, they were nonetheless operating with the same knowledge of constitutional guidelines with which Mr. Burkhart's attorneys operated just months from the date of Mr. Wood's sentencing.

Further, the state did not merely rest on the testimonial evidence presented by state

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[36]To the extent that this claim has not been expressly based upon rights conferred under the Eighth Amendment to the US Constitution and Article 1, Section 15 of the SC Constitution, the undersigned moves to amend this ground as allowed by SCRCP Rule 15.

[37]State v. Burkhart, 640 SE2d 450 (SC 2007).

witness Sligh. To the contrary, these conditions of confinement were forcefully argued by the state during its penalty phase closing. Wood's counsel failed to object here as well[38] An objection at some point would have also allowed the trial judge to find that the death sentence for Mr. Wood was based upon the arbitrary factor testimony and argument concerning conditions of confinement[39].

This testimony and argument allowed the infliction of a sentence based upon a factor which was barred by the statutory scheme enacted by the South Carolina General Assembly.[40] This statutory scheme was carefully enacted to comport with the Eighth Amendment concerns addressed by the US Supreme Court in Furman. Clearly, the proper avenue to challenge the unconstitutional imposition of a death sentence when not preserved for direct appeal is through post conviction relief[41] and a death sentence imposed in an arbitrary manner should be struck down. Burkhart, 489 ("When the jury is invited to speculate about irrelevant matters upon which

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[38]See Ground I.

[39]State v. Shaw, 255 SE2d 799, 802-803 (SC 1979) overruled on other grounds ("...the court, prior to imposing the death penalty, is required to find as an affirmative fact that the death penalty is warranted under the evidence and is not imposed as the result of prejudice, passion, or any other arbitrary factor. [FN2] Section 16-3-20(C), Cum.Supp.1978.")

[40]See State v. Shaw, 255 SE2d 799, 803 (SC 1979), overruled on other grounds, quoting Justice Stewart speaking for the majority in Gregg v. Georgia,428 US 153, 195 (1977)(Eighth Amendment concerns are met by a "carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.")

[41]State v. Johnston, 510 S.E.2d 423 (SC 1999) (When not preserved for appeal and barring exceptional circumstances, a sentence imposed in a manner exceeding statutory authority must be challenged on PCR.)

a death sentence may be based, § 16-3-25(C)(1) is violated.")[42]

Finally, it is obvious that the outcome of the case on direct appeal would have been different had defense counsel performed in a constitutionally effective fashion by lodging an appropriate objection. Thus, the portion of the Order denying relief under Ground I should be reconsidered and reversed.

Ground K (Failure to object to imposition of sentence in violation of the equal protection of the law.)

The Court should reconsider so much of its Order as denies relief under Ground K of the application for post conviction relief because the constitution requires that the law hold the life of all persons to be of equal worth. From the beginning of our of country, it has been a bedrock principle that all persons are created equal. This was stated clearly by Thomas Jefferson in the Declaration of Independence. This sentiment was echoed one hundred years later with the passage of the Fourteenth Amendment to the US Constitution and then one hundred more years after that by the Rev. Dr. Martin Luther King, Jr.[43]

When a greater value is placed upon the life of one person because of his status, this principle is violated. Thus, even though this greater significance may appear to pay homage to the status of one group, it does so by indirectly disparaging the status of others. While the aggravating circumstance in the case at bar does require that the killing not just involve a law enforcement officer, but instead one performing his official duties; this protection of the law is

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[42]This is also consistent with SC caselaw that a re-sentencing is required when sentence is imposed by exceeding statutory authority. State v. Fowler, 289 SE2d 412, 413 (SC 1982) ("A sentence imposed in excess of statutory authority requires remanding the case for resentencing in conformity with the applicable statutes.")

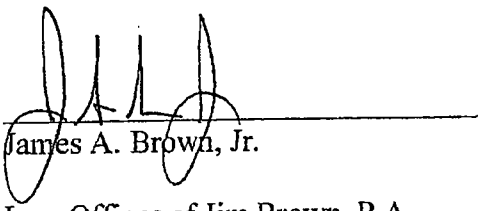
[43]"I have a dream that one day this nation will rise up and live out the true meaning of its creed: 'We hold these truths to be self-evident: that all men are created equal.'" Dr. Martin Luther King, Jr. delivering his I Have a Dream speech.

not extended to others in the performance of their official duties. Thus, the court should reconsider this portion of this Order and grant PCR relief.

Conclusion

Thus, the Applicant moves this Court to Reconsider its Order of Dismissal. The Applicant urges the Court to hold a hearing regarding this Reconsideration to resolve any ambiguity or confusion regarding the applicable law or Applicant's position. Finally, Applicant urges the Court to grant the relief requested by the grounds contained in the application.

AND I SO MOVE



James A. Brown, Jr.

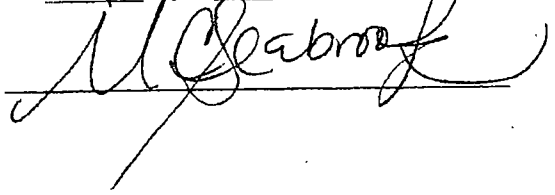
December 31, 2007
Beaufort, SC

Law Offices of Jim Brown, P.A.
1111 Bay Street, P.O. Box 592
Beaufort, SC 29901-0592
(843) 470-0003
Attorney of the Applicant

w/ attachments

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding this 31 day of December, 2007.



STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
COUNTY OF GREENVILLE	C/A No. 2005-CP-23-4737
John Richard Wood, #6005 Applicant, v. The State of South Carolina, Respondent.	**RESPONDENT'S RESPONSE TO APPLICANT'S MOTION TO RECONSIDER ORDER DENYING APPLICATION FOR POST-CONVICTION RELIEF**

Respondent State of South Carolina hereby responds as follows to Applicant's motion to reconsider, received on January 7th, 2008. Respondent respectfully asserts the motion should be denied and generally contend that this Court correctly analyzed the issues.[1] The following is simply to be a quick "bullet-points" refutation of some of the claims raised by Applicant; if the Court has any specific concern on a point, Respondent would be happy to further respond as directed.

Ground A

Applicant contends his counsel were ineffective for failing to more strongly impeach Karen McCall, and in particular point to the fact she had gunshot residue (GSR) on her hands. This overlooks counsel's strategic decision that the evidence of identity was overwhelming, and the defense would be better served by attempting a manslaughter "defense" that would dovetail nicely with its mitigation presentation on Applicant's fear of police and the "perfect storm" theory.

Indeed, this GSR theory would conflict with the evidence. While it is true a couple

[1] This should not be construed as a waiver of Respondent's position that counsel were not deficient in expressly assenting to the testimony of Jimmy Sligh, as expressed at the hearing and in the post-trial pleading on that issue.

of witnesses stated they could not tell whether the moped driver was a man or a woman **{Tr. 1272; 1311}**, the evidence was also clear that it was a *woman* who was driving the Jeep in which the driver of the moped escaped. **{Tr. 1320; 1342; 1354-56; 1506; 1517-18}**.

This ground also conflicts with Applicant's subsequent claim that counsel was ineffective for failing to concede guilt given the overwhelming evidence. Indeed, Applicant with this ground is attempting to expressly do what he later asserts is *per se* ineffective – follow a "he didn't do it" guilt defense with a "he is sorry he did it" mitigation. Undoubtedly, trying to show that Karen actually was the one on the moped who killed the trooper would be a far weaker and indeed almost laughable defense compared to counsel's manslaughter and mental state defense, and would have run a far greater risk of offending the jury.

Ground B

Petitioner has withdrawn this ground.

Ground C

Respondent would respectfully assert that the Court's analysis was correct and has already rejected Applicant's claims – which overlook counsel's strategic judgment on the wisdom of conceding guilt and the limitation of options available to counsel after talking with Applicant.

Ground D

Applicant is apparently conceding that the offered charge is a unconstitutional charge on the facts. This alone seems fatal to his claim that he was denied something to which he is constitutionally entitled.

As argued before and analyzed extensively in this Court's order, counsel ultimately vigorously challenged guilt of murder, and this decision was reasonable. Thus he could not have been prejudiced by the lack of such a charge however phrased, and indeed, such a charge could have been prejudicial to Applicant's credibility as he sought to dovetail his guilt presentation into the sentencing phase.

E. Ground E

Initially, Respondent would object to the inclusion of sheets purporting to reflect standards from the American Academy of Psychiatry and the Law, inasmuch as they are not only irrelevant but also new matter not admitted during the evidentiary hearing. Respondent would otherwise respectfully assert that the Court's analysis was a correct application of the law and has already specifically rejected Applicant's claims. Petitioner misses the point that the results of the evaluation were only allowed after his own mental health experts admitted during the defense sentencing phase case that they had reviewed and relied upon the report, and that counsel was aware of this risk but made the calculated decision to proceed with their mental health case anyway.

F. Ground F

Again, Applicant overlooks that the trial court authorized the evaluation over the objection of Greenville counsel, based on the consent of Anderson counsel, Applicant's own *pro se* requests and communications, and the court's own independent judgment that an evaluation was warranted. If Applicant wished to challenge this determination he should have raised the issue on direct appeal. Applicant's attempt to create two separate and distinct evaluations is simply inaccurate, and the whole point of the pre-trial discussion was whether the evaluation over the Anderson case would "stop at the Saluda River". The trial

court ruled it would not.

Obviously trial counsel were well aware that the sentencing evaluation could negatively affect them, as they fought it at every turn and it was only late in the trial when it was finally disclosed to the State since it had been relied upon by Applicant's own experts. No rule of law would give Applicant sole access to evidence or information actually presented in court.

Applicant's reference to a concession in the return is specious. Obviously a lawyer could decide that it was best not to cooperate with the examiner. Applicant's lawyers tried to do just that, but they were thwarted by their own client and cannot be blamed.

Once an Order of evaluation was issued, Applicant's lawyers had no basis for preventing DMH access (just as Applicant's present counsel could not prevent DMH access after this Court ordered an evaluation following Applicant expressed desire to drop his PCR). It was only after the evaluation was conducted and a report issued that counsel and Applicant came back to terms and an objection was made to the examiner's efforts to do a follow-up evaluation. Ultimately, the court decided to just let the examiner do the best he could at the Blair based on the information he had gathered at the court-ordered evaluation.

Ground G

Respondent objects to Applicant's inclusion of an affidavit from Connie Jantz and school records with and in support of his motion, as these were not items of evidence that were admitted into the record at the PCR hearing.

This Court has already made credibility and other findings rejecting this issue – PCR counsel examined Dr. Narayan extensively on the issue at PCR, but Dr. Narayan held to

his opinion that Applicant had ASPD – as Dr. Narayan pointed out, the DSM-IV is not a "cookbook", and even Connie Jantz's description of shoplifting would support his diagnosis. Indeed, trial counsel examined Dr. Narayan extensively at the sentencing hearing on the basis for his opinion of ASPD, and trial counsel presented the contrary view of Dr. Schwartz-Watts. A lawyer is not ineffective because he could not "force" a witness to say something; all he can do is what counsel did – examine the witness on the issue and present a contrary opinion.

As to Applicant's contention that SCDC was conducting evaluations at the behest of this Office for purposes of litigation, not only was no such evidence presented at the hearing and thus such a contention is improper for reconsideration, but in any event the undersigned specifically and vehemently denies that he or anyone at his direction has ever had any communication with SCDC mental health employees about conducting an evaluation of Applicant for purposes of this litigation or any other reason. The undersigned merely cross-examined Applicant's expert witness with information contained in records reviewed by and used by that very witness in his treatment of Applicant.

Ground H

Respondent objects to Applicant's inclusion of an affidavit from Connie Jantz and school records with and in support of his motion, as these were not items of evidence that were admitted into the record at the PCR hearing, and indeed were specifically excluded after litigation.

Respondent would otherwise respectfully assert that the Court's analysis was a correct application of the law and has already specifically rejected Applicant's claims. Indeed, Ms. Jantz's rather mild testimony before this Court at PCR is not the sort of

testimony that alone would create a reasonable probability of a different result, given the overwhelming evidence of aggravation in this case.

Ground I

Respondent would otherwise respectfully assert that the Court's analysis was a correct application of the law and has already specifically rejected Applicant's claims. As to Petitioner's contention that if the evidence was so overwhelming counsel should have conceded guilt, earlier rejected, this overlooks that not only does counsel not believe in ever conceding guilt, but he did not feel like he could ethically concede guilt after his conversations with Applicant.

Ground J

Respondent would otherwise respectfully assert that the Court's analysis was a correct application of the law and has already specifically rejected Applicant's claims.

Ground K

Respondent would otherwise respectfully assert that the Court's analysis was a correct application of the law and has already specifically rejected Applicant's claims.

Conclusion

For the foregoing reasons, Respondent respectfully requests that Applicant's Motion to Reconsider Order Denying Application for Post-Conviction Relief be denied.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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Assistant Deputy Attorney General

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By: _____
ATTORNEYS FOR RESPONDENT

January 18, 2008.

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.	)	**CERTIFICATE OF SERVICE**
	)	
The State of South Carolina,	)	
	)	
Respondent.	)	

I, S. Creighton Waters, Counsel for the Respondent, certify that I have today served the attached Response to Applicant's "Response to Applicant's "Motion to Reconsider Order Denying Application for Post-Conviction Relief" on Applicant by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

E. P. Bill Godfrey, Esquire
10 East Avenue
Greenville, South Carolina 29601

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

This 18th day of January, 2008.

S. CREIGHTON WATERS

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

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

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

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

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

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

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

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

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