THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
J. DERHAM COLE, CIRCUIT COURT JUDGE

CASE NO. 2011-CP-42-1851

Andres Antonio Torres #6028 — Appellant,

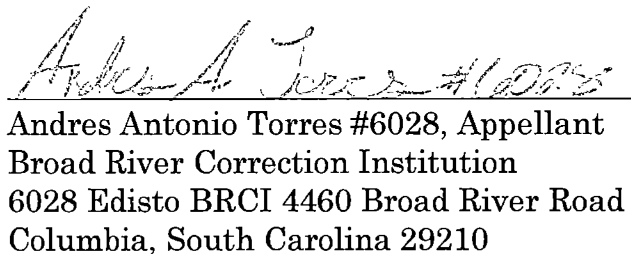
v.

State of South Carolina — Respondent.

NOTICE OF APPEAL

Andres Antonio Torres appeals the order and judgment of the Honorable J. Derham Cole, dated May 8, 2020. A copy of the order and judgment was sent to the Appellant's attorney via electronic mail on Friday, May 8, 2020 at 3:51 PM.

May 13, 2020.



Andres Antonio Torres #6028, Appellant
Broad River Correction Institution
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Columbia, South Carolina 29210

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF **SPARTANBURG**)	
Andres Antonio **TORRES**,)	
Applicant,)	**ORDER**
-vs-)	**DENYING POST CONVICTION RELIEF**
The **STATE** of South Carolina,)	Civil Action No. **2011-CP-42-01851**
Respondent.)	

This matter came before the Court for hearing on the applicant's request for post-relief pursuant to his application filed July 6, 2012 and subsequently amended on February 14, 2014 and April 7, 2014. At the evidentiary hearing held in this matter the applicant was present with appointed counsel William H. Ehlies, Esq. and Troy A. Tessier, Esq. Donald J. Zelenka, Senior Assistant Deputy Attorney General and Melody J. Brown, Senior Assistant Attorney General of the Office of the Attorney General State of South Carolina appeared on behalf of the respondent. The evidentiary hearing was held in this matter on April 14-15, April 21-25, April 30, and June 30, 2015 at the Spartanburg County Courthouse.

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PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. He was indicted by the Spartanburg County Grand Jury at the June 11. 2007, February 25, 2008, and August 2008 terms of General Sessions Court for a number of offenses arising out of a course of events that the State alleged had occurred on or about May 11, 2007. Indictments numbered 2007-GS-42-02772 and 2007-GS-42-02773 charged Applicant with the crime of "Armed Robbery". Indictment numbered 2007-GS-42-02776 charged him with the crime of "Burglary First Degree". Indictments numbered 2007-GS-42-02777 and 2007-GS-42-02778 charged him with the crime of "Murder". Indictment numbered 2008-GS-42-00880 charged him with the crime of "Criminal Sexual Conduct First Degree" and Indictment numbered 2008-GS-42-04677 charged him with the crime of "Arson/Attempt to Burn".

The case proceeded to trial with a jury before Circuit Judge Roger L. Couch on October 13, 2008. Clay Allen and Kathy Hodges of the Office of the Public Defender for Spartanburg County and John G. Reckenbeil, Esq., represented the applicant. On October 19, 2008 the defendant was found guilty of each crime by unanimous verdict of the jury. After a subsequent sentencing hearing before the jury in the sentencing phase of the trial the following circumstances in aggravation of punishment were found by the jury beyond a reasonable doubt: (1) murder committed while in the commission of criminal sexual conduct; (2) murder committed during the commission of burglary; (3) murder committed during commission of robbery while armed with a deadly weapon; (4) murder during commission of larceny while armed with a deadly weapon; (5) murder committed for the purpose of receiving money or a thing of value; and (6) murder of two or more persons pursuant to one scheme or course of conduct. The sentencing jury recommended a sentence of death be imposed for the crimes of murder.

The applicant was sentenced by the Court to death on each of the indictments for which he was found guilty of Murder, a consecutive thirty (30) year sentence on each of the indictments for Armed Robbery and Criminal Sexual Conduct First Degree, a consecutive life sentence for Burglary First Degree, and a consecutive five (5) year sentence for Arson/Attempt to Burn.

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Applicant filed a direct appeal of his convictions and sentences which were affirmed by the Supreme Court of South Carolina on December 13, 2010. *State v. Torres*, 390 SC 618 (2010) Applicant's subsequent petition for rehearing was denied.

APPLICANT'S GOUNDS IN SUPPORT OF RELIEF

In his application for relief the applicant claims:

"The applicant's sentence of death violates Article I, Section 15 of the Constitution of the State of South Carolina, the Eighth Amendment to the Constitution of the United States ... as the applicant suffers with genetic anomalies which substantially diminish his capacity to appreciate the wrongfulness of his conduct and to modulate his decisions and he is by this reason less morally culpable, at least equal in extent to an intellectually

disabled person, and, for that reason alone the applicant is categorically ineligible for a sentence of death."

"Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution during the guilt-or-innocence phase of his capital trial."

"Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial." "Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel failed to conduct adequate *voir dire*. Counsel's failures include, but are not limited to, failing to ask potential jurors whether they would automatically vote to impose death where a defendant has been found guilty of murder, failing to ask appropriate questions of jurors regarding their views on the death penalty thus making the record unclear as to whether the jurors were qualified, failing to *voir dire* for racial bias in this case which involved a defendant of Puerto Rican descent and Caucasian victims.

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2. "Trial counsel were ineffective for failing to recognize and respect the strength of the State's evidence and severely prejudiced Applicant by arguing, in the opening statement, not just that the State had the burden to prove guilt, but affirmatively contending that the Applicant was "not guilty" which in effect, assumed a burden of coming forward with a defense while knowing that the defense was not planning to present any evidence in the guilt phase of trial."

3. "Trial counsel were ineffective for failing to pursue a negotiated resolution of less than death as required by Rule 10.9.1 of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases."

4. "Trial counsel were ineffective for failing to adequately investigate and present evidence and challenge the State's evidence in the guilt-or-innocence phase. Counsel's errors include failing to adequately investigate and present evidence concerning fingerprints, shoe impressions, blood typing and serology,

and forensic autopsy evidence; each issue being presented by the State during trial with separate expert witnesses."

(A) "Trial counsel were ineffective in failing to investigate and challenge potential contaminants on the Applicant's clothing that might have influenced critical forensic testimony regarding sexual assault (DNA)."

(B) "Trial counsel were ineffective in failing to investigate and challenge that the sexual assault occurred on or near the victim's bed when the assault may have occurred with the aid of a third party at a different location in the victim's house."

(C) "Trial counsel were ineffective in failing to investigate and present evidence that the Applicant was a visitor to the victim's home for legitimate and lawful purposes prior to the murders.

(D) "Trial counsel were ineffective in failing to investigate and present evidence that there was extreme blood spattering at the location of the assault, yet witnesses who saw the Applicant soon after the alleged time of the crime did not notice any blood on his clothing."

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(E) "Trial counsel were ineffective in failing to investigate and present evidence that the alleged murder weapon was a tool commonly found in the home and there was little or no forensic evidence that connected the Applicant to the alleged murder weapon. If the State's theory was correct that the murder weapon a tool belonging to the victims, then the suggestion that the murder was premeditated by the Applicant becomes more suspect, as most premeditated murderers come armed."

(F) "Trial counsel were ineffective in failing to investigate and present evidence to more particularize the time of death which, as presented by the State, was problematic and adversely impacted the Applicant's ability to establish a legitimate alibi."

(G) "Trial counsel were ineffective in failing to investigate and present evidence challenging the chain of custody regarding the collection of evidentiary and *Schmerber* biological samples."

(H) "Trial counsel were ineffective in failing to investigate and challenge foot pattern evidence when those patterns were possibly confused with patterns left by law enforcement personnel and to investigate and challenge other issues associated with the processing of the crime scene."

(I) "Trial counsel were ineffective in failing to investigate and challenge the manner of collection of biological samples, their preservation, the process of preparing the DNA profiles and the conclusions to be drawn from the samples."

(J) "Trial counsel were ineffective in failing to challenge the actual statistics offered by the State's DNA expert, to challenge whether the correct statistical population base was used to derive the ultimate numbers offered during the testimony and in failing to object to the testimony as a "match" or words suggesting the same."

(K) "Trial counsel were ineffective for failing to investigate and present evidence that Ann Emery was murdered at a different location than the room where her body was found and with the assistance of another person or persons."

(L) "Trial counsel were ineffective for failing to specifically request any information from prosecutors regarding possible involvement in the crime of another person or persons pursuant to *Brady v. Maryland, 372 U.S. 83 (1963).*"

5. Trial counsel's performance during the guilt-or-innocence phase was both unreasonable and prejudicial. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Ard v. Catoe*, 642 S.E.2d 590 (S.C. 2007). Counsel's acts or omissions during the trial of the case included, but are not limited to, the following:

(A) failing to object when the judge informed the jury that the first trial was "to determine the guilt of the [Applicant]" when that marginalized the Applicant's right to the presumption of innocence.

(B) failing to object when the judge informed the jury that the State would go first "followed by whatever evidence or defense the defense wishes to present at the time" when a caution to the jury was required at this

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exact point that there was no burden upon the Applicant to produce any evidence at any time and inference of guilt could be drawn from that fact. Without such a timely caution the Applicant's right to the presumption of innocence was demeaned and diminished.

(C) failing to object to the State's opening remark that the semen Dr. Wren found in Ann Emery's body "matched the [Applicant] one hundred and ten quadrillion to one" and that "it matched the Defendant," which is not consistent with standard DNA protocols or the testimony as it was later presented.

(D) failing to collect aggressive and misleading statements of the prosecutor to the jury concerning the allegation of the Applicant's sexual assault of the female victim;

(E) failing to object to the court's charge to the jury that the pathologist had been qualified as an expert and for that reason could give opinions without a contemporaneous statement that the expert is no different from any other witness and the jury could believe part of the expert's testimony, all or none.

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(F) failing to object to the pathologist multiple statements offered as opinions where the pathologist was speculating, including testimony where the pathologist said "[he] believed it was," or what "probably" occurred, or what something "could be approximated to," and generally, when the witness was not required to couch and limit his opinions to those he believed were most probable, to a reasonable degree of forensic pathological certainty.

(G) failing to object to the qualification of the State's fingerprint examiner and in failing to object to the opinions offered by the State's fingerprint examiner that were not offered as those opinions he believed were most probable, to a reasonable degree of scientific certainty within the field of fingerprint analysis. For example, the State's fingerprint examiner testified, without objection, that two of the crime scene prints in question "belonged to" the Applicant, as if this were an absolute fact. He was even allowed to testify, again without objection, that it was not just his opinion that the questioned fingerprints belonged to the Applicant, but said "that's a fact." Additionally,

trial counsel failed to object to the lack of foundation to the admission of the comparative exhibits used by the fingerprint examiner.

(H) failing to object to the qualification of the State's footwear comparison expert and in failing to object to the opinions offered by the State's footwear comparison expert that were not offered as those opinions she believed were most probable, to a reasonable degree of scientific certainty within the field of footwear comparison. For example, she was allowed to testify, without objection, that the shoeprint comparison between what was purported to be the Applicant's shoe and a shoeprint found at the scene were "almost an absolute match" or "very close" to an absolute match. She was also allowed to testify, without foundation and without objection, that the Converse shoeprints are not seen "very often at all."

(I) failing to challenge the footwear expertise as junk science inadmissible under either *State v. Jones,* 383 S.C. 535 (2009) or *State v. White,* 382 S.C. 265 (2009).

(J) failing to object to the qualification of the State's DNA analysis expert and in failing to object to the opinions offered by the State's DNA analysis expert that were not offered as those opinions he believed were most probable, to a reasonable degree of scientific certainty within the field of DNA analysis. For example, he was allowed to testify, without objection that in many instances blood found at the scene "matched" the DNA profile of one of the victims or of the Applicant.

(K) failing to object to the publication of the indictment by the judge without first conforming the indictment to the evidence of record where such indictment included entirely irrelevant listings of provocative weapons and modes of death.

(L) failing to object to the judge's charge that the jury could only find the Applicant not guilty if it found "a real possibility that the [Applicant] is not guilty."

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(M) failing to object to the judge's charge concerning circumstantial evidence which was in violation of *State v. Gippon*, 327 S.C. 79 (1997) and *State v. Cherry*, 361 S.C. 588 (2004).

(N) failing to object to prejudicial and improper arguments made by the State in closing argument, and arguments unsupported by the evidence.

(O) failing to object to the judge's charge concerning criminal sexual conduct in that no instruction concerning lack of consent was provided.

(P) failing to object to Mr. Gowdy's statement that "There is no evidence that anyone else committed this crime."

(Q) failing to object to Mr. Gowdy's repeated questions and statements that other persons who had lived in situations similar to Mr. Torres and received similar treatments for Mr. Torres's psychiatric conditions had not committed murder.

6. The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. See *Banks v. Dretke*, 540 U.S. 668 (2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701 (S.C. 2006).

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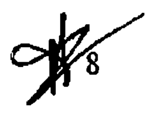
10(c): Applicant was denied the right to effective assistance of counsel during the sentencing phase of his capital trial, in violation of the Sixth, Eight and Fourteenth Amendments of the United States Constitution and Aritle I, §§ 3 and 14 of the South Carolina Constitution.

11(c): Supporting facts: Trial counsel's performance during the sentencing phase was both unreasonable and prejudicial. See *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984); *Von Dohlen v. State*, 602 S.E.2d 738 (S.C. 2005). Counsel's acts or omissions included, but are not limited to, the following:

1. Counsel were deficient in failing to conduct an adequate *voir dire. See* 11(a)(1)*supra*.



2. Counsel were deficient to the prejudice of the Applicant by failing to investigate and present evidence of the Applicant's profoundly abnormal early childhood, including, but not limited to, the socio-economic and medical circumstances surrounding his conception, his *in utero* development, and his early childhood and by failing to employ and utilize appropriate expert consultants and witnesses.

3. Counsel were deficient to the prejudice of the Applicant by failing to make a reasonable and diligent search for early childhood medical records which were necessary and indispensable for the appropriate experts to be informed of the nature and extent of the Applicant's early childhood medical condition.

4. Counsel were deficient to the prejudice of the Applicant in presenting expert witnesses who were neither qualified to render opinions concerning early childhood conditions, or whose opinion was that they did not understand, and no other person understood, the pathology or behavioral consequences of the Applicant's early childhood medical condition.

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5. Counsel were deficient to the prejudice of the Applicant by failing to investigate and present evidence of medical conditions known to them or, on proper investigation, should have been known to them by including, but not limited to, such conditions as fetal alcohol spectrum disorder, genetic and other disorders.

6. Counsel were deficient to the prejudice of the Applicant, as a consequence of the cumulative prejudice of the enumerated errors, in presenting a mitigation case that would both inform and enable the jury to make a meaningful and reasoned moral assessment of the Applicant's personal culpability and thereafter fashion and individualized sentence.

7. Counsel were deficient to the prejudice of the Applicant by failing to object to irrelevant, unsubstantiated, and inflammatory testimony, questioning and closing arguments by the State concerning whether other persons with mental illness committed the same crimes and atrocities as the Applicant; and since the others had not, then the Applicant should be sentenced to death.

8. Counsel were deficient to the prejudice of the Applicant by failing to object to the State's questions and argument to the jury that the Applicant had failed to satisfy all terms and conditions of his probationary sentences for minor offenses since probation was not relevant to the sentencing in this case and violated the statutory constraint against irrelevant sentencing information and because the suggestion was in any way possible.

9. Counsel were deficient to the prejudice of the Applicant by failing to object to the admission of the post-conviction custodial video offered by the State as evidence of future dangerousness since the introduction of such evidence violated S.C. Code Ann. § 16-3-20(B).

10. Counsel were deficient to the prejudice of the Applicant by failing to request that the post-conviction custodial video offered by the State as evidence of future dangerousness be redacted to demonstrate the Applicant's refusal to submit to touching and exclude the remedies imposed by law enforcement.

11. Counsel were deficient to the prejudice of the Applicant by failing to introduce evidence of the long term effects of institutional living upon an individual sentenced to life without the possibility of parole including that the individual's likelihood of adapting and complying with institutional rules and regulations.

12. Counsel were deficient to the prejudice of the Applicant by failing to use the foundational support of peer reviewed data so that the expert on adaptability could render meaningful and complete testimony regarding the Applicant's ability to adapt to prison conditions over his expected, yet reduced, lifetime.

13. Counsel were deficient to the prejudice of the Applicant by failing to argue to the court that the sentencing stature in question, S.C. Code Ann. § 16-3-20(C) , is unconstitutional under both the United States and South Carolina constitutions to the extent that statute makes the jury the sole sentencing authority but then characterizes the jury's sentence as a "recommendation."

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14. Counsel were deficient to the prejudice of the Applicant by failing to ask for a specific charge conference on all charges, both for the guilt and sentencing deliberations.

15. Counsel were deficient to the prejudice of the Applicant in failing to insure that the Judge's written charge correctly stated the law and that a copy of the written mitigation charge was given to the jury for its use during sentencing deliberations.

16. Counsel were deficient to the prejudice of the Applicant in failing to object to judge's statements to potential jurors during *voir dire* that they could be required to give a "recommendation" to the court regarding whether or not to sentence Mr. Torres to death.

17. Counsel were deficient to the prejudice of the Applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have objected to the use of the word "recommend" which erroneously conveyed to the jury that its sentence was advisory, in violation of S.C. Code Ann. § 16-3-20(C) that requires the judge to impose whatever sentence is returned by the jury.

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18. Counsel were deficient to the prejudice of the Applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have requested that the court contemporaneously inform the jury that the sentencing statute required that the court impose whatever sentence the jury returned.

19. Counsel were deficient to the prejudice of the Applicant by failing to object to the judge's jury charge at the beginning of the sentencing proceeding when he told the jury that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" when counsel should have requested that the court contemporaneously inform the jury that a sentence of life meant a sentence of life without the possibility of parole.

20. Counsel were deficient to the prejudice of the Applicant in allowing the errors alleged in paragraphs 13 through 19 to persist and infect the final charge to the jury where the judge made multiple repeated references to the jury's role being to make a "recommendation," with only a nominal gratuitous suggestion that the jury's recommended sentence will be followed by the court.

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21. Counsel were deficient to the prejudice of the Applicant in failing to object to the Court's initial charge defining the jury's "sole function" to be to make a "sentence recommendation" when the Court did not, at that time, include that it was required to impose the "recommended" sentence.

22. Counsel were deficient to the prejudice of the Applicant by failing to obtain and introduce evidence that another person or person(s) were integrally involved in the commission of the crime, which was important mitigation evidence in showing that Mr. Torres's role in the offense was substantially more limited than what the State argued before the jury.

23. Counsel were deficient to the prejudice of the Applicant by failing to argue that the court's ruling that evidence that another person or person(s) were integrally involved in the commission of the crime could not be admitted unless it showed that Mr. Torres was innocent was unconstitutional in violation of the United States and South Carolina constitutions, for the admission of such evidence in the mitigation phase could have resulted in a

determination that Mr. Torres was not death-eligible under the U.S. Constitution.

24. Counsel were deficient to the prejudice of the Applicant by failing to obtain and introduce evidence, in the mitigation case, that another person or person(s) actually committed the actions which resulted in the Emery's losing their lives, where such evidence would have made Mr. Torres ineligible for capital punishment under the United States Constitution.

25. Counsel were deficient to the prejudice of the Applicant by failing to request and obtain the statutory mitigators set forth in S.C. Code Ann. §§ 16-3-20(C)(b)(4) and (5).

26. Counsel failed to object to victim impact testimony elicited, during the sentencing proceeding that exceeded the scope permitted by Payne v Tennessee, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eight Amendment to the United States Constitution.

27. Counsel failed to object to inflammatory, irrelevant and improper statements made by the prosecution in closing argument. Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, statements misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments.

28. The State suppressed evidence that was both favorable to Applicant and material to Applicant's guilt or punishment. See *Banks v. Dretke*, 540 U.S. 668(2004); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Simpson v. Moore*, 627 S.E.2d 701(S.C. 2006).

29. Counsel were deficient to the prejudice of the Applicant by failing to present evidence of Applicant's genetic conditions and to argue that Applicant was not eligible for death under a logical extension of *Daryl Renard*

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Atkins v. Commonwealth of Virginia, 536 US 304 (2002), *Donald Roper v. Christopher Simmons*, 543 USW 551 (2005), *State of South Carolina v. James William Wilson*, 306 SC 498 (1992) and their progeny, and the Constitutions of the United States of America Eight Amendment and Article I, Section 15 of the Constitution of the State of South Carolina.

10(d): Applicant's conviction and death sentence were obtained in violation of the Fifth, Sixth, Eight Amendments and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and South Carolina law.

11(d): Supporting facts: Errors at trial violated the Eight Amendment and the Due Process Clause for the Fourteenth Amendment to the United States Constitution and South Carolina law. Those errors include, but are not necessarily limited to, the following:

1. Using the word "recommendation" and its variants as the title to the sentencing forms, and specifically charging the jury, orally and in writing that their only function in sentencing was to make a "recommendation" to the court as to the sentence the court should impose, and thereafter repeating approximately 60 times in the course of a few minutes that the jury's role in sentencing was to make a "recommendation" without clarifying that the court was required to impose the sentence the jury returned, impermissibly led the jury to believe that the responsibility for determining the appropriateness of the defendant's death rest elsewhere.

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2. Using the word "recommendation" and its variants, as the title to the sentencing forms, and specifically charging the jury, orally and in writing, that their only function in sentencing was to make a "recommendation" to the court as to the sentence the court should impose, and thereafter repeating approximately 60 times in the course of a few minutes that the jury's role in sentencing was to make a "recommendation" without clarifying that the court was required to impose the sentence the jury returns, so impugned the jury's understanding of its function as the ultimate sentence that confidence in the jury's deliberation upon the mitigation case is undermined.

3. Applicant's death sentence was obtained in part as a result of the State's inflammatory, irrelevant, arbitrary and improper statements in closing argument. *See, e.g., Darden v. Wainwright*, 477 U.S. 168 (1986); *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *State v. Copeland*, 468 S.E.2d 620 (S.C. 1996); *Thompson v. Aiken*, 315 S.E.2d 110 (S.C. 1984); *see also Weaver v. Bowersox*, 438 F.3d 832 (8th Cir. 2006), *cert. dismissed*, 127 S. Ct. 2022 (2007). Such statements included, but are not limited to, arguments designed to arouse the passion and prejudice of jurors, assertions substituting his personal opinions as law, statements diminishing the jury's sense of responsibility for their verdict, misrepresenting the proper scope of mitigating evidence, arguments that were not reasonable inferences from the record, and misrepresentations of the nature of alternative punishments.

4. Victim impact testimony elicited during the sentencing proceeding exceeded the scope permitted by *Payne v. Tennessee*, 501 U.S. 808 (1991), in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.

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5. The cumulative prejudicial impact of all errors during the guilt-innocence and sentencing trials resulted in a fundamentally unfair sentencing proceeding, in violation of the Due Process Clause of the Fourteenth Amendment. *See Taylor v. Kentucky*, 436 U.S. 478, 487 n.15 (1978) (concluding that "the cumulative effect" of "damaging circumstances" of case "violated the due process guarantee of fundamental fairness").

10(e): The trial court's erroneous qualification of jurors resulted in a jury uncommonly willing to impose death and deprived Mr. Torres of his right to trial by an impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law.

11(e): Supporting facts: The Sixth Amendment guarantees a capital defendant the right to a fair trial before a panel of impartial and indifferent jurors. *See Morgan v. Illinois*, 504 U.S. 719, 728 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Duncan v. Louisiana*, 391 U.S. 145, 147-58 (1968); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965); *Irwin V. Dowd*, 366 U.S. 717, 722-23

(1961). A "juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan*, 504 U.S. at 729. Further, "[a]ny juror to whom mitigating factors are...irrelevant should be disqualified for cause, for [they have] formed an opinion concerning the merits of the case without basis in the evidence developed at trial." *Morgan*, 504 U.S. at 738-39. Therefore any juror whose predispositions about eh propriety of the death penalty – either generally or related to the specific case – are such that the juror's ability to follow the trial court's instruction that he or she consider the defendant's mitigating evidence is substantially impaired, is not qualified. Several jurors expressed such impairments during *voir dire* in this case. *See* 9(a) and 10(a), *supra*.

10(f): Applicant's death sentence was obtained in violation of the First, Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and South Carolina law by unsubstantiated and irrelevant testimony that other mentally ill persons had not committed the crimes Mr. Torres had committed. And by advancing in evidence and argument the post-conviction video improperly suggesting future dangerousness.

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11(f): Supporting facts: Evidence of a defendant's future dangerousness must be properly noticed and not result in speculation.

10(g) Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.

11(g) During the trial and sentencing phases, Applicant's counsel failed to adequately preserve various issues for appellate review, as more particularly set forth in the First Amended Application.

10(h): Applicant was denied the right to effective assistance of appellate counsel during the sentencing phase of his capital trial, in violation of the Sixth, Eighth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 14 of the South Carolina Constitution.

11(h): Supporting facts; despite having a number of meritorious grounds for eligible to be raised on appeal, appellate counsel failed to raise grounds which could have entitled the Applicant to relief from his conviction and/or sentence of death. These issues include, but are not necessarily limited to, the following:

(A) The trial court erroneously informed the jury that the first trial was "to determine the guilt of the [Applicant]" when that marginalized the Applicant's right to the presumption of innocence.

(B) The trial court erroneously informed the jury that the State would go first "followed by whatever evidence or defense the defense wishes to present at the time" when a caution to the jury was required at this exact point that there was no burden upon the Applicant to produce any evidence at any time and no inference of guilt could be drawn from that fact. Without such a timely caution the Applicant's right to the presumption of innocence was demeaned and diminished.

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(C) The trial court erroneously allowed the State's opening remarks that the semen Dr. Wren found on Ann Emery's body "matched the [Applicant] one hundred and ten quadrillion to one" and that "it matched the Defendant," which is not consistent with standard DNA protocols or the testimony as it was later presented.

(D) The trial court erroneously charged the jury that the pathologist had been qualified as an expert and for that reason could give opinions without a contemporaneous statement that the expert is no different from any other witness and the jury could believe part of the expert's testimony, all or none.

(E) The trial court erroneously published the indictment without first conforming the indictment to the evidence of record when such indictment included entirely irrelevant listings of provocative weapons and modes of death.

(F) The trial court erroneously charged the jury that it could only find the Applicant not guilty if it found "a real possibility that the [Applicant] is not guilty."

(G) The trial court erroneously charged the jury concerning circumstantial evidence which was in violation of *State v. Gippon*, 327 S.C. 79 (1997) and *State v. Cherry*, 361 S.C. 588 (2004).

(H) The trial court erroneously charged the jury on criminal sexual conduct in that no instruction concerning lack of consent was provided.

(I) The trial court erroneously told potential jurors during *voir dire* that they could be required to give a "recommendation" to the court regarding whether or not to sentence Mr. Torres to death.

(J) The trial court erroneously allowed the State to argue to the jury that the Applicant had failed to satisfy all terms and conditions of his probationary sentences for minor offenses since probation was not relevant to the sentencing in this case and violated the statutory constraint against irrelevant sentencing information.

(K) The trial court erroneously admitted the post-conviction custodial video offered by the State as evidence of future dangerousness in violation of S.C. Doe Ann. § 16-3-20(B).

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(L) The trial court erroneously charged the jury at the beginning of the sentencing proceeding that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial." This charge erroneously conveyed to the jury that its sentence was advisory, in violation of S.C. Code Ann. § 16-3-20(C) that requires the judge to impose whatever sentence is returned by the jury.

(M) The trial court erroneously charged the jury at the beginning of the sentencing proceeding that they would "be asked to make a recommendation to the court whether it sentence the [Applicant], Antonio Andres Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issue that's involved in, in (sic) this phase of the trial" without

informing the jury that the sentencing statute required that the court impose whatever sentence the jury returned.

(N) The trial court erroneously charged the jury at the beginning of sentencing that they would "be asked to make a recommendation to the court whether it should sentence the [Applicant], Andres Antonio Torres, to death or life imprisonment. Should you recommend a sentence of life imprisonment or should you recommend a sentence of death, that's the only issued that's involved in, in (sic) this phase of the trial" without informing the jury that a life sentence meant a sentence of life without the possibility of parole.

(O) The trial court erroneously and consistently referenced the jury's role being to make a "recommendation" with only a minimal gratuitous suggestion to the jury that the sentence it returned is the sentence the statute required the court to impose upon the Applicant and that a life sentence meant life without the possibility of parole.

(P) The sentencing stature in question, S.C. Code Ann. § 16-3-20(C), is unconstitutional under both the United States and South Carolina constitutions.

(Q) The trial court erroneously ruled that Mr. Torres could not introduce evidence that another person or person(s) was involved in the planning and/or commission of the crime, even though he was entitled to introduce such evidence in the mitigation phase and such evidence could have resulted in a determination that Mr. Torres was not death-eligible under the U.S. Constitution.

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10(i): Applicant was denied the right to effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution in that counsel failed to adequately present evidence of Applicant's mental state.

11(i): During the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel in numerous ways as more particularly stated herein. Counsel's omissions were both unreasonable and prejudicial in

sentencing. *Wiggins v. Smith*, 539 U.S. 510 (203); *Strickland v. Washington*, 466 U.S. 668 (1984).

10(j): Applicant's death sentence violates the Eight Amendment's prohibition of cruel and unusual punishment [and the Fourteenth Amendment's guarantee of equal protection] because Applicant has one or more genetic conditions that cause Applicant to periodically have intense outbursts during which he is unable to control his behavior, and Applicant has consistently suffered from these conditions from the time of his birth.

11(j): Applicant suffers from numerous, previously undiagnosed conditions, including Prader-Willi Syndrome and 22-Q-11 Deletion Syndrome, which cause Applicant to periodically have intense outbursts during which he is unable to control his behavior. These outbursts occurred consistently throughout Applicant's life, and he was institutionalized for them beginning at 18 months-old. The genetic cause(s) of Applicant's condition coupled with the fact that it manifested itself at an extremely young age and continues throughout the course of his life indicates that defendant's conduct is the product of a disorder he was born with, not merely choices that he made. In this way Applicant is less culpable than the average person convicted of murder. As the Supreme Court explained in *Atkins v. Virginia*, "the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." Like the mentally retarded, Mr. Torres has a substantially diminished ability to engage in the type of reasoning and self-regulation that form the psychological underpinnings of culpability. Consequently the retribution and deterrence rationales that support the death penalty are undermined, and the application of "the most extreme sanction available to the State" is cruel and unusual within the meaning of the Eight Amendment.

In his post-trial brief Applicant sets forth the four "most compelling issues" which he contends support his entitlement to relief but asserts that he is not waiving any ground which has been asserted in his application and believes that each ground is a sufficient basis supporting his request for relief.

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<u>TRIAL JUDGE'S JURY INSTRUCTION</u>

I. "The trial court's charge to the jury at the commencement of the sentencing proceeding was unquestionably erroneous and contrary to clearly established state and federal law as announced by both the Supreme Court of South Carolina. <u>State v. Bellamy</u>, 293 S. C. 103, 359 S. E. 2d 63 (1987), and the Supreme Court of the United States, <u>Caldwell v. Mississippi</u>, 472 U. S. 329, 328-329 (1985). There are both a free-standing constitutional claims and an ineffective assistance claim under <u>Strickland v. Washington</u>, 466 U.S. 668 (1984), as trial counsel were deficient in failing to object to the erroneous charge, and that deficiency resulted in substantial prejudice to the Applicant."

Applicant argues that the death penalty statute under which he was sentenced is "facially unconstitutional". Within the statutory language, "Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death", there exists an inherent ambiguity and contradiction which renders the statute unconstitutional for it "offends the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States of America". Applicant argues that the statute permitting capital punishment is "inherently contradictory" because it requires the trial judge to impose the sentence found appropriate by the sentencing jury but at the same time instructs the jury that their determination as to sentence is a "recommendation" to the Court. Applicant asserts that the Court's use of the term "recommendation" with reference to "sentence" without providing further instruction and guidance "misleads the jury into believing that responsibility for determining the appropriate sentence rests elsewhere". Applicant argues that "at best, the instruction given is ambiguous on whether the jury is the final decision-maker on life or death. At worst, it suggests the jury is not responsible for the life-or-death decision at all. The charge impermissibly and unconstitutionally deprives the applicant of due process and injects an arbitrary factor into the sentencing process in violation of the Eighth and Fourteenth Amendments, and in violation of clearly established federal law as announced by the United States Supreme Court in <u>Caldwell</u>. Applicant

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argues that the Court's failure to contemporaneously instruct the jury further, that any "recommendation" of sentence that they make "shall" be imposed by the Court and to make clear that the jury's "recommendation" is the sentence that the law requires to be imposed by the Court, renders the statute unconstitutional as applied because it creates inherent ambiguity in whom the ultimate decision as to sentence actually rests. Applicant further argues that the statute and the court's "ambiguous, misleading, and erroneous" instruction is a "structural" defect because it forms "the framework within which the jury performs its function" and therefore prejudice must be presumed.

Applicant argues that trial counsel was deficient when they failed to object to the Court's instruction to the jury that they "will be asked to make a recommendation to the court whether it should sentence [Applicant] to death or life imprisonment." Applicant argues that the use of the word "recommendation" by the trial court failed to put the jury on notice that they were "the sole sentencing authority in the courtroom" and that the law required that whatever sentence they determined to be the appropriate "recommendation" would have to be imposed by the Court. Applicant argues that this instruction "diminished and minimalized the seriousness and finality of the juror's task at hand." Because the Court repeated the use of the term no less than sixty-one (61) times in providing the legal instructions and the verdict forms were captioned "RECOMMENDATION OF SENTENCE", the jury could only be under an impression that they would be making a sentence "recommendation" to the Court and "not actually sentencing Mr. Torres." The failure of trial counsel to challenge the use of the term "recommendation" and their failure to take exception to the Court's instructions fell below an objective standard of reasonableness required of counsel in a death penalty case and, but for that failure, there is a reasonable probability the outcome of the trial would have been different.

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Applicant argues that the "instructions, taken as a whole, present more than a reasonable likelihood that the jury would be, at a minimum, confused as to whether or not they were the final arbiter of life or death for the Applicant. Such an instruction is constitutionally infirm and therefore trial counsel was deficient in not seeking a correction from the trial judge and taking exception to

the instruction as provided. Because the error relates to a "structural defect", prejudice should be presumed and any "harmless error" analysis would be inapplicable, but even if such an analysis were to be appropriate, the analysis fails in this case because it cannot be established beyond a reasonable doubt that the erroneous and structurally defective instruction did not contribute to the ultimate decision of the jury. Therefore Applicant is entitled to relief and the grant of a new sentencing hearing.

EVIDENCE OF GENETIC DEFECTS

II. "Trial counsel were deficient by failing to investigate, develop, and present important and available evidence confirming the Appellant suffers from genetic defects which constituted a compelling mitigating factor for the jury to consider while assessing his degree of moral culpability. The defects present as a phenotype entirely consistent with that of intellectual disability and its existence gives rise to both a free standing constitutional claim based upon Atkins v. Virginia, 536 U.S. 304 (2002) as well as Weik v. South Carolina, 409 S.C. 214, 761 S.E.2d 757 (2014) and a Strickland v. Washington, 466 U.S. 668 (1984) claim for relief."

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Applicant asserts that trial counsel was deficient in conducting a reasonably competent investigation for the presentation of evidence in mitigation of punishment by failing to discover, develop, and present through expert testimony, evidence of genetic defects that are presented throughout his medical record which would have tended to establish that his "ability to learn, reason and control his impulses" was "substantially impaired" and therefore "compromised volition and substantially diminishes the applicant's culpability". Applicant argues that trial counsel's failure to investigate, develop, and present this evidence prohibited the jury from properly considering Applicant's actual culpability based upon all of the evidence which existed and which was relevant to that assessment, and which therefore prevented the jury from making a proper and "essential proportionality assessment" as to the appropriate punishment as required by the law. Applicant claims that "although not mentally retarded, this list of [genetic] factors is virtually identical to the

phenotype of mental retardation – a phenotype that the U. S. Supreme Court has ruled makes a person categorically ineligible for the death penalty in Atkins v. Virginia, 536 U.S. 304 (2002)

TESTIMONY OF CRYSTAL WILLIAMSON

III. "Trial counsel were deficient to the prejudice of the applicant by failing to investigate, develop and present mitigation evidence through the victim's sole surviving child, Crystal Williamson, who would have asked the jury for mercy had trial counsel requested it. She would also have provided her reason, supported by substantial evidence that she believed that the applicant's role in the offense was not as presented by the State."

Applicant asserts that trial counsel was deficient in conducting a reasonably competent investigation in preparation of the presentation of evidence in mitigation of punishment. This deficiency included a failure to approach Crystal Williamson, the sole surviving child of the murdered Mary Ann Emery, "to open a dialogue for the purpose of gaining strength in furtherance of a negotiated settlement and to present mitigation testimony to the jury by requesting that it exercise mercy in sentencing Andres Torres. Had this been done counsel would have known of her opinion on punishment and been able to present her as a witness for the purpose of her asking the jury to exercise mercy in the sentencing of the applicant.

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Applicant further asserts that the witness had reason to ask the jury to exercise mercy in this case because there was "substantial evidence" known to her and to defense counsel which contradicted the State's theory as to the significance of the applicant's role in the crimes and supporting a position that the applicant was not "the sole moving force in the murders". Applicant argues that failing to develop and present this evidence was deficient representation resulting in prejudice to the applicant as it prevented the jury from considering relevant evidence of the applicant's "minor role in the offense" which is an important factor for the jury to consider in mitigation of punishment.

CUMULATIVE ERRORS COMMITTED BY TRIAL COUNSEL

IV. "Although each of the enumerated errors set forth in the application are not separately briefed, together they form a basis for relief as they undermine confidence in the outcome. In this issue a summary of some of those errors is presented although the Applicant relies upon all of them as their cumulative prejudice is the essence of the claim for relief."

1. "trial counsel's strongly worded opening statement that the applicant was not guilty when they knew the strength of the State's guilt phase evidence and knew that they would not be offering a single witness in defense of the charges. The error forfeited counsel's credibility during the sentencing phase and evidenced a complete lack of a unified trial strategy between two phases in a capital trial."

2. "trial counsel failed to understand that the role in the offense testimony of multiple witnesses exposed the prosecution to a challenge that it was favoring one person who was involved in the multiple murders from arrest while asking for death on the one who had no motive for the killings. This evidence, if used correctly, would have both enhanced the potential for a negotiated settlement and presented the jury with evidence that the State's theory of the case was wrong and its motives improper, thereby tempering the jury's decision by returning a sentence of life without parole."

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3. "defense counsel failed to ask for a continuance when, during the twenty-four hour cool down period after the guilt phase concluded, the applicant refused to allow his jailers to pat hi m down for weapons." This "would have allowed counsel to investigate, develop, and present expert testimony that incorporated this event into the medical testimony, given the applicant's genetic limitations which included an extreme sensitivity to touch. In addition, it would have allowed sufficient time to redact both audio and video portions of the recording which contained irrelevant and highly inflammatory information."

4. "the trial judge offered a definition of "reasonable doubt" which included the statement that the jury could return a not guilty verdict only if it

found "a real possibility that the defendant is not guilty". This charge was fundamentally erroneous ..."

5. "trial counsel failed to object on the numerous occasions when the prosecutor asked questions of witnesses and then argued to the jury that other individuals who suffered trouble in life were not murderers. The State did not identify the other people it was referring to and offered no evidence that those "other people" had been tracked through their lives and did not commit murder." ... "the questions asked and the arguments made were not limited to the nature and circumstances of the crime or the unique characteristics of the defendant, and therefore arbitrary and irrelevant material into the sentencing process in violation of the statute and State v. Burkhurt."

6. "when the trial judge charged the jury that a witness who had just been qualified as an "expert" was given special standing in the eyes of the law, trial counsel failed to ask that the judge simultaneously charge the jury that is could believe the testimony of an expert or disbelieve it as with any other witness."

7. "trial counsel failed to object when expert witnesses would testify to opinions that were conditioned with remarks like "match", "believe", "I imagine", the matter would be "approximated"", and other caveats entirely inappropriate as testimony of an expert."

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8. "trial counsel failed to ask for a jury charge on circumstantial evidence that would have substantially aided the applicant's case for a tempered result. In a case that relied heavily upon circumstantial evidence, trial counsel failed to ask for the historic and more favorable circumstantial evidence charge."

9. "the State offered a shoe print "expert" and others to establish a circumstantial connection between the applicant and the crime scene. Trial counsel failed to challenge these numerous experts and their respective opinions for trustworthiness and whether they actually could articulate the necessary evidentiary prerequisites for admission as announce by the Supreme Court for expert testimony."

DISCUSSION AND ANALYSIS

S. C. Code of Laws Ann. Section 17-27-20 (A) provides that "Any person who has been convicted of, or sentenced for, a crime and who claims that (1) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State or; (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute ... a proceeding under this chapter to secure relief." Section (B) provides that "this remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."

"A petitioner may allege constitutional violations in PCR proceedings... unless the issue could have been raised by direct appeal." Gibson v. State, 329 S.C. 37 (1998) "Errors in a petitioner's trial may not be asserted for the first time, or reasserted, in post-conviction proceedings" unless such errors are assigned to allegations of the ineffective assistance of counsel. Drayton v. Evatt, 312 S.C. 4 (1993); Simmons v. State, 264 S.C. 417 (1975)

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"In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his petition." Butler v. State, 286 S.C. 441 (1985) In order to prove a claim of the "ineffective assistance of counsel", the applicant must establish that counsel's performance was deficient and the deficiency resulted in prejudice to the applicant. In order to establish a deficient performance by counsel it must be shown that counsel failed to render reasonably effective assistance under prevailing professional norms at the time of the trial. Strickland v. Washington, 466 U.S. 668 (1984) In order to establish prejudice, the applicant must show that, but for counsel's deficient performance, there is a reasonable probability that the result in the trial would have been different. Johnson v. State, 325 S.C. 182 (1997) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial." Patrick v. State, 349 S.C. 203 (2002)

In order to be entitled to relief due to the ineffective assistance of counsel is must be established that counsel "made errors so serious that counsel was

not functioning as the counsel guaranteed by the Sixth Amendment." "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Richter, 562 U.S. 86 (2011)

"[F]air assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Butler v. State, 286 S.C. 441 (1985)

A. TRIAL JUDGE'S INSTRUCTION

"A jury instruction must be viewed in the context of the overall charge." Sigmon v. State, 403 S.C. 120 (2013) "The test to determine the propriety of the trial judge's charge is what a reasonable juror would have understood the charge to mean." State v. Bell, 305 S.C. 11 (1991) In assigning error to the trial judge's instruction, the applicant's reliance on Caldwell and State v. Davis, 306 S.C. 246 (1991) is misplaced. In Caldwell, the Supreme Court reversed a death sentence because the jury was told that any decision that they made was "not final" and was "automatically reviewable" by a higher court. In Davis, the Supreme Court of South Carolina citing Caldwell found reversible error and overturned a death sentence partly because the trial court refused, upon the defendant's request, to inform the jury that "its sentencing recommendation would be accepted by the judge and the sentence imposed accordingly" and commented that "nowhere in the record does the trial judge refer to the jury's sentencing decision as anything more than just a recommendation." 306 S.C. at 250.

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In the sentencing phase of this case the trial court instructed the jury:

> "Ladies and gentlemen ... it now becomes your duty to decide what sentence you will recommend that this Court impose upon the defendant ... Your sentence, sentencing recommendation will be followed by this Court."

Applicant alleges that this instruction created arbitrariness in the sentencing phase that constituted a "structural error" in the framework of the trial and seeks this Court's review for arbitrariness in that framework pursuant to S. C. Code Ann. Section 16-3-25 (C)(1). This section is applicable to appellate review of a trial court's decision and Applicant has received that statutorily

mandated review when Supreme Court heard his appeal and affirmed the trial court's verdicts. State v. Torres, 390 S.C. 618 (2010)

The framework of the trial in this case was established in compliance with the relevant statutory requirements pertaining to capital trials. The trial court's instruction conforms to the statutory language which was applicable and case law dictating what is required to be provided by way of instruction to a jury in a capital trial.

Nothing has been shown which convinces this Court that the sentencing jury in this case did not understand their obligations as instructed by the Court or that they were confused or failed to understand that the decision, as to the appropriate sentence to be imposed, was solely in their discretion applying the statutory legal framework as instructed by the Court. After a review of the record in this case, including the individual *voir dire* of the jury members prior to their selection, and that which was presented at the evidentiary hearing held in this matter, this Court finds that no reasonable juror would have failed to understand that the decision returned by the jury as to its' "recommendation" would be the sentence imposed by the Court on the defendant.

Based upon a review of the record and the applicable law this Court finds that the trial judge's instruction was not defective or erroneous and was appropriate and compliant with the law applicable at the time of the trial and therefore finds no "structural error" or "arbitrariness" by its application.

Applicant has failed to establish by a preponderance of the evidence in this case that trial counsel's failure to object to the Court's "recommendation" charge was unreasonable, deficient, or ineffective assistance in comparison to that which was expected of reasonably competent counsel under prevailing professional norms at the time of the trial. Applicant has further failed to establish that, even if counsel was deficient in failing to object to the instruction, he has been prejudiced by failing to establish a reasonable probability that but for any deficient performance by counsel the outcome would have been different.

Applicant's request for post-conviction relief on that ground should be and is therefore denied.

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B. GENETIC DEFECT EVIDENCE

Applicant presented evidence supporting the allegation that he suffers from three genetic conditions that "substantially impact on his degree of culpability" that trial counsel failed to identify, develop, and present to the jury in the sentencing phase of his trial. Applicant presented expert testimony that he suffers from (1) Prader-Willi Syndrome, (2) 22q11 Deletion Syndrome which includes deletion of the PRODH gene, and (3) a condition that results in a low-activity drug metabolizing enzyme at cytochrome P450 2C19. Testimony established that the last condition prevents Applicant from properly metabolizing imipramine, a type of drug commonly prescribed as an anti-depressant and which was prescribed for the applicant while a toddler.

Petitioner presented the testimony of geneticist Jack Rary, Ph.D., on the issue of whether Applicant has any genetic defects. Dr. Rary diagnosed Applicant with Prader-Willi Syndrome based on a conglomeration of dysmorphic features, including the following: truncal obesity, small and low set ears that are rotated posteriorly, almond-shaped eyes, a narrow forehead, short fingers/small hands, female escutcheon, and a small phallus with a very small urethral opening. (PCR pp. 410-29).

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Dr. Rary also diagnosed Applicant with 22Q11 Deletion Syndrome (22Q11 DS) based on a chromosomal microarray test that revealed a deletion of roughly 90,000 base pairs included both the proline dehydrogenase gene (PRODH) and a "big area of the critical DiGeorge area." (PCE pp. 442-43). Dr. Rary further testified that, upon seeing that Applicant was missing the PRODH gene, he ordered a test of Applicant's proline levels, and that test showed that Applicant's "proline level is way high, tremendously elevated, as opposed to the normal midrange. . ." (PCR pp. 453-54). Accordingly, Dr. Rary diagnosed Applicant with hyperprolinemia. (PCR p. 410; pp.453-54).

The 22q11 Deletion Syndrome results in psychiatric illness, particularly schizoaffective symptoms such as transient psychotic experiences, which may or may not result in a schizophrenia diagnosis. Prader-Willi Syndrome similarly may make a person substantially more likely to suffer from transient psychotic episodes, inappropriate emotionality, and frequent outbursts.

Applicant's medical record reflects the prescribing of the antipsychotic drug Mellaril from the time he was nineteen months until eleven years of age as a result of his inability to metabolize imipramine which was a preferred drug for treatment of the applicant's mental condition. According to Dr. Lipman, who was qualified as an expert in the field of neuropharmacology, the significance being that the use of such strong antipsychotic drugs can cause damage or atrophy to the frontal lobes of the brain which are responsible in part for self-regulation, judgment, and self-control and it is reasonable to assume that Applicant was affected later in his life by this treatment during his childhood. Dr. Schacht who was qualified as an expert in the field of neuropsychology and Dr. Wood, who was qualified as an expert in the field of neuropsychiatry, concluded that based upon the medical record and current testing conducted, Applicant suffers from significant impairment of his executive function and an inability to employ cognitive forces "either because you don't have them or because they don't function well in stressful situations".

Neuropsychiatrist Dr. Wood conducted testing to assess Applicant's intellectual and cognitive function. Dr. Wood concluded that, although Applicant is not mentally retarded, he does have low-average I.Q. and suffers impairment and deficiencies in his intellectual and cognitive functioning which is similar to those found in the phenotype for mental retardation. Dr. Wood concluded that Applicant suffers from a severe cognitive disorder, Prader-Willi Syndrome, and cerebral affective syndrome which all affect his executive functioning and an inability to control dominant impulses. Dr. Woods further opined that Applicant's genetic defects cause him to exhibit behaviors that are not psychiatric but more "organic and brain driven".

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In order for Applicant to be granted relief for failure of trial counsel to present evidence of his genetic related claims, he must establish that he suffers the genetic condition(s) upon which he bases his request for relief. In reply to the expert testimony offered by the applicant the respondent presented expert testimony from Ed Spence, a medical doctor who was qualified as an expert in the field of genetics, on the critical questions raised by the applicant.

Dr. Spence opined that Applicant did not have PWS. He explained that, with the advent of genetic testing, a diagnosis can no longer be made based on

the presence of dysmorphic features alone. (PCR pp. 1437-40; p. 1472). Instead, for a genetics expert, certain dysmorphic features serve as an indication that genetic testing is needed. (PCR p. 1432; p. 1436). Dr. Spence testified that the methylation test is "the definitive test" for the detection and diagnosis of Prader-Willi. (PCR p. 1439). Dr. Spence also pointed to literature regularly relied upon by genetics doctors called GeneReviews, which explains the diagnosis and testing for PWS as follows:

Consensus clinical diagnostic criteria are accurate, but the mainstay of diagnosis is DNA methylation testing to detect abnormal parent-specific imprinting within the Prader-Willi critical region on chromosome 15; this testing . . . detects more that 99% of affected individuals.

DNA methylation-specific testing is important to confirm the diagnosis of PWS in all individuals, but especially in those who atypical findings or are way too young to manifest sufficient features to make the diagnosis on clinical grounds. According to Dr. Spence, because Applicant's methylation test was negative, he does not suffer from Prader-Willi Syndrome.

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Dr. Rary conceded that Applicant's DNA methylation test, which detects over ninety-nine percent of the genetic defects that cause PWS, was negative. (PCR pp. 430-40; pp. 464-65; Applicant's Ex. 16). Nevertheless, Dr. Rary testified that the negative methylation test did "nothing at all" to reduce his confidence in his PWS diagnosis based on dysmorphic features alone. (PCE pp. 439-40).

Dr. Spence further noted the absence of certain dysmorphic features or characteristics that would usually be found in someone with PWS. For example, Dr. Spence did not see any notations of hypotonia (poor muscle tone, floppiness) in Applicant's medical records from infancy and early childhood. (PCR p. 1438). A fact that Dr. Rary also agreed with. (PCR pp. 466-67). Hypotonia is found in 100% of infants with PWS. PWS – Gene Reviews p. 6, Respondent's Ex. 13 ("Infantile hypotonia is a nearly universal finding...."); *see also* PCR pp. 1435-36). Additionally, Dr. Spence opined that Applicant's hand measurements were not small. (PCR p. 1438).

As to the 22Q11 DS diagnosis, Dr. Spence conceded that the microarray showed a small deletion on Applicant's chromosome 22, but he distinguished that small deletion from the typical deletion associated with 22Q11.2 Deletion Syndrome. (PCR pp. 1444-45). Dr. Spence explained that the typical deletion seen in 22Q11 DS is approximately 2,500 kb while Applicant's deletion is only 91 kb. (PCR p. 1445). Furthermore, Applicant's deletion is on a "fringe region" of chromosome 22, not the typical region. (PCR p. 1445). Dr. Spence confirmed that Applicant is missing his PRODH gene and a portion of the DiGeorge area, but he would not diagnose Applicant with 22Q11 DS – rather, he would characterize Applicant's deletion as a variant deletion "on the edge or fringe of the critical region." (PCR pp. 1444-47).

Though the features of 22Q11 DS are widely variable, a large percentage of individuals diagnosed with 22Q11 DS have the following: heart defects (approximately 75%), intellectual disability (70-90%), and palatal abnormalities (69%). (PCR pp. 1441-42); 22q11.2 Deletion Syndrome – GeneReviews p. 1, Respondent's Ex. 14. Though no evidence appeared to support identification of heart defects or cleft palate in Applicant's records, Dr. Spence admitted on cross-examination that he did not have all the medical records. (PCR pp. 1450-51). Even so, no such record was produced for review, the question was simply asked. Dr. Spence testified that he would expect the absence of the Applicant's PRODH gene to result in elevated proline levels, but the testing of Applicant's proline levels showed only a minor elevation. (PCR p. 1446). Accordingly, he characterized Applicant's hyperprolinemia as "minor." (PCR p. 1446).

There is conflicting evidence before this Court on whether Applicant has Prader-Willi Syndrome and 22Q11.2 Deletion Syndrome. Dr. Rary diagnosed Applicant with both of these syndromes while Dr. Spence testified that Applicant has neither of these syndromes based on Applicant's genetic tests. Respondent urges this Court to make factual findings in line with Dr. Spence's testimony, in light of the supporting professional materials relied upon by Dr. Spence that lend credence to his opinion that Applicant does not have either PWS or 22Q11DS.

Prader-Willi Syndrome

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Dr. Spence's testimony that Applicant does not have PWS was credible. Moreover, the negative methylation test supports Dr. Spence's opinion, particularly since both experts agree that this test detects over ninety-nine percent of the occurrences of PWS. Applicant's Ex. 16. And Dr. Spence provided the synopsis of PWS from GeneReviews, a source regularly relied upon by doctors who practice in the field of genetics, which supports his testimony that because of methylation test was negative, Applicant does not have PWS. Furthermore, Dr. Spence opined that Applicant does not even had the dysmorphic features that are characteristics of PWS. There was no indication that Applicant had hypotonia as an infant or young child, a feature found in one hundred percent of individuals with PWS. And though Applicant is short, his other features were fairly normal when compared with the average measurements set forth in Smith's Recognizable Patterns of Human Malformation:

His intercanthal distance was three centimeters, the distance between the eyes. And that was 50th percentile. And this is using those photographs where they use that metal tape measure, and I did the best I could with what I had. The intercanthal distance between the outside corners of the eye was 8.4 centimeters, which was 25th percentile. The ear length was 5.9 centimeters, which is 25 to 50th percentile, but very normal. Total hand measurement was 17.3 centimeters which is 25 to 50th percentile. The palm length was 10.5, which was 75th percentile, and the middle finger length was 6.8, which was [illegible]0th percentile for an adult. Spence Deposition pp. 85-86, Applicant's Ex. 33. Thus, Dr. Spence was able to show that even the purportedly dysmorphic features on which Dr. Rary bases his PWS diagnosis are not that abnormal at all.

Dr. Rary's testimony stands in stark contrast to Dr. Spence's – not only because of the different conclusion reached, but also because of the absence of any supporting sources to confirm his conclusion. Indeed, Dr. Rary's diagnosis of PWS based solely on Applicant's clinical presentation despite a negative methylation test is incongruous with the literature that has been provided to this Court regarding the diagnosis of PWS. While clinical diagnostic criteria were once all that was available to clinicians to diagnose PWS, GeneReviews makes it clear that the DNA methylation test is the touchstone for the diagnosis

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of PWS today. PWS – GeneReviews pp. 1-3, Respondent's Ex. 13. Though Dr. Rary testified that he most often used OMIM (Online Mendelian Inheritance in Man) in his practice, he did not point to anything in particular – from the OMIM entry for PWS or from any other source – to support his diagnosis of PWS in the face of a negative methylation test.

22Q11.2 Deletion Syndrome/Hyperprolinemia

Dr. Spence's testimony that Applicant has a deletion on his chromosome 22 but that the deletion is too small for Applicant to have 22Q11.2 Deletion Syndrome is similarly credible. Clearly, the microarray supports the testimony by both experts that Applicant has a deletion of 91 kb from his chromosome 22. Applicant's Ex. 17. However, whereas Dr. Spence noted that Applicant's decision was only a small fraction of the standard deletion for 22Q11 DS, and he characterized the deletion as "on the fringe." Dr. Rary admitted that he did not know how significant the deletion of Applicant's DiGeorge region was:

"I honestly did not look at this to see how much. I would guess quite a significant amount because the PRODH gene probably is only three or four thousand base pairs in length. So most of this 90,000 deletion would be in the DiGeorge area. So a large portion of the DiGeorge gene is deleted in this case. (PCR p. 446). Nevertheless, Dr. Rary testified it was "absolutely fair to characterize the deletion as 22Q11 DS (PCR p. 446).

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Dr. Spence, on the other hand, explained that Applicant's deletion is "vastly smaller that the classic" deletions seen in 22Q11 DS. Spence Deposition p. 558, Applicant's Ex. 33. He also testified in his deposition that Applicant's "deletion [is] on the very end of that whole critical region. And it does not include the genes that are most typically involved in the classic deletion syndrome." Spence Deposition p. 58, Applicant's Ex. 33. Dr. Spence further notes that while the physical features of 22Q11 DS are widely variable, he did not see those features in Applicant. Spence Deposition p. 58, Applicant's Ex. 33. Again, the literature provided by Dr. Spence supports his opinion. 22Q11 DS – GeneReviews, Respondent's Ex. 14.

Both experts agreed that Applicant's proline dehydrogenase gene is included in the deletion region on chromosome 22. However, they disagree on

the import of that deletion. Dr. Spence testified that Applicant only had mild hyperprolinemia. Spence Deposition pp. 64-65, Applicant's Ex. 33/34. He explained that the standard level for proline is around "the low 30s." (PCR p. 1446). He further explained that Applicant's level was "in the 40's," but those with severe hyperprolinemia have proline levels "in the 60's and above." (PCR p. 1446). In contrast, Dr. Rary categorized Applicant's hyperprolinemia as "tremendously elevated" though he did not provide any numbers to compare Applicant's proline level to. (PCR p. 453).

Dr. Spence's opinion that Applicant does not have 22Q11 DS is more credible than Dr. Rary's opinion that he has that syndrome, particularly since Dr. Spence explained his position and pointed to literature in support thereof, and Dr. Rary failed to consult or provide such literature and could only guess as to the significance of the deletion on Applicant's chromosome 22. Likewise, Dr. Spence's opinion that Applicant's hyperprolinemia is "mild" stands in stark contrast to Dr. Rary's opinion that Applicant's proline levels were "way high," and again, Dr. Spence is more credible on this point as he provided outside support for his opinion.

The credible evidence in the record demonstrates that Applicant does not suffer from the genetic syndromes as alleged and therefore has failed to meet his burden of showing that he has either Prader-Willi Syndrome or 22Q11.2 Deletion Syndrome which might otherwise establish a credible ground for relief based upon him having cognitive impairment. Accordingly, he is not entitled to relief on any ground that has been alleged which depends upon him suffering from the genetic conditions as alleged.

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There was no prejudice in failing to discover and present this additional evidence which could show very little relevant evidence and would depend in part on an outdated stereotype of the science of genetics:

> A common stereotype is that an individual's "genotype" or "genetic constitution" is static, as though there is a "crime gene" that "hard-wires" certain people to violate the law. But this perspective, however entrenched in the public's mind, has no scientific support. Rather, an overwhelming amount of evidence shows that "environments influence gene expression."

Deborah W. Denno, *Revisiting the Legal Link Between Genetics and Crime*, Law & Contemp. Probs., Winter/Spring 2006, at 209, 213.

Dr. Spence explained that the genetics could not be definitely linked to causation. (PCR p. 1473). In other words, the value of the evidence as to character if the defendant or circumstances of the crime would rest on misleading the fact finder under the label of science. That would be improper. Not all evidence offered by a capital defendant need be accepted, nor should it be if the goal is a fair and reliable process for all. see *Lockett v. Ohio*, 438 U.S. 586, 604 n. 12 98 S.Ct.2954 (1978) (acknowledging the continuing "traditional authority" of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."); *State v. Dickerson*, 395 S.C. 101, 122, 716 W.E.2d 895, 906 (2011) (upholding exclusion of evidence stylized as "execution impact" *i.e.* would cause pain to defendant's family, finding some of the evidence could reflect ability to make emotional bonds, but noting such "evidence can easily cross the line from illuminating a defendant's character or a plea for mercy to an opinion of what is the proper punishment" thus inadmissible). The evidence here certainly could be offered at a trial, but again its worth is so damaged and questionable that Applicant cannot carry his burden of showing *Strickland* prejudice.

In addition to the lack of factual basis, Applicant would not be entitled to any relief under *Atkins* as *Atkins* ineligibility is restricted to a specific condition – intellectual disability. Applicant has shown no evidence of the specific mental condition that would render him ineligible for the death penalty, i.e. "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." S.C. Code Ann. § 44-20-30 (Supp. 2011).

Further, the free-standing claim to request extension of *Atkins* is barred by the *Simmons Doctrine*. As noted, the bar specifically applies to trial error claims that could have been present on appeal. *Simmons*, 264 S.C. at 423, 215 S.E.2d at 885 ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings"). The key, of course, is whether the claim was available at trial to

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preserve a trial issue for review on direct appeal. If available, then the issue may only be raised by a claim of ineffective assistance and evaluated under *Strickland. See Drayton*, 312 at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel.").

Regardless of the questionable genetic material presented during the post-conviction hearing, counsel clearly had the ability to argue a reduced mental capacity as an ineligibility basis in extension of the *Atkins* logic. *Atkins* was decided in 2002 well before the 2008 trial. The free-standing claim is thus barred by the ruling in *Simmons*. Applicant has not established that he suffers from the specific mental condition that would render him ineligible for a death sentence.

South Carolina has rejected the concept of extending *Atkins* in *State v. Stanko,* 402 S.C. 252, 741 S.E.2d 708 (2013). In *Stanko,* there was evidence presented that the defendant suffered from "central nervous system dysfunction," "diminished or lowered function of his brain in the frontal lobe area" and brain damage, 402 S.C. at 283-84, 741 S.E.2d at 724. The Court noted the "threshold determination" was whether "Appellant's alleged mental condition places him within the class of offender that may not [be] executed." 402 S.C. at 283, 741 S.E.2d at 724. In other words, did the defendant establish by a preponderance of the evidence "significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period." *Id, citing* S.C. Code Ann. § 44-20-30 (Supp. 2011); *Franklin v. Maynard,* 356 S.C. 276, 278-79, 588 S.E.2d 604, 605 (2003). Not every identifiable mental condition will render a murderer ineligible for a sentence of death. Nothing prohibits a defendant from offering evidence of mental limitation(s) during the sentencing phase of a capital trial. The record in this case reflects counsel presented ample evidence of Applicant's background and limitations. (See R. p. 2378, Shackelford (mental health treatment at early age); p. 2425, Lisa Lamb (Applicant's mother on family and background); p. 2483 Pamela Gordon (Applicant's aunt on Applicant requesting help at an early age); p. 2483 Dr. Alex Morton (psycho-pharmacology aspect on medication, symptoms and other drugs); p. 2552 Dr. Donna Schwartz-Watts

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(background, symptoms and diagnosis of bipolar disorder - also references testing by neuro-psychologist, Dr. Brawley); p. 2621 Dr. Marti Loring (psychosocial assessments and genogram). Applicant's additional evidence presented during the post-conviction relief hearing on the genetics conditions was not reliable. It was subject to significant criticism under the prevailing medical norms.

Applicant has failed to establish by a preponderance of the evidence in this case that trial counsel's failure to present this additional evidence was unreasonable, deficient, or ineffective assistance in comparison to that which was expected of reasonably competent counsel under prevailing professional norms at the time of the trial. Applicant has further failed to establish that, even if counsel was deficient in failing to present such evidence, he has been prejudiced by failing to establish a reasonable probability that but for any deficient performance by counsel the outcome would have been different.

Applicant's claim for relief on this ground should be and therefore is denied.

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C. CRYSTAL WILLIAMSON TESTIMONIAL EVIDENCE

In a death penalty case the jury does not "weigh" aggravating circumstances against mitigating circumstances in order to reach a decision as to punishment, but it must find at least one statutory aggravating circumstance accompanying a murder before the law permits the imposition of a death sentence. The jury may recommend a life sentence for any reason or for no reason other than as a simple act of mercy. The jury is required to consider mitigating circumstances but are under no compulsion to find the existence of any mitigating circumstance in order to recommend a sentence of life imprisonment as opposed to a death sentence. As a result the "role" the defendant played in the commission of the murder is important evidence in mitigation where it can be shown that the role was a minor one. S. C. Section 16-3-20(c)(B)(4) and (5) requires the jury to consider that "the defendant was an accomplice in the murder committed by another person and his participation was relatively minor" and "the defendant acted under duress or under the

domination of another person" as circumstances in mitigation of punishment where such circumstances are supported by evidence in the record.

The record reveals that Chuck Emery was the son of victim Ray Emery and the step-son of victim Mary Ann Emery. Detective Reid Lindsey testified that as a result of his investigation it became his "understanding" that the relationship between Chuck and Mary Ann was "bad" and that the cause was Chuck's drug usage and causing "problems at the house". According to Lindsey: "witnesses place Chuck Emery in and about the scene of the murder, the Emery home, during the time estimated by the Medical Examiner and Coroner to be the time of the victim's deaths". "There was evidence of burglary, arson, and sexual assault, but no evidence of forced entry". He "believed that Chuck Emery had keys to the house" and "Chuck Emery and his associates were all known drug users and distributors." There were other potential witnesses who could have provided testimony that would have tended to support motive and opportunity on the part of Chuck Emery to commit the crimes for which Torres was convicted.

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Williamson testified that she believed Applicant did not act alone in the crimes for which he was convicted and that Chuck Emery was also involved. When asked about the sentencing of Torres she stated that she believed in the death penalty, but had no opinion on whether Torres should have received a death sentence. She believed that that it was worth Torres receiving a life sentence to have Chuck Emery implicated in the crimes but stated with regard to Torres, "If he did this by himself he deserves to die, but I don't think he did" and "If this case doesn't deserve a death penalty, I'm not sure what does ..." In short, it was Williamson's hunch, suspicion, and belief that Chuck Emery was involved in the crimes because of his volatile relationship with the victims and his personality, although there was apparently insufficient evidence to support a charge or a conviction of Emery for the crimes for which Torres was convicted, without the assistance of Torres in providing the necessary information to support the contention that another was involved in the crimes.

While the Constitutions of the United States and the State of South Carolina guarantee the right of a person charged with a crime to present a complete defense, this right is not without reasonable restriction. <u>United States</u>

v. Scheffer, 523 U.S. 303 (1998) "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or other rules promulgated by the Supreme Court of South Carolina." Rule 402, SCRE. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury ..." Rule 403, SCRE. The term "unfair prejudice" refers to the "undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one." State v. Sweat, 362 S.C. 117 (App. 2004)

The presentation of evidence relating to "third-party guilt" is governed by State v. Gregory, 198 S.C. 98 (1941) wherein the Court held that "...evidence offered by [an] accused as to the commission of the crime by another person must be limited to such facts as are inconsistent with his own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence; evidence which can have no other effect than to cast a bare suspicion upon another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible." "An orderly and unbiased judicial inquiry as to the guilt or innocence of a defendant on trial does not contemplate that such defendant be permitted, by way of defense, to indulge in conjectural inferences that some other person might have committed the offense for which he is on trial, or by fanciful analogy to say to the jury someone other than he is more probably guilty." Whether the evidence is being offered to actually prove that another person and not the defendant committed the crime or is being offered to establish a less culpable role in the crime by the defendant on trial, such evidence must meet the standard established by Gregory. This standard is not satisfied when a death penalty defendant during the sentencing phase of a capital trial or later as the applicant in a post-conviction proceeding claims that some other person "could" have committed the crimes with whom he was "possibly" only a minor participant. In this case the applicant has not identified Chuck Emery as a perpetrator of any of the

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crimes for which the applicant was convicted or made the claim that the applicant was only a minor participant, he simply claims that there exist some facts which could have been established by several witnesses that defense counsel could have called to testify at trial to persuade the jury that there is a likelihood someone else committed the crimes and the applicant may have only been a minor participant and thus not deserving of a death sentence.

Where evidence of third-party guilt is inadmissible because it is not sufficiently reliable due to its speculative and conjectural nature, by logical extension, it should also not be admissible in the death penalty phase of a capital trial where it is offered in an attempt to "contradict the State's theory that the applicant was the sole moving force in the crime" and to prove "the applicant's minor role in the offense." For either purpose, it still requires proof of third-party culpability and the evidentiary rules and standards for the admission of "third-party" guilt are applicable.

It would appear to this Court that Williamson was inclined to recommend mercy if Torres was cooperative and implicated Chuck Emery in the crimes so that all who were responsible would be held responsible. Since that did not occur by the time of the trial, Williamson appeared to be willing to leave the sentencing decision up to the jury without expressing her opinion on the application of mercy. Further had she been willing to express her opinion as to the application of mercy by the jury, she would not have been allowed to give her reasoning, if it was based upon her suspicion, hunch, or belief that Chuck Emery was also involved in the crimes, as that would necessarily have required the admission of third-party guilt evidence.

Applicant's claim that trial counsel was deficient for failing to offer this evidence and that he has been prejudiced thereby fails to meet the requisite standard for relief for several reasons; (1) the evidence was not admissible under the rules of evidence and the Gregory standard for admission; (2) there is no likelihood that the trial court would have permitted the evidence to have been admitted as he had already excluded it in the guilt phase of the trial, and; (3) there is no likelihood that had trial counsel offered the evidence and it had been excluded by the trial court, that an appellate court would have found error

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in the trial court's decision and remanded for rehearing. Therefore counsel was not deficient in failing to offer such evidence.

Applicant has failed to establish by a preponderance of the evidence in this case that trial counsel's performance in this regard was unreasonable, deficient, or ineffective assistance in comparison to that which was expected of reasonably competent counsel under prevailing professional norms at the time of the trial. Applicant has further failed to establish that, even if counsel was deficient in some manner, he has been prejudiced by failing to establish a reasonable probability that but for any deficient performance by counsel the outcome would have been different.

Applicant's claim for relief on this ground should be and therefore is denied.

D. <u>CUMULATIVE ERRORS COMMITTED BY TRIAL COUNSEL</u>

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The legal concept of "cumulative error" in the analysis of a trial counsel's performance in determining an "ineffective assistance of counsel" claim has not been recognized by the Supreme Court of South Carolina, see Lorenzen v. State, 376 S.C. 521 (2008), although the Court has expressed a potential application of the concept when it held in Green v. State, 351 S.C. 184 (2002) that:

> "Although an applicant must ordinarily show actual prejudice, he may be relieved of that burden if counsel's ineffectiveness is so pervasive as to render a particularized prejudice inquiry unnecessary." "While it is unsettled law whether individual errors, which may not be independently prejudicial, may be prejudicial when taken as a whole, we recognize the threshold to asking the cumulative prejudicial question is to first find multiple errors."

The Fourth Circuit Court of Appeals in considering the matter has clearly rejected the concept when it held that:

> "Having determined that none of counsel's actions could be considered constitutional error [under Strickland v. Washington] it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived [applicant] of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under Strickland v. Washington, 466 U.S. 668 (1984).

To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims or trial error, must be viewed individually, rather than collectively, we do so now."

Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998) cert. denied. 526 U.S. 1035 (1999).

Applicant in his post-trial brief has specifically identified and argued that nine additional errors he claims were committed by trial counsel entitle him to relief because but for the cumulative effect of the errors alleged, there is a reasonable probability that the result in the trial would have been different.

1. "trial counsel's strongly worded opening statement that the applicant was not guilty when they knew the strength of the State's guilt phase evidence and knew that they would not be offering a single witness in defense of the charges. The error forfeited counsel's credibility during the sentencing phase and evidenced a complete lack of a unified trial strategy between two phases in a capital trial."

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Trial counsel testified that Applicant did not want a concession of guilt and wished to contest his guilt at the trial. Counsel was under an ethical obligation in their representation to follow the instructions of their client. Counsel testified that they devised a strategy based upon that decision to divide the representation in the guilt phase and penalty phase so that different counsel would be handling the separate phases so as to avoid the possibility that counsel's credibility would be compromised by taking what might be considered inconsistent, conflicting, or alternate positions.

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

2. "trial counsel failed to understand that the role in the offense testimony of multiple witnesses exposed the prosecution to a challenge that it was favoring one person who was involved in the multiple murders from arrest while asking for death on the one who had no motive for the killings. This evidence, if used correctly, would have both enhanced the potential for a negotiated settlement and presented the jury with evidence that the State's

theory of the case was wrong and its motives improper, thereby tempering the jury's decision by returning a sentence of life without parole."

Applicant alleges that there was evidence which indicated the possible involvement of an accomplice in the commission of the crimes for which Applicant was convicted. Applicant does not make a claim of "actual innocence" but only that there is evidence supporting the proposition that Chuck Emery had motive and opportunity to have committed the crimes or been involved in their commission. Had this evidence been submitted it could have potentially shown that Applicant had a lesser culpability and was not eligible for a death sentence under Enmund v. Florida, 458 U.S. 782 (1982) Applicant asserts that the evidence could have established that the applicant was not the person who actually killed the victims and would thereby make him ineligible for a death sentence. "Major participation in the crimes committed combined with reckless indifference to human life is sufficient culpability to impose the death penalty upon a defendant liable for murder under a theory of accomplice liability" Tison v. Arizona, 481 U.S. 137 (1987), State v. Hughes, 336 S.C. 585 (1999) and the record reflects that there was substantial and convincing evidence that the Applicant was a major participant and acted with "reckless indifference to human life" as the jury found he acted with "malice aforethought" beyond a reasonable doubt. There is no evidence in the record from which the jury could have found that Applicant was a minor participant in the crimes for which he was convicted. Detective Lindsey testified that "there was nothing I found in my investigation that suggested there was anybody but Mr. Torres."

As has been previously addressed, the standard of admission of evidence of third-party guilt was not met in this case or supported by the record in this case and therefore its exclusion was appropriate.

Further, no direct evidence or any other evidence from which it might be reasonably inferred, has been presented that would tend to show that any effort trial counsel could have made would have resulted in an offer made by the State to allow the defendant to plead guilty to the crimes in return for a negotiated "life" sentence.

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Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

3. "defense counsel failed to ask for a continuance when, during the twenty-four hour cool down period after the guilt phase concluded, the applicant refused to allow his jailers to pat him down for weapons." This "would have allowed counsel to investigate, develop, and present expert testimony that incorporated this event into the medical testimony, given the applicant's genetic limitations which included an extreme sensitivity to touch. In addition, it would have allowed sufficient time to redact both audio and video portions of the recording which contained irrelevant and highly inflammatory information."

The record reflects that trial counsel requested and was afforded time and opportunity that he deemed necessary and sufficient to investigate the matter and be prepared to address it during the trial. There has been no witness identified, called to testify, or other evidence submitted by the applicant that would establish any deficiency in trial counsel's performance in this context or that would give rise to a reasonable probability that the outcome would have been different had trial counsel done anything Applicant now suggests could have been done. Bannister v. State, 333 S.C. 298 (1998); Porter v. State, 368 S.C. 378; Lorenzen v. State, 376 S.C. 521 (2008); and Dalton v. State, 376 S.C. 130 (App. 2007)

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Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

4. "the trial judge offered a definition of "reasonable doubt" which included the statement that the jury could return a not guilty verdict only if it found "a real possibility that the defendant is not guilty". This charge was fundamentally erroneous but went unchallenged."

The language used by the trial court in its "reasonable doubt" instruction which included the language of which the applicant complains has been specifically approved by the Supreme Court of South Carolina in State v. Darby, 324 S.C. 114 (1996) and State v. Logan, 405 S.C. 83 (2013)

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

5. "trial counsel failed to object on the numerous occasions when the prosecutor asked questions of witnesses and then argued to the jury that other individuals who suffered trouble in life were not murderers. The State did not identify the other people it was referring to and offered no evidence that those "other people" had been tracked through their lives and did not commit murder." ... "the questions asked and the arguments made were not limited to the nature and circumstances of the crime or the unique characteristics of the defendant, and therefore arbitrary and irrelevant material into the sentencing process in violation of the statute and State v. Burkhurt."

Applicant has failed to identify the witness being examined or the question that was asked of the witness of which he now complains or on what ground there exists a legal basis for an objection to any question of which he now claims, and one is not obvious or easily identifiable by this Court.

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

6. "when the trial judge charged the jury that a witness who had just been qualified as an "expert" was given special standing in the eyes of the law, trial counsel failed to ask that the judge simultaneously charge the jury that it could believe the testimony of an expert or disbelieve it as with any other witness."

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The trial judge provided the jury with a current and proper instruction on the jury's function as the finders of the facts and the judges of the credibility or believability of the witnesses who have testified, whether they be qualified as an expert or simply testifying as a lay witness. There was no deficiency in the instruction when compared to the present state of the law and therefore trial counsel was not deficient in seeking an additional instruction.

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

7. "trial counsel failed to object when expert witnesses would testify to opinions that were conditioned with remarks like "match", "I believe", "I imagine", the matter would be "approximated"', and other caveats entirely inappropriate as testimony of an expert."

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

8. "trial counsel failed to ask for a jury charge on circumstantial evidence that would have substantially aided the applicant's case for a tempered result. In a case that relied heavily upon circumstantial evidence, trial counsel failed to ask for the historic and more favorable circumstantial evidence charge."

The record in this case reflects that the trial judge provided the jury with a current and proper "circumstantial evidence" instruction and therefore trial counsel was not deficient in requesting an additional instruction.

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

9. "the State offered a shoe print "expert" and others to establish a circumstantial connection between the applicant and the crime scene. Trial counsel failed to challenge these numerous experts and their respective opinions for trustworthiness and whether they actually could articulate the necessary evidentiary prerequisites for admission as announce by the Supreme Court for expert testimony."

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Applicant has presented no evidence to establish this claim and has failed to show that trial counsel's performance was deficient in any way regarding this claim.

Applicant has failed to establish any error or deficient performance on the part of trial counsel or any prejudice resulting from counsel's performance.

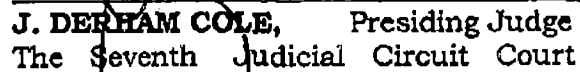
Having reviewed the record in this case in its entirety and finding no constitutional error on the part of trial counsel, a cumulative-error analysis is unnecessary. However, to the extent there has been presented evidence in support of the individual allegations of ineffective assistance as alleged in Section D above, this Court has considered the allegations collectively and

based upon the entire record in this case find that any cumulative deficiency was not so pervasive as to render Applicant's trial fundamentally unfair and therefore Applicant has failed to establish prejudice resulting from counsel's performance.

Applicant's claim for relief on this ground should be and therefore is denied.

CONCLUSION

Applicant's request for **POST-CONVICTION RELIEF** should be and **IS** therefore **DENIED** and his **APPLICATION** seeking relief is **DISMISSED WITH PREJUDICE.**



December 9, 2019

J. DERHAM COLE, Presiding Judge
The Seventh Judicial Circuit Court

FILED
2019 DEC -9 PM 4:07
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF **SPARTANBURG**
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE - PCR

CASE NO. **2011-CP-42-01851**

ANDRES ANTONIO TORRES, SCDC#6028
Applicant,

The **STATE** of South Carolina,
Respondent,

<u>*CHECK ONE:*</u>

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other;

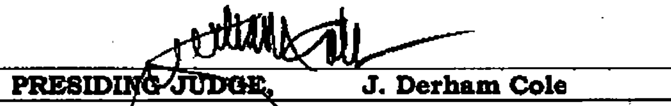
☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other .

IT IS ORDERED AND ADJUDGED: ☐ See attached formal order; ☒ Statement of Judgment by the Court:

This matter came before this court on **MOTION** of the applicant pursuant to **RULE 59, SCRCP.**

Based upon a review of the record of the case, the argument of counsel submitted by memoranda, and consideration of the applicable statutory and case law, this court finds that the applicant's **MOTION** should be and **IS** therefore **DENIED.**

Dated at Spartanburg, South Carolina, this **8th** day of **May, 2020.**



PRESIDING JUDGE, **J. Derham Cole**

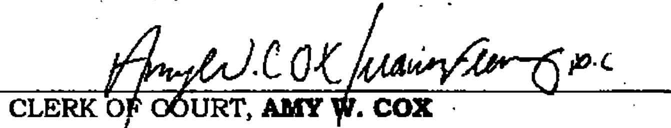
This judgment was entered on the day of **May 8, 2020**, and ~~a copy mailed first~~ emailed class this 8 day of May 2020 to attorneys of record or to parties (when appearing pro se) as follows:

WILLIAM H. EHLIES, *Esq.*
TROY A. TESSIER, *Esq.*

ATTORNEY(S) FOR THE APPLICANT

DONALD J. ZELENKA, *SA DEPUTY AG, SC*
MELODY J. BROWN, *SA AG, SC*

ATTORNEY(S) FOR THE RESPONDENT



CLERK OF COURT, **AMY W. COX**

FILED 2020 MAY -8 PM 3:56 CLERK OF COURT SPARTANBURG COUNTY AMY W. COX

SCRCP FORM 4 (Revised 5/00)