

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas, Non Jury

L. Casey Manning, Circuit Court Judge

Case Number: 03-CP-38-0359

RECEIVED

MAR 14 2013

S.C. Supreme Court

Charles O. Shuler,.....Appellant.

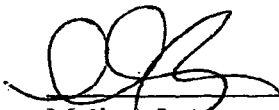
v.

The State.....Respondent.

Notice of Appeal

Charles O. Shuler appeals the judgment of the Circuit Court, the Honorable L. Casey Manning presiding, denying Applicant's request for post conviction relief. The Order was signed on May 24, 2011 and received by counsel for the Applicant on May 31, 2011. The Honorable L. Casey Manning, presiding, also denied Applicant's Motion to Alter and Amend Judgment pursuant to SCRCP Rule 59 on January 7, 2013 and received by counsel for Applicant on January 17, 2013.

Dated: 2/11 / 2013



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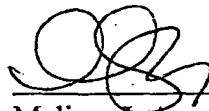
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Proof of Service

I certify that I have served a copy of the Notice of Appeal on the State of South Carolina by depositing a copy of this Notice in the United States Mail, postage prepaid, on 2/11/2013, addressed to the State's attorney of record, Anthony J. Mabry, Esquire, Office of the Attorney General, P.O. Box 11549, Columbia, SC 29211.

Dated: 2/11/2013



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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	
CHARLES O. SHULER,	)	C.A. No. 03-CP-38-0359
	)	
Applicant,	)	
	)	ORDER OF DISMISSAL
-vs-	)	
	)	
STATE OF SOUTH CAROLINA	)	
	)	
Respondent.	)	
_____	)	

This matter is before this Court by way of an application for post-conviction relief ("PCR") filed on March 21, 2003, by death-sentenced inmate Charles O. Shuler ("Applicant"), and a final amended PCR application filed on July 25, 2006. The allegations have been fully briefed, and evidence and argument presented at an evidentiary hearing held July 25th through July 27th, 2006. At the evidentiary hearing, applicant abandoned two (2) of his grounds for relief. Approximately one (1) week after the merits hearing, this Court reconvened and took the testimony of Joseph Savitz, Esq., applicant's direct appeal counsel. Subsequently, this testimony could not be located, and by agreement of the parties, Mr. Savitz' testimony was taken again on October 5th of 2010. Subsequent to the taking of this testimony, collateral counsel notified this Court by e-mail that applicant intended to abandon both of his grounds of ineffective assistance of appellate counsel. This Court also conducted an *in camera* review of the Solicitor's file after the first two evidentiary hearings at the request of applicant. For all the reasons set forth in this Order, this Court, after careful consideration of all the evidence, testimony, and argument, denies relief and dismisses the application with prejudice:

*Facts*¹

On September 3, 1999, Linda Williams asked applicant, Charles Shuler, to move out of her home located in Orangeburg County. Applicant and Linda had lived together or cohabited for two (2) years in Linda Williams' home. The following day, September 4th, the police were summoned to Linda Williams' home, and a deputy sheriff told applicant to leave. Over the next several days, applicant telephoned Linda's home numerous times and left threatening messages on her answering machine. In one message, applicant stated: "you can run, and you can hide, but you can't go on forever, because Charles is coming for your god damn ass. Because you, Linda Gates [sic],² Dot Gates, Terry Gates, Lori Gates, and all you mother fuckers, because I am coming for *you*! I am coming for you. You know what I mean?..." (italics in original).

On September 6th, a police officer was again dispatched to Linda's home. While there the phone rang. The officer answered the phone call, and it was applicant on the other end of the line. Applicant stated "[p]ut that whore on the phone. She owes me \$40,000." The officer told applicant not to call again, and applicant responded that he was not afraid of the law, and stated "I'll see her later."

On September 7th, Lisa Harwood, who lived three (3) doors down the street from Linda Williams, saw applicant driving into Linda Williams' neighborhood. Ms. Harwood testified she was leaving home to pick up her children from school, and applicant drove into their neighborhood

¹The facts of this case are taken directly from the South Carolina Supreme Court's Opinion in this case. State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003). Where facts are recited that were not included in the Supreme Court's opinion in this case, the appropriate record citation is provided.

²Linda Williams' maiden name was Gates.

in his red Nissan. She testified he was wearing a baseball cap and no shirt. **(R. pp. 2186-2191).**³

On September 8, 1999, around 5:30 p.m., a retired highway patrolman was traveling south on Highway 301, near its intersection with I-26, in Orangeburg County. **(R. pp. 2191-2195).** At that time, he saw applicant driving his red automobile headed in the same direction, which was toward the victim's residence. **(R. pp. 2191-2195).** The retired trooper knew applicant because they both lived in the same area of Orangeburg County, which was about fifteen (15) miles from where the victim lived.⁴ **(R. pp. 2191-2195).**

On the same day, September 8, 1999, Linda Williams' sister-in-law, Cassandra Gates, was at Linda's home. Cassandra arrived at Linda's home around 4:30 p.m. Approximately 15 to 20 minutes before Cassandra left Linda's home, applicant called and the answering machine recorded the call. This time applicant did not threaten Linda or Dorothy Gates, but stated he needed to come by the house and pick up his medicine. Cassandra was there when this call came in. Cassandra left Linda's home and returned to her home, which was nearby. Approximately 15 -20 minutes after she left Linda's home, Cassandra was notified of the murders in this case. **(R. pp. 2167-2181).**

On the same day, September 8, 1999, Linda Williams' nine (9) year-old son, Buster, was playing outside his mother's home. Buster saw applicant's car circle the block three (3) times before driving into Buster's mother's yard. Applicant drove through the ditch, up into the yard, and stopped

³Either the day before, or the day of the murders of the victims, a warrant was obtained for the arrest of applicant for telephone harassment. **(See PCR Tr. p. 77, ll. 1-19 & See PCR Exhibits, Plaintiff's Exhibit 5 & R. pp. 2182-2185).**

⁴The witness, Mr. Blume, testified he saw applicant coming from the Elloree area of Orangeburg County headed toward the city of Orangeburg. The victim lived in the Cordova community which is located on the other side of the City of Orangeburg. **(R. pp. 2191-2195).**

in front of the front porch. Applicant got out of his car carrying a shotgun.⁵

Applicant broke through the front window of Linda Williams' home. Applicant entered the home through the broken window still carrying the shotgun. Buster ran inside his mother's home and heard applicant tell his mother Linda "put the mother fucking phone down" and "I got you now, you bitch." Buster immediately ran to a neighbor's home. While he was running, Buster heard a gunshot.

One of the occupants of Linda's home called 911. On the tape recording of the call, screaming and three (3) gunshots can be heard. After breaking into the home, applicant intentionally shot Linda, her sixty-two (62) year old mother, Dorothy Gates, and Linda's daughter and Buster's older sister, Stacy Williams.

Stacy, who was only thirteen (13) years-old at the time, also called 911. Stacy told the 911 operator that five (5) people had been shot by applicant.⁶ Stacy also told the operator that she had been shot, and she could not feel anything below her waist. Applicant had shot thirteen (13) year-old Stacy in the back. **(R. pp. 2235, 2318-2319, 2275).**

Stacy stayed on the line with the 911 operator for several minutes. In addition to identifying applicant as the shooter, the 911 tape contains several minutes of Stacy's conversation with the 911 dispatchers. Stacy's breathing was labored, and she had difficulty speaking. Stacy told the dispatcher several times that "I'm hurting" and "please hurry." Her pain and suffering are evident on the tape.

⁵After getting out of the car with the shotgun, applicant left the door open to this vehicle. **(R. pp. 2217-2218, 2222 & State's Exhibit Two).**

⁶Apparently, Stacy thought her younger brother Buster was still in the house. **(R. p. 2235).** Applicant shot himself after shooting the victims. **(R. p. 2229).**

When deputies arrived at Linda's home, they found Linda shot and barely alive. (R. p. 2236, 2245, 2274, 2283-2284). Stacy was moving on the living room floor. (R. p. 2244). She was conscious and inquired about her brother, Buster. (R. pp. 2235). She stated "Charles" had shot them. (R. pp. 2236). She told police applicant had come through the window and shot her, her mother, and her grandmother.⁷ (R. p. 2236). Dorothy Gates, Linda's mother, was found in a bedroom of the home, lying face down. (R. p. 2243). She too had been shot and was barely alive. (R. pp. 2274, 2305-2324). In addition to asking about her brother, Stacy begged a paramedic not to let her die. (R. pp. 2274-2275). Stacy lived for approximately ten (10) minutes after paramedics arrived. (R. p. 2278, 2285). She ultimately died from the gunshot wound to her lower back. (R. pp. 2285, 2305-2324). Linda and Dorothy also died from their gunshot wounds. (R. pp. 2305-2324). None of the women were armed with any type of weapon.

Applicant was found in the hallway of the home, near Dorothy Gates' body, with a self-inflicted gunshot wound. (R. pp. 2229-2230). His shotgun was beside him, and his finger was on the trigger release. (R. p. 2230). Applicant asked the police to shoot him and finish it, "finish the job." (R. p. 2244). Without being questioned at all, applicant stated to a deputy sheriff his feelings toward the three (3) murder victims. He stated, "Fuck em, fuck em, let them die." (R. p. 2230). Applicant also stated in front of another officer, "Kill the motherfuckers and finish the job." (R. p. 2253).

Applicant shot all three (3) victims with buckshot using a Browning 12-gauge shotgun. (R.

⁷The first officer on the scene found the front door locked and only gained entrance to the home by crawling through the same window applicant had busted out and crawled through to shoot the victims. (R. pp. 2223-2224).

pp. 2229-2230, 2305-2324, 2370-2373). Police found four (4) more unfired 12-gauge shotgun shells in applicant's pocket after the shootings. (R. 2374). The fired shotgun shell casings found at the scene were determined forensically to have been fired by the Browning 12-gauge shotgun brought to the crime scene by applicant and found next to him after he shot himself. (R. pp. 2372-2373).

Dorothy Gates was shot in the chest. Linda Williams was also shot in the chest.⁸ Stacy was shot in the lower back or upper buttocks. (R. pp. 2304-2324).

After his recovery from his self-inflicted gunshot wound, applicant also stated in front of a nurse at the Orangeburg County Detention Center "... I've killed three people and don't mind making it four." On the anniversary of Dorothy Gates' death, applicant told a detention center officer "I killed this witch" or "I killed this bitch" while he pointed at a picture of Dorothy in a local newspaper. At trial, applicant's counsel conceded that applicant "snapped" and killed the three (3) victims. Based on the evidence in the record from the trial and post-conviction relief merits hearing, there is absolutely no question that Charles Shuler is the person who murdered Stacy Williams, Linda Williams, and Dorothy Gates.⁹

⁸The gun was close enough to Linda Williams when she was shot that even though buckshot was used the entrance wound was a single round hole. (R. pp. 2307-2317). The gun was close enough to Dorothy Gates that even though buckshot was used, there was an approximately two inch hole in her chest, with only one single pellet entry to the right of that wound. (R. pp. 2307-2317). Dorothy Gates also had powder burns or stippling or tattooing on her left arm. (R. p. 2311).

⁹ At trial, nine (9) year old Buster Williams also identified applicant as the person who broke into his mother's home with the shotgun and threatened his mother.

PROCEDURAL HISTORY

After the murders, applicant was subsequently arrested and charged with three (3) counts of murder and one (1) count of burglary in the first (1st) degree. On November 22, 1999, the Orangeburg County Grand Jury indicted applicant for three (3) counts of murder and burglary in the first (1st) degree. **(99-GS-38-1892 through 1895)**. The burglary indictment alleged applicant entered the home of Linda Williams willfully and unlawfully with the intent to commit a crime therein, specifically murder, and while in the dwelling applicant was armed with a deadly weapon, a shotgun, and caused physical injury to Dorothy Gates, Linda G. Williams, and Stacy Williams.

The State subsequently served applicant with its Notice of Intent to Seek the Death Penalty. Michael R. Culler, Jr., Esq. and Christopher Wilson, Esq. were appointed to represent applicant on the charges. The case was prosecuted by First (1st) Circuit Solicitor Walter M. Bailey.

The Trial

Applicant proceeded to trial on March 12, 2001 before the Honorable Thomas W. Cooper Jr., Circuit Court Judge. General voir dire and individual voir dire began on March 12, 2001, with a jury panel of twelve (12) jurors and three (3) alternates impaneled on the morning of March 17, 2001.

The Guilt Phase

The guilt phase of the trial began the same date, March 17, 2001, and concluded on March 18, 2001. On March 18, 2001, after closing arguments and jury instructions, the jury convicted applicant of three (3) counts of murder and burglary in the first (1st) degree. Each juror was polled, and each affirmed their verdicts.

The Penalty Phase

After the required statutory twenty-four (24) hour waiting period, the penalty phase began on March 20, 2001 and concluded on March 22, 2001. On that date, after closing arguments and instruction on the law by Judge Cooper, the jury found the following aggravating circumstances beyond a reasonable doubt: (1) Two or more people were murdered pursuant to one scheme or course of conduct, (2) the murders were committed during the commission of a burglary in the first (1st) degree, and (3) murder was committed while in the commission of physical torture.¹⁰ In addition to finding these aggravating circumstances, the jury unanimously recommended a sentence of death for the murders of Linda Williams, Dorothy Gates, and Stacy Williams. Judge Cooper, following the jury's recommendation, sentenced applicant to death. The death sentence was imposed by Judge Cooper on the same date as the jury's recommendation of sentence, March 22, 2001. Judge Cooper also found the sentence of death was appropriate under the circumstances and not the result of passion, prejudice or any arbitrary factor. Applicant was sentenced to life in prison for burglary in the first (1st) degree.

The Direct Appeal

Applicant appealed his convictions and death sentence to the South Carolina Supreme Court.

Applicant raised three (3) issues on direct appeal:

¹⁰The State only proceeded on torture as an aggravating circumstance as to thirteen (13) year old Stacy. This was based in part on the entire 911 tape that was admitted in the penalty phase which records Stacy screaming and then talking to the 911 operator for several minutes after being shot. She describes her pain and asks the 911 dispatcher to please hurry. She also testified she could not feel her lower body. Her pain and suffering are evident on the tape. Shuler, 353 S.C. at 182. Originally, the State had sought to proceed on the torture aggravator as to all three (3) victims, however, the State withdrew the torture aggravator as to the two (2) adult victims at the beginning of the penalty phase.

(1) Did the trial judge err by allowing the Solicitor to “exploit” portions of the un-redacted version of the 911 tape during the sentencing proceeding?

(2) During closing argument did the Solicitor improperly comment on applicant’s constitutional right not to testify?

(3) Did the Solicitor’s closing argument inject an arbitrary factor into the jury’s deliberations? (See Brief of Appellant). The State filed a responsive brief.

On February 3, 2003, applicant’s convictions and death sentence were affirmed unanimously by the South Carolina Supreme Court. State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003). At the close of its opinion, the South Carolina Supreme Court also noted that it had reviewed the entire record and concluded the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the jury’s finding of statutory aggravating circumstances for each of the three (3) murders were supported by the evidence. Id. at 189. The Court also found the death penalty was neither excessive nor disproportionate to that imposed in similar cases. Id., (*numerous citations omitted*). This post-conviction relief (PCR) application followed.

The PCR action and its Allegations.

Applicant filed his initial application for post-conviction relief (PCR) on March 21, 2003. (03-CP-38-0359). On April 9, 2003, the South Carolina Supreme Court issued an Order staying the Order of Execution of applicant to allow him to pursue potential state PCR relief and assigning this Court with continuing jurisdiction regardless of assignment and with the authority to schedule such hearings as may be necessary. On September 16, 2003, this Court, pursuant to its order of assignment appointed Melissa J. Kimbrough, Esq., and James Brown, Esq., to represent applicant in the PCR action. Respondent filed its Return to the PCR application on September 18, 2003.

Applicant subsequently filed an amended application for post-conviction relief. On July 25, 2006, applicant filed his second (2nd) amended application (final application) for post-conviction relief.

A merits hearing was held on July 25th 2006 through July 27th, 2006 at the Orangeburg County Courthouse before this Court. Applicant was present at the hearing and was represented at the hearing by Ms. Kimbrough and Mr. Brown. Respondent was represented by Derrick McFarland, Assistant Attorney General.

At the merits hearing, applicant testified in his own behalf. Applicant also called as witnesses Carol Shuler, Brenda Smith, Amanda Smith, and Lisa Beck. Applicant also submitted an affidavit of O.E. Ott. Applicant also submitted a deposition of Edward Williams, Linda's former husband and Buster's father.

At the merits hearing, Respondent called as witnesses applicant's trial attorneys Michael R. Culler, Esq. and Christopher Wilson, Esq. Respondent also called Edward "Buster" Williams. As previously stated, approximately one (1) week later, additional testimony was taken from applicant's direct appeal counsel, Joseph Savitz, Esq., with applicant, his collateral attorneys, and Mr. McFarland present. Subsequently, this testimony could not be located and Mr. Savitz' testimony was taken again before this Court in October of 2010 by agreement of both parties. Applicant was present at this hearing along with both of his collateral attorneys, and Assistant Attorney General Anthony Mabry appeared for the Respondent. Subsequent to the taking of this testimony, applicant's collateral attorney, Ms. Kimbrough, notified this Court by e-mail that applicant wished to waive and abandon his grounds of ineffective assistance of appellate counsel.

Approximately, one (1) year and a half (½) after the merits hearing, collateral counsel James "Jim" Brown wrote a letter to this Court stating that applicant intended to amend his application for

a third (3rd) time asserting *the State* improperly introduced and argued prison conditions evidence in violation of State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) and asserting the amendment would be permissible under Rule 15 SCRPC. Subsequently, applicant did not file a motion to amend his PCR application or a third (3rd) amended application.¹¹

The Allegations

At the merits hearing on July 27, 2006, on the record, applicant abandoned several of the allegations he made in his second (2nd) amended application (final application) for post-conviction relief. Applicant abandoned Ground A (trial counsel failed to examine the firearm for defects in its function) and Ground B (trial counsel failed to object to testimony that applicant said he would kill another person in an argument during pre-trial detention). (PCR Tr. p. 5). As a result of applicant's express abandonment of those grounds on the record, this Court dismisses Grounds A and B with prejudice. At the merits hearing, applicant did not abandon grounds C through N which are as follows:

Ground C: Counsel was ineffective for failing to move for a change of venue.

Ground D: Counsel was ineffective for failing to introduce more evidence of intoxication of applicant at the time of the murders.

Ground E: Counsel was ineffective in not challenging the introduction of an escape conviction in the penalty phase and not introducing additional facts behind the conviction.

Ground F: Counsel was ineffective in failing to present mitigation evidence of four (4) witnesses regarding a plea for mercy, SLED forensic information regarding applicant's mentality and the domestic circumstances behind the crime, and

¹¹At a status conference held approximately three (3) years after the merits hearing, collateral counsel made clear that applicant was not seeking to amend his application to assert a claim of ineffective assistance of counsel in this regard but only a claim that *the Solicitor* violated the holding in Burkhart. The State objected to any late amendment.

information from witness Edward Williams.

Ground G: Trial counsel was ineffective in failing to object to the trial judge's (allegedly) improper limitation of applicant's final statement to the jury.

Ground H: Counsel was ineffective for failing to object to the playing of Doctor's Sexton's video-taped testimony because the witness was not "present" before the jury so the jury could observe his demeanor, i.e. he was only a "talking head."

Ground I: Counsel was ineffective for failing to object to the testimony of Doctor Sexton on the issue of the pain the victim suffered because Doctor Sexton was not qualified to give such an opinion and the testimony did not meet the scientific standard.

Ground J: Counsel was ineffective in failing to object to the trial court's charge on torture because the charge was overbroad because it permitted the finding of torture from any murder.

Ground K: Counsel was ineffective in failing to object to the trial court's torture charge on the grounds that the trial judge did not charge the jury they had to unanimously agree as to each element of this aggravating circumstance before the existence of this aggravating circumstance could be found.

Ground L: Counsel was ineffective in failing to object to the trial court's torture charge because part of the charge read that torture exists when there is an unlawful act of violent injury to another person, which accompanied by circumstances of aggravation, such as a difference in the sexes, because this violates the equal protection clause.

Ground M: Appellate counsel was ineffective for failing to raise the issue of the trial judges erroneous sua sponte disqualification of six jurors based on the their tardiness.

Ground N: Appellate counsel was ineffective in failing to raise the issue of the trial courts disqualification of Juror Lee Issac.

At the conclusion of the merits hearing, applicant's collateral counsel also requested that this Court order the Solicitor to turn over his file to applicant so his attorneys could review the file and see if there was any Brady or Rule 5 material improperly withheld by the Solicitor before or during his capital trial. This Court refused to grant that specific request; however, this Court did require

the Solicitor to turn over his file to this Court for *in camera* inspection. The Solicitor's file was turned over to this Court for *in camera* review on or about February 1, 2008. This Court carefully reviewed the Solicitor's file *in toto* in comparison to the file that was disclosed to applicant prior to trial by the Solicitor.

Also, at the conclusion of the evidentiary hearing, it was agreed that the record would remain open for an appropriate period of time so that applicant's counsel could take the testimony of appellate counsel, Joseph Savitz. As previously stated, this Court was reconvened approximately one (1) week after the merits hearing and Mr. Savitz' testimony was taken. Subsequently, this testimony could not be located after a reasonable investigation, and Mr. Savitz' testimony was taken again on October 5, 2010 before this Court and on the record. Subsequent to the taking of Mr. Savitz' testimony, collateral counsel indicated to the Court by e-mail that applicant wished to waive and abandon both grounds of ineffective assistance of appellate counsel.

This Court, after having reviewed the trial exhibits, the exhibits and evidence received at the PCR hearings, the argument of counsel, the record including the trial transcript and PCR transcript, the pleadings in this action, the Solicitor's file, and after having viewed the witnesses and heard their testimony and made a credibility assessment of the witnesses presented, makes the following findings of facts and conclusions of law regarding applicant's allegations and his late proposed amendment:

General Law of Ineffective Assistance of Counsel

In a PCR proceeding, including a capital PCR proceeding, the applicant bears the burden of proving he is entitled to relief. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). To establish that he received ineffective assistance of counsel, an inmate must make a two-fold

showing. See Wiggins v. Smith, 539 U.S.510 (2003). First, he must demonstrate that his attorneys' "representation fell below an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688 (1984). "Judicial scrutiny of counsel's performance must be highly deferential;" and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective at the time." Id. at 689. See also Yarborough v. Gentry, 540 U.S. 1, 6 (2003) ("[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight").

To establish that counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984); Simpson v. Moore, 367 S.C. 587, 595-96, 627 S.E.2d 701, 706 (2006). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. Id.

"A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. "There are countless ways to provide effective assistance in any given case," and the simple fact that trial counsel's strategy was ultimately unsuccessful does not render counsel's assistance constitutionally ineffective. Strickland, 466 U.S. at 689; Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688; Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993).

To effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; Butler v. State, 286 S.C. 444-45, 334 S.E.2d 815 (1985). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," Strickland, 466 U.S. at 690; Butler, 286 S.C. at 455, 334 S.E.2d at 815-16, and an applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance, Strickland, 466 U.S. at 689; Butler, 286 S.C. at 442, 334 S.E.2d at 814. As set out above, counsel must be given latitude in the art of advocacy, which, necessarily, allows for strategic decisions. "Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel." Watson v. State, 307 S.C. 68, 72, 634 S.E.2d 642, 644 (2006), *citing* Stokes v. State, 308 S.C. 546, 419 S.E.2d 778 (1992). This is true as long as counsel articulates an objectively reasonable strategic decision. Strickland v. Washington, 466 U.S. 668, 689 (1985)(objectively reasonable trial strategy decisions cannot be the basis of a claim of ineffective assistance of counsel). Counsel's strategy will be reviewed under "an objective standard of reasonableness." Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008), *quoting* Ingle v. State, 384 S.C. 467, 470, 560 S.E.2d 401, 402 (2002).

Lastly, as noted, relief will not be granted on a showing of mere error. Prejudice must also be shown. Strickland, 466 U.S. at 687. The standard of prejudice differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove prejudice in the guilt phase, an applicant must show that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

In the context of a capital sentencing proceeding, applicant must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Strickland, 466 U.S. at 695. *See also* Wiggins, 539 U.S. at 537; Jones v. State, 332 S.C. 329,344-45, 504 S.E.2d 822, 829-30 (1998). Again, [a] reasonable probability is a probability sufficient to undermine confidence in the outcome. Jones, 504 S.E.2d at 823-824. The United States Supreme Court made clear in its recent decision in Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009) that the burden is *not on the State* to show the lack of prejudice, but the burden is *on the applicant* to show prejudice. Id. To establish prejudice, applicant "must show 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Id., *quoting* Strickland, 466 U.S. at 694.¹² This showing requires applicant to establish a reasonable probability that had counsel acted competently the jury would have returned with a different sentence. Id., *quoting* Wiggins v. Smith, 539 U.S. 510, 535, 536, (2003).

Applicant's allegations have been reviewed under the cited standards.¹³ This Court finds the allegations lack merit for the following specific reasons:

¹²*See also* Smith v. Spisak, 558 U.S. ___ (2010).

¹³As set forth earlier, applicant alleges two (2) grounds of ineffective assistance of appellate counsel. The specific standard of review for ineffective assistance of appellate counsel is set forth in the Court's discussion of those two (2) specific issues, *infra*. Applicant's allegations of ineffective assistance of appellate counsel have been reviewed under the above general standard of review for claims of ineffective assistance of counsel and the specific standard of review for claims of ineffective assistance of appellate counsel set forth in this Court's findings and conclusions set forth under Grounds M and N of this Order.

Ground A

Applicant waived and abandoned this ground at the beginning of the evidentiary hearing. (PCR Tr. p. 5). Therefore, since applicant expressly waived and abandoned this ground, and applicant offered no evidence to support this ground, this Court dismisses this ground with prejudice.

Ground B

Applicant waived and abandoned this ground at the beginning of the evidentiary hearing. (PCR Tr. p. 5). Therefore, since applicant expressly waived and abandoned this ground, and applicant offered no evidence to support this ground, this Court dismisses this ground with prejudice.

Ground C

Applicant alleges counsel was ineffective in failing to move for a change of venue. This ground is without merit.

While there was certainly publicity surrounding these crimes, as in any capital case, the jurors were each questioned individually regarding what they had heard about the case. Each juror who was qualified to serve in this case, if they had heard, read, or seen anything about the case, testified under oath that they could set aside what they knew or had heard and decide the case based solely on the evidence they heard in the courtroom. (R. pp. 187-216, 236-269, 269-300, 309-327, 416-437, 496-526, 553-576, 710-736, 769-791, 791-818, 882-911, 925-961). The alternates testified similarly. (R. pp. 1099-1132, 1330-1336, 1488-1536). Applicant has presented no reason to question the sworn testimony of these jurors.

Our Supreme Court has clearly held that the safest guarantee of a fair and impartial jury is voir dire. State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007). Evins was a capital murder case that involved extensive pre-trial publicity including the fact that Evins had previously been convicted

of sexual assaults and had been charged with another brutal murder in addition to the murder for which he was on trial. Even though some of the jurors in Evins had read about the other crimes, our Supreme Court held that the trial judge did not err in refusing to change venue, finding the court's instructions and the jurors' answers under oath sufficient to insure a fair and impartial jury. Id. Given the Evins holding, the trial court's instructions in this case, and the jurors' sworn answers under oath that they would disregard anything they had read, heard, or seen about the case, and decide the case solely on the evidence presented at trial, applicant has failed to show counsel was ineffective in failing to move for a change of venue. State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(when jurors have been exposed to pretrial publicity, a denial of a change of venue is not error where the jurors are found to have the ability to set aside any impressions or opinions and render a verdict based on the evidence presented at trial); State v. Woods, 382 S.C. 153, 676 S.E.2d 128 (2009); State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing trial court's grant of a change of venue based on pretrial publicity because no evidentiary facts supported a finding of actual juror prejudice, the better practice is to try and seat a jury prior to ruling on a change of venue motion); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a change of venue motion should be based on voir dire, not pre voir dire public opinion surveys) *See also* State v. Parker, Shearhouse Advance Sheets, Opinion No. 4475 (Ct. App. Filed December 23, 2008)("issues involved in a change of venue motion were recently addressed with certitude in State v. Evins").

Nor can applicant establish prejudice under Strickland. Even if counsel made a motion to change venue in this case, the trial judge would not have granted such a motion given the voir dire responses of the jurors under oath and our case law. State v. Manning, 329 S.C. 1, 495 S.E.2d 191 (1997)(reversing grant of change of venue based on pretrial publicity because no evidentiary facts

supported a finding of actual juror prejudice, better practice is to try and seat a jury before ruling on a motion for change of venue); State v. Truesdale, 278 S.C. 368, 296 S.E.2d 528 (1982)(indicating a change of venue motion should be based on voir dire, not pre voir dire public opinion surveys). The issue is not whether the jurors had heard something about the case or whether there was publicity about the crimes prior to trial. The critical issue is whether the jurors could set aside what they had read, seen, or heard and decide the case based solely on the evidence adduced at trial. Evins, 373 S.C. at 412, 645 S.E.2d. at 908. See also State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999)(change of venue not required where jurors are found to be able to lay aside exposure and base verdict on evidence at trial); State v. Gardner, 332 S.C. 389, 505 S.E.2d 338 (1998)(relevant inquiry is whether jurors have such fixed opinions that they cannot judge evidence impartially, and credibility of juror responses is for trial court). Given the qualified jurors' responses under oath that they would decide the case based solely on the evidence introduced at trial, and this state's legal precedential standard for a change of venue, the trial judge would not have granted a change of venue even had such a request been made. Applicant has failed to demonstrate prejudice.

Furthermore, applicant was tried by a fair and impartial jury. Applicant cannot establish actual prejudice. A criminal defendant has no right to any particular jury or jurors, but only a right to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 114 326 S.E.2d 132, 138 (1985), *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368 (1985) *overruled on other grounds* State v. Torrence; State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). It is the defendant's burden to demonstrate actual juror prejudice as a result of such publicity. State v. Caldwell, 300 S.C. 494, 388 S.E.2d 816 (1990). Petitioner has shown none. Each juror who was seated on the petit jury panel testified they would set aside anything that they had heard or seen outside the courtroom and

decide the case and issues therein based only on the evidence introduced at trial. (**R. pp. 187-216, 236-269, 269-300, 309-327, 416-437, 496-526, 553-576, 710-736, 769-791, 791-818, 882-911, 925-961**). The alternates testified similarly. (**R. pp. 1099-1132, 1330-1336, 1488-1536¹⁴**). Applicant cannot show and has not shown any of the jurors in this case violated their oath or sworn testimony to disregard anything they heard or saw in the press and decide the case solely on the evidence produced in the courtroom. Applicant has failed to meet his burden of proof to show prejudice. Strickland; Wong.

Furthermore, applicant cannot show and has not shown that even if a change of venue motion had been granted a jury from another county would not have found him guilty or sentenced him to death given this record. This ground must be dismissed with prejudice.

Finally, counsel testified that they made a strategic decision not to move for a change of venue in this case because Orangeburg County was applicant's home county and for other objectively reasonable reasons. As previously set forth, this Court was present at the PCR merits hearing, heard the witnesses' testimony, saw the witnesses testify, observed their demeanor, and made a resulting credibility assessment. This Court finds trial counsel's testimony on this issue was credible.

Counsel testified they thoroughly investigated whether they wished to move for a change of venue. (**PCR Tr. pp. 177-179, 197-203, 228, 99-100**). Counsel testified they consulted with other attorneys including David Bruck, Esq. and William Nettles, Esq. regarding whether they wanted to

¹⁴Juror Utsey, an alternate, testified she had already formed an opinion about applicant's guilt, however she testified she could put aside what she had read about the case, and put aside her pre-formed opinion, and decide the case based solely on the testimony and evidence presented in court. (**R. pp. 1488-1536**). Because of her hesitancy about the death penalty, the *State* tried to have Alternate Juror Utsey declared unqualified. *Defense counsel* insisted she was qualified and the trial judge agreed after further voir dire. There is clearly no merit to this ground

move for a change of venue and where ultimately they would have been striking a jury if they were successful in a motion for change of venue. (PCR Tr. pp. 177-179, 197-203, 228, 99-100). Counsel testified there was a consensus between those they consulted and within the defense team in this case, that a change of venue was not in applicant's best interests given the results of their investigation. (PCR Tr. pp. 177-179, 197-203, 228, 99-100). Counsel testified that based on their investigation and previous experience with juries being brought in from other counties, the defense team, including consultants, felt like they had a better chance of obtaining a more pro-life jury in Orangeburg County than with a jury from another county with similar demographics as Orangeburg. (PCR Tr. pp. 177-179, 197-203, 228, 99-100). Counsel testified that applicant was fully informed of strategic matters, and he fully understood what counsel was doing in that regard. (PCR Tr. pp. 176-177).

Given the reasons counsel set forth for not moving for a change of venue, this Court finds this was an objectively reasonable strategic decision on their part. It cannot be the basis for a claim of ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 689 (1985) (objectively reasonable trial strategy decisions cannot be the basis of a claim of ineffective assistance of counsel). *See generally* Bell v. Evatt, 72 F.3d 421 (4th Cir. 1995) (standing alone, unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel); Council v. State, 380 S.C. 159, 670 S.E.2d 356 (2008). Applicant has failed to demonstrate deficient performance or prejudice. Therefore, for this reason as well, this ground has no merit and must be dismissed with prejudice.

Furthermore, this Court finds applicant has failed to show deficient performance in this regard. Counsel testified they were fully aware of the pre-trial publicity involved in this case and

kept a record of the same. (PCR Tr. pp. 177, 197-198). Counsel testified they were fully aware of the content of the pre-trial publicity in this case. (PCR Tr. pp. 178, 197-198). While some of the pre-trial publicity was negative, and some factually incorrect, counsel testified that a large majority of the publicity was procedural and dealt with procedural matters in the case. (PCR Tr. pp. 99, 200). Counsel testified that even considering the content of the pre-trial publicity, they felt it was strategically not in applicant's best interests to move for a change of venue. (PCR Tr. p. 99-100, 177-179, 198-201). They believed they could still obtain a fair trial from an Orangeburg County jury, and it was a more pro-life venue than the other counties from which they might have to draw a jury. (PCR Tr. pp. 99-100, 179, 200-201). Accordingly, this ground must be denied and dismissed with prejudice. Strickland; Bell; Council; Evins.

Ground D

Applicant alleges counsel was ineffective for failing to introduce more evidence of intoxication of applicant at the time of the murders. This ground is also without merit.

Guilt Phase

At common law intoxication could not be used as a defense in any crime. 1 M. Hale, Pleas of the Crown 32-33 (An intoxicated defendant "shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."). Indeed, according to Blackstone the law of England viewed intoxication "as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour." 4 W. Blackstone, Commentaries 25-26. This general rule continued in the United States. See U.S. v. Cornell, 25 F. Cas. 650 (C.C. R.I. 1820) ("Drunkenness is a gross vice, and in the contemplation of some of our laws is a crime... far from its being in law an excuse for murder, it is rather an aggravation of its malignity."); U.S. v. Forbes,

25 F. Cas. 1141 (D.C. Pa. 1845) ("A drunkard is a voluntary demon, and his intoxication gives him no privilege"). That rigid position eroded slowly over the course of the nineteenth century, and most American jurisdictions now allow juries to consider voluntary intoxication for limited purposes. *See Montana v. Egelhoff*, 518 U.S. 37, 51, 116 S.Ct. 2013 (1996); Jerome Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045 (1944).

However, this is not the law in South Carolina as far as a guilt phase determination. "[V]oluntary intoxication does not relieve an individual from criminal responsibility." *State v. South*, 310 S.C. 504, 508, 427 S.E.2d 666, 670 (1993). Nor can one assert voluntary intoxication to show he lacked the capacity to act with malice aforethought. *State v. Davis*, 278 S.C. 544, 298 S.E.2d 778 (1983).

Applicant's alleged intoxication was completely irrelevant to the issue of guilt or innocence of the crimes of murder or burglary in the first (1st) degree. In fact, the trial judge, correctly charged the jury to this effect at the end of the guilt phase of this trial. Therefore, counsel could not have been deficient nor can applicant show prejudice from counsel's alleged failure to introduce *more evidence* of intoxication in the guilt phase of applicant's trial. Applicant's convictions for the murder of Stacy Williams, the murder of Linda Williams, the murder of Dorothy Gates, and for burglary in the first (1st) degree are constitutionally valid.

Penalty Phase

In South Carolina, in death penalty cases, judges are required to charge the jury in the penalty phase on the statutory mitigating circumstances found in S.C. Code Ann. § 16-3-20(C)(b)(2) ("The murder was committed while the defendant was under the influence of mental or emotional disturbance."), (6) ("The capacity of the defendant to appreciate the criminality of his conduct or to

conform his conduct to the requirements of law was substantially impaired.”), and (7) (“The age or mentality of the defendant at the time of the crime.”) when there is evidence that the defendant was intoxicated at the time of the commission of the crime. State v. Pierce, 289 S.C. 430, 346 S.E.2d 707 (1986), *overruled on other grounds* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Each of these statutory mitigating circumstances were charged to the jury in this case. (**R. p. 2980**). The trial judge justified the charge of these mitigators by noting, *sua sponte*, that the answering machine tapes alone provided sufficient evidence for the jury to conclude that applicant was intoxicated at the time of the murders. (**R. p. 2874**). This fact was argued by the defense in the closing argument of the penalty phase. (**R. pp. 2948-9**).

This Court has reviewed the answering machine tapes admitted into evidence and agrees with the trial court’s findings. A careful review of the answering machine tape recordings shows Petitioner at times slurs his speech, at times his speech is garbled, he has difficulty finding words, repeatedly uses vulgarity, rambles, and Petitioner is angry and belligerent. (**State’s Exhibit 5**). There is clearly an inference of intoxication in the days leading up to the murders from this evidence.

The trial judge also justified the charge on statutory mitigators (2),(6), & (7) based on the testimony of Buster Williams that applicant drove into the ditch with part of his vehicle as he was entering the yard of the victim shortly before the murders. The trial judge found, as the defense argued in its closing argument, that since applicant knew the layout of the victim’s home, having lived there for two (2) years, the fact that he ran part of his vehicle into the ditch was further evidence from which the jury could infer intoxication. (**R. p. 2874**). This Court agrees.

In this case, there is no question applicant received a charge on the statutory mitigating circumstances of S.C. Code Ann. Section 16-3-20(C)(b)(2),(6), & (7). There is also no question that

there was evidence in the record from which the jury could infer or find applicant was intoxicated. This Court agrees with the trial judge's finding, especially in conjunction with the answering machine tapes, applicant's driving immediately before the crimes, his belligerence at the scene, and the testimony of Doctor Schwartz-Watts and Jan Vogelsang; there was evidence from which the jury could infer or find applicant was intoxicated at the time of the murders and burglary. The trial judge appropriately charged statutory mitigators (2),(6), & (7).

Applicant's claim of ineffective assistance under this ground centers on a hospital or after-care facility note, possibly by a nurse, that applicant told that person at some point in time, possibly two (2) to (3) three weeks after the incident, that he had a "pint" to drink the day of the crimes.¹⁵ (PCR Tr. pp 248, ln. 17 - 249, ln. 5). The notation or record *was not* introduced at the merits hearing or subsequent to the merits hearing. Applicant has failed to meet his burden of proof on this issue.

Applicant *did not introduce the referenced record in evidence* at the PCR hearing or subsequent to the hearing. (See Plaintiff's Exhibits).¹⁶ Nor did applicant offer the testimony of *any* nurse, doctor, or custodian of records to authenticate the alleged record, to testify to what was actually said in the alleged record, to testify exactly when applicant made the alleged statement, to testify why the statement was made or for what purpose, or to otherwise lay a proper foundation for the entry of the alleged record into evidence. (See PCR Tr. pp. 3-269). Due to this failure, this

¹⁵The testimony from the attorneys at PCR was conflicting about when the note was made, by whom the note was made, and at what facility. (See PCR Tr. pp. 204, 205, 102).

¹⁶The record was left open for a reasonable period of time to allow collateral counsel to try and locate this alleged record and submit it. (See PCR Tr. pp. 242-243). After a reasonable period of time, this alleged notation or record was not submitted to this Court.

Court finds applicant has failed to meet his burden of proof on this issue. Palacio v. State, 333 S.C. 506, 513, 511 S.E.2d 62, 66 (1999)(finding that where the contents of challenged documents were not presented at the PCR hearing, defendant failed to present any evidence of probative value demonstrating how counsel's failure to obtain the unproduced documents in a more timely fashion prejudiced his defense); Porter v. State, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006)("Mere speculation what a witness' testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR"); Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005)("A PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence."); Bannister v. State, 333 S.C. 298, 509 S.E.2d 807 (1998)(state's failure to object to hearsay testimony as to what another witness's testimony might have been does not relieve applicant of the burden of producing admissible testimony in accordance with the rules of evidence); *See also* Lorenzen v. State, Shearhouse Advance Sheets, Opinion No. 26438 (filed February 2008)(defendant's testimony expert would have helped his case was merely speculative where he called no expert to testify at PCR).

Federal authority is in agreement with these citations *See* Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990), *cert. denied*, 499 U.S. 982 (1991)(prejudice from trial counsel's failure to interview or call witnesses cannot be shown where the witness does not testify at post-conviction relief.); Beaver v. Thompson, 93 F.3d 1186, 1995 (4th Cir. 1996)(rejecting claim that counsel was ineffective for failing to present mitigation evidence, where there was no proffer of this testimony); Bassette v. Thompson, 915 F.2d 932 (4th Cir. 1990)(petitioner's allegation that attorney did ineffective investigation does not support relief absent proffer of the supposed witnesses's favorable

testimony); Zettlemoyer v. Fulcomer, 923 F.2d 284, 298 (3d Cir. 1991)(applicant cannot show deficiency “based on vague and conclusory allegations that some unspecified and speculative testimony might have established his defense,” rather, facts must be presented). *See also* Moss v. Hofbauer, 286 F.3d 851, 864-65 (6th Cir. 2002)(speculation as to possible lines of cross-examination insufficient where no evidence presented how witness would have testified had the cross-examination been pursued).

Due to applicant’s failure to introduce the record which contained the alleged entry, applicant has failed to meet his burden of proof on this issue. Palacio; Bannister. Furthermore, due to applicant’s failure to show there was a sound evidentiary basis to admit the record at trial, by calling the medical personnel who allegedly took this statement from applicant or a custodian of records, this ground must be dismissed with prejudice. Bannister; State v. Tenant, 383 S.C. 245, 678 S.E.2d 812 (Ct. App. 2009)(defendant’s “suicide note” written a day after the incident did not pertain to the defendant’s state of mind at the time of the incident, but rather note asserted *his memory* of events; defendant was improperly offering the note to prove the truth of the matter asserted and such self-serving statement was inadmissible hearsay under Rule 803(3)); State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985)(a doctor’s testimony should be limited to those facts he relied upon to reach a medical diagnosis or treatment): Rule 803(4) SCRE (statements of medical history information by patient may be admitted only if made for the purposes of making a diagnosis and prescribing treatment or deal with past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment, and statements made after the commencement of litigation are still left to the court’s discretion); State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983)(hospital records were excluded

under Uniform Business Records as Evidence Act because person who received report in mail from doctor was not qualified to testify as to the mode of preparation of the document and whether it was kept in the ordinary course of business).

This Court also finds the evidence applicant alleges counsel should have introduced in the penalty phase is cumulative to the other evidence of intoxication admitted in the guilt or penalty phase of the trial. Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383, 387088 (2009)(when substantial mitigation case was presented, evidence that is merely cumulative to the evidence actually presented fails to demonstrate the prejudice necessary to meet the prejudice prong of Strickland); Buckner v. Polk, 453 F.3d 195, 206 (4th Cir. 2006)(trial counsel's failure to present merely cumulative mitigating evidence does not prejudice a defendant's case); Simpson v. Moore; 367 S.C. 587, 627 S.E.2d 701 (2006)(finding where substantial mitigation case was presented, applicant had failed to show prejudice from failure to call other mitigation witnesses that were in essence cumulative); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998)(holding that "fancier mitigation case" does not render the prior case inadequate). Applicant admits as much in this allegation of his PCR application by stating that "*more evidence* of intoxication" should have been introduced. (See **Ground E, Applicant's Amended PCR Application & Tr. p. 13, ll. 8-9(emphasis added)**).

Furthermore, this Court finds there was extensive testimony of applicant's alcoholism and alcohol abuse throughout the penalty phase of the trial. Testimony of applicant's alcohol abuse was elicited from Jan Vogelsang, an expert in forensic social work, Doctor Alexander Morton, an expert in psycho-pharmacology including the effects of alcohol on the brain, Doctor Donna Schwartz-Watts, an expert in forensic psychiatry, and Doctor Paul Pritchard, an expert in neurology.

The jury heard testimony that applicant had been hospitalized several times for alcoholism and for internal physical medical problems due to alcohol abuse. The jury heard testimony that applicant had frontal-lobe shrinkage consistent with alcoholism or alcohol abuse. The jury heard testimony that applicant's break-up with the victim Linda Williams, shortly before the murders, was related to his repeated alcohol use or abuse.

More importantly, the jury also heard specific testimony from Doctor Donna Schwartz-Watts that when applicant was rejected by Linda Williams (made to leave her home) he returned to his aunt's home to live and became extremely inebriated in the days following their break-up. **(R. p. 2853, ll. 13-18)**. The record shows this occurred shortly before the burglary and three (3) murders. The record also shows that Ms. Vogelsang testified that whenever applicant and Ms. Williams would separate applicant would go to his aunt's house and "he would just drink for days at a time." **(R. p. 2681)**. The answering machine tape recordings of applicant in the days leading up to the burglary and murders are consistent with this testimony. **(State's Exhibit 5)**. The jury also heard the testimony of Buster Williams regarding applicant driving into the ditch as he entered the victim's yard, and applicant's belligerence after burglarizing the home. Therefore, given all of the evidence discussed above, this Court finds that applicant has failed to show prejudice from the failure to introduce the alleged record, because the notation alleged was cumulative to other evidence before the jury. Wong; Buckner; Simpson; Jones.

Furthermore, this Court finds the "evidence" Petitioner alleges was so critical was not that critical or important due to its nature. It is questionable whether applicant's statement to a nurse, possibly several weeks after the crime would have been admissible under any hearsay exception. Trial counsel testified they investigated this notation in a record with Doctor Norcross, applicant's

treating surgeon at MUSC. (PCR Tr. pp. 134-135, 179-181). Counsel testified Doctor Norcross informed counsel that the statement contained in the record would not have been a concern with regard to anesthesia or surgery. (PCR Tr. p. 135). One of applicant's attorneys testified the record that contained this note was made two (2) to three (3) weeks after the murders and burglary. (PCR Tr. p. 204). This would also have been several weeks after Petitioner shot himself. Counsel also testified they thoroughly investigated whether applicant was intoxicated at the time of the crimes with those who saw him the day of the shooting, and each of these witnesses testified they did not notice any evidence of intoxication. (PCR Tr. pp. 204-205). Therefore, applicant's statement to a nurse possibly two (2) to three (3) weeks after the incident would have been objectionable and able to be excluded by the Solicitor. Rule 801(c) SCRE (hearsay is out of court statement offered to prove the truth of the matter asserted therein); State v. Price, 368 S.C. 494, 629 S.E.2d 363 (2006)(rule against hearsay prohibits the admission of evidence of an out of court statement to prove the truth of the matter asserted unless an exception to the rule applies); State v. Tenant, 383 S.C. 245, 678 S.E.2d 812 (Ct. App. 2009)(defendant's "suicide note" written a day after the incident did not pertain to the defendant's state of mind at the time of the incident, but rather note asserted *his memory* of events; defendant was improperly offering the note to prove the truth of the matter asserted and such self-serving statement was inadmissible hearsay under Rule 803(3)); State v. Brown, 286 S.C. 445, 334 S.E.2d 816 (1985)(a doctor's testimony should be limited to those facts he relied upon to reach a medical diagnosis or treatment); Rule 803(4) SCRE (statements of medical history information by patient may be admitted only if made for the purposes of making a diagnosis and prescribing treatment or deal with past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to

diagnosis or treatment, and statements made after the commencement of litigation are still left to the court's discretion); State v. McFarlane, 279 S.C. 327, 306 S.E.2d 611 (1983)(hospital records were excluded under Uniform Business Records as Evidence Act because person who received report in mail from doctor was not qualified to testify as to the mode of preparation of the document and whether it was kept in the ordinary course of business).

Furthermore, even if this statement had been admitted at trial its credibility, reliability, and persuasiveness on the issue applicant's intoxication at the time of the crimes was questionable and subject to attack by the prosecution. According to one attorney's testimony, this statement was made two (2) to three (3) weeks after the crimes and therefore this statement was made by applicant after the crimes when applicant knew he was charged or would be charged for the three (3) murders and burglary in the first (1st) degree and would be facing the death penalty. Additionally, regardless of when the statement was made, this referenced statement is not specific as to when applicant allegedly drank this "pint" other than that day, what type or proof of alcohol it was, over what period of time the alcohol was ingested, or whether applicant was even intoxicated as a result. The testimony at trial established applicant was an admitted alcoholic, and by one of his own expert's testimony, applicant had built up some tolerance to lesser amounts of alcohol. Based on all of these factors, this Court also finds applicant has failed to establish prejudice from trial counsel's alleged failure to introduce this evidence. This Court finds that even if this record or notation existed and had been introduced during the sentencing phase, it would not have changed the result of the sentencing proceeding. Wong v. Belmontes; Strickland v. Washington.

This Court finds that the more credible and believable evidence of intoxication at the time of the crimes was the answering machine tapes which were admitted at trial, applicant's driving

immediately prior to the incident, applicant's belligerence at the scene, and the testimony of the experts as to applicant's alcoholism and conduct, especially after any break up with Ms. Williams and in the days leading up to the murders. Trial counsel argued extensively to the jury that the tapes showed applicant was intoxicated at the time the offenses were committed. Applicant's self-serving statement made later, possibly several weeks after the murders, had little relevance to this issue, would have been easily attacked as self-serving, not credible, and non-specific, and would have been cumulative to the other evidence of intoxication. This Court finds counsel was not deficient nor has applicant demonstrated prejudice by counsel's actions in this regard. This ground has no merit. It must be dismissed with prejudice.

Furthermore, whether applicant was intoxicated at the time of the murders was questionable at best. The evidence at trial established that on the day of the murders applicant loaded his Browning 12-gauge shot-gun with the maximum of five (5) rounds of ammunition. Applicant loaded the shotgun only with buck-shot, used for killing large animals. Applicant kept his remaining ammunition, which was a lesser caliber, in his pocket. Applicant then put his shotgun in his car and headed toward the victim's residence.

Applicant drove from the Ellore community of Orangeburg County to the Cordova community in broad daylight without striking another vehicle or being stopped by police. A retired highway patrolman saw applicant driving his car toward the victim's residence. There is no evidence the highway patrolman saw any erratic driving by applicant or any evidence that applicant was operating the vehicle under the influence of alcohol.

Prior to arriving at the victim's residence, applicant made a phone call to the residence. He had the wherewithal not to threaten the victim or her family, but to state he needed to come by her

home to pick up his medicine. According to the record, this call was made approximately fifteen (15) minutes before the burglary and murders. This Court has reviewed this call made by applicant, and it does not sound like applicant is intoxicated in this last phone call. It strains credulity to believe applicant broke into the victim's residence with a loaded shotgun to pick up his medicine. Given applicant's methodical actions before and after arriving at the victim's residence, there is certainly an inference applicant, by this phone call, was attempting to lull the victims into a false sense of security.

Buster Williams, Linda Williams' son, testified he saw applicant *circle the block* where his mother lived *three (3) times* before driving up into his mother's front yard. The fact that one of applicant's back wheels went into the ditch can be explained as nothing more than applicant's hurried desire to murder Linda Williams and Dorothy Gates.

An EMS worker, who treated applicant at the crime scene, testified he did not smell any alcohol on applicant. Nor did any officer who spoke with applicant at the scene testify that they smelled any alcohol on his breath or body. Finally, applicant's treating physician at MUSC, who testified at trial, did not note any intoxication to applicant or alcohol on his breath.

This Court finds applicant's referenced statement to someone possibly two (2) to three (3) weeks after the incident that he, *voluntarily*, drank a pint *on the day of* the crime even if admitted, without more, and given the other evidence in this case, would not have changed the result in the penalty phase given all of the evidence admitted in this case. Applicant has failed to meet his burden of proof to show that had the jury heard that applicant told someone after the incident he had a pint to drink *that day*, the jury would have returned with a different sentence. Wong v. Belmontes; Strickland v. Washington. There is no merit to this ground. It must be dismissed with prejudice.

At PCR, applicant also gave some limited testimony on the issue of his intoxication at the time of the crimes. (PCR Tr. p. 88). Applicant alleged he was intoxicated the day of the crime. (PCR Tr. p. 98). Applicant alleged he told his attorneys he was intoxicated. (PCR Tr. p. 98). When asked what he told them, applicant responded as follows: "They asked me had I drank, you know, whether I was intoxicated, I said, Well, I drank some liquor, yeah, some Vodka." (PCR Tr. p. 88, ll. 16-18).

Trial counsel contradicted applicant's testimony. (PCR Tr. 101-102, 179-180). In fact, one of applicant's attorneys, Mr. Culler, testified his notes did not reflect anything about alcohol consumption on the day of the crimes. (PCR Tr. p. 102, ll. 17-19). Applicant's other attorney corroborated Mr. Culler's testimony. (PCR Tr. p. 180, ll. 16-19). Mr. Wilson testified Mr. Culler told him that applicant had not said anything about alcohol being involved on the date of the crimes. (PCR Tr. pp. 179-180). Mr. Wilson testified they pursued intoxication on the date of the crimes, not based on what applicant initially told them, but based on other evidence that they uncovered. (PCR Tr. p. 179-180).

This Court had the opportunity to view trial counsel's testimony and applicant's testimony on this issue and judge their credibility accordingly. This Court finds trial counsel's testimony on this issue to be credible and applicant's testimony to be not credible.

Regardless, counsel was not ineffective in failing to call applicant to testify to intoxication on the date of the crimes. Applicant admitted at PCR that he was advised of his right to testify and he did not want to testify. (PCR Tr. pp. 87-88). Trial counsel testified applicant was consistent throughout the case in not wanting to testify. (PCR Tr. p. 192, 220). And, applicant did not argue at PCR that trial counsel should have called him to testify to intoxication on the date of the crimes

at trial. (PCR Tr. pp. 248-249). And, as trial counsel testified at PCR, calling applicant to testify to intoxication would have opened applicant up to cross-examination on numerous other issues. (PCR Tr. pp. 181, 182, 217, 231). Trial counsel also made a decision not to call applicant as a witness. (PCR Tr. pp. 110, 203-204, 217).

This Court finds based on this record, counsel was not deficient in failing to call applicant to testify to alleged intoxication on the date of the crime. Applicant chose not to testify and consistently did not want to testify at trial. This was his choice to make. Trial counsel also made an objectively reasonable strategic decision not to call applicant to testify on this issue, because it would have opened applicant up to cross-examination on everything he did the day of the murders and burglary including his methodical planning and execution of these crimes, including the murders of thirteen (13) year old Stacy Williams and her grandmother Dorothy Gates, who was murdered in the back of the house. Strickland v. Washington. It was also an objectively reasonable strategic decision not to call applicant on this specific issue because of the concerns about applicant's narcissism and emotional involvement in the case. Strickland v. Washington. Counsel testified they were concerned about where any statement or testimony of applicant would go if applicant spoke before the jury. Counsel testified applicant was overly concerned about how he was allegedly mistreated by Linda Williams, and such testimony before the jury would not be consistent with their theory and presentation of the case. If applicant had testified, it would have opened him up to cross-examination on numerous issues, including his relationship with Linda Williams and his threatening phone calls leading up to the murders. Finally, applicant did not argue at PCR that his attorneys were ineffective in failing to call him as a witness on this specific issue. Therefore, this argument is without any merit.

At PCR applicant's aunt Carol Shuler also alleged that she knew applicant was intoxicated on the date of the crimes. Ms. Shuler testified applicant lived with her after he separated from Linda Williams. She testified he drank the whole week he was with her. She testified she could tell applicant was drinking the day of the crimes. When asked if she saw applicant drinking the day of the crimes, she contradicted herself. At first she said she did, and then she admitted she did not see him drinking. She also testified applicant did not tell her he was drinking the day of the crimes. She did not explain how she knew applicant was drinking the day of the crime.

Counsel was not ineffective in failing to call Carol Shuler on the issue of intoxication. First, much of Ms. Shuler's testimony was cumulative to that of Dr. Schwartz-Watts and Jan Vogelsang and the answering machine tapes regarding applicant drinking heavily in the days after the separation from Linda Williams and in the days leading up to the burglary and murders. In fact, the record shows the information Dr. Schwartz-Watts and Jan Vogelsang related to the jury regarding applicant's intoxication in the days leading up to the murders would have had to have come from Ms. Shuler or applicant. Therefore, counsel was not deficient nor was applicant prejudiced by the failure to call her as a witness in this regard. Wong; Buckner; Simpson; Jones. Counsel was able to introduce this testimony through Dr. Schwartz-Watts and Jan Vogelsang without opening Ms. Shuler up to cross-examination.

Second, this Court also had the opportunity to view Ms. Shuler's testimony and judge her credibility accordingly. This Court finds her testimony regarding her knowledge of applicant's alleged intoxication on the date of the crimes to be not credible. Ms. Shuler was clearly a biased witness. She admitted she was applicant's aunt, loved him, and had known him since childhood. She was clearly trying to help applicant at the PCR hearing by stating on direct examination no one

asked her to come and testify on applicant's behalf at trial, when in fact she was subpoenaed by trial counsel. She also admitted at PCR she did not believe in the death penalty. She also contradicted herself under oath, stating first she witnessed applicant drinking the day of the crimes and then admitting under oath she did not see him drinking. **(PCR Tr. p. 45)**. She further admitted applicant did not tell her he was drinking the day of the crimes. **(PCR Tr. p. 45)**. And, she gave no explanation how she knew applicant was drinking the day of the crimes. Her own testimony at PCR shows applicant actually slept in a trailer separate from Ms. Shuler and stayed in that trailer during the day time after he separated from Linda Williams. **(PCR Tr. p. 33, ll. 1-8)**. The murders of the victims were committed in the late afternoon of September 8, 1999. This Court finds her testimony on the specific issue of applicant's intoxication on the *day* of the crimes not to be credible.¹⁷

Third, counsel was not deficient in failing to call Carol Shuler for another reason. Counsel testified that they attempted to present mitigation evidence through family members. **(PCR Tr. pp. 105, 187-189)**. Counsel testified they had experts, Jan Vogelsang and Page Tar, who assisted them with investigating the mitigation case who also spoke with family members. **(PCR Tr. pp. 105, 107)**. The record shows Ms. Tar was sent out to find family members who could assist in the mitigation case. **(PCR Tr. p. 107)**. Counsel specifically remembered speaking with *applicant's aunt*, who was called at the PCR hearing. **(PCR Tr. pp. 105, 187)**. The trial record shows Ms. Vogelsang met with applicant's aunt, Carol Shuler, on three (3) occasions. **(R. p. 2657)**.

In conducting their own mitigation investigation, it was discovered applicant had previously shot his brother's car. **(PCR Tr. pp. 106, 188-189)**. Counsel testified attempting to find a family

¹⁷Furthermore, she did not testify when during the day of September 8, 1999 she could tell applicant had been drinking.

member who would assist in the mitigation phase was clearly explored and looked into by both attorneys, Ms. Tar, and Ms. Vogelsang. **(PCR Tr. pp. 107, 162, 166-167, 186-190).** Both counsel testified the family members were not helpful or became more resistant as the case proceeded to trial. **(PCR Tr. pp. 107-108, 163, 166-167, 188-190).**

Trial counsel testified at the merits hearing that they sought the assistance of family witnesses prior to trial, however, at that time, none of the family members were interested in testifying in applicant's behalf. **(PCR Tr. pp. 189-190).** Counsel testified that they investigated whether there were family members who could help them in mitigation, and there was not a great deal of help from applicant's family. **(PCR Tr. p. 107).** Counsel testified that after investigating, interviewing, and speaking with applicant's family, and after begging and pleading for them to provide the defense with information of people that they could go to that would come forward that could help provide favorable information to help paint a picture of applicant, they did not have someone who did want to be there at trial and had good information about applicant, of if they did have them they could not call them because of concerns about bad information about applicant as well that might come out on cross-examination. **(PCR Tr. pp. 237-238).**

Applicant admitted under oath at PCR that he did not ask any of his family members to testify on his behalf at his capital trial. **(PCR Tr. p. 92).** Counsel testified that at that time, during the preparation for trial and the trial itself, the family witnesses were hesitant if not completely refusing to testify. **(PCR Tr. pp. 230, 232-234, 163, 189).** Counsel testified they coached, begged, pleaded, met, and talked with these witnesses in order to get them to testify but they were still unwilling or hesitant to testify. **(PCR Tr. p. 234).** Counsel testified that they still subpoenaed family members to testify and had family members present to testify at applicant's trial. **(PCR Tr. pp. 108,**

162, 166). The record shows counsel subpoenaed *Carol Shuler*. The record also shows counsel subpoenaed other family members. (PCR Tr. p. 48).

Counsel testified they prepared the witnesses to testify. (PCR Tr. p. 188). Counsel testified that they thought that having the family members present at the trial might somehow persuade or help the family members to help them in presenting a mitigation case, however it did not. (PCR Tr. p. 108). Counsel testified when it came time for them to testify, the family members were not interested in testifying or being involved. (PCR Tr. pp. 189, 190). Counsel testified it was an extremely frustrating experience for them. (PCR Tr. pp. 166-167). Based on the interviews counsel had with the family members, counsel did not believe their testimony would have impacted the case in any sort of favorable way. (PCR Tr. p. 108). Counsel testified they were so concerned about the resistance of the witnesses, along with their flat affect, that counsel felt the witnesses' testimony could have been bad for the case, and therefore they did not call them to testify. (PCR Tr. pp. 163, 189-190). Instead, counsel called the thirteen (13) mitigation witnesses they did call.

Applicant's own aunt admitted on cross-examination at PCR that she did not want to testify. Carol Shuler testified she did not want to testify at the trial. (PCR Tr. p. 43, ll. 11-13). Applicant's cousin also admitted that she did not really want to testify at Petitioner's capital trial. (PCR Tr. p. 56, ll. 1-2). Several years after applicant's capital trial, two (2) of applicant's own proposed mitigation witnesses admitted on cross-examination at PCR their reluctance to testify at Petitioner's capital trial.

The circumstances that counsel faced are similar to those faced by counsel in Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial, and the defendant/applicant did not assist counsel in obtaining the cooperation of

his family. This Court notes that the behavior of applicant's family is typical in these type cases. When the crime has been recently committed and those who knew the victims are still outraged, the defendant's family and friends, are likewise shocked and angry and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes. It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victims' family's mind, that witnesses become cooperative and insist that they would have cooperated at the time of trial, when in fact they were originally hesitant or refused to testify.

This Court has viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. This Court finds the testimony of trial counsel on this issue *to be credible*, and the direct-examination testimony of Ms. Shuler regarding her previous willingness to testify *to not be credible*. Accordingly, this Court finds that Petitioner has failed to meet his burden of proof on this issue, and has failed to show that counsel was deficient or that he was prejudiced by any deficient performance *of counsel*. Additionally, this Court finds trial counsel attempted to develop mitigation evidence witnesses from the family but were unable to do so due to the family members reluctance and refusal to testify at the time of trial.

Furthermore, trial counsel also testified that there were dangers in calling any of applicant's family members at trial. **(PCR Tr. pp. 106, 108, 188-189, 230)**. Counsel testified these witnesses knew bad things about applicant as well as good things. **(PCR Tr. pp. 230, 236, 106 & 108)**. Counsel testified that if the witnesses testified bad things could come out about applicant's past conduct or other things that would have been harmful before the jury. **(PCR Tr. p. 188)**. Additionally, counsel testified they consulted with other defense team members, including their

mitigation specialist, and they, the defense team, were all hesitant to call witnesses who did not want to be there and had information about applicant that was not favorable. (PCR Tr. pp. 236-237).

In addition to the reluctance of family members such as Carol Shuler to testify, trial counsel testified that on one occasion in the past applicant had shot his brother's car in an incident prior to applicant's military experience. (PCR Tr. pp. 106, 108, 188). At the capital trial, applicant's experts testified applicant was different when he returned from his service in Vietnam. (R. p. 2678). Trial counsel also argued this fact in his closing argument to the jury. Testimony regarding this prior violent shooting incident involving the brother, which applicant's family members would surely have been aware of, would have completely contradicted the testimony of applicant's experts that applicant was a different person after he returned from the Vietnam War. This testimony would have shown that applicant was a violent individual or had violent tendencies before he went to Vietnam.¹⁸

This Court observed the testimony of trial counsel and Ms. Shuler on this issue and carefully judged their credibility accordingly. This Court finds the testimony of trial counsel to be credible and that presented by Ms. Shuler on direct regarding her willingness to testify at the time of trial not to be credible. Therefore, this Court finds counsel's decision not to present Ms. Shuler to testify was not deficient, because when counsel approached her prior to trial and even at trial she was not

¹⁸This Court would note at this point that the mitigation offered in this case is the opposite of the conduct of counsel that was found deficient in Porter v. McCollum, 558 U.S. ____ (2009). In Porter, counsel failed to discover and offer significant mitigation evidence regarding the defendant's service during the Korean War and his adjustment after his return from the war. In the present case, trial counsel offered testimony that Petitioner had served in the Vietnam Conflict, had been exposed to few instances of limited fire, a companion had committed suicide, and when Petitioner returned home he was a different person. It was certainly objectively reasonable for counsel not to call witnesses who would undercut or counter this mitigation evidence by showing Petitioner had violent tendencies before his military service.

interested in testifying. In fact, this Court finds that this witness either refused or was reluctant to testify. This Court also finds that it was an objectively reasonable trial strategy decision for trial counsel not to call Ms Shuler when she was refusing or was unwilling to testify.

This Court further finds that this witness, while she could relate some good things about applicant, also would have been subject to cross-examination by the Solicitor on prior bad conduct of applicant, including shooting his brother's car after some type of altercation, and the physical abuse of his previous wife. See Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009). This Court finds it was an objectively reasonable trial strategy decision for counsel not to call Ms. Shuler who could be asked on cross-examination about instances of bad conduct by applicant and who would have been required to answer truthfully to such questions. Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000)(trial attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened the door to prior violent behavior of the defendant that the jury had not heard). See also Bell v. Kelly, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished Opinion*)(finding state court's determination petitioner had failed to prove prejudice was not unreasonable where petitioner alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about the defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to provide child support), citing Barnes v. Thompson, 58 F.3d 571 (1995)(upholding in a federal habeas setting district court's determination that trial counsel was not ineffective in state death penalty case in failing to offer family members who constituted "cross-purpose evidence."); Moody v. Polk, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

In fact, counsel testified they interviewed applicant's aunt prior to trial, and she was present at the trial and under subpoena. (PCR Tr. pp. 233-234). Counsel testified the aunt was not interested in testifying and did not want to testify. (PCR Tr. p. 233). Applicant's aunt admitted at the PCR merits hearing that she was present at applicant's trial. (PCR Tr. p. 32). On cross-examination, she readily admitted that she did not want to testify. (PCR Tr. p. 43). In fact, even though Ms. Shuler, the aunt, was subpoenaed by defense counsel to trial and interviewed by them, she made the incredible claim at PCR that no one asked her to come to trial and testify on applicant's behalf. (See PCR Tr. p. 42, ll. 13-17). This Court finds this statement to be completely beyond belief, not supported by the record itself, and, calls into question her entire testimony. She is simply not a credible witness.

This Court would also note that the record shows that after applicant was evicted from the victim Linda Williams' home, he moved in with, actually next door to, this aunt, Ms. Shuler. (PCR Tr. p. 33). This Court has reviewed the answering machine tape recordings of applicant calling Linda Williams' home after he moved in with his aunt. Applicant repeatedly called Linda Williams' home in the days leading up to the murders threatening Linda, her mother, or the Gates' family. During one of the rambling threatening phone messages left by applicant, a female voice can be heard in the background laughing while applicant made threats to the Williams family. The voice appears to be that of an older female. It is clear from the phone recording that the female in the background found applicant's threatening behavior amusing. Had applicant's aunt been called as a witness, she certainly could and would have been impeached by the Solicitor on whether this was her voice on the tape recording, and whether she found applicant's threats on Linda Williams' family, which he carried out, funny or amusing. This testimony would have been damaging and

devastating to the defense case, and would not have been consistent with its theme not to disparage the victims of these horrendous crimes and to express remorse for the crimes. It is hard to believe the jury would have looked on applicant's aunt favorably.¹⁹

Furthermore, with regard to this witness, she admitted that applicant had a son who he did not have a relationship with because his wife would not allow applicant to see the child, and applicant had grandchildren, but was not allowed to see them by his daughter. (PCR Tr. p. 40, ll. 4-22). This testimony would not have been favorable to applicant. This witness would have been further cross-examined by the State regarding why applicant was not allowed to see his son by his ex-wife and his grandchildren by his own daughter. Her response is unknown, but it certainly would not have been helpful to applicant.²⁰ This aunt, who testified she had known applicant since he was six years old, would also have had knowledge of applicant's physical abuse of his previous wife. Additional information damaging to applicant would have been elicited from her on cross-examination. Counsel was not deficient nor can applicant show prejudice from the failure to call his aunt, Carol Shuler. Wong v. Belmontes; Rutherford v. Crosby; Moody v. Polk.

Trial counsel had Ms. Shuler at trial for a reason. The only reasonable explanation is,

¹⁹This Court would also note the jury had already heard the answering machine tapes so they would have been well aware that there was a female voice in the background laughing while applicant was making threats against the victim's family. Even if the Solicitor had not cross-examined or impeached the aunt regarding her laughter on the answering machine tape, the jury would have known about the behavior regardless.

²⁰Ms. Vogelsang, after being shown on cross-examination applicant's divorce decree from his second wife, had to admit the record showed applicant had been violent to his second wife on more than one occasion. Ms. Vogelsang also admitted on cross-examination that her research into the family indicated that applicant had "battered" his second wife "seriously." Ms. Vogelsang testified applicant beat his second wife seriously about the head and also hurt her hand. (R. pp. 2698-2699).

consistent with trial counsel's credible testimony, they sought mitigation evidence from her regarding applicant, and she was reluctant or unwilling to testify. Trial counsel had Ms. Shuler present at the trial in an attempt to coax, persuade, or help her to become more cooperative, but she did not, and remained unwilling or reluctant to testify.

This Court also finds trial counsel made an objectively reasonable trial strategy decision not to call Ms. Shuler. Ms. Shuler, as a family member, would have known of applicant's shooting of his brother's car and would also have known of applicant's abuse of his former wife. She, like other family members, was reluctant to testify at trial.

The record clearly reflects that counsel interviewed Carol Shuler prior to the trial. **(R. p. 105 & PCR Tr. pp. 55).** This Court finds counsel made a reasonable investigation into family mitigation evidence, including using two (2) retained experts, Ms. Vogelsang and Ms. Tarr. Counsel conducted a reasonable mitigation investigation, and it was an objectively reasonable trial strategy decision not to call a witness from whom unfavorable testimony could have been elicited on cross-examination by the Solicitor, and who was reluctant or refusing to testify. Wong v. Belmontes; Moody v. Polk; Rutherford v. Crosby; Strickland v. Washington; Council v. State.

Furthermore, applicant has failed to demonstrate prejudice in this regard. Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009). Applicant has failed to show there is a reasonable probability that, absent counsel's *alleged* errors, the jury would have returned with a different sentence. Id. Again, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Applicant has failed to make this showing.

The United States Supreme Court made clear in its recent decision in Wong v. Belmontes, *supra* that the burden is *not* on the State to show the lack of prejudice, but the burden is on the

applicant to show prejudice. Id. To establish prejudice, applicant “must show ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Id., quoting Strickland, 466 U.S. at 694. That showing requires applicant “to establish ‘a reasonable probability that a competent attorney aware of the [available mitigating evidence], would have introduced it at sentencing,” and “that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.” Id., quoting Wiggins v. Smith, 539 U.S. 510, 535, 536, (2003). “In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it” if applicant “had pursued the different path - not just the mitigation evidence” applicant could have presented, but also” the aggravating evidence “that almost certainly would have come in with it.” Id., referencing Strickland, at 695-696, 700 (emphasis in original). “Thus, to establish prejudice,” applicant “must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence” (including the additional testimony applicant could have presented) against the entire body of aggravating evidence (including any additional aggravating evidence likely to have come in). Id.; See also Porter v. McCollum, 558 U.S. ____ (2009). Applicant has not met this burden. Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997)(holding that, considering the sheer magnitude of the aggravating evidence, the defendant failed to show prejudice from trial counsel’s failure to present certain mitigating evidence).

The amount of evidence in aggravation the State presented in the guilt and penalty phase of applicant’s trial was overwhelming. The State’s third (3rd) witness in the penalty phase, Ed Williams, identified his thirteen (13) year old daughter Stacy’s voice on the tape of a 911 call she placed after being shot. On the tape Stacy begged the 911 dispatcher to “[p]lease hurry up” because

she was hurting. (R. pp. 3006-10).

The State's next witness, Lieutenant M.L. Varnadoe, the first law enforcement officer on the scene, gave testimony about Stacy's pain and suffering, and about how applicant said: "Fuck them. Let them die. Fuck them all," (R. p. 2592) as Stacy lay dying. The record shows Stacy was within hearing distance of applicant when he made these statements. The record also shows that thirteen (13) year old Stacy, though she was severely wounded, was concerned about her brother, and could see her mother lying on the floor mortally wounded.

The State also presented victim impact testimony by one of Stacy's classmates and by her father, and photographs of the scene presented by a crime scene investigator. The photographs showed the brutality of the murders applicant committed, and the fact that Stacy moved or crawled through one portion of the home to another after she was shot. Trial counsel testified at the merits hearing, and this Court agrees, that "[t]here was no way [counsel] were getting around the tape and the fact that a thirteen year old died." (PCR Tr. p. 163). The record established beyond any doubt that applicant murdered a defenseless thirteen (13) year-old girl by shooting her in the lower back or buttocks with buckshot.

Additionally, the evidence in this case established applicant, in a pre-meditated fashion, drove from his home on the other side of the City of Orangeburg to the victims' home with the intent of killing at least Linda Williams and Dorothy Gates. The evidence supporting this fact includes applicant's prior threats against these two (2) victims, the testimony establishing he drove approximately fifteen (15) miles to the victims' home, called the home shortly before the murders stating he wished to pick up his medicine, had a shotgun loaded with buckshot in the vehicle with him, circled the victim's home three (3) times before driving up into the victims' yard, and

immediately broke into the victim's home while armed with the loaded shotgun. Applicant was so intent on murdering the victims that he did not even close his car door after exiting his vehicle with his loaded shotgun.

The evidence also shows beyond any doubt that applicant got out of his vehicle, and in a premeditated fashion burglarized the victim's home. Applicant used his shotgun to break out the front window of the home. Applicant entered through this window because the front door was locked. Applicant's statements once inside the home, such as "I've got you now, bitch," show his actions on September 8, 1999 were a culmination of his threats over the previous several days.

During the commission of the burglary, applicant murdered three (3) people pursuant to one course or scheme of conduct. All three (3) victims were unarmed, and one (1) victim, Linda Williams, was attempting to call for help on her telephone when applicant entered the residence. Applicant murdered all (3) three victims by shooting them with the loaded twelve (12) gauge shotgun he had brought with him from his home for the purpose of murdering the victims. Applicant shot all of the victims with shells loaded with buckshot, a load used for killing large game.

The physical evidence shows applicant specifically selected the caliber of shotgun shells he intended to use on the victims, and he selected the most dangerous shells for the purpose of murdering whatever victims he confronted at the home. The evidence also shows applicant hunted down one of the victims, Dorothy Gates, and murdered her in a different part of the home. The evidence established that applicant intended to murder Linda Williams and Dorothy Gates because he intentionally shot both victims in the chest. The evidence also shows one of the victims, Stacy, was a child thirteen (13) years of age, and applicant brutally shot her in the back.

This Court also finds the evidence showed beyond a reasonable doubt that applicant

committed an assault and battery of a high and aggravated nature on thirteen (13) year old Stacy by shooting her in her lower back with buckshot. This Court also finds that applicant's conduct toward Stacy constituted serious physical abuse of a thirteen (13) year old child. The evidence shows Stacy did not die immediately but lived for at least ten (10) to fifteen (15) minutes after the assault by applicant, and suffered severe pain and suffering before she expired. During these agonizing minutes, Stacy lost the use of her lower extremities. This Court finds applicant's conduct toward Stacy intentionally subjected her to serious physical abuse prior to death and as such constituted the aggravating circumstance of torture under South Carolina law. S.C. Code Ann. Section 16-3-20(C)(a)(1)(h) (Supp. 2007); State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), *cert denied*, 110 Ct. 1536, *rehearing denied*, 495 U.S. 953.

Additionally, the evidence shows applicant had previously expressed his malice toward the victims' family in several phone calls to their residence in the days leading up to the murders. The evidence shows that applicant had a complete disregard of law and order *and* the police in his actions leading up to and including the murder of the victims. Even after applicant shot the victims with buckshot, he continued to express his malice toward the victims in unsolicited statements he made to the police as he lay on the floor of the victims' home suffering from a self-inflicted gunshot wound. Applicant's statements to law enforcement such as "finish the job" show that he came to the victims' residence for the purpose of murdering them. The record also shows that, even after his incarceration, applicant continued to express his malice toward one of the victims, Dorothy Gates, on the anniversary of her death. Also, while awaiting trial, applicant stated in the presence of a jail guard that he had killed three (3) people, and did not mind killing another human being. The record also shows that applicant threatened the life of another inmate during pre-trial detention. The

evidence shows applicant made this threat against the life of another inmate for the petty reason of feeling that the inmate had cut-in-line in front of applicant to receive medical treatment. The record shows the State thoroughly established the aggravating *circumstances* of these heinous crimes and the bad *character* of applicant.

Furthermore, as counsel correctly strategically analyzed the presentation of the mitigation case, had counsel called Ms. Shuler to testify, the Solicitor would have been able to ask her about prior instances of bad conduct committed by applicant, such as shooting his brother's car with a firearm, and previously physically abusing his ex-wife. And, the State would have been able to question Ms. Shuler regarding why applicant was not allowed to see his only son and why he was prohibited from seeing his grandchildren by his own daughter. See Wong v. Belmontes, *supra* (other evidence proposed by applicant would have put into play aspects of applicant's character that would have triggered the admission of the powerful evidence of another crime committed by applicant in rebuttal).

Additionally, as previously set forth, the defense put forth an extensive case in mitigation. Much of the testimony offered by Ms. Shuler on this issue was cumulative to that offered by counsel at trial or introduced into evidence. The jury was aware applicant drank heavily in the days leading up to the burglary and murders.

This Court also finds applicant has failed to meet his burden of proof to show that considering all the evidence, the good with the bad, there is a reasonable probability the result of the sentencing proceeding would have been different. Wong v. Belmontes, *supra*. The record shows these murders were premeditated and the circumstances surrounding them were extremely aggravating. The record shows the State proved each of the aggravating circumstances relied upon

to impose the death penalty beyond any doubt. The evidence established the victims were in their own home, defenseless, and afraid, when applicant burglarized the home and intentionally took their lives. The record also shows the thirteen (13) year-old child suffered needlessly for at least ten (10) minutes, was in agonizing pain, was afraid she was dying, was worried about her brother, and knew her mother and grandmother had been shot by applicant. It is hard to imagine the jury would have returned a sentence of life simply because applicant's aunt, who was laughing on one of the threatening phone messages, testified she believed applicant was drinking on the day of the crime. It becomes even harder to envision such a result when the evidence that applicant had shot at his brother, more evidence of the physical abuse of his previous wife was admitted at trial, and testimony was admitted applicant was not allowed to see his son or his granddaughters. The notion that the result could have been different if only counsel had called Ms. Shuler on this issue, who was reluctant to testify at best, is fanciful. Wong v. Belmontes, *supra*. This portion of this ground must be denied and dismissed with prejudice.

Ground E

Applicant alleges counsel was ineffective in not challenging an escape conviction introduced in the penalty phase and not introducing additional facts behind the conviction. There is no merit to either portion of this ground.

Applicant was previously convicted of escape in Orangeburg County on *April 29, 1985*. (**State's Exhibit Pen. Phase 21**). The facts supporting the conviction are as follows: a family court judge took applicant into custody after a non-support hearing and told him to wait in the hallway outside the courtroom with a court bailiff. Rather than remaining with the bailiff, applicant broke away from the bailiff and left.

Applicant was subsequently indicted by the grand jury of Orangeburg County for escape (85-GS-38- 24) on February 21, 1985. **(State's Exhibit Pen. Phase 21)**. The indictment clearly shows it was true-billed and is signed by the foreperson of the grand jury. **(State's Exhibit Pen. Phase 21)**. Applicant subsequently pled guilty in General Sessions court to escape on April 29, 1985, approximately two (2) months after his indictment was handed down. **(State's Exhibit Pen. Phase 21)**. Applicant was represented by counsel at his guilty plea to escape. **(PCR Tr. p. 13, ll. 19-20)**. Applicant was sentenced to sixty (60) days confinement by the presiding circuit court judge. **(State's Exhibit Pen. Phase 21)**. There is no evidence in the record applicant appealed from his guilty plea or the resulting sentence for escape. During the penalty phase of applicant's capital murder trial, a certified copy of the escape conviction was entered into evidence by the State. **(R. pp. 2554-2555)**.

It is clear that under South Carolina law, the State may introduce a prior conviction of a capital defendant in the penalty phase of a death penalty case. State v. Plath, 281 S.C. 1, 8, 313 S.E.2d 619, 623 (1984), *other numerous citations omitted*. Additionally, during the penalty phase of this capital case, applicant introduced testimony regarding his good conduct while incarcerated. **(R pp. 2787, 2726-7)**. Applicant also introduced testimony regarding his adaptability to prison. **(R. pp. 2799-2800)**.

This ground has no merit because the prior conviction was admissible in the penalty phase of applicant's capital trial as character evidence and in any event would have been admissible in response to applicant's evidence of good conduct while incarcerated and adaptability to prison. Id.; State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison). Counsel in the present case was not ineffective for failing to object to evidence that was relevant and admissible. *See Hough v.*

Anderson, 272 F.3d 878 (7th Cir. 2001)(ineffective assistance of counsel claims based on a failure to object are tied to the admissibility of the underlying evidence; if evidence admitted without objection was admissible, then the complaint fails both prongs of the Strickland test, as counsels actions were neither deficient nor prejudicial). This Court finds any objection to the admissibility of the escape conviction would have been overruled by the trial judge. The evidence was both relevant and admissible in the penalty phase of applicant's capital trial. Trial counsel was neither deficient nor was applicant prejudiced in this regard. Id.

Applicant also alleges trial counsel should have somehow challenged the validity of the escape conviction prior to trial or during the sentencing phase of the trial. This argument has no merit.

As previously stated, the record shows applicant pled guilty to escape in the Court of General Sessions. The record also shows applicant was represented by counsel at his guilty plea to escape. And, applicant did not appeal his guilty plea or sentence for escape.

Applicant contends trial counsel in this capital case in 2001 should have challenged the validity of the prior escape conviction using a "petition" applicant *allegedly* previously filed regarding the conviction in 1985 and which applicant also alleges was never resolved. (See PCR Tr. p. 13). At the PCR merits hearing in this capital case, applicant stated this "petition" was pending during the time "his escape charge was pending and then eventually lead [sic] to a conviction through a plea.." (See PCR Tr. p. 13, ll. 21-23). Applicant contended at his capital PCR hearing that this "petition" was a PCR application. (See PCR Tr. p. 13, ll. 23-24). Applicant's contention is wrong.

As previously stated, this Court has carefully reviewed the exhibits from the trial and the PCR merits hearing. Contrary to applicant's assertion, applicant has not provided this Court nor introduced into evidence any PCR Application or PCR "petition" *filed in the Court of Common Pleas* for Orangeburg County challenging his prior escape *conviction* in 1985.

The only document collateral counsel introduced is a "petition" sent to applicant's public defender *in January of 1985*. (See **Plaintiff's Exhibit 4**). This "petition," though not dated by applicant, is notarized January 10, 1985. This date would be over four (4) months *prior to* applicant *pleading guilty* to and being *convicted of* escape in the Court of General Sessions.

The allegations of the "petition" and its date show that it cannot be a *post-conviction* relief application, but is an attempted attack on applicant's contempt charge in family court and his *arrest* for escape. It is also clear from correspondence to and from applicant and his public defender in the weeks or months following January of 1985, that this "petition" raises civil rights violations arising from applicant's contempt charge and *arrest* for escape. (See **Plaintiff's Exhibit 4**). In fact, the record shows, applicant's public defender refused to file the "petition."

This Court has reviewed the "petition" and there is no indication that this document was ever filed with the Clerk of Court for Orangeburg County. While applicant asserts in a letter to his public defender in *February of 1985* that he forwarded a copy of the "petition" to the Clerk of Court for Orangeburg County, there is no credible evidence, and applicant has not met his burden of proof on this issue, that this was actually done or the "petition" was ever filed with the Clerk of Court for Orangeburg County. (See **Plaintiff's Exhibit 4**). At the merits hearing in this case, applicant called no one from the Orangeburg County Clerk of Court's Office to verify that this "petition" was ever received, filed by them, or that this "petition" was still pending in Orangeburg County as applicant

claimed. Therefore, capital counsel was not ineffective in failing to use this “petition” to challenge the validity of his prior escape conviction.

Even if this Court were to accept applicant’s assertion in his letter of *February 1985*, that he had forwarded the petition to the Clerk of Court for Orangeburg County at that time, and that it had been filed, that would place the filing of this “petition” *before applicant pled guilty* and was convicted of escape on *April 29, 1985*.²¹ This could not be a *post-conviction relief* application. Nor do the contents of the “petition” constitute a post-conviction relief application. Simply put, this “petition” was not a post-conviction relief (PCR) application, nor has applicant presented any credible evidence that a PCR action was pending and still unresolved at the time of his capital trial in 2001. As a result, this document would not have provided capital trial counsel any avenue to attack applicant’s prior counseled guilty plea to escape entered in 1985.

Since there was no PCR application in the Court of Common Pleas for Orangeburg County from 1985 still pending at the time of applicant’s capital trial, trial counsel could not attack the validity of the 1985 escape conviction using this mechanism in 2001. Nor could counsel attack the escape conviction by filing a separate PCR application prior to the capital trial. Any PCR filing by trial counsel in 2001 would have been long after the implementation of the South Carolina Statute of Limitations for PCR actions and would have been long after the expiration of that statute of limitations, and any such application would have been time barred. S.C. Code Ann. Section 17-27-10, *et. seq.* (2003). South Carolina Code Ann. Section 17-27-45(a) reads as follows:

²¹In fact, collateral counsel admitted as much by the very careful phrasing of his argument regarding this ground at the PCR merits hearing when he stated this “petition” was pending during the time “his escape charge was pending and then eventually lead [sic] to a conviction through a plea..” (See PCR Tr. p. 13, ll. 21-23).

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

Applicant pled guilty to escape in 1985. Applicant has introduced no evidence he filed a direct appeal from his guilty plea to and sentence for escape, nor is there any evidence in the record applicant appealed from his guilty plea and sentence for escape. Additionally, there is no credible evidence in the record applicant filed a PCR application between the date of his conviction and 2001. In 2001, when applicant was tried for capital murder, the statute of limitations for attacking his 1985 escape conviction had long since expired. Furthermore, the statute of limitations for filing a PCR action regarding this conviction had expired by the time applicant committed these crimes of murder and burglary and trial counsel was appointed to represent him in this capital case. Therefore, trial counsel was not ineffective in failing to file a separate PCR action before applicant's capital trial to challenge the 1985 escape conviction.

Additionally, trial counsel could not attack the validity of the 1985 conviction for escape during applicant's capital trial proceeding, even if they had desired to do so. See State v. Atkins, 303 S.C. 214, 399 S.E.2d 760 (1990)(defendant's re-sentencing trial was not the proper forum for collateral attack upon his 1970 murder conviction relied upon as an aggravating circumstance). Counsel was not ineffective in this regard. Any such attempt by trial counsel would have been denied by the trial judge pursuant to Atkins. Applicant also alleges counsel should have introduced facts behind the conviction including the fact that he allegedly was brought to family court without notice, and therefore was somehow justified in fleeing from the family court bailiff. Even assuming these facts to be true, introduction of these facts would have been nothing more than an attempt by

counsel to collaterally attack the escape conviction in the penalty phase of applicant's 2001 death penalty trial which is prohibited. State v. Atkins.

Furthermore, this Court finds the escape conviction was valid and not subject to challenge. In the previously mentioned "petition" offered into evidence by applicant at this capital PCR hearing, applicant admits in paragraph 13 that on August 6, 1984, he "did escape from Family Court at Court House of Orangeburg S.C. after being given a sentence of 90 days or \$750.00." (**See Plaintiff's exhibit 4, paragraph 13**). By applicant's own admission, he escaped after he had been sentenced by a family court judge to confinement or a fine for failure to pay support. The escape indictment to which applicant pled guilty alleged applicant broke away from a court bailiff. A bailiff is an officer of the Court. Applicant was guilty of the statutory offense of escape. S.C. Code Ann. Section 24-13-210. *See generally Bing v. Harvey*, 274 S.C. 216, 262 S.E.2d 42 (1980)(escape from pre-trial detention violates the statute which requires no more than lawful confinement); Copeland v. Manning, 234 S.C. 510, 109 S.E.2d 461 (1959)(statutory escape does not depend on whether defendant is ultimately found guilty of underlying offense, but upon whether he was lawfully confined at the time of his escape). Furthermore, applicant entered his guilty plea to the crime of escape in *April of 1985* being *fully aware* of the circumstances surrounding the same and *his allegations* regarding his escape charge as set forth in the "petition" he sent to his criminal defense attorney dated *January of 1985*. There is no evidence applicant entered any objections at his guilty plea, including to his indictment, and there is no evidence applicant's guilty plea was not knowingly, intelligently, and voluntarily entered. *See State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005)(an indictment is a notice document and challenges to an indictment must be made at the appropriate

time of they are waived).²² Nor did applicant appeal his guilty plea conviction. Finally, the record before this Court indicates that applicant did not file a timely and proper post-conviction relief (PCR) application challenging his 1985 escape conviction. If applicant believed he was wrongfully convicted of statutory escape, instead of common law escape, *See State v. Walker*, 311 S.C. 8, 426 S.E.2d 337 (1992)(those who flee from lawful custody of a police officer prior to incarceration are guilty of common law escape despite the fact that the face of the indictment contained the statutory reference S.C. Code Ann. Section 24-13-410, and refusing to address whether the appellant violated the statutory offense), he could have availed himself of a timely PCR application to challenge his conviction.²³ He did not. He waived and abandoned any claim that his escape conviction was not valid. The escape conviction was valid and not subject to challenge by his capital trial attorneys prior to or at his trial in 2001.²⁴ This ground of ineffective assistance of counsel is without merit and must be dismissed with prejudice.

This Court also finds applicant has failed to show prejudice in this regard for another reason. Even assuming applicant is correct in his assertion that trial counsel should have in some fashion

²²Our Supreme Court has also made clear Gentry is to be applied retroactively. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006).

²³Additionally, to the extent applicant pled guilty to common law escape (see sentence on escape indictment) the conviction would be valid, because applicant raised no objection to any defect in his indictment, i.e. failure to allege "against the peace and dignity of the state, and contrary to the statute in such case made and provided[.]" prior to his guilty plea and sentence and filed no direct appeal. Gentry; Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975). *See also State v. Walker*.

²⁴Trial counsel could not have filed a PCR application because the statute of limitations had expired, and trial counsel could not have filed a state habeas action challenging the prior escape conviction because applicant did not exhaust his PCR remedies to challenge his escape conviction. Nor could applicant make the appropriate evidentiary showing under these facts to justify state habeas relief.

prevented the admission of his 1985 escape conviction, this Court finds that even if this prior conviction had been excluded at his 2001 capital trial, applicant has failed to show there is a reasonable probability the result of sentencing proceeding would have been different. Wong v. Belmontes; Strickland v. Washington. Considering the totality of the evidence in this case, including all of the aggravating and mitigating evidence that was presented, this Court finds that applicant has failed to meet his burden of showing there is a reasonable probability the jury's sentence would have been different if counsel had prevented the admission of this evidence. Wong v. Belmontes; Strickland v. Washington.²⁵

Additionally, there is no merit to applicant's argument that trial counsel was ineffective in allegedly failing to introduce the facts behind the escape conviction, because trial counsel did introduce additional facts behind the conviction. The jury was well aware that applicant was convicted of walking away from a family court hearing after being ordered to wait in the hallway with a court bailiff. (**R pp. 2866, 2958**). The jury was aware of the circumstances supporting the escape conviction and that applicant was not convicted of escaping from a prison or jail, because trial counsel published the facts underlying the conviction to the jury, which the Solicitor had omitted to do. (**R p. 2866**). This Court finds there could be no prejudice to applicant from counsel's alleged failure to introduce additional facts, because additional pertinent facts behind the conviction were brought out by trial counsel during the trial and also argued by trial counsel during the closing argument of the penalty phase. (**R. pp. 2866, 2958**). Any other facts would have been merely cumulative to those brought out by counsel or those prohibited as a collateral attack on the

²⁵This finding is supported by the fact the jury, being fully aware applicant was convicted of escape because he walked away from a family court bailiff not escaped from a prison or jail, still sentenced applicant to death.

conviction. Atkins. Furthermore, applicant testified at the PCR hearing and offered no sworn testimony on this issue. (See PCR Tr. pp. 82-92). In fact, at PCR, applicant asserted the 5th Amendment with regard to whether he discussed with his attorneys the circumstances regarding his escape conviction. (PCR Tr. p. 90-92). The only evidence applicant offered regarding the circumstances of his escape conviction were allegations in his "petition" and letters he wrote to individuals. (See Plaintiffs exhibits). This Court would note there is no evidence applicant raised any of these allegations or objections at his counseled guilty plea to escape in 1985. Applicant has failed to show either deficient performance or prejudice on the part of trial counsel.²⁶ Strickland; Wong. This ground has no merit and must be dismissed with prejudice.

Furthermore, this Court finds that even if the additional facts surrounding the escape conviction, which applicant now desires to have been presented to the jury, had been introduced by counsel, it would not have changed the result of the sentencing proceeding. Even if applicant's allegations were true that he was not provided adequate notice of his non-support hearing or did not have an attorney at the family court hearing, the fact remains he still entered a plea of guilty to escape in April of 1985. The jury would still have had the conviction before it for consideration. Considering the totality of the evidence in this case, including all of the aggravating and mitigating evidence that was presented, along with the evidence applicant desires had been introduced, this Court finds that applicant has failed to meet his burden of showing there is a reasonable probability

²⁶This Court would also note that trial counsel's publishing of the facts behind the escape conviction was done in a persuasive and artful fashion. Trial counsel published the facts immediately following his publication of the facts behind applicant's conviction for night hunting. With regard to that charge, applicant was alleged to have unlawfully hunted raccoons at night with an *artificial light* and *high-powered rifle*, rather than a lantern and smaller caliber weapon. These were applicant's only two (2) prior convictions. Applicant has failed to show deficient performance or prejudice in this regard.

that the jury's sentence would have been different if counsel had presented the additional information applicant now desires. Wong v. Belmontes; Jones, 332 S.C. at 333, 504 S.E.2d at 823 (1998)(quoting Strickland, 466 U.S. at 695). This ground must be dismissed with prejudice.

Finally, this Court also finds that applicant's attorneys blunted the effect of this escape conviction by not only introducing the facts behind the conviction, that applicant did not escape from a jail or prison but merely broke away from a family court bailiff, but also by introducing testimony from other credible witnesses that applicant was a model inmate while incarcerated in the Orangeburg County Detention Facility awaiting trial and was adaptable to prison. (**R. pp. 2725-2731, 2785-2789, 2799-2800**). Applicant has failed to show deficient performance or prejudice in this regard. This ground must be dismissed with prejudice.

Ground F

In Ground F, applicant alleges counsel was ineffective in failing to present mitigation evidence of four (4) witnesses regarding a plea for mercy and humanizing of applicant, SLED forensic information regarding applicant's mentality and the domestic circumstances behind the crime, and information from witness Edward Williams. This ground is without merit as well. Wong; Wiggins.

The Four Witnesses

In his application, applicant contends trial counsel should have called members of applicant's family to make a plea for mercy and in not doing so failed to present significant mitigation evidence. There is no merit to this ground for several reasons.

There is no question a defendant may present witnesses to ask for mercy in the sentencing phase. Rosemond v. Catoe, Shearhouse Advance Sheets, Opinion No., 26679 (Filed June 29, 2009);

State v. Torrence, 305 S.C. 45, 51, 406 S.E.2d 315, 318-19 (1991). However, a plea for mercy by third parties is not technically mitigation evidence. *Mitigation evidence* is evidence of the defendant's character, conduct, or life experiences that a jury might consider important in not imposing the death penalty and instead imposing a life sentence. Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954 (1978)(stating that mitigation evidence includes any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death). A plea for mercy by itself by friends or relatives is not evidence of the defendant's character, history, or conduct or of the circumstances of the crime which might lead a jury to chose a life sentence over a death sentence. Therefore, such testimony is not true mitigation evidence, and counsel could not have erred in failing to present *substantial mitigation evidence* in this regard.

At the PCR hearing, applicant also alleged counsel was ineffective in failing to present this *alleged* mitigation evidence and the testimony of four (4) witnesses to personalize or humanize applicant and make a plea for applicant's life. *Even assuming that a plea of mercy is mitigation evidence, and considering all of the testimony of these witnesses*, this Court finds this allegation has no merit.

At the merits hearing, applicant called as witnesses Carol Shuler, Brenda Smith, Amanda Smith, and Lisa Beck. Carol Shuler is applicant's aunt. Brenda Smith is a first (1st) cousin of applicant. Amanda Smith, and Lisa Beck are second (2nd) cousins of applicant.²⁷

Carol Shuler testified she was applicant's aunt by marriage, and when applicant was not

²⁷ Applicant also submitted an affidavit of O.E. Ott. Though Mr. Ott is not a family member, it appears his affidavit was offered for the same reasons as the family members, and therefore, this Court will deal with Mr. Ott's affidavit as if offered to support this ground.

living with Linda Williams he would stay with her. She testified that after applicant and Linda Williams separated before the murders, applicant was angry and drank a lot. She testified she had known applicant since he was a boy and that as testified in the trial, he served in the military. She testified he was a good worker, worked in construction, and he operated heavy equipment. She testified that she thought applicant bought Linda Williams a Ford Mustang automobile. She also testified applicant was a good provider to Linda Williams, and applicant and Linda would come to her house but she did not see them fighting. She also testified that she thought applicant took Linda Williams, Stacy, and Buster camping at a state park and that applicant's nieces and a nephew went along. She also testified applicant would buy things for Stacy and Buster and would give them money. She also testified applicant had a son but was not able to see him because his ex-wife would not allow him to see him. She testified applicant's son was at the trial and she was as well. She also testified applicant had grandchildren but did not have much to do with them because his daughter would not let him see them, but applicant did build a playhouse for his granddaughter. Applicant's aunt also testified that no one asked her to come to the trial and testify on applicant's behalf. She testified she probably would have come if asked. She testified that had she testified she would have asked the jury to spare his life. She also testified that if she had been subpoenaed she would have complied. She also testified that she did not want to testify. She testified she did not discuss the case with trial counsel, and she testified she might have met with them one time. She could not recall meeting with applicant's social worker, Jan Vogelsang, even though Ms. Vogelsang testified at trial that she met with Ms. Shuler on three (3) occasions. She denied supplying information to Ms. Vogelsang regarding fighting within applicant's family. She denied knowing anything about that. She testified she knew applicant was drinking the day of the murder but she didn't actually see him

doing it. She testified she would have told the jury that she didn't think he should get the death penalty. She testified that she would have asked the jury not to execute applicant because she does not believe in the death penalty and because of her relationship with applicant. (PCR Tr. pp. 31-47).

Brenda Smith testified she is applicant's first cousin. She also testified *she was under subpoena to the trial and was present during the trial*. She testified Linda Williams' children played with her children. She testified Linda, Buster, and Stacy would come to the area where her family lived, and they would also come to cookouts or go swimming. She testified applicant, Linda, and her children would go camping at the state park, and she and her children would go there as well. She testified her children would stay with applicant and Linda Williams at the campground. She testified they would go to the store and applicant would watch their children. She testified applicant would cook, and he was a good cook. She testified she never saw applicant and Linda Williams fight. She testified applicant could clean, and applicant put some boards around her flowers to make a flower bed. She testified applicant was a good person for her family. She testified that if she would have been called to testify at trial she would have asked the jury to spare his life, and she loved applicant. She admitted *she met with trial counsel at least once or twice* before the trial. She could not remember what she told trial counsel. She admitted she never indicated to trial counsel that she wanted to testify. She testified that she probably could have testified but she really didn't want to. (PCR Tr. pp. 47- 56).

Amanda Smith testified applicant is her second cousin. She testified he gave her a nickname. She testified applicant writes her letters from death row. She testified applicant and Linda Williams came around her house, and they were nice and kind. She testified she never saw them fighting. She

testified that she used to play with Buster. She testified she would have been eleven (11) years old at the time of the trial. She was fifteen (15) at the time of her testimony at the PCR hearing. She testified she had spent the night at Linda Williams' house before, and applicant and Stacy and Buster were there. She testified they went to a restaurant. She testified she would go camping, and on one occasion she fell off a flotation device and applicant yelled for someone to assist her. She only remembered one trip to the lake. She testified applicant and the victims came to her house several times. She remembered another trip to a restaurant with applicant and the victims. She testified that applicant would give her candy and small things when she saw him. She testified she and another cousin would compete for applicant's affection. She testified she was close to applicant. She testified that if she had been called to court in 2001, she would have testified as she did at the merits hearing. She testified she would have asked the jury to spare applicant's life. She testified she loves applicant and does not want him to die. She also admitted that at the time of the trial she was sad. She admitted that she knew everyone involved in this case including applicant and the victims Linda Williams and Stacy Williams. (PCR Tr. pp. 57-64).

Lisa Beck testified she is also applicant's second cousin. She testified applicant writes her letters from jail and calls her by a nickname. Ms. Beck was sixteen (16) at the time of the PCR merits hearing. She would have been eleven (11) years old at the time of the trial. She testified applicant and Linda Williams never fought. She testified *Carol Shuler* is her grandmother. She testified she knew Stacy Williams and Buster Williams, and when applicant came to see her grandmother, she would play with Stacy and Buster. She testified she had gone camping at the lake, and applicant was there. She testified she rode to the lake on one occasion with Linda Williams and Stacy Williams. When they arrived, applicant was already there with Buster. She testified Stacy and

Buster never made any complaints about applicant. She also testified she had been to Linda Williams' home. She testified she would play outside with the children. She also remembered one occasion at the lake where Stacy did not have any socks and applicant gave her a pair of socks that were too big and everyone laughed. She testified that applicant gave her little stuff like candy. She identified a photograph of applicant cleaning spaghetti off her face. She testified applicant paid attention to her since she was small. She testified she would probably have come to court in 2001 if asked. She testified if she had been subpoenaed she would have come to court and testified. She testified she would have asked the jury to spare applicant's life because in her opinion applicant is a loving person and she loves him. She also testified what applicant did, murdering the three (3) victims, was wrong. She could not remember any fighting going with any family members. (PCR Tr. pp. 65-73).²⁸

Applicant alleges counsel was ineffective for failing to call these witnesses to personalize applicant and make a plea for his life. The record shows counsel attempted to do these very acts.

Counsel testified that they attempted to present mitigation evidence through family members. (PCR Tr. pp. 105, 187-189). Counsel testified they had experts, Jan Vogelsang and Page Tar, who assisted them with investigating the mitigation case who also spoke with family members. (PCR Tr. pp. 105, 107). The record shows Ms. Tar was sent out to find family members who could assist in the mitigation case. (PCR Tr. p. 107). Counsel specifically remembered speaking with

²⁸Mr. Ott's affidavit, which is very brief and takes up approximately one-half (½) page, is similar to the family members. Mr. Ott states in his affidavit that he has known applicant since he was a young man and that he knew him to be a decent man who worked hard and tried to take care of those he loved. Ott states applicant had expressed to him his love for Linda Williams and her children and that Ott believed applicant acted out of emotion and heartbreak. Ott states if he would have been asked to testify he would have, and he would have asked to jury to spare applicant's life. (See Plaintiff's Exhibit 3).

applicant's aunt, who was called at the PCR hearing, and with *applicant's brother* Jerry. (PCR Tr. pp. 105, 187). Counsel testified Ms. Vogelsang spoke with one of *applicant's sisters*. (PCR Tr. p. 106). The trial record shows Ms. Vogelsang met with applicant's aunt, Carol Shuler, on three (3) occasions. (R. p. 2657). The record also shows applicant's *first cousin*, Brenda Smith, was subpoenaed as a witness for applicant's capital trial. (PCR Tr. p. 48, ll. 12-19). Ms. Smith testified she remembered meeting with trial counsel at least once or twice before applicant's trial. (PCR Tr. p. 55).

In conducting their own mitigation investigation, it was discovered applicant had previously shot his brother's car. (PCR Tr. pp. 106, 188-189). Counsel testified attempting to find a family member who would assist in the mitigation phase was clearly explored and looked into by both attorneys, Ms. Tar, and Ms. Vogelsang. (PCR Tr. pp. 107, 162, 166-167, 186-190). Both counsel testified the family members were not helpful or became more resistant as the case proceeded to trial. (PCR Tr. pp. 107-108, 163, 166-167, 188-190).

This Court finds and the record shows trial counsel presented a thorough case in mitigation. Applicant's trial counsel appropriately conceded his guilt in the opening statement, and the State's evidence was not challenged in the guilt phase of the trial. In the face of overwhelming evidence of applicant's guilt, trial counsels' strategy was to concentrate on the sentencing phase and avoiding the death penalty. The record shows this is what trial counsel did. This Court finds, given the overwhelming evidence of applicant's guilt in the record, counsel's decision to concede guilt and focus on the penalty phase of the trial was an objectively reasonable trial strategy and is not subject to a claim of ineffective assistance of counsel. Strickland v. Washington. The record shows this is exactly what trial counsel did.

Not only did both attorneys interview family members in an attempt to find mitigation evidence, counsel employed a recognized expert in clinical social work to conduct a biopsychosocial assessment of applicant. (R. 2649-2656). Ms. Vogelsang interviewed family members and as many non-family members as could be located. (R. p. 2656). Ms. Vogelsang interviewed applicant's sister, Cathy Shuler, on three (3) occasions, his aunt *Carol Shuler*, on three (3) occasions, his brother, Jerry Shuler, on two (2) occasions, his aunt Mary Stokes, on two (2) occasions, and his sister Judy Shuler, on one (1) occasion. (R. p. 2657). The record also shows Ms. Vogelsang also interviewed non-family members. (R. p. 2657). Ms. Vogelsang interviewed Roger Blume on two (2) occasions, applicant's one time employer Cecil Smoak on one (1) occasion, and a number of non-family members who would fall in the category of professionals who had worked with applicant over the years. (R. p. 2657). In fact, Ms. Vogelsang testified at trial that she interviewed as many people as she could locate that could shed some light on applicant's background. (R. p. 2692).

In the penalty phase, trial counsel presented twelve (12) witnesses during the mitigation portion of the trial. Among these witnesses, counsel presented an expert in forensic social work, the EMS worker who treated applicant at the scene, two (2) employees of the Orangeburg Detention Center, a psycho-pharmacologist, the surgeon who treated applicant's self-inflicted gunshot wound, the director of the Orangeburg Detention Center, an expert in prison classification and facility management, an expert in psychiatry, an expert in forensic psychiatry, and an expert in neurology. The order of presentation of these witnesses was as follows: Jan Vogelsang (R. pp. 2649-2701), Todd F. Williams (R. pp. 2713-8), Dr. Douglas Norcross (R. pp. 2718-2723), Charles Taylor (R. pp. 2725-28), Charles Warren (R. pp. 2728-2730), Dr. William Morton (R. pp. 2731-84), Willie James Bamberg (R. pp. 2785-9), James Aiken (R. pp. 2789-2822), Dr. Kenneth Rogers (R. pp.

2822-32), Renee Michelle Snell (**R. pp. 2833-34**), Dr. Donna Schwartz-Watts (**R. pp. 2839-63**), and Dr. Paul Pritchard (**R. pp. 2883-93**).

Together, the mitigation witnesses portrayed applicant as a socially stunted individual with a substantial personal and family history of severe alcohol abuse who had made a serious attempt on his own life immediately after committing these crimes and had been a docile prisoner, adaptable to prison life, who was deeply traumatized by his own actions and would be for the duration of his incarceration. The evidence also portrayed applicant as a veteran of the Vietnam War, who upon his return was a different individual. (**PCR Tr. pp. 2676-2678**). Viewing the abundance of evidence of mitigation presented in the penalty phase of this trial, and counsel's attempt to present family member mitigation evidence, this Court finds counsel was not deficient.

Trial counsel testified at the merits hearing that they sought the assistance of family witnesses prior to trial, however, at that time, none of the family members were interested in testifying in applicant's behalf. (**PCR Tr. pp. 189-190**). Counsel testified that they investigated whether there were family members who could help them in mitigation, and there was not a great deal of help from applicant's family. (**PCR Tr. p. 107**). Counsel testified that after investigating, interviewing, and speaking with applicant's family, and after begging and pleading for them to provide the defense with information of people that they could go to that would come forward that could help provide favorable information to help paint a picture of applicant, they did not have someone who did want to be there at trial and had good information about applicant, of if they did have them they could not call them because of concerns about bad information about applicant as well that might come out on cross-examination. (**PCR Tr. pp. 237-238**). Additionally, counsel testified they were aware of Mr. Ott,, and their investigator had interviewed him; however, Mr. Ott could not be called as a

witness because Mr. Ott knew bad things about applicant. **(PCR Tr. pp. 208-209)**. This Court notes Mr. Ott was not called at PCR, but only a short affidavit was provided to the Court. Therefore, Mr. Ott was not subject to cross-examination as he would have been at trial.

Applicant admitted under oath at PCR that he did not ask any of his family members to testify on his behalf at his capital trial. **(PCR Tr. p. 92)**. Counsel testified that at that time, during the preparation for trial and the trial itself, the family witnesses were hesitant if not completely refusing to testify. **(PCR Tr. pp. 230, 232-234, 163, 189)**. Counsel testified they coached, begged, pleaded, met, and talked with these witnesses in order to get them to testify but they were still unwilling or hesitant to testify. **(PCR Tr. p. 234)**. Counsel testified that they still subpoenaed family members to testify and had family members present to testify at applicant's trial. **(PCR Tr. pp. 108, 162, 166)**. The record shows counsel subpoenaed *Carol Shuler*. The record also shows counsel subpoenaed *Brenda Smith*, who testified at the PCR merits hearing and who was *Amanda Smith's* mother. **(PCR Tr. p. 48)**. Counsel testified they prepared the witnesses to testify. **(PCR Tr. p. 188)**. Counsel testified that they thought that having the family members present at the trial might somehow persuade or help the family members to help them in presenting a mitigation case, however it did not. **(PCR Tr. p. 108)**. Counsel testified when it came time for them to testify, the family members were not interested in testifying or being involved. **(PCR Tr. pp. 189, 190)**. Counsel testified it was an extremely frustrating experience for them. **(PCR Tr. pp. 166-167)**. Based on the interviews counsel had with the family members, counsel did not believe their testimony would have impacted the case in any sort of favorable way. **(PCR Tr. p. 108)**. Counsel testified they were so concerned about the resistance of the witnesses, along with their flat affect, that counsel felt the witnesses' testimony could have been bad for the case, and therefore they did not call them to testify.

(PCR Tr. pp. 163, 189-190). Instead, counsel called the thirteen (13) mitigation witnesses listed above.

Applicant's own aunt and first cousin admitted at PCR that they did not want to testify. Ms. Shuler testified she did not want to testify at the trial. (PCR Tr. p. 43, ll. 11-13). Ms. Smith admitted she never indicated to trial counsel that she wanted to testify. (PCR Tr. p. 55, ll. 22-25). She also admitted that she did not really want to testify at Petitioner's capital trial. (PCR Tr. p. 56, ll. 1-2). Several years after applicant's capital trial, two (2) of applicant's own proposed mitigation witnesses admitted at PCR their reluctance to testify at Petitioner's capital trial.

The circumstances that counsel faced are similar to those faced by counsel in Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000). In that case, the defendant's family was uncooperative at the time of trial, and the defendant/applicant did not assist counsel in obtaining the cooperation of his family. This Court notes that the behavior of applicant's family is typical in these type cases. When the crime has been recently committed and those who knew the victims are still outraged, the defendant's family and friends, are likewise shocked and angry and disappointed in the defendant's behavior. In this case, as in others, they are in no mood to assist the defendant in escaping responsibility for his crimes. It is only after the passage of many years, when the case is on post-conviction relief, and the case is no longer in the forefront of the community's or the victims' family's mind, that witnesses become cooperative and insist that they would have cooperated at the time of trial, when in fact they were originally hesitant or refused to testify.

This Court has viewed the witnesses in this case, listened to their testimony, observed their demeanor, and judged their credibility accordingly. This Court finds the testimony of trial counsel on this issue *to be credible*, and the present testimony of Petitioner's witnesses regarding their

previous willingness to testify *to not be credible*. Accordingly, this Court finds that applicant has failed to meet his burden of proof on this issue, and has failed to show that counsel was deficient or that he was prejudiced by any deficient performance *of counsel*. Additionally, this Court finds trial counsel attempted to develop mitigation evidence witnesses from the family but were unable to do so due to the family members reluctance and refusal to testify at the time of trial.

Furthermore, trial counsel also testified that there were dangers in calling any of applicant's family members at trial. (PCR Tr. pp. 106, 108, 188-189, 230). Counsel testified these witnesses knew bad things about applicant as well as good things. (PCR Tr. pp. 230, 236, 106 & 108). Counsel testified that if the witnesses testified bad things could come out about applicant's past conduct or other things that would have been harmful before the jury. (PCR Tr. p. 188). Additionally, counsel testified they consulted with other defense team members, including their mitigation specialist, and they, the defense team, were all hesitant to call witnesses who did not want to be there and had information about applicant that was not favorable. (PCR Tr. pp. 236-237).

In addition to the reluctance of family members to testify, trial counsel testified that on one occasion in the past applicant had shot his brother's car in an incident prior to applicant's military experience. (PCR Tr. pp. 106, 108, 188). At the capital trial, applicant's experts testified applicant was different when he returned from his service in Vietnam. (R. p. 2678). Trial counsel also argued this fact in his closing argument to the jury. Testimony regarding this prior violent shooting incident involving the brother, which applicant's family members would surely have been aware of, would have completely contradicted the testimony of applicant's experts that applicant was a different person after he returned from the Vietnam War. This testimony would have shown that applicant

was a violent individual or had violent tendencies before he went to Vietnam.²⁹

This Court observed the testimony of trial counsel and the witnesses offered by applicant on this issue and carefully judged their credibility accordingly. This Court finds the testimony of trial counsel to be credible and that presented by the four witnesses on direct regarding their willingness to testify at the time of trial not to be credible. This Court also finds that Mr. Otts' affidavit testimony to not be credible. This Court also finds that trial counsel did not call Mr. Ott for an objectively reasonable trial strategic reason, that Mr. Ott new bad things about applicant. Therefore, this Court finds counsel's decision not to present these witnesses to make a plea for mercy or present mitigation evidence was not deficient, because when counsel approached these witnesses or the family prior to trial and even at trial they were not interested in testifying on applicant's behalf or making a plea for mercy for him. In fact, this Court finds that the witnesses either refused or were reluctant to testify. This Court also finds that it was objectively reasonable for trial counsel not to call family members as witnesses who were refusing or were unwilling to testify.

This Court further finds that these witnesses, while they could relate some good things about applicant, also would have been subject to cross-examination by the Solicitor on prior bad conduct of applicant, including shooting his brother's car after some type of altercation, and the physical abuse of his first wife. See Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009). This Court

²⁹This Court would note at this point that the mitigation offered in this case is the opposite of the conduct of counsel that was found deficient in Porter v. McCollum, 558 U.S. ___ (2009). In Porter, counsel failed to discover and offer significant mitigation evidence regarding the defendant's service during the Korean War and his adjustment after his return from the war. In the present case, trial counsel offered testimony that Petitioner had served in the Vietnam Conflict, had been exposed to few instances of limited fire, a companion had committed suicide, and when Petitioner returned home he was a different person. It was certainly objectively reasonable for counsel not to call witnesses who would undercut or counter this mitigation evidence by showing Petitioner had violent tendencies before his military service.

finds it was an objectively reasonable trial strategy decision for counsel not to call family members or Mr. Ott who could be asked on cross-examination about instances of bad conduct by applicant and who would have been required to answer truthfully to such questions. Rutherford v. Crosby, 385 F.3d 1300 (11th Cir. 2000)(trial attorneys' strategic decision not to call witnesses on alcoholism of defendant was objectively reasonable where it would have opened the door to prior violent behavior of the defendant that the jury had not heard). *See also* Bell v. Kelly, 260 Fed. App. 599 (4th Cir. 2008)(*Unpublished Opinion*)(finding state court's determination petitioner had failed to prove prejudice was not unreasonable where petitioner alleged counsel was ineffective for failing to investigate and present family members mitigation evidence where family members could have been cross-examined about the defendant's prior bad conduct such as infidelity, abandonment of his children, wife, and girlfriend, domestic abuse, and failure to provide child support), *citing* Barnes v. Thompson, 58 F.3d 571 (1995)(upholding in a federal habeas setting district court's determination that trial counsel was not ineffective in state death penalty case in failing to offer family members who constituted "cross-purpose evidence."); Moody v. Polk, 408 F.3d 141, 154 (4th Cir. 2005)(to the extent affidavits presented new information, they were "double edged.").

In fact, counsel testified they interviewed applicant's aunt prior to trial, and she was present at the trial and under subpoena. (PCR Tr. pp. 233-234). Counsel testified the aunt was not interested in testifying and did not want to testify. (PCR Tr. p. 233). Applicant's aunt admitted at the PCR merits hearing she was present at applicant's trial. (PCR Tr. p. 32). She readily admitted that she did not want to testify. (PCR Tr. p. 43). In fact, even though Ms. Shuler, the aunt, was subpoenaed by defense counsel to trial and interviewed by them, she made the incredible claim that no one asked her to come to trial and testify on applicant's behalf. (See PCR Tr. p. 42, ll. 13-17).

This Court finds this statement to be completely beyond belief, not supported by the record itself, and, calls into question her entire testimony.

This Court would also note that the record shows that after applicant was evicted from the victim Linda Williams' home, he moved in with, actually next door to, this aunt, Ms. Shuler. (PCR Tr. p. 33). This Court has reviewed the answering machine tape recordings of Petitioner calling Linda Williams' home after he moved in with his aunt. Applicant repeatedly called Linda Williams' home in the days leading up to the murders threatening Linda, her mother, or the Gates' family. During one of the rambling threatening phone messages left by applicant, a female voice can be heard in the background laughing while applicant made threats to the Williams family. The voice appears to be that of an older female. It is clear from the phone recording that the female in the background found applicant's threatening behavior amusing. Had applicant's aunt been called as a witness in the penalty phase of the trial, she certainly could and would have been impeached by the Solicitor on whether this was her voice on the tape recording, and whether she found applicant's threats on Linda Williams' family, which he carried out, funny or amusing. This testimony would have been damaging and devastating to the defense case, and would not have been consistent with its theme not to disparage the victims of these horrendous crimes and to express remorse for the crimes. It is hard to believe the jury would have looked on applicant's aunt favorably.³⁰

Furthermore, with regard to this witness, she admitted that applicant had a son who he did not have a relationship with because his wife would not allow applicant to see the child, and

³⁰This Court would also note the jury had already heard the answering machine tapes so they would have been well aware that there was a female voice in the background laughing while applicant was making threats against the victim's family. Even if the Solicitor had not cross-examined or impeached the aunt regarding her laughter on the answering machine tape, the jury would have known about the behavior regardless.

applicant had grandchildren, but was not allowed to see them by his daughter. (PCR Tr. p. 40, ll. 4-22). This testimony would not have been favorable to applicant. This witness would have been further cross-examined by the State regarding why applicant was not allowed to see his son by his ex-wife and his grandchildren by his own daughter. Her response is unknown, but it certainly would not have been helpful to applicant.³¹ This aunt, who testified she had known applicant since he was six years old, would also have had knowledge of applicant's physical abuse of his previous wife. Additional information damaging to applicant would have been elicited from her on cross-examination. Counsel was not deficient nor can applicant show prejudice from the failure to call his aunt, Carol Shuler. Wong v. Belmontes; Rutherford v. Crosby; Moody v. Polk.

With regard to applicant's first cousin, Ms. Smith, as previously stated, she admitted she met with trial counsel at least once if not twice before the trial. (PCR Tr. p. 55). Strangely, she could not remember what the conversations were about. (PCR Tr. p. 55). However, she did remember that counsel asked her for some pictures of applicant. (PCR Tr. p. 55). Importantly, she did not testify she provided trial counsel with any pictures of the play house applicant allegedly built for one of her daughters nor did she testify she gave trial counsel this information and they failed to use it at trial. (PCR Tr. p. 55). Similarly, while applicant's aunt testified to applicant building a playhouse for his granddaughter, neither she nor applicant himself testified that they gave trial counsel any information regarding any good deeds applicant had done, including building the

³¹Ms. Vogelsang, after being shown on cross-examination applicant's divorce decree from his second wife, had to admit the record showed applicant had been violent to his second wife on more than one occasion. Ms. Vogelsang also admitted on cross-examination that her research into the family indicated that applicant had "battered" his second wife "seriously." Ms. Vogelsang testified applicant beat his second wife seriously about the head and also hurt her hand. (R. pp. 2698-2699).

playhouse. (PCR Tr. pp. 31-46, 83-92). In fact, strangely, applicant's aunt could not even remember meeting with Ms. Vogelsang, who met with her three (3) times before the trial.

This Court also finds Ms. Smith's testimony not to be credible. She too was subpoenaed for the trial. She was also present at the trial. Trial counsel had her there at the trial for a reason. Additionally, her claim that she did not remember what she and trial counsel talked about prior to trial is simply not credible or believable. She was not an eyewitness to the crimes applicant committed. The only reasonable explanation is, consistent with trial counsel's testimony, they sought mitigation evidence from her regarding applicant, and she was reluctant or unwilling to testify. Trial counsel had Ms. Smith present at the trial in an attempt to coax or help her to become more cooperative, but she did not, and remained unwilling or reluctant to testify.

This Court also finds trial counsel made an objectively reasonable trial strategy decision not to call Ms. Smith. Ms. Smith, as a family member, would have known of applicant's shooting of his brother's car and would also have known of applicant's abuse of his former wife. She too was reluctant to testify at trial.

With regard to the two (2) child witnesses who testified at the PCR hearing, this Court finds that trial counsel did seek the assistance of applicant's family, which included at least one of the parents of one child, and the grandmother of both children prior to trial, and at the time of trial the family, including this parent and this grandmother, was not cooperative with trial counsel in their efforts to prepare or present a mitigation case on applicant's behalf.³² This Court finds counsel could not be expected to enlist the support of two (2) minor eleven (11) year-old children whose parent

³²From the record, it is clear that Amanda Smith is Brenda Smith's daughter and Carol Shuler's granddaughter. (PCR Tr. pp. 47, 48, 50, 52, 57-62). Lisa Beck is Amanda Smith's cousin and also a granddaughter of Carol Shuler. (PCR Tr. p. 67).

and/or grandparent was reluctant, hesitant, or refused to cooperate with counsel's efforts in preparing a mitigation case.

Additionally, trial counsel testified even though they asked applicant for information which they could use in mitigation, and they fully investigated mitigation evidence from the family, they were not made aware of these children or the information they testified to at the PCR hearing. (PCR Tr. pp. p. 162, ll. 11-22). The record clearly reflects that counsel interviewed both Carol Shuler and Brenda Smith prior to the trial. (R. p. 105 & PCR Tr. pp. 55). Neither applicant nor his family members who testified asserted that they had made counsel or their mitigation experts aware of the children's potential testimony. (PCR Tr. pp. 31-56). This Court finds trial counsels' testimony on this issue to be credible. And, neither applicant nor his family members contradicted trial counsel on this issue. (PCR Tr. pp. 83-92 & pp. 31-56). This Court finds counsel made a reasonable investigation into family mitigation evidence, including using two (2) retained experts, Ms. Vogelsang and Ms. Tarr, and neither the family nor applicant made counsel aware of this mitigation information.³³ Wiggins v. Smith. Therefore, counsel was not deficient in failing to present mitigation evidence of which they were not aware after a reasonable investigation. Wiggins.

Furthermore, as testified to at the PCR hearing, calling these child witnesses would have been dangerous as well. (PCR Tr. pp. 167-168). The child witnesses would have been roughly the same age as the victim Stacy Williams and their presence alone would have emphasized Stacy's youth and innocence and the needlessness of her murder. (PCR Tr. pp. 167-168). The child witnesses also

³³During the PCR merits hearing, *collateral counsel* made reference to a newspaper article that contained a picture of Lisa Beck crying, however, this article was published *during the PCR Merits hearing*, after Ms. Beck testified, and not before or during the capital trial itself. Therefore, since this article was published long after the trial, it could not have provided counsel a lead to interview Lisa Beck. (See Plaintiff's Exhibit 8).

knew Stacy Williams, and the State could have elicited testimony from these witnesses regarding the victim Stacy Williams and what she was like, her youth and innocence, and the needlessness of her murder. (PCR Tr. p. 168). Furthermore, counsel testified that even if they had been aware of the child witness' testimony, they would have been hesitant to call these witnesses where their parent or grandparent was reluctant or refusing to testify. (PCR Tr. pp. 165-166). With regard to this issue, this Court finds counsel was not deficient. Rutherford v. Crosby.³⁴

As previously stated, the record also shows counsel through their investigator interviewed Mr. Ott. (PCR Tr. pp. 208-209). A written report of Mr. Ott's testimony was provided to counsel by their investigator. (PCR Tr. pp. 208-209). Counsel testified Mr. Ott knew bad things about applicant that could have been elicited on cross-examination. (PCR Tr. pp. 208-209). Counsel conducted a reasonable mitigation investigation, and it was an objectively reasonable trial strategy decision not to call a witness from whom unfavorable testimony could have been elicited on cross-examination by the Solicitor. Wong v. Belmontes; Moody v. Polk; Rutherford v. Crosby; Strickland v. Washington; Council v. State.

Furthermore, applicant has failed to demonstrate prejudice in this regard. Wong v. Belmontes, 558 U.S. ___, 130 S.Ct. 383 (2009). Applicant has failed to show there is a reasonable probability that, absent counsel's *alleged* errors, the jury would have returned with a different sentence. Id. Again, a reasonable probability is a probability sufficient to undermine confidence in the outcome. Applicant has failed to make this showing.

³⁴This Court would also note that in one of the threatening phone recordings left by applicant, it appears that a child is laughing in the background. If counsel had called either of these child witnesses they would have been subject to cross-examination whether they were present when applicant made this phone call, and if the family of applicant thought the threats were funny or amusing.

The United States Supreme Court made clear in its recent decision in Wong v. Belmontes, *supra* that the burden *is not* on the State to show the lack of prejudice, but the burden is on the applicant to show prejudice. Id. To establish prejudice, applicant “must show ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Id., *quoting Strickland*, 466 U.S. at 694. That showing requires applicant “to establish ‘a reasonable probability that a competent attorney aware of the [available mitigating evidence], would have introduced it at sentencing,” and “that had the jury been confronted with this . . . mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.” Id., *quoting Wiggins v. Smith*, 539 U.S. 510, 535, 536, (2003). “In evaluating that question, it is necessary to consider *all* the relevant evidence that the jury would have had before it” if applicant “had pursued the different path - not just the mitigation evidence” applicant could have presented, but also” the aggravating evidence “that almost certainly would have come in with it.” Id., *referencing Strickland*, at 695-696, 700 (emphasis in original). “Thus, to establish prejudice,” applicant “must show a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence” (including the additional testimony applicant could have presented) against the entire body of aggravating evidence (including any additional aggravating evidence likely to have come in). Id.; *See also Porter v. McCollum*, 558 U.S. ____ (2009). Applicant has not met this burden. Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997)(holding that, considering the sheer magnitude of the aggravating evidence, the defendant failed to show prejudice from trial counsel’s failure to present certain mitigating evidence).

The amount of evidence in aggravation the State presented in the guilt and penalty phase of applicant’s trial was overwhelming. The State’s third (3rd) witness in the penalty phase, Ed

Williams, identified his thirteen (13) year old daughter Stacy's voice on the tape of a 911 call she placed after being shot. On the tape Stacy begged the 911 dispatcher to "[p]lease hurry up" because she was hurting. (R. pp. 3006-10).

The State's next witness, Lieutenant M.L. Varnadoe, the first law enforcement officer on the scene, gave testimony about Stacy's pain and suffering, and about how applicant said: "Fuck them. Let them die. Fuck them all," (R. p. 2592) as Stacy lay dying. The record shows Stacy was within hearing distance of applicant when he made these statements. The record also shows that thirteen (13) year old Stacy, though she was severely wounded, was concerned about her brother, and could see her mother lying on the floor mortally wounded.

The State also presented victim impact testimony by one of Stacy's classmates and by her father, and photographs of the scene presented by a crime scene investigator. The photographs showed the brutality of the murders applicant committed, and the fact that Stacy moved or crawled through one portion of the home to another after she was shot. Trial counsel testified at the merits hearing, and this Court agrees, that "[t]here was no way [counsel] were getting around the tape and the fact that a thirteen year old died." (PCR Tr. p. 163). The record established beyond any doubt that applicant murdered a defenseless thirteen (13) year-old girl by shooting her in the lower back or buttocks with buckshot.

Additionally, the evidence in this case established applicant, in a pre-meditated fashion, drove from his home on the other side of the City of Orangeburg to the victims' home with the intent of killing at least Linda Williams and Dorothy Gates. The evidence supporting this fact includes applicant's prior threats against these two (2) victims, the testimony establishing he drove approximately fifteen (15) miles to the victims' home, had a shotgun loaded with buckshot in the

vehicle with him, and circled the victim's home three (3) times before driving up into the victims' yard and immediately breaking into the victim's home while armed with the loaded shotgun. Applicant was so intent on murdering the victims that he did not even close his car door after exiting his vehicle with his loaded shotgun.

The evidence also shows beyond any doubt that applicant got out of his vehicle, and in a premeditated fashion burglarized the victim's home. Applicant used his shotgun to break out the front window of the home. Applicant entered through this window because the front door was locked. Applicant's statements once inside the home, such as "I've got you now, bitch," show his actions on September 8, 1999 were a culmination of his threats over the previous several days.

During the commission of the burglary, applicant murdered three (3) people pursuant to one course or scheme of conduct. All three (3) victims were unarmed, and one (1) victim, Linda Williams, was attempting to call for help on her telephone when applicant entered the residence. Applicant murdered all (3) three victims by shooting them with the loaded twelve (12) gauge shotgun he had brought with him from his home for the purpose of murdering the victims. Applicant shot all of the victims with shells loaded with buckshot, a load used for killing large game.

The physical evidence shows applicant specifically selected the caliber of shotgun shells he intended to use on the victims, and he selected the most dangerous shells for the purpose of murdering whatever victims he confronted at the home. The evidence also shows applicant hunted down one of the victims, Dorothy Gates, and murdered her in a different part of the home. The evidence established that applicant intended to murder Linda Williams and Dorothy Gates because he intentionally shot both victims in the chest. The evidence also shows one of the victims, Stacy, was a child thirteen (13) years of age, and applicant brutally shot her in the back.

This Court also finds the evidence showed beyond a reasonable doubt that applicant committed an assault and battery of a high and aggravated nature on thirteen (13) year old Stacy by shooting her in her lower back with buckshot. This Court also finds that applicant's conduct toward Stacy constituted serious physical abuse of a thirteen (13) year old child. The evidence shows Stacy did not die immediately but lived for at least ten (10) to fifteen (15) minutes after the assault by applicant, and suffered severe pain and suffering before she expired. During these agonizing minutes, Stacy lost the use of her lower extremities. This Court finds applicant's conduct toward Stacy intentionally subjected her to serious physical abuse prior to death and as such constituted the aggravating circumstance of torture under South Carolina law. S.C. Code Ann. Section 16-3-20(C)(a)(1)(h) (Supp. 2007); State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), *cert denied*, 110 Ct. 1536, *rehearing denied*, 495 U.S. 953.

Additionally, the evidence shows applicant had previously expressed his malice toward the victims' family in several phone calls to their residence in the days leading up to the murders. The evidence shows that applicant had a complete disregard of law and order *and* the police in his actions leading up to and including the murder of the victims. Even after applicant shot the victims with buckshot, he continued to express his malice toward the victims in unsolicited statements he made to the police as he lay on the floor of the victims' home suffering from a self-inflicted gunshot wound. Applicant's statements to law enforcement such as "finish the job" show that he came to the victims' residence for the purpose of murdering them. The record also shows that, even after his incarceration, applicant continued to express his malice toward one of the victims, Dorothy Gates, on the anniversary of her death. Also, while awaiting trial, applicant stated in the presence of a jail guard that he had killed three (3) people, and did not mind killing another human being. The record

also shows that applicant threatened the life of another inmate during pre-trial detention. The evidence shows applicant made this threat against the life of another inmate for the petty reason of feeling that the inmate had cut-in-line in front of applicant to receive medical treatment. The record shows the State thoroughly established the aggravating *circumstances* of these heinous crimes and the bad *character* of applicant.

Furthermore, as counsel correctly strategically analyzed the presentation of the mitigation case, had counsel called family members of applicant or Mr. Ott to testify, the Solicitor would have been able to ask them about prior instances of bad conduct committed by applicant, such as shooting his brother's car with a firearm, and previously physically abusing his ex-wife. And, the State would have been able to question the adult witnesses regarding why applicant was not allowed to see his only son and why he was prohibited from seeing his grandchildren by his own daughter. And, if counsel had called any child witnesses on applicant's behalf, the State would have been able to question those witnesses about the child victim in this case, Stacy Williams, and emphasize her youth and innocence and the senselessness of applicant's murder of that defenseless child. See Wong v. Belmontes, *supra* (other evidence proposed by applicant would have put into play aspects of applicant's character that would have triggered the admission of the powerful evidence of another crime committed by applicant in rebuttal).

Additionally, as previously set forth, the defense put forth an extensive case in mitigation. Much of the testimony offered by applicant at PCR was cumulative to that offered by counsel at trial or introduced into evidence. The jury was well aware applicant had a difficult upbringing, grew up in a difficult environment, had a minimal criminal record, and worked hard. (**R. pp. 2649-2679**,

2688-2689). The jury was aware applicant had provided for his family and for Ms. Williams.³⁵ (R. p. 2679). The jury was also aware applicant had served in the United States Army during the Vietnam War and was honorably discharged. (R. pp. 2677-2678). The jury was also aware through expert testimony that applicant was an alcoholic, had been hospitalized several times for alcoholism, and had atrophy of the brain due to chronic alcoholism. (R. pp. 2649-2680, 2701). The jury was aware applicant drank heavily in the days leading up to the burglary and murders. The jury was also aware that applicant was a socially stunted individual who had difficulty sustaining long lasting relationships and dealing with rejection. (R. pp. 2649-2680).

This Court also finds applicant has failed to meet his burden of proof to show that considering all the evidence, the good with the bad, there is a reasonable probability the result of the sentencing proceeding would have been different. Wong v. Belmontes, *supra*. The record shows these murders were premeditated and the circumstances surrounding them were extremely aggravating. The record shows the State proved each of the aggravating circumstances relied upon to impose the death penalty beyond any doubt. The evidence established the victims were in their own home, defenseless, and afraid, when applicant burglarized the home and intentionally took their lives. The record also shows the thirteen (13) year-old child suffered needlessly for at least ten (10) minutes, was in agonizing pain, was afraid she was dying, was worried about her brother, and knew her mother and grandmother had been shot by applicant. It is hard to imagine the jury would have returned a sentence of life simply because a few of applicant's family members and a friend

³⁵The jury was aware applicant had purchased a Mustang automobile from the tape recordings admitted into evidence where applicant spoke of buying Linda Williams this automobile. The fact that applicant was supportive of Ms. Williams and her family was also evident from other comments made by applicant on the answering machine tapes. (See also PCR Tr. pp. 170-171).

attempted to personalize applicant and made a plea for life. It becomes even harder to envision such a result when the evidence that applicant had shot at his brother, more evidence of the physical abuse of his first wife was admitted at trial, and testimony was admitted applicant was not allowed to see his son or his granddaughters. The notion that the result could have been different if only counsel had called family members, who were reluctant to testify at best, or a friend who knew bad things about applicant, to personalize applicant and make a plea for his life, is fanciful. Wong v. Belmontes, *supra*. This portion of this ground must be denied and dismissed with prejudice.

The SLED Records regarding the Domestic Nature of the Murders

Applicant also alleges counsel was ineffective for not introducing SLED records regarding the domestic nature of this killing and applicant's state of mind. There is no merit to this ground.

The testimony at trial clearly established the domestic nature of these three (3) murders. The record is replete with evidence that applicant and Linda Williams had lived together for two (2) years, and Ms. Williams had asked applicant to leave her home. The testimony established police were called to Ms. Williams' home on more than one occasion either to force applicant to leave the home or because of applicant's repeated harassing or threatening phone call's to his former girlfriend's home. The domestic nature of these murders is evident from the record and any testimony or evidence from SLED regarding the domestic nature of these murders would have been cumulative to the evidence already introduced in the trial. The jury who convicted applicant and sentenced him to death knew full well *the domestic nature* of these murders. Therefore, applicant has failed to show deficient performance or any resulting prejudice from counsel's alleged failure to introduce such evidence. Wong; Simpson v. Moore.

Furthermore, in the recent case of State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007), the

defendant challenged the imposition of the death penalty against him as disproportionate to other death penalty cases because his case involved only a single victim and resulted from a *domestic dispute*. Our Supreme Court rejected this argument, finding the murder was not simply a domestic dispute and that Lindsey's culpability was not lessened by the fact that the victim was his wife. This Court would also note that there have been numerous other death penalty cases in this state where the death penalty was imposed for the murder of a spouse, family member, or lover. See State v. Locklair, 341 S.C. 352, 535 S.E.2d 420 (2000)(death penalty imposed for murder of girlfriend); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998)(death penalty imposed for murder of wife and step-daughter's fiancé); State v. Sigmon, 336 S.C. 552, 623 S.E.2d 648 (2005)(death penalty imposed for murder of girlfriend's parents); State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002)(death penalty imposed for murder of defendant's child); State v. Evans 371 S.C. 27, 637 S.E.2d 313 (2006)(death penalty imposed for murder of girlfriend's father and brother); State v. Williams, 321 S.C. 327, 468 S.E.2d 626 (1996)(death penalty imposed for murder of wife and son); State v. Rosemond, 335 S.C. 593, 518 S.E.2d 588 (1999)(death penalty imposed for murder of girlfriend and her ten (10) year old daughter); State v. Reed; (death penalty imposed for murder of parents of girlfriend); State v. Stanko, (death penalty imposed for murder of girlfriend); State v. Kornahrens, 290 S.C. 281, 350 S.E.2d 180 (1986)(murder of ex-wife, former father-in-law and son of ex-wife's boyfriend). It is hard for this Court to see how additional evidence of the domestic nature of these three (3) brutal murders would have helped applicant at all. Applicant has failed to show deficient performance or prejudice in this regard. Strickland v. Washington; Wong v. Belmontes.

Applicant alleges counsel should have introduced a SLED toxicology report of the victims which showed Ms. Gates had a blood alcohol level of .074 and Linda Williams had a prescription

sedative valium in her blood stream. Applicant alleges the SLED toxicology report shows the domestic nature of these murders and establishes applicant's state of mind. This ground has no merit and must be dismissed with prejudice.

First, this ground has no merit because trial counsel sought to introduce the SLED toxicology report during the sentencing phase. After the Solicitor agreed to withdraw the aggravating circumstance of torture as to the adult victims, the trial court ruled the SLED toxicology report as to Linda Williams and Dorothy Gates would not be relevant to any issue and would not be admissible. Therefore, counsel could not be ineffective in this regard.

This Court also finds that even if trial counsel had sought again to introduce the SLED toxicology report the trial judge would not have allowed its admissibility. Applicant has not met his burden of proof to show this information had any relevance to this case. As will be discussed further hereafter, applicant offered no evidence at trial or at the PCR to establish applicant knew Linda Williams had taken valium on the day of her murder or that Dorothy Gates had drank any alcohol the day of her murder. Applicant offered no evidence at trial or PCR that Ms. Williams' taking a sedative or Ms. Gates drinking alcohol had anything at all to do with their murders. Applicant testified at the PCR hearing and did not offer any testimony that he knew either victim had taken either substance or that the fact that they had taken either substance had anything to do with their murders. **(PCR Tr. pp. 82-92)**. Furthermore, applicant called no expert to testify what effect, if any, the level of valium in Ms. Williams' blood stream or the level of alcohol in Ms Gates' blood stream would have had on each victim. **(See PCR Transcript)**. Applicant has not met his burden of proof on this issue. Butler v. State ; Strickland v. Washington; Wong v. Belmontes.

Applicant's assertion that the SLED toxicology report establishes the domestic nature or

domestic circumstances of these crimes is incorrect. There is no testimony that the presence of a prescription sedative in Ms. Williams' blood stream or the presence of alcohol in Ms. Gates' blood stream had any effect or relation to the commission of these crimes or their domestic nature. Applicant testified at the PCR hearing and did not assert the presence of either substance in either victim had anything to do with his commission of the burglary of Ms. Williams' home or the murders of the three (3) victims. **(PCR Tr. pp. 82-92)**. Nor was there any testimony at the capital trial that the presence of either substance had any relation to applicant's execution of these crimes. **(See R.O.A.)**. Applicant has failed to meet his burden of proof on this issue. This Court would also note there was no expert testimony introduced at the PCR hearing regarding what effect, if any, these specific levels of valium or alcohol would have had on either victim respectively, or that they had anything to do with the commission of these crimes. **(See PCR Transcript)**. In fact, the presence of these substances in both victims may have been directly related to the stress induced by applicant making repeated threats against the victims in the days leading up to the burglary and murders. Applicant did not even prove at PCR that he knew on the date of the murders that either victim had taken either substance. **(See PCR Transcript)**. This Court finds applicant has failed to meet his burden of proof on this issue. This Court finds that applicant has failed to meet his burden of proof on this issue to show counsel was deficient in failing to introduce this evidence for this reason or resulting prejudice from the lack of introduction of these facts. Strickland v. Washington; Wong v. Belmontes.

Furthermore, there is no evidence in the record that thirteen (13) year old Stacy Williams had alcohol or drugs in her system. In fact, all of the evidence is to the contrary. The record shows the brutal murder of thirteen (13) year old Stacy had nothing to do with any alcohol or drugs, and was

completely unjustifiable, for domestic or any other reason. Applicant cannot show deficient performance or prejudice with regard to this issue. Strickland; Wong.

Nor has applicant shown the SLED toxicology report on the victims establishes *his* state of mind at the time of the crimes. There is no testimony in the record from the trial or the PCR hearing that applicant knew Ms. Williams had taken a sedative that day or knew that Ms. Gates had consumed some quantity of alcohol before he committed the murders. Applicant chose not to testify at trial. Applicant did testify at the PCR hearing and offered no testimony on this issue. (**PCR Tr. pp. 83-91**). Applicant has the burden of proof to establish a claim of ineffective assistance of counsel. Hutto v. State, Shearhouse Advance Sheets, Opinion No. 26796 (Filed April 5, 2010), *citing* Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Applicant has failed to meet his burden of proof on this issue. Applicant has failed to meet his burden of proof to show counsel was deficient in failing to introduce this evidence to establish *applicant's* state of mind.³⁶

Furthermore, this Court finds applicant has failed to establish prejudice from counsel's alleged ineffective assistance in not introducing the SLED toxicology report of the victims Linda Williams and Dorothy Gates. This Court fails to see how this evidence would have changed the result at trial. In fact, this Court finds that applicant has failed to show that had this testimony been elicited at trial, given all of the other evidence introduced in this case, the result of the proceeding would have been different. Wong; Jones; Strickland.

³⁶At PCR, applicant's collateral attorneys *argued* this evidence should have been admitted to show there was a "double standard" applied to applicant verses Linda Williams and Dorothy Gates, since he was asked to leave the home days earlier because of his alcohol use and abuse; however, there was no testimony at the trial or PCR that applicant knew that Linda Williams had taken a sedative or that Dorothy Gates had drank alcohol on the date of the crimes. Nor was there any testimony at trial or PCR that applicant murdered the victims because of Linda Williams use of a prescription sedative or Dorothy Gates ingestion of alcohol on the date of the murders

The record shows applicant went to Ms. Williams' home with the specific intent to murder Linda Williams and Ms. Gates and carry out his expressed intent to harm them that he had communicated for several days over the telephone. Applicant expressed to Linda Williams in his phone calls to the residence that he was coming for Ms. Williams and for her family. The record shows that is exactly what he did. He specifically named Ms. Gates as a target in one of the threatening phone calls. His actions prior to and during the murders themselves show his intent was to kill Ms. Williams and the Gates' family regardless of whether Ms. Williams was taking a sedative or Ms. Gates had consumed some quantity of alcohol. All of the evidence introduced in the trial and at the PCR merits hearing shows these murders were the result of applicant's own plan and evil desires.

With regard to these crimes, this Court finds applicant accomplished what he set out to do, what he planned to do, to murder Linda Williams, her mother Dorothy Gates, and any other member of the family who was in the home once he broke in. Furthermore, there is no evidence applicant knew Ms. Williams had taken a prescription sedative or that Ms. Gates had drank alcohol that day. Finally, as set forth above, thirteen (13) year old Stacy Williams murder is unjustifiable. This Court finds the toxicology report would have had no effect on the jury's determinations regarding guilt or punishment given the facts in this case and the overwhelming evidence of applicant's planning and execution of the burglary of Linda Williams' home and these three (3) brutal murders. Wong; Jones. This ground must be dismissed with prejudice.

Furthermore, counsel testified that they made a strategic decision not to disparage the victims in this case. (PCR Tr. p. 171, 185-187). Counsel testified they discussed extensively whether or not to introduce any evidence that reflected negatively on the character of the victims and even

consulted with other attorneys and members of the defense team. Counsel testified they made a strategic decision not to attack the victims' character in this case because they felt based on their experience, along with those they consulted, that this would influence the jury negatively with regard to their client, applicant. In viewing the evidence applicant now alleges counsel should have introduced regarding the victims, and the reason he states this evidence should have been introduced, and the lack of testimony on his part making any connection between this evidence and his state of mind, this Court cannot say that counsel's strategic decision in this regard was objectively unreasonable. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991)(recognizing that while a defendant may rebut victim impact evidence, it may not be prudent for tactical reasons for the defendant to rebut victim impact evidence). In fact, this Court finds counsel's strategic decision not to introduce this evidence was an objectively reasonable trial strategy decision consistent with their theory and presentation of the case. Payne; Strickland. As such, it cannot be the basis for a claim of ineffective assistance of counsel. Strickland; Council. This portion of this ground must be denied and dismissed with prejudice.

The testimony of Edward Williams

Applicant also alleges counsel was ineffective in failing to present information from witness Edward Williams. Edward Williams is the father of Buster Williams. Edward Williams was formerly married to Linda Williams. Dorothy Gates was his former mother-in-law. Collateral counsel deposed Mr. Williams after the capital trial but before the PCR merits hearing.

Mr. Williams testified at his deposition that the victim Dorothy Gates, if she was drinking, had a tendency to "run off at the mouth" and "say things she didn't mean to say, then apologize to you the next day." Mr. Williams testified Ms. Gates was not an angry drinker but would just say

“whatever was on the top of her head at the moment she’d just tell you just what she thought” straight out and blunt. (PCR Tr. pp. 147-148). Mr. Williams also testified Ms. Gates was a heavy drinker of beer at times when she drank. (PCR Tr. p. 148).

Applicant alleges this information should have been introduced in conjunction with the SLED toxicology report of the victim Ms. Gates which showed she had a blood alcohol level of .074 to show the domestic circumstances of the crime and applicant’s state of mind. However, the record shows Edward Williams was in another state when the victims were murdered. He has no direct knowledge of what occurred the day of the murders. Furthermore, applicant did not testify at trial and did not testify at the PCR merits hearing *that* Ms. Gates provoked her murder. (PCR Tr. pp. 82-92). Applicant has failed to meet his burden of proof to show deficient performance and prejudice in this regard. This ground is without merit and must be dismissed with prejudice.

The record shows Ms. Gates was lawfully in her daughter’s home when she was murdered. She was a guest in the home of her daughter and her granddaughter. Applicant, however, had been ordered to leave the home several days before Ms. Gates’ death by both Linda Williams *and* the police. Applicant had been informed by law enforcement that if he returned to the home he would be trespassing.

The record also shows that after applicant was forced to leave Ms. Williams’ home by police, applicant made a series of threatening phone calls to Linda Williams’ home threatening to harm Linda, her mother Dorothy Gates, and other members of their family. Despite the warnings of a police officer, applicant had continued to make threatening phone calls to Linda Williams’ home. As a result, a warrant for telephone harassment had been issued for applicant’s arrest.

The record also shows the victims in this case were afraid of applicant and nervous. A

neighbor testified to the fact that one of the victims was nervous or anxious on the date of the murder. (R pp. 2189). The front door to the Williams' home had been locked. (R. pp. 2223-2224, 2834). This is the reason applicant had to break through the front window of the home to get inside and murder the victims.

Instead of staying away from the Williams' home as instructed by Linda Williams *and by police*, on September 8, 1999, applicant loaded his 12-gauge shotgun with five (5) buckshot shotgun shells. Applicant put additional shotgun shells, of a smaller caliber, in his pants' pocket.³⁷ Applicant put his shotgun in his car and drove approximately fifteen (15) miles to Linda Williams' home. The record shows applicant intended to kill Linda Williams and her mother, Dorothy Gates, when he arrived at Linda Williams' home.

Upon arriving at the Williams' home, applicant circled the block three (3) times before driving into Linda Williams' yard. Applicant then took the loaded shotgun out of his car and used it to break through the front window glass of Ms. Williams' home, because the front door to the home was locked due to his threats and for the protection of the family members inside. Applicant was trespassing on Ms. Williams' property at this time after having been notified by police that he was not to be there.

The record shows applicant crawled through the window, he busted out, armed with his loaded shotgun and told Ms. Williams "I've got you now, bitch," evidencing his intent to carry out the threats he had been making for several days. Applicant then told Ms. Williams to "put the fucking phone down." Ms. Williams was attempting to call police for help from applicant's deadly assault.

³⁷The shotgun shells in applicant's pocket were what is commonly referred to as bird shot.

Applicant then intentionally shot Ms. Williams in the chest with the intent to kill her. Applicant also intentionally shot thirteen (13) year-old Stacy Williams in the back. The evidence shows applicant hunted down and intentionally shot Dorothy Gates in a bedroom further back in the house. Applicant shot Dorothy Gates in the chest as well and intended to kill her. Applicant then intentionally shot himself. Applicant further expressed his original intent when entering the home when he told police "finish the job, let them die."

This Court finds counsel was neither deficient nor was applicant prejudiced by counsel's *alleged* ineffective assistance in not eliciting the specific deposition testimony of Edward Williams referenced above. It is hard for this Court to see how Edward Williams' testimony would have been relevant, admissible, or helpful given the undisputed facts in this case. In fact, this Court finds Edward William's deposition testimony would have been irrelevant, inadmissible, and not helpful to applicant given the undisputed facts in this case.

Applicant did not testify in the guilt phase or penalty phase of his trial. As a result, there was no testimony admitted during the trial of this case, or PCR, if such even existed, that Dorothy Gates said anything at all to applicant, much less something that might have offended or provoked him. Buster Williams testified to what he overheard. Buster testified that the only thing he heard were threats made by applicant such as "put the fucking phone down," and "I got you now bitch." Buster was afraid and ran.

The physical evidence shows Linda Williams was shot first, in the front room of the house where applicant broke into the home. The evidence also shows that Stacy Williams was shot next near the hallway, and finally applicant hunted down Ms. Gates and shot her in a bedroom near the end of the hallway. While a neighbor testified he heard hollering or screaming before the shooting

started, this was certainly applicant screaming at the victim or victims or the victims response to his terroristic threats after breaking into the home and his murderous assault, and the witness did not identify Ms. Gates' voice. Regardless, there is no evidence in the record that Dorothy Gates said anything to applicant before he murdered her. Applicant made no such assertion at trial (See **R.O.A.**). Applicant testified at the PCR hearing and did not make any such assertion. (**PCR Tr. pp. 82-92**). Nor is there any evidence in the record that if she said anything, that it was of the nature as would have provoked her murder. (See **R.O.A. & PCR Tr. pp. 82-92**). Especially given this record, which shows applicant went to the victim's home with the intent to murder Linda Williams and her mother Dorothy Gates.

The relevance of Edward Williams' deposition testimony regarding Ms. Gates has simply not been tied up or connected to this case such that it would have been relevant and admissible at trial. Applicant bears the burden of proof at PCR, and this Court finds he has failed to carry that burden. Given this record, it is merely speculative that Ms. Gates said anything to applicant or said anything that might have provoked her murder. Nor can this Court see how Edward Williams' testimony would be relevant given the overwhelming evidence that applicant burglarized the home with the intent to kill the victims, and the victims were lawfully in the residence and under attack.

Furthermore, this Court fails to see how this referenced testimony would have changed the result at trial. In fact, this Court finds that applicant has failed to show that had this testimony been elicited at trial the result of the proceeding would have been different. Wong; Jones. Ms. Gates tendency to speak her mind when drinking does not negate in any fashion the overwhelming evidence that applicant went to and into the Williams' home with the specific intent to murder Linda Williams and Ms. Gates and carry out his expressed intent to harm them that he had communicated

for several days over the telephone. The record shows applicant was there to "finish the job," which included murdering the victims and then killing himself.

Applicant expressed to Linda Williams in his phone calls to the residence that he was coming for Ms. Williams and for her family. That is exactly what he did. He specifically named Ms. Gates as a target in one of the threatening phone calls. His actions prior to and during the murders themselves show that his intent was to kill the Ms. Williams and the Gates' family regardless of what Ms. Gates *might* or *might not* have said after he unlawfully burglarized the Williams' home.

Applicant did not testify at trial, and there is no testimony in the record that Ms. Gates provoked her murder or anyone else's murder in the home. Even if Edward Williams' testimony on this issue had been admitted, the jury would had to have speculated that Ms. Gates said anything to applicant and would had to have speculated exactly what she said. To the contrary, the evidence shows these murders were the result of applicant's own plan and evil desires. This Court finds applicant accomplished what he set out to do, what he planned to do, to murder Linda Williams, her mother Dorothy Gates, and any other member of the family who was in the home once he broke in. Buster Williams was lucky to have escaped with his life. Ms. Gates' tendency to speak her mind when drinking simply was irrelevant and in any event would have had no effect on the jury's determinations regarding guilt or punishment given the facts in this case and the overwhelming evidence of applicant's planning and execution of this burglary and these three (3) brutal murders. Wong; Jones. This Court finds, considering all of the evidence in this case, including the testimony applicant alleges should have presented, the result of the proceeding would not have been different. Wong; Jones; Strickland. This ground must be dismissed with prejudice.

Applicant also contends that counsel should have introduced testimony from Edward

Williams that Linda Williams previously used illicit drugs in the past and had lost custody of her children for a time to show these were not premeditated or cold blooded murders. This portion of this ground has no merit.

First, this Court finds much of this testimony would have been inadmissible as hearsay. Most of the testimony of Edward Williams on these subjects was based on discussions he had with his daughter Stacy Williams, and his further discussions with Linda Williams, both of whom are deceased.

Second, even if applicant could overcome the hearsay objection to this testimony, this Court does not see how this testimony would have been relevant for the purpose applicant contended at the PCR merits hearing that it should have been introduced in the penalty phase. Applicant contended that this testimony should have been introduced to show the circumstances of the crime and that this was not a premeditated or cold blooded killing. Whether, Linda Williams used illegal drugs in the past, or abused prescription medication in the past, or had lost custody of her children for a period of time, was not relevant to whether applicant committed these murders in a premeditated or cold blooded fashion or to the circumstances of the crime. Applicant did not testify at trial. Applicant testified at the PCR hearing and offered no testimony in support of this ground. (See PCR Tr. pp. 82-92). Applicant failed to establish any connection between these brutal crimes and Linda Williams' prior illegal drug usage or the fact that she lost custody of her children so as to make this evidence relevant and admissible.³⁸

³⁸Applicant's collateral attorneys *argued* this testimony would have established applicant's state of mind regarding a "double standard" being applied to him because he was asked to leave the home because of his alcohol use or abuse; however, applicant did not testify at trial and offered no testimony at PCR that he was aware of Linda Williams' prior alleged drug use or abuse or the fact that she had lost custody of her children in the past.

As previously stated, the victims were in their own home with the front door locked. Applicant's own actions would have demonstrated whether he committed these murders in a deliberate and pre-mediated fashion. In fact, this Court finds applicant's own actions do demonstrate he committed these murders in a deliberate and premeditated fashion. Linda Williams' past was irrelevant to this issue.

The record shows applicant made numerous phone calls threatening Ms. Williams and the Gates' family in the days leading up to the murders. Applicant then placed a loaded shotgun in his vehicle the afternoon of the murders, drove fifteen (15) miles to the victims' home, circled the block several times, drove into the yard, burglarized the home with the loaded shotgun with the intent to murder the victims, and shot each victim separately with buckshot. This Court finds counsel was not deficient in failing to introduce Linda Williams' alleged prior drug use or abuse or the fact that she may have lost custody of her children at some time in the past to show applicant did not commit these murders in a deliberate and willful fashion or to show the circumstances of the crime.

This Court also finds applicant has failed to demonstrate prejudice by the failure to introduce this testimony for this specific purpose. As previously stated, the record shows applicant made a series of phone calls to the Williams' residence indicating he was going to harm Linda Williams, Dorothy Gates and the Williams' family. Applicant loaded his 12 gauge shotgun with buckshot and placed the shotgun in his car. Applicant drove approximately fifteen (15) miles from his aunt's home where he was staying to the victims' home. Applicant circled the block surrounding the victims' home three (3) times before driving up in the yard. Applicant got out of his car and obtained his 12-gauge shotgun. Applicant then broke into the victim's home by breaking out the front window. Applicant then crawled through the window he had smashed and pointed his shotgun

at Linda Williams who was trying to call the police for help. Applicant stated "I've got you now bitch" and "put the fucking phone down." Applicant then shot Linda Williams in the chest, Stacy Williams in the lower back or buttocks, and hunted down and shot Dorothy Gates in a back bedroom, where he also shot her in the chest. Applicant then shot himself in an attempt to take his own life. When police arrived, applicant asked the police to kill the victims and himself, to "finish the job." This Court fails to see how Linda Williams' alleged history of drug use, or the fact that she may have lost custody of her children at some time in the past, even if it had been admitted, would have shown these murders were not committed in a deliberate, willful, and pre-meditated fashion or would have changed the result at sentencing. Applicant has failed to demonstrate prejudice with regard to this allegation of ineffective assistance of counsel. Wong; Jones v. State; Strickland. This Court finds, given all the aggravating and mitigating evidence in this case, even had this information been before the jury, there is no reasonable probability the result of the sentencing proceeding would have been different.

Furthermore, counsel testified that they made a strategic decision not to disparage the victims in this case. (PCR Tr. pp. 171, 185-187). Counsel testified they discussed extensively whether or not to introduce any evidence that reflected negatively on the character of the victims and even consulted with other attorneys and members of the defense team. Counsel testified they made a strategic decision not to attack the victims' character in this case because they felt based on their experience, along with those they consulted, that this would influence the jury negatively with regard to their client, applicant. In viewing the evidence applicant now alleges counsel should have introduced regarding the victim Linda Williams, and the reasons he states this evidence should have been introduced, this Court cannot say that counsel's strategic decision in this regard was objectively

unreasonable. Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991)(recognizing that while a defendant may rebut victim impact evidence, it may not be prudent for tactical reasons for the defendant to do so). In fact, given the evidence of Petitioner's execution of these crimes, and given counsel's strategy at trial, to accept responsibility for applicant's actions, and not blame the victims, this Court finds not introducing this evidence was an objectively reasonable trial strategy decision. Payne; Strickland. As such, it cannot be the basis for a claim of ineffective assistance of counsel. Strickland. This ground has no merit and must be dismissed with prejudice.

Ground G

Applicant alleges trial counsel was ineffective in failing to object to the trial judge's (allegedly) improper limitation of applicant's final statement to the jury. This ground is without merit also.

In a capital murder case, the defendant has the right to testify and make a closing argument to the jury. S.C. Code Ann. Section 16-3-20(B); *and see* State v. Norris, 285 S.C. 86, 328 S.E.2d 339 (1985). However, the defendant's right to make a closing argument is not absolute and does not encompass every subject he would like to discuss with the jury. It is limited to arguing the evidence in the record. *See* State v. Davis, 306 S.C. 86, 328 S.E.2d 339 (1985). It has been previously held that an instruction by the trial judge to the defendant that he was not to testify during his argument was not an improper comment on his failure to testify previously. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991). The trial judge in the present case did not instruct applicant that he could not talk about the facts of the case which were in evidence. *See* State v. Davis, 306 S.C. 86, 328 S.E.2d 339 (1985)(Although the trial judge may prohibit a defendant from offering unsworn testimony in his statement to the jury, a defendant may present argument regarding facts that are in

evidence).

This Court has reviewed the colloquy between the trial judge and applicant on this issue and finds the trial judge in this case correctly instructed applicant regarding what was permissible in his closing statement to the jury and did not prohibit or prevent applicant from making a plea for mercy to the jury. Since the trial judge's instructions to applicant were a correct statement of the law, trial counsel could not have been ineffective in failing to object.

Furthermore, as previously stated, this Court had the opportunity to listen to the testimony, view the witnesses, and judge their credibility accordingly. This Court finds the testimony of trial counsel on this issue is credible and the testimony of applicant is not.

Applicant testified at the PCR merits hearing he wanted to make a plea for mercy, and the trial court prohibited him from doing so by its instructions to him. Trial counsel testified that applicant did not want to make a plea for mercy or have anything to do with making any kind of statement or argument to the jury. Counsel's testimony is supported by the record at trial as well. This Court had an opportunity to observe the witnesses testify, heard their testimony, and judged their credibility accordingly. This Court finds trial counsels' testimony credible or believable on this issue and applicant's testimony was not credible or believable.

This Court has reviewed the trial court's colloquy with applicant and finds the trial court did not prohibit applicant from making a plea for mercy. (See **R. pp. 2707 -2711, 2881-2882**). While the trial court correctly informed applicant that he could not testify and had to argue facts in evidence just like his attorneys, the trial court did not prohibit applicant from making a plea for mercy. Trial counsel testified he did not consider the judge's colloquy with the applicant to prohibit a plea for mercy. (**PCR Tr. pp. 215-222, 230-231**). While one of applicant's attorneys felt the judge's

statement to applicant was not a correct statement of the law, the other attorney stated that the trial judge's statement regarding what was permissible in a statement to the jury was a correct statement of the law. This Court would note that it is not bound by an attorney's opinion of what is a correct statement of the law or not. This Court finds the trial judge correctly stated the law to applicant and did not prohibit a plea for mercy. This Court also finds this ground has no merit for another reason.

Trial counsel testified that applicant was advised that he could make a statement to the jury, that he could argue the facts in evidence, and that he could make a plea for mercy or his life. **(PCR Tr. pp. 97-98, 231)**. Both of applicant's trial attorneys testified that applicant, after being fully advised of his rights in this regard several times, did not want to make or having anything to do with making any kind of statement before the jury including a plea for mercy. **(PCR Tr. pp. 97-98 190-192, 220-221)**. Trial counsel testified applicant's decision not to make any statement to the jury or any plea for mercy was consistent throughout his capital sentencing proceeding. **(PCR Tr. pp. 192)**. This Court had an opportunity to view the witnesses and judge their credibility accordingly. This Court finds trial counsel's testimony on this issue to be credible and applicant's testimony at PCR not to be credible. Therefore, this Court finds that the decision not to make a final statement to the jury, including a plea for mercy, was made by applicant and applicant alone, and not the result of any coercion or duress by the trial court or a result of the trial court's instructions to applicant. **(R. pp. 2707-2711, 2881-2882, PCR Tr. pp. 97-98, 190-192)**.

This Court finds that applicant has failed to show deficient performance or prejudice resulting from counsel's alleged failure to object in this regard. This Court finds based on the credible evidence in the record that applicant was not going to make a final statement to the jury whether by argument or by plea for mercy regardless of the trial court's discussions with applicant. **(R. pp.**

2707-2711, 2881-2882, PCR Tr. pp. 97-98, 190-192, 220-221). This Court finds, based on the credible testimony, that even had counsel objected to the trial court's colloquy with applicant, applicant still would not have made any statement or plea for mercy. According to trial counsel's credible testimony, applicant had clearly expressed his desire and intent to his attorneys after being fully advised of his rights that he was not going to make a final argument or a plea for mercy. This ground must be dismissed with prejudice.

Furthermore, counsel testified they had fully considered whether applicant should make a final statement to the jury including a plea for mercy, discussed this issue within the defense team including their experts, and discussed this issue with outside counsel. (PCR Tr. pp. 110-111). Counsel testified the defense team and consultants were in agreement that applicant should not make a final statement to the jury. (PCR Tr. pp. 110-111, 191-192, 217-219). Counsel testified they had advised applicant, given the findings in applicant's psychological evaluation and applicant's obsession or overarching concern with how he had been wronged by the victim, that they did not feel strategically that making a statement before the jury would be in applicant's best interests. (PCR Tr. pp. 191-192, 217-219). Counsel testified they were very concerned about where a statement to the jury would go once applicant began talking to the jury and applicant's narcissism and emotional attachment to how he had been wronged would come out before the jury, and such a statement would not be an expression of regret or remorse for the crimes. (PCR Tr. pp. 110-111, 191, 192, 217-219). This Court would note that applicant has not contended that *this advice* constituted ineffective assistance of counsel. This Court finds counsel's advice in this regard was objectively reasonable, given the circumstances as testified to by trial counsel, and it would not make sense given counsel's advice and applicant's decision that he did not want to make a statement or plea of mercy before the

jury, that counsel would have objected to the trial court's instructions in any event. Given the credible evidence, applicant was not going to make a final statement to the jury under any circumstances. Therefore, this ground of ineffective assistance of counsel must be dismissed with prejudice.

Ground H.

Applicant argues trial counsel was ineffective for failing to object to the videotaped testimony of Doctor Joel Sexton in the penalty phase of the case, because it prevented the jury from properly judging his credibility and rendered Doctor Sexton merely a "talking head." There is no merit to this ground.

The record reveals Doctor Sexton, a forensic pathologist, testified in person during the guilt phase of the trial regarding the cause of death of each victim. **(R. pp. 2303-2324)**. Doctor Sexton could have testified in person in the penalty phase of the trial; however, it would have inconvenienced him to be present because he had another conflicting personal matter. **(R. pp. 2620-2621)**. Both counsel for the State and applicant's trial counsel agreed to take Doctor Sexton's penalty phase testimony by videotape, so that he would not have to be recalled personally in the penalty phase. This testimony was taken, outside the presence of the jury, but in the same courtroom with the trial judge, applicant, his trial attorneys, and the prosecutor present. **(R. pp. 2620-2621, 2331-2353)**. During his penalty phase testimony, Doctor Sexton was examined by the State and cross-examined by applicant's trial counsel with the trial judge present. **(R. pp. 2620-2621, 2331-2353)**. His entire testimony, except for a portion ruled inadmissible, including applicant's cross-examination, was played for the jury later during the penalty phase. **(R. p. 2621)**. Prior to his videotaped testimony being played for the jury, the trial judge instructed the jury regarding how the

testimony was taken, in the same courtroom with the parties present, and they were further instructed they were to judge Doctor Sexton's testimony as they would any other witness and give it whatever weight they determined it should have. **(R. pp. 2620-2621).**

This Court finds applicant's argument is without merit. The jury was able to view Doctor Sexton during his guilt-phase direct examination testimony, his guilt-phase cross-examination testimony, could judge his credibility accordingly, and could also view Doctor Sexton again when he testified via video-recorded testimony in the penalty phase and could judge his credibility accordingly. While Doctor Sexton was not physically present in the courtroom during his penalty phase testimony, the jury was familiar with Doctor Sexton from his guilt phase testimony and could see and hear Doctor Sexton during his penalty phase testimony. Doctor Sexton was thoroughly cross-examined in his guilt phase testimony and was again cross-examined during his penalty phase testimony by applicant's trial attorneys with applicant present. Applicant's argument that Doctor Sexton was rendered a "talking head" simply has no merit. Doctor Sexton testified in the same courtroom, before the same judge, and was examined by the same lawyers representing the same parties. The challenged testimony was actually taken during applicant's trial and simply played for the jury at a later time. The jury was specifically instructed that they should consider Doctor Sexton's testimony as they would any other witness, and give it whatever credibility and weight they deemed appropriate. This ground is completely without merit.

Additionally, it was to applicant's advantage that Doctor Sexton's penalty phase testimony was via videotape and not in person. This Court finds that if Doctor Sexton had testified before the jury his testimony would have been even more powerful than merely played back from an earlier recorded time period. Again, there is no merit to this ground.

Nor has applicant shown prejudice under Strickland. Applicant has failed to show that but for counsel's alleged failure to object, the result of the proceeding would have been different. Strickland; Wong. If counsel had objected to the offering of Doctor Sexton's penalty phase testimony by videotape and the trial court sustained such an objection, Doctor Sexton's testimony would have been admitted live. Although it would have been a personal inconvenience, Doctor Sexton informed the trial court that if he could not offer his penalty phase testimony via videotape, he would return later in the penalty phase and testify in person. This Court finds that had counsel objected to the video-taped testimony of Doctor Sexton, Doctor Sexton would have been called live in the penalty phase of the case. Furthermore, his live testimony would have been the same as his testimony given by video-tape, and more powerful given his presence. Therefore, this Court finds applicant cannot show prejudice under these facts. Wong; Jones.

Additionally, even if counsel had objected, and the trial judge sustained the objection, and Doctor Sexton not testified again live in the penalty phase, this Court finds applicant has failed to show there is a reasonable probability the result of the sentencing proceeding would have been different. Jones; Council. There was overwhelming evidence Stacy Williams suffered pain and suffering as a result of the aggravated battery which applicant committed on her. Doctor Sexton's testimony in the penalty phase was cumulative to other evidence Stacy suffered pain during the ten (10) minutes she survived the shooting. On the 911 tape of Stacy talking to the dispatcher, her "pain and suffering are evident." Shuler, 353, S.C. 182, 577 S.E.2d 441. As the Supreme Court stated in its opinion in this case, "[e]ven though the pathologist described Stacy's gunshot wounds as painful, Stacy's own expression of her pain and suffering more fully chronicles the last few minutes of her life." Id. at 184. Additionally, a sheriff's deputy and a paramedic who stayed with

Stacy until her death, testified to her pain and suffering. (R. pp. 2590-2591). Also, a crime scene specialist testified to the fact that Stacy was shot, bled considerably, walked or crawled through one portion of the home to another while dripping blood, and then collapsed where authorities found her still alive and conscious. (R. pp. 2594, 2596, 2610-2611). Finally, photographs were introduced into evidence over applicant's objection that documented Stacy's conscious movements throughout the home after she was shot. (R. pp. 2593-2597). These photographs were properly admitted pursuant to State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995)(photographs of victim's body were relevant to aggravating circumstance of torture). (R. p. 2596). Applicant has not and cannot establish prejudice in this regard. Wong; Jones; Council.

Furthermore, applicant cannot demonstrate prejudice because the jury found two (2) other aggravating circumstances justifying imposition of the death penalty independent of any finding of torture, and, as stated above, there was other more powerful testimony of Stacy Williams' pain and suffering in the record which the jury could consider. See State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993)(failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based), citing Zant v. Stephens, 462 U.S. 862 (1983), State v. Rault, 445 So.2d 1203 (La. 1984); and also referencing State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985) *vacated on other grounds* 476 U.S. 1101; State v. Chaffee, 285 S.C. 1, 328 S.E.2d 464 (1984); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)(it is sufficient to support the death penalty that one aggravating circumstance be proved). See also State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002)(declining to address torture aggravator because there was another valid aggravator).

Furthermore, trial counsel testified that they considered objecting to Doctor Sexton's

testimony being taken by videotape and consulted regarding making such an objection. Trial counsel testified that they concluded that it was to applicant's strategic advantage not to object to Doctor Sexton's penalty phase testimony being videotaped and played later before the jury. (PCR Tr. pp. 111-112, 193-194). Counsel testified that if Doctor Sexton had testified in person his testimony would have been more powerful and more impressive to the jury. (PCR Tr. pp. 111-112, 193-194). Counsel testified that they felt Doctor Sexton's testimony being videotaped somewhat blunted and neutralized the power and impact of his testimony. (PCR Tr. pp. 111-112, 193-194). Counsel testified they believed this was to applicant's strategic advantage. (PCR Tr. pp. 111-112, 193-194). Counsel also testified that had they objected, the trial court would have required Doctor Sexton to appear in person, and Doctor Sexton would have appeared, despite his personal conflict, and this would have been to applicant's detriment. (PCR Tr. pp. 193-194 & 222-224). Counsel testified that they had no question regarding the jury being able to judge Doctor Sexton's credibility because they had already seen him testify live in the guilt phase. (PCR Tr. p. 112, ll. 3-8). This Court finds trial counsel's testimony on this issue to be credible. Applicant's assertion in this ground is without merit.

Additionally, as previously stated, this Court also agrees with trial counsel's assessment of whether or not to object to taking Doctor Sexton's penalty phase testimony by videotape. Doctor Sexton's testimony would have been more powerful in person than by video-tape. Counsel has articulated an objectively reasonable strategic reason for not objecting to the taking of the penalty phase testimony by video-tape and as such cannot be challenged as ineffective assistance of counsel. Strickland v. Washington; Council v. State.

This Court also finds, based on the record, that had counsel objected Doctor Sexton would

have appeared in person and his testimony would have been more powerful and detrimental to Petitioner's case. Petitioner has failed to show deficient performance or prejudice as a result of counsel's alleged failure to object in this regard. This ground must be dismissed with prejudice.

Ground I

Applicant argues that trial counsel was ineffective for failing to object to Doctor Joel Sexton's qualifications to testify to the pain suffered by the victim, Stacy Williams, before her death. This ground is also without merit.

As previously stated, Doctor Sexton is a forensic pathologist. As such, he also is a medical doctor. This Court and our Supreme Court are well aware of Doctor Sexton's qualifications. The trial record reflects he was imminently qualified to give his opinion as to the pain the victim suffered before her death. (R. pp. 2303-2307, 2334-2336). And, Doctor Sexton performed the autopsy of Stacy Williams. (R. pp. 2303-2324). There simply is no merit to this argument. See State v. Tucker, 334 S.C. 1, 512 S.E.2d 99 (1999) citing State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996)(forensic pathologist could testify as to pain victim endured).

There are numerous cases decided by our Supreme Court noting that a forensic pathologist testified in the penalty phase of a capital case to the facts constituting torture and pain suffered by the victim, including this case. See State v. Bennett, 328 S.C. 251, 493 S.E.2d 845 (1997); State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000); State v. Weik, 356 S.C. 76, 587 S.E.2d 683 (2003). In one case, the Supreme Court noted that **Doctor Joel Sexton**, the pathologist whom applicant alleges was not qualified in this case, testified to the facts constituting torture. State v. Smith, 298 S.C. 482, 381 S.E.2d 724, 725 (1989). In Bennett, Doctor Sexton testified to the facts constituting

torture including the fact that the victim lived 3-10 minutes after the injuries were inflicted. In Bennett, Sexton also testified the injuries were *painful*.

Applicant contends the Supreme Court's decisions on the admissibility of Doctor Sexton's penalty phase testimony are no longer apposite, and Doctor Sexton's testimony on pain does not meet the standard of expert witness testimony as adopted in the S.C. Rules of Evidence and does not meet the scientific standard. This Court rejects this entire argument.

First, this Court does not agree that our Supreme Court's previous decisions regarding the admissibility of a pathologist testimony in the penalty phase of a death penalty trial on the issue of whether a victim suffered pain are no longer apposite. The Court's holdings in this regard have not been overruled, nor were they implicitly overruled by the adoption of the South Carolina Rules of Evidence.

Furthermore, this Court finds the testimony of Doctor Sexton on this issue was admissible under the South Carolina Rules of Evidence and as proper scientific testimony under the South Carolina Supreme Court's holdings in State v. Jones, 383 S.C. 535, 681 S.E.2d 580 (2009); State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); State v. Jones, 343 S.C. 562, 541 S.E.2d 813 (2001); and State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979). Counsel was not deficient in failing to object to evidence that was relevant and admissible in the penalty phase of the trial. Hough, *supra* (ineffective assistance claims based on failure to object are tied to the admissibility of the underlying evidence; if the evidence was admissible, then the claim of ineffective assistance of counsel fails both prongs of the Strickland test since the applicant has failed to show deficient performance or prejudice).

If counsel had objected to Doctor Sexton testifying to the pain suffered by the victim, the

objection would have been overruled. Von Dohlen. The testimony was admissible to show the circumstances of the crime, applicant's character, and went directly to the aggravating circumstance of torture alleged by the State. Applicant has failed to show deficient performance or prejudice.

Hough

Additionally, this evidence was cumulative to other evidence Stacy suffered pain during the ten (10) minutes she survived the shooting. On the 911 tape of Stacy talking to the dispatcher, her "...pain and suffering are evident." Shuler, 353, S.C. 182, 577 S.E.2d 441. As the Supreme Court stated in its opinion in this case, "[e]ven though the pathologist described Stacy's gunshot wounds as painful, Stacy's own expression of her pain and suffering more fully chronicles the last few minutes of her life." Id. at 184. Additionally, a sheriff's deputy and a paramedic who stayed with Stacy until her death, testified to her pain and suffering. (**R. pp. 2590-2591**). Also, a crime scene specialist testified to the fact that Stacy was shot, bled considerably, walked or crawled through one portion of the home to another while dripping blood, and then collapsed where the authorities found her still alive and conscious. (**R. pp. 2594, 2596, 2610-2611**). Finally, photographs were introduced into evidence over applicant's objection that documented Stacy's conscious movements throughout the home after she was shot. (**R. pp. 2593-2597**). These photographs were properly admitted pursuant to State v. Franklin, 318 S.C. 47, 456 S.E.2d 357 (1995)(photographs of victim's body were relevant to aggravating circumstance of torture). (**R. p. 2596**). Applicant cannot show prejudice.

Additionally, Doctor Sexton freely admitted he could not testify to the exact pain that Stacy felt, because pain is hard to quantify because each individual's pain threshold is different. Doctor Sexton made clear that all he could testify to was that he would have expected Stacy to feel some pain from this gunshot wound due to the fragmentation of the bone inside her body. (**R. pp. 2335-**

2336). Applicant has failed to establish prejudice given the overwhelming evidence of pain suffered by the victim Stacy that was admitted into evidence independent of Doctor Sexton's testimony and given the limited testimony Doctor Sexton gave on this issue.

Furthermore, even assuming counsel had objected and the trial judge had excluded Doctor Sexton's testimony on this issue, this Court finds that applicant has failed to show the result of the sentencing proceeding would have been different. Wong; Jones. The fact that Stacy Williams suffered conscious pain and suffering is readily apparent from the record completely independent of any testimony of Doctor Sexton. State v. Shuler. Applicant has failed to establish prejudice. *See Council v. State*, 380 S.C. 159, 670 S.E.2d 356 (2008), *citing Arnold v. State/Plath v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)(finding, in capital case, trial counsel's failure to object to unconstitutional malice charge was harmless where, beyond a reasonable doubt, the error did not contribute to the verdict in light of the overwhelming evidence of malice).

Finally, applicant cannot demonstrate prejudice because the jury found two other aggravating circumstances justifying imposition of the death penalty independent of any finding of torture, and, as stated above, there was other more powerful testimony of Stacy Williams' pain and suffering in the record which the jury could consider. *See State v. Elkins*, 312 S.C. 541, 436 S.E.2d 178 (1993)(failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based), *citing Zant v. Stephens*, 462 U.S. 862 (1983), State v. Rault, 445 So.2d 1203 (La. 1984); *and also referencing State v. Elmore*, 286 S.C. 70, 332 S.E.2d 762 (1985) *vacated on other grounds* 476 U.S. 1101; State v. Chaffee, 285 S.C. 1, 328 S.E.2d 464 (1984); State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)(it is sufficient to support the death penalty that one aggravating circumstance be

proved). *See also State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002)(declining to address torture aggravator because there was another valid aggravator).

Applicant has failed to show deficient performance or prejudice on this issue. This ground must be dismissed with prejudice.

Ground J

Applicant alleges counsel was ineffective in failing to object to the trial court's charge on torture because the charge was over-broad because it permitted the finding of torture from any murder. This argument is also without merit.

First, it is impossible for applicant to establish prejudice under these circumstances because the jury also found the aggravating circumstances of (1) murder committed while in the commission of a burglary, and (2) two or more persons were murdered pursuant to one scheme or course of conduct. *See State v. Passaro*, 350 S.C. 499, 567 S.E.2d 862 (2002)(where the defendant murdered his two (2) year old daughter by pouring gasoline over the car which contained the child, and then setting it on fire, the act of physical torture was one of three statutory aggravating circumstances relied upon by the sentencing judge in imposing the death penalty; however, the Supreme Court stated that because the statutory aggravating circumstance of murdering a child under the age of eleven was alone sufficient to impose the death penalty, the statutory aggravating circumstance of physical torture was not discussed in the opinion). Additionally in *State v. Chaffee*, 285 S.C. 1, 328 S.E.2d 464 (1984), the defendant argued on appeal that the trial judge erred in failing to define torture. The *Chaffee* court held:

We are not at all sure under the facts of this case that such was required. If failure to define torture be error, it would not effect the convictions or the sentences because the jury found two other statutory aggravating circumstances as a basis for their finding that the accused persons should suffer death by

electrocution.

Chaffee, 328 S.E. 2d 464, 468. Applicant has not challenged the finding of the other two (2) aggravating circumstances in this case. Therefore, applicant cannot establish prejudice. Id., citing State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)(it is sufficient to support the death penalty that one aggravating circumstance be proved). See also State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993)(failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based), citing Zant v. Stephens, 462 U.S. 862 (1983), State v. Rault, 445 So.2d 1203 (La. 1984); and also referencing State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985) *vacated on other grounds* 476 U.S. 1101.

Second, the charge by the trial court was appropriate. As our Supreme Court made clear in the direct appeal of this very case, the basic definition of physical torture is that it occurs when a victim is subjected to serious physical abuse or an aggravated battery prior to the victim's death. State v. Shuler, 353 S.C. 176, n. 8, 577 S.E.2d 438 (2002); see also State v. Elmore, 279 S.C. 417, 308 S.E.2d 781 (1983), *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

The facts in this case establish the victim, Stacy Williams, was intentionally shot in the left rear buttocks with buckshot, an aggravated battery. See State v. Gardner, 332 S.C. 389, 505 S.E.2d 338, 340 (1998) (when there is sufficient evidence that the victim was intentionally subjected to aggravated battery there is sufficient evidence to submit aggravating circumstance of torture) citing State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992); State v. Smith, 298 S.C. 482, 381 S.E.2d 724, *cert. denied*, 110 S.Ct. 1536 (1990). The evidence also established the victim screamed and the

injuries to her were painful. State v. Shuler, 353 S.C. 182. See State v. Weik, 356 S.C. 76, 587 S.E.2d 83 (2002)(wherein the Court pointed to the facts the victim received a painful gunshot wound and screamed, in addition to other facts, as being sufficient to submit charge of torture to the jury). And, the evidence in this case established beyond any doubt that Stacy lived for at least ten (10) minutes in extreme pain after being shot in the buttocks. See State v. Johnson, 338 S.C. 114, 525 S.E.2d 519 (2000)(conscious awareness of pain may buttress the conclusion that the victim was subjected to physical abuse before death); Weik, *supra* (pointing to the fact that the victim lived a minute and a half between the first and second shot, along with other facts, as supporting a charge on the aggravating circumstance of torture). Additionally, the evidence established after the victim was shot, she moved slowly through the house for some distance before coming rest near her mother. See State v. Johnson, *supra* (fact that victim moved of his own after infliction of injuries was some evidence that he was conscious and suffering pain and therefore evidence of torture). Finally, the evidence established that after some period of time Stacy could not feel anything below her waist and was conscious of this fact. See State v. Elmore, 308 S.E.2d 781, 785, n. 2 (1983) (approving trial judge's charge that torture may include malicious infliction of bodily harm to another depriving the victim of the use of a member of her body).

The trial judge's charge copied or tracked the charge quoted and approved by the South Carolina Supreme Court in State v. Davis, 309 S.C. 326, 422 S.E.2d 133 (1992). The trial judge's charge on this aggravating circumstance was as follows:

Now ladies and gentlemen, there is a third element, a third aggravating circumstance, which we have said applies only to the indictment regarding Stacy Williams, and that is the murder was committed while in the commission of physical torture. I have not yet defined for you what we mean by the phrase physical torture; and so I do that now.

Physical torture occurs when the victim is subjected to serious physical abuse before death. Torture occurs when the victim is subjected to aggravated battery and what do we mean by aggravated battery.

An aggravated battery is an unlawful act of violent injury to another person, which is accompanied by circumstances of aggravation, such as the use of a dangerous or deadly object, or the infliction of a serious bodily injury with the intent to commit a felony or the great disparity between the ages and the physical condition of the parties or a difference in the sexes. Physical torture is the intentional infliction of serious, vile, horrible or inhuman abuse upon the body of another before death. The instantaneous death of the victim does not constitute torture. Physical torture may include the malicious infliction of bodily harm to another by depriving her of a member of her body or by rendering a member of her body useless or by seriously disfiguring her body or a member of her body or the intentional and unmerciful prolonging of severe pain and abuse upon the body or the intentional and unmerciful infliction of serious and extensive pain, physical pain and abuse to the body of another

(R. pp. 2974, ln. 18 - 2975, ln. 22). In Davis, the appellant argued the trial judge's charge was inappropriate because it charged the serious physical abuse and aggravated battery language charged by the trial court in this case. Specifically, the trial court in Davis charged the jury what an aggravated battery was under South Carolina law. The Supreme Court found the trial judge's charge was proper and did not impermissibly expand the definition of physical torture. Id. Therefore, there is no merit to this ground of applicant's application.

Third, the trial judge's charge in this case on torture was not overly broad. Applicant alleges the trial judge's charge did not channel or limit the jury's discretion in imposing the death sentence as required by State v. Smith, 298 S.C. 482, 381 S.E.2d 724 (1989), *cert. denied*, 494 U.S. 1060, 110 S.Ct. 1536 (1990). This very argument was raised in Davis, to the very charge given in this case.

Our Supreme Court rejected this challenge finding the physical definition of torture utilized by the trial judge complied with the limiting requirements of the Eighth Amendment to the United States Constitution. Id. A similar challenge was raised in State v. Smith. The appellant argued that the trial judge's charge, which tracked the charge given in Elmore, supra, did not channel or limit the jury's discretion in imposing the death penalty as required in Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853 (1988); Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980). The Smith Court found that the charge given by the trial judge complied with the "channeling" requirement of the Eighth Amendment. "This Court finds and concludes, based on the requirements set forth in Maynard and Godfrey, that the charge given in this case complied with the "channeling" requirement of the Eighth Amendment." Id. Therefore, given the precedent of our Supreme Court, this ground has absolutely no merit. Counsel was not deficient in failing to object because the charge was entirely proper and was not overly broad.

Nor can Petitioner show prejudice. Any objection to the torture charge on this basis would have been overruled. This ground of ineffective assistance of counsel must be denied and dismissed with prejudice.

Furthermore, even if this Court were to invalidate this aggravating circumstance, applicant cannot show prejudice. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006). In sentencing applicant, the jury was entitled to consider all the facts and circumstances surrounding the crimes applicant committed, including the facts and circumstances of Stacy Williams' murder and applicant's character. The evidence was before the jury and could be considered by them that applicant shot Stacy Williams in the lower back or upper buttocks with a 12-gauge shot-gun, an aggravated battery, and Stacy lived for at least ten (10) minutes after the battery in conscious pain

and suffering, and she lost the use of her lower extremities. Therefore applicant cannot establish prejudice under Brown, *supra*, because the jury could consider this evidence, and there were two (2) other valid aggravating circumstances. This ground must be dismissed with prejudice.

Ground K

Applicant also alleges counsel was ineffective in failing to object to the trial court's torture charge on the grounds that the trial judge did not charge the jury they had to unanimously agree as to each element of this aggravating circumstance before the existence of this aggravating circumstance could be found. Applicant's argument is without merit.

Again, applicant cannot show prejudice in this regard. The jury found two (2) other aggravating circumstances which supported the death penalty. The jury unanimously found applicant murdered the victims in the commission of a burglary and that applicant murdered two or more people pursuant to one scheme or course of conduct. Applicant cannot show Strickland prejudice given the finding of these two (2) other aggravating circumstances beyond a reasonable doubt. State v. Passaro; State v. Chaffee; State v. Plath. *See also* State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993)(failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based), *citing* Zant v. Stephens, 462 U.S. 862 (1983), State v. Rault, 445 So.2d 1203 (La. 1984); *and also referencing* State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985) *vacated on other grounds* 476 U.S. 1101.

Nor was trial counsel deficient. In the present case, the trial judge appropriately charged the law to the jury regarding the aggravating circumstances that were submitted to the jury, including torture. (**R. pp. 2968, n. 18-2985**). The trial judge properly instructed the jury that the State was

required to prove each aggravating circumstance upon which it relied to seek the death penalty beyond a reasonable doubt. (R. pp. 2971, 2972, 2973, 2975, 2976, 2979, 2982, 2983). State v. Smith, 286 S.C. 406, 334 S.E.2d 277 (1985), *cert denied*, 106 S.Ct. 1239. The jury was instructed that if the State did not prove the existence of an aggravating circumstance beyond a reasonable doubt, then the jury could not find the existence of that statutory aggravating circumstance, which necessarily included the aggravating circumstance of torture. (R. pp. 2976-2977). As set forth above, the trial judge meticulously charged the jury on the definition of torture under South Carolina law and what the State was required to prove beyond a reasonable doubt in order for the jury to find the existence of the aggravating circumstance of torture. (R. pp. 2974, ln. 18 - 2975, ln. 22). Therefore, since the trial judge properly charged the jury regarding the aggravating circumstances, their definitions, and the State's burden of proof, trial counsel could not have been deficient in failing to object to the trial judge's charge on torture on the basis alleged above. (R. pp. 2968, ln. 18-2985). This ground must be dismissed with prejudice.

However, even if this Court were to invalidate this aggravating circumstance, applicant cannot show prejudice. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006). In sentencing applicant, the jury was entitled to consider all the facts and circumstances surrounding the crimes applicant committed, including the facts and circumstances of Stacy Williams' murder and applicant's character. The evidence was before the jury that applicant shot Stacy Williams in the lower back or upper buttocks with a 12-gauge shot-gun, an aggravated battery, and Stacy lived for at least ten (10) minutes after the battery in conscious pain and suffering, and she lost the use of her lower extremities. Applicant cannot establish prejudice under Brown, *supra* since applicant does not challenge the finding of the other two (2) aggravating circumstances. This ground must be

dismissed with prejudice.

Ground L

Applicant alleges counsel was ineffective in failing to object to the trial court's torture charge because part of the charge read that torture exists when there is an unlawful act of violent injury to another person, which is accompanied by circumstances of aggravation, such as a difference in the sexes, because this violates the equal protection clause. This argument is also without merit.

As previously set forth above, applicant cannot establish prejudice arising from such a failure to object. In addition to the aggravating circumstance of torture, the jury also found the existence of two (2) other aggravating circumstances; (1) two or more people were murdered pursuant to one scheme or course of conduct, and (2) the murders were committed during the commission of a burglary. Similarly, in State v. Passaro, 350 S.C. 499, 567 S.E.2d 862 (2002), where the defendant murdered his two year old daughter by pouring gasoline over the car which contained the child, and then setting it on fire, the act of physical torture was one of three statutory aggravating circumstances relied upon by the sentencing judge in imposing the death penalty, however the Supreme Court stated that because the statutory aggravating circumstance of murdering a child under the age of eleven was alone sufficient to impose the death penalty, the statutory aggravating circumstance of physical torture was not discussed in the opinion. Additionally in State v. Chaffee, 285 S.C. 1, 328 S.E.2d 464 (1984), the defendant argued on appeal that the trial judge erred in failing to define torture. The Chaffee court held:

We are not at all sure under the facts of this case that such was required. If failure to define torture be error, it would not effect the convictions or the sentences because the jury found two other statutory aggravating circumstances as a basis for their finding that the accused persons should suffer death by electrocution.

Chaffee, 328 S.E. 2d 464, 468. Applicant has not challenged the finding of the other two (2) aggravating circumstances. Therefore, applicant cannot establish prejudice. Id., citing State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984)(it is sufficient to support the death penalty that one aggravating circumstance be proved). See also State v. Elkins, 312 S.C. 541, 436 S.E.2d 178 (1993)(failure of one aggravating circumstance does not so taint the proceedings as to require reversal where there remains a valid aggravating circumstance upon which the sentence of death is based), citing Zant v. Stephens, 462 U.S. 862 (1983), State v. Rault, 445 So.2d 1203 (La. 1984); and also referencing State v. Elmore, 286 S.C. 70, 332 S.E.2d 762 (1985) *vacated on other grounds* 476 U.S. 1101.

Additionally, applicant has not shown counsel should have objected to the charge, or that had counsel objected the result of the proceeding would have been different. In State v. Wright, 349 S.C. 310, 563 S.E.2d 311 (2002), a similar equal protection challenge was raised and rejected. In Wright, the defendant contended the trial judge's charge of a "difference in the sexes" as an aggravator under the CDVHAN statute violated equal protection.³⁹ A majority of the Court held, this language did not violate equal protection. Id., citing State v. Gurganus, 39 N.C. App. 395, 250 S.E.2d 688, 672-673 (1979)(upholding against equal protection challenge statute enhancing punishment for males convicted of assault on a female), and referencing Buchanan v. State, 480 S.W.2d 207, 209 (Tex. 1972)(statute making assault and battery committed by adult male on adult female an aggravated

³⁹The offense of CDVHAN incorporates the elements of ABHAN. S.C. Code Ann. Sections 16-25-10, 16-25-20, 16-25-65 (2003). See also Id. at 312, n. 1, and State v. McCloud, 354 S.C. 40, n. 11, 579 S.E.2d 534, n. 11 (Ct. App. 2003). And see McCloud, Shuler, J., dissenting. The elements of ABHAN include "circumstances of aggravation" which include "infliction of serious bodily injury" and "a difference in gender" between the defendant and the victim. Wright, 349 S.C. at 312, n. 1, 563 S.E.2d at 312, n. 1; McCloud, 354 S.C. 40, n. 11, 579 S.E.2d 534, n. 11.

assault did not deny equal protection); People v. Silva, 27 Cal. App. 4th 1160, 33 Cal. Repr.2d 181 (1994)(upholding against equal protection challenge domestic abuse statute criminalizing willful injury upon person of opposite sex, noting obvious distinction that women are physically less able to defend themselves against their husbands than vice-versa), *other citations omitted*. Therefore, there is no merit to this ground. It must be dismissed with prejudice.

However, even if this Court were to invalidate this aggravating circumstance, applicant cannot show prejudice. Brown v. Sanders, 546 U.S. 212, 126 S.Ct. 884 (2006). In sentencing applicant, the jury was entitled to consider all the facts and circumstances surrounding the crimes applicant committed, including the facts and circumstances of Stacy Williams' murder and applicant's character. The evidence was before the jury that applicant, an adult male in his fifties shot and killed Stacy Williams a 13-year old female child. Applicant does not contest the validity of the other two (2) aggravating circumstances. Applicant cannot establish prejudice under Brown, *supra*. This ground must be dismissed for this reason.

Additionally, as an additional sustaining ground to those set forth above, applicant cannot establish prejudice because it was uncontested at trial, and uncontested at PCR, that applicant committed an aggravated battery upon Stacy Williams independent of the challenged language here. It was uncontested that applicant shot Stacy in the lower back or upper buttocks with a 12-gauge shot-gun loaded with buckshot, and Stacy lived for at least ten (10) minutes after the infliction of this wound, suffering pain and losing the use of her lower extremities. State v. Jones, 133 S.C. 167, 181, 180 S.E.747, 751 (1925)(assault and battery of a high and aggravated nature includes an unlawful act of violent injury to the person of another accompanied by circumstances of aggravation, such as the use of a deadly weapon or the infliction of serious bodily injury). This Court finds applicant

could not have been prejudiced by the challenged language given the uncontested facts of his assault on thirteen (13) year-old Stacy and the law of this State regarding what constitutes an aggravated assault and battery. This ground must be dismissed for this reason as well.

Ground M

Applicant alleges appellate counsel was ineffective for failing to raise the issue of the trial judge's erroneous sua sponte disqualification of six (6) jurors based on the their tardiness. This allegation is also without any merit.⁴⁰

Ineffective Assistance of Appellate Counsel

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

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

⁴⁰Collateral counsel indicated to this Court in an e-mail that applicant wished to abandon this ground of ineffective assistance of counsel. As a result, in addition to finding this ground to be without merit, this Court finds applicant has waived and abandoned this ground.

failure ..., he would have prevailed on his appeal.” Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted).⁴¹ Although recognizing that “[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim” on direct appeal, the Supreme Court has recently reiterated that “it [will be] difficult to demonstrate that counsel was incompetent.” Robbins, 528 U.S. at 288. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Id., quoting Gray, 800 F.2d at 646. See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc). Applicant has failed to make this difficult showing. This ground must be dismissed with prejudice.

It is clear that appellate counsel is not ineffective for failing to file a “kitchen sink” brief. Smith v. Stewart, 140 F.3d 1267, 1274, n. 4 (9th Cir. 1988); See also Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); See also Jones v. Barnes, 463 U.S. 745, 751 (1983) (appellate counsel may make a reasonable strategic decision not to appeal every non-frivolous argument requested by the defendant, and noting the “importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible”). It is clear appellate counsel’s representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Further, under the two part test of Strickland, *supra*, a defendant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced defendant. This Court finds that applicant has failed to show his appellate attorney’s performance was deficient or that he was prejudiced in any way by his appellate attorney’s performance.

⁴¹ See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed “to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims”).

Appellate Court Standard of Review/Excusal of Jurors

Applicant alleges appellate counsel was ineffective in failing to raise on appeal the trial court's excusal of certain jurors. Applicant contends appellate counsel was deficient in failing to raise this issue, and he was prejudiced by this failure to raise this issue. In order to properly analyze this issue, it must first be understood what the appellate court's standard of review would have been in reviewing a trial judge's excusal of jurors, if such occurred..

The matter of the excusal of jurors is left to the sound discretion of the trial judge unless an abuse of discretion occurs that results in prejudice. State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). A trial judge is given wide discretion in deciding whether a juror is qualified or not. State v. Reed, 293 S.C. 515, 518, 362 S.E.2d 13, 14 (1987) *citing* State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The trial judge has the exclusive power to determine a juror's competency and a finding on such is not reviewable except for an error of law. State v. Faries, 125 S.C. 281, 286, 118 S.E. 620, 621 (1923), *citing* South Carolina Constitution, 1895 Art. 5, Sec. 4. Furthermore, S.C. Code Ann. Section 14-7-810 also states:

The trial judge must make the final determination of the qualifications of a juror as set out in this section, and his decision must not be disturbed on appeal.

However, notwithstanding this code section, our appellate courts have reviewed a trial judge's excusal of jurors under an abuse of discretion standard, and the trial court is given wide discretion in deciding whether a juror is qualified or not. State v. Rogers; State v. Reed. This is the standard of review appellate counsel would have been confronted with.

What Occurred at Trial

On the second day of individual voir dire, Judge Cooper took up the matter of *jurors who did*

not report for service until Tuesday and did not report for service at all on the first day of this capital murder trial. **(See R. pp. 217-228)**. Before continuing with *death penalty qualification* of the *next panel* of jurors *drawn the previous day*, Judge Cooper had all the late jurors who did not report for service until Tuesday to come forward before him. The trial judge questioned each of the late jurors individually regarding why they did not appear for service *and general qualification* on Monday, the starting date of the trial.

Except for three (3) of the jurors who Judge Cooper properly and lawfully excused, Judge Cooper instructed the Clerk of Court to give each of the remaining late jurors an information slip, and they were instructed to call back after 6:00 p.m. on Thursday as any of the other jurors who were not selected in the original panels of six (6) for individual death penalty qualification. **(R. pp. 217-228)**.

The Three Late Jurors Who Were Excused or Transferred

The three (3) late jurors who were excused from service on Tuesday were excused or transferred for the following reasons:

Juror Jeanette Brown

Judge Cooper excused Juror Jeannette Brown because she had a *doctor's note* or letter excusing her from jury service due to a hearing disability. Judge Cooper noted on the record that she would have been excused much earlier, actually at a date previous to the trial, had her doctor's excuse been included with the juror information at that time. Mrs. Brown was accompanied by her daughter-in-law, Debra Brown, who spoke for Juror Brown. **(See R. pp. 221-222)**. Judge Cooper asked Juror Brown's daughter-in-law to explain to her mother-in-law that she was excused based on her doctor's excuse. There was no error in the excusal of this juror. *See S.C. Code Ann.* Section 14-

7-810(3). Nor was there any objection by trial counsel to the excusal of Mrs. Brown for this reason. (See R. pp. 217-228).

Juror Randall Glover

Likewise, Judge Cooper transferred Juror Randall Glover to another term of court because Mr. Glover was a *full time student* and involved in exams the very week of the trial. (See R. pp. 223-224). See S.C. Code Ann., 14-7-845. Judge Cooper also explained to Juror Glover that he would have transferred him to another term of court earlier if he had just informed the court of his *status*. Judge Cooper noted on the record that the court did not expect a full-time student to miss school. (See R. p. 223). Juror Glover was transferred to a term after his spring semester of college. (See R. p. 224). There was no error in transferring this juror. S.C. Code Ann. Section 14-7-845(A); State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996); State v. South, 285 S.C. 529, 331 S.E.2d 775 (1985). Nor was there any objection by trial counsel to the excusal of this juror for this reason. (See R. pp. 217-228).

Juror Carmella White

Juror Carmela White was statutorily exempt. Juror White informed Judge Cooper she had sent in the paperwork to the Clerk of Court that *she had the care and custody of two small children*. Juror White's children were ages six (6) months and five (5) years old. Juror White also explained that both of her children had the flu. (See R. pp. 225-226). Judge Cooper explained to Juror White that she had a statutory right to be excused since she did not work and had the care of two small children. (See R. p. 226). Judge Cooper explained to Juror White that if she had come in earlier and told the Clerk and the court that she wished to be excused she would not even have had to report for the trial. (See R. p. 226). Judge Cooper allowed Juror White to be excused because she had the care

and custody of two small children and both children were sick and their mother needed to take care of them. (See **R. p. 227**). There was no error in the excusal of this juror. S.C. Code Ann. Section 14-7-820; State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996). Nor was there any objection by trial counsel to the excusal of this juror for this reason. (See **R. pp. 217-228**).

As set forth above, each of the three (3) late jurors who were excused or transferred were properly and legally excused or transferred. Nor was there any objection to their excusal by trial counsel.

The Remaining Late Jurors

The remaining late jurors were *not excused* but were placed into the panel of jurors who were not drawn when the Clerk of Court selected panels of six (6) for death penalty qualification on Monday. (**R. pp. 217-228**). These late jurors were placed back into the panel for service if the trial court could not qualify a sufficient number of jurors for death penalty selection from the panels of six (6) selected on Monday, the beginning of the trial. (**R. pp. 217-228**). The trial court's actions were reasonable and not an abuse of discretion given general qualification had already been completed, panels of six (6) had already been selected, individual voir dire had already begun, and the non-excused jurors were tardy and did not arrive until Tuesday morning. Nor was there any objection by trial counsel at this time to placing these jurors back into the pool of jurors who might be needed later if those who had already been generally qualified could not be death penalty qualified. (**R. pp. 217-228**).

On Friday, March 16, 2001, after several days of individual voir dire, and prior to individual voir dire of Panel 26, trial counsel made a motion *in camera* to include the late jurors with the remaining thirty-three (33) jurors who had been through general qualification and had been randomly

selected into panels of six (6) for individual death penalty qualification. **(R. p. 1680)**. Counsel's justification for this was that allegedly five (5) of the six (6) jurors who did not report on Monday and were placed back in the pool of jurors were African-American and one was Caucasian. Counsel wanted the trial judge to stop independent death penalty qualification, generally qualify the six (6) late jurors, and then put them in with the remaining thirty-three (33) jurors who had been through general qualification and had been randomly selected into panels of six (6) and redraw them randomly. **(R. p. 1680)**. Counsel's justification was that this would more accurately reflect the racial makeup of the county or cross-section of the community. **(R. p. 1681)**. Counsel conceded that both the applicant and the victims were Caucasian. **(R. p. 1681)**. Counsel also conceded that he did not know the racial make up of Orangburg County. **(R. p. 1682)**.

The Court noted that at that point in jury selection the parties had death penalty qualified thirty-one (31) jurors. Eighteen (18) of those jurors were African-American. Twelve (12) were Caucasian, and one (1) was Hispanic. **(R. p. 1682)**. The Court concluded that every aspect of the racial composition in Orangeburg County was probably more than racially or proportionally representative given the jurors currently qualified. **(R. p. 1682)**. The Court stated that it was not inclined to interrupt individual death penalty qualification or voir dire at that point for several reasons. **(R. pp. 1682-1683)**. The Court pointed out that while some of the jurors who were late had valid excuses for being late, nonetheless, the Court and the parties had gone through the qualification process; and the Court and the parties were now in the fifth day of individual voir dire which very well could go into a sixth day even on the current schedule without stopping to generally qualify anymore jurors. **(R. p. 1683, ll. 4-12)**. The Court pointed out that there was a risk involved in an extended qualification process. Jurors who were already qualified and were able to serve may have

some circumstance occur in their lives that would prevent their ability to serve if the selection process was prolonged for even more time, to the point the Court's and the parties' work in attempting to qualify an impartial jury would produce diminishing returns. **(R. pp. 1683-1684)**. The Court also noted that based on the Court's recollection the parties were qualifying fewer and fewer jurors as the days progressed. So, the Court felt like it needed to move the jury selection along as quickly as possible to get the balance of the jury qualified. **(R. p. 1684)**. The Court also noted that the racial make up of the jury was "fairly representative, and relatively insignificant" with well over fifty (50) percent of the qualified jurors being African-American. **(R. p. 1684)**. The Court also noted that all of the participants in the case were Caucasian. **(R. p. 1684)**.

The Court denied trial counsel's motion regarding stopping to generally qualify the late jurors, and then randomly placing them with the thirty-three (33) jurors who had already gone through general qualification and had been randomly selected into panels of six (6) for individual qualification. **(R. p. 1684)**. The Court decided to move forward with the jurors who were already generally qualified and randomly selected into panels. **(R. p. 1684)**. The Court noted that if they did not get the appointed number of death penalty qualified jurors, he would qualify those who came in late and were not earlier qualified. **(R. p. 1684)**. The Court and the parties then proceeded with individual death penalty qualification of Panel 26. **(R. p. 1685)**.

After completion of individual voir dire of Panel 27, the Court and counsel again discussed this issue. Earlier that morning, the Clerk had randomly selected from the remaining generally qualified jurors Panels 28 through 38. At that point, thirty-two (32) jurors had been qualified. The Court stated that it hoped to be through with individual voir dire by the end of that day and to begin jury selection in the morning. **(See R. pp. 1777-1779)**. Counsel then discussed with the court the

racial make-up of Orangeburg County based on registered voters. Counsel also discussed the racial make-up of the jury pool and the qualified jurors. Counsel also discussed the racial make-up of the six (6) unqualified jurors who were late. Counsel conceded that the racial make-up of jurors would not change that much whether the six (6) unqualified jurors went into the pool or not. **(R. pp. 1779-1780)**. Counsel then asked the trial judge to place the six (6) unqualified jurors back into the jury pool of qualified jurors based *on the sex of the jurors*. **(R. pp. 1780-1781)**. Counsel conceded that placing the jurors back into the pool would not make that big of statistical jump in the break-down of male and female jurors. **(R. pp. 1780-1781)**. Counsel asked for the Court to reconsider its request to place the unqualified jurors back into the pool of qualified jurors based on the fact *applicant was male and all of the victims were female*. **(R. p. 1781)**. Counsel conceded that the panels that were randomly drawn were already set. **(R. p. 1781)**.

The Court noted that the ultimate decision regarding fairness in the jury process was in the final composition of the jury itself. **(R. p. 1781)**. The Court pointed out that according to its calculations, of the thirty-one (31) jurors who had been qualified thus far, twenty-two (22) were male and nine (9) were female. The Court declined counsel's request.

After petit jury selection, the final jury was composed of nine (9) males and three (3) females. **(R. p. 2085)**. The alternates were two (2) males and one (1) female. **(R. p. 2086)**. The petit jury was also composed of nine (9) African-Americans, two (2) Caucasians, and one (1) Hispanic. **(R. p. 2085 & Voir Dire Strike Sheet R. Vol. 1 following Index)**. The alternates were composed of two (2) African-Americans and one (1) Caucasian. **(R. p. 2086 & Voir Dire Strike Sheet R. Vol. 1 following Index)**.

The Lack of Merit of this Issue

This Court viewed and heard the testimony of appellate counsel in this case. This Court finds appellate counsel's testimony on this issue to be credible, and applicant's claim to be without merit for several reasons.

The trial judge did not abuse his discretion in excusing two (2) late jurors and transferring one (1) other late juror. Each of these late jurors that were excused or transferred were properly excused or transferred pursuant to state statute. Since there was nothing improper about how Judge Cooper handled any of these (3) late jurors, there could be no ineffective assistance of appellate counsel in failing to raise on appeal the issue of the excusal or transferring of these three (3) late jurors.

Furthermore, there was no objection to Judge Cooper's initial handling of any of these three (3) late jurors by trial counsel. Any issue regarding Judge Cooper's initial handling of these jurors was not preserved for appellate review. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996)(failure to object to the excusal of a juror for good cause constitutes waiver of issue on appeal); Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995)(failure to object to the exclusion of potential jurors by the trial judge constitutes a waiver of the issue on appeal). Appellate counsel could not have been ineffective in failing to raise on appeal Judge Cooper's handling of the late jurors. Jackson v. Duggar, 931 F.2d 712 (11th Cir. 1991)(appellate counsel not ineffective for failing to appeal issue not preserved for review). This portion of this ground must be dismissed with prejudice.

The remaining six (6) late jurors *were not excused* as applicant contends. The remaining jurors were placed back into the pool for service. They could not be included in the panels that were drawn on Monday, because those panels were randomly drawn from the available pool which did

properly and timely report the first day of the trial. Furthermore, those jurors who did report timely on Monday, had successfully completed *general jury qualification* before being selected into the individual panels. The late jurors had not. This Court finds Judge Cooper did not abuse his discretion in the handling of any of these late jurors initially.

Additionally, appellate counsel testified he considered this issue, but determined it not to be meritorious. He understood the standard of review he was confronted with regarding the excusal of jurors, and he determined from his review of the record that he could not overcome that standard of review. In fact, as appellate counsel correctly pointed out, besides the three (3) jurors who were excused or transferred pursuant to statutory reasons, the remaining six (6) jurors were not excused at all but were placed back in the pool of service. This was within the trial court's discretion. The record supports appellate counsel's testimony.

Furthermore, there was no objection to Judge Cooper's initial handling of any of the last six (6) late jurors by trial counsel. Any issue regarding Judge Cooper's initial handling of these jurors was not preserved for appellate review. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996)(failure to object to the excusal of a juror for good cause constitutes waiver of issue on appeal); Ott v. Pittman, 320 S.C. 72, 463 S.E.2d 101 (Ct. App. 1995)(failure to object to the exclusion of potential jurors by the trial judge constitutes a waiver of the issue on appeal). Appellate counsel could not have been ineffective in failing to raise on appeal Judge Cooper's initial handling of the late six (6) jurors. Jackson v. Duggar, 931 F.2d 712 (11th Cir. 1991)(appellate counsel not ineffective for failing to appeal issue not preserved for review). This portion of this ground must be dismissed with prejudice.

Furthermore, applicant has failed to meet his burden of proof with regard to this allegation

of ineffective assistance of appellate counsel. Jones v. Barnes, 463 U.S. 745, 751 (1983)(stating that appellate counsel may make reasonable strategic choice not to appeal every non-frivolous argument requested by defendant, and noting “the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible.”); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); Smith v. Stewart, 140 F.3d 1267, 1274 n. 4 (9th Cir. 1988)(counsel is not ineffective for failing to file a “kitchen sink” brief). Applicant has failed to show deficient performance or prejudice on the part of appellate counsel.

The issue applicant alleges should have been raised on appeal by appellate counsel had no factual or legal merit. Appellate counsel would have been required to demonstrate on appeal that the trial court abused his discretion in regard to the late jurors. Rogers; Plemmons; Faries. Appellate counsel could not do so. Applicant has failed to demonstrate that the omitted issue, the trial court’s handling of the late jurors, was clearly stronger than those issues raised on appeal. Robbins. It was not.

As previously stated, the trial judge did not err in excusing or transferring the three (3) late jurors that were excused or transferred. They were excused or transferred for legal and proper reasons. The trial judge did not abuse his discretion in placing the remaining jurors back into the pool of potential jurors because these late jurors did not appear on Monday and had not been generally qualified, where the jurors already selected into panels of six (6) had successfully completed general qualification.

Nor did the trial judge abuse his discretion in declining to stop independent death penalty qualification on March 16, 2001 of jurors who had been generally qualified and already selected into random panels of (6) for death penalty qualification. Counsel wanted the trial judge to stop

independent death penalty qualification, generally qualify the six (6) late jurors, and then put them in with the remaining thirty-three (33) jurors who had been through general qualification and had been randomly selected into panels of six (6) and redraw them randomly again. (**R. p. 1680**). At that point, the parties and the Court had already been engaged in independent death penalty qualification for approximately four (4) days and were into the fifth (5th) day of independent jury qualification. The parties were about to conduct individual voir dire of Panel 26. At that point, the Court and the parties had death penalty qualified thirty-one (31) jurors.

To grant applicant's request, the Court would had to have stopped individual qualification of jurors who had successfully completed general qualification and who had been randomly selected into panels of six (6), and generally qualify the six (6) late jurors who had not appeared on Monday. This would have required the Court to go through each of the general qualification questions of each of the six (6) late jurors with no guarantee if or how many of the six (6) late jurors would even successfully complete general qualification. Additionally, the Court would had to have taken additional time to place the names of those late jurors who did successfully complete general qualification, back in with the names of those who had already completed general qualification but had not completed individual voir dire and redraw panels of six again randomly. This would have taken additional time. This would also have required notifying those jurors who had already been selected into panels of six of their new panels after the redraw.

The trial court reasonably stated that it was not inclined to interrupt individual death penalty qualification or voir dire at this point for several reasons. (**R. pp. 1682-1683**). The Court pointed out that while some of the jurors who were late had valid excuses for being late, nonetheless, the Court and the parties had gone through the qualification process and the Court and the parties were

now in the fifth (5th) day of individual voir dire which very well could go into a sixth (6th) day even on the current schedule without stopping to generally qualify anymore jurors. **(R. p. 1683, ll. 4-12).** The Court pointed out that there was a risk involved in an extended qualification process. Jurors who were already qualified and were able to serve may have some circumstance occur in their lives that would prevent their ability to serve if the selection process was prolonged for even more time, to the point the Court's and the parties' work in attempting to qualify an impartial jury would produce diminishing returns. **(R. pp. 1683-1684).** The Court also noted that based on the Court's recollection the parties were qualifying fewer and fewer jurors as the days progressed. So, the Court felt like it needed to move the jury selection along as quickly as possible to get the balance of the jury qualified. **(R. p. 1684).** Given the time period the parties had already been engaged in individual death penalty qualification and the additional time period that would have been required in attempting to qualify the six (6) late jurors along with re-selecting the panels, the Court's ruling in this regard was reasonable and correct and was not an abuse of discretion. Appellate counsel was not deficient in failing to raise this issue on appeal. The trial court acted within its discretion.

Furthermore, counsel's justification for this request on March 16, 2001 was that allegedly five (5) of the six (6) jurors who did not report on Monday and were placed back in the pool of jurors were African-American and one was Caucasian. Counsel's justification was that stopping independent qualification of those jurors who had successfully completed general qualification and been drawn into panels of six (6), and generally qualifying the six (6) late jurors and then redrawing the panels would more accurately reflect the racial makeup of the county or cross-section of the community. **(R. p. 1681).** Counsel conceded that both the applicant and the victims were Caucasian. **(R. p. 1681).** Counsel also conceded that he did not know the racial make up of Orangburg County.

(R. p. 1682). The Court noted that at that point in jury selection the parties had death penalty qualified thirty-one (31) jurors. Eighteen (18) of those jurors *were African-American*. Twelve (12) were Caucasian, and one (1) was Hispanic. (R. p. 1682). The Court concluded that every aspect of the racial composition in Orangeburg County was probably more than racially or proportionally representative given the jurors currently qualified. (R. p. 1682). The Court also noted that the racial make up of the jury was “fairly representative, and relatively insignificant” with well over fifty (50) percent of the qualified jurors being African-American. (R. p. 1684). The Court also noted that all of the participants in the case were Caucasian. (R. p. 1684). Given the racial composition of those jurors who were qualified, and counsel’s lack of any offer of proof at this point in the proceedings of what the racial composition of Orangeburg County was, the trial court did not abuse its discretion in denying counsel’s request. Appellate counsel was not deficient in failing to raise this issue on appeal.

The Court reasonably denied trial counsel’s motion regarding stopping to generally qualify the late jurors, and then randomly placing them with the thirty-three (33) jurors who had already gone through general qualification and had been randomly selected into panels of six (6) for individual qualification. The Court properly decided to move forward with the jurors who were already qualified and randomly selected into panels. The Court noted that if they did not get the appointed number of death penalty qualified jurors, he would qualify those who came in late and were not earlier qualified. The late jurors *were not* excused or dismissed from service. The Court and the parties then appropriately proceeded with individual death penalty qualification of Panel 26.

With regard to counsel’s subsequent request, the trial court did not abuse its discretion. After completion of individual voir dire of Panel 27, the Court and counsel again discussed this issue.

Earlier that morning, the Clerk had randomly selected from the remaining generally qualified jurors Panels 28 through 38. At that point, thirty-two (32) jurors had been death penalty qualified. The Court stated that it hoped to be through with individual voir dire by the end of that day and to begin jury selection in the morning. (See **R. pp. 1777-1779**). Counsel then discussed with the Court the racial make-up of Orangeburg County based on registered voters. Counsel also discussed the racial make-up of the jury pool and the qualified jurors. Counsel also discussed the racial make-up of the six (6) unqualified jurors who were late. Counsel *conceded* that the racial make-up of jurors would not change that much whether the six (6) unqualified jurors went into the pool or not. (**R. pp. 1779-1780**). Therefore, trial counsel conceded it could not show prejudice resulting from the Court's ruling on its March 16th request. For this reason as well, appellate counsel was not ineffective in failing to raise the March 16th request on appeal.

Counsel then asked the trial judge to place the six (6) unqualified jurors back into the jury pool of generally qualified jurors *based on the sex of the jurors*. (**R. pp. 1780-1781**). Counsel conceded that placing the jurors back into the pool would not make that big of statistical jump in the break-down of male and female jurors. (**R. pp. 1780-1781**). Counsel asked for the Court to reconsider its request to place the unqualified jurors back into the pool of qualified jurors based on the fact *applicant was male and all of the victims were female*. (**R. p. 1781**). Counsel conceded that the panels that were randomly drawn were already set. (**R. p. 1781**).

The trial court noted that the ultimate decision regarding fairness in the jury process was in the final composition of the jury itself. (**R. p. 1781**). The Court pointed out that according to its calculations, of the thirty-one (31) jurors who had been death penalty qualified thus far, twenty-two (22) were male and nine (9) were female. The Court declined counsel's request.

This Court finds that given the time it would have taken the Court to generally qualify the six (6) late jurors, with no guarantee that any of those six (6) jurors would successfully complete general qualification, and given the time period involved in redrawing the panels to include these late jurors, and the composition of male and female jurors already death penalty qualified, the trial judge did not abuse his discretion in refusing counsel's request. Appellate counsel was not deficient in failing to raise this issue on appeal because it has no merit. Furthermore, trial counsel conceded that placing these jurors back in the pool of generally qualified jurors would not make a significant statistical difference in the break-down of male and female jurors. In essence, counsel conceded there would be no prejudice if the trial court ruled against its request. For this reason, as well, appellate counsel was not deficient in raising this issue on appeal, nor can applicant demonstrate prejudice from the failure to raise this issue on appeal.

The final composition of the jury, given applicant's requests, also shows the trial judge's decision with regard to the late jurors was not an abuse of discretion nor was applicant prejudiced in any regard. After petit jury selection, the final jury was composed of nine (9) males and three (3) females. **(R. p. 2085)**. The alternates were two (2) males and one (1) female. **(R. p. 2086)**. The petit jury was also composed of nine (9) African-Americans, two (2) Caucasians, and one (1) Hispanic. **(R. p. 2085 & Voir Dire Strike Sheet R. Vol. 1 following Index)**. The alternates were composed of two (2) African-Americans and one (1) Caucasian. **(R. p. 2086 & Voir Dire Strike Sheet R. Vol. 1 following Index)**.

This ground of ineffective assistance of appellate counsel has no merit and must be dismissed with prejudice. There is no merit to this ground applicant alleges his appellate attorney should have raised on appeal. Applicant has failed to meet his burden of proof to show that appellate counsel's

performance was deficient. Anderson v. State. With regard to this issue, applicant has failed to show his appellate counsel was objectively unreasonable in failing to identify, argue, and present significant and obvious issues on appeal. The record shows the trial court did not abuse his discretion in the manner in which he handled any of the late jurors. This Court has reviewed applicant's Final Brief on Appeal and the issues raised therein, and applicant has failed to show that the issue he raises here, if raised on appeal, was clearly more meritorious than those issues raised by appellate counsel. Applicant has also failed to show that if this issue had been raised by appellate counsel, there is a reasonable probability he would have prevailed on appeal. To the contrary, this Court finds that if this issue had been raised on appeal, applicant would not have prevailed. As a result, this ground must be dismissed with prejudice.

Ground N

Applicant also alleges appellate counsel was ineffective in failing to raise the issue of the trial court's disqualification of Juror Lee Isaac. This allegation is also without merit.⁴²

This Court viewed and heard the testimony of appellate counsel. This Court finds appellate counsel's testimony on this issue to be credible, and Petitioner's allegation to be without merit.

As previously stated, a PCR applicant has the burden of proving appellate counsel's performance was deficient. Anderson v. State, 354 S.C. 431, 581 S.E.2d 834 (2003). Appellate counsel is not required to raise every non-frivolous issue that is presented by the record, Tisdale v. State, 357 S.C. 474, 594 S.E.2d 166 (2004), as "[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most

⁴²Collateral counsel notified this Court by e-mail that applicant wished to waive and abandon this ground of ineffective assistance of appellate counsel. As a result, in addition to finding this ground to be without merit, this Court finds this ground was waived and abandoned by applicant.

promising issues for review.” Jones v. Barnes, 463 U.S. 745, 752 (1983). Rather, appellate counsel has a professional duty to choose among potential issues according to their merit. Id.

To obtain relief a PCR applicant must show that appellate counsel's performance was (1) deficient; and (2) prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). In other words, the applicant is required to demonstrate “that his counsel was objectively unreasonable in failing” to identify, argue, and present significant and obvious issues on appeal, and “a reasonable probability that, but for his counsel's unreasonable failure ..., he would have prevailed on his appeal.” Smith v. Robbins, 528 U.S. 259, 285 (2000) (citation omitted).⁴³ Although recognizing that “[n]otwithstanding Barnes, it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim” on direct appeal, the Supreme Court has recently reiterated that “it [will be] difficult to demonstrate that counsel was incompetent.” Robbins, 528 U.S. at 288. “Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.” Id. (quoting Gray, 800 F.2d at 646. See also Bell v. Jarvis, 236 F.3d 149, 164 (4th Cir.2000) (en banc). Petitioner has failed to make this showing. This ground must be dismissed with prejudice.

Counsel is not ineffective for failing to file a “kitchen sink” brief. Smith v. Stewart, 140 F.3d 1267, 1274, n. 4 (9th Cir. 1988); See also Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990); See also Jones v. Barnes, 463 U.S. 745, 751 (1983) (appellate counsel may make a reasonable strategic decision not to appeal every non-frivolous argument requested by the defendant, and noting the “importance of winnowing out weaker arguments on appeal and focusing on one central issue if

⁴³ See also Smith v. South Carolina, 882 F.2d 895, 899 (4th Cir.1989) (counsel's failure to raise a weak constitutional claim may constitute an acceptable strategic decision designed “to avoid diverting the appellate court's attention from what [counsel] felt were stronger claims”).

possible”). It is clear appellate counsel’s representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Further, under the two part test of Strickland, *supra*, a defendant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced defendant. This Court finds that applicant has failed to show his appellate attorney’s performance was deficient or that he was prejudiced in any way by his appellate attorney’s performance.

Juror Isaac was disqualified from service because Judge Cooper determined he had a prior conviction that legally *disqualified him* from service on the jury. Juror Isaac had disclosed on his juror questionnaire that he had previously been convicted of a crime for which he was sentenced to probation.

Juror Isaac also testified during individual voir dire that he was unable to read or write. (R. pp. 1685-1686). He testified he completed the sixth grade at James Elementary School but thereafter quit school to go to work. (R. p. 1686).

Juror Isaac testified under oath that he had previously been convicted of a crime for which he was placed on probation. (R. p. 1687). He testified he served three (3) or four (4) months in jail and was given *two (2) years probation*. (R. pp. 1688-1689). He testified the offense occurred during the 1960s. (R. p. 1688). He testified the offense involved stolen property or merchandise which the police could not prove he actually stole. (R. p. 1687). The Solicitor stated that the offense did not appear on the NCIC rap sheet because the conviction was so old, and it was probably not entered into the NCIC computer. (R. pp. 1690-1691).

The trial judge found that there was sufficient evidence that Juror Isaac had a disqualifying

offense. Judge Cooper made this determination based on the juror's sworn testimony. (*See R. p. 1694*). Juror Isaac testified he served three (3) to four (4) months incarceration, and that he was sentenced to *two (2) years probation*. Judge Cooper noted on the record that the offense could not have been shoplifting because shoplifting did not carry four (4) months in jail in the 1960s. (*R. p. 1691*). Judge Cooper also noted that the juror could not have been sentenced to probation for a magistrate court offense. (*R. p. 1691*). The Solicitor also noted that it would had to have been a General Sessions offense for the juror to have received a probationary sentence. (*R. p. 1691*). Defense counsel *agreed* to the extent *the juror was correct in his memory that he was on probation*. (*R. pp. 1692-3*). Judge Cooper found that, given all of these facts, the offense would had to have been a General Sessions level offense. Judge Cooper determined that given the jail time served and the probationary sentence to which the juror admitted, the crime must have been receiving stolen goods which would have carried more than one (1) year in jail. (*R. p. 1961, ll. 12-25*). Judge Cooper found there was more than sufficient evidence that indicated that Juror Isaac had a disqualifying interest. (*R. p. 1693*). This Court finds that the record supports Judge Cooper's ultimate determination that Juror Isaac was statutorily disqualified.

Appellate counsel testified he was familiar with this potential appellate issue; however, he determined that it did not have any merit because the juror (Juror Isaac) received a probationary sentence of two (2) years, which necessarily meant, by law, he was convicted of an offense that carried at least two (2) years in prison. And, if the juror was convicted of a crime that carried more than one year in prison, he was statutorily disqualified. He also determined this issue did not have any merit on appeal because it was within the trial court's discretion whether to believe the juror's testimony or not concerning his prior conviction and the sentence he received. Appellate counsel

testified he could not overcome the abuse of discretion standard on appeal, because the trial judge acted within his discretion in excusing the juror. Appellate counsel also testified that because the juror could not read or write the English language, he would have been disqualified for that reason as well.

This Court was present when appellate counsel testified. This Court heard and saw appellate counsel's testimony on this issue and accordingly made a credibility assessment. This Court finds appellate counsel's testimony was credible, and is supported by the record. This Court finds there is no merit to applicant's allegation.

In raising this issue appellate counsel would have been faced with the standard of review of such a decision by the trial court. Under South Carolina law, the matter of excusal of jurors is left to the sound discretion of the trial judge unless there is an abuse of discretion that results in prejudice. State v. Rogers, 263 S.C. 373, 381, 210 S.E.2d 604, 608 (1974). A juror's competence is within the trial court's discretion and is not reviewable on appeal unless wholly unsupported by the evidence. State v. Ivey, 331 S.C. 118, 123, 502 S.E.2d 92, 94 (1998); State v. Simpson, 325 S.C. 37, 479 S.E.2d 57 (1996); State v. Thompson, 278 S.C. 1, 8, 292 S.E.2d 581, 585 (1982), *cert denied*, 456 U.S. 938, *overruled on other grds.*, State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991); State v. Franklin, 267 S.C. 240, 226 S.E.2d 896 (1976); State v. Watkins, 259 S.C. 185, 191 S.E.2d 135 (1972). A disqualification prohibits a juror from serving, regardless as to whether or not the person desires to serve as a juror. State v. Hughey, 339 S.C. 439, 448-49, 529 S.E.2d 721, 726 (2000). A trial judge is given wide discretion in deciding whether a juror is qualified or not. State v. Reed, 293 S.C. 515, 518, 362 S.E.2d 13, 14 (1987) *citing* State v. Plemmons, 286 S.C. 78, 332 S.E.2d 765 (1985). The trial judge has the exclusive power to determine a juror's competency

and a finding on such is not reviewable except for an error of law. State v. Farries, 125 S.C. 281, 286, 118 S.E. 620, 621 (1923), *citing* South Carolina Constitution, 1895 Art. 5, Sec. 4. Furthermore, S.C. Code Ann. Section 14-7-810 also clearly states:

The trial judge must make the final determination of the qualifications of a juror as set out in this section, and his decision must not be disturbed on appeal.

Notwithstanding this section, our appellate courts have reviewed the excusal of a juror by the trial judge under an abuse of discretion standard.

The trial judge has a special responsibility. His responsibility is to insure that both sides receive a fair and impartial trial and that the defendant receives a fair and impartial trial by *competent* and impartial jurors. State v. Mathews, 291 S.C. 339, 343-44, 353 S.E.2d 444, 447 (1986); State v. Gaskins, 284 S.C. 105, 114, 326 S.E.2d 132, 138 (1985) *overruled on other grounds* State v. Torrence, *supra*.

When it appears to the court that a disqualified juror has been drawn or impaneled without the knowledge or fault of any party, who afterwards discovers the fact and promptly brings it to the attention of the court, the court may, even after the jury has been sworn, and the trial is in progress, have the juror excused or order a mistrial. State v. Wells, 114 S.C. 151, 154, 103 S.E. 515, 516 (1920); State v. Baker, 112 S.C. 142, 143-44, 99 S.E. 348 349 (1919); State v. Cooler, 112 S.C. 95, 98-99, 98 S.E. 845, 845 (1919); State v. Cason, 41 S.C. 531, 533-34, 19 S.E. 918, 919 (1894). A criminal defendant has no right to any particular jury or jurors, but only a right to a trial by a competent and impartial jury. State v. Gaskins, 284 S.C. 105, 114 326 S.E.2d 132, 138 (1985) *cert. denied*, 471 U.S. 1120, 105 S.Ct. 2368 (1985) *overruled on other grounds* State v. Torrence; State v. Rogers, *supra*. There is no right to be tried by a jury composed of particular individuals.

Williams, 321 S.C. 455; Gaskins, *supra*; McDaniel, *supra*. There is only a right to a trial by a competent and impartial jury. State v. Rogers, 263 S.C. at 382, 210 S.E.2d at 609. This is precisely what applicant received at trial. Id. at 382.

In addition to the responses of a juror to a judge's questions, a judge may consider the manner and bearing of the juror, nature's stamp of character on form and countenance, all of which are evidential exhibits for the consideration of the circuit judge, which may be more indicative of the juror's real attitude than his words. State v. Faries, 125 S.C. 281, 118 S.E.620 (1923). It was within Judge Cooper's discretion to accept the juror's testimony as credible that he had been convicted of an offense to which he was sentenced to two (2) years probation. Id.

S.C. Code Ann. Section 14-7-810(1) provides that a juror who has previously been convicted in state or federal court of a crime punishable by imprisonment for more than one (1) year and his civil rights have not been restored by pardon or amnesty *is disqualified* from service. This disqualification prohibits a juror from serving regardless of his willingness to serve. Hughey, *supra*. Receiving stolen goods is a crime that carries more than one year in prison and would have carried more than one year in the 1960s. Given the record in this case, this Court finds Judge Cooper did not abuse his discretion in disqualifying Juror Issac under S.C. Code Ann. Section. 14-7-810(1). *See* S.C. Code Ann. Section 24-21-410 (a judge of *any court of record with criminal jurisdiction* may suspend the imposition of sentence and place the defendant on probation); 1963-64 Ops. Att'y Gen., No 1766, p. 281 (a magistrate's court *not being a court of record* is not empowered to suspend a sentence); 1986 Op. Atty. Gen. 86-81, p. 253 (a municipal court judge could not impose a sentence of probation); 1962-63 Ops. Att'y Gen., No. 1575, p. 143 (period of probation is limited to the statutory maximum). Otherwise, Judge Cooper would have been derelict in his duty as a trial judge

to see that applicant was tried by a competent jury. His decision is not wholly unsupported by the evidence, which applicant would have had to have shown on appeal. Therefore, it cannot be said that appellate counsel was ineffective for failing to raise a non-meritorious issue on appeal. Additionally, given this record and this Court's finding and conclusion, it cannot be said that this issue was more meritorious than those issues which appellate counsel did raise on appeal.

Juror Isaac was properly disqualified from serving as a juror because it can be shown that the only courts that could have given probation to a defendant were those courts titled as courts of record. S.C. Code Ann. Section 55-591. Under the South Carolina Code from 1962, in order for a sentence to be suspended and a defendant placed on probation, the judge issuing the reduction in sentence had to: (1) be a judge of a court of record; and (2) have criminal jurisdiction at the time the sentence is given. S.C. Code Ann. Section 55-591 (1962); S.C. Atty. Gen. Op., 1964 WL 11725 (S.C. A.G.). Because the only courts with criminal jurisdiction, statutorily confirmed as courts of record, involve County Courts and Courts of General Session, these two courts are the only criminal courts with the ability to issue a probationary sentence. S.C. Const. Art. V., Section 18; S.C. Code Ann. Sections 15-201, 15-610, 15-611, (1962). The South Carolina Code granted magistrate court with exclusive jurisdiction over any criminal offense in which the punishment did not exceed more than thirty (30) days imprisonment or a fine of one hundred dollars (\$100). Magistrate court was not a court of record necessary for a court to issue probation. S.C. Code Ann. Section 55-591.

Grand larceny is one possible crime that could have been committed by the juror to receive the amount of probation that he received. The South Carolina Code provided that a person guilty of grand larceny if the value of the goods stolen is valued above twenty dollars. S.C. Code Ann. Section 16-352 (1962). Further, the notes following the statute reference Section 17-552, providing

that punishment for a felony not enumerated specifically by the statute shall be implemented at the discretion of the court "not less than three months nor more than ten years." Id. at Section 17-552; See State v. Edwards, 127 S.C. 116 (1923)(stating that the sentence must be "comfortable to the common usage and practice of this state, according to the nature of the offense. . . [.]).

Shoplifting is an improbable offense that the juror could have been convicted of. South Carolina first codified shoplifting in the 1960 supplement to the 1952 code. S.C. Code Ann. Section 16-359.1 (1960). The punishment of the newly supplemented statutory offense is reiterated verbatim in the 1962 Code providing: 1) the first offense for shoplifting carried a fine of three hundred dollars (\$300) or less, or imprisonment of six (6) months or less, or both; 2) the second offense carried a fine of five hundred dollars (\$500) or less, or imprisonment of a year or less, or both; 3) a third offense carried no less than one (1) year imprisonment and no more than five (5) years imprisonment. S.C. Code Ann. Section 16-359.3 (1960). If Juror Issac had been convicted of shoplifting 3rd offense he would be statutorily disqualified because the offense carried more than one (1) year in prison. It is unlikely however the juror was convicted of this offense because he mentioned no other prior convictions to Judge Cooper, and he stated the State could not prove he stole the merchandise. .

Receiving stolen goods is an offense the juror could presumably have been convicted of. The South Carolina Code provided that receiving stolen goods is a misdemeanor offense that carried the sole penalty of imprisonment, so long as the value of the goods received was above twenty (\$20) dollars. S.C. Code Ann. Section 16-362 (1962). The statute further provided that if the value of the goods was below twenty (\$20) dollars, then the offender is subject only to thirty (30) days imprisonment or a fine of no more than one hundred (\$100) dollars. Id. Juror Issac could not have been convicted of the lesser offense because he stated he received *sixty (60) days in jail* and two (2)

years of probation. Additionally, the greater offense would had to have proceeded in County Court or General Sessions Court because the sentencing provision carried the possibility of a sentence of greater than 30 days or a one hundred (\$100) fine. S.C. Code Ann. Sections 43-68, 69 (1962); *See State v. Johnson*, 119 S.C. 55 (1919)(holding no abuse of discretion had occurred with the length of sentence imposed by the trial court and affirmed a defendant's sentence of three (3) years).

Obtaining property by false pretenses is also an offense that could have provided the juror a two (2) year probationary sentence. The South Carolina Code provided that obtaining property by false pretenses was a misdemeanor that mandated a fine not exceeding five hundred dollars (\$500) and imprisonment not exceeding three (3) years. S.C. Code Ann. Section 16-366 (1962). The Code further provided that if the value of the property did not exceed seventy-five (\$75) dollars then the case shall be triable in magistrate's court. *Id.* If Juror Isaac had been convicted of the greater offense it would be statutorily disqualifying since the offense carried more than one year in prison. Since he received a probationary sentence, he could not have been convicted of the lesser offense because, as previously shown, magistrate's court could not sentence someone to probation.

Finally, whatever the offense Juror Isaac was convicted of, it would had to have carried more than one (1) year in prison because juror Issac received a probationary sentence of two (2) years. Under South Carolina law at the time, a period of probation was limited to the statutory maximum sentence for the offense. 1962-63 Ops. Att'y Gen., No. 1575, p. 143. A circuit court judge or a county court judge could not have sentenced Juror Issac to two (2) years probation unless the statutory maximum for the crime was at least two (2) years. There is no merit to this issue. Therefore, there could have been no ineffective assistance of appellate counsel with regard to this issue. Applicant has failed to show deficient performance or resulting prejudice.

Additionally, there was no ineffective assistance of appellate counsel in failing to raise this issue on direct appeal because the juror was statutorily disqualified for another reason. While Juror Isaac testified he had a sixth grade education, Juror Isaac testified that he could not read or write the English language. (**R. pp. 1685, ln. 24 - 1686, ln. 1**). He was therefore statutorily disqualified under S.C. Code Ann. Section 14-7-810 (2). This disqualification prohibited the juror from serving. Hughey.

Appellate counsel could not have been deficient in failing raise an issue that was not meritorious. The record supports Judge Cooper's finding that the juror had a statutory disqualifying conviction. (**R. pp.1687-1694**). To have seated the juror would have rendered any verdict or sentence a nullity. (See **R. p. 1693, ll. 7-18**). See State v. Elliot, 169 S.C. 208, 168 E.E. 546 (1933)(murder conviction reversed where juror was clearly disqualified for service because he held a constable's commission and defendant's attorney had inquired of clerk of court about juror and was told juror was a farmer and would make a good juror).

After a review of this issue compared with the other issues raised by appellate counsel on direct appeal, the record shows the *alleged* omitted issue was not clearly stronger than the other issues raised on appeal. With regard to this issue, appellate counsel may make a reasonable strategic choice not to appeal every non-frivolous argument⁴⁴ requested by a defendant because of "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible." See Jones v. Barnes, 463 U.S. 745, 751 (1983); Thrift v. State, 302 S.C. 535, 397 S.E.2d 523 (1990). As previously stated, counsel is not ineffective for failing to file a "kitchen sink" brief.

⁴⁴By citing this authority, Respondent is not conceding this issue is "non-frivolous", merely pointing out that appellate counsel does not have to raise every issue Petitioner thinks might be meritorious. In fact, as discussed *supra*, the issue Petitioner now raises is frivolous and would not have been meritorious on appeal.

Smith v. Stewart, 140 F.3d 1267, 1274 n. 4 (9th Cir. 1988).

This Court finds applicant has failed to show appellate counsel was deficient in failing to raise or argue this issue on appeal, and applicant has also failed to show there is a reasonable probability had this issue been raised on appeal he would have prevailed. In fact, this Court finds that had this issue been raised on appeal, applicant would not have prevailed. Since, applicant has failed to prove deficient performance or prejudice arising from appellate counsel's representation, this ground must be dismissed with prejudice.

PROPOSED GROUND O

Approximately one (1) year after the merits hearing, applicant's collateral counsel James Brown forwarded a letter to this Court notifying the Court that applicant intended to amend his application and allege *the Solicitor* violated the South Carolina Supreme Court's holding in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) by arguing prison conditions. However, subsequent to this letter, applicant did not file a Motion to Amend his Application, and did not file a Proposed Amended Application, *or* an Amended Application asserting this new ground. The merits hearing was concluded in this matter in August of 2006. This case has now been pending over four (4) years since the completion of the merits hearing.

Denial of the proposed Amendment

This Court, in its discretion, declines to grant the late amendment under these circumstances. Grombach v. Oerlikon Tool & Arms Corp., 276 F.2d 155 (4th Cir. 1960); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973). Furthermore, this issue was not addressed by any testimony at the PCR hearing, but is a completely new claim. *See* Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)(applicant should have been allowed to amend pleadings given there was testimony on the subject at the PCR hearing); Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834,

843 (1992)(amendments must conform to evidence presented at trial, not raise new claims). There was no testimony on this issue at the PCR merits hearing.

A motion to amend is addressed to the sound discretion of the trial judge. Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 607 S.E.2d 711 (2005). Leave to amend pleadings pursuant to Rule 15, SCRCP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201 493 S.E.2d 826 (1997). “The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004), *quoting* Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998); Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999). The party opposing the amendment has the burden of establishing prejudice. Foggle v. CSX Transp., Inc. 315 S.C. 17, 431 S.E.2d 587 1993). This Court finds Respondent has met its burden of proof of showing prejudice under Rule 15. Clearly, since the trial of this PCR case has been over for four (4) years, there was a complete lack of notice that this issue was going to be tried. There was no testimony taken on this issue at the PCR hearing. Furthermore, at this point, Respondent is limited to the record of the criminal trial itself in refuting this alleged claim, since no further testimony can be taken unless this Court re-opens the record four (4) years after the fact. This Court declines to do so. Furthermore, this Court would note, the State/Respondent did not consent to the trying of this issue. Therefore, under all of these circumstances, this Court finds, in its discretion, that the late amendment should not be allowed.

This proposed claim is not cognizable in PCR

Even if this Court were to grant the late amendment, this claim is not cognizable in post-

conviction relief. Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) (citations omitted). (“Allegations of trial court error are not cognizable on PCR. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel.”). This issue is a direct appeal issue.⁴⁵ Therefore, even if this Court allowed the late amendment, this ground would be dismissed as not cognizable in post-conviction relief. Id.; Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993), *citing* S.C. Code Ann. Section 17-27-20(b) (1985); Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), *also referencing* Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973).

The Lack of Merit of this Proposed Ground

Furthermore, even if this Court were to grant such a late amendment, and even if this Court were to ignore the fact that this claim is not cognizable in post-conviction relief, there is no merit to this proposed ground.

During applicant’s trial, the State did not offer any lay witness or expert witness in the guilt phase to testify to general conditions of confinement of an inmate sentenced to life without parole. During applicant’s trial, the State did not offer any lay witness or expert witness in the penalty phase

⁴⁵At a conference with the attorneys, collateral counsel made clear that *they did not wish to raise a claim of ineffective assistance of counsel in this regard*, only that *the Solicitor* violated Burkhart. At trial, applicant did not raise any objection regarding the Solicitor improperly arguing or introducing prison conditions nor did he raise such an issue his final brief to the South Carolina Supreme Court. Similarly, the Court found that an appellant’s claim that the Solicitor’s cross-examination and closing argument were prejudicial error was procedurally barred on direct appeal because trial counsel failed to make “any meaningful objection to this line of cross-examination, and we cannot review it.” State v. Gardner, 332 S.C. at 393-94, 505 S.E.2d at 339-40.

to testify to general conditions of confinement of an inmate sentenced to life without parole. Furthermore, the State did not offer any lay or expert witness on prison conditions at all.

During the penalty phase of applicant's trial, *applicant called* James Aiken, former warden of C.C.I., to testify as an expert in prisons and corrections specifically with regard to prison classification and facility management. **(R. p. 2794, ll. 8-10)**. *Applicant elicited* from Mr. Aiken *on direct examination* the privileges that are accorded to inmates in a maximum security prison. Mr. Aiken testified on direct examination to general or good conditions of confinement in a maximum security prison. Mr. Aiken testified to the fact that prisoners are allowed to worship, recreate, look at television, converse, read, seek legal advice, work, receive wages, and to have visitation. **(R. p. 2797, ll. 4-22)**. Mr. Aiken testified on direct examination that these good or favorable conditions are mandated by law.

Applicant also elicited on direct examination from Mr. Aiken bad prison conditions for those who violate prison rules and regulations. Mr. Aiken testified these inmates are in very maximum security environments, in continuous lock-up, in continual visual contact with guards, and have very limited interaction with staff and other prisoners. **(R. p. 2798)**.

Mr. Aiken also testified to other bad conditions of confinement on direct examination. Mr. Aiken testified to how other inmates informally classify each other, from the highest ranking inmate which would be a bank robber or safe-cracker to the lowest being a child-killer, such as applicant. **(R. p. 2800)**. Mr. Aiken testified that child-killer's like applicant are not liked even by inmates and are subject to attack and victimization and have no control over other people. **(R. pp. 2800-2801)**.

On direct examination, Mr. Aiken testified to other general conditions of confinement such as supervision of an inmate's daily routine including what time the inmate gets up, what time they

go to work, who they may call, what time they eat, and what time they worship. (R. p. 2795). Mr. Aiken also testified to the fact that prison officials are always looking for weapons and always looking for gang activity. (R. p. 2796). Aiken testified on direct that in prison, unlike in society, there are rules and regulations for everything, including cleaning up your room, and a violation of the rules results in consequences to the inmate. (R. pp. 2796-2798). Aiken also testified inmates are required to be constructively engaged in some fashion, such as work, unless their behavior is such that they cannot be constructively engaged. (R. p. 2797). Aiken testified that there is a prison within a prison for those who repeatedly disobey rules. Aiken also testified on direct examination that "prisons are very dangerous places. You have very aggressive people and very violent people..." (R. p. 2800, ll. 16-17). Aiken also testified that based on applicant's conviction as a child killer, he would not be liked by other inmates and would probably be subject to victimization. (R. pp. 2800-2801). The record shows this testimony of general prison conditions, both good and bad, was elicited by applicant for his benefit on direct examination of Mr. Aiken. The record also shows that Aiken's direct examination testimony portrayed prison as a dark and dangerous place and a life sentence as severe or harsh, and was not merely offered to show adaptability to prison. (R. pp. 2789-2801).⁴⁶

On cross-examination, the Solicitor delved into matters which applicant had clearly opened the door to and which Mr. Aiken had testified to on direct examination. (R. pp. 2801-2821). The Solicitor clarified the separate classification systems in the prison system and exactly what classification system applicant would be under. (R. pp. 2801-2822). The Solicitor also inquired

⁴⁶Respondent was therefore prejudiced by the proposed late amendment because if the record remained open Respondent could have re-called trial counsel and questioned them regarding why they specifically elicited testimony from Mr. Aiken on prison conditions.

about and clarified the privileges or good conditions that applicant, serving a life sentence without parole for murder, would have available to him. **(R. pp. 2801-2821)**. The Solicitor also showed that contrary to Mr. Aiken's implication during his direct examination, that the prison system could control prisoners and Petitioner would not be a danger to himself or others since Mr. Aiken never lost a prison guard during his tenure, that Mr. Aiken had lost eleven (11) prisoners to death during his tenure. **(R. pp. 2801-2821)**.⁴⁷

On re-direct examination, Mr. Aiken testified that going to prison is a traumatic experience. **(R. p. 2816)**. Mr. Aiken also testified that living in a prison environment is "stressful from the standpoint, yeah, you can go to recreation, but you're recreating with some people that will kill you without any reason and you're constantly having to watch your back.." **(R. p. 2817, ll. 11-15)**. Aiken testified on re-direct examination that the fact that he had lost approximately a dozen prisoners during his tenure showed the dangerous nature of the prison environment. **(R. p. 2817)**. Aiken also testified on re-direct that "[p]risons are very dangerous with predatorial, violent people." **(R., p. 2817, ll. 22-23)**. Aiken also testified that work and privileges are used to establish a structure for the prisoner to obey the rules and regulations applicable in prison, and if they could not do that, the prison system had a way of managing that misbehavior. **(R. pp. 2817-1818)**. Mr. Aiken also testified that living in prison was like "sitting in a house full of rattlesnakes, and one can attack you without provocation, and you can never leave that house." **(R. p. 2819, ll. 16-18)**. Aiken also stated that "[n]o matter how good you may be or how bad you may be, you're around people that are more dangerous than you are and people that are wanting to make a name by inflicting violence against

⁴⁷Respondent was further prejudiced by the proposed late amendment because if the record was still open, Respondent could have called Solicitor Bailey to explain why he cross-examined Mr. Aiken in this regard.

you, especially as it relates to the nature of your offense.” (R. p. 2819, ll. 18-23). It is clear from both Aiken’s direct and redirect testimony, that applicant sought not only to show that he was adaptable to prison, but also that a life sentence would be a harsh and severe punishment. (R. pp. 2789-2801, 2816-2820).

Applicant was tried, convicted, and sentenced to death in March of 2001. At the time applicant’s criminal case was tried, State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) was the controlling authority on the issue he raises here. In Plath, our Supreme Court addressed the state’s cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment “a form of slavery” - which our Supreme Court concluded was “to demonstrate the permanence and deprivation entailed in life imprisonment.” On cross-examination, the State asked about another inmate’s escape, which the Court ultimately held was permissible:

Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626. The Plath Court also held the State’s challenged questioning was *only a proper response* to what that Court considered, at the time, to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants’ own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor’s] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (*emphasis added*). See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison). The Plath Court additionally found there was no prejudice to the defendant.

The facts of this case are no different, and in fact are more favorable to the State/Respondent. At trial, through his expert Mr. Aiken, applicant repeatedly attempted to portray a life sentence just as the defendants' expert did in Plath. Additionally, in the present case, applicant elicited testimony of general prisons conditions, *both good* and bad, on direct examination. Pursuant to Plath, and just as in Plath, the Solicitor was entitled to respond through cross-examination. The Solicitor was entitled to demonstrate or remind the jurors that life imprisonment was not the "total abyss" and "was by no means as hopeless" as applicant would have it believed. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. Furthermore, applicant *opened the door* to cross-examination on the subject of prison conditions, both good and bad, by the testimony he, applicant, elicited on direct examination. **(See Record citations above)**. There is no merit to this ground.

The inescapable conclusion from the record in this case is that trial counsel wanted to offer both adaptability evidence and general conditions evidence. Given that general conditions evidence was intentionally elicited by defense counsel on direct, the Solicitor was entitled to cross-examine the witness on the conditions issue. See State v. Taylor. Moreover, the lack of prejudicial error under such circumstances was acknowledged in well established precedent. State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628, *cert. denied* 467 U.S. 1, 106 S.Ct. 1669 (1984). See also State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982)(evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

It must also be remembered that applicant is not raising a claim here that his counsel was ineffective for opening the door to cross-examination on this subject by introducing testimony of general prison conditions on direct examination and attempting through his expert to portray a life sentence as harsh to applicant's advantage. Applicant is raising a claim that *the Solicitor* violated the holding in Burkhart. The record shows applicant introduced the issue of prison conditions, both good and bad, into this case, not the Solicitor. This Court cannot ignore the fact that Plath was decided approximately nineteen (19) years before the trial of this case, and applicant chose to introduce this testimony for his benefit despite the holding in Plath. The Solicitor's cross-examination was clearly proper under Plath.

Nor did the Solicitor's closing argument constitute reversible error. Since applicant introduced general prison conditions into this trial through the testimony of his expert on direct examination, the Solicitor was entitled to argue matters in evidence, including those matters properly brought up on direct examination, cross-examination, and on re-direct examination by applicant. The State did not characterize the conditions of confinement as aggravating evidence, and it did not suggest that applicant would not be punished if sentenced to life imprisonment. Instead of attempting to pressure the jury, the Solicitor simply addressed the nature of the sentence that applicant's attorneys sought and argued that it was not an appropriate punishment in light of the facts. Thus, the State's evidence and argument were merely explanatory; and the Solicitor based his argument on the record, as he is required to do as the representative for the people of the State of South Carolina. *See State v. Durden*, 264 S.C. 86, 212 S.E.2d 587 (1975). *See also Bell v. Evatt*, 72 F.3d 421, 437 (4th Cir.1995) (holding that remarks that "were consistent with the record and ... rationally inferred from the ... evidence" were not improper). Furthermore, given the fact that applicant introduced this

testimony, the Solicitor was entitled to anticipate that applicant would argue the same evidence in his closing argument, and he in fact did. (See R. pp. 2953, ln. 11- 2954, ln. 1 & R. p. 2954, ll. 12-25). The Solicitor's closing argument was not improper.

Here, as in Plath, and without the guidance specifically given in the later cases of Bowman (November 2005 Opinion) and Burkhart (January 2007 Opinion), and Bryant (2007), the defense (at the 2001 trial) voluntarily elicited the testimony as part and parcel of their case in the penalty phase. The State merely succinctly and fairly responded. Moreover, since the evidence was in the record, and both defense and the State argued prison conditions based on the evidence, the record based responsive argument cannot support proof of error, as there could be no reasonable basis for an objection. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999) ("solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony"). Respondent's arguments as to conditions, again under Plath, were not prejudicial as such arguments were succinct and confined to the evidence elicited in fair response.

Additionally, the fact remains that the Solicitor could not have violated the South Carolina Supreme Court's holding in Burkhart, because Burkhart was decided long after this case was tried. This case was tried in 2001. The decision in Burkhart was handed down in 2007.⁴⁸ At the time this case was tried, Plath had been decided and State v. Gardner, 332 S.C. 389, 505 S.E.2d (1998). In Gardner, the appellant raised on appeal the Solicitor's cross-examination of his prison expert on general conditions of confinement in the prison setting. The South Carolina Supreme Court held the issue was not preserved for appellate review by an appropriate objection. Gardner, *supra*. However,

⁴⁸The decision in State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005) and State v. Bryant, 372 S.C. 305, 642 S.E.2d 582, 589 (2007) were also handed down long after applicant's criminal trial.

in conducting its statutory proportionality review, the Court found that “the sentence was not the result of passion, prejudice or any other *arbitrary factor*, and is neither excessive nor disproportionate.” Gardner, 332 S.C. at 394, 505 S.E.2d at 340 (*emphasis added*). Additionally, in 1989, our Supreme Court decided State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). In Patterson, the appellant claimed the Solicitor’s closing argument trivialized a life sentence in violation of State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987)(wherein the Court disapproved the solicitor’s reference to “those bad life sentences.”) The Court held the Solicitor’s comments were not improper because the thrust of the Solicitor’s comment was to distinguish life on death row, where the appellant had been residing, from life in the general prison population where appellant would be placed if given a life sentence. The Court further found the Solicitor was “directly quoting appellant’s own witness” and was “clearly within the record as required.” Patterson, 299 S.C. at 282, citing State v. Reed, *supra*.⁴⁹

Furthermore, Burkhart is distinguishable from the present case. In the present case, the State did not call an expert to testify to general conditions of prison confinement or favorable conditions of confinement in its case in chief in the penalty phase, which the State did in Burkhart. Nor did the State call an expert witness in reply on this subject. Here, as in Plath, *applicant* voluntarily elicited the testimony as part and parcel of his case in the penalty phase. The State simply succinctly and fairly responded to the evidence *introduced by applicant* through cross-examination and closing argument. This is a major distinction from Burkhart where the defense objected to the evidence from the State, and had not put in such evidence, but merely “attempted to counter the testimony of the

⁴⁹Nor did the Court find that the comment undermined the requirement that life imprisonment be understood in its plain and ordinary meaning, or that the defendant be allowed to present evidence in mitigation of death. Patterson, 299 S.C. at 282, *other citations omitted*.

State's witness with evidence regarding the harshness of prison life...." Burkhart, 371 S.C. at 488, 640 S.E.2d at 453. In the present case, applicant has failed to show error or prejudice in the Solicitor's questions or his closing argument in light of applicant's examination on prison conditions of his own expert. There is no merit to this ground.⁵⁰

Furthermore, the holding in Burkhart would not be applicable to actions which took place in this case tried in 2001. This case is on collateral review. Retroactive application of that decision on applicant's claim would violate Teague v. Lane, 489 U.S. 288, 309 (1989) and State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994), because Burkhart established a new rule of law that cannot be applied retroactively to this case since this case became final almost six (6) years before that rule was announced. *See also* Talley v. State, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity").⁵¹ Old rules of

⁵⁰This Court would also note that the Solicitor's cross-examination clarified for the jury exactly what custody status *applicant* would be under or could advance to in the Department of Corrections given *his offenses* and what possible institutions *he* would or could be placed in. The Solicitor's cross-examination also clarified what favorable conditions of confinement would be available *to applicant* given his particular offenses. Such testimony would be in compliance with language from the subsequent decisions in Bowman and Bryant that conditions of confinement must be tied to the particular defendant on trial. Furthermore, given this clarification, there was no danger the jury would be confused about what conditions applicant would be confined under. Since applicant introduced the issue of prison conditions through his expert by portraying life in prison as harsh and severe and additionally introduced testimony through his expert of adaptability to prison, there can be no prejudice from the cross-examination testimony or the Solicitor's closing argument referencing the same.

⁵¹ The United States Supreme Court has explained that the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment). Further, "[i]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, *cf.* Younger v. Harris, 401 U.S. 37, 43-54 ... (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing

constitutional law are those that were "dictated by precedent existing at the time the defendant's conviction became final." See Teague, 489 U.S. at 301. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. at 301 (*internal citations omitted*) (*emphasis in original*).

As the United States Supreme Court has explained, a rule is not dictated by precedent - and is therefore a new rule of constitutional law - if, prior to its announcement, its existence was "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990). In other words, a rule is an old rule of constitutional law only if all reasonable jurists would have agreed that it existed prior to its announcement. This definition of a new rule is meant to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." O'Dell v. Netherland, 521 U.S. 151, 156 (1997).

It cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in Burkhart existed before it was decided. In Burkhart, the Court held for the first time, since its decision in Plath, that the admission of evidence regarding general prison conditions constituted reversible error. Although *dicta* in Bowman, which also was not decided until this case was in collateral review, indicated that it was error to admit evidence regarding general prison conditions, the Court did not disturb the death sentence in Bowman. The Court likewise did not disturb the death sentence on direct appeal in Gardner. Rather, the Burkhart decision is the first time the Court

constitutional standards." Teague, 489 U.S. at 310.

concluded that the State's examination of a witness about general prison conditions constituted reversible error.

Further, Plath's holding, that the defense could not present evidence of adaptability to life imprisonment, had been overruled by the United States Supreme Court's Opinion in Skipper; and the type of evidence found to be reversible in Burkhart was raised in at least three cases: Bryant, Bowman and Gardner, without the Court disturbing the death sentences in any of those cases. As a result, Respondent alternatively submits that the Court should deny relief on this ground because the rule in Burkhart was a new rule that cannot be applied retroactively under Teague, and the current proposed amendment should be rejected on that basis. This Court agrees.

It is also *res judicata* that the sentence in this case was not the result of an “arbitrary factor.” State v. Shuler, 353 S.C. 176, 189, 577 S.E.2d 438 (2003)(“After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the..”). “*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.” Duckett v. Goforth, 374 S.C. 446, 464-65, 649 S.E.2d 72, 81-82 (Ct. App. 2007) [citing Nelson v. QHG of S. C., Inc., 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct.App.2003) (*quoting* James F. Flanagan, *South Carolina Civil Procedure* 642 (2d ed.1996)), *rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005)].

“*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Under the doctrine

of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). A party seeking to preclude litigation on the grounds of *res judicata* must show: (1) a final, valid judgment on the merits; (2) identity of parties; and (3) the second action must involve matters properly included in the first suit. Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006); Plum Creek Dev. Co., 334 S.C. at 34, 512 S.E.2d at 109.

Also, the South Carolina Supreme Court has previously applied *res judicata* in capital criminal cases. See State v. Gilbert, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) (“Appellants' allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore *res judicata*”). In the present case, all three elements for application are met. Further, the Court’s finding that “the sentence in this case is not the result of passion, prejudice or any other arbitrary factor” in Shuler, was not predicated upon a procedural bar and that doctrine bars re-litigation of the issue now attempted to be raised on P.C.R.

In Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991), the Court admonished inmates that “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice.” Cf. Town of Sullivan's Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (recognizing that the doctrine of *res judicata* flows from the principle that public interest requires an end to

litigation); Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956) (“[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be some end to litigation”). The United States Supreme Court has also emphasized the importance of finality in our criminal justice system. *E.g.*, Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (“No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation”).⁵² Again, applicant seeks to re-litigate an issue that has already been resolved adversely to him, which would frustrate the concept of finality, since the system has not simply failed [applicant] and denial of relief without further review would not, for the reasons set forth herein, “amount to a gross miscarriage of justice,” as envisioned in Aice. Therefore, denial of relief on this allegation is appropriate for this reason as well.

Finally, this Court finds that the record rebuts any allegation of a due process violation in the presentation of this evidence. A prosecutor's improper closing argument may constitute a denial of due process only if it renders the proceeding “fundamentally unfair.” Bennett v. Angelone, 92 F.3d 1336, 1345 (4th Cir.1996) (*internal quotation marks omitted*); Donnelly v. DeChristoforo, 416 U.S.

⁵² “The fact that life and liberty are at stake in criminal prosecutions ‘shows only that [conventional notions of finality] should not have as much place in criminal as in civil litigation, not that they should have none.’ Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 150 (1970).” Teague, 489 U.S. at 309 (emphasis added by Court); Bator, “*Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,” 76 Harv.L.Rev. 441, 450-451 (1963) (“[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality”) (emphasis omitted).

637, 643 (1974). *See also* Darden v. Wainwright, 477 U.S. 168, 181 (1986) (same). In determining whether a defendant's due process rights were violated by a prosecutor's closing argument, a reviewing court must first determine whether the remarks were, in fact, improper. *See* United States v. Morsley, 64 F.3d 907, 913 (4th Cir.1995). If so, the court then must decide whether the improper remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial." *Id.* "This determination requires the court to look to the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Boyd, 147 F.3d at 329 (*internal quotation marks omitted*).

The record shows the State did not affirmatively present evidence about the conditions of life in the general population as part of its case-in-chief or in reply. Rather, it merely responded to trial counsel's presentation through cross-examination and argument. Further, the challenged portion of the Solicitor's argument was merely a brief point in a lengthy argument. (**See. R. pp. 4755-4802**). Also, the facts of this case, as set forth in the Court's decision in State v. Shuler, show overwhelming and conclusive proof that applicant committed three (3) exceptionally aggravated murders while in the commission of burglary, and physical torture. Plath, 281 S.C. at 9-10, 313 S.E.2d at 624 (Court unanimously affirmed death sentence because erroneous admission of prison condition evidence was not accompanied by any demonstration of prejudice). *Cf.* Burkhart, 371 S.C. at 493-95, 640 S.E.2d at 454-57 (*Toal, C.J., dissenting*).

There is nothing that applicant was not allowed to address or rebut; rather, there was a level playing field for all parties - - the very goal of due process. *See generally* Gardner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197 (1977)(finding a due process violation where "death sentence was

imposed, at least in part, on the basis of information which he had no opportunity to deny or explain"). Applicant introduced this evidence into the trial of this case on direct examination, rebutted the Solicitor's cross-examination on re-direct examination of his witness and argued the evidence introduced through his witness in his closing argument. It is clear from the record defense counsel wished to elicit testimony about the harshness of prison life. He used the same in his closing argument to the jury. Part of the reason Mr. Aiken was called was to establish that applicant would most likely be a victim in SCDC, which, was not adaptability evidence. It is clear, from the trial court record, that the harsh and miserable conditions of living a life without parole sentence was part and parcel of the defense penalty phase case. Moreover, counsel wanted to show that good prison conditions or privileges were mandated by law. There was no prejudice where applicant presented and argued the evidence to his benefit.

Conclusion to this Issue

In sum, applicant has failed to show error and prejudice where the defense essentially received what was requested, that is to introduce evidence (of their own choosing and though a defense witness as opposed to a prosecution witness), and to argue that the punishment of life imprisonment was an extraordinarily harsh sentence, and the State merely cross-examined the defense witness on the same. Not only was this case tried without the benefit of Burkhart, it is also specifically distinguishable from Burkhart in the major respect of who offered the evidence, when, and whether there is fair response. Moreover, the record demonstrates that the balance of evidence on each side fails to support a finding of prejudice on this record. Lastly, given the overwhelming evidence of aggravating circumstances, and the mitigation evidence, there was no prejudice to applicant. There is overwhelmingly strong evidence in aggravation, including the finding of torture,

burglary first (1st) degree, and the murder of not one (1) but two (2) adult victims and one (1) child victim in a vicious shooting with a shotgun, the victims having been surprised in their own home. Applicant has not established error on these particular facts, however, if error could be shown, he has not established prejudice such that would entitle him to a new proceeding. Applicant is not entitled to any relief on this issue.

In Camera Review

Finally, this Court conducted an *in camera* review of the Solicitor's file at the request of applicant's collateral counsel. Applicant makes no specific allegation the prosecution violated Brady v. Maryland or Rule 5, SCRCr.P., but asked this Court to review the Solicitor's file and determine whether there was any information improperly withheld under Brady v. Maryland or Rule 5. This Court has reviewed the Solicitor's file and finds the State did not violate Brady v. Maryland or Rule 5, of the South Carolina Rules of Criminal Procedure. Applicant is not entitled to any relief in this regard.

CONCLUSION

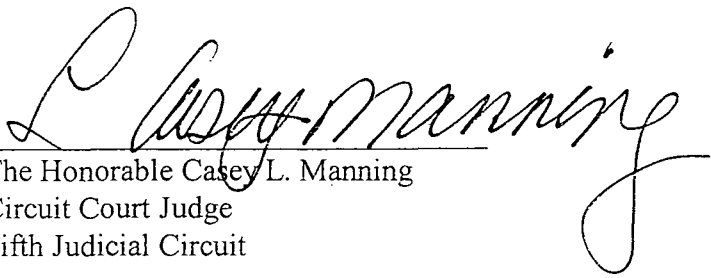
For the above stated reasons, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, and he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

IT IS THEREFORE ORDERED THAT:

1. The post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**; and
2. Applicant is to remain in Respondent's custody.

IT IS SO ORDERED this 24 day of May, 2011.

Columbia, South Carolina.


The Honorable Casey L. Manning
Circuit Court Judge
Fifth Judicial Circuit

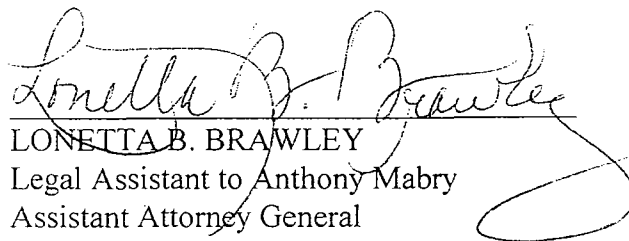
CERTIFICATE OF SERVICE

I, **Lonetta B. Brawley**, hereby certify that I have served the *Order of Dismissal* in the foregoing action by depositing copies in the United States mail, postage prepaid, to the following:

Melissa J. Armstrong, Esquire
1830 Marion Street
Columbia, SC 29201

Jim Brown, Esquire
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P. O. Box 592
Beaufort, SC 29901-0592

This 27th day of May, 2011.


LONETTA B. BRAWLEY
Legal Assistant to Anthony Mabry
Assistant Attorney General

STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

CHARLES O. SHULER,)

Applicant,)

-vs-)

STATE OF SOUTH CAROLINA)

Respondent.)

IN THE COURT OF COMMON PLEAS

C.A. No. 03-CP-38-0359

**ORDER DENYING
RULE 59, SCRC/MOTION
TO ALTER OR AMEND
JUDGMENT**

This is a capital post-conviction relief ("PCR") case. Applicant was previously convicted of three (3) murders and burglary in the 1st degree by an Orangeburg County jury and sentenced to death for murder. His convictions and sentences were affirmed by the South Carolina Supreme Court.¹ Applicant subsequently filed a PCR application in the Orangeburg County Court of Common Pleas, and this Court conducted an evidentiary hearing regarding the same beginning on July 25, 2006 and concluding on July 27, 2006.² This Court issued an Order of Dismissal on May 24, 2011 denying and dismissing the above entitled PCR application with prejudice. This matter is currently before this Court by way of a Rule 59, SCRC/Motion to Alter or Amend Judgment dated

¹State v. Shuler, 353 S.C. 176, 577 S.E.2d 438 (2003).

²The record was allowed to remain open solely for the following reasons: (1) to take the testimony of applicant's appellate counsel Joseph Savitz on an issue of ineffective assistance of appellate counsel, which was taken a few weeks after the merits hearing; (2) for collateral counsel to submit a medical record or note, which was never submitted, and (3) for the State to submit the Solicitor's file to this Court to review for any potential Brady violation. Subsequently, Mr. Savitz' testimony could not be located and by agreement of the parties this Court reconvened solely for purpose of taking Mr. Savitz' testimony on the issue of ineffective assistance of counsel.

July 8, 2011 filed by applicant Charles O. Shuler ("Shuler" or "applicant"). In the Motion to Alter or Amend, applicant raised numerous objections to this Court's Order of Dismissal issued May 24, 2011.

A Rule 59 hearing was conducted by this Court on November 22, 2011 at the Richland County Courthouse. Present at the hearing were applicant, his collateral counsel, Jim Brown, Esquire *and* Melissa Armstrong, Esquire, Assistant Deputy Attorney General Don Zelenka, and Assistant Attorney General Anthony Mabry. At the Rule 59 hearing, applicant argued only the issue that he should be allowed to amend his PCR application, five (5) years post-trial, to assert a claim the Solicitor *allegedly* violated the South Carolina Supreme Court's holding in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007), by arguing general conditions of confinement, and a claim of ineffective assistance of counsel with regard to failing to object to the Solicitor arguing general conditions of confinement *allegedly* in violation of the South Carolina Supreme Court's holding in Burkhart, which was handed down several years after this capital case was tried.

For the reasons set forth in this Order, this Court denies the Rule 59 Motion to Alter or Amend Judgment in its entirety. Additionally, for the reasons set forth in this Order, this Court also denies applicant's request for a late amendment to his PCR application. This Court also finds the proposed amendment lacks any substantive merit.

Applicant's Written Objections

In applicant's Rule 59/Motion to Alter or Amend, applicant raises numerous objections to this Court's Order of Dismissal denying and dismissing his PCR application. This Court denies each of these objections because they have no merit.

Applicant alleges this Court inappropriately issued its Order of Dismissal without informing

applicant which proposed Order it was going to adopt so applicant could file objections before the Court issued its Order of Dismissal. This Court would note it requested both applicant Shuler and Respondent to submit proposed Orders in January of 2011. Both applicant and Respondent knew this Court had previously been directed by the South Carolina Supreme Court to issue an Order in this case as soon as reasonably possible. Both applicant and Respondent submitted proposed Orders on January 12th of 2011 and provided a copy of their proposed Orders to respective opposing counsel at that time. This Court did not issue its Order of Dismissal in this case until May 24, 2011. Applicant had five (5) months to file any written objections to the State's proposed Order and did not do so. See Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992). Respondent filed no objection to applicant Shuler's proposed Order either. This Court carefully reviewed both proposed Orders in that five (5) month period of time, along with the record and exhibits in this case, and did not issue its Order of Dismissal until May 24 of 2011 finding the findings of fact and conclusions of law in Respondent's proposed Order which it adopted in its Order of Dismissal were appropriate and supported by the credible evidence and also making its own additional findings of fact and conclusions of law. This Court would also note it made changes to Respondent's proposed Order in drafting and issuing its Order of Dismissal. Therefore, this Court's Order of Dismissal is in compliance with and consistent with Hall v. Catoe, 360 S.C. 353, 601 S.E.2d 335 (2004). See also Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992). Furthermore, collateral counsel has filed a Rule 59 Motion to Alter or Amend Judgment pursuant to the S.C. Rules of Civil Procedure, See Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992), raising its objections to this Court's Order of Dismissal, and this Court is addressing each of these objections in this Order. Therefore, this specific objection raised in the Rule 59 Motion has no merit and is denied.

Applicant alleges the drafting of a "proposed" Order by the Assistant Attorney General assigned to the case was improper because he did not participate in the PCR merits hearing.³ This objection is merit-less for several reasons. First, applicant raised no objection to the drafting of the "proposed" Order by the Attorney General until after its submission.⁴ Second, both Respondent and applicant Shuler submitted "proposed" Orders to this Court, and that is exactly what they were, "Proposed" Orders.⁵ Third, and more importantly, this ground has no merit as this Court's *Order of Dismissal*, issued May 24, 2011, contains the findings of fact and conclusions of law *of this Court*, which did conduct the PCR merits hearing and did observe the testimony of each witness and make a credibility assessment accordingly. As a result, this objection is without merit and is denied.

Applicant also asserts this Court adopted "wholesale" the Proposed Order of the Respondent. This assertion is incorrect as this Court carefully and independently reviewed both proposed orders and adopted the findings it deemed appropriate and made its own findings of fact and conclusions of law in drafting and entering the Order of Dismissal filed in this case. This objection is therefore

³Assistant Attorney General Derrick McFarland handled the case for Respondent at the PCR merits hearing. Mr. McFarland subsequently left the Attorney General's Office and was replaced by Assistant Attorney General Anthony Mabry. Mr. Mabry prepared the Proposed Order which was submitted to this Court on behalf of the State. Collateral counsel also submitted a Proposed Order to this Court.

⁴This Court directed counsel for both the State and the applicant Shuler to submit proposed Orders with proposed findings of fact and conclusions of law. Applicant raised no objection to Assistant Attorney General Mabry drafting a "proposed" Order even though collateral counsel knew Mr. Mabry did not participate in the merit's hearing when this Court asked both sides to submit proposed orders. Applicant did not raise an objection until after the State submitted its proposed Order.

⁵This Court notes, if applicant's reasoning were accepted, it would be impossible for the State to submit a proposed Order where counsel who handled the merits hearing had left the Attorney General's Office to accept other employment. This objection is simply unreasonable and unworkable.

denied.

Applicant also objects to the Order of Dismissal on the grounds that allegedly this Court resolved every factual assertion against the applicant and given the voluminous record in this case, "it is incredible that every factual dispute was resolved against applicant." As a result, applicant alleges this Court did not participate in the creation of the Order of Dismissal but adopted wholesale the State's Proposed Order. This objection has no basis in fact, as this Court independently reviewed both proposed orders and adopted the findings it deemed appropriate and supported by the record and this Court's own credibility determinations and made its own findings of fact and conclusions of law in drafting and entering the Order of Dismissal which was filed in this case. To the extent every factual dispute was resolved against applicant, it was because the credible evidence and/or law controlled the decisions against applicant. This objection is therefore denied.

Applicant also objects on the basis that in the Order of Dismissal the Court made findings of fact which have no citation to the record. Applicant attached a chart with his Motion alleging this chart sets forth these alleged failings of the Court. This Court finds this objection has no merit. It is not necessary that this Court cite every record citation applicable to its findings of fact or conclusions of law, so long as the Court's findings are supported by the record itself. After carefully reviewing applicant's chart, this Court finds its findings of fact and conclusions of law with regard to the claims raised by applicant are supported by the record, though a specific record citation may not be indicated for each factual finding or conclusion of law.⁶ This objection to the Order of

⁶This Court would note it did make one clerical error in its Order of Dismissal. The Order states a deposition of the victim's husband was taken by collateral counsel. (Order, p. 92). The deposition was actually taken by civil attorneys. This clerical error did not effect this Court's decision of the issue involved because this Court accepted that the deposition of the witness was taken. Who took the deposition of the victim's husband was irrelevant to this Court's decision

Dismissal is without merit and is denied.

In the Motion to Alter or Amend, applicant Shuler took most issue with this Court's denial of his *late* Motion to Amend his PCR Application. As previously discussed, this issue was the only issue raised and argued at the Rule 59 hearing before this Court. At the Rule 59 hearing, this Court heard argument from collateral counsel James "Jim" Brown and Assistant Attorney General Mabry and Assistant Deputy Attorney General Donald Zelenka.

Applicant alleges this Court should have allowed him to amend his PCR application several years after trial to assert *the Solicitor* violated the South Carolina Supreme Court's holding in Burkhart, and he also alleges he intended to raise a claim of ineffective assistance in this regard, and the Court should have allowed him to amend his application several years after trial to include this late claim as well. This Court finds this objection has no merit for the following reasons:

Background of the Late Amendment

Approximately one (1) year after the PCR merits hearing, applicant's collateral counsel James Brown forwarded a letter to this Court notifying the Court that applicant intended to amend his application and allege *the Solicitor* violated the South Carolina Supreme Court's recent holding in State v. Burkhart, 371 S.C. 482, 640 S.E.2d 450 (2007) by arguing prison conditions.⁷ However, subsequent to this letter, applicant did not file a Motion to Amend his Application, seeking leave of this Court to file any amendment, and did not file a Proposed Amended Application, or an Amended

on the issue involved.

⁷The letter dated July 11, 2007 makes no mention of any claim of ineffective assistance of counsel. The letter only notified the Court that applicant intended to file an amended application asserting the Solicitor in the present case violated the Court's holding in Burkhart.

Application asserting this new ground *until* he submitted his proposed order in this case in 2011.⁸

The merits hearing was conducted in this matter in July 2006. This case has now been pending over five (5) years since the completion of the merits hearing, except for the taking of appellate counsel Joseph Savitz' testimony on an unrelated issue, and this Court at no point granted leave to amend the application to include a ground the Solicitor violated Burkhart or that counsel was ineffective in failing to raise an objection the Solicitor violated Burkhart.

Denial of the proposed Amendment

This Court, in its discretion, declined to grant the late amendment under these circumstances.⁹ Grombach v. Oerlikon Tool & Arms Corp., 276 F.2d 155 (4th Cir. 1960); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973). Furthermore, the issues raised by this claim were not addressed by any testimony at the PCR hearing, but was a completely new claim. See Simpson v. Moore, 367 S.C. 587, 627 S.E.2d 701 (2006)(applicant should have been allowed to amend pleadings given there was testimony on the subject at the PCR hearing); Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 843 (1992)(amendments must conform to evidence presented at trial, not raise new claims). There was no testimony on either the direct appeal Burkhart claim or the ineffective assistance of counsel issue at the PCR merits hearing.

Under South Carolina law, a motion to amend is addressed to the sound discretion of the trial judge. Parker v. Spartanburg Sanitary Sewer District, 362 S.C. 276, 607 S.E.2d 711 (2005). Leave

⁸The first attempted assertion of a claim of ineffective assistance in this regard was not raised until applicant submitted an Amended Application with his proposed Order in 2011.

⁹In this Court's Order of Dismissal, this Court declined to grant the late amendment raising the direct appeal claim. This Court also found in the alternative that the direct appeal claim had no merit given this record. (See Order of Dismissal/Proposed Ground O).

to amend pleadings pursuant to Rule 15, SCRCPP, shall be liberally and freely given when justice so requires and does not prejudice any other party. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201 493 S.E.2d 826 (1997). "The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it." City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 599 S.E.2d 462 (Ct. App. 2004), *quoting* Pool v. Pool, 329 S.C. 324, 328-29, 494 S.E.2d 820, 823 (1998); Tanner v. Florence County Treasurer, 336 S.C. 552, 521 S.E.2d 153 (1999). The party opposing the amendment has the burden of establishing prejudice. Foggle v. CSX Transp., Inc. 315 S.C. 17, 431 S.E.2d 587 1993).

This Court finds Respondent has met its burden of proof of showing prejudice under Rule 15, SCRCPP. Clearly, since the trial of this case has been over for five (5) years, except for the taking of testimony of Mr. Joseph Savitz on a completely unrelated issue of ineffective assistance of appellate counsel, and solely because the transcript of his previous testimony could not be located on that unrelated issue, there was a complete lack of notice that this issue was going to be tried. There was no testimony taken on this claim or claims at the PCR hearing. Furthermore, at this point, Respondent is limited to the record of the criminal trial itself in refuting this alleged claim, since no further testimony can be taken unless this Court re-opens the record three (5) years after the fact.

Furthermore, this Court would note and find, the State did not consent to the trial of this issue. See Simpson v. Moore (finding allowing amendment was proper where State consented to trial of issue). The direct appeal issue was not raised by applicant until approximately one (1) year after the merits hearing. The ineffective assistance issue was not raised by applicant until he submitted his proposed Order. Therefore, under all of these circumstances, this Court finds, in its discretion, that the late amendment should not be allowed. As a result, this Court declines to alter

or amend its judgment to grant the late amendment as either a direct appeal claim or as a claim of ineffective assistance of counsel.

The direct appeal claim is not cognizable in PCR

Even if this Court were to grant the late amendment, allowing a direct appeal claim alleging the Solicitor violated Burkhart, this claim is not cognizable in post-conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975). This issue, as applicant framed it in his 2007 letter, and in a chambers conference with this Court at a status conference on this case in 2009/2010, was a direct appeal issue that was not preserved at trial and not raised on appeal to the South Carolina Supreme Court.¹⁰

Applicant did not raise any allegation at his criminal trial and sentencing proceeding regarding the Solicitor improperly arguing or introducing prison conditions nor did he raise such an issue in his final brief to the South Carolina Supreme Court. Similarly, the South Carolina Supreme Court previously found that an appellant's similar claim that the Solicitor's cross-examination and closing argument were prejudicial error was procedurally barred on direct appeal because trial counsel failed to make "any meaningful objection to this line of cross-examination, and we cannot review it." State v. Gardner, 332 S.C. at 393-94, 505 S.E.2d at 339-40. The decision in Gardner was handed down several years before applicant's case was tried before a jury. Likewise in State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005), decided several years after this case was tried, the Court found a similar claim procedurally barred on direct appeal due to the lack of a

¹⁰At an in-chambers conference with the attorneys on August 19, 2009, collateral counsel made clear that he did not wish to raise a claim of ineffective assistance of counsel in this regard. His claim was solely that the Solicitor violated the South Carolina Supreme Court's holding in Burkhart. The State objected to any late amendment.

proper objection by the appellant. The claim applicant sought to raise by late amendment in his letter of 2007 and at a chambers conference on August 19, 2009, was a direct appeal issue, and is clearly procedurally barred at this point and was waived and abandoned by applicant at trial. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991).

Applicant now seeks to raise this direct appeal issue in his State collateral PCR proceeding.¹¹ Even if this Court were to allow the late amendment of applicant's PCR application to include this direct appeal ground, this Court would be forced to dismiss this ground as it is not cognizable in post-conviction relief. Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993); Irick v. State, 264 S.C. 632, 216 S.E.2d 545 (1975). Therefore, the interests of justice do not require or dictate that late amendment should be allowed.

Respondent has shown Rule 15 prejudice

With regard to the new claim of ineffective assistance of counsel, Respondent has shown prejudice under Rule 15, SCRCP. Respondent did not consent to the trial of this issue. In fact, Respondent objected to any late amendment at the in-chambers conference with this Court on August 19, 2009. At that in-chambers conference, collateral counsel represented to this Court that it did not wish to amend its PCR application to include a claim of ineffective assistance in this regard but

¹¹Applicant cites Riddle v. Ozmint, 369 S.C. 39, 631 S.E.2d 70 (2006) for the proposition that a direct appeal claim can be asserted in PCR; however, Riddle involved the assertion of a Brady claim and related due process claim where the evidence was discovered after the applicant's capital trial and sentencing proceedings. These type of claims are routinely allowed in PCR. However, the direct appeal claim applicant wishes to raise here is not cognizable based on numerous cases decided by our state Supreme Court. Hyman v. State, 278 S.C. 501, 299 S.E.2d 330 (1983); Peeler v. State, 277 S.C. 70, 283 S.E.2d 826 (1981); Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1975), also referencing Cummings v. State, 274 S.C. 26, 260 S.E.2d 187 (1979); Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973); Sellers v. Boone, 261 S.C. 462, 200 S.E.2d 686 (1973).

strictly a claim the Solicitor violated the holding in Burkhart. Collateral counsel argued that as a result, no new testimony need be taken regarding this issue.

This Court specifically notes that no testimony was offered regarding this issue at the PCR merits hearing. Trial counsel was not asked why they did not object to the Solicitor's cross-examination of expert James Aiken or the Solicitor's closing argument. The reason being that this issue was not raised in any PCR application filed by applicant Shuler or at the PCR merits hearing. As a result, there was no testimony on this issue from trial counsel regarding why they did not object to the alleged Burkhart violation. Therefore, Respondent has been specifically prejudiced by the late proposed amendment of an ineffective assistance claim in this regard.

Furthermore, applicant has mis-characterized the record in his Rule 59 Motion. The record of the PCR merits hearing was allowed to remain open for only three (3) reasons, to take the testimony of appellate counsel Joseph Savitz on an unrelated issue of ineffective assistance of appellate counsel raised by applicant in his PCR application, to submit a medical record or note on another issue, which was never submitted by applicant, and for Respondent to submit the Solicitor's file to this Court to review for any possible Brady violation. The testimony of Mr. Savitz was taken just a few weeks after the merits hearing. Subsequently, the transcript of Mr. Savitz' testimony could not be located, and the parties agreed to take Mr. Savitz' testimony again at a later date. This later hearing was conducted solely for the purpose of taking Mr. Savitz' testimony again, not to introduce new evidence regarding any other claims. Additionally, applicant did not file any amended application before that hearing. Applicant did not file an amended application asserting ineffective assistance of counsel for failing to object to the Solicitor's alleged violation of Burkhart until applicant submitted his proposed Order in this case. As a result, Respondent was clearly prejudiced

by the late proposed amendment where Respondent did not have the opportunity to elicit testimony from counsel on a claim alleging ineffective assistance of counsel.

Additionally, this Court finds Respondent has established Rule 15, SCRCP prejudice with regard to any direct appeal claim that the Solicitor violated Burkhart in this case. Because Petitioner did not raise this issue at the PCR merits hearing, the State was not able to elicit any testimony from the Solicitor, Walter Bailey, on this issue. As a result, Respondent would be prejudiced by this Court allowing any late amendment of the PCR application to allow this claim.

Essentially, what collateral counsel is asking this Court to do is to allow him to file late amendments to his PCR application alleging claims that the State has not had an opportunity to rebut, respond to, or explain by sworn testimony in the record. While this could certainly be advantageous to applicant, it would not be fair or just. As a result of the above, this Court finds Respondent has established Rule 15, SCRCP prejudice with regard to the proposed late amendment of both claims and therefore denies the late amendment.

There is no merit to this proposed ground

Furthermore, even if this Court were to grant such a late amendment, and even if this Court were to ignore the fact that the direct appeal claim is not cognizable in post-conviction relief, and even if this Court were to ignore the prejudice to Respondent from granting a late amendment of the direct appeal claim and the ineffective assistance of counsel claim, there is no merit to this proposed ground either as a direct appeal claim or as a claim of ineffective assistance of counsel. As a result, the interests of justice do not require or demand that this Court allow the proposed amendment in its original form (as a direct appeal claim) or in its later form (as an IAC claim).

During applicant's trial, the State did not offer any lay witness or expert witness in the guilt

phase to testify to general conditions of confinement of an inmate sentenced to life without parole. During applicant's trial, the State did not offer any lay witness or expert witness in the penalty phase to testify to general conditions of confinement of an inmate sentenced to life without parole. Furthermore, the State did not offer any lay or expert witness on prison conditions at all.

During the penalty phase of applicant's trial, *applicant called* James Aiken, former warden of C.C.I., to testify as an expert in prisons and corrections specifically with regard to prison classification and facility management. (R. p. 2794, II. 8-10). *Applicant elicited* from Mr. Aiken *on direct examination* the privileges that are accorded to inmates in a maximum security prison. Mr. Aiken testified on direct examination to general or good conditions of confinement in a maximum security prison. Mr. Aiken testified to the fact that prisoners are allowed to worship, recreate, look at television, converse, read, seek legal advice, work, receive wages, and to have visitation. (R. p. 2797, II. 4-22). Mr. Aiken testified on direct examination that these good or favorable conditions are mandated by law.

Applicant also elicited on direct examination from Mr. Aiken bad prison conditions for those who violate prison rules and regulations. Mr. Aiken testified these inmates are in very maximum security environments, in continuous lock-up, in continual visual contact with guards, and have very limited interaction with staff and other prisoners. (R. p. 2798).

Mr. Aiken also testified to other bad conditions of confinement on direct examination. Mr. Aiken testified to how other inmates informally classify each other, from the highest ranking inmate which would be a bank robber or safe-cracker to the lowest being a child-killer, such as applicant. (R. p. 2800). Mr. Aiken testified that child-killer's like applicant are not liked even by inmates and are subject to attack and victimization and have no control over other people. (R. p. 2800-2801).

On direct examination, Mr. Aiken testified to other general conditions of confinement such as supervision of an inmate's daily routine including what time the inmate gets up, what time they go to work, who they may call, what time they eat, and what time they worship. (R. p. 2795). Mr. Aiken also testified to the fact that prison officials are always looking for weapons and always looking for gang activity. (R. p. 2796). Aiken testified on direct that in prison, unlike in society, there are rules and regulations for everything, including cleaning up your room, and a violation of the rules results in consequences to the inmate. (R. p. 2796-2798). Aiken also testified inmates are required to be constructively engaged in some fashion, such as work, unless their behavior is such that they cannot be constructively engaged. (R. p. 2797). Aiken testified that there is a prison within a prison for those who repeatedly disobey rules. Aiken also testified on direct examination that "prisons are very dangerous places. You have very aggressive people and very violent people..." (R. p. 2800, ll. 16-17). Aiken also testified that based applicant's conviction as a child killer, he would not be liked by other inmates and would probably be subject to victimization. (R. pp. 2800-2801). The record shows this testimony of general prison conditions, both good and bad, was elicited *by applicant* for his benefit *on direct examination* of Mr. Aiken. The record also shows that Aiken's direct examination testimony portrayed prison as a dark and dangerous place and a life sentence as severe or harsh, and was not merely offered to show adaptability to prison. (R. pp. 2789-2801).

On cross-examination, the Solicitor delved into matters which applicant had clearly opened the door to and which Mr. Aiken had testified to on direct examination. (R. pp. 2801-2821). The Solicitor clarified the separate classification systems in the prison system and exactly what classification system applicant would be under. (R. pp. 2801-2822). The Solicitor also inquired

about and clarified the privileges or good conditions that applicant, serving a life sentence without parole for murder, would have available to him. (R. pp. 2801-2821). The Solicitor also showed that contrary to Mr. Aiken's implication during his direct examination that the prison system could control prisoners, and Petitioner would not be a danger to himself or others since Mr. Aiken never lost a prison guard during his tenure, that Mr. Aiken had lost eleven (11) prisoners to death during his tenure. (R. pp. 2801-2821).

On re-direct examination, Mr. Aiken testified that going to prison is a traumatic experience. (R. p. 2816). Mr. Aiken also testified that living in a prison environment is "stressful from the standpoint, yeah, you can go to recreation, but you're recreating with some people that will kill you without any reason and you're constantly having to watch your back.." (R. p. 2817, ll. 11-15). Aiken testified on re-direct examination that the fact that he had lost approximately a dozen prisoners during his tenure showed the dangerous nature of the prison environment. (R. p. 2817). Aiken also testified on re-direct examination that "[p]risons are very dangerous with predatorial, violent people." (R., p. 2817, ll. 22-23). Aiken also testified that work and privileges are used to establish a structure for the prisoner to obey the rules and regulations applicable in prison, and if they could not do that, the prison system had a way of managing that misbehavior. (R. p. 2817-1818). Mr. Aiken also testified that living in prison was like "sitting in a house full of rattlesnakes, and one can attack you without provocation, and you can never leave that house." (R. p. 2819, ll. 16-18). Aiken also stated that "[n]o matter how good you may be or how bad you may be, you're around people that are more dangerous than you are and people that are wanting to make a name by inflicting violence against you, especially as it relates to the nature of your offense." (R. p. 2819, ll. 18-23). It is clear from Aiken's direct and redirect testimony, that applicant sought not only to show that he

was adaptable to prison, but that a life sentence would be harsh and severe punishment. (R. pp. 2789-2801, 2816-2820).

Applicant was tried, convicted, and sentenced to death in March of 2001. At the time applicant's criminal case was tried, State v. Plath, 281 S.C. 1, 313 S.E.2d 619 (1984) was the controlling authority on the issue he raises here. In Plath, our Supreme Court addressed the state's cross-examination of a professor who generally testified that life imprisonment was a punishment superior to the death penalty. During his direct examination, the professor testified about conditions of life imprisonment at CCI, and called life imprisonment "a form of slavery" - which our Supreme court concluded was "to demonstrate the permanence and deprivation entailed in life imprisonment." On cross-examination, the State asked about another inmate's escape, which the Court ultimately held was permissible:

Since the witness claimed an intimate knowledge of CCI, and based his testimony upon that knowledge, it was not amiss for the State to pursue his claim more closely.

Plath, 281 S.C. at 12, 313 S.E.2d at 626. The Plath Court also held the State's challenged questioning was *only a proper response* to what that Court considered, at the time, to be improper sentencing phase defenses on the utility of capital punishment or the conditions of capital punishment:

In the case before us, defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. . . . [The solicitor's] references [were] . . . merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response.*

Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28 (*emphasis added*). See also State v. Woomer, 278 S.C. 468, 299 S.E.2d 317 (1982) (evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison). The Plath Court additionally found there was no prejudice to the defendant.

The facts of this case are no different, and in fact are more favorable to the State. At trial, through his expert Mr. Aiken, applicant repeatedly attempted to portray a life sentence just as the defendants' expert did in Plath. Additionally, applicant elicited testimony of general prisons conditions, *both good and bad*, on direct examination. Pursuant to Plath, and just as in Plath, the Solicitor was entitled to respond through cross-examination. The Solicitor was entitled to demonstrate or remind the jurors that life imprisonment was not the "total abyss" and "was by no means as hopeless" as applicant would have it believed. Plath, 281 S.C. at 15-16, 313 S.E.2d at 627-28. Furthermore, applicant *opened the door* to cross-examination on the subject of prison conditions, both good and bad, by the testimony he, applicant, elicited on direct examination. (See **Record citations above**). There is no merit to this ground either as a direct appeal claim or as a claim of ineffective assistance of counsel for failing to object to the Solicitor's cross-examination or argument.

The inescapable conclusion is that applicant wanted to offer both adaptability evidence and general conditions evidence. Given that general conditions evidence was intentionally elicited by applicant on direct, for applicant's benefit in portraying a life sentence as a harsh punishment, the Solicitor was entitled to cross-examine the witness on the conditions issue. See State v. Taylor. Moreover, the lack of prejudicial error under such circumstances was acknowledged in well established precedent. State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628, *cert. denied* 467

U.S. 1, 106 S.Ct. 1669 (1984). *See also* State v. Woomer, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982)(evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

It must also be remembered that applicant is not attempting to raise a claim here that his counsel was ineffective for opening the door to cross-examination on this subject by introducing testimony of general prison conditions on direct examination and attempting through his expert to portray a life sentence as harsh to applicant's advantage. Applicant is now attempting to raise a claim that the Solicitor violated the holdings in Burkhart and a claim that his counsel was ineffective in failing to object to the Solicitor violating Burkhart. The record shows applicant introduced the issue of prison conditions, both good and bad, into this case, not the Solicitor. And, he did so for his own benefit. This Court cannot ignore the fact that Plath was decided approximately nineteen (19) years before the trial of this case, and applicant chose to introduce this testimony for his benefit despite the holding in Plath. The Solicitor's cross-examination was clearly proper under Plath. And, counsel was not ineffective in failing to object to the Solicitor's cross-examination because it was entirely proper.

Nor did the Solicitor's closing argument constitute reversible error. Since applicant introduced general prison conditions into this trial through the testimony of his expert on direct examination, the Solicitor was entitled to argue matters in evidence, including those matters properly brought up on direct examination, cross-examination, and on re-direct examination by applicant. The State did not characterize the conditions of confinement as aggravating evidence, and it did not suggest that applicant would not be punished if sentenced to life imprisonment. Instead of attempting to pressure the jury, the Solicitor simply addressed the nature of the sentence that applicant's

attorneys sought and argued and that it was not an appropriate punishment in light of the facts. Thus, the State's evidence and argument were merely explanatory; and the Solicitor based his argument on the record and the reasonable inferences therefrom, as he is required to do as the representative for the people of the State of South Carolina. See State v. Durden, 264 S.C. 86, 212 S.E.2d 587 (1975). See also Bell v. Evatt, 72 F.3d 421, 437 (4th Cir.1995) (holding that remarks that "were consistent with the record and ... rationally inferred from the ... evidence" were not improper). Furthermore, given the fact that applicant introduced this testimony, the Solicitor was entitled to anticipate that applicant would argue the same evidence in his closing argument, and he in fact did. (See R. p. 2953, ln. 11- 2954, ln. 1 & R. p. 2954, ll. 12-25). The Solicitor's closing argument was not improper. Therefore, counsel was not ineffective in failing to object to the Solicitor's closing argument in this regard. Any, such objection would have been overruled by the trial judge.

Here, as in Plath, and without the guidance specifically given in the later cases of Bowman (November 2005 Opinion) and Burkhart (January 2007 Opinion), and Bryant, applicant (at the 2001 trial) voluntarily elicited the testimony as part and parcel of their case in the penalty phase. The State merely succinctly and fairly responded. Moreover, since the evidence was in the record, and both defense and the State argued prison conditions based on the evidence, the record based responsive argument cannot support proof of error, as there could be no reasonable basis for an objection. See State v. Cooper, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999)("solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony"). Respondent's arguments as to conditions, again under Plath, were not prejudicial as such arguments were succinct and confined to the evidence elicited in fair response. The Solicitor did not violate Burkhart and counsel was not ineffective in failing to object.

Additionally, the fact remains that the Solicitor could not have violated the South Carolina Supreme Court's holding in Burkhart, because Burkhart was decided long after this case was tried. This case [applicant's case] was tried in 2001. The decision in Burkhart was handed down in 2007.¹² At the time this case was tried, Plath had been decided and State v. Gardner, 332 S.C. 389, 505 S.E.2d (1998). In Gardner, the appellant raised on appeal the Solicitor's cross-examination of his prison expert on general conditions of confinement in the prison setting. The South Carolina Supreme Court held the issue was not preserved for appellate review by an appropriate objection. Gardner, *supra*. However, in conducting its statutory proportionality review, the Court found that "the sentence was not the result of passion, prejudice or any other *arbitrary factor*, and is neither excessive nor disproportionate." Gardner, 332 S.C. at 394, 505 S.E.2d at 340 (*emphasis added*). Additionally, in 1989, our Supreme Court decided State v. Patterson, 299 S.C. 280, 384 S.E.2d 699 (1989). In Patterson, the appellant claimed the Solicitor's closing argument trivialized a life sentence in violation of State v. Reed, 293 S.C. 515, 362 S.E.2d 13 (1987)(wherein the Court disapproved the solicitor's reference to "those bad life sentences.") The Court held the Solicitor's comments were not improper because the thrust of the Solicitor's comment was to distinguish life on death row, where the appellant had been residing, from life in the general prison population where appellant would be placed if given a life sentence. The Court further found the Solicitor was "directly quoting

¹²The decision in State v. Bowman, 366 S.C. 485, 498-99, 623 S.E.2d 378, 384 (2005) and State v. Bryant, 372 S.C. 305, 642 S.E.2d 582, 589 (2007) were also handed down long after applicant's criminal trial.

appellant's own witness" and was "clearly within the record as required." Patterson, 299 S.C. at 282, citing State v. Reed, *supra*.¹³

Furthermore, Burkhart is distinguishable from the present case. In the present case, the State did not call an expert to testify to general conditions of prison confinement or favorable conditions of confinement in its case in chief in the penalty phase, which the State did in Burkhart. Nor did the State call an expert witness in reply on this subject. Here, as in Plath, *applicant* voluntarily elicited the testimony as part and parcel of *his* case in the penalty phase. The State simply succinctly and fairly responded to the evidence *introduced by applicant* through cross-examination and closing argument. This is a major distinction from Burkhart where the defense objected to the evidence from the State, and had not put in such evidence, but merely "attempted to counter the testimony of the State's witness with evidence regarding the harshness of prison life...." Burkhart, 371 S.C. at 488, 640 S.E.2d at 453. In the present case, applicant has failed to show error or prejudice in the Solicitor's questions or his closing argument in light of his direct examination on prison conditions. He has also failed to show counsel was deficient or prejudice from the failure to object. There is no merit to this ground as a direct appeal claim or as a claim of ineffective assistance of counsel.¹⁴

¹³Nor did the Court find that the comment undermined the requirement that life imprisonment be understood in its plain and ordinary meaning, or that the defendant be allowed to present evidence in mitigation of death. Patterson, 299 S.C. at 282, *other citations omitted*.

¹⁴This Court would also note that the Solicitor's cross-examination clarified for the jury exactly what custody status *applicant* would be under or could advance to in the Department of Corrections given *his* offenses and what possible institutions *he* would be could be placed in. The Solicitor's cross-examination also clarified what favorable conditions of confinement would be available to *applicant* given his particular offenses. Such testimony would be in compliance with language from the subsequent decisions in Bowman and Bryant that conditions of confinement must be tied to the particular defendant on trial. Furthermore, given this clarification, there was no danger the jury would be confused about what conditions applicant would be confined under. Since applicant introduced the issue of prison conditions through his

Therefore, the interests of justice do not require granting the late amendment either as a direct appeal ground or as a claim of ineffective assistance of counsel.

Furthermore, the holding in Burkhart would not be applicable to actions which took place in this case tried in 2001. This case is on collateral review. Retroactive application of this decision on applicant's claim would violate Teague v. Lane, 489 U.S. 288, 309 (1989) and State v. Jones, 312 S.C. 100, 439 S.E.2d 282 (1994), because Burkhart established a new rule of law that cannot be applied retroactively to this case since this case became final almost six (6) years before that rule was announced. See also Talley v. State, 371 S.C. 535, 541, 640 S.E.2d 878, 881 (2007) ("In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity").¹⁵ Old rules of constitutional law are those that were "dictated by precedent existing at the time the defendant's conviction became final." See Teague, 489 U.S. at 301. "[A] case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not dictated by precedent existing at the

expert by portraying life in prison as harsh and severe and additionally introduced testimony through his expert of adaptability to prison, there can be no prejudice from the cross-examination testimony or the Solicitor's closing argument referencing the same. This ground has no merit as a claim against the Solicitor or against counsel.

¹⁵ The United States Supreme Court has explained that the "costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus ... generally far outweigh the benefits of this application." Solem v. Stumes, 465 U.S. 638, 654 (1984) (Powell, J., concurring in judgment). Further, "[i]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, cf. Younger v. Harris, 401 U.S. 37, 43-54 ... (1971), for it continually forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." Teague, 489 U.S. at 310.

time the defendant's conviction became final." Id. at 301 (internal citations omitted) (emphasis in original).

As the United States Supreme Court has explained, a rule is not dictated by precedent - and is therefore a new rule of constitutional law - if, prior to its announcement, its existence was "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415 (1990). In other words, a rule is an old rule of constitutional law only if all reasonable jurists would have agreed that it existed prior to its announcement. This definition of a new rule is meant to "validate[] reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." O'Dell v. Netherland, 521 U.S. 151, 156 (1997).

It cannot fairly be said that all reasonable jurists would have agreed that the rule set forth in Burkhart existed before it was decided. In Burkhart, the Court held for the first time, since its decision in Plath, that the admission of evidence regarding general prison conditions constituted reversible error. Although *dicta* in Bowman, which also was not decided until this case was in collateral review, indicated that it was error to admit evidence regarding general prison conditions, the Court did not disturb the death sentence in Bowman. The Court likewise did not disturb the death sentence on direct appeal in Gardner. Rather, the Burkhart decision is the first time the Court concluded that the State's examination of a witness about general prison conditions constituted reversible error.

Further, Plath's holding, that the defense could not present evidence of adaptability to life imprisonment, had been overruled by the United States Supreme Court's Opinion in Skipper; and the type of evidence found to be reversible in Burkhart was raised in at least three cases: Bryant, Bowman and Gardner, without the Court disturbing the death sentences in any of those cases. As

a result, Respondent alternatively submits that the Court should deny relief because the rule in Burkhart was a new rule that cannot be applied retroactively under Teague, and the current proposed amendment should be rejected on that basis. This Court agrees.

It is also *res judicata* that the sentence in this case was not the result of an “arbitrary factor.” State v. Shuler, 353 S.C. 176, 189, 577 S.E.2d 438 (2003)(“After reviewing the entire record, we conclude the death sentence was not the result of passion, prejudice, or any other arbitrary factor, and the..”). “*Res judicata* is the branch of the law that defines the effect a valid judgment may have on subsequent litigation between the same parties and their privies. *Res judicata* ends litigation, promotes judicial economy and avoids the harassment of relitigation of the same issues.” Duckett v. Goforth, 374 S.C. 446, 464-65, 649 S.E.2d 72, 81-82 (Ct. App. 2007) [citing Nelson v. QHG of S.C., Inc., 354 S.C. 290, 304, 580 S.E.2d 171, 178 (Ct.App.2003) (quoting James F. Flanagan, *South Carolina Civil Procedure* 642 (2d ed.1996)), *rev'd in part on other grounds*, 362 S.C. 421, 608 S.E.2d 855 (2005)].

“*Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties.” Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). Under the doctrine of *res judicata*, “[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.” Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). A party seeking to preclude litigation on the grounds of *res judicata* must show: (1) a final, valid judgment on the merits; (2) identity of parties; and (3) the second action must involve matters properly included in

the first suit. Stone v. Roadway Express, 367 S.C. 575, 580, 627 S.E.2d 695, 697 (2006); Plum Creek Dev. Co., 334 S.C. at 34, 512 S.E.2d at 109.

Also, the South Carolina Supreme Court has previously applied *res judicata* in capital criminal cases. See State v. Gilbert, 277 S.C. 53, 58, 283 S.E.2d 179, 181 (1981) (“Appellants’ allegations that their confessions should have been suppressed have been considered by this Court and resolved adversely to the appellants. These matters are therefore *res judicata*”). In the present case, all three elements for application are met. Further, the Court’s finding that “the sentence in this case is not the result of passion, prejudice or any other arbitrary factor” in Shuler, was not predicated upon a procedural bar and that doctrine bars re-litigation of the issue now attempted to be raised on P.C.R.

In Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991), the Court admonished inmates that “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant’s imprisonment without review would amount to a gross miscarriage of justice.” Cf. Town of Sullivan’s Island v. Felger, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct.App.1995) (recognizing that the doctrine of *res judicata* flows from the principle that public interest requires an end to litigation); Webb v. Greenwood County, 229 S.C. 267, 276, 92 S.E.2d 688, 691 (1956) (“[t]here is universal acceptance of the logic of Statutes of Limitations that litigation must be brought within a reasonable time in order that evidence be some end to litigation”). The United States Supreme Court has also emphasized the importance of finality in our criminal justice system. E.g., Mackey v. United States, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting

in part) ("No one, not criminal defendants, not the judicial system, not society as a whole is benefitted by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation").¹⁶ Again, applicant seeks to re-litigate an issue that has already been resolved adversely to him, which would frustrate the concept of finality, since the system has not simply failed [applicant] and denial of relief without further review would not, for the reasons set forth herein, "amount to a gross miscarriage of justice," as envisioned in Aice. Therefore, denial of relief on the direct appeal allegation is appropriate.

Finally, this Court finds that the record rebuts any allegation of a due process violation in the presentation of this evidence. A prosecutor's improper closing argument may constitute a denial of due process only if it renders the proceeding "fundamentally unfair." Bennett v. Angelone, 92 F.3d 1336, 1345 (4th Cir.1996) (internal quotation marks omitted); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). See also Darden v. Wainwright, 477 U.S. 168, 181 (1986) (same). In determining whether a defendant's due process rights were violated by a prosecutor's closing argument, a reviewing court must first determine whether the remarks were, in fact, improper. See United States v. Morsley, 64 F.3d 907, 913 (4th Cir.1995). If so, the court then must decide whether the improper remarks "so prejudiced the defendant's substantial rights that the defendant was denied a fair trial."

¹⁶ "The fact that life and liberty are at stake in criminal prosecutions 'shows only that 'conventional notions of finality' should not have as much place in criminal as in civil litigation, not that they should have none.' Friendly, *Is Innocence Irrelevant? Collateral Attacks on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 150 (1970)." Teague, 489 U.S. at 309 (emphasis added by Court); Bator, "*Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*," 76 Harv.L.Rev. 441, 450-451 (1963) ("[I]f a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competence to determine legality") (emphasis omitted).

Id. "This determination requires the court to look to the nature of the comments, the nature and quantum of the evidence before the jury, the arguments of opposing counsel, the judge's charge, and whether the errors were isolated or repeated." Boyd, 147 F.3d at 329 (internal quotation marks omitted).

The record shows the State did not affirmatively present evidence about the conditions of life in the general population as part of its case-in-chief or in reply. Rather, it merely responded to trial counsel's presentation through cross-examination and argument. Further, the challenged portion of the Solicitor's argument was merely a brief point in a lengthy argument. *See App. pp. 4755-4802.* Also, the facts of this case, as set forth in the Court's decision in State v. Shuler, show overwhelming and conclusive proof that applicant committed three exceptionally aggravated murders while in the commission of burglary, and physical torture. Thus, there is no reasonable probability that applicant would not have been sentenced to death but for the Solicitor's cross-examination and argument. Wong v. Belmontes, 130 S.Ct. 383 (2009). *See Gardner v. Ozmint*, 511 F.3d at 430-31 ("given the abundant and damaging evidence presented at Gardner's trial," trial counsel's error in introducing evidence of racial motive for murder was not prejudicial); Jones, *supra*. *See also Plath*, 281 S.C. at 9-10, 313 S.E.2d at 624 (Court unanimously affirmed death sentence because erroneous admission of prison condition evidence was not accompanied by any demonstration of prejudice). *Cf. Burkhardt*, 371 S.C. at 493-95, 640 S.E.2d at 454-57 (Toal, C.J., dissenting).

There is nothing that applicant was not allowed to address or rebut; rather, there was a level playing field for all parties - - the very goal of due process. *See generally Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197 (1977)(finding a due process violation where "death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or

explain"). Applicant introduced this evidence into the trial of this case on direct examination, rebutted the Solicitor's cross-examination on re-cross examination of his witness and argued the evidence introduced through his witness in his closing argument. It is clear from the record applicant wished to elicit testimony about the harshness of prison life. He used the same in his closing argument to the jury. Part of the reason Mr. Aiken was called was to establish that applicant would most likely be a victim in SCDC, which, was not adaptability evidence. It is clear, from the trial court record, that the harsh and miserable conditions of living a life without parole sentence was part and parcel of the defense case. Moreover, applicant wanted to show that good prison conditions or privileges were mandated by law. It is difficult to see any prejudice, much less a reasonable probability that but for admission of the evidence that the result of the proceeding would have been different, especially where applicant presented and argued the evidence to his benefit. Wong v. Belmontes, 130 S.Ct. 383 (2009); Jones v. State, 322 S.C. 329, 504 S.E.2d 822 (1998).

Conclusion to this Issue

In sum, applicant has failed to show error and prejudice where applicant essentially received what was requested, that is to introduce evidence (of his own choosing and through a defense witness as opposed to a prosecution witness), and to argue that the punishment of life imprisonment was an extraordinarily harsh sentence, and the State merely cross-examined the defense witness on same. Not only was this case tried without the benefit of Burkhart, it is also specifically distinguishable from Burkhart in the major respect of who offered the evidence, when, and whether there is fair response. Moreover, the record demonstrates that the balance of evidence on each side fails to

support a finding of prejudice on this record.¹⁷ Lastly, given the overwhelming evidence of aggravating circumstances, and the mitigation evidence, there could be no “reasonable probability that, absent [counsel’s] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” Jones, 332 S. C. at 340, 504 S.E.2d at 829. There is overwhelmingly strong evidence in aggravation, including the finding of torture, burglary first degree, and the murder of not one but two adult victims and one child victim in a vicious shooting with a shotgun, the victims having been surprised in their own home. Applicant has not established error on these particular facts, however, if error could be shown, he has not established prejudice such that would entitle him to a new proceeding. Applicant is not entitled to any relief on this issue. As a result, this Court did not err in declining the late amendment whether as a direct appeal claim or as a claim of ineffective assistance of counsel. Therefore, this Court declines to alter or amend its judgment.

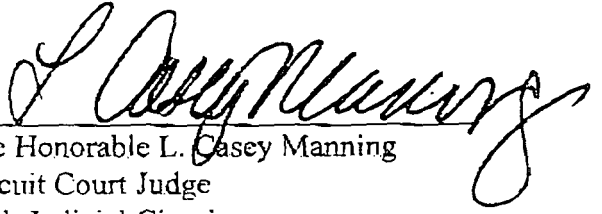
CONCLUSION

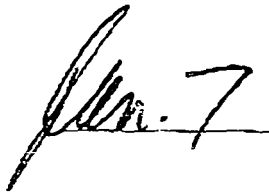
For the above stated reasons, applicant’s Rule 59 motion to alter or amend the Court’s judgment and his objections set forth in the same are denied. The application for post-conviction

¹⁷ See John Richard Wood v. State of South Carolina, C/A 2005-CP-23-4737, wherein the PCR judge declined to find prejudice in similar circumstances: “Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State’s evidence on this issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State’s and defense’s evidence of conditions of confinement does not establish Strickland prejudice.” Order of Dismissal with Prejudice, filed December 19, 2007. See also Brad Sigmon v. State of South Carolina, C/A 2006-CP-23-6547, wherein the PCR judge reached a similar result.

relief is denied in its entirety for the reasons set forth in this Court's Order of Dismissal issued May 24, 2011.

IT IS SO ORDERED.


The Honorable L. Casey Manning
Circuit Court Judge
Fifth Judicial Circuit

 Jun. 7, 2012