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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to Court of Common Pleas

CAPITAL PCR ACTION

APPEAL FROM PICKENS COUNTY
Honorable Alexander S. Macaulay, Circuit Court Judge

Jerry Buck Inman, #5256
a/k/a Jerry Buck Inmon.....Respondent-Petitioner

v.

State of South Carolina.....Petitioner-Respondent.

Appellate Case No. 2020-000881

APPENDIX
VOLUME 1 OF 10

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[1] State's Exhibits 1-11 were previously marked and entered into evidence on August 19, 2008. They are included under the exhibits listed for that date.

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[2] Court's Exhibit # 1 was previously marked and entered into evidence on August 19, 2008. It is included under the exhibits listed for that date.

[3] Defense Exhibits # 32-43 were included in the Record on Appeal and are included with the Record on Appeal in this Appendix.

[4] Court's Exhibit 3 was included in the Record on Appeal and is included with the Record on Appeal in this Appendix.

STATE OF SOUTH CAROLINA)		
)	**IN THE COURT OF COMMON PLEAS**	
COUNTY OF PICKENS)		
Jerry Buck Inman, #5256,)	**C/A No.: 2012-CP-39-918**	
***a/k/a* Jerry Buck Inmon,**[1])	**(Capital PCR Action)**	
)		
Applicant,)		
vs.)		
)		
State of South Carolina,)	**ORDER GRANTING POST-CONVICTION RELIEF**	
)		
Respondent.)		
)		

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 APR 21 P 2:40

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ATTACHMENT: 2-C, **THE STATE**—Columbia, S.C., Friday, Jan. 25, 1980

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[1] Applicant has submitted documents to this Court with his last name spelled "Inmon." Because he was referred to in all previous proceedings as "Jerry Buck Inman," and was committed to the Department of Corrections under that name, the Court will refer to Applicant by the last name "Inman."

INTRODUCTION TO ORDER

This matter comes before the Court on the Application of Jerry Buck Inman for Post-Conviction Relief (PCR), filed June 21, 2012, as last amended on August 20, 2018. An evidentiary hearing was held August 20-23, 2018 in Pickens County, South Carolina. Applicant declined to attend but gave sworn responses to the Court via telephone. His appointed PCR counsel, Diana L. Holt, Esquire, and E. Charles Grose, Jr., Esquire, represented the Applicant, Mr. Inman. Senior Assistant Deputy Attorney General Melody J. Brown, with Assistant Attorneys General, Sherrie Butterbaugh and DeShawn H. Mitchell, represented Respondent.

At the conclusion of the hearing, the Court requested proposed orders from each party in lieu of post-hearing briefing, with the opportunity for each party to respond to the other party's proposed language. After carefully considering the pleadings, transcripts, testimony and other evidence before the Court, and having also considered the able argument of counsel and each of their thorough proposed orders, this Court finds the Applicant's post-conviction relief application must be granted and remands this case to the Pickens County Court of General Sessions for a new trial before a duly summoned, examined, qualified, selected and empaneled death penalty trial jury pursuant to S.C. Code Ann. (1976), **§16-3-20(A)(B)(C)(D)(E). Punishment for Murder; separate sentencing proceeding when death penalty sought;** and **§16-3-21(A)(B)(C). Jury instruction as to verdict.**

Applicant argues §16-3-20(B) is unconstitutional based upon the decision in *Hurst v. Florida*, 577 U.S. ___, 136 S .Ct. 616, 193 L.Ed2d 504 (2016), in which the United States Supreme Court held:

> "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619.

"The Sixth Amendment protects a defendant's right to an impartial jury. [2] This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact finding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." 136 S. Ct. at 624.

In *Hurst*, as it did in *State v. Inman*, 395 S.C. 539, 556, 720 S.E.2d 31, 40 (2011):

"The State next argues that *stare decisis* compels us to uphold Florida's capital sentencing scheme. As the Florida Supreme Court observed, this Court 'repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century.' *Bottoson v. Moore,* 833 So. 693, 695 (2002) (*per curiam*) (citing *Hildwin*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed/2d 728; *Spaziano*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340). 'In a comparable situation,' the Florida court reasoned, 'the United States Supreme Court held:

'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' *Bottoson*, 833 So.2d, at 695 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490); see also 147 So.3d, at 446-447 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed2d 526 (1989)); see also 147 So.3d, at 446—447 (case below).

We now expressly overruled *Spaziano* and *Hildwin* in relevant part.

Spaziano and *Hildwin* summarized earlier precedent to conclude that 'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.' *Hildwin,* 490 U.S., at 640-641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi* [v. *New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)].'" *Hurst*, 136 at 623.

Applicant's **REMAINING PCR CLAIMS:** Ineffective assistance of Trial Counsel, Ground 10 and 11(b) and Appellant Counsel, Ground 10 and 11(c), Challenges to Capital Sentencing Statute, Ground 10 and 11(e), Cumulative Effect of Errors, Ground 10 and 11(f), Denial of Fair Trial Due to Prosecutorial Misconduct, Ground 10(g), and Ground 10(h) Denial of

[2] **IMPARTIAL JURY.** Within constitutional provision is one which is of impartial frame of mind at beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged. Const. U.S. Amend. 6, *Durham v. State,* 182 Tenn. 577, 188 S.W.2d 555 (1945), 160 A.L.R. 746. Black's Law Dictionary (Rev. 4th Ed. 1968) at p.886.

Fair Trial based on Rush to Forgone Conclusion that the Sentence Would be Death, as well as the constitutionality of the capital sentencing scheme in South Carolina as it relates to the imposition and review of capital punishment, are not addressed as the further proceedings upon remand shall be consistent with the proper conduct of the trial had pursuant to this judgment of the Court. Moreover, the record of the proceedings, and the testimony received at the PCR hearing support and confirm that trial counsel diligently prepared, assiduously and aggressively represented Inman throughout the representation. Further, both trial and appellate counsel made reasoned and careful decisions to raise and present the particular issues involved at the time. Applicant's remaining freestanding claims are bared by jurisdictional limitations set out in S.C. Code § 17-27-20, accordingly, the Court denies that relief.

The Court now makes the following findings of facts and conclusions of law as required under S. C. Code (Ann.) §§ 17-27-80 and by Rules 52(a) and 71.1(a) SCRCP. *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019).

II. PROCEDURAL HISTORY

Applicant Inman is presently a safe-keeper under a sentence of death for murder, and a term of year's sentence for other charges, pursuant to orders from the Clerk of Court for Pickens County. His charges all stem from the May 26, 2006, murder of Tiffany Souers, a Clemson University student. Ms. Souers was attacked and murdered in her apartment. She had no ties to Inman prior to his admitted crimes against her.

Inman was indicted, at a November 2006 term of Pickens County General Sessions Court, on the charges of murder (2006-GS-39-2225), kidnapping (2006-GS-39-2224), criminal sexual conduct in the first degree (2006-GS-39-2223), amended in August 2008, and burglary in the first degree (2006-GS-39-2222). [R. at 1037-1044]. The State, by and through its Solicitor of the

Thirteenth Judicial Circuit, Robert M. Ariail, Esquire, timely noticed Inman of the State's Intent to Seek the Death Penalty, on August 22, 2006, pursuant to S.C. Code § 16-3-26. By order of March 13, 2007, the Supreme Court of South Carolina assigned jurisdiction over the matter to the Honorable Edward W. Miller, Circuit Court Judge.

Mode of Trial Challenge

Motion to Determine Mode of Trial.

On August 17, 2007, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Mr. Inman, by his trial counsel, James W. Bannister, Esquire, moved the trial court to determine the mode of trial to allow Inman to enter a guilty plea before the trial jury, in the guilt phase and, then, the court conduct the separate sentencing proceeding before the trial jury, under the bifurcated provisions of the South Carolina capital sentencing scheme, S.C. Code Ann. § **16-3-20. Punishment for Murder; separate sentencing proceeding when death penalty sought**, which provides, [in pertinent part,] that:

> (A) ***A person who*** is convicted of or ***pleads guilty to murder*** must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life. ***If the State seeks the death penalty*** *and a statutory aggravating circumstance is found beyond a reasonable doubt* pursuant to subsections (B) and (C), *and* ***a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment.*** For purposes of this section, "life" or "life imprisonment" means until death of the offender without the possibility of parole, and, when requested by the State or the defendant, ***the judge must charge the jury*** in his instructions that life imprisonment means the death of the defendant without the possibility of parole.
>
> (B) ***When the State seeks the death penalty, upon*** conviction or ***adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding.*** In the proceeding, *if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to*

life. ***The proceeding must be conducted by the trial judge before the trial jury*** as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. **[If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge.]** ***In the sentencing proceeding, the jury*** or *judge* ***shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment.*** Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. (Emphasis supplied.)

Mr. Inman's motion and supporting memorandum of law relied on *Apprendi v. New Jersey,* 530 U.S. 466 (2000), *Ring v. Arizona,* 536 U.S. 584 (2002), and *Blakely v. Washington,* 542 U.S. 296, 307, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004).

Mr. Inman, *who did "not wish to contest his guilt," had informed his "counsel of his strong desire to acknowledge his guilt,"* ***did "not want to put the victim's family through the spectacle of a courtroom proceeding regarding his guilt," and sought "to alleviate the cruel impact the attendant media attention would have on everyone involved."*** R. 1202-3. *See,* S.C. Const., Art. I, § 24(A), Victims' Bill of Rights, [3] and S.C. Code Ann. (1976), §§ 16-3-1505 & 16-3-1510.[4]

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[3] South Carolina Constitution of 1895, Article I, Section 24(A). "To preserve and protect victims' rights to justice and due process...victims of crime have the right to:

***

(12) have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and have these rules subject to amendment or repeal by the legislature to ensure protection of these rights.

[4] § 16-3-1505. Legislative intent.

"[T]o implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of ... a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights ... extended in this article to victims of ... a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants; . . . " (Emphasis supplied).

§ 16-3-1510. Definitions.

On September 17, 2007, Judge Miller convened a hearing on Mr. Inman's motion to determine the mode of trial. Mr. Bannister, the Defense Counsel, explained:

> ***"Mr. Inman wants to plead guilty***. He has a strong desire to acknowledge his guilt in both the formal legal sense and in the moral sense. He wants to accept responsibility for what he has done, regardless of what the ultimate sentence will or will not be. The only way he can adequately show the remorse he feels and acknowledge the moral guilt that he is dealing with now is ***to stand at the bar and admit to the elements of the indictment, and to have Your Honor accept that guilty plea and formally acknowledge that. He also,*** *as a subset of that,* ***wants to alleviate what he sees would be the cruel impact that the media attention in this case has already had, that impact that it would have on the both the Souers family and his own family.*** He also wants to avoid what he would consider to be the spectacle and charade of a guilt-phase proceeding. In other words, he wants to plead guilty." (Emphasis supplied.) R. 800-01.

Trial counsel argued, Mr. Inman has *a constitutional right to be sentenced by an impartial jury* while acknowledging *S.C. Code Ann. § 16-3-20(B) statutorily mandates*: "If trial by jury has been waived by the defendant and the State, or **if the defendant pleaded guilty, the sentencing procedure must be conducted before the judge,**" (emphasis supplied). The consequence of which is that, "[w]hen the State seeks the death penalty," *id.*, and the State accepts the Defendant's guilty plea, under the South Carolina statutory capital sentencing scheme, expressly provided by S.C. Code Ann. "**§ 16-3-20(B). Punishment for Murder; separate sentencing proceeding when death penalty sought,**" the State, by its own statutory mandate, thereby, preemptively precludes any participation in the bifurcated phases of that capital sentencing scheme — and more particularly, the sentencing phase — by a duly summoned, examined, qualified, selected and empaneled impartial trial jury, expressly provided by § 16-3-20(D)(E), and constitutionally

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(a) "Victim" means any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense, ..."Victim" also includes any individual's spouse, parent, child, or the lawful representative of a victim who is:

(b) Deceased;" . . . (emphasis supplied).

required by the Sixth Amendment to the CONSTITUTION OF THE UNITED STATES, as it has been ultimately decided in *Hurst v. Florida, supra.*, to wit:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public *trial, by an impartial jury....*" This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v. United States,* 570 U.S. —, ___, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 314 (2013). *Apprendi v. New Jersey,* 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000).
>
> 136 S. Ct. 616, at 621 (2016) (emphasis supplied).

Moreover, the SOUTH CAROLINA CONSTITUTION, Article 1, Section 14, explicitly provides that:

> **"The *right of trial by jury shall be preserved inviolate*. Any person charged with an offense shall enjoy the right to a speedy *and* public trial *by an impartial jury*;"** (Emphasis supplied.)
>
> "**Inviolate** means 'free from substantial impairment.' **Black's Law Dictionary** (6th Ed. 1990) at 826. It has been held that the right "*cannot be invaded or violated by either legislative act or judicial order or decree.*" *Sorrell v. Thevenir,* 69 Ohio St.3d 415, 422 (1994) (emphasis supplied).

The South Carolina statutory capital punishment scheme was enacted by the General Assembly, as Act No. 177, Section 1, 1977 Acts, **"Section 16-3-20. Punishment for Murder; Separate sentencing procedure when death penalty sought."** Sections (A) through (E), S.C. CODE ANN. (1976). The 1977 South Carolina "Act No. 177 was patterned after the death penalty statutes of our sister state of Georgia," the constitutionality of which "was considered by the United States Supreme Court in *Gregg vs. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976)," and the Court in *Gregg* approved Georgia's death penalty statutes." *State v. Shaw,* 273 S.C. 194, 199, 202 S.E.2d 799, 802 (1979).

> "Mr. Justice Stewart, speaking for the Court in Gregg, summarized **the procedural conditions necessary to impose the death penalty:**

In summary, *the concerns expressed in Furman* [*v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972)] *that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.* As a general proposition, **these concerns are best met by a system that provides a bifurcated proceeding** *at which the* **sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.** [*Gregg*] 428 U.S. at 195, 96 S. Ct. at 2935, 49 L.Ed.2d at 887."

State v. Shaw, 273 S.C. at 202, 202 S.Ed.2d at 803.

In addressing "whether this State's statutory death penalty procedure is sufficiently similar to Georgia's procedure to pass constitutional scrutiny," the South Carolina Supreme Court noted that:

"A capital **defendant's guilt** is determined in the traditional manner, by either a **judge or jury, in the first stage of a bifurcated trial.**

Upon conviction or adjudication of guilt of a capital defendant of murder, **a separate sentence proceeding is conducted** to determine whether the capital defendant shall be sentenced to death or life imprisonment. The **sentencing proceeding is conducted before the trial jury, or if the capital defendant pled guilty** or the trial jury is waived by both the capital defendant and the State, **the sentencing proceeding is conducted before the court**. Section 16-3-20(B), Cum. Supp. 1978." *State v. Shaw*, 273 S.C. at 200.

Nevertheless, when the United States Supreme Court had compared the constitutionality of Georgia's death penalty procedure to its sister state Florida's, it found that:

"The basic *difference between the Florida system and the* ***Georgia system is that in Florida the sentenced is determined*** *by the trial judge rather than* ***by the jury.*** This court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois,* 391 U.S. 510, 519, n. 15, 88 S. Ct. 1770, 1775, 20 L. Ed.2d 776 (1968), *but it has never suggested that jury sentencing is constitutionally required.* And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences in analogous cases. *Proffitt v. State of Florida,* (emphasis supplied), 428 U.S. 242, 252, 96 S. Ct. 2960, 2966, 49 L.Ed2d 913 (1976).

After the United States Supreme Court announced "the judgment of the court" in the "opinion...delivered by Mister Justice POWELL," in *Proffitt v. State of Florida, supra,* and noted that: "*but it has never suggested that jury sentencing is constitutionally required," id.,* the United States Supreme Court in *Hurst v. Florida,* 136 S.Ct. 616 (2016), ultimately, in fact, did hold, in cases where the State seeks the death penalty, that:

> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact finding. *Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.*
>
> The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion." *Hurst,* 136 S. Ct. 616, at 624 (2016) (emphasis supplied).

Moreover, just as important here, was the judgment of the *Proffitt* Court that, "since *a trial judge is more experienced in sentencing than the jury,* and therefore is *better able to impose sentences similar to those imposed in analogous cases."* 428 U.S. at 252. This is in direct derogation of the, aforesaid, "procedural conditions necessary to impose the death penalty," that were recognized by our South Carolina Supreme Court in *State v. Shaw, supra,* to wit:

> "To meet the *concerns that the penalty of death not be imposed in an arbitrary or capricious manner* can be met by a carefully drafted statute that ensures the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of the sentence and provided with standards to guide its use of the information." *Id.*, 273 S.C. at 202, 255 S.E.2d at 803.

Furthermore, under the South Carolina death penalty complex: S.C. Code (1976) **§16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought**, if the State seeks the death penalty," for which the jurors are selected for "an impartial jury," the statutory mandate is: "if the defendant pleads guilty," not only does the trial judge become the fact finder in the "guilt phase" of the bifurcated proceeding, but the "sentencing proceeding must be

conducted before the judge," thereby conflating the "trial jury" with the "trial judge," and, even though the trial judge, necessarily, "is more experienced in sentencing than a jury," this does not, *ipso facto*, lend itself to the trial judge, necessarily, being qualified to "render a fair and impartial verdict," *infra,* in a particular case.

All potential jurors [but not the "trial judge," as Judge Hill candidly noted in his colloquy (R. at 954-55)] are asked, on their *voir dire:*

> "Can you *lay aside any outside knowledge or any information received prior to this trial,* from any source whatsoever, *and, setting aside such knowledge or information* ***render a fair and impartial verdict*** *based solely on the law and evidence presented and received in this case? "* **The South Carolina Capital Trial,** Honorable Gary E. Clary, (emphasis supplied).

The antithetical nature of this qualification to the statutory mandate that: "if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge," § 16-3-20(B), was revealed in the very first case to consider the constitutionality of the South Carolina capital punishment scheme.

In *State v. Shaw,* 273 S.C. 194, 255 S.E.2d 799 (1979), "the first capital case reviewed under our current death penalty statutes," the South Carolina Supreme Court determined that "this State's statutory death penalty procedure is sufficiently similar to Georgia's procedure to pass constitutional scrutiny," 273 S.C. at 199, 255 S.E.2d at 802, and held: "[w]e conclude, therefore, that section 16-3-20 through Section 16-3-28, Cum. Supp. 1978, are constitutional, and a sentence of death may be lawfully imposed pursuant to the statutory complex." 273 S.C. at 205B, 255 S.E.2d 804. *State v. Shaw,* 273 S.C. 194, 202, 55 S.E.2d 799, 803 (1979), thereby, became a part of the "existing case law in South Carolina and the statutes," when, "counsel informed the judge of Inman's intent to enter a guilty plea to the crimes and demand a jury trial for sentencing. After a hearing, the judge summarily denied the motion on the ground he was constrained by the existing

case law in South Carolina and the statutes," *Inman,* 395 S.C at 35, 720 S.E.2d at 545-546, but this was prior to *Hurst v. Florida, supra.*

If the judge is "more experienced in sentencing than a jury," *Proffitt v. Florida,* 428 U.S. at 252, 96 S. Ct. at 2966, it is a *complete trifecta for the State*, under § 16-3-20(B), when "the State seeks the death penalty" and the defendant pleads guilty, then, it is mandated by the statute that the Trial Jury is conflated with the Trial Judge, before whom "the sentencing proceeding must be conducted," § 16-3-20(B): *first*, the State is the prosecutor—who seeks the death penalty; *second*, the judge is "the employee of the State," *Blakely v. Washington,* 542 U.S. 296, 314, 124 S.Ct. 2531, 2543, 159 L.Ed.2d 403 (2004), who conducts the proceeding, and, *third,* the judge is the jury, who decides the facts and who sentences the defendant, all without "an impartial jury" as required, not only by the Sixth Amendment to the United States Constitution, *Hurst, supra*, but Article I, Section 14, of the South Carolina Constitution of 1895.

In his colloquy, Judge Miller consciously inquired whether anyone had "made any promise, prediction, or prophesy to [Inman] about what they think my sentence might be," and Inman responded, "No, sir." [R. at 954]. Judge Miller further explained:

> THE COURT: And I want to tell you right now that this is the first time I've been exposed to these facts, and that I have not made up my mind, and that I will listen fairly and impartially to everything that's presented to me.
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> THE COURT: But, at the same time, you don't get the right to send me a questionnaire, and you don't get the right to question me the way you would jurors.
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> R. at 954-55.

That was the sum and substance of the waiver colloquy as it pertained to the trial judge's "impartiality" during the entire course of the trial relative to assuring that the impartiality of the trial judge was maintained as the "lone" sentencing authority, notwithstanding the explicit provision that: *"in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense."* §16-3-20(D) (emphasis supplied).

Nevertheless, in order to meet the concerns expressed in *Furman v. Georgia, supra,* that the death penalty not be "imposed in an arbitrary or capricious manner," the bifurcated statutory death penalty complex approved in *Gregg v. Georgia, supra,* Act No. 177, enacted by the 1977 South Carolina General Assembly, and the protocols adopted pursuant thereto, provide that, from the time that an impartial trial jury is qualified and selected, all jurors are sequestered in appointed lodging for the duration of the entire trial, under the supervision of South Carolina Law Enforcement Division (SLED) Details of Jury Custodians, who are sworn to keep the jury sequestered and to allow no person to talk to them without leave of the court—even during the twenty-four hour respite between the bifurcated guilt phase and the sentencing phase under § 16-3-20(B), so that they are not exposed to any information about the case or any outside extrajudicial influence that might bear on their ability to serve as impartial death penalty jurors—to include any discussion of the case among themselves—before it is given to them, with proper instructions, for their deliberation and determination of each of the separate verdicts in first, the guilt phase, and then, the sentence phase, of the bifurcated proceedings. See: **OATHS OF BAILIFFS, CONSTABLES, ETC.** TO KEEP A JURY, ETC. **The South Carolina Capital Trial (September 1998)**, Honorable Gary E. Clary, Circuit Court Judge. *Infra at* p. 31. More, particularly, it was not addressed in the trial judge's colloquy with the accused, that the Trial Judge,

who becomes, both, the "Trier of Facts" as well as the "Sentencer," is not sequestered, even when and after Inman "pleaded guilty" and his plea was accepted by the Court.

As above noted, the trial jury is subjected to sequestration during the entire proceedings of capital trials—to protect the selected and empaneled jurors from any outside or other extra-judicial influences—under strict death sentence protocols, promulgated to protect the jurors from such extra-judicial influences that are not a part of the formal judicial process of a death penalty trial. Conversely, the trial judge is not subject to those protections afforded the trial jury. In fact, it is the duty of the trial judge to hear and determine the admissibility of all matters presented to or brought before the court for the jury's consideration, during the course of capital punishment proceedings, whether the matters are ultimately ruled admissible for the trial jury's consideration, with proper instructions, or not admitted into evidence. All such matters are to be heard and decided by the Trial Judge, and made a part of the trial record for review.

Necessarily, trial judges instruct trial juries that the duties of the jury and judge are separate and distinct, and that "it is impermissible for the judge to express his opinion to the jury, although the opinion may be based upon his experience and the best judgment," and this applies to advice to capital defendants, as well. *State v. Owens,* 362 S.C. 175, 177, 607 S.E.2d 78, 79 (2004). Furthermore, "a trial judge cannot intimate, state, comment on, or make any statement to a trial jury about the facts in a case." Circuit Court Judges' **Criminal Trial Bench Book, Tab. 1,** *Jury Instructions in Criminal Cases,* at p.34.

Inman had sought to exercise his right, once an impartial jury was empaneled pursuant to § 16-3-20(B)(C)(D), to waive his Fifth Amendment rights and plead guilty to stipulated facts upon which the jury, with proper instructions, could make an adjudication of guilt and, if its unanimous verdict was a "conviction or adjudication of guilt," § 16-3-20(B), make its unanimous finding of

any statutory aggravation for its recommendation for the sentence phase, thereby sparing the victims—the family of the decedent—a full scale trial on the facts, in the guilt phase, to protect the victim's family from the spectacle of a guilt phase proceeding, [*cf.* § 16-3-1505. "Legislative Intent of Victim's Rights Constitutional Amendment." Art. 1, § 24, *supra.*], and, yet, Inman would "stand at the bar and admit to the elements of the indictment, and . . . have Your Honor accept the guilty plea and formally acknowledge that," pursuant to § 16-3-20(A). Then, "upon conviction or adjudication of guilt of [the] defendant of murder," *supra*, pursuant to the Sixth Amendment and Article I, § 14, of the respective Federal and State Constitutions, have "the court...conduct a separate sentencing proceeding" pursuant to § 16-3-20(B) and (C), which "proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant." *Id.*

Notwithstanding the constitutional guarantee that an "accused shall enjoy the right to a speedy and public *trial, by an impartial jury,*" under the United States Constitution's Sixth Amendment, and the South Carolina Constitution's Article 1, Section 14, which *"right of trial by jury shall be preserved inviolate,"*[5] the South Carolina Supreme Court in *State v. Harper*, 251 S. C. 379, 162 S.E.2d 712 (1968), was compelled to considered the constitutionality of Section 17-553.4 of the S.C. Code (1962), relating to guilty pleas, enacted by the General Assembly in 1962, approximately sixty-eight years after the enactment, in 1894, of Section 16—52, , prescribing death as the punishment for murder, unless the jury found a special verdict recommending the defendant to the mercy of the court, in which event the punishment was life imprisonment. "Under Section 17—553.4, a defendant could tender a plea of guilty of murder and, if accepted with the

[5] "**Inviolate** means 'free from substantial impairment.' Black's **Law Dictionary** (6th Ed. 1990) at 826. It has been held that the right 'cannot be invaded or violated by either legislative act or judicial order or decree.'" *Sorrell v. Thevenir,* 69 Ohio St.3d.415, 422. (1994).

approval of the court, such a plea had the same effect as a recommendation to mercy by a jury, with life imprisonment as the automatic punishment." 251 S.C. at 382—383, 162 S.E.2d at 713—714.

In *Harper*, the South Carolina Supreme Court had found that:

> "The question to be decided in this appeal is whether the ruling of the United States Supreme Court in the recent case of the United *States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 138 [1968], renders constitutionally invalid the South Carolina statutory provisions relating to the imposition of the death penalty for murder. *Id.*, S.C. at 382, and S.E.2d at 713.

In *Jackson*, the United States Supreme Court had declared unconstitutional a provision of the Federal Kidnapping Act (18 U.S.C., Section 1201(a)), that was similar to the South Carolina Code (1962), Section 16—52, that prescribed capital punishment for murder, and Section 17—553.4, relating to guilty pleas, which provided that an accused who pleads guilty is a "defendant who abandons the right to contest his guilt before a jury [and] is assured that he cannot be executed," but "the defendant ingenuous enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die." The United States Supreme Court held that: "The death penalty provisions of the Federal Kidnapping Act were, therefore, unconstitutional because the death penalty under the Act was applicable only to those defendants who assert the right to contest their guilt before a jury."

Our South Carolina Supreme Court unanimously held:

"We therefore hold that:

(1) Section 17—553.4 is unconstitutional under the test laid down in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed. 138 (1968).
(2) Section 16—52 is constitutional and legally severable from the provisions of 17—553.4;
(3) Hereafter, regardless of past custom and practice, the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case, in accord with Section 16—52, regardless of how the

> defendant's guilt has been determined, whether by verdict of the jury or by a plea of guilty.

State v. Harper, 251 S.C. at 385, 162 S.E. at 715; *see, also, State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, 44 (1974), "section 16-52 remains fully operative law."

Nevertheless, in 1977, some nine years after *Harper* (1968), then *Speights* (1974), when the General Assembly of South Carolina amended "Section 16—52 of the 1962 Code of Laws, setting forth the punishment for murder," by Act No. 177 Section 1, 1977 Acts and Joint Resolutions, approved June 8, 1977, and adopted the provisions of: "**SECTION 16-3-20.** Punishment for murder; separate sentencing proceeding when death penalty sought[,]" it did so, notwithstanding the aforesaid unanimous holding of the South Carolina Supreme Court that:

> "**Hereafter,** regardless of past custom and practice**, the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case,** in accord with Section 16—52**, regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by a plea of guilty.**"(Emphasis supplied).

State v. Harper, supra, and, *State v. Speights, supra.*

In so doing, the legislature of the State imposed its "*statutory mandate*," *State v. Patterson,* 278 S.C. 319, 322, 295, S.E.2d 264, 266 (1982)(emphasis supplied), into Section 16-3-20(B) that:

> "If trial by jury has been waived by the defendant and the State, or **if the defendant pleaded guilty**, the sentencing proceeding must be conducted before the judge."

This was done in abrogation of the unanimous holding of our Supreme Court in *Harper,* and later *Speights, supra,* that:

> ". . . **the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case, . . . regardless how the defendant's guilt has been determined, whether by verdict or by plea of guilty.**" *Supra.*

Moreover, the State's "*statutory mandate*," *State v. Patterson, supra,* nullifies the right of an accused to a trial—in the sentencing phase—"by an impartial jury," *contra, Hurst v. Florida,*

supra, as guaranteed by our founders when they adopted, in 1791, the Sixth Amendment to the Constitution of the United States that provides:

Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed; ... (emphasis supplied).

More importantly, the State's gratuitous *statutory mandate* of Section 16-3-20(B) vitiates the explicit provision of the South Carolina Constitution of 1895, as amended:

ARTICLE I

Declaration of Rights

(Formerly Article 1, Section 25; and Article I, Section 11, Constitution of 1868) [6]

> "Section 14. The ***right of trial by jury shall be preserved inviolate***. Any person charged with an offense shall enjoy the *right to a* speedy *and public trial by an impartial jury;* . . . ." Article I, Section 14. (Emphasis supplied.)

Moreover, S.C. Code (1976): **SECTION 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought,"** *without the statutory mandate here-involved*, expressly and constitutionally provides, otherwise, that:

> (A) A person who...**pleads guilty to murder** must be punished by death, or a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt . . . and *a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment.*
>
> * **
>
> (B) When the **State seeks the death penalty**, upon conviction or adjudication of guilt of a defendant of murder, *the court shall conduct a separate sentencing proceeding*... The proceeding *must be conducted by the trial judge before the trial*

[6] "The South Carolina Constitution of 1868 . . . was the most democratic and equitable of the seven constitutions in the history of this state." **The South Carolina Constitutional Convention of 1868,** Nic Butler, Ph.D., March 2, 2018, Charleston County Public Library. This was reflected in its ARTICLE I, DECLARATIONS OF RIGHTS, *SECTION 11*, where it is succinctly provided: *"The right of trial by jury shall remain inviolate;"* then, in SECTION 13, that:" every person shall have a right . . . to have a speedy and public trial by an impartial jury; " and, in SECTION 14, that: "No person shall be deprived of his life . . . but by the judgement of his peers . . . . And the General Assembly shall not enact any law that shall subject any person to punishment without trial by jury; . . . ." *South Carolina Constitution of 1868.*

jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant.

* * *

(C). . . If the jury has *found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all members of the jury.* The *jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided.* If members of *the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder,* the *trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment* as provided in subsection (A).

Nevertheless, "[w]hen the State seeks the death penalty," it abrogates, by the aforesaid "mandatory statutory provision," the rights guaranteed by the Constitutions of the United States and South Carolina "to a trial by an impartial jury," and creates a *Catch 22* [7] for a defendant, such as Inman, in that:

> "If a trial by jury has been **waived by the defendant and the State,** or ***if the defendant pleaded guilty, the sentencing process must be conducted before judge.***" § 16-3-20(B) S.C. Code Ann. (1976).

In this regard, it has been held, as part of the South Carolina "case law," that "**the condition that the jury determine punishment,**" would be "an *impermissible condition* under the ***statutory mandate*** that **the trial judge alone determines punishment when a defendant pleads guilty to murder,**" *State v. Patterson,* 278 S.C. 319, 322, 295, S.E.2d 264, 266 (1982) (emphasis supplied), notwithstanding the Sixth Amendment and Art. 1, Section 14, of our respective Constitutions, *supra*, and, more particular, the further explicit provision of the South Carolina Constitution that:

> "*The right of trial by jury shall be preserved inviolate.* Any person charged with an offense shall enjoy the right to a speedy and public *trial by an impartial jury. Id.* (Emphasis supplied).

But, see, *State v. Truesdale*, 278 S.C. 368, 296 S.E.2d 528 (1982), where it was held that:

> "*Pleas of guilty are unconditional*, and ***if an accused attempts to attach any condition or qualification*** thereto, ***the trial court should direct a plea of not guilty.***

[7] "A hidden difficulty or means of entrapment: catch." **Merriam-Webster** Dictionary (original emphasis).

(Citations omitted). The basis for this rule is, of course, the settled doctrine that a guilty plea constitutes wavier of all prior claims of constitutional rights or deprivations thereof." *State v. Patterson,* supra; *Whetsell v. State*, 276 S.C. 295, 277 S.E.2d 891; *Rivers v. Strickland*, 264 S.C. 121, 213 S.E.2d 97; *Lefkowitz v. Newsom*, 420 U.S. 283, 289, 95 S. Ct. 886, 889, 43 L.Ed.2d 196 (and cases cited therein). (Emphasis supplied).

Therefore, the accused, Inman, could not freely and voluntarily waive his Fifth Amendment right to plead guilty, upon stipulated facts, before a duly qualified trial jury and the trial judge, in the guilt phase of the bifurcated proceeding, when, as above noted, it is expressly mandated under the South Carolina statutory capital sentencing scheme, that:

> **"SECTION 16-3-20. Punishment for Murder; separate sentencing proceeding when death penalty sought.**
>
> (A) **A person who** is convicted or **pleads guilty to murder must punished by death, or by a mandatory minimum term of imprisonment for thirty years to life.**
>
> (B) ***When the State seeks the death penalty, upon*** conviction or ***adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding.*** In the proceeding, *if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life.* ***The proceeding must be conducted by the trial judge before the trial jury*** as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. *If trial by jury* has been waived by the defendant and the State, or ***if the* defendant pleaded guilty, THE SENTENCING PROCEEDING MUST BE CONDUCTED BEFORE THE JUDGE.** In the sentencing proceeding, the jury or *judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment.* Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. **This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either.** (Emphasis supplied.)

Under the statutory mandate of Section 16-3-20 (B), then, Inman had no alternative but to involuntarily forfeit—not freely and voluntarily waive—his constitutional "right to a trial by an impartial jury," under the Sixth Amendment, and Article I, Section 14, of the Federal and State Constitutions, respectively, in the sentencing phase of the bifurcated proceeding, in order "to avoid

imposing additional burdens on victims [and] '*consider the trauma the victims of these particularly heinous crimes would experience in a . . . trial, forcing them to relive harrowing experiences now long past*' " [*see, Inman,* concurring opinion of Justice Pleicones, *infra* (emphasis supplied)], or "the trial court should direct a plea of not guilty," *Truesdale, supra,* thereby compelling the State to proceed with the trial on the facts before the trial jury in the guilt phase, regardless of the impact and effect upon the victim's family, whose rights are to be "honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants," § 16-3-1505, in implementing "the rights guaranteed to victims in the Constitution of this State," Victims' Rights, Art. I, § 24(A) (12), "to have all rules governing criminal procedure and the admissibility of evidence to protect victims' rights."

Justice (later, Chief Justice) Pleicones' concurring opinion, in *Inman,* on the question of a mistrial, addressed such "*weighty concerns*:"

> "As the United States Supreme Court has noted, interests beyond the supervision of prosecutorial behavior are implicated by a decision to grant a new trial. *United States v. Hastings*, 461 U.S. 499, 506—507, 103 S. Ct. 1974, 76 L. Ed2d 96 (1983). Although the duty to curb prosecutorial misconduct is compelling, other ***weighty concerns*** *are also at stake, including the need* to conserve judicial resources and ***to avoid imposing additional burdens on victims.*** *Id.* at 509, 103 S. Ct. 1974. The *Hastings* Court rebuked the court below for failing to '*consider the trauma the victims of these particularly heinous crimes would experience in a . . . trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.*' "

State v. Inman, 395 S.C. 539, 568—569, 720 S.E.2d 31, 47 (2011) (emphasis supplied).

"The South Carolina Constitution and case law place unfettered discretion to prosecute solely in the State prosecutor's hands. 'Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense or they may simply decide not to prosecute the offense in its entirety.' "*State v. Thrift,* 312 S.C. 282, 291-292, 440 S.E.2d 341, 346 (1994). Our Supreme Court,

in the first death penalty trial, in which "the sentencing proceeding [was] conducted before the judge," without a jury, pursuant to the "statutory mandate" of Section 16-3-20(B), held that:

> "While these three defendants are equally guilty of the crime of murder as defined by the laws of this State, they are not *ipso facto* deserving of the same punishment. (Citation omitted).
>
> * * *
>
> The Solicitor chose to bargain with Mahaffey rather than Shaw or Roach because it was unlikely a death sentence would be imposed on Mahaffey."

State v. Shaw, 273 S.C. 194, 255 S.E.2d 799, 804 (1979).

Therefore, "whenever a solicitor seeks the death penalty he shall notify the defense attorney of his intention to seek such penalty at least thirty days prior to trial of the case." § 16-3-26(A). Then, "[i]f trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge." § 16-3-20(B).

As above discussed [and Inman was to find out after the State exercised the statutory mandate that "the sentencing proceeding be conducted before the trial judge," *id.*] — although Inman was not advised in his colloquy with the trial judge or at any other time — that upon appeal from a conviction in the proceedings conducted solely by the trial judge, even, if the Supreme Court "concluded that the Solicitor's actions constituted prosecutorial misconduct, the question becomes whether a mistrial was warranted." The burden of proof was upon the accused, and, it would be up to the Defendant, Inman, to establish "prejudice sufficient to warrant such a severe remedy." As our Supreme Court noted:

> "First, any assessment of *prejudice to Inman must be viewed from the posture of a bench trial* as opposed to a jury trial. It is *well-established that it is a near insurmountable burden for a defendant to prove prejudice* in the context of a bench trial as a *judge is presumed* to disregard prejudicial or inadmissible evidence.
>
> * * *
>
> Although we find the Solicitor committed prosecutorial misconduct, we conclude Inman's sentence of death was not imposed in violation of his due process Rights." *Inman, supra,* 395 S.C. at 565—566, 720 S.E.2d at 45—46 (emphasis supplied).

The significance of "a bench trial as opposed to a jury trial" . . . "by an impartial jury," was not lost on the exceedingly capable trial judge in *Inman.* At the time that Judge Miller made his ruling on the defendant's motion for mistrial, being the conscientious judge he is, he candidly stated:

> "Now, *if this had been a jury trial* in September, *there may have been a different result. But I am,* in fact, *the fact finder, as well as sitting in my capacity as the Judge.* I didn't ask for this. I don't want it. But that's where I sit. And I don't find that there is — that the Defendant's rights are prejudicially effected by the remarks or the conduct of the prosecutor." (Emphasis supplied).

R. 647-48.

Because of the statutory mandate of § 16-3-20(B), Inman was faced with a "Catch 22," in that his stated offer was that: "*he wants to alleviate what he sees would be the cruel impact that the media attention in this case has already had, that impact it would have on both the [victim's] family and his own family,*" such being the explicit: "Legislative Intent of Victim's Rights Constitutional Amendment, § 16-3-1505," *but* **he could not insist on pleading guilty to stipulated facts in the guilt phase,** *and* "stand at the bar and admit to the elements of the indictment, and to have [the trial judge] accept his guilty plea and formally acknowledge that before a[n 'impartial' trial] jury," with proper instructions, pursuant to § 16-3-20(A), *and then,* "upon conviction or adjudication of guilt of [the] defendant of murder," pursuant to the Sixth Amendment and Article 1, Section 14 of the respective Federal and State Constitutions, have "the court...conduct a separate sentencing proceeding," which "proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant." § 16-3-20(B) (C).

Moreover, notwithstanding, Inman's "weighty concerns . . . to avoid additional burdens on victims," (Justice Pleicones concurring in separate opinion, *Inman* at 395 S.C. at 569, 720 S.E.2d at 47):

> "In effect, [as Judge Miller found, Inman had] entered a conditional plea which is a practice not recognized in South Carolina and a practice we expressly disapprove. Pleas of guilty are unconditional, and, if an accused attempts to attach any condition or qualification thereto, *the trial judge should direct a plea of not guilty*."

State v. Truesdale, 278 S. C. 368, 370, 296 S.E.2d 528, 529 (1982) (citations omitted). In which event, Inman would be compelled to have the State conduct a full scale trial in the guilt phase notwithstanding his aforesaid "desire to avoid additional burdens on victims."

Yet, because Inman did "consider the trauma the victims [and their families] of these particularly heinous crimes would experience in a . . . trial, forcing them to relive harrowing experiences now long past, . . . [and] these sensitive issues more than four years after the events," *Inman, supra,* Inman offered to forego his Fifth Amendment right not "to be a witness against himself," and to plead guilty in the guilt phase of the bifurcated trial. But, Inman, personally and by and through his counsel, could not "freely and voluntarily waive", but was required to forswear and forfeit, "his right to a ... public trial, by an impartial jury," otherwise, guaranteed by the Sixth Amendment, and Article I, Section 14, of the respective Federal and State Constitutions, in "the separate sentencing proceeding," which "proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant," as provided by:

> "§ 16-3-20(B). Punishment for murder; separate sentencing proceeding when death penalty sought.
>
> (A) A person who is convicted of or pleads guilty to murder must be punished by death, or a minimum term of imprisonment for thirty years or life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a

> reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment.
>
> * * *
>
> (B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. . . . The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after twenty-four hours unless waived by the defendant."

Moreover, if the State merely does ***not*** agree to Defendant's waiver of a trial in the guilt phase, as Inman offered in the instant case, and denies the defendant's demand for a jury trial in the sentencing phase, Inman was compelled to accept the state's *Hobson's Choice* [8] to "plead guilty," if he was to spare "the trauma the victims of these particularly heinous crimes would experience in a [guilt phase] trial, forcing them to relive harrowing experiences now long past," contrary to the intent of the Constitution of South Carolina Victims' Rights Act, which "rights...extended to victims...are [to be] honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants." § 16-3-1505. In so doing, the statutory mandate of § 16-3-20(B), conflates the separate and distinct duties of the trial judge with those of "an impartial [trial] jury," of the Federal and State Constitutions, upon "a lone employee of the State," *Blakely v. Washington,* 542 U.S. 296, 314, 124 S.Ct. 2531, 2543, 159 L.Ed.2d 403 (2004), the trial judge, who, then, becomes, both the "trier of facts" and the "sentencer."

This is patently inimical to the aforesaid, "*procedural conditions necessary to impose the death penalty,*" as stated by Mr. Justice Stewart, "speaking for the Court in *Gregg* [*v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976)]," upon which our present statutory death penalty complex, §§ 16-3-20 through 16-3-28, S.C. Code Ann. (1976), is patterned — as it was amended

[8] No real choice at all—the only options being either accept what is offered or refuse it. The expression is effectively "take it or leave it."

by two (2) additional aggravating circumstances and one (1) additional mitigating circumstance being added — after its enactment in 1977 as Act No. 177, Section 1:

> Justice Stewart: "In summary, *the concerns* expressed in *Furman (v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972)*) that the penalty of death imposed by an arbitrary or capricious manner* can be met by carefully drafted statutes that the sentencing authority is given adequate information and guidance. As a general proposition, **these concerns are best met by a system that provides a bifurcated proceeding** at which the **sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of information.** 428 U.S. at 195, 96 S. Ct. at 2935, 49 L.Ed.2d at 887. (Emphasis supplied.)

State v. Shaw, 273 S.C. 194, 202, 55 S.E.2d 799, 803 (1979) (emphasis supplied), where it was concluded, on appeal, "that Section 16-3-20 through Section 16-3-28, Cum. Suppl. 1978, [were at that time, **prior to** *Hurst*], constitutional, and that a sentence of death may be lawfully imposed pursuant to the statutory complex," 273 S.C. at 205, 55 S.E.2d at 804, without a jury determination in the imposition of the death penalty. As herein noted and addressed, the "statutory complex" mandates that: "If trial by jury is waived by the defendant and the State, or **if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge."** § 16-3-20(B) (emphasis supplied.)

Shaw was "the first capital case reviewed under our current death penalty statutes," 273 S.C. at 197, 55 S.E. at 800, and it continues to constitute part of "the existing case law in South Carolina and the statutes," § 16-3-20(A) — (E), S.C. Code Ann., when;

> "After a circuit court judge determined that Inman was competent to stand trial, defense counsel filed a motion to determine the mode of trial. In the motion, counsel informed the judge of Inman's intent to enter a guilty plea to the crimes and demand a jury trial for the sentencing. After a hearing, *'the judge summarily denied the motion on the ground he was 'constrained by the existing case law in South Carolina and the statutes.'"*
>
> *State v. Inman,* 395 S.C. 539, 545-546, 720 S.E.2d 31, 35 (2011) (emphasis supplied).

State v. Shaw, 273 S.C. 194, 255 S.E.2d 799 (1977), being the seminal case to be tried under our current death penalty statutes, it is, therefore, of particular interest in light of the United States Supreme Court's holding in *Hurst v. Florida, supra,* that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Id. Hurst* gives meaning to the "longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors,' 4 W. Blackstone, Commentaries on the Laws of England 343 (1789)," *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000); and "the State should suffer the modest inconvenience of submitting its accusation to 'the *unanimous suffrage of twelve* of his equals and neighbors,' *rather than a* ***lone employee*** *of the State."* 4 W. Blackstone, *supra. Blakely v. Washington,* 542 U.S. 296, 314, 124 S. Ct. 2531, 2543, 159 L.Ed.2d 403 (2004) (emphasis supplied).

The Defendant in *State v. Shaw,* Joseph Carl Shaw, whose guilty plea was accepted and his subsequent sentence to death, by the trial judge, pursuant to Sections 16-3-10, *et seq.,* South Carolina Code of Laws, 1976 (Cum. Supp. 1978), had been "meticulously considered" and AFFIRMED, by our South Carolina Supreme Court, 273 S.C. 194, 212, 255 S.E.2d 799, 807 (1979), thereafter, was the "Applicant Shaw," who filed an application for Post-Conviction Relief (PCR) under the provisions of Sections 17-27-10, *et seq.* of the S.C. Code Ann. (1976). At the start of his post-conviction evidentiary hearing, Shaw filed a motion alleging that the PCR Hearing Judge had a personal bias and had failed to disqualify himself from presiding over his post-conviction proceedings, which motion and his PCR Application, both, respectively, were ultimately denied by the hearing judge.

On appeal to the South Carolina Supreme Court, the Court found and held that:

"Evidence submitted by appellant's [Shaw's] lawyers indicated that certain criminal defense lawyers were present in the hearing judge's chambers at a time prior to sentencing of the appellant [Shaw] by another judge. At that time, the hearing judge in these proceedings, which are currently before the Court, allegedly said that another judge had already discussed the matter concerning the appellant [Shaw] with the sentencing judge and that if the appellant [Shaw] was not sentenced to death, the sentencing judge would be holding court in some remote part of the State. The statement was made in the judge's chambers to public defenders who were well-known to the judge. They additionally indicated that the statement was made in an 'off-hand and joking manner by . . . (the hearing judge).'" *Shaw v. State,* 276 S.C. 190, 192, 277 S.E.2d 140, 141 (1981).

[**ATTACHMENT**: Article reported in **THE STATE**—Columbia, S.C., Friday, Jan. 25, 1980, 2-C, by Holly Gatling, Staff Writer.]

After noting that:

"Our Court has apparently not specifically considered the authority of a judge to resolve a motion for disqualification of which he is the subject. After much consideration of the authorities, we conclude that as a general rule the judge in determining whether to proceed, must accept as true the factual allegations of a motion to disqualify. However, this does not prevent the judge from exercising his right to consider the legal sufficiency of those facts. [Citations omitted.] Additionally, the fair meaning of any remark must be interpreted in the light of the context in which it was uttered in determining whether the remarks show personal bias or prejudice on the part of the judge sufficient to require that he be disqualified. *U.S. v. Birrell,* (D.C.), 276 F.Supp. 798. With these premises in mind, we considered the record.

Assuming the truth of the factual allegations, we think that the only reasonable view of the facts alleged are they indicate *an attempt at levity to ease the tensions created by the magnitude of the case concerning Mr. Shaw,* rather any actual bias on the part of the judge. Neither of the judges who allegedly discussed the sentencing judge's assignments has any authority or ability to affect a judge's assignment. Under our State's Constitution, this authority rests exclusively with the Chief Justice. The attorneys to whom the statements were made were well-known to the judge as public defenders who are dedicating all of their talents and energies to the defense of others. It is totally unreasonable to conclude that a judge would make such a statement and thereby reveal *actual improper conduct* to the public defenders, if such actions had actually occurred. In fact, the affidavits belie the conclusion of actual personal bias or improper conduct. They indicate that the *comments, if made, were made in a joking manner.* The fact that a more reflective manner might have been used *to ease the obviously sobering discussion* is insufficient, under the facts of this case, to require a judge's disqualification.

> Our conclusion is further supported by the denial of the hearing judge that he made the statement attributed to him, his denial of any personal bias or prejudice in this matter, and his affirmance that he could conduct a fair and impartial hearing. The fair and impartial manner in which the proceedings were conducted evidences a complete lack of any personal bias.
>
> In view of the total lack of any reasonable basis for the charge of bias and prejudice on the part of the trial judge, we conclude that he properly ruled on the motion to recuse."
>
> Of course, the question of recusal of the judge who presided at the post-conviction hearing was designed, ultimately, to reach the issue of whether the alleged statements adversely affected the ability of the sentencing judge to consider the matter in an unbiased manner. Alleged errors in the refusal to subpoena the sentencing judge in an attempt to develop prejudice on his part are of no consequence in view of the absence of proof that the nature of the statements, if made, were such to create a likelihood that they adversely influenced him. There is no intimation that anyone contacted him for the purpose of influencing his decision. The alleged *statements were, admittedly, jokingly made*, if made at all. The sentencing judge also denied any contact of the nature charged. We find the charges of bias and prejudice on the part of the trial judges in this case to be completely without foundation.

Shaw v. State, 276 S.C. 190, 193-194, 277 S.E.2d 140, 141-142 (1981) (emphasis supplied).

If any of the extrajudicial comments allegedly made to "the trial judges" that "indicate an attempt at levity to ease tensions created by the magnitude of the case concerning Mr. Shaw," even "if made in a joking manner...to ease the obviously sobering discussion," ***Id.***, had been made to a member of a qualified, selected and empaneled capital trial jury, sequestered under the supervision of sworn SLED Details of Custodians, pursuant to the protocols in such cases, such unauthorized extrajudicial contact would not have been permitted without some consequence to participants in those discussions of the pending proceedings, see, § 16-9-350 S.C. Code Ann. (1976).

The protocols for the enforcement of the capital trial jury's sequestration is such that:

> **OATHS OF BAILIFFS, CONSTABLES, ETC.**
> TO KEEP A JURY
> "DO YOU SWEAR THAT YOU WILL KEEP THE JURORS SWORN OF THIS JURY...UNTIL THEY HAVE AGREED ON THEIR VERDICT OR YOU

ARE OTHERWISE ORDERED BY THE COURT; THAT YOU WILL ALLOW NO PERSON TO SPEAK TO THEM, INCLUDING YOURSELF, WITHOUT LEAVE OF THE COURT, EXCEPT FOR YOU TO ASK WHETHER THEY HAVE AGREED ON THEIR VERDICT; THAT YOU WILL SEE THAT THEY CARRY OUT ALL ORDERS OF THE COURT; AND THAT YOU WILL CARRY OUT ALL ORDERS OF THIS COURT PERTAINING TO YOUR RESPONSIBILITIES TO THE COURT IN THIS CASE?

Also, ESCORTING TO MEALS and ESCORTING TO SEE PROPERTY.

The South Carolina Capital Trial, ***supra.***

The Supreme Court went on to affirm the judgment of the hearing judge, who had denied, both, Shaw's motion for the hearing judge's disqualification, and Shaw's application for post-conviction relief, and his refusal to subpoena the sentencing judge," noting that "[t]here is no intimation of anyone contacted him for the purpose of influencing his decision. The alleged statements were, admittedly, jokingly made, if made at all." *Shaw,* 276 S.C. at 194, 277 S.E.2d at 142. The two justices noted as "not participating," in the decision, each a distinguished justice in his own right, thereafter, in due course, did serve as Chief Justice under our State's Constitution with all the prerogatives appertaining thereto.

Nevertheless, both *State v. Shaw, supra,* and *Shaw v. State, supra,* became and were a part of the "existing case law in South Carolina and the statutes," when the able and conscientious trial judge in *Inman*, "[a]fter a hearing, the judge summarily denied the motion on the ground he was 'constrained by the existing case law in South Carolina and the statutes,'" *Inman, supra,* which was prior to the United States Supreme Court holding in *Hurst v. Florida,* 577 U.S. ____, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), that:

> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact finding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." *Id.* 136 S. Ct. at 624.

Moreover, inasmuch as "the judge summarily denied the motion on the ground he was 'constrained by the existing case law in South Carolina and the statutes,'" the 1895 Constitution of South Carolina, Art. I, Declaration of Rights, explicitly provides:

> "Section 3. The *privileges and immunities of citizens of this State and the United States under this Constitution shall not be abridged*, **nor** shall **any person be deprived of life**, liberty or property **without due process of law,** nor shall any person be denied the equal protection of the laws.
>
> * * *
>
> Section 14. The *right of trial by jury shall be preserved* ***inviolate***. Any person charged with an offense shall enjoy the right to a speedy and public ***trial by an impartial jury***; . . ." (emphasis supplied),

"The Sixth Amendment protects a defendant's *right to an impartial jury.* This right required [the State] to base [the Defendant's] death sentence on a jury's verdict, not a judge's fact finding. *The State's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." Hurst v. Florida,* 136 S. Ct. at 624 (emphasis supplied).

THRESHOLD QUESTION

Accordingly, as conceded by the State, "this Court must consider the issue...whether *Hurst v. Florida," supra,* does "impose upon state criminal proceedings a substantive standard not previously recognized or right not in existence at the time of the state court trial," as provided by S.C. Code §17-27-45(B). *Hurst* did "create a new rule," in that, the United States Supreme Court held:

> "We granted *certiorari* to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring v. [Arizona]* [] 575 U.S. ___, 135 S. Ct. 1531, 191 L.Ed.2d 558 (2015). We hold that it does, and reverse.
>
> ***
>
> The Sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury...*' This right, in conjunction with the *due process* clause, requires that each element of a crime

be proved to a jury beyond a reasonable doubt." *Hurst, supra,* 136 S. Ct. at 621 (emphasis supplied).

On the first day of the evidentiary hearing, this Court entertained argument and discussion of the constitutionality of S.C. Code 16-3-20 (B), in particular, the statutory mandate that a defendant's decision to waive his Fifth Amendment right, not to "be compelled ... to be a witness against himself," and to plead guilty in the guilt phase of the bifurcated proceeding, constitutes a forfeiture of the defendant's right to a trial "by an impartial jury" in the sentencing phase, under the Sixth Amendment to the United States Constitution and Art. I, §§ 3 and 14, of the South Carolina Constitution. The statute mandates that: "if the defendant pleaded guilty, the sentencing proceedings must be conducted before the judge," § 16-3-20 (B), without a jury, in what, otherwise, would be the bifurcated proceeding provided by the statutory capital sentencing scheme: "S.C. Code Ann. **§ 16-3-20. Punishment for Murder; separate sentencing proceeding when death penalty sought.**"

> (A) **A person who** is convicted or **pleads guilty to murder must be punished by death, or by a mandatory minimum term of imprisonment for thirty years to life.** *If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and* ***a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment.***
>
> ***
>
> (B) **When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding.** In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life in imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. ***The proceeding must be conducted by the trial judge before the trial jury*** *as soon as practicable after the lapse of twenty-four hours unless waived by the defendant.* ***If trial by jury has been*** **waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear**

additional evidence in extenuation, mitigation, or aggravation of the punishment.

* * *

(C) . . . The jury, if its verdict is a recommendation of death, shall designate in writing signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. *In nonjury cases the JUDGE SHALL MAKE THE DESIGNATION OF THE STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES.* Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

* * *

If the jury has found a statutory aggravating circumstance or circumstances beyond reasonable doubt, the jury shall designate this finding, in writing, signed by all members of the jury.The ***jury shall not recommend the death penalty if the vote is not unanimous*** as provided. If members of the ***jury after a reasonable deliberation cannot agree*** on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, ***the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).***"

S.C. Code Ann. §16-3-20 (1976) (emphasis supplied).

Applicant's counsel in the evidentiary hearing on Inman's Application, as last amended, relied upon *Hurst v. Florida, supra,* and maintained S.C. Code § 16-3-20 was inimical to the United States Constitution under that case. [See, for example, PCR Tr. at 23-24; 35-36; 70; 78.] This Court similarly considered the issue under *Hurst* throughout the proceeding. [See, for example, PCR Tr. p. 177]. The issue raised in the application is precisely that issue.

The relevant issue as raised in the second amended application is:

Ground 10(d) S.C. Code Ann. Section 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

11(d) S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inman his right to have a jury determine the existence of aggravating circumstances,

consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

Therefore, the threshold issue before the Court is whether *Hurst v. Florida,* 136 S. Ct. 616, 193 L. Ed.2d 504, ___ U.S. ___ (2016), renders the South Carolina capital sentencing scheme unconstitutional, as argued by Inman at the evidentiary hearing pursuant to his Amended Application on August 20, 2018.

Respondent argues the issue cannot be reached because it is a freestanding claim that falls in the category of direct appeal claims; however, concedes that *Hurst* does "impose upon state criminal proceedings a substantive standard not previously recognized or right not in existence at the time of the state court trial," as provided by S.C. Code § 17-27-45 (B):

> "*When a court whose decisions are binding upon the Supreme Court of this State* or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, *impose upon state criminal proceedings a substantive standard not previously recognized* or a right not in existence at the time of the state court trial, *and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed* not later than one year after the date on which the standard or right was determined to exist." (Emphasis supplied). [*Hurst v. Florida*, supra, was decided January 12, 2016, and Inman's PCR was filed June 21, 2012, and last amended and heard August 20, 2018].

Moreover, *Hurst* did create a new rule.

> "The Florida Supreme Court affirmed 4 to 3 [the sentence in *State v. Hurst,* 147 So.3d 435 (2014)]. As relevant here, the court rejected Hurst's argument that his sentence violated the Sixth Amendment in light of *Ring* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed2d 556. *Ring,* the court recognized, 'held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment.' 147 So.3d, at 445. But the court considered *Ring* inapplicable in light of this Court's repeated support of Florida's capital sentencing scheme in pre-*Ring* cases. 147 So.3d, at 446-447 (citing *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) (*per curiam*)); see, also *Spaziano v. Florida*, 468 U.S. 447, 457-465, 104 S.Ct. 3154, 82 L.Ed2d 340 (1984). Specifically, in *Hildwin*, this court held the Sixth Amendment 'does not require that specific findings authorizing the imposition of the sentence of death be made by the jury.' 490 U.S., at 640-641, 109 S.Ct. 2055. The Florida Court noted

that we have 'never expressly overruled *Hildwin*, and did not do so in *Ring*.' 147 So.3d at 446-447.

Justice Pariente, joined by two colleagues, dissented from this portion of the court's opinion. She reiterated her view that '*Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury.' *Id.*, at 450 (opinion concurring in part and dissenting in part).

We granted certiorari to resolve whether Florida's capital sentencing scheme violates the sixth amendment in light of *Ring*. 575 U.S. ---, 135 S.Ct 1531, 191 L.Ed2d558 (2015). **We hold it does, and reverse."**

II

The sixth Amendment provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial jury*. . . .' This right in conjunction with the due process clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt. *Alleyne v, United States*, 570 U.S.___ ____, 133 S. Ct. 2151, 2156, 186 L.Ed.2d 435 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), this Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by a jury's guilty verdict" is an "element that must be submitted to a jury. In the years since *Apprendi,* we have applied its rule to instances involving plea bargains, *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed.2d 403 (2004) . . . and in *Ring,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, capital punishment."

Hurst v. Florida, 136 S. Ct. 616, 620-621, 193 L.Ed.2d 504 (2016)
As reflected by the *Syllabus,* 136 S.Ct. at 617, the United States Supreme Court found that:

"Under Florida law, the maximum sentence a capital felon may receive on the basis of a conviction alone is life imprisonment. He may be sentenced to death, but only if an additional sentencing proceeding 'results in findings by the court that such person shall be punished by death.' Fla. Stat. § 775.082(1). In that proceeding, the sentencing judge first conducts an evidentiary hearing before a jury. § 921.141(1). Next, the jury, by majority vote, renders an 'advisory sentence.' § 921.141(2). Notwithstanding that recommendation, the court must independently find and weigh the aggravating and mitigating circumstances before entering a sentence of life or death. § 921.141(3).

A Florida jury convicted petitioner Timothy Hurst of first-degree murder for killing a co-worker and recommended the death penalty. The court sentenced Hurst to death, but he was granted a new sentencing hearing on appeal. At resentencing, the jury again recommended death, and *the judge again found the facts necessary to sentence Hurst to death.* The Florida Supreme Court affirmed, rejecting Hurst's argument that his sentence violated the Sixth Amendment in light of *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L.Ed.2d 556, in which this Court found

unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than the jury to find the facts necessary to sentence a defendant to death.

Held: Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. 136 S. Ct. at pp. 620 – 624.

As is relevant here, the Florida Supreme Court had rejected Hurst's argument that his sentence violated the Sixth Amendment in light of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L.ED.2d 556 (2002), "in which [the United States Supreme] Court found unconstitutional an Arizona capital sentencing scheme that permitted a judge rather than the jury to find facts necessary to sentence a defendant to death. *Held*: Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*. Pp. 620-624." *Hurst v. Florida*, 136 S.E.2d 616, 617, 193 L. Ed.2d 504, ___ U.S. ___ (2016). In *Apprendi v. New Jersey*, 530 U.S. 466, 494, 120 S. Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court had held that any fact that "exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an element that must be submitted to a jury.

The South Carolina capital punishment sentencing scheme, S.C. Code Ann. Section 16-3-20, expressly provides:

(A) ***A person*** convicted of or ***pleads guilty to murder*** *must be punished by death, or a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt* pursuant to sections (B) and (C), *and* ***a recommendation of death is not made,*** *the* ***trial judge must impose a sentence of life imprisonment.***

(B) ***When the state seeks the death penalty, upon*** conviction or ***adjudication of guilt of a defendant of murder***, *the* ***court shall conduct a separate sentencing proceeding.*** In the proceeding, ***if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found,*** the defendant must be *sentenced to* ***either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury*** as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the

State, or ***if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge***."

(C) . . . ***In nonjury cases the JUDGE SHALL MAKE THE DESIGNATION OF THE STATUTORY AGGRAVATING CIRCUMSTANCE OR CIRCUMSTANCES.*** **Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.**

* * *

The ***jury shall not recommend the death penalty if the vote is not unanimous*** as provided. If members of the ***jury after a reasonable deliberation cannot agree*** on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, ***the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A)***."

Although the trial counsel assiduously sought to preserve Inman's right to have a jury make the critical specific factual findings of the statutory aggravating circumstance(s) — after considering statutory mitigation — necessary to impose the death penalty under the state's capital sentencing scheme, our Supreme Court held:

"... even if Inman preserved his challenge to section 16–3–20(B), he specifically abandoned this issue on appeal as he correctly recognizes that this issue has been decided against his position. See *State v. Allen,* 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied,* —— U.S. ——, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16–3–20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments; noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005) (adhering to *Downs* and rejecting claims that section 16–3–20(B) was unconstitutional); *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004) (citing *Downs* and concluding section 16–3–20(B) was constitutional); *Downs,* 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of section 16–3–20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing).

Inman, 395 S.C. at 556, 720 S.E.2d at 40.

It was the holding of the *Inman* Court:

"Turning to the facts of the instant case, we find that Inman's guilty plea was unconditional. Significantly, *Iman never attempted to reserve the right to challenge or deny the merits of his guilt.* Any condition **he sought to attach to the *plea***

involved an appellate challenged to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters plea of guilty. Under the mandatory appeal procedures in capital cases, ***Inman was permitted to appeal this secondary sentencing issue***; however, any decision as to this issue did not affect the entry or validity of his plea. *Cf. Downs,* 361 S.C. at 145-46, 604 S.E.2d at 379-80.

* * *

Furthermore, even if Inman preserved his challenge to section 16-3-20(B), he specifically abandoned this issue on appeal as he correctly recognizes that *this issue had been decided against his position.* See *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied,* ___ U.S. ____, 130 S. Ct. 3329, 176 L.Ed.2d 1229 (2010)(noting, **in appeal of guilty plea and capital sentence,** ***South Carolina precedent finding that section 16-3-20 does not violate the Sixth Amendment*** to the United States Constitution and concluding that it also *did not violate the Eighth and Fourteenth Amendments;* noting that the statute requires the sentencing judge to consider any mitigation circumstances allowed by law and the a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); *State v. Crisp,* 362 S.C. 412, 608 S.E2nd 429 (2005) (adhering to *Downs* and rejecting claims that Section 16-3-20(B) was unconstitutional); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004)(citing Downs and concluding section 16-3-20(B) was constitutional; *Downs*, 361 S.C. at 146, 604 S.E2d at 380(discussing constitutionality of section 16-3-20(B) and finding capital defendant plead guilty waived his right to trial by jury on guilt and sentencing).

Finally, as found by the Inman Court:

"Significantly, Inman never attempted to reserve the right to challenge or deny the merits of his guilt. [The only] condition involved [was] an appellant challenge of the constitutionality of section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a plea of guilty. Under the mandatory appeal procedures in capital cases, ***Inman was permitted to appeal this secondary sentencing issue***; however, any decision as to this issue did not affect the entry or validity of his plea."

State v. Inman (emphasis supplied), 395 S.C. at 555, 720 S.E.2d at 40.

Inman's appeal of his guilt and sentence proceedings, under the mandate of § 16-3-20(B), was decided December 28, 2011, and, on January 25, 2012, his rehearing was denied, thereafter, on June 21, 2012, he filed his Application for Post- Conviction. While his PCR was pending, on January 12, 2016, the United States Supreme Court decided *Hurst v. Florida,* 136 S.Ct. 616 (2016), holding that "Florida's capital sentencing scheme, under which . . . the judge makes the critical

findings needed for imposition of a death sentence, violates the Sixth Amendment right to jury trial, overruling (its prior decisions) and abrogating (state decisions holding it was constitutional)." **Synopsis,** *Hurst, supra.* The application was amended to reflect the *Hurst* decision's impact on Inman's "appellate challenge to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea." *Inman, 395 S.C.* at 40, 720 S.E.2d at and 555. Therefore, his PCR Application was amended, pursuant to S.C. Code § 17-27-45 (B), and addressed at the evidentiary hearing August 20-23, 2018.

The State's assertion that Inman's "challenge to section 16-3-20(B), was specifically abandoned . . . as he correctly recognize[d] that this issue has been decided against his position" in previous holdings, *id.,* was also addressed by the United States Supreme Court in *Hurst v. Florida,* where:

> "[T]he State next argues that *stare decisis* compels us to uphold Florida's capital sentencing scheme. As the Florida Supreme Court observed, this Court 'repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century. *Bottoson v. Moore*, 833 So.2d 693, 695 (2002) (*per curiam*) (citing *Hildwin*, 490 U.S. 638, 109 S. Ct. 2055, 104 L.Ed. 728; *Spaziano*, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed2d 340). 'In a comparable situation,' the Florida court reasoned, 'the United States Supreme Court held:
>
> > 'If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other decisions, the [other courts] should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions.' "*Bottoson*, 833 So.2d, at 695 ('quoting' citations omitted).
>
> We now expressly overrule *Spaziano* and *Hildwin* in relevant part.
>
> *Spaziano* and *Hildwin* summarized earlier precedent to conclude that 'the Sixth Amendment does not require specific findings authorizing the imposition of the sentence of death be made by the jury.' *Hildwin,* 490 U.S., at 640—641, 109 S.Ct. 2055. Their conclusion was wrong, and irreconcilable with *Apprendi.* Indeed, today is not the first time we recognized as much. In *Ring*, we held that another pre-*Apprendi* decision — *Walton,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511— could not "survive the reasoning of *Apprendi.*" 536 U.S., at 603, 122 S.Ct. 2428.

Walton for its part, was a mere application of *Hildwin*'s holding to Arizona's capital sentencing scheme. 497 U.S., at 648, 110 S.Ct. 3047.

"Although ' "the doctrine of *stare decisis* is of fundamental importance to the rule of law [,]' . . . [o]ur precedents are not sacrosanct,' . . . [W]e have overruled prior decisions where the necessity and propriety of doing so has been established.' "*Ring*, 536 U.S., at 608, 122 S. Ct. 248 (citations omitted). And in the *Apprendi* context, we have found that *stare decisis* does not compel adherence to a decision whose underpinnings have been 'eroded' by subsequent developments of constitutional law." *Alleyene*, 570 U.S. at ---, 133 S. Ct., at 2155 (SOTOMAYOR, J., concurring); see also (citations omitted).

Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin*. The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's finding, that is necessary for the imposition of the death penalty."

Hurst v. Florida, 136 S. Ct. at 623 – 624.

Inasmuch as the South Carolina authorities relied upon by our Supreme Court that, "'even if Inman preserved his challenge to section 16-3-20(B), he specifically abandoned this issue on appeal as he correctly recognizes that this issue has been decided against his position, See *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied*, -- U.S. --, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16-3-20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments;" *Inman*, 395 S.C. at 556, 720 S.E.2d at 40, where "[c]ontrary to Allen's assertion, the statute's requirement that the trial judge conduct sentencing does not deprive him of due process, nor does it result in cruel and unusual punishment. . . . S.C. Code Ann. § 16-3-20 (B)(C)," preceded ***Hurst v. Florida* (2016)**, *supra.*

There, as above-noted, the United States Supreme Court held that:

". . . [o]ur precedents are not sacrosanct.' . . . [W]e have overruled prior decisions where the necessity and propriety of doing so has been established.' "*Ring*, 536

U.S., at 608, 122 S. Ct. 248 (citations omitted). And in the *Apprendi* context, we have found that *stare decisis* does not compel adherence to a decision whose underpinnings have been eroded by subsequent developments of constitutional law." *Alleyene*, 570 U.S. at ---, 133 S.Ct., at 2155 (SOTOMAYOR, J., concurring); see also (citations omitted).

Time and subsequent cases have washed away the logic of *Spaziano* and *Hildwin.* **The decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's finding, that is necessary for the imposition of the death penalty.** *Id.* (emphasis supplied).

***

The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact finding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional."

Hurst v. Florida (emphasis supplied), 136 S. Ct. at 124.

Accordingly, the Court makes the following Findings of Fact and Conclusions of Law pursuant to S.C. Code §§ 17-27-80 and 160(D). *Fishburne v. State,* Op. No. 27911 (S.C. Sup. Ct. filed July 31, 2019).

FINDINGS OF FACT

The Court finds the following specific facts:

1. The statute providing for the "Punishment for murder; separate sentencing proceeding when death penalty sought," §16-3-20, S.C. Code Ann. (1976), was adopted in 1977, to avoid unconstitutional "arbitrary or capricious" death penalty verdicts, as cited, by our South Carolina Supreme Court, in the first case to be tried and reviewed under the South Carolina death penalty scheme:

"Mr. Justice Stewart speaking for the Court in *Gregg*, summarized the procedural conditions necessary to impose the death penalty:

"In summary, the *concerns expressed* in *Furman* (*v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972)) that *the penalty of death not be imposed in an arbitrary or capricious manner* can be met by a carefully drafted statute that

ensures that the *sentencing authority is given adequate information and guidance.* As a general proposition **these concerns are best met by a system that provides for a bifurcated proceeding** at which the **sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.** 428 U.S. at 195, 96 S. Ct. at 2935, 49 L.Ed.2d at 887." (Emphasis supplied). *State v. Shaw,* 273 S.C. 194, 202, 55 S.E.2d 799, 803 (1979).

2. In South Carolina, prior to *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), it was provided under the S.C. Code of Laws (1962), that:

> **§ 16-52. Punishment for Murder**—Whoever is guilty of murder shall suffer the punishment of death; *provided however,* that in any case in which the prisoner is found guilty of murder the jury may find a special verdict recommending him to the mercy of the court, whereupon the punishment shall be reduced to imprisonment in the Penitentiary with hard labor during the whole lifetime of the prisoner.
>
> It was held that: "We believe it was the manifestly the wise intent of the statute that the full responsibility for recommendation to mercy in murder cases and the reducing the sentence from death to life imprisonment was placed upon the jury rather than upon the presiding judge and their discretion in this matter is an unlimited one." *State v. Jones,* 201 S.C. 403, 23 S.E.2d 387, 392 (1942).

3. In striking down, as unconstitutional, a separate sentencing statute enacted in 1962, Act No. 864, 52 Stat. 2155, then Section 17-553.4, 1962 Code (1967 Supp.), relating to guilty pleas, that permitted a defendant to plead guilty before the trial judge and, if accepted, to be sentenced as if a trial jury had recommended mercy to life in the Penitentiary, our Supreme Court held:

> **"Hereafter, regardless of past custom and practice, the choice between life imprisonment and the death penalty must be left to the jury in Every case,** in accord with Section 16-52, **regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by plea of guilty."** *State v. Harper,* 251 S.C. 379, 385, 162 S.E.2d 712, 715 (1968) (emphasis supplied).

4. The South Carolina Supreme Court's holding in *Harper, supra,* was and is in accord with the South Carolina Constitution that has provided and, now, does explicitly provide:

> "The **right of trial by jury shall be preserved inviolate.** Any person charged with an offense shall enjoy the right to a speedy and public *trial by an impartial jury*;"

... Art. 1, §14, Constitution of South Carolina of 1895, formerly Art. I, §11, Constitution of 1868. (Emphasis supplied).

5. In *Furman v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), the United States Supreme Court, by a Per Curiam Decision, five justices concurring in separate opinions, and four justices dissenting in separate opinions, held that the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments "when jury sentencing may be characterized as arbitrary or discriminatory." Opinion of Justice Douglas, 408 U.S. at 448, 92 S. Ct. at 2833.

6. It was thereafter, as noted, *supra,* that "Mr. Justice Stewart, speaking for the Court in *Gregg* (*v. Georgia,* 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976)), summarized the procedural conditions necessary to impose the death penalty:

> "In summary, the concerns expressed in *Furman* (*v. Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972)) that the penalty of death not be imposed in an arbitrary or capricious manner can be met by carefully drafted statutes that **the sentencing authority** is given adequate information and guidance. As a general proposition, **these concerns are best met by a system that provides a bifurcated proceeding** at which the **sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of information.** 428 U.S. at 195, 96 S. Ct. at 2935, 49 L.Ed.2d at 887.

State v. Shaw, 273 S.C. 194, 202, 55 S.E.2d 799, 803 (1979).

7. The "first capital case tried and reviewed under our current death penalty statutes, Section 16-3-20 through Section 16-3-28 [S.C. Code Ann. (1976), formerly Section 16-52, 1962 Code of Laws]," was *State v. Shaw,* 273 S.C. at 197, 202 S.E.2d at 800, and, because the two Defendants, who "pleaded guilty, [and the mandate of § 16-3-20(B) required] the sentencing proceeding . . . be conducted before the judge", each of those defendants forfeited their aforesaid "right to trial by an impartial jury," granted under the Federal and State Constitutions, and were tried, convicted and sentenced to death by the trial judge.

(a) On appeal, when our Supreme Court "considered whether this State's statutory death penalty procedure is sufficiently similar to Georgia's procedure to pass constitutional scrutiny," they found that:

> "Upon conviction or adjudication of guilt of a capital defendant of murder, a separate sentencing proceeding is conducted to determine whether the capital defendant shall be sentenced to death or life imprisonment. The sentencing proceeding is conducted before the trial jury, or **if the capital defendant pled guilty** or if the trial jury is waived by both the capital defendant and the State, **the sentencing proceeding is conducted before the court.** Section 16-3-20(B), Cum. Supp. 1978."
> 273 S.C. at 200, 255 S.E.2d at 802

(b) This was, and is, in direct conflict with the unanimous Supreme Court holding nine years before that:

> **Hereafter, regardless of past custom and practice, the choice between life imprisonment and the death penalty must be left to the jury in Every case,** in accord with [then] Section 16-52, **regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by plea of guilty."** *State v. Harper,* 251 S.C. 379, 385, 162 S.E.2d 712, 715 (1968) (emphasis supplied), *see, also, State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, 44 (1974), "section 16-52 remains fully operative law."

(c) And, the explicit provision of the South Carolina Constitution of 1895, that:

> "The *right of trial by jury* shall be *preserved inviolate.* Any person charged with an offense shall enjoy the right to a speedy and public *trial by an impartial jury*; . . . ." Article 1, Section 14 (formerly, Article 1, Sections 18 and 25; and Article I, Sections 11, 13 and 14 of the South Carolina Constitution of 1868) (emphasis supplied).

And, now, it has been succinctly held by the United States Supreme Court that, pursuant to the United States Constitution:

> "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."
> *Hurst v. Florida*, 577 U.S. ___, 136 S .Ct. 616, 619, 193 L.Ed2d 504 (2016).

8. Prior to the United States Supreme Court's decision in *Hurst v. Florida,* ___ U.S. ___, 136 S. Ct. 616, 193 L.Ed2d 504 (2016), the South Carolina Supreme Court had held that:

> "This Court has found, in capital cases in which the defendant pleads guilty, that statutorily mandated sentencing by the trial judge does not violate the United States

Supreme Court's opinion in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 248, 153 L.Ed.2d 556, (2002). *State v. Downs,* 361 S.C. 141-146-147, 604 S.E.2d at 380 (2004). *State v. Allen,* 386 S.C. 93, 101-102, 687 S.E.2d 21, 25 (2009).

State v. Downs, supra (2004) and *State v. Allen, supra* (2009), *cert. denied,* -- U.S. --, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010), which decisions preceded *Hurst v. Florida* that held:

"[such] decisions are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's finding, that is necessary for the imposition of the death sentence."

Hurst, 136 S. Ct. at 623-624 (2016).

9. *Ring* held an Arizona statute which required the trial judge to find the existence of statutory aggravating circumstances, after the jury found defendant guilty, violated the Sixth Amendment right to a jury trial." *Id.* fn. 6.

10. "The capital-sentencing procedure invalidated in *Ring* does not exist in South Carolina. *Arizona's statute required the judge to factually determine whether there existed an aggravating circumstance supporting the death penalty regardless whether the judge or a jury had determined guilt.* Ariz. Rev. Stat § 13-703(C) (2001) (amended 2002); *Ring,* 536 U.S. at 597, 122 S. Ct. at 2437, 153 L.Ed.2d at 569. (Emphasis supplied). **In South Carolina, conversely, a defendant convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty.** S.C. Code Ann. § 16-3-20(B) (2003); *Sheppard v. State,* 357 S.C. 646, 652, 594 S.Ed.2d 462, 466 (2004)." *State v. Downs,* (emphasis supplied) 361 S.C. at 146, 604 S.E.2d at 380.

11. Under South Carolina's capital sentencing scheme, "Section 16-3-20. Punishment for murder; separate sentencing proceeding when death sentence sought.

(A) A person who is **convicted or pleads guilty** to murder must be punished by **death, or** a mandatory minimum term of imprisonment of

thirty years to life. If the State **seeks the death penalty and a statutory aggravating circumstance** is **found** beyond a reasonable doubt pursuant subsections (B) and (C), and a **recommendation of death is not made,** the trial **judge must impose** a **sentence of life** imprisonment.

* * *

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory **aggravating circumstance is found,** the defendant must be sentenced to **either death or life imprisonment.** If **no aggravating circumstance is found,** the defendant must be sentenced to either life imprisonment or a **mandatory minimum term of imprisonment for thirty years to life.** The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant.

* * *

(C) The judge . . . shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized by law and . . . statutory aggravating and mitigating circumstances . . . supported by the evidence:

* * *

Where a **statutory aggravating circumstance is found** and *a* **sentence of death is not recommended by the jury,** *the* **trial judge shall sentence the defendant to life imprisonment** as provided in subsection (A). . . .Where a **statutory circumstance is not found,** the **trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.**" S.C. Code Ann. § 16-3-20(C).

12. Inman's trial counsel did not waive his insistence that his client was entitled to have a jury to determine and recommend his sentence pursuant to the bifurcated capital sentencing scheme provided by S.C. Code Ann. §16-3-20, and assiduously sought to have the right for his client to have "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," which is "*one of the longstanding tenets of common-law criminal jurisprudence that*:

> "[T]he '*truth of every accusation*' against a defendant 'should *afterwards be confirmed by unanimous suffrage of twelve* of his equals and neighbors.' 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), . . . ***'rather than a lone employee of the State.***' "

Blakely v. Washington, 542 U.S. 296, 314, 124 S.Ct. 2531, 2543, 159 L.Ed.2d 403 (2004).

Our founders recognized and adopted this "right to a speedy and public trial, by an *impartial jury,*" with the enactment of the Sixth Amendment to the United States Constitution, ratified December 15, 1791.

13. Moreover, in light of trial counsel's assiduous and unwavering insistence on the defendant's right to be sentenced by an impartial trial jury, is Article 1, Section 14, of the South Carolina Constitution of 1895, that explicitly provides:

> **"The right of trial by jury shall be preserved *inviolate*.** Any person charged with an offense shall enjoy **the right to a speedy and public *trial by an impartial jury*.** (Emphasis supplied.)"

14. On the first day of the evidentiary hearing, this Court entertained argument and discussion on:

> **Ground 10(d)** S.C. Code Ann. Section 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.
>
> **Ground 11(d)** S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inman his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

The grounds regarding the constitutionality of the statutory provision that a decision to pursue a guilty plea in the guilt phase preempts the defendant's right to a "trial by an impartial jury," *Id.*, in the sentencing phase, when it mandates that: "if the defendant pleaded guilty, the sentencing proceedings must be conducted before the judge," without a jury, in what would otherwise be the bifurcated proceeding under the statutory capital

sentencing scheme of "Section 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought."

15. "The constitutionality of Section16-3-20(B) . . . rests, *inter alia*, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions." *State v. Crisp,* 362 S.C. 412, at 418-419, 608 S.E.2d 429, at 433 (2005). *See, also, State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004).

(a) The United States Supreme Court, in its decision in *Hurst v. Florida*, 577 U.S. ___, 136 S .Ct. 616, 193 L.Ed2d 504 (2016), held:

> "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619.
>
> [And]
>
> "The Sixth Amendment protects a defendant's right to an impartial jury. [9] This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's fact finding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." 136 S. Ct. at 624.

(b) Moreover, the South Carolina Constitution Article I, Section 14, explicitly provides that:

> **"The *right of trial by jury* shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy *and* public trial *by an impartial jury*;"** (Emphasis supplied.)
>
> "**Inviolate** means 'free from substantial impairment.' **Black's Law Dictionary** (6th Ed. 1990) at 826. It has been held that the right "*cannot be invaded or violated by either legislative act or judicial order or decree.*" *Sorrell v. Thevenir,* 69 Ohio St.3d 415, 422 (1994) (emphasis supplied).

IMPARTIAL JURY. Within constitutional provision is one which is of impartial frame of mind at beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged. Const. U.S. Amend. 6, *Durham v. State,* 182 Tenn. 577, 188 S.W.2d 555 (1945), 160 A.L.R. 746. Black's Law Dictionary (Rev. 4th Ed. 1968) at p.886.

(c) The South Carolina Supreme Court in upholding the former Section 16-52 of the 1962 Code, Punishment for Murder, amended by Section 16-3-20, S.C. Code (1976), held:

1. **Section 17—553.4** [relating to guilty pleas], is unconstitutional under the test laid down in *United States v. Jackson*;

2. **Section 16—52. Punishment for Murder**, is constitutional and legally severable from the provisions of 17—553.4;

3. Hereafter, regardless of past custom and practice, the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case, in accord with Section 16—52, regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by a plea of guilty.

State v. Harper, 251 S.C. at 385, 162 S.E. at 715; *see, also, State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, 44 (1974), "section 16-52 remains fully operative law."

16. Nevertheless, in 1977, some nine years after *Harper* (1968); six years after the South Carolina electorate ratified and declared, in the 1970 General Election, to transpose certain sections in Article I, Declaration of Rights, of the Constitution of 1895, and, in 1971, by Act No. 276, 1971 Acts 316, the General Assembly did designated the former sections: "Section 3. . . [t]he privileges and immunities of citizens . . . due process and equal protection of the laws;" and "Section 14. The right of trial by [an impartial] jury shall be preserved inviolate . . . "; and three years after *Speights* (1974); the General Assembly of South Carolina, then, amended "Section 16—52 of the 1962 Code of Laws, setting forth the punishment for murder," by Act No. 177 Section 1, 1977 Acts and Joint Resolutions, approved June 8, 1977, and adopted: "**SECTION 16-3-20. Punishment for murder; separate sentencing proceeding when death penalty sought,**" and did so notwithstanding the aforesaid unanimous holding of the South Carolina Supreme Court:

"**Hereafter,** regardless of past custom and practice**, the choice between life in imprisonment and the death penalty must be left by the trial courts in this**

State to the jury in Every case, in accord with Section 16—52, **regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by a plea of guilty."**

State v. Harper, supra, and, *State v. Speights, supra.*

17. In so doing, the legislature of the State, gratuitously, imposed its "*statutory mandate*," *State v. Patterson,* 278 S.C. 319, 322, 295, S.E.2d 264, 266 (1982) (emphasis supplied), onto Section 16-3-20(B) that:

"If trial by jury has been waived by the defendant and the State, or **if the defendant pleaded guilty,** the sentencing proceeding must be conducted before the judge."

This was done in direct violation of Article 1, Section 14, South Carolina Constitution of 1895, notwithstanding the case law of this state as reflected in the aforesaid unanimous holdings of our Supreme Court in *Harper,* and later *Speights, supra,* that:

"Hereafter, regardless of past custom and practice**, the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case, . . . regardless how the defendant's guilt has been determined, whether by verdict or by plea of guilty."** *supra.*

18. Moreover, the State's "*statutory mandate*" abrogates the right of an accused to a trial—in the sentencing phase—"by an impartial jury," *accord, Hurst v. Florida, supra,* as guaranteed by our founders when they adopted, in 1791, the Sixth Amendment to the Constitution of the United States that provides:

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed; ... (emphasis supplied).

Most significantly, the State's *statutory mandate* of Section 16-3-20(B) vitiates the explicit provision of the South Carolina Constitution of 1895, as ratified by the electorate in 1970, and amended by Act No. 276, 1971 Acts 315, as noted above:

ARTICLE I

Declaration of Rights
(Formerly Article 1, Section 25; and Article I, Section 11, Constitution of 1868 [10])

"Section 14. The *right of trial by jury shall be preserved inviolate*. Any person charged with an offense shall enjoy the *right to a* speedy and *public trial by an impartial jury;* . . . ." Article I, Section 14, South Carolina Constitution of 1895 (emphasis supplied.)

19. Moreover, S.C. Code Ann. "§ 16-3-20(B). **Punishment for murder; separate sentencing proceeding when death penalty sought**," otherwise, **without** the *statutory mandate*, expressly provides that:

> (A) A person who...pleads guilty to murder must be punished by death, or a mandatory minimum term of imprisonment for thirty years to life. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment
>
> (B) When the **State seeks the death penalty**, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant.

20. Nevertheless, "[w]hen the State seeks the death penalty," it mandates, thereafter, that: "if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge," in unlawful derogation of the rights guaranteed by the Constitutions of the United

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[10] "The South Carolina Constitution of 1868 . . . was the most democratic and equitable of the seven constitutions in the history of this state." **The South Carolina Constitutional Convention of 1868**, Nic Butler, Ph.D., March 2, 2018, Charleston County Public Library. This was reflected in its ARTICLE I, DECLARATIONS OF RIGHTS, *SECTION 11*, where it is succinctly and explicitly provided: *"The right of trial by jury shall remain inviolate;"* then, in SECTION 13, that:" every person shall have a right . . . to have a speedy and public trial by an impartial jury; " and, in SECTION 14, that: "No person shall be deprived of his life . . . but by the judgement of his peers . . . . And the General Assembly shall not enact any law that shall subject any person to punishment without trial by jury; . . . ." *South Carolina Constitution of 1868.*

States and South Carolina "to a trial by an impartial jury," and creates a *Catch 22* for a defendant, such as Inman, in that, it has been held, as part of the South Carolina "case law," that: "**the condition that the jury determine punishment,**" would be "an *impermissible condition* under the ***statutory mandate*** that **the trial judge alone determines punishment when a defendant pleads guilty to murder,**" *State v. Patterson,* 278 S.C. 319, 322, 295, S.E.2d 264, 266 (1982) (emphasis supplied), notwithstanding the Sixth Amendment and Art. 1, Section 14, of our respective Constitutions, *supra*, and, more particular, the explicit provision of the South Carolina Constitution that:

> "The right of trial by jury shall be *preserved inviolate.* Any person charged with an offense shall enjoy the right to a speedy and public *trial by an impartial jury. Id.* (Emphasis supplied).

21. Moreover, under *State v. Truesdale*, 278 S.C. 368, 296 S.E.2d 528 (1982), it was held that: "*Pleas of guilty are unconditional*, and ***if an accused attempts to attach any condition or qualification*** thereto, ***the trial court should direct a plea of not guilty.*** (Citations omitted). In which event, Inman would have been compelled to go forward with a guilt phase trial in which the State would have to prove its case, before the trial jury, by trying the sensitive issues with the facts of the particularly heinous crimes, without consideration for the victims, "forcing them to relive the harrowing experiences now long past." *Inman, supra.*

21. Therefore, the accused, Inman, could not freely and voluntarily waive his Fifth Amendment right and plead guilty, upon stipulated facts, before a duly qualified trial jury, in the guilt phase of the bifurcated proceeding, "to avoid imposing additional burdens on victims" and "consider the trauma the victims of these particularly heinous crimes would experience in a . . . trial, forcing them to relive

harrowing experiences now long past," *State v. Inman*, 395 S.C. 539, 569, 720 S.E.2d 31, 47 (2011), Justice Pleicones, concurring in separate opinion.[11]

22. This was, notwithstanding, the unanimous decisions of the South Carolina Supreme Court that:

> **"Hereafter,** regardless of past custom and practice, **the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case,** in accord with Section 16—52, **regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by a plea of guilty."**

State v. Harper, 251 S.C. at 385, 162 S.E. at 715 (1968); *see, also, State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, 44 (1974), "section 16-52 remains fully operative law,"

Nevertheless, in 1977, some eleven years after *Harper* (1968), then *Speights* (1974), when the General Assembly of South Carolina amended "Section 16—52 of the 1962 Code of Laws, setting forth the punishment for murder," by Act No. 177 Section 1, 1977 Acts and Joint Resolutions, approved June 8, 1977, and adopted: "**SECTION 16-3-20.** Punishment for murder;

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[11] See: South Carolina Constitution of 1895, Article I, Section 24(A). "To preserve and protect victims' rights to justice and due process...victims of crime have the right to:

***

(12) have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and have these rules subject to amendment or repeal by the legislature to ensure protection of these rights.

* * *

§ 16-3-1505. Legislative intent.

"[T]o implement the rights guaranteed to victims in the Constitution of this State, the General Assembly declares its intent, in this article, to ensure that all victims of ... a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights ... extended in this article to victims of ... a crime are honored and protected by law enforcement agencies, prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants; . . . " (Emphasis supplied).

§ 16-3-1510. Definitions.

(a) "Victim" means any individual who suffers direct or threatened physical, psychological, or financial harm as the result of the commission or attempted commission of a criminal offense, ..."Victim" also includes any individual's spouse, parent, child, or the lawful representative of a victim who is:

(b) Deceased;" . . . (emphasis supplied).

separate sentencing proceeding when death penalty sought," it did so, notwithstanding the aforesaid unanimous holding of the South Carolina Supreme Court that:

> **"Hereafter,** regardless of past custom and practice**, the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case,** in accord with Section 16—52**, regardless of how the defendant's guilt has been determined, whether by verdict of the jury or by a plea of guilty."**

State v. Harper, 251 S.C. at 385, 162 S.E. at 715, and *State v. Speights*, 263 S.C. 127, 134, 208 S.E.2d 43, 44 (1974).

In so doing, the legislature of the State imposed its "*statutory mandate*," *State v. Patterson,* 278 S.C. 319, 322, 295, S.E.2d 264, 266 (1982)(emphasis supplied), inupon Section 16-3-20(B) that:

> "If trial by jury has been waived by the defendant and the State, or **if the defendant pleaded guilty**, the sentencing proceeding must be conducted before the judge."

This was done in abrogation of the aforesaid unanimous holding of our Supreme Court in *Harper,* and later *Speights*, *supra,* that:

> ". . . **the choice between life in imprisonment and the death penalty must be left by the trial courts in this State to the jury in Every case, . . . regardless how the defendant's guilt has been determined, whether by verdict or by plea of guilty."** *supra.*.

23. The conflation of the Trial Jury and the Trial Judge, requires the Judge to conduct the trial, to determine the facts — to include credibility of witnesses and the admissibility of evidence of aggravation and mitigation — and, then, to decide the matter of any applicable statutory aggravating circumstances, and the ultimate consequence of the proceedings, considering only relevant and material matters, and, if guilt is found, determine the appropriate punishment. The judge, who is not sequestered, is by the public nature of the proceedings subject to potential compromise, in that "[a] judge is s presumed to weigh evidence properly," *Inman,* 395 S.C. at 570,

720 S.E.2d, at 48 (citation omitted), and, therefore, more likely to be exposed to extra-judicial influences than are jurors, who are questioned, qualified, selected and seated as impartial jurors, according to statutes and rules governing the same, and, then, pursuant to the protocols and procedures of a death penalty trial, are sequestered during the entire bifurcated proceedings to maintain their "impartiality," until they have reached their verdicts, and are dismissed. That is unless the Trial Judge would be required to be sequestered, also, as is the Trial Jury, to prevent the possibility of any appearance of untoward extra-judicial attempts "to ease the tensions created by the magnitude of the case," *Shaw v. State, supra,* where the State seeks the death penalty.

24. Such was a purported incident, allegedly occurring during a PCR hearing arising out of the first case to be tried pursuant to the "mandate" included in Section 16-3-20(B). *Ib.*

> "Evidence submitted by appellant's lawyers indicated that certain criminal defense lawyers were present in the hearing judge's chambers at a time prior to the sentencing of the appellant to death by another judge. At that time, the hearing judge in these proceedings, which are currently before the Court, allegedly said he and another judge had already discussed the matter concerning the appellant with the sentencing judge and that if the appellant was not sentenced to death, the sentencing judge would be holding court in some remote part of the State. The statement was made in the judge's chambers to public defenders who were well-known to the judge. They additionally indicated that the statement was made in an "off-hand and joking manner by (the hearing judge).
>
> * * *
>
> Assuming the truth of the factual allegations, we think the only reasonable view of the facts alleged are that they indicate an attempt at levity to ease the tensions created by the magnitude of the case concerning Mr. Shaw, rather than any actual bias on the part of the judge. . . . They indicate that the comments, if made, were made in a joking manner. The fact that a more reflective manner might have been used to ease the obviously sobering discussion is insufficient, to require the judge's disqualification. . . . We find the charges of bias and prejudice on the part of the trial judges to be completely without foundation.

Shaw v. State, 276 S.C. 190, 277 S.E2d 140, 141-142 (1981).

CONCLUSIONS OF LAW

In view of the foregoing, it is concluded that:

(1) Because Mr. Inman pleaded guilty to murder, it was mandated that his "sentencing proceeding must be conducted before the judge," by S.C. Code Ann. Section. 16-3-20(B), therefore, the guilty plea to murder, standing alone, did not make him eligible for the death penalty, in that, under South Carolina's capital sentencing scheme, Section 16-3-20 (C), it is provided, in pertinent part, "[w]here a statutory aggravating circumstance is found and a **sentence of death is not recommended by the jury,** the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A)," which provides: "If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, **the trial judge must imposed a sentence of life imprisonment.**"

(2) Nevertheless, Mr. Inman's guilty plea, pursuant to the statutory mandate gratuitously imposed upon Section 16-3-20(B), does not preclude application of *Hurst v. Florida.* The *"statutory mandate" included in "Section 16-3-20(B). Punishment for murder; separate sentencing proceeding when death penalty sought,"* that provides: "If trial by jury has been waived by the defendant and the State, or *if the defendant pleaded guilty,* **the sentencing proceeding must be conducted before the judge,**" is unconstitutional under that test laid down in *Hurst v. Florida,* 577 U.S. ___, 136 S .Ct. 616, 193 L.Ed2d 504 (2016):

> "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 136 S. CT. at 619.
>
> [And]
>
> "The Sixth Amendment protects a defendant's right to an impartial jury. The right required the [State] to base [Inman's] death sentence on a jury's verdict, not a judge's fact finding. [South Carolina's] sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional." 136 S. Ct. at 624.

Justice BREYER, concurring in the judgement.

> "I concur in the judgment here based on my view that 'the Eighth Amendment requires that a jury, not a judge, make the decision to sentence a defendant to death.' [*Ring v. Arizona*, 536 U.S. 584, 614, 122 S. Ct. 2428 (153 L.Ed.2d 556 (2002))]; at 614, 122 S. Ct. 2428; see *id.*, at 618, 122 S. Ct. at 2428 ('[T]he danger of unwarranted imposition of the [death] penalty cannot be avoided unless the 'decision to impose the death penalty is made by a jury rather than by a single government official' " (quoting *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed.2d 340 (1984) (STEVENS, J. concurring in part and dissenting in part))).
>
> *Hurst v. Florida*, 577 U.S. ___, 136 S. Ct. 616, at 624, 193 L.Ed2d 504 (2016).

(3) The Sixth Amendment to the United States Constitution provides that: "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State;" and

(4) Article 1, Section 14 of the South Carolina Constitution of 1895 provides that:

"The right of trial by jury shall be preserved *inviolate*. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury;" and

The 'the statutory mandate' of Section 16-3-20(B), that "if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge," is unconstitutional in that it specifically violates Article 1, Section14, of the South Carolina Constitution of 1895, as well as the Sixth Amendment to the United States Constitution.

(5) Section 16-3-20(B), is legally severable from the unconstitutional provision imposed upon it that: "if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge," and, as so modified, S.C. Code Ann. (1976) "**SECTION 16-3-20.** Punishment for Murder; Separate sentencing procedure when death penalty is sought," is constitutional.

(6) "Regardless of past custom and practice, the choice between life imprisonment and the death sentence must be left by the trial courts in this State to the jury in every case, in accord with [the constitutional provisions of Section 16-3-20(B)], regardless of how the defendant's guilt was determined, whether by the verdict of the jury or by a plea of guilty." *State v. Harper* and *State v. Speight.*

(7) The trial court in *Inman* did not follow the case law that "the choice between life imprisonment and the death sentence must be left by the trial courts in this State to the jury in every case . . . regardless of how the defendant's guilt was determined, whether by the verdict of the jury or by a plea of guilty," *State v. Harper* and *State v. Speight, supra,* and, instead, enforced the statutory mandate that "if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge," without a jury." Section 16-3-20(B).

(8) Nevertheless, under "**Section 16-3-20**. Punishment for Murder; separate sentencing proceeding when death penalty is sought. (A) . . . Where a statutory aggravating circumstance is found beyond a reasonable doubt and *a sentence of death is not recommended by the jury*, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A)." Section 16-3-20(C).

(9) In a case where the "sentence is greater than what state law authorized on the basis of the verdict alone." * * * Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), or one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact."

Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid." *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 538, 159 L.Ed.2d 403 (2004)

(10) Inasmuch as the decision of the United States Supreme Court in *Hurst v. Florida* did "impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of trial," and, the Defense pre-trial motion for a jury trial in the sentencing phase, which "the judge summarily denied . . . on the ground he was constrained by the existing case law in South Carolina and the statutes," and Inman's PCR action was, at the time of the *Hurst* decision, and is now pending, it is proper for consideration in these Post-Conviction Relief proceedings, as provided by S.C. Code §17-27-45(B).

2020 APR 22 P 5:51
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

JUDGEMENT

Accordingly, it is the judgment of the court that:

(1) The Sixth Amendment to the United States Constitution protects a defendant's right to be tried by an impartial jury.

(2) That Article 1, Section 14, Constitution of South Carolina 1895, explicitly provides, *inter alia*, that:

"The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial [*by an impartial jury*]"

(3) The Post-Conviction Relief Application of the Applicant Jerry Buck Inman, also known as Jerry Buck Inmon, must be GRANTED, and the matter remanded to the Court of General Sessions of Pickens County for a new trial by an impartial jury pursuant to the constitutional provisions of Sections 16-3-10, *et seq.*, South Carolina Code of Laws (1976), and the constitutional laws made and provided in such cases.

AND, IT IS SO ORDERED.

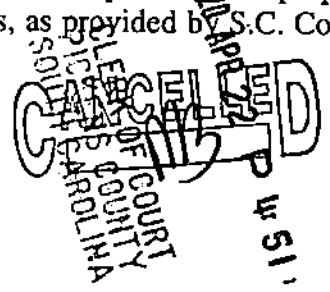
ALEXANDER S. MACAULAY, Presiding Judge

April 17, 2020
Walhalla, South Carolina

[Inadvertently omitted from the original: ASM 4/20/2020]

CLERK OF COURT
April 22, 2020
PICKENS COUNTY
SOUTH CAROLINA

(10) Inasmuch as the decision of the United States Supreme Court in *Hurst v. Florida* did "impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of trial," and, the Defense pre-trial motion for a jury trial in the sentencing phase, which "the judge summarily denied . . . on the ground he was constrained by the existing case law in South Carolina and the statutes," and Inman's PCR action was, at the time of the *Hurst* decision, and is now pending, it is proper for consideration in these Post-Conviction Relief proceedings, as provided by S.C. Code §17-27-45(B).



JUDGEMENT

Accordingly, it is the judgment of the court that:

(1) The Sixth Amendment to the United States Constitution protects a defendant's right to be tried by an impartial jury.

(2) That Article 1, Section 14, Constitution of South Carolina 1895, explicitly provides, *inter alia*, that:

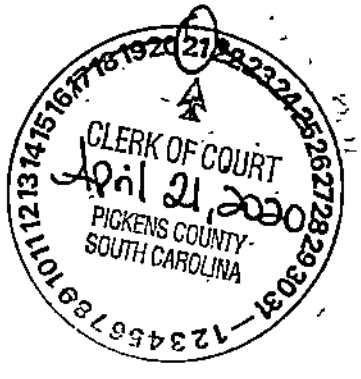
"The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury.

(3) The Post-Conviction Relief Application of the Applicant Jerry Buck Inman, also known as Jerry Buck Inmon, must be GRANTED, and the matter remanded to the Court of General Sessions of Pickens County for a new trial by an impartial jury pursuant to the constitutional provisions of Sections 16-3-10, *et seq.*, South Carolina Code of Laws (1976), and the constitutional laws made and provided in such cases.

AND, IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Presiding Judge

April 20, 2020
Walhalla, South Carolina



(10) Inasmuch as the decision of the United States Supreme Court in *Hurst v. Florida* did "impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of trial," and, the Defense pre-trial motion for a jury trial in the sentencing phase, which "the judge summarily denied . . . on the ground he was constrained by the existing case law in South Carolina and the statutes," and Inman's PCR action was, at the time of the *Hurst* decision, and is now pending, it is proper for consideration in these Post-Conviction Relief proceedings, as provided by S.C. Code §17-27-45(B).

JUDGEMENT

Accordingly, it is the judgment of the court that:

(1) The Sixth Amendment to the United States Constitution protects a defendant's right to be tried by an impartial jury.

(2) That Article 1, Section 14, Constitution of South Carolina 1895, explicitly provides, *inter alia*, that:

"The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial.

(3) The Post-Conviction Relief Application of the Applicant Jerry Buck Inman, also known as Jerry Buck Inmon, must be GRANTED, and the matter remanded to the Court of General Sessions of Pickens County for a new trial by an impartial jury pursuant to the constitutional provisions of Sections 16-3-10, *et seq.*, South Carolina Code of Laws (1976), and the constitutional laws made and provided in such cases.

AND, IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Presiding Judge

April 17, 2020
Walhalla, South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 APR 21 P 12:41

ATTACHMENT

2020 APR 21 P 12:42

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Appeal Set Monday

Lawyers Accuse Judge Peeples Of Commenting On Shaw Case

By HOLLY GATLING
Staff Writer

The judge hearing condemned murderer Joseph Carl Shaw's appeal for a life sentence has been accused of once saying he favored capital punishment for Shaw.

Three local attorneys gave sworn statements alleging Circuit Judge Rodney Peeples of Barnwell made the remarks in Lexington County in December 1977, the same month Shaw and James Terry Roach received death sentences for murdering two Columbia teen-agers.

Shaw and Roach pleaded guilty together, but are appealing their cases separately.

One of Shaw's attorneys, John Delgado, filed Thursday the sworn statements as part of the documents arguing that his condemned client has the right to question Peeples under oath about the statements.

Peeples, who is scheduled to begin hearing Shaw's appeal Monday, said he "categorically refutes making such statements" and has "no independent recollection" of the conversation.

Lexington County Public Defenders Pat McWhirter and Danny Beck gave separate statements saying they heard Peeples, in his chambers, remark that he and South Carolina Supreme Court Justice Julius Ness had spoken with Circuit Judge David W. Harwell who sentenced Shaw and Roach.

Peeples' statement, according to McWhirter, was to the effect that "if he (Harwell) didn't sentence him (Shaw) to die he would be holding court in Walhalla for the rest of his life."

Walhalla is a small town in the Piedmont.

Beck, in his affidavit, said the judge's remark "came up in the general course of conversation and as I recall was made in a somewhat offhand or joking manner by Judge Peeples. I was surprised to have heard Judge Peeples make such a statement."

In a third sworn statement, Lexington attorney John Earl Duncan said he discussed the Shaw case with a neighboring attorney the night before Peeple's alleged comments.

Duncan said the attorney "related she had a conversation with the Honorable David Harwell at which time he had related his surprise and displeasure at having to pass sentence on Joseph Carl Shaw and James Terry Roach. She seemed to believe Judge Harwell was experiencing difficulty in deciding their sentences and much preferred the decision to be made by a jury.

"I passed on what I had heard to Judge Peeples who then stated as best I recall 'I would have no difficulty and would not hesitate,'" Duncan concluded.

According to Delgado's document, "such a suggestion, even if made in jest, could have had an effect on the mind of the trial judge" and violates the Code of Judicial Conduct.

Earlier this week Peeples declined Shaw's attorneys' requests to remove himself from the case or to grant a delay in the post conviction relief hearing scheduled to begin Monday.

Shaw escaped the electric chair by only a few hours last December after a federal appeals court judge granted a stay of execution. Two other courts declined to halt the death sentence which would have been South Carolina's first since 1962.

Escapee Charged With Assaulting Olympia Woman Is Recaptured

A prison escapee accused of raping a Columbia woman was captured by authorities near Florence Friday night.

State Department of Corrections spokesman Sam McCuen said Michael Godwin Sloan, 19, who fled the Campbell Pre-Release Center in a state-owned van, was captured by corrections officers backed up by Florence deputies.

He was found in a trailer off S.C. 51 about five miles south of Florence.

Sloan became the object of a statewide search after a 29-year-old Olympia area woman was raped in her home Wednesday morning

phone. Again when she replied no he forced his way into the house and raped her, the victim said.

Before leaving the woman's home the man told her

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012- CP-39-918 (PCR)

Jerry Buck Inman, etc.	State of South Carolina
Diana Holt, Esquire	Melody J. Brown, Sr. Dep. Atty. Gen.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by: AlexanderS. Macaulay, Presiding Judge	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	063 Judge Code	4/17/20 Date

For Clerk of Court Office Use Only

This judgment was entered on the ~~day of~~ , 20 and a copy mailed first class or placed in ~~the appropriate~~ attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

2020 APR 21 P 12:39

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

State of South Carolina
Tenth Judicial Circuit Court

Oconee County Courthouse

ALEXANDER S. MACAULAY
Circuit Judge (Active/Retired)

Post Office Drawer 428
Walhalla, SC 29691-0428

Telephone: (864) 718-1041
Facsimile: (864) 638-4267
amacaulayj@sccourts.org

April 17, 2020

Honorable Harold P. Welborn
Pickens County Clerk of Court
Post Office Box 215
Pickens, South Carolina 29671-0215

emailed All Atty's and Taylor Smith 4-21-20 MB

Re: Jerry Buck Inman, etc. v State
2012-CP-39-918

Dear Mr. Clerk:

Enclosed herewith find the Order Granting Post-Conviction in the above-referenced PCR Appeal to be filed with the records of your office. I trust you will find it in order, but should there be any questions, please do not hesitate to advise me.

Also enclosed is the Form 4 for service on the Attorneys:

Applicant: Diana Holt, Esquire
Post Office Box 6454
Columbia, South Carolina 29260

State of South Carolina: Melody J. Brown, Senior Deputy Attorney General
Post Office 11549
Columbia, South Carolina 29211.

Thanking you for your attention to and consideration in this matter, I remain

Sincerely,

Alexander S. Macaulay, Judge

Enclosure.

2020 APR 22 P 4:51
CANCELLED
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

State of South Carolina
Tenth Judicial Circuit Court

CLERK OF COURT
April 2020
PICKENS COUNTY
SOUTH CAROLINA

Oconee County Courthouse

ALEXANDER S. MACAULAY
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April 20, 2020

Honorable Harold P. Welborn
Pickens County Clerk of Court
Post Office Box 215
Pickens, South Carolina 29671-0215

Re: Jerry Buck Inman, etc. v State
2012-CP-39-918 (Capital PCR)

Dear Mister Clerk:

Please file the enclosed ERRATTA SHEET with the original Order GRANTING POST-CONVICTION RELIEF in the above referenced Capital PCR that I mailed Friday, April 17, 2020, for filing with the records of your office. Unfortunately, I was in a bit of a hurry to get this Order filed as soon as I could considering how long it has been pending.

Then, when I read over my copy this weekend, I realized that I had not completed the statement of Article 1, Section 14, of the Constitution of South Carolina 1895, in Paragraph (2) of the JUDGEMENT on page 58, leaving out the final words: "by an impartial jury." Therefore, I have prepared the ERRATTA SHEET reflecting the correction to be filed with the original, along with the final page now dated today.

I regret the confusion and inconvenience this may cause, but please include the ERRATTA SHEET together with the corrected final page 58, with your records, for service of the Order on the attorneys. I will try to reach you by phone this afternoon to discuss the matter and any questions you may have.

Thanking you for your attention to and patient consideration in this matter, and with kind personal regards, I remain,

Sincerely,

Cc: Diana L. Holt, Esquire
Melody J. Brown, Office of Attorney General

CLERK OF COURT
April 2020
PICKENS COUNTY
SOUTH CAROLINA

2020 APR 22 P 1:51
CANCELLED
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

State of South Carolina
Tenth Judicial Circuit Court

Oconee County Courthouse

ALEXANDER S. MACAULAY
Circuit Judge (Active/Retired)

Post Office Drawer 428
Walhalla, SC 29691-0428

Telephone: (864) 718-1041
Facsimile: (864) 638-4267
amacaulayj@sccourts.org

ERRATA SHEET

Jerry Buck Inman, etc. versus State
2012 CP-39-918 (Capital PCR)

Order Granting Post-Conviction Relief, dated and filed April 17, 2020
Court of Common Pleas, Pickens County, South Carolina.

Judgement, page 58, Paragraph:

(2) That Article 1, Section 14, Constitution of South Carolina 1895, explicitly provides, *inter alia*, that:

"The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial ['*by an impartial jury.*']" was inadvertently omitted and is to be added to complete cite.

The corrected Page 58 of 58 is enclosed, dated and signed.

If there are any questions or exceptions please do not hesitate to advise me.

Alexander S. Macaulay, Presiding Judge

April 20, 2020
Walhalla, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Jerry Buck Inman, #5256 a/k/a Jerry Buck Inmon, Applicant, versus State of South Carolina, Respondent.	CASE NO. 2012-CP-39-00918 (Capital PCR) **ORDER DENYING RULE 59(e) MOTIONS**

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY 20 P 1:32

After careful consideration of the able arguments of Counsel in their respective RULE (59) MOTIONS: the Applicant's and his Proffer of Proposed Order, dated April 30th, 2020; the Respondent's, dated May 1, 2020; the Applicant's Response in Opposition to the State's Rule 59(e), SCRCP Motion, dated May 8, 2020; and the Respondent's Response to Applicant's Rule 59(E) Motion, dated May 13, 2020, and a review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded, and further finds no error of law or fact that has not been appropriately considered.

Accordingly, the respective **RULE 59(e), SCRCP, MOTIONS** [1] of the Applicant, dated April 30, 20202, the Respondent's, dated May 1, 2020, and the Applicant's Response in Opposition to the State's RULE 59(e), SCRCP Motion, dated May 8, 2020, and Respondent's Response to Applicant's Rule 59(E) Motion, dated May 13, 2020, are **DENIED.**

AND, IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Presiding Judge

Walhalla, South Carolina
May 18, 2020

[1] The Court, in its discretion, has determined these Motions on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

ADDENDUM

2020 MAY 28 P 1:32

Under the rubric that: "The record here shows no evidence of any bias or improper influence," the Respondent, cites: *Inman*, 395 S.C [539] at 570, 720 [S.E.2d 31] at 48 ("A judge is presumed to weigh evidence properly.") (Pleicones, J. concurring). RESPONDENT'S RULE 59(E) MOTION (MAY 1, 2020), ¶ 5 at pp. 9 & 10, to which this court concurs completely; and, therefore, has entered the within **ORDER DENYING RULE 59(e) MOTIONS** of the Applicant and Respondent.

Nevertheless, exception must be taken to the application, in the instant case, of the proposition that:

> "Similar *paternalistic* approaches in legal decisions on constitutional rights have been soundly rejected on appellate review in favor of the individual's right to make his own decisions. *State v. Rivera*, 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) "(finding the trial court erred in preventing defendant from testifying, noting 'It is apparent the trial court, like defense counsel, was operating under the *paternalistic* belief that it wanted to protect Appellant from potentially undermining his own defense.'"
>
> RESPONDENT'S RULE 59 (E) MOTION, *supra* (emphasis supplied).

Inasmuch as the writer, here, was "the trial judge" in *Rivera*, I am compelled to set the RECORD, in that case, correct here.

Unfortunately, due to a non-judicial event, the trial judge to whom the capital murder trial, *State v. Rivera*, Indictment No. 2007-GS-04-0649, had been assigned, for some time, and who had conducted all pretrial proceedings and was directly involved in hearing all other matters in the case, could no longer continue as trial judge. Therefore, approximately two weeks before the *Rivera* trial was to commence, the case was assigned to this judge. I was not unfamiliar with the case in that, it was the trial of the "first" murder, with which the Defendant was to be charged, and

to which he had previously, voluntarily confessed during his testimony in the earlier trial of the "second" murder.

During the interim between the Defendant's two trials, it was reported that he had attempted to contact the family of his victim in the first murder that was, then, pending. As reflected by the attached newspaper account, the Solicitor, the late most Honorable Christina Theos Adams, Solicitor of the Tenth Judicial Circuit, "after the death penalty was overturned in 2013," on appeal of *Rivera*, there was more to be considered than the certainty of the sentence upon retrial.

> "'The facts are truly horrific and do call out for the death penalty, and we are sure we would get the death penalty, if we went to trial,' Adams said in 2013. 'He has never shown any remorse. But it is not fair to the families to be victimized again. This plea today will really give them the closure they deserve.'" Anderson **Independent Mail**, December 29, 2016, pages 1-A and 8-A. **ATTACHMENT 1**.

Therefore, perhaps a closer reading of Justice Pleicones' concurring opinion in *Inman*, *supra,* might reveal something else than a critique of perceived "paternalistic approaches in legal decisions on constitutional rights" of defendants, *supra;* but, rather, the impact and effect upon the victim's family, whose rights are to be "honored and protected by law enforcement agencies, prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants," § 16-3-1505, S.C. Code (1976), in implementing "the rights guaranteed to victims in the Constitution of this State," Victims' Rights, Art. I, § 24(A)(1)(6)(12), South Carolina Constitution of 1895, "to have all rules governing criminal procedure and the admissibility of evidence to protect victims' rights." *Id.*

Justice (later, Chief Justice) Pleicones, in *Inman*, was actually addressing such "*weighty concerns*" as "the trauma the victims of these particularly heinous crimes would experience" in a trial.

> "As the United States Supreme Court has noted, interests beyond the supervision of prosecutorial behavior are implicated by a decision to grant a new trial. *United*

States v. Hastings, 461 U.S. 499, 506—507, 103 S. Ct. 1974, 76 L. Ed2d 96 (1983). Although the duty to curb prosecutorial misconduct is compelling, other ***weighty concerns*** *are also at stake, including the need* to conserve judicial resources and ***to avoid imposing additional burdens on victims.*** *Id.* at 509, 103 S. Ct. 1974. The *Hastings* Court rebuked the court below for failing to *'consider the trauma the victims of these particularly heinous crimes would experience in a . . . trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.'* "

State v. Inman, 395 S.C. 539, 568—569, 720 S.E.2d 31, 47 (2011) (emphasis supplied).

Apparently, neither the record on appeal and briefs nor the arguments in *Rivera, supra*, reflected any of the basis for Solicitor Adam's concerns. Otherwise, this writer is confident that the South Carolina Supreme Court in *Rivera* would not have ignored an appropriate basis for excluding proposed testimony purporting to impugn the character or reputation of the victims with malicious, unfounded allegations pertaining to sexual conduct if, and as, determined in an *in camera* hearing. §16-3-659.1 (1) and (2), S.C. Code (1976).

Nevertheless, the Supreme Court found:

> It is also clear from the record that the trial judge appeared willing to call Appellant as a courts witness, but ultimately declined to do so because during the *peculiar proffer procedure,* Appellant indicated his intention to testify about the crime. It is apparent the *trial court*, like defense counsel, *was operating under the paternalistic belief* that it wanted to protect Appellant from potentially undermining his own defense.
>
> * * *
>
> "Other than a paternalistic desire to protect Appellant from himself, there was no basis upon which the trial court could have appropriately found Appellant's testimony to be irrelevant and therefore inadmissible. Rather, *we find the logical relevancy of Appellant's testimony is self-evident* [1]*— it pertained to the killing of the victim, which was the precise basis for the prosecution.* Indeed, it is difficult to fathom anything more logically connected to the fundamental issue in this capital

[1] "Appellant's testimony" was what the "*peculiar proffer procedure*" was all about, but the Appellant never provided any proposed testimony, only generalities that "it pertained to the killing of the victim," to which he had already confessed under oath in the first trial—but without details, even in mitigation, unless it had something to do with the victims' "conduct" and/or "reputation." It would have been helpful if the Supreme Court could have identified what the "Appellant's testimony" was or would have been, inasmuch as the Appellant had been asked, repeatedly, to provide such, as can be required of any witness who seeks to testify, to assure that "its probative value is **[not]** substantially outweighed by the danger of unfair prejudice," then, even "*relevant evidence may be excluded.*" Rule 403, SCRE (emphasis supplied).

murder trial than a defendant's own testimony about the killing." (5th Cir. 1985, cite omitted).

* * *

Further, although the trial judge relied upon Rule 403, SCRE, as an additional *basis for excluding Appellant's testimony*, it is clear that his ruling was erroneously based upon his *concern that Appellant's testimony would be prejudicial to Appellant*. Again, while this concern may have been well founded, it is not a proper basis for disallowing the testimony of the accused. Thus we find it was error to exclude Appellant's testimony pursuant to Rule 403, SCRE.

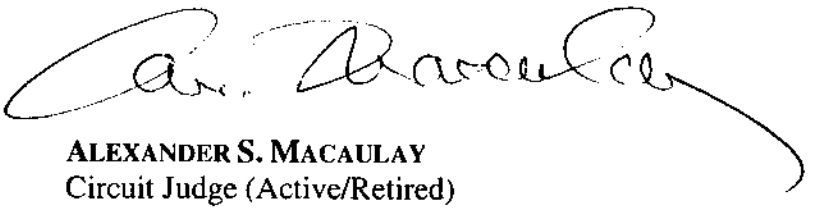
State v. Rivera, 402 S.C. at 243-244, 741 S.E. 2d at 703-704 (emphasis supplied).

Regardless, Rule 402, SCRE, expressly provides that:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the *Constitution of the State of South Carolina, statutes,* these rules, or by other rules promulgated by the Supreme Court of South Carolina. See, also, Rule 403, SCRE, fn. 1.

In this regard, there is the above-cited South Carolina Constitution's Article I, Section 24(A)(1)(6)(12), Victims' Bill of Rights, and the Code of Laws of South Carolina (1976) that declares it is the intent of the General Assembly to implement those rights guaranteed to victims "to be 'treated with dignity, respect, courtesy, and sensitivity' . . . protected by ... prosecutors and judges in a manner no less vigorous than the protections afforded criminal defendants," §16-3-1505, to include immediate family members of a homicide victim, §16-3-1110 (8), *supra,* and §16-3-659.1(1), and that "evidence of the victim's sexual conduct is not admissible [except in specific instances] if the judge finds . . . that its inflammatory or prejudicial nature does . . . outweigh its probative value," and, further, that: the "Court shall order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)." §16-3-659.1 (2). See: ***EX PARTE ORDER***, **REFERRING MOTIONS FOR ATTORNEY FEES, COSTS** and **FUNDS FOR EXPERT SERVICES, In Re: State of South Carolina v. Raymondeze Rivera,** Indictment No. 2007-GS-04-0649, May14, 2013, pages 2-3. **ATTACHMENT 2.**

Respectively submitted,



ALEXANDER S. MACAULAY
Circuit Judge (Active/Retired)

May 18, 2020
Walhalla, South Carolina

ATTACHMENT 1

Independent
THURSDAY, DECEMBER 29, 2016 PART OF THE USA TODAY NETWORK

Solicitor Chrissy Adams remembered as devoted



Adams' biggest cases

MIKE ELLIS
MIKE.ELLIS@INDEPENDENTMAIL.COM

Solicitor Chrissy Adams, the chief prosecutor for Anderson and Oconee counties for 12 years, was proud to handle the biggest cases from her community.

Adams, 49, died Tuesday after fighting cancer for more than a decade.

She recognized in a November 2015 interview with the *Independent Mail* that many of her decisions had been controversial.

"It comes with the territory," she said. "I'm elected to do a job that a solicitor should do and it's not to punt the hard things. I'm not going to back down on making a decision based on facts and law. My job is to preserve the sanctity of the judicial system."

Here are a few of the major cases Adams handled as solicitor:

Raymondeze Rivera

Kwana Burns was strangled to death in 2006, with her 2-year-old in the home.

Raymondeze Rivera was convicted of killing her, and another single mother, and received a death penalty for Burns' death.

The death penalty was overturned in 2013 and instead of going through another trial, Adams decided to make a plea deal for a second life sentence for Rivera.

Both of the life sentences, the other for the murder of Asha Wiley, have no chance for appeal or release from prison.

Adams said the life sentence was preferable to the trauma of another trial for family members, including Burns' daughter and son.

Rivera had thrived on attention during his court appearances, mugging for cameras and taunting the family before begging a jury to convict him and give him a death sentence.

"The facts are truly horrific and do call out for the death penalty, and we are sure we would get the death penalty if we went to trial," Adams said in 2013. "He has never shown any remorse. But it is not fair to the families to be victimized again. This plea today will really give them the closure they deserve."

ATTACHMENT 2

STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	))	IN THE COURT OF GENERAL SESSIONS TENTH JUDICIAL CIRCUIT
In Re:	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
versus	)	Indictment No. 2007-GS-04-0649
	)	
RAYMONDEZE RIVERA, Defendant.	))	

EX PARTE ORDER
REFERRING MOTIONS FOR ATTORNEY FEES AND COSTS
and **FUNDS FOR EXPERT SERVICES**

Pursuant to S.C. Code Ann. § 16-3-26(C) and § 17-27-160(B) (2003), separate *ex parte* motions have been made to the Chief Judge for Administrative Purposes, Tenth Judicial Circuit. Upon review of the motions, it appears that the undersigned was the trial judge in the above-referenced death penalty prosecution whose conviction and sentence were reversed and vacated, respectively, by the South Carolina Supreme Court. *State v. Raymondeze Rivera*, Op. No. 27220 (S.C. Sup. Ct. filed February 13, 2013) (Shearouse Adv. Sh. No. 7 at 43).

The Opinion of the Supreme Court was based on the assumption that:

> It is also clear from the record that the trial judge appeared willing to call Appellant as a court's witness, but ultimately declined to do so because during *the peculiar proffer procedure*, Appellant indicated his intention to testify about the crime. *It is apparent the trial court, like the defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense.*
>
> * * *
>
> Other than *a paternalistic desire to protect Appellant* from himself, there is *no basis upon which the trial court could have appropriately found* Appellant's testimony to be irrelevant and therefore inadmissible.

Ibib., at pp. 59-60. (Emphasis supplied).

Nevertheless, as reflected in the Defendant's Motions:

> "Just before the trial the Defendant exhibited some bizarre and self-destructive behavior. Specifically, the **Defendant wrote multiple letters to the victim's family**. The letters contained bizarre religious references and also **indicated that the Defendant had a relationship with the mother of the victim**. It is clear beyond dispute that the Defendant did not even know the victim or her mother."

***EX PARTE* MOTIONS FOR ATTORNEY FEES AND COSTS** and **FUNDS FOR A PSYCHIATRIST** (dated May 29, 2013, at page 3). (Emphasis supplied).

Apparently neither the Record on Appeal nor the Arguments reflected any of this. Otherwise, this Court is confident that our Supreme Court would not have ignored the fact that there was an appropriate basis — rather than a seemingly personal "paternalistic belief" or "desire to protect Appellant from himself" — "upon which the trial court could have appropriately found Appellant's testimony to be irrelevant and therefore inadmissible."

FIRST, there is the South Carolina Constitution, Article I, Section 24, Victims' Bill of Rights, which provides, *inter alia*, that:

> "(A). To preserve and protect victims' rights to justice . . . , victims of crime have the right to:
>
> (1) be treated with fairness, respect, and dignity, and to be free from *intimidation, harassment, or abuse*, throughout the criminal . . . justice process, . . . ;
>
> * * *
>
> (6) be reasonably protected from the accused or persons acting on his behalf throughout the criminal justice process;
>
> * * *
>
> (12) have all rules governing criminal procedure and *the admissibility of evidence in all criminal proceedings protect victims' rights* . . . .
>
> * * *
>
> (C) For purposes of this section:
>
> * * *
>
> (2) "Victim" means a person who suffers direct or threatened . . . psychological . . . harm as the result of the commission . . . of a crime against him. The term "victim" also includes the person's . . . parent, child . . . of a crime

victim who is deceased . . . or who was a homicide victim . . . ." (Emphasis supplied).

The General Assembly has declared its intent "to implement the rights guaranteed to victims in the Constitution of this State . . . to ensure that all victims . . . of a crime are treated with dignity, respect, courtesy, and sensitivity; that the rights and services extended . . . to victims of . . . a crime are honored and protected by . . . prosecutors, and judges in a manner no less vigorous than the protections afforded criminal defendants . . . ." S.C. Code Ann. § 16-3-1505 (2003). (Emphasis supplied). In furtherance of this end, the General Assembly has provided that: "'Victim' means a person who suffers direct or threatened . . . emotional . . . harm as a result of an act by someone else, which is a crime. The term includes immediate family members of a homicide victim . . . ." S.C. Code Ann. § 16-3-1110 (8) (2003).

To protect the "victims" from defendants who would use their asserted "constitutional rights" for "intimidation, harassment, or abuse, throughout the criminal . . . justice process," our Constitution provides that "all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights." S.C. Const. Art. I, §24, Victims' Bill of Rights. More importantly, in the instant matter, it is expressly provided that:

> "Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct is not admissible [except in specific instances] if the judge finds such evidence is relevant to a material fact and issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value."

S. C. Code Ann. §16-3-659.1 (1) (2003).

It is further provided that: "The Court shall order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)." §16-3-659.1 (2) (2003).

As assumed by our Supreme Court, "the trial judged appeared willing to call appellant as a court's witness, but ultimately declined to do so because during the *peculiar proffer procedure*, the Appellant indicated his intention to testify about the crime,"— but not what that testimony would be — after repeated requests to do so. Inasmuch as the Defendant had "exhibited some bizarre and self-destructive behavior," specifically "multiple letters to the victim's family" that, *inter alia*, "indicated that the Defendant had a relationship with the mother of the victim"— when it was "clear beyond any dispute" that this was not true — the trial court could not abrogate its own Constitutional duty to have the "rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights," to include the family of a crime victim who is deceased, a homicide victim, "to be free from intimidation, harassment, or abuse." S.C. Art. I, § 24, Victims' Bill of Rights.

Therefore, in order to avoid any question of impartiality, I am compelled to disqualify myself in this matter, Rule 501, SCACR, Cannon 3, E (1), and refer all *ex parte* and other matters to the Presiding Trial Judge for disposition in accordance with the law made and provided in such cases.

AND, IT IS SO ORDERED.

ALEXANDER S. MACAULAY
Chief Judge for Administrative Purposes
The Tenth Judicial Circuit

This 30th day of May 2013.
Walhalla, South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY 20 P 1:32

The Grose Law Firm, LLC

404 Main Street, Greenwood, South Carolina 29646

E. Charles Grose, Jr.
Phone: 864-538-4466 Fax: 864-538-4405
E-mail: charles@groselawfirm.com
Web: GroseLawFirm.com

May 18, 2020

The Honorable Harold P. Welborn
Clerk of Court, Pickens County
PO Box 215
Pickens, SC 29671-0215

Re: *Jerry Inmon v. State of South Carolina*
Case Number: 2012-CP-39-00918

Dear Mr. Welborn:

Enclosed for filing, please find Mr. Inmon's Reply to State's Response to Mr. Inmon's Rule 59(e), SCRCP Motion, along with a certificate of service.

By copy of this letter to Judge Macaulay and Ms. Brown, I am providing the Court and counsel with copies.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: The Honorable Alexander S. Macaulay (via email and US Mail)
Diana Holt, Esquire (via email)
Melody Brown, Esquire (via email and US Mail)

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2020 MAY 20 P 1:32

State of South Carolina
Tenth Judicial Circuit Court

Oconee County Courthouse

ALEXANDER S. MACAULAY
Circuit Judge (Active/Retired)

Post Office Drawer 428
Walhalla, SC 29691-0428

Telephone: (864) 718-1041
Facsimile: (864) 638-4267
amacaulayj@sccourts.org

May 18, 2020

Honorable Harold P. Welborn
Pickens County Clerk of Court
Post Office Box 215
Pickens, South Carolina 29671-0215

Re: Jerry Buck Inman, etc. v. State of South Carolina
Case No. 2012-CP-39-00918 (Capital PCR)

Dear Mr. Welborn:

Enclosed please find the following in the above-referenced Capital PCR:

ORDER DENYING RULE 59(e) MOTIONS, with
ADDENDUM and ATTACHMENTS 1 & 2; and
FORM 4.

Please filed these with the Records of your Office and serve copies on the attorneys. Necessarily, should there be any questions, please do not hesitate to call upon me.

Thanking you for your attention to and consideration in this matter and with warmest personal regards, I remain,

Sincerely,

Alexander S. Macaulay
Presiding Judge

Enclosures

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-39-00918 (Capital PCR)

39

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY 20 P 1:32

Jerry Buck Inman, #5256, a/k/a Jerry Buck Inman — PLAINTIFF(S)

State of South Carolina — DEFENDANT(S)

Submitted by: The Court **Court**	**Attorney for :** ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

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

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

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$

		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Alexander S. Macaulay — 063 — 5/18/20

Circuit Court Judge — **Judge Code** — **Date**

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or placed in the appropriate attorney's box on this day of , 20 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

****

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE

(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.

2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

   The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).

4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.

5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.

6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.

7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.

9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.

10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.

11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.

12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.

13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.

14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	IN THE COURT OF COMMON PLEAS THIRTEENTH JUDICIAL CIRCUIT
Jerry Buck Inman, #5256 a/k/a Jerry Buck Inmon, Applicant, versus State of South Carolina, Respondent.	CASE NO. 2012-CP-39-00918 (Capital PCR) **AMENDMENT TO ORDER** **ORDER DENYING RULE 59(e) MOTIONS**

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY 22 A 10:48

The Court, on May 18, 2020, submitted to the Pickens County Clerk of Court for filing and service upon the parties, its **ORDER DENYING RULE 59(e) MOTIONS**, dated May 18, 2020. In its Order the Court, had carefully considered the following filings of the parties:

a. Applicant's **Rule 59(e), SCRCP, Motion and Proffer of Mr. Inmon's Proposed Order,** dated April 30, 2020;

b. **RESPONDENT'S RULE 59(E) MOTION,** dated May 1, 2020; with Attachment #1, **Respondent's Proposed Order of Dismissal**, with attachments; and Attachment #2, **PCR Hearing Transcript** pages;

c. Applicant's **Response in Opposition to the State's Rule 59(e), SCRCP Motion,** dated May 8, 2020;

d. Respondent's **Response to Mr. Inmon's Rule 59(e), SCRCP, Motion,** dated May 13, 2020.

Then, on the same date, May 18, 2020, the Court received a copy of the filing of the:

e. Applicant's **Reply to State's Response to Mr. Inmons's Rule 59(e), SCRCP Motion,** dated May 18, 2020, in surrebuttal.

In a careful review of the pleadings of the parties, both recognize the significance of *stare decisis* as it relates to the constitutionality of the statutory mandate of Section 16-3-20(B): "if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge," to the right to "trial, by an impartial jury," as guaranteed by the Sixth Amendment to the United States Constitution and Article I, § 14, of the South Carolina Constitution of 1895, that: "The right of trial by jury shall be *preserved inviolate.*"

"The State cites *State v. Allen,* 386 S.C. 93, 687 S.E.2d 21 (2009) and *State v. Crisp*, 362 S.C. 412, 608 S.E.2d429 (2005)." Applicant's **Reply to State's Response to Mr. Inmon's Rule 59(e), SCRCP Motion,** ¶ G, p. 6.

The South Carolina Supreme Court in *Crisp* held that:

> "The constitutionality of Section 16-3-20(B) . . . rests, *inter alia,* on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. See U.S. Const. amend VI; S.C. Const. art I, § 14." *Crisp*, 362 S.C. at 418-419, 608 S.E.2d at 433.

In this regard, *State v. Harper*, 251 S.C. 379, 162 S.E.2d 712 (1968), held that:

> "[H]ereafter, regardless of past custom and practice, the choice between life imprisonment and the death penalty must be left by the trial courts of this State to the jury in Every case, in accord with [the statute 'setting forth the punishment for murder'] regardless of how the defendant's guilt has been determined, whether by the verdict of the jury or by a plea of guilty." 251 S.C. at 385, 162 S.E. at 715.

In a recent decision, the United States Supreme Court "held that the Sixth Amendment right to trial by jury requires a unanimous verdict to convict a defendant of a serious offense, abrogating" its own precedents. *Ramos v. Louisiana*, 2020 WL 19006545, --- S. Ct. --- (2020), *Synopsis*. More importantly, Justice Kavanaugh, concurring in part, noted that:

> "The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents. See, *e.g., Knick v. Township of Scott*, 588 U.S. ___ (2019); *Franchise Tax Bd. of Cal. V. Hyatt*, 587 U.S. ___ (2019); *Janus v. State, County, and Municipal Employees*, 585 U.S. ___ (2018); ***Hurst v. Florida*, 577 U.S. ___ (2016);**[1] *Obergefell v. Hodges*, 576 U.S. 644 (2015); . . . . "(Emphasis supplied).

After, further, careful consideration of the able arguments of Counsel in their respective RULE (59) MOTIONS: the Applicant's Rule 59(e), SCRCP, Motion and Proffer of Proposed Order, dated April 30th, 2020; the Respondent's Rule 59(E) Motion with Respondent's Proposed Order of Dismissal, dated May 1, 2020; the Applicant's Response in Opposition to the State's Rule 59(e), SCRCP Motion, dated May 8, 2020; the Respondent's Response to Applicant's Rule 59(E) Motion, dated May 13, 2020, and Applicant's

[1] "We hold this sentencing scheme unconstitutional. The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." *Hurst v. Florida*, 577 U.S. ___ ,136 S. Ct. 616, 619 (2016).

Reply to State's Response to Mr. Inmon's Rule 59(e), SCRCP Motion, dated May 18, 2020, and a review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded, and further finds no error of law or fact that has not been appropriately considered.

Accordingly, the respective **RULE 59(e), SCRCP, MOTIONS** [2] of the Applicant, dated April 30, 20202, the Respondent's, dated May 1, 2020, and the Applicant's Response in Opposition to the State's RULE 59(e), SCRCP Motion, dated May 8, 2020, and Respondent's Response to Applicant's Rule 59(E) Motion, dated May 13, 2020, were **DENIED** by the Court's **ORDER DENYING RULE 59(e) MOTIONS,** with **ADDENDUM** and **ATTACMENTS 1 and 2**, dated May 18, 2020, and filed May 19, 2020.

Moreover, upon receipt of: **"e. Applicant's Reply to State's Response to Mr. Inmons's Rule 59(e), SCRCP Motion,"** dated May 18, 2020, in surrebuttal, the Court has further consider the arguments of law and facts presented by the parties motions and makes this **AMMENDMENT** to be incorporated into and with its **ORDER DENYING RULE 59(e) MOTIONS, with ADDENDUM and ATTACHMENTS 1 and 2,** dated May 18, 2020.

AND, IT IS SO ORDERED, nunc pro tunc.

ALEXANDER S. MACAULAY, Presiding Judge

Walhalla, South Carolina
May 20, 2020

[2] The Court, in its discretion, has determined these Motions on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	Case No. 2012-CP-39-00918
Jerry Buck Inmon,	)	
Applicant,	)	
vs.	)	**Rule 59(e), SCRCP Motion and Proffer of Mr. Inmon's Proposed Order[1]**
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

2020 MAY -1 A 10:59

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

To: The Honorable Alexander S. Macaulay, Presiding Judge by Special Assignment of the Supreme Court of South Carolina

Pursuant to Rule 59(e), SCRCP, Jerry Inmon moves this Court for an order altering and amending its order dated April 17, 2020, filed April 21, 2020, granting post-conviction relief ("PCR") (hereinafter "Order").[2] Mr. Inmon agrees with this Court that the procedure followed by the trial court judge, pursuant to S.C. Code Ann. § 16-3-20, requiring the trial judge to impose sentence following a guilty plea in a capital case, denied Mr. Inmon the right—protected by the Sixth Amendment to the United States Constitution and Article I, § 14 of the South Carolina Constitution—to have twelve independent jurors make the findings of fact necessary for eligibility and imposition of the death penalty. Mr. Inmon is mindful of the Court's reasoned statement that it was not addressing the other issues because the Court's order obviated the need to address the

[1] "At the conclusion of the hearing, the Court requested proposed orders from each party in lieu of post-hearing briefing." Order at 2. A copy of Mr. Inmon's proposed order is attached to this motion and incorporated by reference.

[2] Undersigned counsel received notice of entry of this order by email from the Pickens County Clerk of Court on April 21, 2020. By letter and errata sheet dated April 20, 2020, filed April 22, 2020, the Court corrected page 58 of the order. Undersigned counsel received notice of this filing by viewing the Public Index on April 23, 2020.

other issues in greater detail. However, Mr. Inmon brings this motion to respectfully request this Court further address its dismissal of his remaining PCR claims (order at 3-4) and make specific findings of fact and conclusions of law,[3] which specifically address factual and legal arguments set forth in Mr. Inmon's proposed order. This motion is based on the following grounds.

A. Dr. Donna Schwartz Maddox.

This Court's order, at 4, states, "[T]he record of proceedings, and the testimony received at the PCR hearing support and confirm that trial counsel diligently prepared, assiduously and aggressively represented Inman throughout the representation." This statement, however, does not preclude a finding of ineffective assistance of trial counsel based on the failure to develop and present "information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition [Biastophilia] that is treatable and controllable with a common drug, and failing to advise the Court, sitting in decision of what punishment to mete out to Mr. Inmon, of this extraordinarily powerful mitigation evidence that was and is a treatable medical condition." *See* Second Amended PCR Application (Corrected), ¶¶ 10(b) & 11(b)(5); *see also* Mr. Inmon's proposed order, Section III(C).

Trial counsel acknowledged they did not have a strategic reason for not presenting this powerful mitigation.[4] James Bannister consulted with Dr. Maddox throughout the case. Although Dr. Maddox testified about Mr. Inmon's competency during the guilty plea, Mr. Bannister did not

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[3] S.C. Code Ann. § 17-27-80; *see also Fishburn v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019); *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004); *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (1992); *McCray v. State*, 305 S.C. 329, 330, 408 S.E.2d 241, 241 (1991); Rules 52 and 71, SCRCP.

[4] *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002); *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015).

use her for the sentencing phase. PCR Tr. 239. After reviewing Applicant' Exhibits 33 and 34, Mr. Bannister recalled that Dr. Maddox preformed an assessment at her office in Columbia. PCR Tr. 240. Mr. Bannister was aware that both Dr. Gregory Dwyer, also a psychiatrist, and Dr. Maddox specialized in sexual disorders. Mr. Bannister testified that, at first, he didn't recall Dr. Dwyer's participation in the case. Mr. Bannister testified that he did not recall that Dr. Maddox and Dr. Dwyer diagnosed Mr. Inmon, though no fault or blame of his own, as suffering with a mental disorder called Biastophilia and that the disorder was treatable with medication and therapy. PCR Tr. 243-44.

Mr. Inmon established prejudice under the second prong of *Strickland*.[5] As seen in Mr. Inmon's proposed order, Section I(E) at 58-63, the trial judge made multiple findings that are not accurate once it is recognized Mr. Inmon has a rare, treatable disorder. Thus, the "specific impact counsel's error" influenced "the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) ("In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial."). Dr. Maddox's testimony presented powerful evidence that would have precluded many of the trial court's findings that led to the decision to impose the death penalty, especially given that the only sentencing possibilities available were life without parole or death.

Section III(C) of Mr. Inmon's proposed order suggested how this Court might resolve this issue based on the evidence presented at the evidentiary hearing. Mr. Inmon respectfully requests this Court adopt the reasoning in his proposed order or, alternatively, make specific findings of fact and conclusions of law regarding this claim.

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[5] *Strickland v. Washington,* 466 U.S. 668 (1984).

B. Dr. Marti Loring.

Regarding Dr. Marti Loring, the trail judge recognized, "I'm not getting all the information, because of some form of legal gamesmanship." R. 694-96. Indeed, Mr. Inmon presented testimony at the PCR evidentiary hearing establishing that Dr. Loring suffered from Post-Traumatic Stress Disorder as a result of the Solicitor's "inexplicable and reprehensible"[6] misconduct, which caused her to forget to include in her testimony powerful mitigation evidence she discovered during her social history investigation. *See* Mr. Inmon's proposed order, Section III(B). Mr. Inmon's PCR application raised five issues regarding the prosecutor's misconduct towards Dr. Loring:

1. Trial counsel was ineffective for failing to obtain another mitigation expert witness after Dr. Marti Loring would not continue in Mr. Inmon's case because she was intimidated by the prosecutor who threatened to have her arrested if she testified, and Mr. Inmon was prejudiced by the same.

2. In the alternative, trial counsel was ineffective for failing to continue to prepare with Dr. Loring in the event the trial judge reconvened the trial, as in fact occurred, and Mr. Inmon was prejudiced by the same.

3. In the alternative, trial counsel was ineffective for obtaining another mitigation expert witness but failing to prepare and present that witness to testify and render an expert opinion, and Mr. Inmon was prejudiced by counsel's deficient performance.

4. Failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.

5. Appellate counsel was ineffective for not appealing Mr. Inmon's motion to continue his sentencing hearing so that he would have sufficient time to obtain another mitigation expert witness after Dr. Marti Loring who refused to participate in Mr. Inmon's case because she was intimidated by the prosecutor.

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[6] *State v. Inman*, 395 S.C. 539, 570, 720 S.E.2d 31, 48 (2011).

Section III(B) of Mr. Inmon's proposed order suggested how this Court might resolve these issues based on the evidence presented at the evidentiary hearing.[7] In particular, Mr. Inmon believes trial counsel preserved the continuance motion for appeal and appellate counsel abandoned a meritorious ground for relief.[8] Mr. Inmon respectfully requests this Court adopt the reasoning in his proposed order or, alternatively, make specific findings of fact and conclusions of law regarding these claims.

C. Additional Mitigation Evidence & Cumulative Error.

Mr. Inmon's PCR Application also alleged prejudicial, ineffective assistance of trial counsel for "[f] ailing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration." In addition to the diagnosis of Biastophilia, Dr. Maddox also diagnosed Mr. Inmon with a persistent depressive disorder labeled Dysthymia, suffering from unspecified trauma, including some features of Post-Traumatic Stress Disorder, and having a personality disorder with two distinctive traits which have changed over time from her pretrial assessment to current times. PCR Tr. 497-501.

Section III(C) of Mr. Inmon's proposed order suggested how this Court might resolve this issue based on the evidence presented at the evidentiary hearing. Mr. Inmon respectfully requests

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[7] The Second Amended PCR Application (Corrected) raised alternative grounds for relief. Mr. Inmon is mindful of the fact that his proposed order suggested some grounds could be denied while granting relief on alternate grounds. Mr. Inmon still requests the Court to adopt the reasoning in his proposed order. Alternatively, the Court should make specific findings of fact and conclusions of law regarding each claim.

[8] *Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002); *Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999).

this Court adopt the reasoning in his proposed order or, alternatively, make specific findings of fact and conclusions of law regarding this claim.

Section III(D) of Mr. Inmon's proposed order suggested how this Court might apply a cumulative error analysis regarding trial counsel's mitigation investigation and presentation, which resulted in prejudice to Mr. Inmon.[9] As seen, the trail judge recognized, "I'm not getting all the information, because of some form of legal gamesmanship." R. 694-96. Mr. Inmon respectfully requests this Court adopt the reasoning in his proposed order or, alternatively, make specific findings of fact and conclusions of law regarding this claim.

D. Additional Guilty Plea Claims.

This Court granted Mr. Inmon post-conviction relief under a Sixth Amendment[10] theory applying *Hurst v. Flordia*, ___ U.S. ___, 136 S. Ct. 616 (2016), *Blakely v. Washington*, 542 U.S. 296, 307 (2004), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). In addition to the Sixth Amendment claims, Mr. Inmon also requested relief based on the Eighth Amendment,[11] because the procedure followed by the trial judge forced Mr. Inmon to make a Hobson's Choice—deciding whether to plead guilty (accepting responsibility, showing remorse and respect to the victim's family, and taking a step towards rehabilitation) without his constitutional right to jury sentencing or having twelve independent jurors make the decisions about eligibility and imposition of the death penalty without benefit of the mitigation evidence

[9] *See, e.g., Sears v. Upton*, 561 U.S. 945, 954 (2010); *Porter v. McCollum*, 558 U.S. 30 (2009); *Williams v. Taylor*, 529 U.S. 362, 399 (2000); *Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *Williams v. Stirling*, 914 F.3d 302 (4th Cir. 2019).

[10] This Court also granted relief based on S.C. Const. Art. I, § 14.

[11] See also S.C. Const. Art. I, § 15.

flowing from his guilty plea. This Court should expand its order to include this additional ground for relief.

Mr. Inmon's PCR Application raised two additional claims regarding his guilty plea:

1. Trial counsel was ineffective for advising Mr. Inmon to plead guilty and appeal the trial court judge denying his request to be sentenced by a jury when then existing state law did not allow jury sentencing following a guilty plea in a capital case.

2. Appellate Counsel was ineffective not appealing the trial court judge denying Mr. Inmon his request to plead guilty and have his sentence determined by a jury when that right is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and trial counsel had preserved that issue for appellate review.

Section III(A) of Mr. Inmon's proposed order suggested how the Court might resolve these two issues. Based on the direct appeal opinion, Mr. Inmon believes trial counsel preserved this issue for review. *Inman*, 395 S.C. at 555, 720 S.E.2d at 40 ("Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases, [Inmon] was permitted to appeal this secondary sentencing issue.").[12] To the extent the State contends there is an ambiguity in the direct appeal opinion, Mr. Inmon respectfully requests this Court make specific findings of fact and conclusions of law to resolve these issues.

E. Remaining Claims.

In addition to requesting this Court make findings of facts and conclusions of all regarding these claims, Mr. Inmon wishes to call two additional matters to the attention of the Court.

[12] Sentencing issues can be raised on direct appeal following a guilty plea. *E.g. State v. Brown*, 426 S.C. 63, 824 S.E.2d 476 (Ct. App. 2019); *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010).

First, when dismissing the remaining claims, the order, at 4, stated, "Applicant's remaining freestanding claims are bared by jurisdictional limitations set out in S.C. Code § 17-27-20." The Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10, *et. seq,* does not bar claims of prosecutorial misconduct. *See, e.g., Kyles, supra; Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006), *Gibson v. State*, 334 S.C. 515, 518, 514 S.E.2d 320, 321 (1999); *see also* Second Amended PCR Application (Corrected), ¶¶ 10(g) and 11(g); Mr. Inmon's proposed order, Section III(E).

Second, former Solicitor Robert M. Ariail made allegations about the trial judge's rush to a foregone judicial conclusion and sandbagging by the defense. *See* Second Amended PCR Application (Corrected), ¶¶ 10(b)&11(b)(7) and 10(h)&11(h); Mr. Inmon's proposed order, Section III(F) and (G).[13]

Mr. Inmon's proposed order suggested how this Court might resolve these issues based on the evidence presented at the evidentiary hearing. Mr. Inmon respectfully requests this Court adopt the reasoning in his proposed order or, alternatively, make specific finding of fact and conclusions of law regarding these claims.

(conclusion on next page)

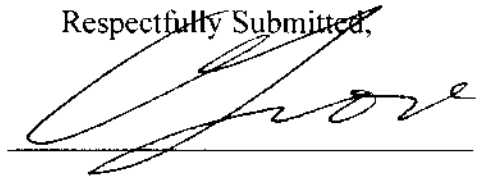
[13] Mr. Inmon recognizes the former solicitor's allegations of sandbagging by trial counsel are contrary to the Court's finding "that trial counsel diligently prepared, assiduously and aggressively represented Inman throughout the representation." Order, at 4. To the extent the State might seize on these allegations to advance a convoluted trial strategy argument, the Court should make findings of fact and conclusions of law on this issue.

CONCLUSION

For the foregoing reasons, this Court should reconsider its order dated April 17, 2020, make specific findings of fact and conclusions of law, and grant Mr. Inmon post-conviction relief on additional grounds.

IT IS SO MOVED.

Respectfully Submitted,

By 

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April 30, 2020.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	Case No. 2012-CP-39-00918
Jerry Buck Inmon,	)	
Applicant,	)	
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	

2020 MAY -1 A 10:59

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

By: _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

April 30, 2020
Greenwood, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF Pickens)
)
Jerry Inmon)
Plaintiff,)
vs.)
)
State of South Carolina)
Defendant.)

IN THE COURT OF COMMON PLEAS
13th JUDICIAL CIRCUIT

CASE NO.: 2012 -CP-39-0918

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY -1 A 10:59

Plaintiff's Attorney:	Defendant's Attorney:
Charles Grose, Bar No. 66063	Melody Brown, Bar No. ____
Address:	Address:
404 Main Street, Greenwood, SC 29646	PO Box 11549, Columbia, SC 29211
Phone: 864-538-4466Fax 864-538-4405	Phone: _____ Fax_____
E-mail: charles@groselawfirm.comOther: _____	E-mail: mbrown@scag.gov, Other: _____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Rule 59(e), SCRCP Motion
Estimated Time Needed: _____ Court Reporter Needed: ☐ **YES**/☐ **NO**

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

_____ April 30, 2020
Signature of Attorney for ☒ Plaintiff /☐ Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT: $_____
☒ EXEMPT:
(check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order.	JUDGE CODE _____
☐ Other: _____	Date: _____

CLERK'S VERIFICATION

Collected by:_____ Date Filed: _____
☐ MOTION FEE COLLECTED: $ _____
☐ CONTESTED – AMOUNT DUE: $ _____

X emailed to Atty's
MB 5/1/20

SCCA 233 (11/2003)

The Grose Law Firm, LLC

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April 30, 2020

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

2020 MAY -1 A 10:59

The Honorable Harold P. Welborn
Clerk of Court, Pickens County
PO Box 215
Pickens, SC 29671-0215

Re: *Jerry Inmon v. State of South Carolina*
Case Number: 2012-CP-39-00918

Dear Mr. Welborn:

Enclosed for filing, please find Mr. Inmon's Rule 59(e), SCRCP Motion and Proffer of Mr. Inmon's Proposed Order, along with a certificate of service.

By copy of this letter to Judge Macaulay and Ms. Brown, I am providing the Court and counsel with copies. As Judge Macaulay already has a copy of Mr. Inmon's proposed order in multiple formats, I am not including an additional copy in the mailing to the Court; however, a copy will be provided if requested.

Thank you for your attention to this matter. Please let me know if you have any questions or require additional information.

With kindest regards, I am

Yours very truly,

E. Charles Grose, Jr.

cc: The Honorable Alexander S. Macaulay (via email and US Mail)
Diana Holt, Esquire (via email)
Melody Brown, Esquire (via email and US Mail)

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	Case No. 2012-CP-39-00918
Jerry Buck Inmon,	)	
Applicant,	)	
	)	**Order Granting Post-Conviction Relief**
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

COPY

Jerry Inmon,[1] a death sentenced inmate confined to the South Carolina Department of Corrections, seeks post-conviction relief ("PCR"). For the reasons set forth below, this Court grants, in part, and denies, in part, Mr. Inmon's PCR application and remands this case to the Court of General Sessions for Pickens County for a new sentencing hearing.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Charges, Assignment of Trial Judge, and Appointment of Counsel.

This case arises out of the murder and sexual assault of Clemson University student Tiffany Souers. Robert M. Ariail and Betty C. Strom of the Thirteenth Circuit Solicitor's Office represented the State.

Within twenty-four hours of being expedited from Tennessee back to Pickens County to face the charges, Jerry Inmon happened to meet attorney Symmes Culbertson at the Pickens County Sheriff's Department. Mr. Inmon asked Mr. Culbertson for legal advice, and Mr. Culbertson agreed to represent Mr. Inmon.

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[1] "Inmon" is the correct spelling. Mr. Inmon's name appears as "Inman" in prior proceedings and some prior pleadings in this proceeding. This Court will use the correct spelling.

[2] By written order dated October 31, 2012, the Supreme Court of South Carolina assigned this Court jurisdiction over Mr. Inmon's capital PCR case.

On November 8, 2006, the Pickens County Grand Jury indicted Mr. Inmon for murder, first-degree burglary, kidnapping, and first-degree criminal sexual conduct in connection with the death of Clemson University student Tiffany Souers. R.[3] 1037-44. After the Solicitor's office issued a notice of intent to seek the death penalty, the Supreme Court vested exclusive jurisdiction over the case in the Honorable John Cannon Few. Applicant's Exhibit 14-A. Judge Few declined to officially appoint Mr. Culbertson, over his objection, to represent Mr. Inmon. Instead, Judge Few appointed James Bannister and Pickens County Public Defender John DeYong to represent Mr. Inmon. Applicant's Exhibit 15-A. Mr. Culbertson petitioned the Supreme Court of South Carolina for a writ of prohibition. Applicant's Exhibits 10 and 11. The Supreme Court denied the writ but rescinded its order appointing Judge Few and issued an order vesting jurisdiction in the Honorable Edward N. Miller. Applicant's Exhibit 16-A. Thereafter, Judge Miller also appointed Mr. Culbertson to represent Mr. Inmon, reasoning that Mr. DeYong's heavy caseload as the head public defender would significantly limit his participation in Mr. Inmon's case. Tr. (4/16/2007) 3-7; Applicant's Exhibit 17-A.

B. Motion to Determine Mode of Trial.

On August 17, 2007, pursuant to the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Mr. Inmon moved the trial court to determine the mode of trial, allow him to enter a guilty plea, and allow a jury to determine the sentence. Mr. Inmon did "not wish to contest his guilt," had informed his "counsel of his strong desire to acknowledge his guilt," did "not want to put the victim's family through the spectacle of a courtroom proceeding regarding his guilt, and sought "to alleviate the cruel impact the attendant media attention would have on

[3] "R." refers to the Record on Appeal in Mr. Inmon's direct appeal. "PCR Tr." refers to the transcript of the PCR evidentiary hearing. Tr. refers to General Sessions Court transcripts that were not included in the Record on Appeal.

everyone involved." R. 1202-03; Applicant's Exhibit 7. The motion and supporting memorandum of law relied on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Blakely v. Washington*, 542 U.S. 296, 307 (2004)

On September 17, 2007, Judge Miller convened a hearing on Mr. Inmon's motion to determine the mode of trial. Mr. Bannister explained:

> Mr. Inmon wants to plead guilty. He has a strong desire to acknowledge his guilt in both the formal legal sense and in the moral sense. He wants to accept responsibility for what he has done, regardless of what the ultimate sentence will or will not be. The only way he can adequately show the remorse he feels and acknowledge the moral guilt that he is dealing with now is to stand at the bar and admit to the elements of the indictment, and to have Your Honor accept that guilty plea and formally acknowledge that.
>
> He also, as a subset of that, wants to alleviate what he sees would be the cruel impact that the media attention in this case has already had, that impact that it would have on the both the Souers family and his own family. He also wants to avoid what he would consider to be the spectacle and charade of a guilt-phase proceeding. In other words, he wants to plead guilty.

R. 800-01.

Trial counsel argued Mr. Inmon has a constitutional right to be sentenced by a jury while acknowledging S.C. Code Ann. § 16-3-20(B) mandates the capital "sentencing procedure must be conducted before the judge."[4] Trial counsel also argued, "A guilty plea is mitigation," citing *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001) and pointing out, "for those that plead guilty, the fact itself is Constitutionally permissible consideration in sentencing, a consideration that is not present when one is found guilty by a jury." Trial counsel argued *Brouwer* recognized, "[g]uilty pleas are recognized as a significant step towards rehabilitation." Trial counsel asserted Mr. Inmon's Sixth amendment right to a jury trial and his Eight Amendment right to present mitigation. Counsel argued *Apprendi, Ring* and *Blakely* and pointed

to a pre-*Blakely* case in Louisiana and post-*Blakely* cases in South Dakota and Colorado. The State argued it could force Mr. Inmon to have a jury trial, there's no constitutional right to a guilty plea, and a guilty plea cannot be entered without its consent. The trial judge questioned whether pleading guilty and reserving jury sentencing would be a conditional plea. Trial counsel reminded the trial court that entering a guilty plea "does not waive the right to contest the sentence." The trial judge felt "constrained by the existing law in South Carolina," denied the motion, but noted the issue "perhaps is best addressed by a court that [] might have the final say in a matter like this." R. 801-30. By written order dated November 15, 2007, the trial judge denied Mr. Inmon's motion to be sentenced by a jury following his guilty plea. Mr. Inmon moved the trial judge to reconsider this order. Applicant's Exhibit 4.

After the trial judge denied Mr. Inmon's motion and motion to reconsider, Mr. Inmon attempted an interlocutory appeal to the Supreme Court of South Carolina. Applicant's Exhibit 11. By written order dated January 9, 2008, the Supreme Court dismissed the appeal as interlocutory. Applicant's Exhibit 8. Both Mr. Inmon's written motion and appellate brief argued our state's statute disallowing jury sentencing following a guilty plea infringes on Mr. Inmon's Sixth Amendment right to have a jury decide sentencing enhancing facts following a guilty plea. In addition to *Blakeley*, Mr. Inmon also relied on decisions from other states. *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007) (holding provision of death penalty statute that mandated that defendant waive his right to a jury trial on sentencing facts when he pled guilty violated defendant's Sixth Amendment rights); *State v. Page*, 2006 S.D. 2, ¶ 71, 709 N.W.2d 739, 762 (2006) ("We agree with Page's argument that under *Ring*, a capital sentencing scheme would be unconstitutional if it prevented a defendant who pleaded guilty from having

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[4] Trial counsel acknowledged *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005) and

alleged aggravating circumstances found by a jury."); *State v. Piper*, 2006 S.D. 1, ¶ 48, 709 N.W.2d 783, 803 (2006) ("We agree with Piper's argument that under *Ring*, a capital sentencing scheme would be unconstitutional if it prevented a defendant who pleaded guilty from having alleged aggravating circumstances found by a jury."); and *State v. Louviere*, 833 So. 2d 885, 895 (La. 2002) ("Only this interpretation of Art. I, § 17—that the legislature is thereby restricted only inasmuch as any capital sentencing scheme must put the penalty issue before the jury—preserves a capital defendant's ability to present a defense of his choice, while preventing the infirmity ultimately found in *Ring*."). The Supreme Court dismissed this appeal.

C. The Guilty Plea.

On August 9, 2008, the trial judge convened a hearing to accept Mr. Inmon's guilty plea. R. 911-74. Dr. Donna Schwartz Maddox[5] testified Mr. Inmon was competent to enter his guilty plea. Dr. Maddox also stated she "need[ed] to evaluate Mr. [Inmon], at least, one more time before any sentencing hearing takes place." R. 914-24. When the trial judge asked Mr. Inmon whether he understood he was giving up his right for a jury to determine his sentence, trial counsel reminded:

> [I]n March, we raised the issue that [Mr. Inmon] sought to enter a guilty plea, as he's doing today, and then proceed to a jury trial sentencing. And we believe that that was an option that he should be entitled based on the fact of his Sixth Amendment right to a jury trial, his Eighth Amendment right to present mitigation, and his Fourteenth Amendment right to present a complete defense.
>
> You determined, prior to this proceeding, that he did not have that option. I believe that that issue has been preserved for review. But to the extent that I need to state it again for the record, I'm saying that we raised that issue and we believe it's part of this case no matter what going forward. But that's been part of my explanation to him about where we go. So, with that on the record, go ahead.

State v. Downs, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). R. 803-05.

[5] Dr. Maddox remarried after this hearing. Her name was Dr. Donna Schwartz-Watts at the time of this hearing.

R. 931-32. Solicitor Ariail recited the "stipulated facts," trial counsel renewed the request for jury sentencing, and the trial judge accepted Mr. Inmon's guilty plea. R. 932-56.

D. The Sentencing Hearing Begins: September 8-11, 2008.

On September 8-11, 2008, Judge Miller convened a sentencing hearing. Trial counsel renewed the "demand for a jury trial for the sentencing phase." The trial judge denied the motion because of "the statute." R. 17.

1. The State's Case.

The prosecution relied, in part, on the facts stipulated at the guilty plea to establish three aggravating circumstances: (1) murder during commission of a criminal sexual conduct, (2) murder during commission of kidnapping, and 3) murder during commission of burglary. R. 22. The prosecution presented the following evidence to establish the facts and circumstances of the crime and aggravating circumstances:

- G.W. McCoig ("McCoig") is the Chief Deputy for the Jefferson County Sheriff's Department (Dandridge, Tennessee). On June 6, 2006, McCoig conducted a traffic stop on Mr. Inmon, took him into custody, and provided him his *Miranda* rights. McCoig asked Mr. Inmon about being wanted in South Carolina, and Mr. Inmon said, "I am a fucking animal." R. 68. Investigator Michael Hannon of the Tennessee Bureau of Investigation was also present for Mr. Inmon's statement. R. 138-51.

- Agent Jeffery Kindley ("Kindley") is a regional investigator of the South Carolina Law Enforcement Division ("SLED"). Kindley interviewed Dandridge, Tennessee where Mr. Inmon made a voluntary statement admitting to the crimes involving Tiffany Souers. R. 83.

- Dr. Eric Dean Christensen, M.D., a forensic pathologist, performed the autopsy on Tiffany Souers on May 27, 2006. The cause of death was asphyxia due to ligature strangulation, and the manner of death was homicide. The ligature was Ms. Souers' swimsuit top. Dr. Christensen saw scraping and bruising around the opening of the vaginal area, which was not consistent with normal sexual relations. R. 219-242.

The prosecution published Mr. Inmon's criminal history (R. 111-*) and presented the following evidence about his prior criminal history and unadjudicated crimes:

- On December 13-14, 1987, Suzanne Clavel lived in a ground floor apartment in Tampa, Florida. When she woke up a little after midnight, Mr. Inmon was holding a gun to her head. Mr. Inmon made tie up her roommate. Mr. Inmon tied Ms. Clavel's hands behind her back, removed her pants, and sexually assaulted her. Mr. Inmon pled guilty on August 18, 1989 and was sentenced to thirty years for sexual battery, thirty years for robbery, five years for theft of a motor vehicle, and five years for aggravated assault. R. 100-111.

- On May 23, 2006, Beth Bates Patterson came home from work for lunch. Mr. Inmon came from behind, put a knife to her throat, tied her hands behind her back. She prayed and talked to Mr. Inmon, telling him God would forgive him. Because she Ms. Patterson was on her period, Mr. Inmon did not sexually assault her. Mr. Inmon barricaded her in a closet, took $250.00 from inside a piano bench, and left. Investigators determined Mr. Inmon cut a hole in the floor to enter Ms. Patterson's house. R. 129. Mr. Inmon made a statement to Agent Hannon (R. 150-64) and Rhonda Jackson of the DeKalb County, Alabama District Attorney's Office (R. 167-88), admitting to these crimes.

- On May 26, 2006, Jessica Gann of Sevierville, Tennessee woke up with Mr. Inmon on top of her, which his hand over his mouth, and holding a knife to her throat. He wanted money and jewelry. He used her bra to tie her hands behind her back, pulled down her underwear, and tried to rape her from behind. He made her get into the bathtub and use shampoo to clean her vaginal area. Two weeks later, Mr. Gann saw Mr. Inmon's photograph on the 11:00 news and called the Sevier County Police Department. R. 193-204. Mr. Inmon made a statement to Agent Hannon admitting to the sexual assault. R. 204-17.

The prosecution also presented victim impact testimony of Holly Elaine Bergman (R. 36-48) and Christina Ann Morello (R. 48-57), both of whom met Tiffany Souers their freshman year at Clemson and remained friends.

2. The Mitigation Case.

Trial counsel presented a mitigation case. Dr. David Price, Ph.D. is a self-employed forensic neuropsychologist in Greenville, South Carolina. He reviewed fifteen three-to-four inch think notebooks of biographical information on Mr. Inmon, including records about his family,

his incarcerations, newspaper clippings, all of his mental health treatment. These included about 3000 pages of records of Mr. Inmon's mental health treatment while incarcerated. Dr. Price talked to treatment providers that saw Mr. Inmon. He reviewed records of crime itself. Records from North Carolina and Florida made up the majority of records. Dr. Price opined, at the time of the crimes, Mr. Inmon was under the influence of a mental or emotional disturbance and his capacity to conform his conduct to requirements of law was substantially impaired. R. 257-59.

Dr. Price testified Mr. Inmon has a history of mood disorder (reported differently by different providers, ranging from dysthymia, major depressive recurrent type, major depressive disorder with psychotic features, bipolar disorder, psychorhythmic disorder), Schizoid personality disorder, which is a developmental disorder, Dissociative Identity Disorder, and Sexual paraphilia.[6] R. 259-60.

According to Dr. Price, evidence of mood disorder found throughout prison records, including multiple suicide attempts, suicide ideations,[7] and withdrawal. Mr. Inmon's Mood disorder was pretty profound at one point in Florida. Mr. Inmon's Global Assessment of Functioning was as low as 30 several times, meaning Mr. Inmon had serious impairment with

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[6] Dr. Price is a national expert on malingering. Mr. Inmon is not malingering. The greatest credibility about psychiatric history is that he has extensive history. He's not trying to feign mental illness. He minimizes his hsitroy. Part of dissociative issue is he wants to believe he had happy childhood. At the Pickens detention center, he denied a history of suicide attempts and a history of psychiatric disorders, even though it would have been beneficial to acknowledge those at that point. He is protective of parents and denies sexual abuse. R. 281-83.

[7] Dr. Price testified about Mr. Inmon's seven suicide attempts, six of which occurred while he was incarcerated. He cut his writs on more than one occasion. He cut his jugular vein and would have died if guard had not been nearby. He swallowed two six-inch strands of chain or barbed wire or two strands of razor wire. Perforated stomach. Serious attempt. He tried to starve himself. He tried to cut his antecubital vein, resulting in a very deep wound. At least some of these attempts resulted from guilt and shame he carries with him. The suicide attempts related to unhappiness and hopelessness. Mr. Inmon is genetically predisposed to depression, but his environment contributed. R. 278-81.

ability to communicate, judgment, and overall ability to function. Impairment in clinical, social or occupational function is required to diagnosis a mood disorder. Suicide attempts are an example in clinical sense. R. 260-65.

According to Dr. Price, personality disorders exist by late adolescent or early adulthood. Personality disorders are not caused by specific trauma but have some trauma in the development. Schizoid Personality Disorder means Mr. Inmon is an introvert, does not have warm relations with people, and has impaired ability to form relationships. Part of this disorder was a genetic pre-disposition. Mr. Inmon's mother had paranoid schizophrenic. His father is an alcoholic. Mr. Inmon began using drugs at age ten, running away at age thirteen, living on streets at age fifteen, and in jail by age seventeen. Interaction between environment and genetic predisposition plays a role. R. 265-66.

According to Dr. Price, Dissociative Identity Disorder is when a person has at least two specific identities. When events change or something in the environment changes, the disorder causes them to assume a different internal identity. Mr. Inmon's primary identity is generally passive, dependent, depressed, has difficulty with guilt. He engages in self-mutilating behavior, consistent with his tattooing and suicidal ideation. R. 266-69. Traveling to commit sexual assaults consisted with diagnosis. Mr. Inman was inn a fugue-like or disassociate state. Mr. Inmon traveled with no clear destination in mind. People with dissociative identity disorder generally have a history of being sexually and physically abused. One identity takes the abuse and they sort of pull back into themselves and escapes the climate. R. 270.

Dr. Price diagnosed a sexual paraphilia where Mr. Inmon has "a compulsive drive to rape." Dr. Price was astounded the Florida Department of Corrections did not diagnosed it. They

document Mr. Inmon did not meet criteria for sexual offender treatment program, but he clearly met that when released from incarceration in Florida.[8] R. 270-72, 309.

According to Dr. Price, all of these disorders have some intertwinement. Someone with dissociative identity disorder often has difficulty with substance abuse and depression. R. 166.

According to Dr. Price, Mr. Inmon's family and social history is significant for being sexually abused and physically abused. He grew up in a very unstable environment. His mother had periods of anger. At that time, doctors thought she was depressed. She had paranoid schizophrenia, probably meaning she had delusions of people trying to harm her or her family. She could have depression consistent with schizophrenia.[9] She was neither a protector nor a provider for Mr. Inmon. Mr. Inmon had one stable relationship—his maternal grandfather who died when he was young. Mr. Inmon was abandoned by his father, who sexually abused him. Mr. Inmon "[a]cted out the conflict in the home beginning at the age of 10 with drugs, failing in the school system, and, ultimately, winding up out on the street." Dr. Price opined the government should have removed Mr. Inmon from home and provided counseling and group therapy to help understand that they were victims, improve self-esteem, and treat guilt. Victims of sexual abuse will have shame, guilt, and often depression later in life. According to Dr. Price, Mr. Inmon's shame, guilt, and self-loathing is well documented. R. 272-78. A psychiatrist in

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[8] Claude Tournay, a psychologist with the Florida Department of Corrections, testified about his department's procedures for screening sexually violent predators and explained why Mr. Inmon was not screened for that program. R. 351-61.

[9] Denise Baker, Mr. Innmon's half-sister, testified about their mother's mental illness. Their mother starting hearing things. She was on medication. She would just "freak[] out" over the smallest things. Later on, their mother as diagnosed with bipolar and schizophrenia. Ms. Baker remembered her mother talking to herself, which her mother blamed on medication. R. 396-97.

the North Carolina Department of Corrections notes Mr. Inmon "was a lost soul who would continue to be lost." R. 285.

On cross-examination, Dr. Price testified Mr. Inmon is permanently damaged. Not going to be able to treat him and change his behavior to make him a functioning person? "Within the structure of prison, he's a functioning person. But without structure, he has not structure, that's correct." Tr. 309-10.

According to Dr. Price, Mr. Inmon is not at risk to rape in prison. The male inmate Mr. Inman had sex with in 1990 was consensual. There is no other record of Mr. Inmon having sex with another male inmate. Tr. 310.

James Aiken, an expert in prison management and classification, reviewed all of Mr. Inman's confinement records. He testified Mr. Inmon automatically would be assigned a high security status. Because of his status as a sex offender and having tattoos some gang members might find offensive, the Department of Corrections would place Mr. Inmon in a "security envelope" for his own safety. Mr. Aiken opined the Department of Corrections is equipped to care for Mr. Inmon if he attempted suicide or engaged in self-mutilation. R. 364-80.

Denise Baker is Jerry Inmon's sister. They have same mother, different father. She is three years older. R. 384-86. Ms. Baker had fond memories of her brother growing up. Mr. Inmon played Pee Wee football She was a cheerleader. The games usually were played on Saturday mornings. It was chaotic getting ready for games, making sure the uniforms clean and pressed. Mr. Inmon struggled to get into the pads and uniform pants. Mr. Inmon loved the uniform. He would get up, mom made breakfast, get dressed, mess around the house, and go to rehearsals and practice. After the game, would got to Brocks to get a sub. R. 386-89.

Ms. Baker remembers her brother cried quite a bit growing up. R. 389-90. When Mr. Inmon was small and his father lived with them, Ms. Baker and her brother shared a bedroom. Mr. Inmon's father would give Ms. Baker inappropriate gifts, such see through nightgowns but made for children. When Ms. Baker was five years old, they moved to another house and the abuse started. At naptime, she would be on top bunk, and Jerry would be on the bottom bunk. Jerry, Sr. would shut windows and close drapes. He blindfolded Ms. Baker, tied her hands, turned her over and sexually assaulted her. She knows Jerry, Sr. sexually abused her brother. She testified, "And I don't know what happened. I don't remember." He would leave top bunk and got to bottom. Jerry would be crying. She was blind folded. R. 398-401.

Ms. Baker recalled her brother had seizures. He would doze off and a glaze would come over his eyes. He would go into full seizure, just stiffen up. His muscles got very rigid, and you couldn't control him. His eyes would roll in the back of his head. A lot of times it would be accompanied by high fever and would have to put him in a tub with ice. The family also kept a butter knife with tape around it to try to keep Mr. Inmon from biting his tongue. The seizures set Jerry Inmon apart from other children and kept him from making friends. R. 391-93.

Ms. Baker recalled Mr. Inmon did not have many friends outside the family. He had some older friends but no one his age. R. 391. He was never comfortable in own skin. He didn't like himself. Mr. Inmon was close to his grandfather. His grandfather passing away was a turning point for Mr. Inmon. Jerry talked to his grandfather a lot and thought he was only person who understood him, could reach him, and connect with him. Jerry was sixteen years old when his grandfather died. Shortly after his grandfather's death, things started happening poorly for Jerry. Started staying out later. Jerry became more withdrawn. Jerry ran away. R. 394-96.

Reverend David Michael Hensley testified he witnessed Mr. Inmon's baptism. R. 405-06.

3. Dr. Marti Loring.

Trial counsel called Dr. Marti Loring and offered her as an expert witness in the "field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing cases. R. 324-27. Solicitor Ariail *voir dired* Dr. Loring:

> Q. Dr. Loring, as a part of the services that you provided in this case, have you performed services under your licensed clinical social worker status?
>
> A. Yes, sir.
>
> Q. All right. And, as part of that, have you interviewed the Defendant?
>
> A. Yes, sir.
>
> Q. Have you had conversations with him?
>
> A. Yes, sir.
>
> Q. And have you charged a fee for those services?
>
> A. A fee is being paid to the Center for Mental Health, yes, sir.
>
> Q. All right. And you derive an income from the Center for Mental Health?
>
> A. No, sir.
>
> Q. You don't get any money for your services?
>
> A. No, sir.
>
> Q. Okay. Are you a licensed clinical social worker in the State of South Carolina?
>
> A. No, sir.
>
> Q. All right.
>
> A. Although that license is sort of honored across the country whenever I go to different states. We – the custom is not to be licensed in each state we go into. Like if I go to New Hampshire and other states, you see, it's honored, the ones in whatever state the professional comes from.

> MR. ARIAIL: Your Honor, I would direct the Court's attention to the licensing requirements of Section 40-63-200, which deals with the unauthorized practice of social work within the State of South Carolina.
>
> And one of the requirements of this section is that anyone who practices license – or practices social work within the State must be licensed prior to any performing of those services, particularly, Section 40-63-30.
>
> And, in addition to that, it carries penalties for both civil and criminal penalties for violation. And, based on that, I would submit that she's not qualified as an expert in this state to testify or to render those services until she gets licensed.

R. 327-28.

Trial counsel recognized the Solicitor "represented to the Court is that this witness is about to testify to things that would potentially subject her to criminal sanctions." Counsel argued, "This is an inappropriate attempt to intimidate the witness with the authority that this Solicitor has in this state to indict." The Solicitor responded, "I'm raising the issue of licensing for the purposes of voir dire. And that's as far as we've gotten. And whether or not I present an indictment against her is a totally separate issue." R. 328-31.

Trial counsel cited *State v. Williams*, 326 S.C. 130, 485 S.E.2d 99 (1997) and argued:

> [T]he Solicitor's attempt to make the testimony that Dr. Loring may potentially give fit within a criminal statute is a due process violation. It is an attempt to improperly intimidate this witness. And it, specifically, violates the Defendant's due process right to present his defense witnesses freely. I believe the intimidation, at this point, amounts to a substantial government interference with this Defense witness' free and unhampered choice to be able to testify unfettered.
>
> I don't believe that she will be able to testify in that manner absent some assertion from the Solicitor that he would either grant her immunity from any perceived illegality to this case – he has got to do something – I'm sorry. We're going to have to have more of a protection for her for this not to be an issue that impacts the Defendant's due process rights.

R. 332.

Solicitor Ariail granted Dr. Loring immunity for her testimony in Mr. Inmon's case, but pointed out he did not have the authority to grant her immunity for the other times she had testified in

South Carolina. Trial counsel was satisfied and prepared to present Dr. Loring's testimony. The trial judge asked Dr. Loring if she was satisfied with the Solicitor's representation, and the following exchange occurred:

> THE WITNESS: Yes, sir. I am concerned, Judge. May I clarify to see if I understand the situation properly?
>
> THE COURT: Yes, ma'am.
>
> THE WITNESS: Am I hearing correctly, Your Honor, that the State of South Carolina is not going to indict me for giving improper information today that I have gathered in this case, to the best of my ability, that I won't be indicted in doing so for any reason of being a social worker licensed in Georgia or such?
>
> THE COURT: That is my understanding of what the Solicitor has told you. He is the chief prosecuting officer for the Thirteenth Judicial Circuit. And he has expressed on the record, as an officer of the court, that he will grant you immunity for the testimony that you are –
>
> And I presume the underlying work she did to arrive at her opinion?
>
> MR. ARIAIL: Yes.
>
> THE COURT: You are granted immunity. So you will not be indicted based on your work in this case. Now, do you feel secure?
>
> THE WITNESS: First, thank you for asking. I appreciate your concern. I wouldn't be honest if I didn't tell you that what I just heard alarmed and concerned me a great deal. So I will hope that I can return my attention to what I came here to do in the first place and be as effective as I would hope to be. But to tell you that I'm not alarmed and concerned at what I heard would not be truthful.

R. 333-35.

The trial judge recessed court so Dr. Loring could consult with an attorney.[10] After the recess, the trial judge asked, "Dr. Loring, are you feeling secure?" She responded:

> No, Your Honor.
>
> With profound condolences to Tiffany's family, and with respect to the family of Jerry [Inmon], and with deep apologies to the Court, I worked so hard to gather all this information to come here today to tell you the truth about Jerry

[10] *See also* Notice of Limited Appearance for Dr. Loring by Bill Godfrey. Applicant's Exhibit 25.

[Inmon's] past. I'm so sorry, Your Honor. Upon advice of counsel, I must plead the Fifth. I feel threatened as a witness in this case, and in other cases in which I've testified in South Carolina at this time.

R. 336.

The trial judge and counsel discussed whether Dr. Loring had the right to claim the Fifth Amendment privilege:

THE COURT: Ma'am, it occurs to me that you have been given immunity in this case. There will be no criminal prosecution or threat of criminal prosecution for what you've done in this case.

And, ma'am, I don't believe you have a right to assert a Fifth Amendment privilege in this case based on – or in this case because of that, or that there is a Fifth Amendment privilege to assert with respect to what you've already done in the other cases.

What do you want to tell me, Mr. Bannister?

MR. BANNISTER: Your Honor, I'm not her lawyer, so I think that goes –

THE COURT: Well, you have risen to say something.

MR. BANNISTER: I did. I have a motion that is separate and apart from the issue of whether or not her Fifth Amendment is appropriate. I would – if you're ready to hear that at this point, I'll, certainly, go into it.

THE COURT: Well, no, I'm not – I don't know who her attorney is either.

MR. BANNISTER: Mr. Godfrey volunteered. He was here in the courtroom. He spoke with her.

THE COURT: Well, great.

Mr. Godfrey, how does she have a Fifth Amendment privilege to assert in this case?

MR. GODFREY: Well, Judge, the Solicitor, when he granted the immunity for this particular case, said, of course, I can't grant immunity for the other cases you have testified for or on. And, of course, she has other cases which are coming up. The Solicitor himself is the one who has intimidated this witness.

THE COURT: Well, I –

MR. GODFREY: Under *Lanzetta v. New Jersey*, 306 U.S. 451, a 1939 case, it says that no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. If the Solicitor was going to raise such an issue as this, it appears it should have been raised pre-trial and not during voir dire. But what he has done now is chill the Doctor's ability to testify, which was exactly his intent.

THE COURT: Well, I –

MR. GODFREY: It's a violation of due process.

THE COURT: Well, that's your inference. I don't know if it was or not. And I can't read his mind. But I don't know how there's a how her conduct in these other cases, and I'm not talking about the pending cases, but I'm talking about the ones where she's already testified, how anything she does, in this case, would have anything to do with a Fifth Amendment privilege in those cases. How could she violate by her testimony in this case, which she has been given –

Is that the complete full immunity, Solicitor?

MR. ARIAIL: Yes, sir.

THE COURT: She has no Fifth Amendment privilege here now.

MR. GODFREY: If she has complete full immunity, I agree she has no Fifth Amendment privilege in this particular case

THE COURT: Correct.

MR. GODFREY: The Solicitor –

THE COURT: So how does her testimony in this case – because I know where this is going. We all do.

How does her testimony in this case implicate her in any way in a penal nature in cases where she has already testified and she is finished?

MR. GODFREY: She has been placed on notice by Solicitor Ariail that this statute exists, and there is [sic] penalties to the statute. And, clearly, I think he did that to intimidate and hinder her testimony.

Now, the fact that that is in the back of her mind Judge, she has testified before that this issue has not been raised at previous hearings.

THE COURT: Well, she said it was raised at one and then put to rest and, apparently, didn't rise to the level that this one has.

MR. GODFREY: But in the back of her mind, from my conversation with her, she is afraid and she is fearful that she could now be indicted in other counties for the work that she has done and for being qualified as an expert in giving her opinion in court as she has done.

THE COURT: All right.

MR. GODFREY: And also, Judge, obviously, the Attorney General can prosecute in any county in the State.

THE COURT: Well, they work for the same state and he has granted immunity. He speaks on behalf of the State. So I believe the immunity would extend to any prosecution the Attorney General might initiate. But, Dr. Loring, I'm sorry you're caught in the middle of all this.

THE WITNESS: Me, too. I'm sorry, Your Honor.

R. 336-42.

The trial judge took another recess to conduct research. The trial judge also asked Dr. Loring to consult further with her attorney. After the recess, the following occurred:

THE COURT: Okay. Dr. Loring, how are you?

THE WITNESS: Full of sorrow.

THE COURT: Full of sorrow?

THE WITNESS: Full of sorrow.

THE COURT: And why is that?

THE WITNESS: Because, Your Honor, with the knowledge that there are people that have come a long way that need to get home, I must, upon advice of counsel, tell you that I cannot testify.

THE COURT: On what grounds?

THE WITNESS: I'm advised that I have been threatened in regard to subsequent – previous cases, and that to testify when I'm told that I would be in violation of criminal statute would affect my professional reputation in other cases – in other jurisdictions in which I'm involved currently.

R. 362.

THE COURT: All right. Well, I'm going to ask you to rethink that. And I am going to tell you that you have immunity in this case. And insofar as I am able to, I am granting you immunity in all your prior cases that you've testified in this state. I do not believe that the statute cited by the Solicitor is intended to prevent the testimony that you are – have been hired to present in court today.

I rely as well on the Chief Justice's order #2006-08-24-01, which is not, specifically, on point, but it is of the same flavor. It relates to an act – Act #385 of 2006, ratified by the South Carolina Legislature and became effective on June 9th, 2006, which had to do with the licensing of physicians and other medical personnel. This Court – well, it's, actually, signed by all the members of the Court at that time, and makes it very clear that the South Carolina Constitution vests this Court with the authority to make rules governing the administration of the unified court system, and in order to prevent a significant impairment to the Court's duty to properly administer the judicial power of South Carolina, and pursuant to Article 5, Section 4's authority of the South Carolina Constitution, we hereby temporarily delay judicial enforcement of that act insofar as it requires an out-of-state physician to obtain a license to practice medicine in South Carolina before offering expert medical testimony.

I believe that the Supreme Court, had they been asked to do so, would have issued the same order in this case or in this – with respect to this statute. You have been hired to perform a job. Mr. Inman is indigent, which means that the State of South Carolina is paying your bill. And if I had believed that you were not –

And I believe I'm the one that signed the *ex parte* funding order, am I not, #11?

MR. BANNISTER: You are, Your Honor.

THE COURT: I would not have signed an *ex parte* funding order had I thought your testimony was inappropriate or illegal.

So I don't believe – your testimony today would not effect what's happened prior to today. You are – you have no Fifth Amendment privilege to assert in this case, because you have immunity from the Prosecutor and from me. And while it may not be a generally recognized – judicial immunity may not be generally recognized in South Carolina, I think the fact that I'm putting it out there would carry some weight.

So I will allow you to step down and confer with your attorney. I do not believe you have a you're here under the subpoena power of the State. I do not believe you have a lawful ground to refuse to testify. But I want you to feel comfortable about it. And I want you to go talk to your attorney.

Mr. Bannister, do you have another witness?

You can step down, ma'am. Please go think about it and talk about it.

Mr. Bannister.

MR. BANNISTER: I do have another witness, Your Honor. But I also – I guess depending on where we are after she finishes conferring with her attorney, I have a motion. It's – there are two different analyses that would apply –

THE COURT: Wait. Let Dr. Loring get down.
MR. BANNISTER: Yes, sir.

(Pause.)

THE COURT: All right. Mr. Bannister.

MR. BANNISTER: I need – I think I am entitled to hear the Solicitor state for the record whether or not he does, in fact, believe the statute he raised to you implicates criminal conduct on behalf of the Defendant. Because depending on where he falls with that would depend on how the analysis is conducted from the motion I intend to make.

THE COURT: I'm sorry?

MR. BANNISTER: The Solicitor has represented to the Court that Dr. Loring had committed a criminal act pursuant to the statute he cited when he was conducting the voir dire. He set her up by saying, Did you come to South Carolina and did you interview anybody, knowing that she would have interviewed the Defendant and knowing that he would have been inside this circuit. He then asserted that that was subject to criminal violations pursuant to the statute that he cited to Section 44 – or whatever he said exactly.

So I want to know, does he – and, of course, he has now granted immunity for that. So I want to know, on the record, does he believe that that statute implicates the conduct she did?

THE COURT: Well, I don't know that I can be required to require him to answer that question.

MR. BANNISTER: Well, then I need to call him as a witness. Because it is –

THE COURT: No, sir. I'm not going to allow that. No, sir.

MR. BANNISTER: Okay.

THE COURT: Any other motions?

MR. BANNISTER: I do, if you're ready to hear them now.

THE COURT: Yes.

MR. BANNISTER: I think probably we ought to wait and see what Dr. Loring, ultimately, says to us. So I'm prepared to go forward. I believe Dr. Tournay is here.

THE COURT: Well, just hang on. I don't know if you need to confer with her attorney, but I don't believe there is any legal ground for her to come here and refuse to testify. And if she comes up here and refuses to testify, then I'll have to take the next step, so.

MR. BANNISTER: Let me be clear. Are you – is the Court instructing me to convey that to Mr. Godfrey?

THE COURT: No, sir. I'm asking you to talk to him and find out if there's a legal ground, Mr. Bannister. This lady, we've hired her – I don't know when I signed the order. This has been going on for a long time.

MR. BANNISTER: It has.

THE COURT: This is a tempest in a teapot. There is no issue here. Okay.

MR. BANNISTER: Judge, don't look at me for having raised it.

THE COURT: Wait a minute. I'm not casting stones. But there is no issue here.

And for us to go through this this would not overturn the adjudication of guilt if I were to grant the mistrial, which I presume the motion will come for that. We'd go through the same thing again and –

MR. BANNISTER: I couldn't agree with you more. And that's why I said in the beginning – I'm the one that offered to say, hey, look, the Solicitor needs to grant her immunity so we can put this red herring to rest. I didn't raise it. And, Judge, I just don't think it's fair

THE COURT: Well, you can deal with that in another forum at a later time, if you think that's appropriate. But, right now, I want to see this case move forward in an orderly fashion

MR. BANNISTER: And I want to – there's no – well, I'm, certainly, among the people that want to see this case resolved this week. I didn't inject this issue into

the case. We would be finishing probably by 3:00 or 4:00 this afternoon but for the Solicitor's comments.

THE COURT: All right. Well, we're going to – we will break. And I'll tell you what, it's noon, so we'll break for lunch. We'll come back at 2:00.

MR. BANNISTER: Thank you.

THE COURT: And I want – over that period of time, if anybody has got any notions or ideas or understanding – has any authority, based on what I've said, that would allow her to refuse to testify, please, let me know about it.
MR. BANNISTER: Your Honor, may – she is still, currently, under oath and still a witness. But with relation to this particular issue, do I have permission to speak with her, if she would be willing to speak with me?

THE COURT: Yes, you do. I give that to you. We hadn't even gotten her qualified as an expert before this came up. You can talk to her about it. There would be no prejudice or harm to anybody by doing that.

MR. BANNISTER: Thank you.

R. 342-50.

Trial counsel presented the testimony of Claude Tournay, James Aiken, Denise, Baker, and Reverend David Michael Hensley, which was summarized above, before returning to the issue of whether Dr. Loring would testify. Trial counsel moved for a mistrial, citing *Williams* and *State v. Needs*, 333 S.C. 134, 508 S.E.2d 857 (1998), *holding modified on other grounds by* State v. Cherry, 361 S.C. 588, 606 S.E.2d 475 (2004), "which says that a Prosecutor may not lob baseless threats or charges at a potential witness." Trial counsel and the trial judge summarized the events involving Dr. Loring invoking her Fifth Amendment rights, and then the following transpired:

MR. BANNISTER: Well, I'm requesting a mistrial at this point. Because I believe the proceedings have been tainted to such an extent that we cannot get a fair trial whether she were to take the stand and either waive her Fifth Amendment privilege at this point, be told that she didn't have one, or be forced to testify under the contempt sanctions of the Court. I believe, at this point, it's risen to the level that no matter where we go from this point, she will have concerns about whether her testimony will impact her reputation at a minimum, whether it's a reportable offense on her malpractice, whether or not it would

implicate her license in Georgia, whether or not it would implicate the conduct that – in conducting herself to be prepared as a witness. She interviewed witnesses in Tennessee and spoke with some in Michigan. Tennessee, in particular, would be the exact same jurisdiction of the two law enforcement officers who testified here in this court on behalf of the Solicitor for this case. I think it should be noted for the record that those concerns would be valid ones. Finally, I would say, Judge, that I need to go through, at least, a number of different issues that I think are applicable in terms of what the law is that's governing where we are at this point. I believe

THE COURT: Well –

MR. BANNISTER: Because what you've got to decide is whether or not there's been a governmental interference, whether or not it's been substantial, and whether or not it has prejudiced the Defendant.

THE COURT: No, sir. I don't have to make that decision.

MR. BANNISTER: I disagree, Your Honor.

THE COURT: Well, you can bring that up with a higher court at a later date. The decision I have to make is how we proceed today. And I see three possible alternatives. I don't know if Dr. Loring has had a change of heart. And I requested one of the brightest minds I know to come speak with her today. I don't think that that has occurred. But he came and offered his services. I can require this case go forward without her testimony, which I believe would then result in a – the Supreme Court sending it right back. And we would have a do-over. I could declare the mistrial that you want, or I could continue this case, remove Dr. Loring as a potential witness, and ask you all to obtain a new social historian expert and give you as much time as you need.

MR. BANNISTER: Well, Your Honor, obviously, that's a difficult choice to make. And I need to make my record before you make your choice.

THE COURT: Okay.

MR. BANNISTER: Because I think some of the things that I am going to say impact which of those decisions you have to make.

THE COURT: All right. Go ahead.

MR. BANNISTER: I believe, if it's a mistrial, it would be based on prosecutorial misconduct. And I want to be clear here that I think that implicates at a minimum and I'm talking about Federal Constitutional law the Defendant's Fourteenth Amendment to due process. I believe it implicates the Defendant's Fourteenth and Sixth Amendment rights to present a full and complete defense, specifically,

that would be the due process clause of the Fourteenth Amendment confrontation clause and the compulsory process clause of the Sixth Amendment. I believe that this issue now implicates his Sixth Amendment right to have competent counsel represent him. And I believe it implicates his Eighth Amendment right to present a full and fair presentation of mitigation in this case. Here is the case law that I base that on, Your Honor. First off, it would be *State v. Williams*, as I said before, and *State v. Needs*. I, also, would cite, too, *State v. Quattlebaum*, that's 527, SE2nd 105, which states that deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice. So one of the areas of inquiry that I need in order to – that we need in order to determine whether or not there's been prosecutorial misconduct in this case is a number of things. For one thing, the issue that the Solicitor raised about the criminality of the statute with a witness on the stand who wasn't licensed in the state is an issue that he raised before in the case of *State v. Michael Laney*. That issue was dealt with in that case. There's a transcript of that record. I believe that that transcript needs to be put into evidence, in this case, a evidence of the fact that the Solicitor knew that this issue existed, had already been brought to task on this issue, and we need to see what was the ultimate adjudication of this issue. Because I don't know for certain, but I believe he was required to formally withdraw the motion. Second, I need a transcript of the testimony and the – of Dr. Loring which was taken in the *State v. Cockman* case, another death penalty case, where this Solicitor interviewed – cross-examined Dr. Loring and this issue was not raised. In that case, the jury asked to review Dr. Loring's testimony on two different occasions. That's my information. I represent that to the Court upon information and belief. But I need the transcript of those two proceedings. Because I believe that that would be evidence of the intent that goes to whether or not it was misconduct here. In other words, he didn't want Dr. Loring to testify because he was afraid of what she would say. And so he took this tactic in order to prevent her from being able to testify or to intimidate her.

Your Honor, I, also, would like to point out that, currently, South Carolina has adopted the ABA guidelines, that's in *State v. Council* or *Council v. State*, I forget, and, also, the ABA standards. The ABA standard for solicitors, which can be found at 3-5.7, requires fair treatment of witnesses. And what it says is even if the assertion of a legal position is arguably correct, for the Solicitor to use that legal position to intimidate a witness or attempt to chill their testimony would be unethical. And whether it is or is not isn't for me to say at this point. But I'm telling you that that's the backdrop by which you should judge whether or not this prosecutorial misconduct rises to the level that would necessitate a mistrial. Furthermore, there's Rule 8.4 of the South Carolina Ethics. And in the Comment there, it says that a pattern of repeated offenses, even ones of minor significance, when considered separately can indicate an indifference to legal obligation. That applies, specifically, to those lawyers who hold public office. Furthermore, at Comment 3.8 – or that may be – actually, Comment 8.4 is the one that deals with separate instances that can be considered together. That's why I say we need the evidence from the Laney case and the evidence from the *Cockman* case to be able

to support our foundation for the prosecutorial misconduct. I have been in touch today with a former solicitor and assistant solicitor who have indicated that they would be willing, if given the chance to review the documents, to come in and potentially testify as to whether or not the Solicitor, in his attempts with Dr. Loring to bring up criminal conduct, has violated his standards as a prosecutor. As you know, Your Honor, under [Rule] 3.8, the Solicitor is held to a much higher level of ethical consideration. Your Honor, if, as I believe it might be found, that conduct in here rose to the level that would indicate that he had violated those rules of ethics, then he has intimidated a witness. South Carolina Code Section 16-9-340 says that it is unlawful for any person to attempt to intimidate a witness. That's a felony of up to 10 years. I believe that that situation alone, in addition to requiring a mistrial, or, at least, the opportunity for me to develop the record to put forward what I think would be a very kosher argument that should be a mistrial, puts the Solicitor in a position where he needs to be recused from this case. Because if I'm correct, then he has got some problems. And that gives him a different mode than just being the Solicitor. He has no longer becoming an advocate for the State. He is now moving into having to advocate for himself to extricate himself from this problem. Your Honor, I, also, believe that the law regarding the duties of lawyers to have knowledge and research the law is implicated. I have a number of cases that I want to cite that deal with a lawyer's duty to know the law. And this is – forgive me, but it's a number of cites, so let me read through them. *Kempf v. Magiba*, 37 AD3d 763, an attorney may be liable for legal malpractice when he fails to conduct adequate legal research.

THE COURT: What's your cite on that?

MR. BANNISTER: 37 AD3d 763. *Clary v. Lite Machines Corporation*, 850 NE2d 423. That's failure to research an issue is the proper subject of legal malpractice. *Jerry's Enterprises v. Larkin Hoffman*, 711 N.W. 2d 811, an attorney failed to perform the minimal research that an ordinarily prudent attorney would do in a similar situation satisfied the element of conduct beneath the generally accepted standard of care. Your Honor, I'll just read the cites for the remainder of the cases, but they stand for the basic proposition that I'm putting forth.

THE COURT: Do you have anything from South Carolina or Fourth Circuit?

MR. BANNISTER: I don't have anything from South Carolina.

THE COURT: Fifth Circuit?

MR. BANNISTER: Let me see. Well, I'll just give you the key cite, there are a number of cases that fall under this. It's 45 K 112.50. You can pull up every case that deals with this issue in the United States. Your Honor, we need an inquiry into the Solicitor's conduct in this matter because the issue got raised, I don't know how many months ago, in *Laney*. So he was, at least, on notice, at that

point, that this issue might not be, in fact, a valid one. Some of the issues that I'm raising are exactly the same ones that got raised in that case.

So we need an answer as to why that issue wasn't researched between then and when we came to court now. We need to know why when he understood that Dr. Loring was going to be testifying, which would have, to my recollection, been Tuesday, when he raised the objection to her testimony, why wasn't this issue brought up at pre-trial? That, also, is part of the ethical requirements under the ABA standards for the administration of justice and solicitors to bring that up pre-trial before those issues would come forward at the case. Your Honor, we would, also, need to know what research he did after Dr. Loring testified. I point out, again, in less than half a day, Your Honor was able to pull up two citations that showed that this issue was factious, at best. Your Honor, I would to know – I would like for the record to reflect what authority did he have to make that assertion in the first place, aside from the statute he quoted to you, which I quoted to you contained an exemption that should have applied to Dr. Loring. Your Honor, I would seek, at least, a continuance before you make a ruling on the motion for a mistrial to be able to present that evidence to you. It's a necessary element for the Court's determination of prosecutorial misconduct. And we need to have that inquiry if you're going to be able to make an intelligent decision about whether the prosecutorial misconduct rose to that level. Actually, whether it was prosecutorial misconduct at all, but then whether it rose to the level of being intentional. Your Honor, the prejudice my client has suffered, at this point, is that we believe that there has already been placed in the Court's mind a doubt about the strength of the testimony and/or the credibility of our witness.

THE COURT: What do you base that on?

MR. BANNISTER: Well, there have been like comments made about whether or not she really has been chilled. There's been comments to her, in particular, about whether or not she could, in fact, assert the Fifth, and whether or not she needed to just go ahead and suck it up and testify. Those are my words, obviously. Your Honor, we believe this conduct has Unconstitutionally chilled the witness's ability to present this critical ,testimony on behalf of my client in an unfettered manner free of the restraint of fear and intimidation. I've listed the ones that – I believe I've already listed regarding the license for malpractice, her professional reputation, the other two states where she's conducted –

THE COURT: What are you relying on? What are you quoting from when you

MR. BANNISTER: I'm sorry?

THE COURT: What did you just quote from, Mr. Bannister?

MR. BANNISTER: I'm just reading you my notes so I don't lose my place.

THE COURT: Okay.

MR. BANNISTER: She has – I assume that she has malpractice liability. She is, certainly, licensed in Georgia. That was one of the things she testified to. We know now that she's conducted interviews not only in South Carolina, but in, at least, two other states. And, Your Honor, the Solicitor made it clear on the record that while he can grant immunity for here, he can't grant immunity for the other circuits. I can't remember whether he mentioned, also, the Attorney General or not. I just – I don't recall. In any event, the relief I would request, initially, would be a continuance so that we can perfect the record on this issue regarding misconduct. I believe it has, perhaps, already risen to the level of a mistrial. I, furthermore, would ask the Court to recuse the Solicitor from this case, and for us to develop some system by which we can put on the record what exactly was going on that caused this issue to be raised in the first place, what information he had, when he had it, and how he arrived at that conclusion. I would, furthermore, ask you to set aside the notice of the death penalty and implement a life without parole sentence in light of the fact that – of the conduct we believe is intentional. Thank you.

THE COURT: All right. Mr. Ariail.

MR. ARIAIL: I think the first place we've got to start is where Your Honor went, and that is that we have to find out if Dr. Loring will testify. Secondly, I believe if she refuses to testify – you have already concluded she doesn't have a Fifth Amendment basis to not testify. We need to determine what it is, specifically, that is the reason she doesn't want to testify. If those reasons are not related to something involving this case, but involves something outside of this case, then, obviously, it would have no relevance to what we're talking about. So the issue that would be presented would be different. She would then be making a choice based on something that's unrelated to this case. And I think that's critical that we find out where she is and what the basis is of her reason for not testifying. Because if she's concerned about her license in Georgia being impacted by something she did, in addition to your continuance, there's also a very simple way that all of this could have been cured probably in the last 12 hours. And that is to simply comply with the code section that he cited and notify the Board that she is here in South Carolina and going to testify, and it is an emergency situation, and she's worked on this case. And, therefore, she would have complied with the statute and this tempest in a teapot would be over. So I submit to the Court that if you want to continue the case, she can become a licensed witness with a simple phone call under this code section he cited. So when he has talking about my not doing the research, I guess we have to go back, what are we really trying to create here? I think what we want to create – or what the goal should be is to preserve as much of the trial as possible, and to proceed forward in an orderly fashion. Dr. Loring does not have any concern regarding prosecution. She's been given immunity. If she's got other concerns, we need to find them out. But I think before we get into all this other attempt to deal with issues of prosecutorial

misconduct and what I knew, I would like to point out one thing I think we've all forgotten is that when I handed – we were in a situation of voir dire. Was she qualified? And I handed the Court the licensing statute that dealt with a practicing social – a licensed social worker, clinical social worker. The purpose of handing that statute to the Court was for the Court to determine, as other courts have determined, whether or not that licensing requirement was such that would require that this person is a licensed social worker and be licensed prior to testifying. Now, the engineering case you found later may in some way be relevant to that, but it's not, specifically, on point. And social work is a vastly different area. But, be that as it may, the purpose in handing the statute up was to enlighten you as to that statute, which I felt you probably weren't aware of. And, number two, it was to advise you that it had similar criminal penalty provisions that designated the significance the legislature placed on this licensing requirement. Now, I never addressed the witness regarding civil and criminal penalty. That was to you. Now, what came later was that Mr. Bannister raised the issue that now we've got to have immunity. Now, we've had a threat. Now, we have this. I have never threatened her. I have never even moved to indict her, even though, theoretically, she would have violated the statute from a prior case. So to raise this is truly a red herring and is moving to undermine –

(Pause.)

THE COURT: I'm sorry to interrupt.

MR. ARIAIL: That's all right. It's moving to undermine this case that really doesn't need to be undermined. We can have a short continuance, get her a license by having her apply, have her testify, and we're all back in the same place we were before. Or, secondly, if you want to, you can continue it. Or, third, if you deem it appropriate, because the delay is going to be too long, you can declare a mistrial. And we'll all come back and do the same thing over again at a later date, which would be a judicial waste of time. But Your Honor, I believe, can solve the problem.

THE COURT: All right. Anything else?

MR. BANNISTER: Your Honor, I, again, move for a mistrial at this point. If it's as easy as the Solicitor says and that I should have realized that Dr. Loring needed to simply make a phone call in order to resolve this issue and I should have read that, then the fact that we are where we are implicates my client's Sixth Amendment right to have effective counsel. Thank you.

THE COURT: Well, the first thing we need to find out is Dr. Loring's position with respect to testimony this morning.

Are you going to call her as a witness?

MR. GODFREY: May it please the Court?

THE COURT: Yes, sir.

MR. GODFREY: I have been acting as Dr. Loring's attorney since yesterday. And I have talked to Dr. Loring this morning. And I know exactly what her position is, and she has asked me to relay it to the Court at the appropriate time. Dr. Loring does not see this as a tempest in a teapot. Dr. Loring sees this as a major storm. Dr. Loring was sitting in the stand up there when the Solicitor gave you the statute and then talked about the criminal penalties. Dr. Loring is extremely upset about testifying in this case. She is, also, heartbroken about not testifying in this case. Basically, her position is she – if she testifies here, she testifies in South Carolina and she is a licensed social worker in the State of Georgia. She was put on notice by the Solicitor – whether he wants to say he was talking to you or whether he was talking to her, she was put on notice that this Solicitor believes that she is violating a criminal statute when she testifies. And this Solicitor then talked about the criminal penalties. She was sitting on the stand and she heard that. It was very upsetting to her.

HE COURT: Mr. Godfrey, we don't need to go through the whole thing again. Is she going to testify?

MR. GODFREY: No, sir. She's going to take the Fifth Amendment.

THE COURT: The Fifth Amendment. And how does she think she has the right to claim the Fifth Amendment when she's been granted immunity from prosecution?

MR. GODFREY: She's been granted immunity on this particular case. She has testified in other cases in this state. There is no statute of limitations. She has interviewed witnesses in this particular case in two other states. No one has been able to assure her that there are not similar laws in those other two states. She is licensed in Georgia. And if she – the questions that she has to answer each year, if anything of a criminal nature or quasi criminal nature comes up, she has to respond. It could have an impact on her license in Georgia.

THE COURT: That is not a Fifth Amendment issue.

MR. GODFREY: If it leads to criminal sanctions for her in Georgia if she testifies here –

THE COURT: You're talking about an administrative licensing statute.

MR. GODFREY: She's interviewed witnesses in two other states. And the other states

THE COURT: Well, Mr. Godfrey, in that regard, the damage or the criminal act is consummated. Whether or not she testifies here or not does not excuse – if she doesn't testify, it doesn't excuse what she did if she violated the law in those other states and they want to prosecute her. So I don't see a Fifth Amendment – I don't see that she can avail herself under the Fifth Amendment protection.

MR. GODFREY: I understand your ruling, but we still assert that position. Also, this, obviously, has an impact on her ability to testify.

THE COURT: Did you – I guess nobody has, actually, looked at 40-63-130. All right. Thank you. Well, that answers that, Mr. Bannister.

MR. ARIAIL: Your Honor, I believe she has to assert her Fifth Amendment. I don't believe she can do it –

THE COURT: Well, I can drag her out here. And I don't think that's going to serve any purpose. And I am not sure how I am going to deal with Dr. Loring. She is a subpoenaed witness and has refused to testify. So that's something I'll have to consider. But I'm not going. to make that decision right now.

Yes, sir, Mr. Bannister.

MR. BANNISTER: I think, at this point, I need to renew my motion for a mistrial.

THE COURT: I know. I know. I haven't ruled on it yet.

MR. BANNISTER: I know.

THE COURT: One thing I want to say is that in no form or fashion would what we're talking about today cause you to be violative of the *Strickland* standards. Now, I don't know about anything else. But you are certainly, not incompetent for the issues you have raised today and the way you've done it. So I just – and I'll rule right now, although it can be raised later in another proceeding if that becomes necessary. But for purposes of this, where we stand today, that is not even on the table. I do not believe that this – there's no jury here. I have copious notes. And, fortunately, I have one of the best court reporters in the State. I will have access to all the evidence that has been presented up to this time. I'm not going to grant your mistrial. I'm going to continue the case. I would instruct counsel to seek another social historian so that Dr. Loring will never have to deal with this case again. And I can't tell you how long we're going to continue the case. But – and I will allow you if you have other materials that you want to put into the record to support your position, that's entirely up to you. Okay.

MR. BANNISTER: Thank you, Your Honor.

THE COURT: All right. Is there anything else?

MR. BANNISTER: Not at this point, Your Honor.

THE COURT: That anybody can think of?

(There was no response.)

THE COURT: Solicitor, anything?

MR. ARIAIL: No, Your Honor.

THE COURT: All right. Well, we'll just have to – Mr. Bannister?

MR. BANNISTER: Nothing.

THE COURT: Okay. You just – I would ask you to inquire into well, let me ask you this. I think part of your – I want to give you the opportunity – well, I wouldn't rule that Dr. Loring is completely out of the case.

MR. BANNISTER: No. And I would ask you not to. I understand we've got a variety of things we have to hash out legally from this point forward.

THE COURT: She can – well, you look into that. But I don't know how long it's going to take. But if you determine or she determines that she doesn't want to participate any longer, I'll give you an opportunity to show how you've been prejudiced by not having her, in particular, if that's what you want to do. I want to give you that opportunity. I'm sure there are many, many qualified, highly qualified persons that can perform the same job that Dr. Loring has done so far. Okay. All right. Stay in touch with me and let me know when I need to set aside some more time to resolve the rest of the case.

MR. BANNISTER: Okay.

THE COURT: We're adjourned.

R. 411-35.

E. Out-of-State Subpoena for Dr. Loring.

The Solicitor petitioned for the trial judge to declare Dr. Loring a material witness and to initiate the process for an out-of-state subpoena on April 1, 2009. R.446. Mr. Godfrey filed a return on behalf of Dr. Loring. R. 446. The trial judge convened a hearing on April 14, 2009.

Mr. Godfrey argued Dr. Loring was not a material witness because other people could provide similar testimony, reminding the trial court continued the case so trial counsel could determine whether Dr. Loring was willing to participate or, if not, then to obtain a qualified expert to replace her. Mr. Godfrey argued:

> Subsequent to the September hearing, Mr. Bannister did in fact meet with or talk with Dr. Marti Loring. And she was still very concerned about the potential legal problems. And because of that, Judge, she was released from the defense team. She is no longer a defense expert. And it's my understanding, although I don't know who it is, but it's my understanding that another social historian has been retained by the defense. I have an affidavit in this package from Dr. Loring indicating that she is not going to be testifying. I have an affidavit from Mr. Bannister, and of course he's present here in the courtroom, advising that he is not going to call her as a witness.
>
> Judge, I don't believe the State has the right to subpoena Dr. Marti Loring because she was formally a defense expert. I think it's a violation of legal standards that we practice under and discovery rules that we practice under. And, in fact, if she was subpoenaed as a witness, I can't even imagine what Solicitor Ariail's questions would be of Dr. Loring. I can't even imagine what his first question would be. Judge, this lady felt intimidated and she felt threatened based on the comments that she heard in the courtroom. She asserted the Fifth Amendment privilege, which Solicitor Ariail granted immunity in this district.

R. 1023-25.

Mr. Godfrey and the trial judge discussed whether Dr. Loring could assert her Fifth Amendment rights. When Mr. Godfrey re-asserted his position that Dr. Loring is not a material witness, the following exchange occurred between the Solicitor and the trial judge:

> MR. ARIAIL; Your Honor, I think it begs the question to say she's not a material witness. She is a material witness. She testified – she's on the record that she had knowledge of mitigation evidence and that it was relevant in the sentencing phase and she wanted to tell the truth about this defendant. She's got relevant information. And until and as such time as her presence is not needed, she is material.
>
> THE COURT: Well what about Mr. Bannister's affidavit that he's not going to call her?
>
> MR. ARIAIL: Does not render her not material.

THE COURT: Well we don't know what other experts he may have hired, who may have material evidence, who he's not going to call.

MR. ARIAIL: That is correct. And also, I don't know that he's going to call somebody that would not fill the role that she was originally hired to fill. And if—

THE COURT: Well it may be that Mr. Bannister has made a strategic decision that he doesn't need a social historian.
MR. ARIAIL: Could be. And when that develops, it may render the need for her being a material witness and to be present, it may render unnecessary. But until that happens, I believe that both the Court – well primarily the Court ought to have, in the fact finding role that you are in, this witness available to you in the event that she is needed and the Court deems her to be needed. And that's why I took the action.

R. 1025-29.

Mr. Godfrey informed the Court:

Dr. Loring, after her conversation with Mr. Bannister, wanted to be off this case. She has not done anything on it. She has not looked at it. She hasn't had any conversations with the defense team since sometime in late September, early October.

R. 1032.

Trial counsel pointed out the trial judge approved funding for an expert to replace Dr. Loring. Trial counsel then pointed out:

I have another expert. Whether or not she will be sufficient or whether or not she can do what Dr. Loring [is capable of doing] remains to be seen. But what I do know standing here today, having talked with her yesterday, is that there is no way that she is going to be prepared to go forward on the 20th. And so I felt like it was incumbent upon me to let the Court know that.

R. 1033-34.

The trial judge ruled:

[T]his case was continued in September, around the 14th. That's seven months. So I suspect – and this date has been set by agreement of everybody. And we're going forward on Monday. I am not going to withdraw my certification of this subpoena. It may be that she becomes – she's going to have to fight that fight in Georgia.

R. 1034.

E. Sentencing Hearing Reconvenes: April 20-22, 2009.

The trial judge re-convened Mr. Inmon's sentencing hearing on April 20, 2009. Dr. Loring was present with counsel and moved to be released from her subpoena. Mr. Godfrey explained:

> I filed a motion requesting that Dr. Loring be immediately released as a witness in this case or, also, ask for alternative relief.[11]
>
> Solicitor Ariail filed a petition for – subpoena of an out-of-state witness on April 1st, requesting that the Court certify that Dr. Loring should attend the trial here in Pickens. We had a hearing on that on April the 14th. At that time, the Court found that she was a necessary material witness and declined to withdraw the certification of the South Carolina subpoena.
>
> Judge, on April 16th, Dr. Marti Loring was working. When she returned to her home – she was taken home by someone else. When she returned home, she went through the front door, which she normally does not go through since her garage is in the back. When she got to the front door, she found sticking in the door a rule nisi requiring her to appear in Court on April the 16th, at 3:00 p.m. Obviously, she couldn't appear in Atlanta at 3:00 p.m. and state why she could not or should not come to Pickens County because she never, actually, received notice.
>
> She called me at about 8:21 and advised me as to what she had found. And she left the house for a little while. When she came back, she discovered that people had been pounding on her door saying that they had a warrant for her arrest. She called me again.
>
> Judge, at that point, I went back to the office and called your residence and spoke with you about this. The next day, on April – well, that night, I should say, in the morning at about 12:15 a.m., the Court sent an e-mail to both sides, and a copy to me, regarding this matter and advising that Dr. Loring would be present today.
>
> The next day, on April 17th, Dr. Loring continued to receive phone calls about where she was and about being arrested. Finally, Judge, we contacted an attorney in Atlanta, who then contacted the District Attorney's Office and provided them with a copy of your e-mail.

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[11] *See also* Motion for Release of Witness and Related Relief dated April 2, 2009. Applicant's Exhibit 27.

At that point in time, the District Attorney's Office indicated that they would, in their terms, stand down on the warrant and would not serve it, as long as Dr. Marti Loring appeared in Pickens County today. And they further requested that somebody from the Court system advise them whether she did or not, because the warrant was still active.

Based on the e-mail and based on the – based on your e-mail in which it was, clearly, indicated that Dr. Loring was going to be here, it is obvious that neither Solicitor Ariail, nor anyone else in the Thirteenth Circuit Solicitor's Office, contacted the District Attorney's Office in Atlanta or the Court to tell them to withdraw the request. Dr. Loring was walking around Atlanta where she lives and where she works scared to death.

I had intended to go to Atlanta to fight this particular subpoena in Atlanta in Superior Court there. We did not receive notice. There is no possible way that sticking a notice in a door is effective service. And, also, the timing of this thing is absolutely incredible. The rule nisi was signed by the Georgia judge on April 15, 2009, at 2:20 p.m., and it was clocked for record on April 16th, 2009, at what appears to be 10:12 a.m.

The order directing witness into custody to determine material witness status in the state of South Carolina was signed by the Georgia judge on April 16, and clocked for record at what appears to be 10:12 in the morning.

The affidavit of Don Geary, Chief Assistant District Attorney, he put in his affidavit that he received proper paperwork from Solicitor Ariail on April the 15th, requesting that Dr. Loring be a witness in Pickens County. That document was clocked on April 16, at what appears to be 2:13 p.m.

Judge, I contacted an investigator in Atlanta. And I asked her to go by the Clerk of Court's Office and copy all of the paperwork in the Court file regarding Dr. Marti Loring. And I have included that as an attachment so the Court can, clearly, see what was in the Court file in Atlanta. What is missing is any affidavit of personal service or any affidavit saying that they attempted to serve it. Notice requires that a person be given a legitimate time to know that they need to appear in Court. If one works every day and they're not at home and somebody sticks something in the door, that, clearly, is not effective notice.

Also, Judge, I would submit to the Court that if I, as a defense attorney, got a petition for an out-of-state witness and sent it to Atlanta, it would not be handled by the District Attorney's Office running around trying to get all the paperwork.

Judge, what has happened to Dr. Loring in Atlanta over the last few days is further intimidation of her. It has threatened her. She does not feel safe.

Judge, Solicitor Ariail had, at least, six months – or maybe not that long, because he did change his strategy on whether he wanted to have Dr. Loring testify or not from the September hearing. But he had a lot of time to get this done in an orderly fashion with notice to everybody. And that was not done.

It appears that the District Attorney's Office in Atlanta was used to facilitate this petition for an out-of-state witness, which I think is unusual and would not happen in the normal course. Judge, I believe this rises to a denial of Dr. Marti Loring's due process rights. And I believe it has impacted on her civil rights.

Now, at the trial in September – and this is just a continuation of the intimidation and threats. Solicitor Ariail stated to the Court, "I'm raising the issue of licensing for the purpose of voir dire. And that is as far as we've gotten. And whether or not I present an indictment against her is a totally separate issue." That's found at the partial transcript of record from September 10 and 11, at Page 116, Lines 17 through 19.

Judge, I would submit to the Court that any citizen who hears the chief solicitor – or the Solicitor say, "I may get an indictment against you" – are his exact words – "And whether or not I present an indictment against her is a totally separate issue" is a threatening statement. I believe that Solicitor Ariail has attempted to threaten and intimidate Dr. Loring to chill her testimony in this case. And that, clearly, impacts Dr. Loring's reputation. And although I don't represent Mr. Inman, it, clearly, implicates his due process rights.

Judge, if you do not release Dr. Loring as a witness in this case, it appears to me, and I would submit to the Court, that the actions of Solicitor Ariail are being rewarded and that he is getting what he wants.

The problem of Dr. Loring testifying at this hearing now is obvious. The Defense no longer has her on the Defense team. She has not talked to the Defense team since late September of 2008. She's had no follow-up visits with any of the people that she interviewed. She's had no follow-up visits with the family. She does not know what their current theory of the mitigation is. She has not reviewed her notes until this past weekend. And, frankly, she's sitting outside in the conference room reviewing notes again now.

Judge, I would submit that at the close of the September hearing on September 11th, the Court allowed Mr. Bannister, as lead counsel, to determine whether or not Dr. Loring should remain in this case. And it was determined that she would no longer be in the case. You advised, at that time, that a new social historian could be retained. And it's my understanding that a new social historian was retained.

> Judge, if you do not agree and order that Dr. Marti Loring can be released as a witness immediately, I would move in the alternative that any portion of this trial that requires Dr. Loring's testimony be suspended until I can properly do an investigation into what, actually, happened with this abuse of process in Georgia.
>
> I would further move for an order of discovery ordering the Solicitor's Office to provide me with cover letters or faxed transmissions of any correspondence regarding the petition for out-of-state witness that was sent to Georgia. I would request an order for a detailed telephone log from April 1 through April 20, 2009, of all outgoing and incoming calls from the Solicitor's Office to Georgia.
>
> And I would respectfully request an order to take depositions in a criminal case of the following people: Solicitor Robert Mills Ariail; Deputy Solicitor Betty Strom; John Tucker of the Thirteenth Circuit Solicitor's Office; Melita Graham of the Thirteenth Circuit Solicitor's Office; Don Geary, Chief Assistant District Attorney, DeKalb County, Georgia; Investigator Ben Norris of the District Attorney's Office, DeKalb County, Georgia; and the District Attorney of DeKalb County, Georgia.
>
> This is an extremely serious matter. My client has been frightened. She's been threatened. She's been intimidated. And although she is here today and is willing to testify, if the Court calls her as a witness, she is, clearly, scared. And I do not believe the State should be rewarded for their misconduct.

R. 446-53 (footnote added); *see also* Rule Nisi, Motion to Compel Out of State Witness, and Order Directing a Witness into Custody to Determine Material Witness Status in the State of South Carolina, R. 1054-56.

Trial counsel pointed out:

> Judge, I'm not sure how clear it is just how extraordinary these documents that have been filed in Georgia really are. You've got the hearing scheduled. That order is filed, along with the motion to compel Dr. Loring. And that order – that motion is file contemporaneously with the order requesting Dr. Loring to be taken into custody.
>
> So, in essence, the order setting the hearing was filed within 30 to 60 seconds of the order directing her to be taken into custody because she is, "a flight risk and is purposely avoiding service." Neither of which on the face of the documents could possibly be true since the documents requiring her to appear had only been filed within the exact same 60 seconds that the order setting the hearing was filed.

Furthermore, this took place less than five hours before the hearing was even scheduled. And, point of fact, Dr. Loring was not at or near her residence during the time period in question. So, from a factual standpoint, she simply was not a flight risk and, certainly, was not avoiding service of process.

The only place that the information relied upon by Don Geary, the Chief Assistant DA with DeKalb County, Georgia, could have come from that Dr. Loring was a flight risk, or that she was avoiding the service of process, had to be from the Solicitor's Office for the Thirteenth Circuit. There just was no other way that Don Geary could have come by that information within the 60 seconds between when the rule to show cause – or rule nisi was filed and the order was filed requiring Dr. Loring to be arrested.

Judge, that sequence of events in Georgia would go directly to the motion for prosecutorial misconduct and the mistrial that we requested orally on September the 11th, 2008. It would go to the level of misconduct that was inherent in our motion for mistrial on September 11th, 2008. It would go to the – as further evidence of the harassment and the intimidation of Dr. Loring, which is directly relevant to our motion pursuant to the double-jeopardy clause to have this case declared life without parole.

So we need one of two things for purposes of the Defendant's position. We either need an affirmative finding from the Court that the Solicitor's conduct was intentional, and that it was misconduct as it relates to what happened in Georgia, that it resulted in substantial interference with Dr. Loring's ability to testify, it makes her unavailable, and that his conduct was in direct violation of the Defendant's Fourteenth and Sixth Amendment due process rights and the Sixth Amendment compulsory process rights.

On the other hand, Your Honor, the Defendant has a right, on par with the State, to be allowed to have witnesses compelled to attend. Now, what has happened in this case is you've got this extraordinary set of circumstances that are happening in Georgia which, ultimately, have resulted in Dr. Loring being here as a witness today. The Defendant is entitled to, at least, that level of – I guess power would be the way to put it to have witnesses brought here.

And I think that the Court, in order to put the Defendant on equal par with what the Solicitor has done already, is going to have to be involved in getting some of these other witnesses from Georgia here. At a minimum, we need Don Geary. At a minimum, we need the deputy sheriffs, the investigators with DeKalb County, Georgia, who were there outside of Dr. Loring's house with lights going on and bull horn. We have information to suggest that, at one point, they were attempting to break down her front door, but were talked out of it by a neighbor.

> Your Honor, it is the – what has happened in Georgia is of such a critical nature for the Defendant and his claim for mistrial and, in particular, with his claim to his –

R. 453-56.

The trial judge inquired whether Mr. Inmon's rights had been prejudiced because counsel had made the decision not to call Dr. Loring regardless of whether she was present not present. Trial counsel explained making a record of the events in Georgia went to the decision to grant a mistrial, the level of the State's misconduct, and potential double jeopardy implications. Trial counsel then pointed out:

> The creation of the record of what happened is so critical for the Defendant, because regardless of whether the Court, at this stage, agrees or disagrees – well, I guess regardless if the Court doesn't agree with the Defendant's position, this issue, potentially, at every single stage of the proceedings, direct appeal, any new trial, habeas, wherever we are, this issue will come back. Because at this moment right now is when we believe the Court should declare the mistrial and impose life without parole.
>
> So the record that is going to follow this case needs to be established so that each reviewing authority or new trial judge will have the opportunity to see and make a determination if the proceedings should go forward another step. And that is why it is – it's absolutely critical that we have the ability to do that, or you make an affirmative finding, at this point, that misconduct has occurred, as I stated before.

R. 456-58.

The Solicitor relied on the affidavit of Don Geary to establish his office's lack of involvement in the events pertaining to Dr. Loring in Georgia and to support and allegation that Dr. Loring attempted to evade service. Trail counsel objected to the trial judge relying on this affidavit "without some sort of witness getting on the stand and testifying to that under oath." Trial counsel pointed out the contradiction between Mr. Geary's affidavit and the time stamps on the Georgia court filings:

[T]his affidavit submitted by Don Geary, under oath, apparently, which says, Judge Hunter, which appears to be the same judge on this order, issued a pick-up order for Dr. Loring at approximately 5:00 p.m. on April 16th, 2009. The two cannot be true at the same time. The order was issued at 10:00. Don Geary is trying to make it sound like we tried to serve it, and then we went and got the pick-up order. That's simply not true by virtue of the fact of the time stamp on the order.

So I object to this affidavit being used for any purposes of fact finding in this case.

R. 464.

The Solicitor had not provided Mr. Godfrey with Mr. Geary's affidavit. Mr. Godfrey explained:

I did not know this was here. They're claiming that Dr. Loring attempted to evade service.

Judge, on the 16th of April, she was, actually, with Laura Switzer, who is another investigator. They had been in Alabama. And Laura Switzer took her home. And that's when they found the note sticking in the door. She wasn't there. She couldn't have evaded service because we know what time the Judge signed the rule nisi.

When she got home, she saw it sticking in the door. The hearing had already occurred, if there was one. And, as far as the people at the door, it was her next door neighbors. She had left the house that night. It was her next door neighbors, when she got home, that told her that they had come beating on the door saying they had an arrest warrant. Had I known that such an affidavit from Don Geary existed, I, certainly, could have had witnesses here to support the motion.

R. 464-65.

The trial judge then stated:

Well, this all goes back to the voir dire of Dr. Loring by the Solicitor at the September hearing. And I want to say that in my comments after that, which resulted in this seven-month delay, I did not release her. I said she was here as a State's – at the – not as a State's witness, but at the behest of the State and that the State of South Carolina – not the prosecuting arm – had hired her. She had, as I ruled at that time, mistakenly and wrongfully claimed the Fifth Amendment. Mr. Ariail's comments about the licensing statute were wrong. You cannot claim the Fifth Amendment if there is no violation of the law.

So, at that point, my understanding, from Fourth Circuit law, is that it's up to the Judge, at that point, to instruct her as to that – the unavailability of the Fifth Amendment, which I believe I did, particularly, in light of the fact that she was granted immunity from the Prosecutor. And while I have no authority to do it, I gave her my immunity, too. But – and she continued to refuse to testify.

At that point, although I did not do it, I may have insinuated it, I think the McCloskey case indicates that I should have instructed her she would be facing contempt of Court. I, additionally, said in the transcript that, as I adjourned the hearing or continued it, I wanted to give the Defense the opportunity to go get another social historian. And I said that I wouldn't rule that Dr. Loring is completely out of the case. So I'm not sure that she's not still subject to the original subpoena issued in this case.

Now – and in my e-mail, which you've now made part of the record, I made it plain that who called – that the decision about what witnesses to present in Mr. Inman's mitigation defense was entirely up to the Defense team. And it would be and they would make those decisions unmolested from any other source, as long as the evidence offered was relevant and competent. And whether or not they want to call Dr. Loring as a witness in their case is up to them.

R. 466-67.

The trial judge asked trial counsel if they intended to call Dr. Loring. Trial counsel responded:

Judge, had the events that transpired on September 11th, 2008, never happened, she would have been our witness, and we were happy to have her do so.

In answering your question, I want to be clear. I believe that the – and it goes beyond her ability and whether she's right or wrong in asserting a Fifth Amendment privilege. I believe that the Solicitor's conduct on the 11th, coupled with what has happened since then, including what's happened down in Georgia, has put us in a position that on the record in this case, there's no way that she, as an expert witness, could testify in this case for this Defendant and reach the level that we needed to be at to be competent expert testimony for our Defendant.

So, at this point, no, we do not intend to call her. And I don't want her as a witness for that purpose. Whether or not she is a witness for any other purpose, I guess, remains to be seen as to how you intend to proceed.

R. 467-68.

After additional discussion with the trail judge, trial counsel called Dr. Loring "for the limited purposes of putting what we can on the record regarding what happened in Georgia." Thursday, April 16, 2009 was a "writing day" for Dr. Loring, and she drive from her home in Atlanta to Alabama where she worked "away from telephones." Later that day, Dr. Loring returned to Georgia to meet with an "investigator named Laura Switzer." The two interviewed witnesses in Douglasville, Georgia. Dr. Loring returned home at 7:30, opened the front door and "discovered some papers," which pertained to the South Carolina subpoena. She also had a message that she "had missed a Court appearance, which I hadn't known about," and "there was an arrest warrant." She called Mr. Godfrey. After taking to Mr. Godfrey, Dr. Loring was "very upset." She went to a park near her home, "sat on a bench," read some," and "tried to calm down." She went home and "turned in for the night." The next day, her neighbors told Dr. Loring the police had been to her house and were preparing to knock down [the] front door." Dr. Loring reached out to two Georgia attorneys. These attorneys helped her get into contact with the DeKalb County District Attorney's Office, and she learned the arrest had been "tabled." R.472 -80.

The following exchanged occurred between trial counsel and Dr. Loring:

> Q. Dr. Loring, how did this impact you, this sequence of events, personally? How did you feel about what had transpired with regards to the documents you have in front of you and the events of Thursday night and Friday?
>
> A. Well, I was frightened. I mean, my normal experiences I'm usually called, you know, maybe two weeks ahead and advised by an attorney that they would like for me to be subpoenaed. And then we arrange something right – I'm there when they want to cover it. I go get it from them, however they want to do it. I've never had an arrest warrant or anything like that. So it was a new experience for me.
>
> So I was alarmed, concerned, frightened, especially when I found out that I had been described as a flight risk. And then I didn't know whether I should go on my vacation this last weekend or not. I was told I – you know, would I be able to get on the airplane or not? It was very confusing.

Q. Was that partly over the concern that the arrest warrant might impact your travel?

A. Yes, sir. And then I really didn't know exactly what to do. I've never had an experience like this before.

R. 480.

Dr. Loring denied purposefully trying to avoid service of the subpoena. She did not know how Solicitor Ariail cross-examining her might affect her ability to testify. The trial judge informed Dr. Loring:

Dr. Loring, I would tell you that, if you are called as a witness, I would not allow Solicitor Ariail to be the attorney who handled the examination. And so I've made that clear. And if that is – I don't know how that would impact you or not, but I want you to be aware of that.

R. 481-84.

The following exchange occurred between trial counsel and Dr. Loring:

Q. Dr. Loring, when was the last time that we've had any consultation regarding this case?

A. I believe it was September of 2008.

Q. Okay. And when was the first time that you picked this case back up to try to refresh your recollection regarding where you were?

A. This last week.

Q. And how long have you spent trying to do that, approximately?

A. I'd estimate between four and five hours.

Q. Okay. And just to be clear, you and I have had no contact while – within the last two weeks; is that correct?

A. Yes, sir. That's correct.

R. 484-85.

Later on, the following exchange occurred between trial counsel and Dr. Loring:

Q. Is there a certain level of preparation and composure that you are used to having as an expert witness who testifies in Court?

A. Yes, sir.

Q. And do you believe, here today, you are at that level of preparation and composure that you are used to having?

A. No, sir.

Q. Is it less than what you are used to having?

A. Yes, sir.

R. 493-494.

The following exchange occurred between the trial judge and Dr. Loring:

THE COURT: I presume then that the activity of the people in Georgia have made you feel now that you don't have the composure and preparation that you felt like you had before all this started; is that right?

THE WITNESS: In part, Your Honor, yes, sir.

R. 495.

The trial judge instructed Dr. Loring to remain. R. 496-98.

Trial counsel called the court's attention to "a renewed motion for recusal of the Thirteenth Circuit Solicitor's Office" and the Solicitor Ariail conduct during the trial of *State v. Michael Laney*, and the "motion to determine the role of Solicitor Ariail and the Prosecution team. Trial counsel wanted to call Solicitor Ariail and Ms. Strom as witnesses. Counsel argued, "We believe that it's a strong enough showing on prosecutorial misconduct to warrant the imposition of the double-jeopardy clause and live without parole." R. 489-506.

The State called the court's attention to its response to the motion to suspend proceedings, the affidavit of Mr. Geary, and its response to the motion to recuse. R. 506-08.

The trial judge did not allow trial counsel to call the Solicitor as a witness. R. 509, 604-06.

Trial counsel called the following witnesses to lay a foundation for the motions:

- John Mauldin testified about a non-jury *Atkins* hearing[12] on April 12, 2007 in *State v. Michael Laney*, to determine whether Mr. Laney was eligible for the death penalty. Dr. Caroline Everington was one of Mr. Laney's expert witnesses. On cross-examination, Solicitor Ariail asked Dr. Everington about S.C. Code §§ 40-55-50 for definitions and 40-55-55 for penalties.[13] Mr. Mauldin believed "it had an extraordinary adverse effect regarding her involvement in the case." Mr. Mauldin filed a motion regarding "whether the conduct constituted prosecutorial misconduct for threatening a witness." He also moved to quash the death notice because of "the conduct of the Prosecutor." The *Laney* case was resolved for a life sentence without a hearing on these motions. R. 510-546.

- Mr. Mauldin also testified about his involvement in the joint capital trial of *State v. David Edens and Jennifer Holloway* in the summer of 2006. Mr. Mauldin represented Mr. Edens. Ms. Holloway called Dr. Loring as a witness. Solicitor Ariail did not raise an "issue about her licensing." R. 547-48.

- Troy Tessier, Mr. Mauldin's co-counsel in *State v. Laney*, who corroborated Mr. Mauldin's testimony about the *Laney* case. R. 580-86.

- Susan Allen a juror *State v. David Edens and Jennifer Holloway*. Dr. Loring was a witness in that case, and the jurors requested her testimony be re-played during penalty-phase deliberations. The trial judge imposed life sentences because the jurors were not able to reach an agreement on the sentence. Following the trial, Solicitor Ariail invited the jurors to dinner at Stax Peppermill in Greenville, which Ms. Allen attended. Ms. Allen "took it to be they wanted to know what had influenced us the most, the jury, in not giving them the death penalty. She had the "impression that Solicitor Ariail, in particular, was upset about" the jurors not returning the death penalty. R. 587-93.

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[12] *Atkins v. Virginia*, 536 U.S. 304 (2002); *see also Franklin v. Maynard*, 356 S.C. 276, 588 S.E.2d 604 (2003).

[13] S.C. Code Ann. § 40-55-55 provides, "It is unlawful for a person to engage in the practice of psychology in this State without obtaining a license from the board, except as otherwise authorized by this chapter."

- Desa Ballard, an attorney who concentrates her practice "in the area of legal ethics and professional responsibility," testified as an expert in "ethics and their application to lawyers' conduct." She reviewed the materials in *State v. Laney*, excerpts from *State v. Edens and Holloway*, and a portion of the transcript of *State v. Jeffery Motts* where Dr. Loring testified in a death penalty case prosecuted by Solicitor Ariail. She opined Solicitor Ariail's examination of Dr. Loring in September 2008 violated multiple provisions of the South Carolina Rules of Professional Conduct. R. 606-21.

Trial counsel moved to suspend the proceedings in order to obtain testimony from Don Geary and other witnesses to the efforts to subpoena and arrest Dr. Loring in Georgia. Trial counsel proffered a summary of what the testimony likely would have revealed. The trial judge dined the motion to suspend the proceedings. The trial judge also denied the motion to recuse the Solicitor's Office. R. 632-34.

At the conclusion of the presentation of evidence on the motions, trial counsel informed the trial court Mr. Inmon planned to "move the Court for a continuance to give us the opportunity to complete out mitigation with our new social historian." The trial judge responded:

> Mr. Bannister, I am not going to continue the case. And Dr. Loring is still here. I'll tell you, I will order Mr. Ariail out of the courtroom during her examination. I will have her suffer no intimidation. But this case has been dragging on and we're going to come to a conclusion.

R. 636-37.

Trial counsel requested:

> Your Honor, it's almost 5:15 and we've been going pretty hard today. I would ask that you permit me to make my argument before you, ultimately, decide on whether or not to continue the case. And I think that's appropriate after we get through the conclusion of the prosecutorial misconduct. But can tell Your Honor that I believe stand on pretty firm ground with regards to the case law. My understanding of what my duties are is that we're not going to be calling Dr. Loring. I just want an opportunity to be heard on that. If that's going to impact the Defendant's case, then I just need to be heard on it.

R. 637.

The trial judge instructed Dr. Loring to remain available. R. 637.

When the proceedings resumed the next day, trial counsel informed the trial judge the defense would not call Dr. Loring as a witness and the replacement witness was not prepared. The trial judge announced, "I am considering what to do with Dr. Loring. I'm considering calling her as a Court's witness." Solicitor Ariail added, "Your Honor, in that posture, we would, certainly, urge you to do that." R. 639-41.

Trial counsel reminded the trial judge the Court had not ruled on the motion for a mistrial as a result of prosecutorial misconduct, which includes a request for the Court to declare the Fifth Amendment prohibition against double jeopardy requires the "imposition of a life without parole sentence." After allowing the prosecution to respond, the trial judge ruled double jeopardy did not apply. The trial judge found, "[T]e fact that the Solicitor brought up criminal sanctions, in my opinion, is inappropriate." The trial judge further explained:

> So I find that the comments were inappropriate. A lot of paper and memorandum have been submitted to the Court. We've done a lot of research on our own. We are – I am relying on the *United States v. Golding*, which is found in 168 F.3d 700. It is a Fourth Circuit case. It reads, The test for reversible prosecutorial misconduct, generally, has two components. One, the Prosecutor's remarks and conduct must, in fact, have been improper. Well, I found that those remarks were improper. And, two, Such remarks or conduct must have prejudicially effected the Defendant's substantial rights so as to deprive the Defendant of a fair trial.
>
> Now, if this had been a jury trial in September, there may have been a different result. But I am, in fact, the fact finder, as well as sitting in my capacity as the Judge. I didn't ask for this. I didn't want it. But that's where I sit. And I don't find that there is – that the Defendant's rights are prejudicially effected by the remarks or the conduct of the Prosecutor.
>
> The events in Georgia may be the subject of another action at a later day. But they are not part and parcel of this case. Dr. Loring was prepared to come testify prior to any of that occurring. And she is prepared now from – I understand from her attorney to do just that. In my capacity as a fact finder, I am interested in hearing everything from all parties connected with this matter that might bear on my decision. I don't find – while I know what the Defense is trying to do in

their excellent and thorough presentation zealously advocated, but I don't find that they connect the dots to raise this issue to deliberate prosecutorial misconduct.

And I would say to the Solicitor that the comments that he made, while to all of us who sit in the courtroom and spend a lot of time in the courtroom, we don't – well, I think we lose touch with or lose sight of just how powerful and intimidating what appear to be simple comments might be to a layperson, so.

And I think that the decisions of the Courts have recognized that when sometimes in the heat of battle, trial attorneys may lose sight of it. So I think that covers your motion.

R. 647-48.

Trial counsel next moved for a continuance so the replacement witness would have time to prepare:

Your Honor, at this time, I have a motion for continuance in order to allow us more time to prepare the mitigation evidence. And in support of that motion, I've attached a number of affidavits. And if I may have brief argument on that.

Your Honor, the position that we were in back on September the 11th, 2008, as I understood it, when Dr. Loring took the Fifth Amendment, was that the Court was giving us the option, at that time, to either try to fix the problem with Dr. Loring or to find another social historian to serve as a mitigation expert. There was – the proceedings were suspended. And there was – there were a number of weeks during which I felt like that we ought to spend some time exploring a potential resolution of the case. We did. We were unable to resolve the case.

At that point in time, which would have been roughly October or so, I began to spend some serious time trying to determine, was there a way to fix the problem, as I perceived it, from Dr. Loring asserting the Fifth Amendment? What I knew, at that time, which had not come out to the Court in the testimony, was that Dr. Loring had not only performed clinical social work type of activities in the Thirteenth Circuit, but, also, in other jurisdictions and other states.

And in looking at the argument that the Solicitor had made, I felt that until the South Carolina Supreme Court spoke with authority on that issue, despite my feeling that it was a red herring and was a meritless issue to raise to begin with, Dr. Loring's Fifth Amendment privilege would go beyond my view of what that – the merits of the argument and only the South Carolina Supreme Court could, ultimately, state whether or not the licensing statute did, in fact, apply to what she had done and her attempt to testify as an expert. That did not happen overnight. That conclusion that I sought to reach took roughly a month or so.

It was at that point that I began to look, as the Court had suggested and had encouraged me to do, strongly suggested, to find another social historian or mitigation expert to speak on behalf of the Defendant. There were statements made at the conclusion of the September 11th hearing that finding a mitigation expert that there were a number of them across the State, and that that would not be a difficult issue and that we should be able to get one.

I have been a participant in two capital cases and sort of somewhat in a third one. So I took that at face value and attempted to find the names of mitigation experts in the state who potentially could handle this case for us. In doing that, I consulted with a number of lawyers, whom I considered to be sufficiently well versed in capital litigation, to point me in the direction of a number of people that I could approach about getting involved in this case.

If you recall, Judge, the issue, again, was whether or not somebody was a licensed clinical social worker. I felt like, based on the information I had about the Defendant and his family, that I was going to have to have a licensed clinical social worker to serve as my mitigation expert in order to avoid the same issues we had run into on September 11th. Regardless of whether or not that had limited the field of potential mitigation experts, ultimately, I only got three names from the lawyers that I talked to of who could potentially handle this case.

Out of those three people, one was – I was informed had medical issues that made it impossible for her to be involved in the case. The second one flat told me, no, she was not interested in getting involved in a case that involved the types of allegations that were in this case, which left a third. And the only expert I had left on my list of people to call was Jan Vogelsang.

Now, I cannot, off the top of my head, remember the date that I sought ex parte funding for Jan Vogelsang, but I can –

THE COURT: January.

MR. BANNISTER: January. That was the first time that I was able to –

THE COURT: January 2nd.

MR. BANNISTER: January 2nd. Thank you.

THE COURT: That is the date that I signed the order.

MR. BANNISTER: So that expert has had less than four months to try to get ready for a case that took us approximately a year and a half of preparation for the mitigation side of the case.

She informed me, at the time, that she had a number of other cases that were imminently ready to go to trial, and that she couldn't in good conscious put my case in front of those. And I respected that. But that was my last resort.

Fast-forward to April the 14th of this year when we were back on the record. I informed the Court, as I felt like I was required to do so by the order, to say, look, we've tried, but we can't be ready for the 20th.

Now, whether I was correct or not in relying in good faith or in believing that we were going to be given sufficient time, even though that might be a significant amount of time, to be prepared, if I misread that, then that's my fault. But I believe that where we were headed next was to finish the prosecutorial misconduct, put the evidence in the case, and allow Your Honor to rule. And then we would be looking at a period of time to get – at least, if I couldn't be ready by the 20th, then we would then have a period of time to come back and present the mitigation in the most forceful and comprehensive way that we could. And it just couldn't happen by April the 20th.It couldn't. We still believe –

THE COURT: Are you telling me you understood that we were just going to come today – or this week and do half of it?

MR. BANNISTER: Judge, when I – if you look at the transcript, what it says is

THE COURT: Mr. Bannister, outside of the transcript, we've had discussions. There's no question that this was going we were going to proceed with this case today.

MR. BANNISTER: No question we were –

THE COURT: According to the affidavit you have submitted from your new social worker, she can't testify until the first quarter of 2010.

MR. BANNISTER: And that would be within the ABA guidelines of what it takes for a mitigation expert to get ready.

THE COURT: Well, I'll tell you what –

MR. BANNISTER: We may be able to change that, but –

THE COURT: I'll tell you what we'll do. Dr. Loring is prepared to testify. She has done all the work. She's been on the case for a long time. I, certainly – in my capacity, I want to hear from her. And what I will do -- I don't know how you were prepared to go in September. You were going in September.

MR. BANNISTER: Yes, sir.

THE COURT: I don't know how much more work you would have to do to get ready. But I'm prepared to break for the day and give you today, and even tomorrow, to meet with Dr. Loring and prepare her testimony to present in this Court.

And I will tell you right now, I will not allow the Prosecutors in any way to intimidate her. I will protect the sanctity of her status on the stand. And I'm not going to limit their cross-examination. But they're not going to get into anything that might threaten her improperly.

So I will – we'll adjourn. This week, we're going to finish the case. We're going to get the testimony up this week. And if you want to put Dr. Vogelsang up as well to testify to whatever she wants to testify to I don't guess – she's a PhD. But that's fine, too. I'll give you that opportunity to get ready to present the case today. This case needs to be finished.

MR. BANNISTER: Your Honor, I need a ruling on my motion for a continuance. I've made the motion. I think I've supported it. And I need a ruling on that motion. I'm hearing, I think, that you're telling me that's denied.

THE COURT: What I'm telling you is that I will give you an opportunity – I'll break for you to meet with Dr. Loring. As a matter of fact, we will do that. And you can make a decision whether or not you want to talk to her or not – I'm going to give you that opportunity. She is prepared. She was prepared to go forward in September. She is prepared to go forward today.

Now, we're not going to create an issue out of thin air. So we will be adjourned until tomorrow morning at 10:00.

R. 649-55.

When the proceedings resumed the next day, trial counsel called Ken McArthur, who is Jerry Inmon's stepfather. Mr. Inmon was four years old when he married Mr. Inmon's mother, Vera. Mr. McArthur testified the September 2008 trial was stressful "because of the potential sentence that could be imposed." The intervening time was also stressful, resulting in Vera being "hospitalized in January for five days." Mr. McArthur and Vera love Jerry Inmon and "enjoy having the opportunity to see Jerry in prison in Pickens." R. 656-58.

Trial counsel announced:

Your Honor, at this point, based on the previous motions, both oral and written, that we've made, the issues that we've raised in there, I don't believe it would be in our client's best interest to call any further witnesses for mitigation.

So that would close our mitigation case.

R. 658.

The trial judge announced:

All right. Well, I'm going to call Dr. Loring. I think she would aid the fact finder, me, I guess, in the determination of the resolution of this case.

And I want to put in the record that she was the number one choice for the social historian in this case, and that the Defense has had no contact with her since September. That's what was represented in the Court. She was rehabilitated. She's up here, despite the fact that she failed to testify in September because of the – her feelings of intimidation, which I did rule was prosecutorial misconduct, but did not arise to the level requiring mistrial or reversal because of the lack of prejudice, which is cured in part by her presence – voluntary presence today.

So I think it's necessary to put her up to ensure that these claims of due process violation are put to rest. So I'm going to call her as a witness.

R. 658-59.

Trial counsel objected to the procedure being followed by the trial court, and the trial court overruled the objection and explained:

The second thing I'd like to bring up is that the Defense did not contact Dr. Loring. In January, it was the first time – that is three months after the suspension of the case that I saw a request for funds to get a new social historian. At that time, I'm presuming that the Defense was made aware that it would be another year from that date before their new expert would be ready to testify. The Court was never informed of that. Being aware of that, I presume – I'm presuming this. Being aware of that, the Defense did not recontact Dr. Loring to determine whether or not she could be rehabilitated and if she would come testify.

It leads me to the conclusion that counsel for the Defendant is more interested in pursuing the misconduct issue than in presenting a full defense. And as a result – the assertion that due process is violated is disingenuous. Because defense counsel has perpetrated the failure to prepare for the social history.

Having said that, I'm going to call – ask Dr. Loring to come around and take the stand.

R. 661-662.

The trial judge noted the court had already qualified Dr. Loring as an expert, but the trial judge asked her to review her qualifications. She is "a social worker and sociologist." She summarized her education, work experience, teaching experience, and writings. The trial judge qualified her as an expert "in the field of social history, trauma, and abuse," subject to trial counsel's "running objection." R. 663-65.

Trial counsel originally retained Dr. Loring to prepare a social history of Mr. Inmon and his family, which involved interviewing Mr. Inmon and members of his family, reviewing records, consulting with other members of the defense team, and reviewing the scientific research on trauma. Dr. Loring testified about a genogram she prepared based on interviews with family members and collateral witnesses. Mr. Inmon struggled "with alcohol problems during his life," as did his biological father, paternal grandfather, and maternal grandfather. Alcoholism also extends throughout Ken McArthur's family. R. 665-70, 672.

Dr. Loring listed the family dogs on the genogram. Because Mr. Inmon "moved so much during his childhood, he didn't form many, if, and friendships." Mr. Inmon loved the family dogs, and "they are part of the violence . . . he witnessed in his life, the demise of the dogs and the way that they were killed." R. 672.

Dr. Loring testified that Mr. Inmon has been diagnosed with "major depression with psychotic features." Mr. Inmon's father also suffered from mental illness, having been committed to "a hospital for the criminally insane." R. 673.

Dr. Loring testified about Mr. Inmon's mother, Vera:

> Your Honor, Jerry's mother, Vera, also, has been diagnosed with mental illness. Jerry Buck Inman consented to my doing mitigation, as much as I was able to do, with only one condition, that I show respect to his mother, which I

> intend to do. I would say to you that she is a very loving and gracious woman, who through her whole life after Jerry was born with all of her potential, did her best to look after Jerry, to be considerate of him, and to protect him in every way she was able. And he is very devoted to her with good cause.
>
> I would say that she struggled with great handicaps, Your Honor, through no fault of her own whatsoever. And then handicaps included hospitalizations. They included such diagnoses as depression, schizophrenia, and hearing voices of reference. Your Honor, voices of reference refer to voices that someone who's very disturbed hears within their own head. They're not real. And some of these voices told her to kill herself. We're, certainly, very glad she's alive today. But she has struggled with very severe mental illness, which is well documented in the many records that the excellent investigator was able to get for me, and I was able to review. There were a lot of records for that.

R. 673-74.

Mr. Inmon tried to mentor his nephew Nicholas (Denise's son), trying to keep Nicholas "from getting in any further trouble." Nicholas struggled with drugs and has "a very minor criminal history." R. 679-80. Other family members with drug problems included Mr. Inmon's biological father, stepbrother Bill, stepbrother Andy, and nephew Kevin. Dr. Loring testified alcoholism and drug addiction often occur "in families in clusters." Mr. Inmon's stepsister and stepbrother introduced him to alcohol and drugs at a young age, possibly as early as nine years old. R. 674-75.

Sexual abuse was prevalent in Mr. Inmon's family. Mr. Inmon's stepbrother, Bill, "has a criminal history as a pedophile. Dr. Loring testified:

> [S]adly, we have two people who are sexually abusing Denise, Jerry's sister. The first person was the grandfather on the father's side sexually abused Denise, not in the presence of Jerry Buck Inman.
>
> However, Jerry's biological father, Jerry, sexually abused Denise in the presence of Jerry Buck Inman. Jerry and Denise shared a room. They had bunk beds. And there was a ritualistic sexual abuse that would occur. We call it ritualistic, Your Honor, because it is even more emotionally disturbing to the children. It starts off with step one, and then step two, et cetera, up to the point where the sexual abuse, actually, occurs.

> And our research has showed us – shown us that the childrens [sic] anxiety and terror begins when the first steps are occurring. And then when the sexual abuse, actually, occurs, they often disassociate or feel like they're not really there. They feel like they're off watching it happen as a form of trauma.
>
> In this case, it was described to me that the father, Jerry, would collect the two children, Jerry Buck Inman and his sister, Denise, from playing outside. He would lead them into the room where they slept and would say, Come on it's time to go inside now. He would shut the close the blinds, would ask them both to get into bed, and remind them that they better not cry or he would tell their mother that they were bad children, all those being steps of the ritual. Then he would get on Denise's bed, tie her hands, blindfold her, and either sodomize her or vaginally rape her.
>
> Denise reported to me that she once looked up from the bottom bunk and saw Jerry Buck Inman looking down. He was very young. He may have been three or a little older than three years old at that point.
>
> It is reported then that the father, Jerry, would then either reach up or climb up to Jerry's bed. And it is thought that he – there are indicators that he sexually abused Jerry as well. These indicators were observed by the mother, Vera. But with her own severe mental illness, they were not recognized for what was happening at that time it is believed. We, also, have indicators that Jerry was sexually abused by his stepbrother, Bill, who was later imprisoned as a pedophile.

R. 674- 78, 686.

Dr. Loring testified about the history of violence in Mr. Inmon's family. His maternal grandfather "killed a member of the family." Mr. Inmon's Uncle A.W. "would fly into rages and family members would scatter to avoid having chairs thrown at them or being harmed." Jerry witnesses "verbal fighting between his mother and Ken" when he was a child. Denise's ex-husband was "physically abusive" towards her. Denise "escaped one night with her two children when she thought she was going to be killed." R. 678-79.

According to Dr. Loring, Mr. Inman had close relationship with his mother, Ken McArthur, his nephew Nicholas, and his maternal grandfather. R. 679-80.

Dr. Loring also testified about a timeline she prepared about Mr. Inmon's life. This portion of her testimony was supported, in part, by photographs of Mr. Inmon as a child,

including one where he was on a swing and he was crying. Mr. Inmon's relatives told Dr. Loring that Mr. Inmon cried a lot as a child. This photograph was taken during the timeframe Mr. Inmon was sexually abused by his biological father and witnessed his biological father abusing Denise. R. 680-83.

Mr. Inmon's biological father would hit Mr. Inmon in the head with closed fists and open-handed slaps. Mr. Inmon would complain of headaches. Mr. Inmon also had childhood seizures. On one occasion, Mr. Inmon had untreated "burns around his genital area," which was attributed to spilling blech. Mr. Inmon's biological father once spanked Mr. Inmon "so hard that the red imprint of a hand went through the diaper." R. 680-84.

Dr. Loring testified Mr. Inmon witnessed "a string of violent events" and relatives described him "as looking at it transfixed with tears coming down his eyes." Dr. Loring, however was unable to provide details because she "didn't have an opportunity to go back and re-interview family members" and "couldn't find in [her] notes those other violent events he witnessed." R. 684-85.

Dr. Loring testified about Mr. Inmon's life in prison, including the numerous suicide attempts. She testified:

> [I]n September of 2005, Mr. Inman was released from prison and spent nine months out of prison before the tragedy. And he was described by the family as anxious and lost during that period of time, that he would try to get a job and couldn't seem to hold it. He would attempt to relate to women. He didn't seem able to do that. He appeared depressed. He would disappear for periods of time and then turn up again.
>
> The one thing, during that time, that he seemed to be able to do was to mentor Nicholas. He stopped Nicholas, his nephew, his sister Denise's son, from huffing gas. And he tried to get him on the right track. Once Mr. Inman was in prison again, he corresponded with Nicholas about the threat to the teacher that I mentioned. And to my last hearing, my last information is that because Nicholas is described as idolizing his uncle, Jerry, he seems to be trying to keep on the right

track at this point. I'm not aware of any further difficulty. But that Mr. Inman tries to keep it that way at any rate.

R. 690-91.

The trial judge asked Dr. Loring, "[I]is there anything else that you think you need to tell me?" Dr. Loring expressed a concern about "attorney work product" and asked for a break to consult her attorney. After the break, the following transpired between Dr. Loring and the trial judge:

A. Your Honor, there are two halves of what I'd like to say to you.

Q. Okay.

A. The first half is, as a trauma expert who's focusing on mitigation as a specialist in social history today, Jerry Buck Inman's early history has been very important for me to learn about. That is, family has revealed to me, as a child, him being in trance-like states. Sometimes they would find him in the morning lying by the back door, instead of in his bed, with no idea how he got there. Other times, they'd find him staring off into space. Sometimes they were able to bring him back to them, sometimes they were not.

Sometimes during the times he was abused by his father, that's how he would be, staring into space. Sometimes after those times and other times, he would then behave in ways that he would later seem to be unaware of. He couldn't remember what the family had told him he had done.

Your Honor, this early history seems to be related and consistent with the later history in the life of Jerry Buck Inman where others -- not myself, Your Honor, but others have diagnosed him as bipolar, having major depression with psychotic features. Those are often the early childhood histories of people who are later diagnosed with those kinds of mental illnesses, Your Honor. That is the first half of what I wanted to share with you.

Q. Okay.

A. The second half, Your Honor, is my additional opinions are interwoven with consultations with the Defense team. They seem to be attorney-work product. And as such, Your Honor, I think I'm not allowed to share those additional opinions for that reason.

R. 693-94.

At that point, trial counsel interposed an objection based on "attorney work product," and Dr. Loring's testimony concluded. The trial judge stated, "I'm just – I'm deeply concerned that there is – I'm not getting all the information, because of some form of legal gamesmanship." R. 694-96.

Trial counsel questioned Dr. Loring about not being involved in the case for seven months and not having access to new information that might have become available. The Deputy Solicitor asked Dr. Loring follow up questions about Mr. Inmon's biological father killing the family dogs. R. 697-709.

The trial judge released Dr. Loring. R. 711. The parities made closing arguments. R. 720-40.

The trial judge pronounced sentence:

> This sentencing order concerns indictments #2006-GS-39-2222, #2006-GS-39-2223, #2006-GS-39-2224, and #2006-GS-39-2225. The Pickens County Grand Jury indicted the Defendant on November 8th of 2006, on charges of murder, burglary in the first degree, criminal sexual conduct in the first degree, and kidnapping.
>
> Pursuant to South Carolina Code of Law Section 16-3-26(a), the State timely filed – timely notified the Defendant that it intended to seek the death penalty for the murder charge on August 22, 2006. I was assigned this case by order of the Chief Justice of the South Carolina Supreme Court dated March 13, 2007.
>
> On August 19, 2008, this Court conducted a competency hearing pursuant to South Carolina Code of Law Section 44-23-410 and *State v. Blair* found at 275 S.C. 529. The Court found the Defendant competent to stand trial. This case was scheduled for a jury trial to commence on September 8th, 2008.
>
> On August 19, 2008, the Defendant pled guilty to murder, burglary in the first degree, criminal sexual conduct in the first degree, and kidnapping. On September 11th through September 8th – excuse me, on September 8th through September 11th, 2008, this Court commenced a non-jury sentencing proceeding as a result of the guilty plea. On September 11, 2008, the sentencing proceeding was adjourned and continued as a result of the Defense witness, Dr. Marti Loring, claiming protection under the Fifth Amendment of the Unites States Constitution

and refusing to testify after comments made by the Solicitor, which the witness construed as intimidating. The hearing was resumed on April 20, 2009, and the presentation of all legal issues and testimony were concluded on April 22, 2009.

South Carolina Code of Law Section 16-3-20 provides, in part, that a person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for 30 years. For purposes of this statute, life imprisonment means until death of the off ender without the possibility of parole. No person sentenced to life imprisonment pursuant to this statute is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment.

When the State seeks the death penalty, upon conviction or adjudication of guilt of a Defendant of murder, the Court is required to conduct a separate sentencing proceeding. In such a proceeding, if a statutory aggravating circumstance is found beyond a reasonable doubt, the Defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the Defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for 30 years.

In cases like the present case where the Defendant, in the guilt phase, waives his right to a trial by jury and pleads guilty, the sentencing proceeding must, also, be conducted without the benefit of a jury, and the sentencing decision is to be made by a judge

In the sentencing proceeding, the Judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. And the law requires the Judge to consider mitigating and extenuating circumstances authorized or allowed by law, as well as certain enumerated statutory, aggravating, and mitigating circumstances, which may be supported by the evidence pursuant to South Carolina Code of Law Section 16-3-20 Subsection C. The Judge is required to examine the evidence to determine the existence of the statutory aggravating circumstance or circumstances, unless, at least, one of the statutory aggravating circumstances enumerated in this section is found beyond a reasonable doubt, the death penalty must not be imposed.

With respect to the aggravating circumstances, pursuant to South Carolina Code of Law Section 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory aggravating circumstances, I find the State has proven beyond a reasonable doubt that the Defendant committed the murder for which he is charged while in the commission of the crimes of kidnapping, burglary in the first degree, and criminal sexual conduct in the first degree.

The circumstances surrounding the murder of Tiffany Souers are savage, brutal, and unconscionable. I find that the State has proven beyond a reasonable doubt that Tiffany Souers home was broken into in the nighttime by the Defendant constituting burglary in the first degree, that she was held against her will constituting kidnapping, and that she was the victim of a forcible rape constituting criminal sexual conduct in the first degree, and that she was, subsequently, choked by the Defendant until she died constituting murder. Having proven the charge of murder accompanied by three statutory aggravating circumstances, the State is entitled to seek the death penalty for the Defendant.

Now, pursuant to South Carolina Code of Law Section 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory mitigating circumstances. With respect to the first statutory mitigating circumstance, the Defendant does have a significant history of prior criminal convictions involving the use of violence against another person and is, therefore, unable to avail himself of this mitigating factor.

Number two, the murder was committed while the Defendant was under the influence of mental or emotional disturbance. It is apparent that the Defendant has an continues to suffer from serious several – serious and several mental and emotional disturbances. The Defendant makes no attempt to claim he was not criminally responsible for the murder of Tiffany Souers. However, there is clear evidence that the Defendant suffers from numerous and long-standing mental health disorders.

The Defendants's [sic] witness, Dr. David Price, was qualified as an expert in the fields of forensic psychology, clinical psychology, and neuropsychology. Dr. Price testified that the Defendant had been diagnosed with three Axis One disorders, mood disorders consisting of depression, bipolar, major depression in the recurrent form, and major depression with psychosis. Number two, dissociative identity disorder. And, number three, sexual paraphilia.

The Defendant, also, suffers from the Axis Two disorder of personality disorder with schizophrenia. Some of the effects of these diseases on the Defendant, according to this expert's testimony, were impulsivity, irritability, aggressiveness, agitation, and poor thinking, a profound impairment of ability to function in daily life, bad decisions, flat effect, slow speech, introvert behavior, not forthcoming about himself, and an inability to engage in normal heterosexual relationships. Dr. Price, also, describes the Defendant as a serial rapist.

The Defendant has, also, attempted to commit suicide on seven separate occasions, including cutting his wrists on two occasions, cutting his jugular vein, starvation, cutting his antecubital vein, and swallowing two six-inch strands of barbed wire. Dr. Price is a nationally recognized expert on mental health malingering. And he opines that the Defendant is not a malingerer.

This Defendant was sexually abused as a young child. And Dr. Price testified that the circumstance of this offense and several other of Mr. Inman's offenses mimic the sexual abuse which he suffered as a child.

Mr. Inman tries to minimize his mental illness and refuses to acknowledge the physical and sexual abuse he suffered at the hands of his parents. Mr. Inman's ability to conform his conduct to the requirements of the law is substantially impaired. On cross-examination, Dr. Price testified that Mr. Inman has the ability to make choices to conform to the requirements of the law, as evidenced by some of his conduct relating to other victims of his offenses who testified at this hearing.

Again, I stress that the Defendant does not claim his disorders excused him from criminal responsibility for his actions, but may have contributed to them for purposes of sentencing only.

With respect to the third statutory mitigating circumstance, there is no evidence the victim was a participant in the Defendant's conduct or consented to the act.

Number four, there is no evidence of the participation of accomplice -- of an accomplice in this murder. And the Defendant's participation was not relatively minor.

Number five, there was no evidence presented that the Defendant acted under duress or under the domination of another person.

Number six, as stated above, the capacity of the Defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired at the time of the crime due to mental and emotional disturbances, but it did not rise to the level of excusing criminal responsibility. The Defendant was 35 years old at the time of the crime and his mental acuity is described as average.

Number eight, there is no evidence that the Defendant was provoked by the victim in committing the murder.

Number nine, as stated above, the Defendant was over the age of 18 at the time of the crime.

And number 10, the Defendant showed no signs of mental retardation at the time of the crime with mental retardation meaning significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Turning to non-statutory mitigation, I have carefully considered all the evidence. The Defendant, through excellent and well prepared counsel, presented compelling mitigation evidence. There is evidence in the record that the Defendant has suffered a great amount of trauma in his life. He was exposed to violence and sexual abuse at a very early age. He was exposed to violence at an early age by witnessing the sexual abuse of his sister and experiencing physical and sexual abuse from both his biological father and from his older stepbrother. He was sexualized at a young age and has had a history of deviant sexual activity. He has a substance abuse problem that has an apparent genetic component and is, also, exacerbated by his underlying mental disorders. And the mental disorders are documented above.

The Defendant admitted his guilt to the crime early in this criminal investigation. He made numerous confessions to law enforcement beginning on the day of his arrest, June 26, 2006, in which he confessed to murdering Tiffany Souers.

The Defendant has pled guilty and has acknowledged the brutality of his conduct and, also, acknowledges that he cannot be rehabilitated. As Dr. Price has described Mr. Inman, he grew up in prison, he is a person with a bad genetic loading of inherited mental disorders who's formative environment did him no favors. He was described as a lost soul who will remain lost. This Court views Mr. Inman as a tortured soul whose inner-demons will never leave him.

I have considerable sympathy for Mr. Inman and the lamentable circumstances of his early life, a person with no opportunity to escape his tragic circumstances. However, his background lends itself to an understanding of who he has become. It does not excuse his long-standing pattern of violence and his sexually predatory conduct.

As stated above, the State has proven beyond a reasonable doubt the existence of more than one aggravating circumstance accompanying the commission of the murder of Tiffany Souers. This crime was horrific and was perpetrated upon one of societies [sic] most valuable citizens, a young woman full of life, energy and vitality, love for her family, and with a passion for life and for people, whose own life was marked by her good deeds and generosity to others.

Jerry Buck Inman is a self-described animal who has acknowledged that he cannot be rehabilitated. The concept of a fair sentence includes consideration of many factors, such as the seriousness of the crime, the culpability of the offender, characteristics of the offender, need for protection of society, need for punishment and accountability.

Determining the proper sentence in a case in which the death penalty is sought is especially painful and agonizing. The death penalty is the ultimate sentence, which is to be imposed only in the worst cases and only after serious

deliberate and careful consideration. Regrettably, Jerry Buck Inman falls within a small group of deviant predators who exhibit in their conduct a callous disregard for society and the rights and safety of others.

While this has been one of the hardest decisions of my life, I am firmly convinced that the murder and rape of Tiffany Souers and the characteristics of Jerry Buck Inman warrant the penalty of death. I have carefully considered all relevant facts and circumstances, including the existence of statutory aggravating circumstance, as well as statutory and non-statutory mitigating circumstances. My verdict is not the result of passion, prejudice, or any other arbitrary circumstance.

It is, therefore, the judgment and sentence of this Court that the Defendant, Jerry Buck Inman, be remanded to the South Carolina Department of Corrections henceforth to be kept in close and safe confinement until the 27th day of July, 2009. Upon which day, between the hours of 6:00 p.m. and 6:00 a.m. on July 27th, of – excuse me, July 28th of 2009, or upon an order of execution issued by the South Carolina Supreme Court, the Defendant, Jerry Buck Inman, shall suffer death by electrocution or by lethal injection in the manner prescribed by law.

Mr. Inman, may God have mercy on your soul.

Therefore, it is ordered, adjudged, and decreed that for indictment 2006-GS-39-2225, the murder of Tiffany Souers, you, Jerry Buck Inman, are sentenced to death.

That for indictment 2006-GS-39-2222, burglary in the first degree, you, Jerry Buck Inman, are committed to the Department of Corrections for a period of 30 years to run consecutive to the sentence imposed above.

That for indictment 2006-39-2223, criminal sexual conduct in the first degree, you, Jerry Buck Inman, are committed to the Department of Corrections for a period of 30 years to run consecutive to the sentence imposed above.

That for the indictment 2006-GS-39-2224, kidnapping, pursuant to South Carolina Code Section 16-3-1910, and because you have been sentenced for murder, this Court may not impose a sentence for the crime of kidnapping. It is so ordered.

R. 742-55; *see also* written sentencing order, R. 1045-53.

After sentencing, Mr. Inmon stated:

Your Honor, I'd like to let the -- I know the Souers family isn't here today. There's [sic] no excuses for any of the things I've done. There's nothing I can say

that will ease any of the pain I've caused them. I'm just sorry for taking their daughter and their sister away from them.

R. 755.

On May 1, 2009, Mr. Inmon moved for a new trial and to reconsider the sentence. R. 1244-47. By written order dated July 17, 2009, the trial judge denied that motion. R. 1248.

Mr. Inmon appealed his guilty plea and sentence to the South Carolina Supreme Court. Joseph L. Savitz, III of the Office of Appellate Defense initially represented Mr. Inmon and selected the following issues for appeal:

1. The trial judge committed reversible error by accepting [Mr. Inmon's] guilty plea, despite defense counsel insistence the judge's refusal to allow jury sentencing was preserved for review by the Supreme Court on direct appeal, because the defense position rendered the plea conditional and thus invalid under South Carolina law.

2. The judge committed reversible error at sentencing by refusing to grant a mistrial and recuse the Solicitor's Office from any further involvement in the case, despite finding prosecutorial misconduct, where the Solicitor threatened a key defense witness with a baseless criminal prosecution and then subpoenaed her as a State's witness after the judge granted the defense a continuance to obtain a new expert because of this misconduct.

3. The judge committed reversible error at sentencing by refusing to allow the defense to cross-examine the Solicitor and his Deputy on the issue of prosecutorial misconduct as the Solicitor's intent was directly relevant to that issue.

Upon Mr. Savitz's retirement from the Office of Appellate Defense, Robert M. Dudek began representing Mr. Inmon. Our Supreme Court convened an oral argument on September 21, 2011 and issued a written opinion on December 28, 2011. *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011). Our Supreme Court held the issue of whether the Constitution requires jury sentencing following a guilty plea was preserved for appellate review:

> Turning to the facts of the instant case, we find that Inman's guilty plea was unconditional. Significantly, Inman never attempted to reserve the right to challenge or deny the merits of his guilt. Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B), which mandates

> that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases, Inman was permitted to appeal this secondary sentencing issue; however, any decision as to this issue did not affect the entry or validity of his plea.

Inman, 395 S.C. at 555, 720 S.E.2d at 40.[14] Our Supreme Court then held that Mr. Inmon "specifically abandoned this issue on appeal." *Id.* 395 S.C. at 556, 720 S.E.2d at 40.

Our Supreme Court then held, "[T]he judge did not abuse his discretion in refusing to recuse the Solicitor's office as advocates and declining defense counsel's request to question the Solicitor." *Id.* 395 S.C. at 558-60, 720 S.E.2d at 41-42. The Court reasoned "that the judge's determination of prosecutorial misconduct did not necessitate the recusal of the entire Solicitor's office as this allegation primarily involved the Solicitor." *Id.* The Court recognized, "[D]efense counsel's primary reason for calling the Solicitor as a witness was to establish that he intentionally committed misconduct." *Id.* The Court reasoned, "Because a determination of prosecutorial misconduct is not necessarily dependent upon the intent of the prosecutor, such testimony was neither relevant nor material to the defense's claim." *Id.* "Finally, any testimony from the Solicitor or members of his staff would have been cumulative as defense counsel submitted significant testimonial and documentary evidence regarding the Solicitor's use of this tactic in prior capital cases." *Id.*

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[14] A plethora of capital and non-capital appellate decisions exist considering sentencing issues following a guilty plea. *See, e.g., Mahdi v. State*, 383 S.C. 135, 137, 678 S.E.2d 807, 808 (2009) (following guilty plea, appealing whether "capital sentence should be reversed because the trial judge improperly based his decision to impose a death sentence on petitioner's [initial but abandoned] assertion of his right to a jury trial); *State v. Bryant*, 390 S.C. 638, 704 S.E.2d 344 (2011) (following guilty plea in capital case, appealing exclusion of mitigation evidence); *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009) (following guilty plea, appealing imposition of the imposition of a death sentence was not the result of any arbitrary factor); *State v. Brown*, No. 2016-000526, 2019 WL 576588 (S.C. Ct. App. Feb. 13, 2019) (defendant was entitled to credit for time served for the period of time he was civilly committed after he was found incompetent to stand trial and was deemed to have a genuine mental illness); *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010) (plea judge's denial of jail credit for time defendant served in

Our Supreme Court held, "[T]here is evidence to support the judge's finding of prosecutorial misconduct as the Solicitor's actions were done for no other purpose than to intimidate Dr. Loring."[15] Id. 395 S.C. at 564, 720 S.E.2d at 45. The Court, however, held the error harmless because Dr. Loring testified and "any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his criminal history." *Id. 395 S.C. at 566, 720 S.E.2d at 45.*

The Supreme Court of the United States denied Mr. Inmon's petition for a *writ* of *certiorari* on October 1, 2012. *Inman v. South Carolina*, 568 U.S. 863 (2012).

Mr. Inmon filed his PCR application on June 21, 2012. He amended his PCR application on April 11, 2016 and October 16, 2016. The State filed returns on October 18, 2012, May 16, 2016, and November 7, 2016. Mr. Inmon filed a corrected second amended PCR application on August 20, 2018. In this PCR application, Mr. Inmon alleges he "was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the guilt-or-innocence phase of his capital trial" for the following reasons:

1. Trial counsel was ineffective for advising Mr. Inmon to plead guilty and appeal the trial court judge denying his request to be sentenced by a jury when then existing state law did not allow jury sentencing following a guilty plea in a capital case.

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pretrial detention based upon state's decision to drop charge against defendant from armed robbery to strong arm robbery was an error at law).

[15] In a concurring opinion, joined by Chief Justice Toal and Justice Hearn, Justice Pleicones wrote, "The solicitor's conduct in this case was inexplicable and reprehensible. In light of the aggravated nature of the crime and the fact that the sentencing hearing took place before a judge, it is difficult to comprehend how the solicitor believed that intimidating an expert witness would be more likely to ensure a death sentence than to create a risk of reversal." *Inman*, 395 S.C. at 570, 720 S.E.2d at 48.

2. Not developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug, and failing to advise the Court, sitting in judgment of Mr. Inmon, of this evidence that supported a verdict of guilty but mentally ill.

PCR Application ¶¶ 10(a) and 11(a).

Mr. Inmon alleges he "was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his capital trial" for the following reasons:

1. Failing to obtain another mitigation expert witness after Dr. Marti Loring would not continue in Mr. Inmon's case because she was intimidated by the prosecutor who threatened to have her arrested if she testified, and Mr. Inmon was prejudiced by the same.

2. In the alternative to (1 l)(b)(l), failing to continue to prepare with Dr. Loring in the event the trial judge reconvened the trial, as in fact occurred, and Mr. Inmon was prejudiced by the same.

3. In the alternative to l l(b)(l) and l l(b)(2), counsel is informed and believes that trial counsel did obtain another mitigation expert witness but failed to prepare and present that witness to testify and render an expert opinion, and Mr. Inmon was prejudiced by counsel's deficient performance.

4. Failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.

5. Developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug, and failing to advise the Court, sitting in decision of what punishment to mete out to Mr. Inmon, of this extraordinarily powerful mitigation evidence that was and is a treatable medical condition Mr. Inmon, and Mr. Inmon was prejudiced by counsels' failures.

6. Failing to object to the rush to the forgone judicial conclusion that the sentence would be death. This ground is based on the deposition testimony of former Solicitor Robert M. Ariail:

> And Judge Miller had an agenda, probably one of the better agendas. And that was: Let's get through this case. You know, I know what the decision - I know what the verdict is going to be. Let's get through it and quit interrupting.

7. In the alternative to II(b)(1), (2), (3), (4), (5), and (6), intentionally not presenting powerful, available mitigation evidence in order to create an issue for postconviction relief. This alternate ground for relief is based on the deposition of testimony of former Solicitor Robert M. Ariail. If Solicitor Ariail is correct, then such conduct amounts to intentional sandbagging for which no strategic justification exists.

PCR Application ¶¶ 10(b) and 11(b).

Mr. Inmon alleges he "was denied the right to effective assistance of counsel-guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the appeal of his capital trial" for the following reasons

1. Not appealing the trial court judge denying Mr. Inmon his request to plead guilty and have his sentence determined by a jury when that right is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and trial counsel had preserved that issue for appellate review.

2. Not appealing Mr. Inmon's motion to continue his sentencing hearing so that he would have sufficient time to obtain another mitigation expert witness after Dr. Marti Loring who refused to participate in Mr. Inmon's case because she was intimidated by the prosecutor.

PCR Application ¶¶ 10(c) and 11(c).

Mr. Inmon alleges "S.C. Code Ann. § 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution," arguing this section

> as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inmon his right to have a jury determine the existence of

aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

PCR Application ¶¶ 10(d) and 11(d).

Mr. Inmon argues his "death sentence was obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" because the "capital sentencing scheme in South Carolina violates the Constitution because its methods for the imposition and review of capital punishment suffers the same infirmities as the statute rejected as unconstitutional by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238 (1972) because:

1. South Carolina's capital sentencing statute, as written by the General Assembly and construed by the South Carolina Supreme Court, does not perform the constitutionally mandated narrowing function.

2. South Carolina's sentencing system permits discrimination on the basis of race.

3. The South Carolina Supreme Court consistently fails to fulfill its statutory and constitutional obligation to conduct meaningful proportionality review in capital cases.

4. The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose.

PCR Application ¶¶ 10(e) and 11(e).

Mr. Inmon argues, "The cumulative effect of all of counsels' failures entitle Mr. Inmon to the relief sought because he was also prejudiced by the synergistic impact of the constitutional failures." PCR Application ¶ 10(f)

Mr. Inmon argues he "was denied the right to a fair trial-as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his capital trial because of prosecutorial misconduct" because

> [b]oth the trial court judge and the South Carolina Supreme Court found prosecutorial misconduct regarding Solicitor Ariail's treatment of Dr. Marti Loring. Dr. Loring was traumatized by this misconduct and was unable to inform the sentencing judge with powerful mitigation evidence known to her that would have resulted in imposition of a life sentence.

PCR Application ¶¶ 10(g) and 11(g).

Finally, Mr. Inmon argues he "was denied the right to a fair trial-as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his capital trial because of the rush to the forgone judicial conclusion that the sentence would be death." He contends "[t]his ground is based on the deposition testimony of former Solicitor Robert M. Ariail:

> And then we went to a – a staged – that would be my word – staged intimidation of a witness who was never intimidated. And then we went to a four-month recess or a six-month – whatever it was – in the middle of the death penalty trial. And after that, then we tried to recess. The defense has done nothing to prepare for the retrial to start, apparently. That's what it seemed to indicate. And the judge orders it to start anyway. So then we've got to deal with the issue of sabotage from the defense of not bringing this woman back and creating a huge appellate or a PCR issue. So we had to make a decision as to do we seek a subpoena of this woman from out of state? Do we ask the court for the subpoena? Well, how do we go about doing all these things?

PCR Application ¶¶ 10(g) and 11(g) (citing deposition of Robert Ariail at pp. 34-35).

From August 20-23, 2018, this Court convened an evidentiary hearing. Diana L. Holt and Charles Grose represented Mr. Inmon. Melody J. Brown, Sherrie Butterbaugh, and DeShawn H. Mitchell represented the State. The Court heard testimony from Mr. Inmon's trial counsel James W. Bannister, Symmes Culbertson, and John DeJong. This Court also heard testimony from Dr. Marti Loring, Dr. Louis Viamonte, and Dr. Donna Schwartz Maddox. Mr. Inmon submitted the depositions of Donald P. Geary, Trina Lucas, Michael Baker, Michael Bednarz, Tracey Meyers-Enderson, Alan Traylor, and Roger Lindsay, all of who we employed

by the DeKalb County District Attorney's office and participated in the 2009 events involving Dr. Loring. Applicant's Exhibits 47-54. The parties also submitted excerpts of the deposition of former Solicitor Robert M. Ariail. Applicant's Exhibit 55.

II. STANDARD OF REVIEW.

Under the first prong of *Strickland v. Washington*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." 466 U.S. 668, 688 (1984). "The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (internal quotations omitted). "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

The second prong of *Strickland*, requires a defendant establish that this deficiency prejudiced him. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* "In determining whether the applicant has proven prejudice, the PCR court should consider the specific impact counsel's error had on the outcome of the trial." *Smalls v. State*, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) (citing *Strickland*, 466 U.S. at 695-96 (explaining that

the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). "In addition, the PCR court should consider the strength of the State's case in light of all the evidence presented to the jury." *Id.* (citing *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 824 (1998) ("In deciding whether Jones was prejudiced, we must bear in mind the strength of the government's case ...," and "we must consider the totality of the evidence before the jury."')). "In general, the stronger the evidence presented by the State, the less likely the PCR court will find the applicant met his burden of proving prejudice." *Id.* "Ordinarily, the existence of 'overwhelming evidence' does not automatically preclude a finding of prejudice." *Id.* 422 S.C. at 189, 810 S.E.2d at 844. "[F]or the evidence to be 'overwhelming' such that it categorically precludes a finding of prejudice . . . the evidence must include something conclusive, such as a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence so strong that the *Strickland* standard of 'a reasonable probability ... the factfinder would have had a reasonable doubt' cannot possibly be met." *Id.* 422 S.C. at 191, 810 S.E.2d at 845.

"It is well settled that the [Sixth Amendment] right to the effective assistance of counsel applies to certain steps before trial," *Missouri v. Frye*, 566 U.S. 134, 140 (2012), including "to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156 (2012). "[T]he two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." *Id.* at 162-63 (internal quotations omitted). This Court has observed:

> In *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985), the Supreme Court applied the two part standard adopted in *Strickland* to guilty plea challenges bottomed on ineffective assistance of counsel. The Court reiterated that the defendant must show first that counsel's representation fell below the standard of reasonableness; and, that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. 106 S.Ct. at 370. Specifically, the Court stated that the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would

> not have pleaded guilty and would have insisted on going to trial." 106 S.Ct. at 370.

Jordan v. State, 297 S.C. 52, 54, 374 S.E.2d 683, 684 (1988). *See also Frierson v. State*, No. 2016-001940, 2018 WL 2325560, at *3 (S.C. May 23, 2018) ("reiterate[ing] the prejudice analysis is limited to the outcome of the plea process—whether but for counsel's deficiency, the defendant would have declined to plead and instead proceeded to trial"); *Thompson v. State*, 340 S.C. 112, 115, 531 S.E.2d 294, 296 (2000) ("A defendant who pleads guilty on advice of counsel may only attack the voluntary and intelligent character of a plea by showing that counsel's representation fell below an objective standard of reasonableness demanded of attorneys in criminal cases and there is a reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted on going to trial.").

As the Supreme Court of the United States recently reminded, "The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea." *Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1961 (2017). The High Court cautioned, "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Rather, they should look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

As the South Carolina Supreme Court recognized long ago, "capital trials today, as never before, present a myriad of complexities heretofore unknown." *Bailey v. State*, 309 S.C. 455, 457, 424 S.E.2d 503, 505 (1992).

> The attorney must be conversant with constantly *new* interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State. Moreover, in preparation for trial, he must investigate the facts and circumstances of the alleged crime with no less vigor and thoroughness than the publicly compensated solicitor, who has at his disposal the entire array of state, county, and municipal law enforcement. Dramatic technological advances, such as the science of DNA (deoxyribonucleic

> acid) analysis, are employed by prosecutors, requiring defense attorneys to acquire special knowledge and retain expert witnesses. . . .
>
> While the greater demands now made upon defense attorneys in the guilt phase are severe, it is in the sentencing phase that new and different issues, heretofore unknown, are introduced as a result of recent decisions of the United States Supreme Court. For example, in today's capital trial, the defendant is entitled to produce evidence concerning his childhood and family background in mitigation of his criminal conduct, so that the jury may impose life imprisonment as an alternative to the death sentence. In preparing this evidence the attorney must employ investigators in the course of thoroughly researching the defendant's entire life.

309 S.C. at 460-61, 424 S.E.2d at 506-07; *see also State v. Haight*, 649 N.E.2d 294, 309 (Ohio Ct. App. 1994) ("Because death is unique as a penalty, more is and should be expected of attorneys who undertake the responsibility to represent individuals who face the prospect of being executed").

Under *Strickland*, the defendant "must show that counsel's representation fell below an objective standard of reasonableness," which must be judged under "prevailing professional norms." *Id.* at 688.

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4–1.1 to 4–8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides.

Id. at 688-89; *see also Padilla,* 559 U.S. at 366 ("We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable ...."). The Supreme Court of the United States looks to the ABA Guidelines for Appointment and Performance of Counsel in Capital Cases ("ABA Guidelines") as evidence of the prevailing professional norms in capital cases. *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005). The South Carolina Supreme Court "has adhered to the principles and analysis in *Wiggins* in determining whether

counsel was ineffective in failing to thoroughly investigate potential guilt and penalty phase evidence." *Council v. State*, 380 S.C. 159, 171, 670 S.E.2d 356, 362 (2008) (citing *Ard v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007), *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), and *Von Dohlen v. State*, 360 S.C. 598, 605, 602 S.E.2d 738, 742 (2004)). The 2003 revision of the ABA Guidelines were in effect at the time of Mr. Inmon's capital proceeding. "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guideline 10.7. "The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." ABA Guideline 10.7(2). During the penalty phase of a capital trial, counsel should select "[e]xpert and lay witness along with supporting documentation (e.g., school records, military records) to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)." ABA Guideline 10.11(F)(2).

In assessing the investigation in *Strickland*, 539 U.S. at 527. *See also Council*

In *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court discussed the appropriate prejudice analysis. To assess prejudice, *i.e.* the probability of a different result, a court must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 41 (internal quotations omitted). Additionally, the Supreme Court has "never limited the prejudice inquiry under Strickland to cases in which there was only 'little or no mitigation evidence' presented." *Sears v. Upton*, 561 U.S. 945, 954 (2010). Although it has "considered cases involving such circumstances," the High Court has "explained that there is no prejudice when the new mitigating evidence 'would

barely have altered the sentencing profile presented' to the decisionmaker," but it also has "found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* (emphasis supplied by the court). The Supreme Court has "never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955 (emphasis supplied by the court).

Due process requires a defendant receive effective assistance of counsel on direct appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Effectiveness of appellate counsel is judged under *Strickland. Smith v. Robbins*, 528 U.S. 259 (2000). Appellate counsel is ineffective for not raising a meritorious issue entitling an appellant to relief. *See, e.g., Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

A. Guilty Plea and Constitutionality of S.C. Code § 16-3-20.

At the evidentiary hearing, Mr. Inmon called trial counsel James Bannister to testify about his representation of Mr. Inmon at trial. After Mr. Bannister agreed to represent Mr. Inmon, he very quickly realized Mr. Inmon was set on pleading guilty to the offenses with which he was charged. Mr. Bannister said Mr. Inmon was extremely remorseful for his crimes and his desire to plead guilty was born of his desire to mitigate additional suffering by the victim's family by avoiding having them endure a guilt-or-innocence phase of trial. Mr. Bannister researched his ethical duty regarding Mr. Inmon's decision to plead guilty in a death penalty case. PCR Tr. 122.

Satisfied that his client could enter a guilty plea without trial counsel's consent, Mr. Bannister engaged in extensive research regarding whether Mr. Inmon could plead guilty at a bench trial and still retain the right to have a jury determine his punishment. This legal issue was at the very core of Mr. Bannister's strategy, attention, and efforts. Because of the guilty plea, there would not be many available appellate issues. He testified, "[O]ne of the issues I was looking at is the constitutionality of having a jury decide the death or life without parole and whether or not our current South Carolina system met the constitutional requirements for that." PCR Tr. 127.

Mr. Bannister researched jury sentencing after a guilty plea, very focused on preserving the claim at every critical stage of the proceedings. He testified:

> [I]n the research we had done that the problem was always when it got to the Supreme Court on whether or not you could have a jury trial sentencing is that they would say, "Well, you waived it when you entered your guilty plea." And so I was trying to come up with a way in which we could tee-up the issue so that nobody could say that we had waived trying to get a jury to sentence Mr. Inman after a guilty plea.

Id. Mr. Bannister's billing records demonstrate that he spent scores of hours over many months researching and working on this issue. Applicant's Exhibit 7; PCR Tr. 141.

Mr. Bannister and the team decided the best way to proceed on this path was to go forward with "a motion regarding the mode of trial." Their goal was to have a determination by the trial court "on the front end barring a jury trial," if Mr. Inmon entered a guilty plea. PCR Tr. 127-129. Mr. Bannister described the reasoning and strategy plan going forward:

> Our plan was ... to get a ruling from the judge on the procedure so that we would have a ruling that we were not going to get a jury trial if we entered a guilty plea, explain why that was not constitutional. We anticipated the interlocutory appeal would be denied, and then I believe we were going to and did file a petition for

> cert with the United States Supreme Court. Ultimately, that was – that petition was denied. So that was step one, I guess, of the formal way in which we tried to preserve this issue so that it wouldn't be waived.

PCR Tr. 128.

The legal theory at the foundation of their efforts to win a jury sentencing for Mr. Inmon was buttressed by cases like *Apprendi v. New Jersey, Ring v. Arizona*, and *Blakely v. Washington*, which "were stair steps that were moving towards in the inevitable conclusion that [for] a death penalty to be valid was going to have to be determined by a jury if that is what a defendant sought." PCR Tr. 137-138. South Carolina's statutory framework barring a jury sentencing if a defendant pled guilty, unless the state agreed to a jury sentencing, would eventually fall. PCR Tr. 138, 142. Mr. Bannister testified about the evolution of this theory while the case was pending:

> And as we tickled out this issue, we realized that *Blakely* had become a significant moment in terms of interpreting the kinds of statutes we were dealing with in South Carolina. Post-*Blakely*, it looked like the majority of states were deciding you have a right to have a jury decide your sentence.

PCR Tr. 143.

The team, including Mr. Inmon who was initially reluctant to presenting mitigating evidence, agreed on the plan for the guilty plea and during the sentencing phase, including presenting mitigation evidence. Mr. Bannister explained:

> [W]e were talking about guilty plea negotiations with Inman in the sense that it was us and the client saying, okay, look, we're happy to – we're going to let you do the guilty plea because that's your right, but you're going to have to let us do what we need to do to defend you in the sentencing portion. And so there are certain things that are going to happen during the plea, and we're going to have a fight probably about the issues about whether we can get a jury to come in and be the ultimate decider of your sentence.

PCR Tr. 126

Mr. Bannister candidly acknowledged Mr. Inmon's initial hesitation to fight for jury sentencing and for presentation of mitigation evidence. He testified, "[Mr. Inmon] was always reluctant to have any mitigation put forward on his behalf, and we were always trying to get some cooperation from him to let us do our job." PCR Tr. 126. As the trial record shows, Mr. Inmon ultimately allow his attorneys to present mitigation and agressively preserve the jury sentencing issue. PCR Tr. 127.

Mr. Bannister recognized the depth and breadth of Mr. Inmon's remorse and self-loathing are types of powerful mitigation that juries find compelling. Mr. Bannister testified:

> [R]emorse seems to be one of the things that compels juries to give life sentences in the research of death penalty cases, and being able to say I pled guilty, I take full responsibility, to me was a big deal to be able to put that in front of a jury. And I felt like the inability that was created by the statutory framework to do that cut against your ability under the Eighth Amendment to present any mitigation.

PCR Tr. 132-133. And, again by Mr. Bannister, endorsing the power of a defendant's remorse in a death penalty sentencing trial:

> [R]emorse seems to be the big issue with juries that are giving life sentences, that at the end of the day, even a horrible, horrible case like this one was, if there's going to be something that might can change the outcome, remorse can often be it.

PCR Tr. 134.

Mr. Bannister testified about the earnestness of Mr. Inmon's remorse:

> [The] contradiction about him was that he could have engaged in such an evil act and at the same time be so remorseful and so confused about how he could have been the type of person that did that.
>
> It's hard to explain in a way that really captures it, but he hated himself for what he did, couldn't understand why he would do it and had a full understanding of the pain and misery that he had caused not only Tiffany Souers, but also the family. I mean, he was – he was always concerned that the ultimate outcome be something that would benefit them to some extent.

PCR Tr. 134-135.

Mr. Bannister and Mr. Inmon drafted an affidavit concerning Mr. Inmon's remorse, his willingness to plead guilty, and his willingness and desire to be sentenced by a jury. Applicant's Exhibit 12. Mr. Bannister noted it was further evidence of Mr. Inmon's agreement with counsel's strategy. Mr. Inmon signed the affidavit. *Id.*; PCR Tr. 130-140. Additionally, Mr. Bannister worked to prepare Mr. Inmon for the fight Mr. Bannister expected from the state while Mr. Bannister endeavored to maintain preservation of the right to jury trial at sentencing. PCR Tr. 151, 911. Mr. Inmon approved all of Mr. Bannister's efforts, including lengthy objections and arguments during the plea. PCR Tr. 152-153. Most significant to the Court, Mr. Inmon actually signed a plea agreement, the terms of which included Mr. Inmon agreeing to and accepting a life sentence. Applicant Exhibit 13; PCR Tr. 155-156. One of the reasons Mr. Inmon signed the agreement and agreed to a life sentence was for the Souers family—to end the litigation for them for all time, right then and there. Instead, as Mr. Bannister warned, the case remains ongoing. PCR Tr. 157.

Mr. Inmon's PCR application raises three claims regarding his guilty plea. This Court will address each claim separately.

1. **Trial counsel was ineffective for advising Mr. Inmon to plead guilty and appeal the trial court judge denying his request to be sentenced by a jury when then existing state law did not allow jury sentencing following a guilty plea in a capital case.**

Mr. Bannister testified Mr. Inmon is extremely remorseful and wanted to plead guilty. As a result, Mr. Bannister researched *Apprendi, Ring,* and *Blakely.* Mr. Bannister also identified other jurisdictions holding the defendant in a capital case has the constitutional right to plead guilty and be sentenced by a jury. PCR Tr. 143. This Court is required to give great deference to trial counsel's strategy. *See Freiburger* and *Ingle, supra.* This Court further finds Mr.

Bannister was credible when he testified Mr. Inmon was aware of and approved of this strategy leading up to and during his guilty plea. *See Lee,* 137 S.Ct. at 1961 (courts "should look to contemporaneous evidence to substantiate a defendant's expressed preferences"). This Court, therefore, finds and concludes that Mr. Inmon has failed to meet this burden of proof on this claim.

2. **Appellate Counsel was ineffective not appealing the trial court judge denying Mr. Inmon his request to plead guilty and have his sentence determined by a jury when that right is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and trial counsel had preserved that issue for appellate review.**

In prior pleadings, the State argued that Mr. Inmon did not preserve this issue for appeal and, therefore, appellate counsel could not be ineffective for not raising it on appeal. This argument is conclusively refuted by our Supreme Court's opinion in Mr. Inmon's direct appeal. *Inman*, 395 S.C. at 555, 720 S.E.2d at 40 ("Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases, [Inmon] was permitted to appeal this secondary sentencing issue."). Since this issue was preserved for appeal, this issue before this Court is whether Mr. Inmon received ineffective assistance of appellate counsel who failed to brief it for appellate review. Based on the extensive litigation of this issue, trial counsel obviously believed it to be an important issue for future appellate review. Although appellate counsel can make a strategic decision[16] to abandon an issue on appeal, it would not be a valid strategic decision to

[16] *See,* e.g., *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015) ("If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy."); *Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002) ("Counsel must articulate a **valid** reason for employing a certain strategy to avoid a finding of ineffectiveness." (emphasis supplied by court)).

abandon a winning issue on appeal. *See, e.g., Patrick, supra* (holding that appellate counsel was ineffective in failing to adequately raise or brief the issue of prosecutorial retaliation). This Court, therefore, must consider the merits of Mr. Inmon's contention that the Sixth Amendment requires jury sentencing. This issue can be determined as a matter of law.

The State's relies on *State v. Allen*, 386 S.C. 93, 101-02, 687 S.E.2d 21, 25 (2009); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004); and *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004). None of these cases, however, cited *Blakeley.*[17] *Blakeley,* as a superseding contrary decision of the Supreme Court," *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005), allows this Court to consider the merits of Mr. Inmon's arguments that are contrary to *Allen, Crisp,* and *Downs*.

Blakeley followed *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona,* 536 U.S. 584 (2002). "In each case, [the Supreme Court] concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding." *Blakeley*, at 303. Blakely "was sentenced to more than three years above the 53-month statutory maximum of the standard range because the sentencing judge subjectively found that Blakely had acted with 'deliberate cruelty.' The facts supporting that finding were neither admitted by [Blakeley] nor found by a jury." *Id.* The Court held, "[T]he State's sentencing procedure did not comply with the Sixth Amendment" and Blakeley's "sentence [was] invalid." *Id.* at 305.

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[17] The South Carolina appellate courts have cited *Blakeley* on three occasions. *State v. Rice*, 401 S.C. 330, 737 S.E.2d 485 (2013) (held that *Apprendi* was not applicable to a family court juvenile waiver hearing); *Dervin v. State*, 386 S.C. 164, 687 S.E.2d 712 (2009) (held that trial counsel was ineffective in failing to object to imposition of 25-year sentence when maximum sentence was 10 years); *State v. Brown*, 360 S.C. 581, 602 S.E.2d 392 (2004) (evidence did not establish that defendant actually used aggravated force on or about time of

This Court, therefore, must consider whether the trial court judge found any fact beyond Mr. Inmon's admissions during his guilty plea to support imposing the death sentence. In South Carolina, a death sentence is never required, even with a finding of an aggravating circumstance. S.C. Code Ann. § 16-3-20(B) and (C). The trial judge expressly stated that, in addition to the statutory aggravating factors, he considered the circumstances of the crime, the characteristic of Mr. Inmon, victim impact evidence, and penological justifications for sentencing. Our state's capital sentencing scheme allows for consideration of the specific circumstances of the crime and the character of the defendant. In a capital "sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment." S.C. Code Ann. § 16-3-20(B); *and see State v. Stewart*, 283 S.C. 104, 107, 320 S.E.2d 447, 450 (1984) ("Before a death sentence may be imposed, the attention of the jury or judge must be directed to the specific circumstances of the crime and the characteristics of the person who committed the crime."); *State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) ("the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant."). South Carolina's capital sentencing scheme additionally allows the sentencing authority to consider victim impact evidence. *Payne v. Tennessee*, 501 U.S. 808 (1991); *State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010); *Lucas v. Evatt*, 308 S.C. 31, 33, 416 S.E.2d 646, 647 (1992); *State v. Johnson*, 306 S.C. 119, 410 S.E.2d 547 (1991). Protection of the community, punishment, and accountability are traditional sentencing considerations. *See e.g. Graham v. Florida*, 560 U.S. 48, 71-74 (2010) (discussing "penological justifications" including retribution, deterrence, incapacitation, and rehabilitation).

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sexual assaults, as element of first-degree criminal sexual conduct). None of these cases

In Mr. Inmon's case, the sentencing judge, as provided for by our state's capital sentencing scheme, considered more than Mr. Inmon's admissions to the elements of murder, first-degree burglary, kidnapping, and first-degree criminal sexual conduct. The trial judge subjectively found the crime "horrific," "savage, brutal, and unconscionable." The trial judge further subjectively found Mr. Inmon to be "within a small group of deviant predators who exhibit in their conduct a callous disregard for society and the rights and safety of others." The trial court subjectively made findings of fact concerning victim impact evidence. Under *Blakeley*, a jury and not a judge must decide all of these facts, which the trial judge used to enhance Mr. Inmon's sentence. That did not happen here. Because consideration of *Blakeley* would have led our Supreme Court to a different outcome, appellate counsel was ineffective for not raising and briefing this meritorious issue on appeal, and Mr. Inmon was prejudiced by that failure. *Strickland and Patrick, supra.* This Court, therefore, grants Mr. Inmon post-conviction relief and orders a new sentencing hearing with a jury.

3. **"S.C. Code Ann. § 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution," because this section, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inmon his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed. PCR Application ¶¶ 10(d) and 11(d).**

This claim turns on whether *Hurst v. Florida*, __ U.S. __, 136 S. Ct. 616 (2016),[18] which had not been decided at the time of Mr. Inmon's trial and direct appeal, is a constitutional

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considered the issue currently before this Court.

[18] The decision in *Hurst* followed a jury trial where "Florida law required the judge to hold a separate hearing and determine whether sufficient aggravating circumstances existed to justify imposing the death penalty." 136 S. Ct. at 619. Like Hurst, Mr. Inmon chose to exercise his right for a jury to find facts relevant to punishment, but a judge determined those facts instead.

decision binding on the Supreme Court of South Carolina, allowing this Court to consider the claim pursuant to S.C. Code Ann. § 17-27-45(B).[19] A review of *Apprendi* and *Ring* reveals *Hurst* established a new constitutional rule requiring jurors to make all findings of fact necessary for *imposition* of the death penalty. *Ring* considered the application of *Apprendi* to Arizona's capital sentencing scheme. *Apprendi* held that the Sixth Amendment does not permit a defendant to be

> expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone. . . . even if the State characterizes the additional findings made by the judge as sentencing factor[s].

Ring, 536 U.S. at 588-89 (internal citations and quotations omitted; emphasis supplied by Court). *Ring*, however, was expressly limited to whether "the Sixth Amendment required jury findings on the aggravating circumstances." *Id.* at 597 (fn. 4). *Ring* did not address whether a jury must consider mitigation and "make the ultimate determination whether to *impose* the death penalty." *Id.* (emphasis added). *Ring*, accordingly, was limited to a jury determination regarding *eligibility* for the death penalty. *Hurst*, however, involved a challenge to Florida's capital sentencing procedure where the jurors render an "advisory sentence" but "the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." 136 S.Ct. at 620. *Hurst* held the Sixth Amendment requires jurors make the "critical findings necessary to *impose* the death penalty." *Id.* at 622 (emphasis added). *Ring*, accordingly,

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[19] The State contends, "This is a free-standing claim that could have been raised at trial or on direct appeal if preserved at trial." The Court is not persuaded by the State's insistence that Mr. Inmon is raising a free-standing claim that is not cognizable in post-conviction relief because of S.C. Code Ann. § 17-27-45(B) allowing consideration of new, binding constitutional decisions. The State also argues that Mr. Inmon's guilty plea "waived and abandoned a jury determination of his guilt or innocence, the existence of statutory aggravating circumstances, statutory and non-statutory mitigating circumstances, and the appropriate sentence." These arguments ignore our Supreme Court's holding that the separate sentencing issue was preserved for appeal. *Inman*, 395 S.C. at 555-56, 720 S.E.2d at 40.

addressed only *eligibility* for the death penalty. *Hurst* addressed *imposition* of the death penalty. *Hurst*, therefore, decided constitutional issues not considered in *Ring*. This Court must determine whether *Hurst* is a substantive constitutional rule that applies retroactively. *Montgomery v. Louisiana*, militates in favor of *Hurst* applying retroactively. __ U.S. ___, 136 S. Ct. 718 (2016) (*Miller v. Alabama*, 567 U.S. 460 (2012) prohibiting under Eighth Amendment mandatory life sentences without parole for juvenile offenders, announced a new substantive constitutional rule that was retroactive on state collateral review).

Because Mr. Inmon pleaded guilty to murder, S.C. Code Ann. § 16-3-20(B) mandated his "sentencing proceeding must be conducted before the judge." The guilty plea to murder, standing alone, did not make him eligible for the death penalty. Under South Carolina's capital sentencing scheme, a "statutory aggravating circumstance [must be] found beyond a reasonable doubt" before someone convicted of murder is eligible for the death penalty. S.C. Code Ann. § 16-3-20(A)-(C). The statutory aggravating circumstances are set forth in § 16-3-20(C). Although Mr. Inmon also pleaded guilty to burglary, first-degree criminal sexual conduct, and kidnapping, the prosecution still had the burden of proving beyond a reasonable doubt that "[t]he murder was committed while in the commission of" these crimes. S.C. Code Ann. § 16-3-20(C)(a)(1)(a), (b) and (d). Although the prosecution had a "head start," based on Mr. Inmon's guilty plea, towards persuading the judge to find these statutory aggravating circumstances, the statute still required the additional findings of fact.

In South Carolina, a finding that a statutory aggravating circumstance exists beyond a reasonable doubt does not require imposition of the death penalty. The sentencing authority must consider statutory mitigating circumstances, S.C. Code Ann. § 16-3-20(C)(b), and non-statutory mitigating circumstances, *see, e.g., State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721

(2000) *overruled on other grounds by Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). The sentencing authority is "authorized to impose a life sentence even if it did not find any mitigating circumstances." *State v. Hicks*, 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). The sentencing authority must consider "the specific circumstances of the crime and the characteristics of the person who committed the crime." *State v. Green*, 301 S.C. 347, 358, 392 S.E.2d 157, 162 (1990). Pursuant to *Payne v. Tennessee,* 501 U.S. 808, (1991), South Carolina allows consideration of victim impact evidence. *See, e.g., State v. Bixby*, 388 S.C. 528, 555, 698 S.E.2d 572, 586 (2010). Even after all of these considerations, a life sentence may be imposed "for any reason or no reason at all, including as an act of mercy." *Rosemond,* 383 S.C. at 330, 680 S.E.2d at 10.

Mr. Inmon's guilty plea does not preclude application of *Hurst*. As seen above, the Supreme Court of the United States applied *Apprendi* "to instances involving plea bargains" in *Blakely v. Washington,* 542 U.S. 296 (2004). *Hurst*, 136 S. Ct. at 621. Blakely "was sentenced to more than three years above the 53-month statutory maximum of the standard range because the sentencing judge subjectively found that Blakely had acted with 'deliberate cruelty.' The facts supporting that finding were neither admitted by [Blakeley] nor found by a jury." *Id.* The Court held, "[T]he State's sentencing procedure did not comply with the Sixth Amendment" and Blakeley's "sentence [was] invalid." *Id.* at 305.

This Court, therefore, must consider whether the trial court judge found any fact to support imposing the death sentence beyond Mr. Inmon's admissions during his guilty plea. The sentencing judge, as provided for by our state's capital sentencing scheme, considered more than Mr. Inmon's admissions to the elements of murder, first-degree burglary, kidnapping, and first-degree criminal sexual conduct. The trial judge subjectively found the crime "horrific," "savage,

brutal, and unconscionable." The trial judge further subjectively found Mr. Inmon to be "within a small group of deviant predators who exhibit in their conduct a callous disregard for society and the rights and safety of others." The trial court subjectively made findings of fact concerning victim impact evidence.

This Court recognizes the holding in *State v. Downs*, 361 S.C. 141, 604 S.E.2d 377 (2004) requires the trial court judge to conduct a sentencing hearing following a guilty plea.[20] *Downs* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley, supra.* Once *Hurst* and *Blakeley* are considered together, South Carolina's capital sentencing procedure following a guilty plea can withstand Sixth Amendment scrutiny.

Finally, other states apply *Hurst* retroactively. Florida applies *Hurst* retroactively to death sentences that became final after the U.S. Supreme Court's opinion in *Ring. Asay v. State*, 210 So. 3d 1 (Fla. 2016); *Mosley v. State*, 209 So. 3d 1248 (Fla. 2016). Delaware applies *Hurst* retroactively. *Rauf v. State*, 145 A.3d 430 (Del. 2016) (Delaware's capital sentencing statute unconstitutionally allows a judge to find an aggravating circumstance for the weighing phase).

Because this Court concludes *Hurst* is retroactive, this Court grants Mr. Inmon post-conviction relief and orders a new sentencing hearing with a jury.

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[20] The South Carolina Supreme Court also addressed this issue in *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005); and *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004). *Crisp*, and *Wood* concluded *Ring* does not apply when the defendant pleads guilty but failed to consider the impact of *Blakeley, infra.* All of these

B. Dr. Marti Loring.

1. Evidence Presented at the PCR Hearing.

Mr. Bannister testified that when the defense team was "one or two witnesses away from the conclusion of [its] presentation of mitigation," the State attacked Dr. Marti Loring, who was Mr. Inmon's social historian and primary mitigation expert, by threatening her with a criminal charge for working in South Carolina without a South Carolina professional license to do so, thereby abruptly stopping the sentencing trial. PCR Tr. 198-200. Mr. Bannister testified, "[It] was one of those moments where suddenly everyone realized that what had been proceeding in a relatively orderly fashion without any real significant missteps had suddenly become potentially a mistrial." PCR. Tr. 200.

Mr. Bannister testified that mitigation evidence of the type Dr. Loring would have presented was important to explain to the Court and the victim's family how Mr. Inmon ended up being on trial for murder. In doing that Mr. Bannister also hoped that the victim's family would be impacted and support a life sentence for Mr. Inmon. He believed, "Helping to explain to them how we ended up here would be of benefit" to them. PCR Tr. 202.

Mr. Bannister, aware that former Solicitor Ariail had tried a similar bullying tactic in another death penalty case, had prepared for the "outside chance" that Mr. Ariail might try the tactic in Mr. Inmon's case. PRC Tr. 202-203. When Solicitor Ariail threatened Dr. Loring with criminal prosecution, Mr. Bannister literally had a front row seat to observe the impact of the threat on her sitting in the witness stand. Mr. Bannister's own first reaction was disbelief that "we are really getting ready to go into this." He observed Dr. Loring as she realized what Mr.

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cases predated and, therefore, could not have considered *Hurst*. Appellate counsel abandoned this issue in *State v. Inman*, 395 S.C. 539, 720 S.E.2d 31 (2011).

Ariail was threatening her with and, as the discussion went along, that the prosecutor was also suggesting that she might face criminal prosecution for her testimony in other South Carolina death penalty sentencing trials. PCR Tr. 204.

Mr. Bannister opined Judge Miller grasped the gravity of the situation when he raised the possibility of granting Dr. Loring immunity to secure her testimony. Dr. Loring was allowed to consult with a lawyer who just happened to be in the courtroom, Bill Godfrey, who had no connection to Mr. Inmon's case. PCR Tr. 207. Ultimately, Dr. Loring expressed her discomfort with continuing to participate in the case because of the risk she would be prosecuted for doing her life's work. She asserted her intent to invoke her Fifth Amendment rights. PCR Tr. 206. Mr. Ariail statement that he would not agree to grant her immunity (and could not in other judicial circuits) strengthened her resolve. PCR Tr. 206. The trial judge suspended the proceedings.

Consistent with the trial judge's instructions, Mr. Bannister followed up with Dr. Lroing but determined she could no longer work on Mr. Inmon's case. PCR Tr. 208. He was forced to to attempt to locate another similar, professional to present Mr. Inmon's mitigation evidence. Mr. Bannister's challenge included not only finding an appropriate expert who could accept the case immediately, but also finding an expert who was licensed in South Carolina in order to avoid a repeat of the Solicitor's attack on Dr. Loring. PCR Tr. 211.

Mr. Bannister testified that he contacted three similar experts who were licensed in South Carolina about the possibility of working up the case for presentation at the eventual restart of the sentencing trial. *Id.* The first of the three experts Mr. Bannister reached out to refused to accept the case because she had "heard what happened" with Solicitor Ariail and was "not getting involved in that." PCR Tr. 212. The second expert Mr. Bannister contacted was not available.

Mr. Bannister ultimately contacted Jan Vogelsang, a South Carolina resident who is an expert in social work, with experience working on death penalty cases in the state. Ms. Vogelsang agreed to accept the case but required eight months or so to prepare the case professionally and properly. PCR Tr. 213-214. In fact, Mr. Inmon's team had begun working with Ms. Vogelsang, including supplying her with Mr. Inmon's records, in February of 2009. The Court set the sentencing hearing to reconvene in April of 2009.

Mr. Bannister prepared a motion for continuance based on the fact that the defense had not had sufficient time to prepare for the continuation of the hearing having been hamstrung by the state's misconduct. Ms. Vogelsang provided an affidavit to Mr. Bannister detailing many of the tasks she needed to preform and an estimate of the length of time it would take her to complete the tasks, and her affidavit established that she would need many months to complete her work. Applicant's Exhibit 3; PCR Tr. 217. Teresa Norris, a veteran capital litigator, also provided an affidavit detailing the requirements for preparing and presenting an effective and constitutionally sound sentencing case in a death penalty trial. *Id.*

At the PCR hearing, the State asked Mr. Bannister "was there anything during the mitigation investigation, anything that you uncovered that you felt was not presented during the sentencing phase." He testified:

> So it's so hard to answer that question because I cannot remember everything that Dr. Loring testified to and everything that we had planned on her testifying to.
>
> I remember being incredibly frustrated, because at least initially when we were preparing for her testimony, we spent a lot of time going through the testimony, how we were going to march it out and present it in the most effective way as possible.
>
> When we got into the second phase of the trial in April of 2009, it was the most bizarre scenario I've ever been involved with as an attorney. The judge called our former expert witness as a witness of the Court and began asking direct questions, at which point I was objecting because there were – there were things

he was asking that I thought were going to elicit information that I would not have intended to bring out had I been the one directing the question.

It was also frustrating because there were things that he did not bring out. I mean, there were a number of questions that said can you remember anything else that you and Mr. Bannister talked about, or words to that effect. You know, and Dr. Loring is doing the best she can to remember stuff that happened, let's see, September, April – so six months without really being involved in it.

Furthermore, there were developments that had occurred since that that I thought were important to roll into the mitigation, and I was anticipating with, again, the time I thought we were going to get with Jan Vogelsang, there would be even more that we could add to it.

So I can't agree with the statement that everything got in that should have gotten in.

PCR Tr. 279-81.

The State asked Mr. Bannister, "[W]hy did you make that decision not to question her about mitigation in that second sentencing." Mr. Bannister responded:

There were a lot of reasons. The primary one was I didn't feel like the process at that point was fair. That's just the bottom line. The position I had been put in was take this witness cold that you had spent weeks preparing, we want you to cross-examine her so you can fix what the solicitor has done in this case.

I knew that she wasn't prepared in the sense that she had been for the original trial. I also knew that she didn't know some of the facts that we had uncovered or had talked to Jerry about in going forward since the trial, and I knew – or I felt like at least that even if she was willing to offer testimony, that there would be some pullback just by virtue of the fact that she's in the same courthouse, she's in there with Solicitor Ariail, and he's the one that had threatened her in the first place.

Add to that the fact that he had, in my view, just sent Georgia authorities down to arrest her and had her in her – I mean, I remember hearing, and so my impression was that this was still very relevant to her ability to testify was that she had literally been in her house calling people on her phone saying, "What do I do? They're trying to break in my house." I mean, it was – to hear her tell me about it, it was -- and to describe it, it was a very traumatic experience.

So I just didn't feel like she was ever going to be in a position to offer the kind of testimony that I anticipated putting forward with the mitigation with a social historian. And it wasn't just social history. I mean, there was more to it than that. So I was mad.

PCR Tr. 290-92.

On redirect, PCR counsel directed Mr. Bannister's attention to the "conversation between [him] and Judge Miller at the conclusion of the September 2008 hearings." Mr. Bannister testified:

> So we were talking about Dr. Loring. I think that the – I think that the Court was a little bit put out at that time that Dr. Loring was refusing to testify and asserting the Fifth. I think I described earlier that he had gone through, you know, potentially granting immunity and some of the other things, which I'm not sure the Court has the authority to do.
>
> But in any event, he was a little bit put out with her, and he was talking about my motion for a mistrial. And he said, "I'm not going to grant your mistrial." And I kind of took it as at this point, I'm going to continue the case. I felt like he was leaving the mistrial up in the air for me to give me a chance to kind of figure out where I was, gather together the – I mean, I think we all want to know what sort of the legal framework was going to be for what was going forward.
>
> And he was telling me to get another social historian so that Dr. Loring wouldn't have to come back and be part of the case. And I said – well, basically, he was telling me she was out. And I said, "Well, don't make her completely out," because I figured part of what we were going to have to do is create a record related to the intimidation. I was already anticipating that we might have to call her back to talk about what – how she had felt about what had gone on and why she had ultimately not become a witness. But I also got kind of specific instructions that I believe from the judge to go – you know, if it's not going to work, go get somebody else and we'll give you some time, which is what I thought was doing from September to January was really what I had – the instructions I had gotten from the Court.
>
> Q. And do you think it was reasonable to think that you were going to have time to get another expert?
>
> A. Yeah. I think I said I was shocked as we got closer to April and it looked like this was really going to happen, they were going to force me in a position where I couldn't put up Jan Vogelsang because she just wasn't ready and hadn't had time to get ready. It really caught me off guard. I mean, I had been – I had felt like I had been pretty informed about, you know, dates, timing, what we were going to be doing. I mean, there was – I mean, it was a hard-fought litigation, but we all were on the same page as to what was going to be scheduled. And this really – I don't want to say it came out of left field, but nobody said, hey, we don't care whether Jan Vogelsang is ready or not. We're going forward in April.

Q. Right.

A. You know, I had like maybe, I want to say, two, three weeks. Whenever I put together the motion for a continuance and started working on those affidavits is roughly when I started feeling like they may actually try to put me – "they" being the judge, I guess, put me in the position where we're going to go forward, and I'm not going to be able to have Jan.

Q. And that's a good point, because it's been sort of presented as the appellate issue, preserving the record was the misconduct issue, but it was also the separate issue of your continuance motion; is that correct?

A. I thought that was a huge deal, yes.

PCR Tr. 313-16. The Court finds Mr. Bannister's testimony credible.

At the PCR hearing, Dr. Loring testified about her experiences during the sentencing trial, after the sentencing trial when a DeKalb county SWAT team (also known as a "VIPER" team in Georgia) attempted to arrest her at her home, and about her testimony when the sentencing trial reconvened. When asked why she left out some information during her testimony at the reconvening of the sentencing hearing in April of 2009, Dr. Loring testified:

> Looking back and trying to understand how it could have happened, I just – I think that this case affected me in a way that no other case ever has before or since. I was – I was just so anxious, and I was experiencing such kind of dread and fear and really horror of what was going to happen as a result of things that I had been threatened with. It was just amazing. I actually don't think I was as aware of how terrified I was at the time. I think it took some time going by before I became fully aware of how scared and I'd have to say ineffective I was to have left out such important information."

PCR Tr. 347.

When asked why she was scared and what was the source that caused that fear, Dr. Loring testified:

> Well, the solicitor had told me that I would be locked up, I'd be incarcerated if I did testify because I'm not licensed in South Carolina. This has never come up before, so I wasn't sure exactly what to do.
>
> ****

> Then there were other threats. I think the solicitor said not only was I in trouble here, but in any other state where I testified outside of the State of Georgia, he thought that there were serious concerns, too. So then I was frightened about that. And that was the beginning of a series of incidents that kept on and on. It was like I would try to solve them, I think.
>
> The solicitor asked me for the names of all the cases I've ever testified in, so I hired a research person, a graduate student and we began to try to put that together. And then it changed, and I was to do all the cases in South Carolina. And then it changed and I was to list all the death penalty cases all over the country. And that concerned me because I signed an agreement with one particular office that I wouldn't tell anyone else the1 cases I was working with for them. . . .
>
> ****
>
> [but] that worked out where I was just to give the ones in South Carolina. But it seemed like every week there was something else horrendous. I got home – Judge, I got home one day, and the neighbors came to say that the police had been at my house and they were bringing up the equipment to break down my door, that they were sure that I was in the house, which I wasn't. was just getting home. And they were – because of information they'd gotten from South Carolina, they thought it was important to break the door down, and the neighbors had come up and talked to them about, you know, please not to do that, and I would certainly have answered the door.

PCR Tr. 347-349.

When asked by the State about what Dr. Loring meant when she told the trial judge in April of 2009 that she was [in Pickens, SC] "voluntarily," but that "it doesn't feel quite voluntary to me," Dr. Loring explained:

> I think that was after they threatened to break down my front door. If I'm wrong, I expect someone to correct me, but that's my memory. And so having been told I better not fly or I'll get arrested, having almost had my front door broken down with my dog inside, I didn't feel like anything was voluntary. And my lawyer told me either you testify, or the judge may feel like he needs to lock you up.

PCR Tr. 368.

Dr. Loring stated several times that she was terrified and fearful, then and now. PCR Tr. 369-390. Dr. Loring testified to having concerns about the Solicitor's tactics in Mr. Inmon's case affecting her professionally—that it might end her career. She explained:

> I was – my husband had died several years previously, and I was just learning how to manage financially and otherwise, and I really thought that this was going to be the end of my career. Because if I got arrested or something like that, then it seemed – and if I kept having to ask lawyers in other states who headed agencies may I tell the names of your clients and they would get upset like this one did, I just thought that perhaps my way of earning a living would be over. I didn't think it. I really believed that that's what was happening.

PCR Tr. 350. She testified that she was afraid and believed that she would actually lose her professional license, as well as being afraid she would be arrested. *Id.*

Dr. Loring was asked what information she had left out of her testimony during the April of 2009 reconvened sentencing hearing. When she remembered the information, she wrote it down. Applicant's Exhibit 36, PCR Tr. 342. She testified that she had left the following information out during her testimony there:

> Vera told me that she tried to commit suicide multiple times, sometimes in the presence of Jerry, that she took an overdose of medicine, then she tried to hang herself, and with Jerry in the car, she attempted to kill them both by wrecking the car.
>
> She told me she often thought about killing Jerry. Once she became aware that she was squeezing his neck with her own hand and thinking that she was going to help him be reunited with God when the telephone rang and that interrupted her. She was crying when she told me this. She said that Jerry looked at her and looked surprised and sad at what she was doing. She wasn't sure exactly how old he was. She thought about 5 to 7 when she had her hand on his neck.
>
> She said she did a number of other things like trying to starve him, but he found a garbage can and ate food from it. She also tried to suffocate him with a pillow.
>
> She had thoughts of castrating Jerry so he wouldn't, as she said, become like his father. She said she made some attempts to do this.
>
> Once she saw his father go into the bedroom and climb into bed with Jerry's sister.
>
> She talked often to Jerry about death. She told him about hell and threatened at if he was like his father he would go to hell.

> She was choked, raped and beaten by Jerry's father. And the father seemed to become more aroused when Jerry was watching so that he would be choking her and looking up at Jerry watching from the bedroom door, and he laughed like it was a joke and then he'd repeat the whole thing over again.
>
> Vera told me that she was often depressed and she would just sit staring into space all day, and during those periods of time, she wouldn't feed or wash Jerry.
>
> She had a vague recollection that there was some kind of an accident where he was hurt in the backyard, but she couldn't remember what happened, what the injury was.
>
> One night she looked – I don't know if it was night. Once she looked into Jerry's bedroom at night and reported that she saw the father in Jerry's bed, and that the father's body was going up and down under the covers.

PCR Tr. 351-53. The Court finds Dr. Loring's testimony credible.

When asked if Dr. Loring had advised him about Mr. Inmon's mother trying to kill Mr. Inmon and to castrate Inmon, Mr. Culbertson confirmed that Dr. Loring told him about those incidents. PCR Tr. 635-636. Mr. Culbertson explained that the defense had been hamstrung concerning mitigation and the events surrounding prosecutorial misconduct and Dr. Loring, including not being given reasonable amount of time to bring in a new mitigation expert. PCR Tr. 639-640. Mr. Culbertson characterized the value of the evidence the defense was not able to present as a result of trial court's refusal to grant a continuance in order to give a new mitigation expert sufficient and reasonable time to prepare:

> We thought Dr. Loring was capable of presenting some facts and some evidence that she was not allowed to because of what happened at, during and after the first hearing. I can tell you that in our search for another – or for a subsequent mitigation person, expert, we became aware of potentially some other beneficial information that we thought might have been beneficial to Jerry. We did not have the opportunity to develop that because we didn't have the time to develop it.

PCR Tr. 642. The Court finds Mr. Bannister's testimony on this point credible.

Dr. Loring testified that she agreed to be assessed by psychiatrist, Louis Viamonte, MD., and she cooperated with him. PCR Tr. 353. Dr. Louis Viamonte is an expert in forensic psychiatry. He testified about his professional assessment of Dr. Loring's mental health condition during the period of time starting with Mr. Ariail's misconduct toward her in September of 2008 and through the end of her testimony in April of 2009, including the period when a DeKalb county SWAT (or VIPER) team tried to arrest her at her DeKalb county home. In Dr. Viamonte's opinion, Dr. Loring met the diagnosis for PTSD, under both the DSM-IV-TR (which was in use by professionals in 2008-2009, and the DSM-V, which is the current edition at the time of his testimony before the Court. PCR Tr. 409-410. In setting up a mutually agreeable time for Dr. Viamonte to assess Dr. Loring in Atlanta, he noted that she exhibited avoidance, which could be a symptom of PTSD. PCR Tr. 411-412.

Dr. Viamonte reviewed the trial transcripts of Dr. Loring's testimony as a collateral source of information to compare with information she provided to him during his assessment. The information was consistent, which also helped rule out the possibility that Dr. Loring was malingering. PCR Tr. 413-414. Memory problems can arise with PTSD, which explains, in part why Dr. Loring failed to testify about significant facts at trial. He also testified about Dr. Loring's testimony before this Court and some of the aspects of her PTSD were very present. PCR Tr. 418. The Court finds Dr. Viamonte's testimony credible.

The Dekalb County officials testified about the extraordinary events related to Mr. Ariail's attempts to obtain Dr. Loring's attendance in SC, by any means necessary. Trial counsel was denied an opportunity to discover this information at trial. Unlike trial counsel, post-conviction counsel was able to obtain the information from Donald Geary, the lawyer with the DeKalb County District Attorney's Office involved in attempting service of the out of state

subpoena for Dr. Loring. Donald Geary testified about Investigator Bednarz from his office attempting to serve Dr. Loring. When they claimed they thought Dr. Loring was avoiding service, Mr. Geary explained:

> I wouldn't have told him to stay there at that point in time. If they were trying to avoid service, we don't play cat and mouse. I don't know how to put that. I don't have the investigator try to stalk them once we know they're avoiding service –
>
> Q. Okay.
>
> A. – or expect they're avoiding service.
>
> Q. All right. And so then what would you normally do in those circumstances?
>
> A. We would normally go and get a pickup order.
>
> Q. Okay. Explain what that means.
>
> A. Given the – we would go to the judge assigned and indicate – the investigator would come. The investigator would describe the efforts made to serve and the reasons he or she believed the person was avoiding service. The judge would either say reattempt service or the judge would grant a pickup order and a pickup order is, go get them.
>
> Q. Okay.
>
> A. It would be akin to an arrest order.
>
> Q. Right.
>
> A. But it's not obviously probable cause for a crime. It's – we have a – there's a valid nisi to get them their material witness warrant. They can't evade service. *Go get them for the purpose of the hearing.*

Applicant's Exhibit 47 at 19-20 (emphasis added)

Mr. Geary confirmed the purpose of the pickup order was to bring the witness to the hearing:

> Q. And then the request would be for a pickup order; is that right?
>
> A. Yes, sir.

Q. And that would be for the purpose of bringing somebody to the hearing?

A. Before the Court, yes, sir.

Q. Okay. Well, when you say before the Court, for the – for the hearing that was scheduled to determine whether or not they have to comply with the out-of-state subpoena?

A. Yes, sir.

Id. at 20-21.

Mr. Geary reviewed the time stamps on the Georgia court filings. The Georgia judge scheduled the hearing regarding Dr. Loring for April 16, 2009 at 3:00 p.m. The judge signed the document scheduling the hearing on April 15, 2009 at 2:20 p.m. The same judge singed the pickup order for Dr. Loring. The pickup order was filed on April 16, 2009 at 10:12 a.m. *Id.* at 22-24. Thus, Mr. Geary's deposition testimony contradicted his affidavit, relied on by Solicitor Ariail stating

> that a hearing was held at 3 p.m. on April 16, 2009, before the Honorable Linda Warren Hunter, Dekalb County Superior Court, that Dr. Loring did not appear at this hearing, that after testimony from this State's Attorney, Investigator Blake and Officer Tucker, Judge Hunter issued a Pickup Order for Dr. Loring.

Id. at Exhibit 2.

Investigator Michael Baker of the Dekalb County District Attorney's Office explained that, in 2009, his office had a VIPER (or SWAT) team, consisting of about fifteen people. He explained the purpose of the VIPER team:

> Primarily if we had to serve warrants or look for a particularly dangerous suspect. Or we did protection details for witnesses where there was a threat towards them. Or we protected the [Assistant District Attorneys] or the prosecutors in the office if there was a credible threat.

Applicant's Exhibit 49 at 13-14. VIPER team members "had to go through SWAT training," and "be able to meet the criteria of the team which was the physical attributes and the desire to be on the team." *Id.*

Investigator Baker recalled the VIPER team efforts to serve the out-of-state subpoena on Dr. Loring.

> Investigator Bednarz was assigned an out-of-state material witness warrant. And, you know, part of his thing was to tell me what was going on. He said that they attempted several times and didn't make contact. And we set up a date to go out with him and some additional team members.[21]

Id. at 22. He testified about the follow up attempt. The VIPER team "went to the location," which was Dr. Loring's home at 9:05 p.m. *Id.* at 23. The VIPER team used a "standard

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[21] Michael Bednarz, the primary point person for Georgia law enforcement's efforts, testified:

> I've stated in past conversations about this case that based on the fact that, one, it was something – an endeavor that Mr. Geary had essentially assigned not per se me, but as – it's evident that I was the only one who wanted to have a record of what occurred. And the fact I knew by arresting a doctor there was going to have to be something on paper to say why we did ... And who was involved in doing it. And the DC which I explained was Deputy Chi Understood. And I would, you know, it's not in my notes, but I remember when we were knocking on the door and it was dark and the porch lights were coming on around us. I get it. I understand. ....
>
> Q. This was a big deal?
>
> A. It wasn't necessarily a big deal, it was a --I anticipated that people were going to have some questions.
>
> Q. Uh-huh. It was unusual?
>
> Other than the endeavor on the 15th with Lindsey, Lucas, and Blake, we— we made it a point to take a Deputy Chief with us being supervisor who, when that neighbor or Dr. Loring says I want to talk to your supervisor, we can go[“] here they are[“] ...[It was] [t]he first time I'd ever been asked to arrest a doctor.

Applicant's Exhibit 50 at 63-65.

deployment, one person goes to the back, two up front, one at the door." *Id.* One of the VIPER team members present was Dr. Fred Hall, a medical doctor. Investigator Baker explained the purpose of including a medical doctor in the VIPER team:

> Say we served a lot of high risk warrants, not only for our benefit and our safety, but those of anybody that collateral or even the target of a particular incident, we want to make sure there was some medical coverage.

Id. at 23-24.

Other members of the DeKalb County District Attorney's Office corroborated the testimony of Mr. Geary and Investigator Baker. Applicant's Exhibits 48, 50-54.

Mr. Savitz's testified that he, in his capacity as chief appellate defender, first became involved in the Applicant's case after the state's misconduct stopped Dr. Loring's testimony. Bill Godfrey called to ask how to handle Dr. Loring's predicament. Thereafter, Mr. Savitz said his next interaction with the case is when the appeal came to his office. PCR Tr. 512. Early on, he and Deputy Appellate Defender Robert Dudek were going to work together on Mr. Inmon's appeal. However, Mr. Savitz solely pursued Mr. Inmon's appeal until Mr. Savitz retired, which was after all pleadings had been filed. *Id.* Mr. Savitz testified unequivocally that ineffective assistance of appellate counsel claims in the PCR application were well-preserved.

Regarding Mr. Inmon's claim that Mr. Savitz rendered ineffective assistance of appellate counsel in that Mr. Savitz failed to appeal the trial court's failure to grant Mr. Inmon a reasonable continuance of time for a new mitigation expert to prepare for the sentencing trial, Mr. Savitz testified:

> Q. All right. So the same question, I think you've already telegraphed the answer, but the continuance motion, there's nothing – no reason why you couldn't appeal that along with the three that you did appeal.
>
> A. No, no. I could have raised any of the stuff that we're talking about.

Q. All right. And from an issue of deference to the trial judge, if the trial judge had promised or had instructed trial counsel to get another expert to replace Dr. Loring –

A. Right.

Q. – would that have been an important thing to include in a motion regarding the continuance.

A. I'm not sure I understand your question.

Q. Okay. Well, if the trial judge had said we're going to take a break in trial –

A. Right.

Q. – and I want you to go get a witness to take the place of Dr. Loring –

A. Right.

Q. – and then later on did not give trial counsel enough time to do that –

A. Right.

Q. – would that be important factual background – procedural background to put in an appeal?

A. So he said, "Go get a witness," and then later on down the road he says, "Oops, time's up"?

Q. Right.

A. And – yes.
Q. That would be something that would be important to the appeal?

A. Yes, yes.

PCR Tr. 527-528. The Court finds Mr. Savitz's's testimony on these two points credible.

2. Discussion.

Mr. Inmon raises five issues regarding the prosecutor's misconduct regarding Dr. Loring:

1. Trial counsel was ineffective for failing to obtain another mitigation expert witness after Dr. Marti Loring would not continue in Mr. Inmon's case because she was intimidated by the prosecutor who threatened to have her arrested if she testified, and Mr. Inmon was prejudiced by the same.

2. In the alternative, trial counsel was ineffective for failing to continue to prepare with Dr. Loring in the event the trial judge reconvened the trial, as in fact occurred, and Mr. Inmon was prejudiced by the same.

3. In the alternative, trial counsel was ineffective for obtaining another mitigation expert witness but failing to prepare and present that witness to testify and render an expert opinion, and Mr. Inmon was prejudiced by counsel's deficient performance.

4. Failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.

5. Appellate counsel was ineffective for not appealing Mr. Inmon's motion to continue his sentencing hearing so that he would have sufficient time to obtain another mitigation expert witness after Dr. Marti Loring who refused to participate in Mr. Inmon's case because she was intimidated by the prosecutor.

The Court will address these claims as a group. As a threshold matter, both the trial judge and our Supreme Court found prosecutorial misconduct on behalf of former Solicitor Ariail. Justice Pleicones described it as "inexplicable and reprehensible." *Inman*, 395 S.C. at 570, 720 S.E.2d at 48. These findings of misconduct are the law of the case. *See, e.g., Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015) (held that the decision in prior appeal affirming the denial of center's motion was law of the case, and thus parent's motion to compel was properly denied). This Court, therefore, does not need to address this issue.

These claims turn on the reasonableness of trial counsel's conduct in responding to the unavailability of Dr. Loring. Trial counsel are entitled to great deference regarding trial strategy. *See Freiburger* and *Ingle, supra.* As seen, when Dr. Loring refused to testify in September 2008, the trial judge offered trial counsel two options. The first option was continuing to use Dr. Loring as an expert witness and preparing her testimony for when the trial resumed. The second

option was finding a replacement expert. Trial counsel's consideration and actions regarding these two options was reasonable. Trial counsel first contacted Dr. Loring to determine whether she could still participate in the case. Trial counsel, therefore, made a reasonable decision to discontinue using Dr. Loring as a witness. This Court, accordingly, dismisses this claim.

After trial counsel determined Dr. Loring could no longer participate in the case, trial counsel contacted three possible replacement witnesses. Two of these possible witnesses declined to take the case, one because of medical reasons. Jan Vogelsang agreed to take the case. Trial counsel obtained funding for her on January 2, 2009. Applicant's Exhibit 29. Trial counsel met with Ms. Vogelsang on February 10, 2009, and she spent time reviewing the records. Applicant's Exhibit 30. Because of her work on other cases, Ms. Vogelsang estimated she needed until early 2010 to complete her work on the case. This timeframe is reasonable given nature of the investigation counsel is required to conduct pursuant to the ABA Guidelines. *See Wiggins* and *Council.* In addition to reviewing relevant records, Ms. Vogelsang needed to interview Mr. Inmon, family members, and collateral witnesses, which very likely would have required travel to Tennessee and Michigan. This Court, therefore, finds trial counsel reasonably decided to retain Mr. Vogelsang as a replacement witness. *See Freiburger* and *Ingle, supra.* Because Ms. Vogelsang did not have enough time to prepare the case, trial counsel reasonably decided not to present her as an expert witness and to move for a continuance. *Id.* This Court, accordingly, dismisses these claims.

Failing to investigate and present the mitigation evidence known to Dr. Loring presents the Court with a difficult analysis. Dr. Loring did discover the information. Additionally, it is reasonable to believe Ms. Vogelsang would have discovered the same information if she had been provided with sufficient time. Having concluded trial counsel's decision to retain Ms.

Vogelsang was reasonable and that Ms. Vogelsang would have discovered the same information, this Court cannot find trial counsel was unreasonable for not discovering and presenting this evidence. This Court, accordingly, dismisses this claim.

This Court additionally finds trial counsel properly preserved the motion to continue the sentencing hearing so Ms. Vogelsang would have sufficient time to properly investigate and prepare. This Court, therefore, finds appellate counsel deficient for not briefing this issue on appeal. *See Strickland, Southerland,* and *Patrick, supra.* This Court further finds Mr. Inmon was prejudiced by appellate counsel's failure to brief this issue on appeal. *Id.* This Court, therefore, grants post-conviction relief on this issue.

C. Dr. Donna Schwartz Maddox.

Mr. Inmon alleges trial counsel was ineffective for not developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug, and failing to advise the Court, sitting in decision of what punishment to mete out to Mr. Inmon, of this extraordinarily powerful mitigation evidence that Mr. Inmon is not a typical rapist, but instead suffers from treatable mental disorder; Mr. Inmon was prejudiced by counsels' failures.

1. Evidence Presented at the PCR Hearing.

Dr. Donna Schwartz Maddox testified in depth about paraphilic disorders and biopsychosocial constructs. PCR Tr. 459. Paraphilic disorders can be caused by exposure to and witnessing things during childhood and also caused by genetic coding. PCR Tr. 461. She explained further:

> [I]f you look at the onset of all illnesses, whether they're medical or psychiatric, there's usually some stressors going on in the environment. There's usually some genetic predisposition, and something happened that all of a sudden you wake up

and you're different. You have an illness that at least we're able to measure and define.

PCR Tr. 466. Dr. Maddox diagnosed Mr. Inmon with a sexual disorder. *Id.*

Dr. Maddox testified to significant events in Mr. Inmon's childhood. Prior to Mr. Inmon's first sentencing trial, Dr. Maddox obtained part of Mr. Inmon's social history from Dr. Marti Loring, including information from her interviews with many family members. Mr. Inmon's father was a convicted rapist and sex offender when Mr. Inmon was very young and in his formative years. PCR Tr. 462-463. His father raped his sister and his mother in Mr. Inmon's presence, and Mr. Inmon may have been sexually abused by his father. *Id*

Dr. Maddox testified about the details of Mr. Inmon's childhood:

> She reported that the sister stated that the father would tie her to the bed, and that – he would tie her to the bed and rape her. It was a bunk bed, and she would be on the top. And at the time, Jerry was years old, and he was in the bottom bunk and he would be sleeping under her while these rapes occurred. She reported that he, the father, would blindfold her and digitally penetrate her. She did report to Dr. Loring that there was one occasion that Jerry heard what was going on and she could hear him crying. She reported whenever they would cry, the father would spank them for crying while this abuse was happening.
>
> She also told me, Dr. Loring [did], that the mother found blood on Mr. Inmon's anal area on one occasion. She also noted redness around his anal area – excuse me – on more than one occasion. She also noticed redness around his anal area around age 3.

PCR Tr. 463-464.

Dr. Maddox testified about the impact of childhood multi-generational sexual abuse and Mr. Inmon's family history of it, which she had information that the sexual abuse spanned three generations of Mr. Inmon's family. PCR Tr. 465. Mr. Inmon's grandfather sexually abused Mr. Inmon's sister, Denise. Mr. Inmon witnessed his father "choke, rape, and beat his mother." Multi-generational sexual abuse creates a toxic environment. She testified that "when you are

raised in violence and you see violence and then you become violent, that would certainly, again, lead to either a biological component or certainly a psychological component." Dr. Maddox explained the connection between childhood experiences and some details of his offense. "The fact that he choked this victim is certainly something that dynamically it's important." PCR. Tr. 466.

After Mr. Inmon's guilty plea, Dr. Maddox sought to complete her thorough psyco-sexual assessment of Mr. Inmon, in consultation with Dr. Gregg Dwyer. Dr. Maddox apprised Mr. Bannister that Dr. Dwyer had much more training in sexual disorders, and she wanted to consult with him on the assessment. Mr. Inmon was transported on August 28, 2008 to their USC medical offices in Columbia for the assessment. Part of the assessment included a lengthy interview with Mr. Inmon performed by Dr. Dwyer. Dr. Maddox conveyed to Mr. Bannister that they needed one more day with Mr. Inmon and that they had a preliminary diagnosis of Biastophilia. Mr. Bannister declined to proceed with the necessary remainder of the assessment which the doctors needed to preform to rule out sexual sadism. PCR Tr. 475.

During that interview, Mr. Inmon reported that, in his early teens, he had started looking in windows and watching people undress. That conduct progressed to him "entering people's homes while they were sleeping, women, and he would touch them." During one of those episodes, where he had touched someone and she woke up, and he got scared and ran away." PCR Tr. 469. Dr. Maddox testified that as a young man, Mr. Inmon was engaged in a paraphilic behavior, including Voyeurism, that eventually evolved, as he became a post-pubescent teenager and witnessed a woman either being raped or engaged in role-playing a rape scenario, into Biastophilia, with which he was partially diagnosed prior to his sentencing. PCR Tr. 468-469. Dr. Maddox and Dr. Dwyer, after lengthy additional testing that they recommended he have

prior to his sentencing, finally diagnosed Mr. Inmon with Biastophilia during the pendency of this PCR action.

Dr. Maddox testified that "paraphilias are not choices . . . it is mental illness." PCR Tr. 470. She pointed to people who say their interest is homosexual and testified, "They have a choice whether they act on it or not, but once their brain is wired for sexual arousal, you cannot really change that." *Id.* Somebody's sexual identity – what they're aroused to – is ages 10-14. The brain is developing its sexuality around those ages. She stated, "The brain is myelinating" and those things are being determined. PCR Tr. 471. Dr. Maddox expounded:

> We don't really know all the reasons why. We know that there's areas of the brain that perhaps there's some issues with. We know that it could have to do with your environment. It may be things that you've been exposed to. But it's just evidence, again, that he's got this wiring for deviant sexual behavior and was engaging in it. Even before he was sexually active, he was going into people's homes and watching them. And then he's raised in an environment where he has seen rapes and those sorts of things, so they all play together. So I think they're very significant.

PCR Tr. 470-471.

Dr. Maddox testified about her diagnosis of Mr. Inmon with mental disorder of Biastophilia and the its forensic importance:

> There is a group of offenders that are not rapists, that don't rape to control people. There is a group of offenders, and it's a mental illness, that their only arousal is to non-consensual sex. And that's a very rare disorder, but we felt that, based on our interview, that Mr. Inmon may have very well indeed had the disorder.

PCR Tr. 475-476. (Trial counsel did not allow Dr. Dwyer and Dr. Maddox to complete the assessment.)

Dr. Maddox testified about the difference between the typical rapist and people suffering from the mental illness of Biastophilia:

> There are a group of rapists . . . that are antisocial, that they rape to harm people, to control them, and it's a volition. They choose to do it. There's a group of

> offenders that the only way they get sexual satisfaction is to have raped someone, so it's very different. They don't do it to control or dominate. It is their only sexual outlet. Now, they're responsible for what they do. They can choose not to act on those urges, but those urges are not coming out of anger, they're not coming out of rage, they're not coming out of being a sociopath and trying to hurt someone. It's how their brain is wired. They can't help it. They can help what they do, but they can't help that their brain has been kind of miswired that way.

PCR Tr. 476.

She explained that antisocial rapist, people who rape out of anger or control, are far more common than people who suffer with Biastophilia, which she testified was "extremely rare." In her three decades-long career, Dr. Maddox has only assessed *three* patience who suffered with Biastophilia. PCR Tr. 484. Notably, Dr. Maddox has amount of experience assessing sex offenders, she testified that she "evaluates sex offenders "probably every week" and has done so for as part of the sexually violent predator program for 11 years." PCR Tr. 485.

Dr. Maddox's explained the forensic importance of completing Mr. Inmon's assessment and presenting that information to the trial judge or jury:

> [I]t needed to be evaluated to see – to be fully evaluated to see if it was something that potentially would be presented to the Court or not. It explained why he raped so many people.
>
> He wasn's raping people because – he certainly had some antisocial features about him. He had broken the law before. He was not a stranger to crime, but he was not the typical rapist. He was not the prototypical rapist. And this was a very different issue. And in my opinion, it was an illness. It needed to be evaluated so that that information could or could not be presented to the Court.
>
> Q. All right. And that information, the purpose of presenting that to the Court would have been to explain why the rape of Tiffany Souers occurred; is that right?]
>
> A. Yes. And in my opinion, it could have affected – he may have been eligible for a guilty but mentally ill defense just for the rape.
>
> And one thing I have to add, Your Honor, we don't have it – there's no evidence that the strangling was part of this offense. What I've learned is the strangling

> happened after the rape, so it would have explained the rape. It wouldn't have been eligible as a defense for the murder, but it would have been eligible perhaps for a guilty but mentally ill defense for her rape, or, at the most, in the sentencing phase, it would have been mitigation. It would have been diminished capacity.

PCR Tr. 486-487.

Dr. Dwyer and Dr. Maddox called Mr. Bannister on August 28, 2008[22] to explain their preliminary findings and the reasons why they needed to complete the assessment:

> We called. I have a specific recollection. Dr. Dwyer and I were in the basement. That's where our lab was at USC. Mr. Inman had just left. Mr. Bannister asked me to call him and tell him what we found. And we were somewhat excited about that because you don't really see that disorder. We – at that point, we were not sure if he had a sexual disorder or whether he was just a rapist. And we tried to explain to him that this was a sexual disorder, that we needed to do further work up. And I did report to him that it would certainly be an issue that could be brought up at least at mitigation and potentially a guilty but mentally ill offense to the rape of Ms. Souers.
>
> Q. And do you feel like he understood what you were trying to explain to him?
>
> A. No. And, in fact, [Mr. Bannister's] answer was, "You're telling me my guy's a rapist and he's got unreported rapes? No, thank you."

PCR TR. 489-90. The Court finds Dr. Maddox's testimony credible and compelling.

Dr. Maddox testified about her and Dr. Dwyer's efforts completing the sexual assessment, at PCR counsels request, during the pendency of the PCR. PCR Tr. 491. The steps the doctors took doctors took started with Dr. Maddox asking to consult with Dr. Gregg Dwyer since he had known Mr. Inman from 2006 [sic]. PCR counsel "Ms. Holt and I both met Dr. Dwyer at MUSC on March 12th to begin the evaluation." PCR Tr. 491. Dr. Dwyer was prohibited by MUSC policy in place in 2017 to allow Dr. Maddox to participate at one of MUSC's facilities. The prohibition was a simple matter of policy and was not directed at Dr.

[22] Lack of time was not an issue and trial counsel did not claim it to be.

Maddox in the least bit. PCR. Tr. 492. Dr. Maddox testified about the assessment Dr. Dwyer performed:

> [Dr. Dwyer] completed the interviews, he administered the multi-phasic sex inventory, some different tests that we use that compares him to other sex offenders and those sort of things. He denied administer of PPG. He did not do the physiologic testing, and he felt comfortable that he could render his own opinions without that testing. And [Mr. Inmon] clearly met the diagnosis of Biastophilia. Dr. Dwyer concurred. But the most interesting thing, Your Honor, [Mr. Inmon] does not have sexual sadism. And I was incorrect. I had given a deposition in 2016 on this case. I didn't have my records. USC had them" . . . [Mr. Inmon] clearly did not meet the criteria for sexual sadism.[23]

PCR Tr. 493 (footnote added).

After completion of the sexual assessment, the doctors confirmed the preliminary diagnosis of Biastophilia. PCR Tr. 495.

Dr. Maddox explained her diagnoses of Mr. Inmon. She noted the importance of the fact that Mr. Inmon has suffered with the major mental illness of "pretty bad" depression most of his life and that there was a known family history of major depression. PCR Tr. 496. She also diagnosed him with Biastophilia. In the controlled environments of the Florida and North Carolina Departments of corrections, Mr. Inmon was not a threat for over 2 decades. Dr. Maddox testified that he could be treated with medication and therapy. Treatment with Depo-Privara would reduce his testosterone levels, making his arousal level almost non-existent. PCR Tr. 505-506. With cognitive therapy, he would learn ways to self-regulating and being aware of his thoughts. Dr. Maddox testified that Mr. Inmon has developed some insight and was already practicing self-regulating behaviors by avoiding watching television programs that might trigger urges. He limits his television viewing "to sports, sporting events." PCR Tr. 503.

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[23] She and Dr. Dwyer had both already made that determination during the 2008 partial assessment. PCR Tr. 494.

Dr. Maddox testified that Mr. Inmon's insight is very positive for his future prognosis. She explained:

> It's very helpful. Insight is, Your Honor, that you recognize what's wrong. At the time of this crime, he didn't know that he had this illness. He didn't understand. He thought he was a horrible person that's a rapist that has no cure or concern for others, and he thought that this was – he did not recognize – he had no idea that this was a mental illness. And so insight is recognizing that it's an illness, that there's triggers, that you have to control it, that there's treatment available, that you recognize, you know, what's going on with you and that you're participating in your care.

PCR Tr. 506.

Dr. Maddox testified that she also ordered that Mr. Inmon undergo neuropsychological testing, which revealed that he has a high IQ. She testified Mr. Inmon's high IQ "makes him much more amenable to treatment [because] [h]e's going to be able to understand these things." PCR Tr. 507. Dr. Dwyer, who is known across the country for his expertise treating sexual disorders, has committed personally to treat Mr. Inmon or to play a consulting role. PCR Tr. 506.

Dr. Maddox described the treatment that would be available for Mr. Inmon in the South Carolina Department of Corrections, whether he be housed on death row or in general population for the rest of his natural life:[24]

> In cognitive therapy, yes. Most of these therapies are based on – there's two kinds of therapies they use. One, it's cognitive behavioral therapy. And so they also teach persons a lot about self-regulating, being aware of your thoughts. It's called dialectical behavioral therapy, but there's a number of therapies that are used now for that treatment.

PCR Tr. 505.

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[24] Dr. Maddox noted that it was important to her view that Mr. Inmon would do well in general population because he had no sexual assault behavior in the 20 years he was incarcerated in the Florida and North Carolina prison systems. PCR Tr. 538.

Dr. Maddox testified further about treatment for Mr. Inmon:

> And then the main thing that they do is you practice what's called skills of distraction, and they're very common therapies, believe it or not. But when persons are having bad thoughts or blaming themselves, you teach them how to, you know, change their mind to think of other things. And so there';s lots of ways that you can help people cope who have been victims of abuse.

PCR Tr. 532.

Aside from the diagnosis of Biastophilia, Dr. Maddox also diagnosed Mr. Inmon as suffering with a persistent depressive disorder labeled Dysthymia. In practical terms, she said, Mr. Inmon "is always sad, he always sees the worst in everything, he has a very poor self-esteem. It's a chronic condition." PCR Tr. 497. She also diagnosed Mr. Inmon as suffering with unspecified trauma, including some features of Post-Traumatic Stress Disorder. Dr. Maddox testified:

> [W]hen Dr. Loring presented this information, there was information about specific instances of child abuse or things [Mr. Inmon has] witnessed. He has no recollection at all. So I made that diagnosis to reflect that while there have been witnesses that he's had traumatic events, he has – his consistent story to me is that he recalls bits and pieces of his childhood. He recognizes that he has difficulty recalling a lot of events in his childhood, but this is a diagnosis that reflects that he's had some history of exposure to abuse, and he's having issues from it because he doesn't recall them.
>
> ***
>
> Usually it has to be chronic. You know, if you have just one bad thing happen to you when you're a child, you may remember those things. But if you've had them repeated and it's going on while your brain's developing over a number of years, there are a group of people that don't remember those things.

PCR Tr. 499.

Dr. Maddox also diagnosed Mr. Inmon with a personality disorder with two distinctive traits which have changed over time from her pretrial assessment to current times. She testified that she diagnosed him with "antisocial personality disorder" in 2006, which she believed was

still present. She also diagnosed him with "avoidant personality" in 2006. PCR Tr. 500. However, she updated the second diagnosis after assessing Mr. Inmon in conjunction with the PCR. Her current diagnosis is that he is schizoid, because he cannot handle the anxiety of the interaction required for some personal relationships. PCR Tr. 501. Mr. Inmon simply wants to be left alone. *Id.*

Mr. Bannister consulted with Dr. Maddox throughout the case. While she testified about Mr. Inmon's competency during the guilty plea, Mr. Bannister testified that they made a determination not to use her for the sentencing phase. PCR Tr. 239. After reviewing Applicant' Exhibits 33 and 34, Mr. Bannister recalled that Dr. Maddox preformed an assessment at her office in Columbia. PCR Tr. 240. Mr. Bannister was aware that both Dr. Gregory Dwyer, also a psychiatrist, and Dr. Maddox specialized in sexual disorders. Mr. Bannister testified that, at first, he didn't recall Dr. Dwyer's participation in the case. Mr. Bannister testified that he did not recall that Dr. Maddox and Dr. Dwyer diagnosed Mr. Inmon as suffering with a mental disorder called Biastophilia and that the disorder was treatable with medication and therapy. Mr. Bannister testified that the team had been desperate for help from a clinical and treatment standpoint, as follows:

> I mean, we – during – and especially the initial stages with Mr. Inman, I was desperate for some help to – from a clinical standpoint, a treatment standpoint because you'd go meet with him sometimes, and he couldn't function, I mean, he couldn't talk to you or wouldn't talk to you. I described it on a number of occasions as it was like a computer and it was in an endless loop. You just couldn't – you needed to hit control/alt/delete or something to get it back. He just was nonresponsive in a lot of ways. And then on other occasions, he would be difficult to communicate with. He had ideas about what he wanted to do.
>
> I mean, it was – I really felt sorry for him in a lot of ways. I mean, he was obviously in a lot of pain over what was going on.
>
> So I don't know what biastophilia is, so I can't answer your question without knowing more about it. If I put my shoes – if I put myself in my shoes

back then, I would have wanted to know could it have been? Absolutely. Would I have wanted medication to help him if it would help him? Absolutely.

PCR Tr. 243-44. The Court finds Mr. Bannister's testimony credible.

2. Discussion.

Mr. Inmon PCR application alleges trial counsel was ineffective for

1. Failing o developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug, and failing to advise the Court, sitting in decision of what punishment to mete out to Mr. Inmon, of this extraordinarily powerful mitigation evidence that was and is a treatable medical condition Mr. Inmon, and Mr. Inmon was prejudiced by counsels' failures.

2. Failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.

Trial counsel has an obligation to conduct a complete mitigation investigation. *Wiggins* and *Council, supra.* Trial counsel not completing the evaluation recommended by Dr. Maddox was not reasonable. This Court, therefore, finds deficient performance under the first prong of *Strickland.* The failure to complete the investigation cannot be excused as a reasonable strategic decision. Because the evaluation had not been completed, trial counsel was not in a position to evaluate the usefulness of the evidence. *See, Weik, supra.*

In determining whether Mr. Inmon has proven prejudice, this Court must "consider the specific impact counsel's error had on the outcome of the trial." *Smalls*, 422 S.C. at 188, 810 S.E.2d at 843 (citing *Strickland,* 466 U.S. at 695-96 (explaining that the court must analyze how individual errors of counsel affect the important factual findings in a particular case)). The Court begins this analysis by examining the testimony of Dr. Price. Dr. Price diagnosed a sexual

paraphilia where Mr. Inmon has "a compulsive drive to rape." On cross-examination, Dr. Price implied it was **not possible** to medically "treat" Mr. Inmon and "change his behavior to make him a functioning person." While it is true Mr. Inmon suffers from a mental disorder, a sexual paraphilia where he has "a compulsive drive" to have non-consensual sex," this condition is **rare and treatable**, meaning it is possible to treat him and change his behavior.

When pronouncing sentence, the trial judge pointed to the testimony of Dr. Price describing Mr. Inman "as a serial rapist." As seen above, the trial judge made multiple findings that are not accurate once it is recognized Mr. Inman has a rare, treatable disorder. Thus, the "specific impact counsel's error" influenced "the outcome of the trial." *Smalls, supra.* Dr. Maddox's testimony presented powerful evidence that would have precluded many of the trial court's findings that led to the decision to impose the death penalty, especially given that the only sentencing possibilities available were life without parole or death. Mr. Inmon, therefore, has established "a reasonable probability that, but for counsel's unprofessional errors," the trial judge would have imposed a life sentence. *Strickland,* 446 U.S. at 694. This Court, therefore, grants Mr. Inmon post-conviction relief, vacates his death sentence, and remands the matter to the court of General Sessions for Pickens County.

D. Cumulative Error.

Mr. Inmon argues in his PCR application, "The cumulative effect of all of counsels' failures entitle Mr. Inmon to the relief sought because he was also prejudiced by the synergistic impact of the constitutional failures." One of Mr. Inmon's PCR other claims is a broad, more generalized allegation of ineffective assistance of counsel for

> failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.

Appellate counsel's prejudicial failure to brief the continuance issue is inextricably linked to this mitigation claim.

In *Porter v. McCollum*, 558 U.S. 30 (2009), the Supreme Court discussed the appropriate prejudice analysis. To assess prejudice, *i.e.* the probability of a different result, a court must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding." *Id.* at 41 (internal quotations omitted). Additionally, the Supreme Court has "never limited the prejudice inquiry under Strickland to cases in which there was only 'little or no mitigation evidence' presented." *Sears v. Upton*, 561 U.S. 945, 954 (2010). Although it has "considered cases involving such circumstances," the High Court has "explained that there is no prejudice when the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker," but it also has "found deficiency and prejudice in other cases in which counsel presented what could be described as a superficially reasonable mitigation theory during the penalty phase." *Id.* (emphasis supplied by the court). The Supreme Court has "never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Id.* at 955 (emphasis supplied by the court).

This Court, therefore, must consider the cumulative prejudice.[25] *Kyles v. Whitley*, 514 U.S. 419, 436 (1995) (the prejudice must be "considered collectively, not item-by-item"). The

[25] The "cumulative error doctrine provides relief to a party when a combination of errors that are insignificant by themselves have the effect of preventing a party from receiving a fair trial and it requires the cumulative effect of the errors to affect the outcome of the trial." *State v. Johnson*, 334 S.C. 78, 93, 512 S.E.2d 795, 803 (1999) (citing *Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995)). The Court of Appeals applied the cumulative error doctrine in State v. Blurton*, 342 S.C. 500, 512, 537 S.E.2d 291, 297 (Ct. App.

United States Supreme Court's opinion in *Williams v. Taylor*, 529 U.S. 362, 399 (2000), reveals that the Court considered "the entire postconviction record . . . as a whole and cumulative of mitigation evidence presented originally" in conducting its prejudice analysis and finding counsel ineffective for failing to adequately prepare and present mitigation evidence. "[A]s a whole" implies a cumulative analysis. Likewise, in *Strickland*, the Court stated, "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional *errors*, the result of the proceeding would have been different." 466 U.S. at 694 (emphasis added).

This Court finds and concludes the mitigation presentation was prejudicially deficient. Regarding Dr. Loring, the trail judge recognized, "I'm not getting all the information, because of some form of legal gamesmanship." R. 694-96. The sentencing order was based on a finding that Mr. Inmon is not capable of rehabilitation, a conclusion that is not possible based on Dr. Maddox's testimony that Mr. Inmon has a rare sexual disorder that is *treatable with medication.* This Court, therefore, grants post-conviction relief based totality of the mitigation evidence that was not prestned to the trial court.

E. Prosecutorial Misconduct.

Mr. Inmon argues he "was denied the right to a fair trial-as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution-during the sentencing phase of his capital trial because of prosecutorial misconduct" because

> [b]oth the trial court judge and the South Carolina Supreme Court found prosecutorial misconduct regarding Solicitor Ariail's treatment of Dr. Marti Loring. Dr. Loring was traumatized by this misconduct and was unable to inform

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2000) ("[T]he cumulative effect of this error, when coupled with the exclusion of the previously discussed evidence, warrants reversal.") *overruled on other grounds by State v. Blurton*, 352 S.C. 203, 573 S.E.2d 802 (2002).

> the sentencing judge with powerful mitigation evidence known to her that would have resulted in imposition of a life sentence.

PCR Application ¶¶ 10(g) and 11(g).

Prosecutorial misconduct claims are cognizable in post-conviction relief. *See, e.g., Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006) (solicitor's failure to disclose impeachment evidence constituted *Brady* violation, and State was obligated to correct co-defendant's false testimony at trial); *Gibson v. State*, 334 S.C. 515, 518, 514 S.E.2d 320, 321 (1999) (held that, in guilty plea case: (1) prosecution violated *Brady v. Maryland*, and (2) such violation precluded finding that prosecutor did not engage in misconduct).

As discussed above, the findings of prosecutorial misconduct are the law of the case. *See Flexon, supra.* Also as discussed above, the events in Georgia were much more serious and, therefore traumatic to Dr. Loring, that previously known to the trial judge and the Supreme Court. Dr. Viamonte testified about the trauma to Dr. Loring. The Solicitor's misconduct was the very reason the trial judge did not get all of the evidence known to Dr. Loring. This Court, therefore, grants post-conviction relief.

F. Rush to Foregone Judicial Conclusion that Sentence would be Death.

Mr. Inmon argues he "was denied the right to a fair trial—as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial because of the rush to the forgone judicial conclusion that the sentence would be death." He contends "[t]his ground is based on the deposition testimony of former Solicitor Robert M. Ariail:

> And Judge Miller had an agenda, probably one of the better agendas. And that was: Let's get through this case. You know, I know what the decision – I know what the verdict is going to be. Let's get through it and quit interrupting.

Mr. Bannister testified about being rushed to conclude the sentencing hearing: "I was shocked as we got closer to April and it looked like this was really going to happen, they were going to force me in a position where I couldn't put up Jan Vogelsang because she just wasn't ready and hadn't had time to get ready." PCR Tr. 315. As seen above, at the end of the September 2008 hearing, the trial judge presented trial counsel with two options – continuing with Dr. Loring or obtaining a new expert. Trial counsel considered both and concluded Dr. Loring could no longer participate in the case under the circumstances. Trial counsel obtained a new expert, but the trial judge did not allow sufficient time for that expert to prepare. The trial judge knew the court did not grant funding for the new expert until January 2009. The trial judge's rush to conclude the sentencing hearing contributed to the trial court not receiving all of the available mitigation evidence. This Court, therefore, grants post-conviction relief.

G. Defense Sandbagging.

Mr. Inmon alleges trial counsel was ineffective for intentionally not presenting powerful, available mitigation evidence in order to create an issue for postconviction relief. This ground for relief is based on the deposition testimony of former Solicitor Ariail:

> And then we went to a – a staged – that would be my word – staged intimidation of a witness who was never intimidated. And then we went to a four-month recess or a six-month – whatever it was – in the middle of the death penalty trial. And after that, then we tried to recess. The defense has done nothing to prepare for the retrial to start, apparently. That's what it seemed to indicate. And the judge orders it to start anyway. So then we've got to deal with the issue of sabotage from the defense of not bringing this woman back and creating a huge appellate or a PCR issue. So we had to make a decision as to do we seek a subpoena of this woman from out of state? Do we ask the court for the subpoena? Well, how do we go about doing all these things?

PCR Application ¶¶ 10(g) and 11(g) (citing deposition of Robert Ariail at pp. 34-35). If Solicitor Ariail is correct, then such conduct amounts to intentional sandbagging for which no strategic

justification could exist. This Court, however, finds neither the trial record nor the post-conviction relief record contains even a scintilla of evidence—other than the former Solicitor's self-serving testimony—of defense sandbagging. Former Solicitor Ariail raised this allegation, apparently in an effort to distract from his own misconduct that created this situation. This Court, therefore, finds this claim should be dismissed.

IV. CONCLUSION.

Therefore, it is ordered that Jerry Inmon's PCR application is granted, in part, and denied, in part. This matter is remanded to the Court of General Sessions for Pickens County for a new sentencing hearing.

IT IS SO ORDERED.

COPY

Alexander Stephens Macaulay
Presiding Judge by Special Assignment of the Supreme Court of South Carolina

_____, 2019
Wahalla, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF PICKENS	)	
	)	
Jerry Buck Inman, #5256,	)	**C/A No.: 2012-CP-39-918**
***a/k/a* Jerry Buck Inmon,**	)	**(Capital PCR Action)**
Applicant,	)	
v.	)	
	)	**RESPONDENT'S RULE 59(E) MOTION**
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

2020 MAY -8 A 11:13

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Respondent, State of South Carolina, received a copy of the Court's Order granting relief on April 21, 2020, the same day it was entered. Pursuant to Rule 59(e), SCRCP, Respondent respectfully seeks reconsideration of the ruling; and, pursuant to S.C. Code §§ 17-27-80 and 160 (D), and *Fishburne v. State*, 427 S.C. 505, 832 S.E.2d 584 (2019), a complete ruling on all the arguments presented through the State's proposed order on the issue upon which relief was granted. (See Attachment 1, Respondent's Proposed Order of Dismissal, pp. 22-40). Respondent sets out the following specifics for reconsideration and ruling:

1. This Court found the portion of S.C. Code § 16-3-20(B) providing that judge sentencing must follow a guilty plea is unconstitutional based upon the decision of *Hurst v. Florida*, 577 U.S. ___, ___, 136 S.Ct. 616 (2016). As a matter of clearly-established federal law, *Hurst* cannot afford relief in this collateral proceeding. The Supreme Court of the United States has expressly held that "*Ring* and *Hurst* do not apply retroactively on collateral review." *McKinney v. Arizona*, 589 U.S. ___, ___,140 S.Ct. 702 (2020) (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (holding *Ring* did not apply retroactively on collateral review)).[1] Relief

[1] *Ring v. Arizona*, 536 U.S. 584 (2002). As observed in *McKinney*, in "*Hurst*, the Court applied *Ring*" in reaching its decision on the Florida procedure. 140 S.Ct. at 707.

pursuant to *Hurst* is not only unavailable for that reason, but it is also procedurally barred in two ways under state law. The PCR court's conclusion that "*Hurst* did 'create a new rule' " that would allow the issue to be reached as a free-standing, timely claim in PCR is incorrect under the cited Supreme Court precedent.[2] (See Order, pp. 31 and 34-36). Further, an issue based upon

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[2] The PCR court references a concession that *Hurst* was a new rule. (Order, p. 34). If the PCR court considered that there was a concession by the State to that effect, that is absolutely wrong and should be modified. At a minimum, the reference should be clarified to avoid confusion in further litigation. The State submitted on pages 23-24 of the proposed order denying relief:

> *Hurst,* though, did not create a new rule. Rather, the Supreme Court applied its 2002 ruling in *Ring v. Arizona,* 536 U.S. 584 (2002), to the Florida procedure at issue in *Hurst. See Hurst,* 136 S.Ct. at 621 ("We granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring.* 575 U.S. ___, 135 S.Ct. 1531, 191 L.Ed.2d 558 (2015). We hold that it does, and reverse."). *See also Dunlap v. Paskett,* No. 1:99-CV-559, 2019 WL 1274862, at *5 (S.D. Ohio Mar. 20, 2019) ("... this Court is of the view that *Hurst* did not announce a new constitutional rule or watershed rule of criminal procedure, but rather, simply applied *Apprendi* and *Ring.*"); *Lambrix v. Sec'y, DOC,* No. 2:17-CV-541-FTM-99CM, 2017 WL 6017760, at *1 n.1 (M.D. Fla. Oct. 2, 2017), *appeal dismissed,* 872 F.3d 1170 (11th Cir. 2017), *cert. denied sub nom. Lambrix v. Jones,* 138 S. Ct. 312, 199 L. Ed. 2d 202 (2017) ("The Supreme Court in Hurst plainly and expressly applied the standard it first set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000), and later applied to capital cases in Ring v. Arizona, 536 U.S. 584 (2002), to Florida's capital-sentencing scheme; it neither expanded the Apprendi/Ring rule nor announced a new rule."); *United States v. Con-ui,* No. 3:13-CR-123, 2017 WL 1393485, at *2 (M.D. Pa. Apr. 18, 2017) (" ... *Hurst* stands for the proposition that a capital sentencing scheme under which a jury makes a sentencing recommendation and a judge makes the critical findings needed for the imposition of a death sentence violates the Sixth Amendment's right to a jury trial. It appears, therefore, that *Hurst* merely applied *Ring*'s holding to Florida's capital sentencing procedure."); *Sneed v. Jenkins,* No. 5:17 CV 83, 2017 WL 564821, at *4 (N.D. Ohio Feb. 13, 2017) ("The Supreme Court in *Hurst* plainly and expressly *applied* the standard it first set forth in *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and later applied to capital cases in *Ring v. Arizona,* 536 U.S. 584 (2002), to Florida's capital-sentencing scheme; it neither expanded the *Apprendi/Ring* rule nor announced a new rule.") (emphasis in original); *State v. Lotter,* 917 N.W.2d 850, 864 (Neb. 2018) ("*Hurst* merely applied *Ring.*").

(See Attachment 1, Respondent's Proposed Order of Dismissal, pp. 23-24).

Apprendi,[3] *Ring*,[4] and *Blakely v. Washington*,[5] was presented during the trial level proceedings. This Court recognized that fact in its Order. (See Order, p. 6). Under the Simmons Doctrine,[6] and S.C. Code § 17-27-20 (B), this issue may not be considered on the merits. (See also Attachment 1, Respondent's Proposed Order of Dismissal, pp. 24-25). But in addition to these procedural bars, relief is not warranted on the merits. The Court's reasoning on the merits is flawed in several respects as addressed below. [7]

2. In finding the statutory provision unconstitutional, the PCR court cited to *State v. Shaw*. (See Order, p. 27). The reliance on *Shaw* is misplaced. The Supreme Court of South Carolina in *Shaw* upheld the statute. *State v. Shaw*, 273 S.C. 194, 199–203, 255 S.E.2d 799, 802–04 (1979). In fact, the statute has been repeatedly upheld when challenged on this particular

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[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[4] As our Supreme Court has previously found, *Ring* is not implicated in the plea sentencing provisions in the state statute. *State v. Downs*, 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004) ("... *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty.") (collecting cases). *See Mullens v. State*, 197 So. 3d 16, 38 (Fla. 2016), *cert. denied sub nom. Mullens v. Fla.*, 137 S. Ct. 672, 196 L. Ed. 2d 557 (2017) (collecting cases, including precedent from South Carolina, where "courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding.").

[5] 542 U.S. 296, 310 (2004).

[6] *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

[7] The reasoning results in the findings of fact and conclusions of law on pp. 41-58 of the Order. Respondent's reference to the reasoning is in specific challenge to the findings and conclusions that follow without unnecessary duplicative references.

provision.[8] The Supreme Court of South Carolina noted the long line of recent cases upholding the statutory provision in Inman's direct appeal opinion. *State v. Inman,* 395 S.C. 539, 556, 720 S.E.2d 31, 40 (2011) (citing *State v. Allen,* 386 S.C. 93, 687 S.E.2d 21(2009); *State v. Crisp,* 362 S.C. 412, 608 S.E.2d 429 (2005); *State v. Wood,* 362 S.C. 135, 607 S.E.2d 57 (2004); *State v. Downs,* 361 S.C. 141, 604 S.E.2d 377 (2004)). The federal courts have similarly upheld the statutory provision, most recently in a March 25, 2020 order in *Allen v. Stephan*:

> ... Petitioner asserts the state court's determination, if it did address the merits, was contrary to and an unreasonable application of clearly established federal law, specifically, the United States Supreme Court's decisions in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Hurst v. Florida,* —— U.S. ——, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016). *Id.* Petitioner's argument fails under either standard of review.
>
> This District has considered this argument twice before and found South Carolina's death penalty statute complies with the Sixth Amendment. *See Mahdi v. Stirling,* No. 8:16-cv-3911-TMC, 2018 WL 4566565, at *41–42 (D.S.C. Sept. 24, 2018) (finding "South Carolina's capital sentencing procedures have not violated Mahdi's constitutional rights" where Mahdi pled guilty and agreed to the facts as stated by the State during his plea); *Wood v. Stirling,* No. 0:12-cv-3532-DCN-PJG, 2018 WL 4701388, at *15–18 (D.S.C. Oct. 1, 2018), *Report and Recommendation adopted by* 2019 WL 4257167 (D.S.C. Sept. 9, 2019) (finding the state court did not err in finding South Carolina's death penalty statute does not violate either the Sixth or Fourteenth Amendment). Petitioner has not distinguished his case from *Mahdi* or *Wood* or provided the Court with novel argument warranting reconsideration of its prior holdings.
>
> In addition, the Fourth Circuit has rejected the same challenge to Virginia's capital sentencing scheme, which is functionally equivalent to South Carolina's, finding *Ring* did not hold "that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors." *Lewis v. Wheeler,* 609 F.3d 291, 309 (4th Cir. 2010). Petitioner "acknowledges" the Fourth Circuit's decision in *Lewis* and that Virginia's statutory scheme is "comparable"

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[8] The PCR court's references to alleged comments made or intended in the *Shaw* matter does not bear – in any way – on the constitutionality of the statutory provision or the proceedings before Judge Miller. Nor do those referenced comments in a case separated from Inman's proceedings by approximately three decades somehow impugn Judge Miller or the discharge of his duties. The references to the *Shaw* matter do not involve Judge Miller or the proceedings at issue here.

> to South Carolina's, but "contends that *Lewis* is inconsistent with *Ring*," without further elaboration. ECF No. 63 at 78. Petitioner's disagreement with the Fourth Circuit's conclusion is not reason for the Court to disregard the Fourth Circuit's clear position on this issue.
>
> For these reasons, and those stated in *Mahdi* and *Wood*, the Court finds Petitioner has not shown a Sixth Amendment violation or that the state court's decision was an unreasonable application of federal law and is not entitled to habeas relief on this claim.

Allen v. Stephan, No. 0:18-CV-01544-DCC, 2020 WL 1446717, at *35 (D.S.C. Mar. 25, 2020). But perhaps more difficult to understand is the Court's failure to consider what Inman directly waived. The Court's reliance on trial counsel's preferences as opposed to Inman's stated choice is simply wrong.

3. The PCR court repeatedly relies on the actions and assertions of trial counsel rather than Inman regarding the decision to plead guilty, and the voluntariness of Inman's decision. (See Order, pp. 5-7; p. 15; p. 23; p. 37; and pp. 46-47). This is wrong as a matter of law. The right to make that decision belongs to Inman, not trial counsel. *McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500, 1508 (2018) ("Some decisions, however, are reserved for the client—notably, **whether to plead guilty, waive the right to a jury trial**, testify in one's own behalf, and forgo an appeal.") (emphasis added). Inman was competent,[9] and fully informed of the rights that were waived. (See Attachment 1, Respondent's Proposed Order of Dismissal, pp. 32-39). The record shows that Inman tendered his plea knowing the statute mandated that he be sentenced by the judge.

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[9] Judge Miller heard testimony from Dr. Donna Schwartz-Watts who confirmed, in her opinion, Inman was competent to understand the proceedings and had the capacity to communicate with counsel. (R. at 916). She stated that he had made it clear to her that he wished to receive a death sentence and felt he deserved to die for what he had done. (R. at 917-921). Judge Miller questioned Dr. Schwartz-Watts: "There's no question in your mind that Mr. Inman is competent," to which the doctor responded, "No question, Your Honor." (R. p. 924).

Judge Miller was extremely careful to ensure that Inman understood that a plea would result in Judge Miller being the fact finder and sentencer. Inman personally waived his right to a jury trial, and personally professed, time and again, that he understood he would be sentenced by Judge Miller. (See R. pp. 930-34; p. 952; 954). Judge Miller questioned Inman several times, several different ways, to ensure that Inman understood that he was "giving that right [to a jury] up and" asked him directly if he was "requesting that the Court be the fact finder and the determiner of the sentence; is that right?" to which Inman responded, "Yes." (R. p. 954). (See also Attachment 1, Respondent's Proposed Order of Dismissal, pp. 32-38). Inman chose to enter his guilty plea with that knowledge. That is a valid waiver.

There was no doubt that trial counsel interrupted several times, but Inman consistently clarified that he was waiving the right to a jury trial and to have a jury sentence him. Inman stated he had discussed "the issue of the jury trial versus the guilty plea" with his attorneys and still wished to plead guilty." (R. p. 963; see also Attachment 1, Respondent's Proposed Order of Dismissal, p. 38). Many of these various exchanges – all supporting voluntary waiver – were also recited by the Supreme Court of South Carolina in the direct appeal. 395 S.C. 546-47, 720 S.E.2d at 35. And, if there could be any doubt remaining from this extensive on-the-record discussion, Inman dispelled it by his own admission, volunteered through sworn testimony at the PCR hearing:

> APPLICANT INMAN: I understand that there's a question of when I pled guilty, that I was asking for a jury trial. That's false. When I pled guilty, it was with the understanding that I wanted a judge sentencing and not a jury sentencing. And I understood that, and, again, that's what I wish for.

(Attachment 2, PCR Tr. pp. 192-93).

In granting relief in light of this record, the PCR court's decision fails to afford this knowing and intelligent, voluntary waiver the importance and deference it deserves:

> ... nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi,* 530 U.S., at 488, 120 S.Ct. 2348; *Duncan v. Louisiana,* 391 U.S. 145, 158, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.

Blakely v. Washington, 542 U.S. 296, 310 (2004).

The PCR court's decision essentially finds error in United States Supreme Court precedent; South Carolina precedent; federal District Court precedent; and directs Inman to be placed before a jury despite his express decision to the contrary. The PCR decision offends settled procedural and substantive law, and the constitutional rights afforded a defendant to assert *or independently decide to waive* his right to a jury trial. The PCR court's decision lacks support in law and fact.

4. The PCR court also made reference to the South Carolina Constitution in finding a right to a jury trial is provided specifically by this State. (See Order, p. 8). However, that provision does not prohibit guilty pleas. The State Constitution does not speak to the legislative structure that provides the options for choosing a jury or waiving that right. The State Constitution, like the Federal Constitution, preserves the right, but does not force the right on any defendant.

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. ... If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it."

Ring v. Arizona, 536 U.S. at 609 (quoting *Duncan v. Louisiana,* 391 U.S. 145, 155–156 (1968)).

However,

> ... the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place.

Blakely v. Washington, 542 U.S. at 312 (emphasis in original). Further, there has never been a suggestion that a judge cannot be fair in bench proceedings, or that a defendant cannot waive his right. *See, e.g., Duncan,* 391 U.S. at 157-58 ("We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.").

In short, the gist of the guarantee afforded by *Ring* and its progeny is not that jury proceedings cannot be waived; rather, the cases hold the opportunity to make the decision is preserved. That opportunity is preserved in the state statute. The right to a jury trial never has to be waived under the state statute, and if a jury trial is a defendant's choice, the jury hears both guilt and sentencing phases. There is no provision in our state statute – as there was in the Arizona statute – that even when the jury is impaneled, the judge must nonetheless conduct sentencing. A careful reading of *Ring, Hurst* and *Blakely* shows the PCR court's error.

5. The PCR court also impermissibly considers whether the right to a jury trial *should* be waived. (See Order, pp. 10-11). The PCR court discusses that a trial judge is not subject to qualification in a *voir dire* process,[10] nor subjected to being sequestered, and is

---

[10] The suggestion that *voir dire* questions should be allowed has been addressed and rejected:

> This state's capital sentencing scheme contains no provision for *voir dire* examination of a trial judge, ***nor do we believe one is necessary. A judge's oath requires him to follow and uphold the law in all cases***, including capital cases. Had appellant waived the jury and chosen sentencing by the court, the judge would have been required to consider applicable mitigating and aggravating circumstances under Section 16–3–20(C) before imposing a sentence. The judge is entitled to a presumption that he would have done so, regardless of his "personal beliefs" about capital punishment."

ordinarily not allowed to comment on facts. (See Order, pp. 13-14; pp. 27-30). These observations are inapposite to the inquiry. These observations go to an opinion on the wisdom of the decision – a benefit, "pro" and "con" consideration – not to any constitutional infirmity in the proceeding. Judge Miller duly considered the proper evidence of statutory mitigating circumstances and non-statutory mitigation evidence, and expressed:

> While this has been one of the hardest decisions of my life, I am firmly convinced that the murder and rape of Tiffany Souers and the characteristics of Jerry Buck Inman warrant the penalty of death. I have carefully considered all relevant facts and circumstances, including the existence of statutory aggravating circumstance, as well as statutory and non-statutory mitigating circumstances. My verdict is not the result of passion, prejudice, or any other arbitrary circumstance.

(R. at 753). Further, the Supreme Court of South Carolina, in the direct appeal, found:

> After reviewing the entire record, we conclude the sentence of death was not the result of passion, prejudice, or any other arbitrary factor, and the judge's finding of three statutory aggravating circumstances for the murder is supported by the evidence. In its case, the State presented evidence of Inman's confessions, which detailed the events of the Victim's murder, as well as testimony from the forensic pathologist that confirmed Inman committed the murder while in the commission of kidnapping, first-degree criminal sexual conduct, and first-degree burglary.

Inman, 395 S.C. at 567, 720 S.E.2d at 46.

The record here shows no evidence of any bias or improper influence. The *potential* for real error is not real error. *See Ray v. State*, 330 S.C. 184, 188, 498 S.E.2d 640, 642 (1998) (affirming death sentence by judge where "gory photographs" introduced in sentencing before the judge, there was "neither an assertion, nor any evidence, that [the] judge was improperly influenced"); *Inman,* 395 S.C. at 570, 720 at 48 ("A judge is presumed to weigh evidence properly.") (Pleicones, J. concurring). Similar paternalistic approaches in legal decisions on

---

State v. Matthews, 296 S.C. 379, 383, 373 S.E.2d 587, 590 (1988) (emphasis added). The PCR court's findings resting on ways a trial judge may be "subjected to potential comprise," (Order, pp. 54-55), fail to also reference that judge's oath, or the presumption as reflected in *Matthews.*

constitutional rights have been soundly rejected on appellate review in favor of the individual's right to make his own decisions. *State v. Rivera,* 402 S.C. 225, 243, 741 S.E.2d 694, 703 (2013) (finding the trial court erred in preventing defendant from testifying, noting "It is apparent the trial court, like defense counsel, was operating under the paternalistic belief that it wanted to protect Appellant from potentially undermining his own defense."); *State v. Brewer,* 328 S.C. 117, 120, 492 S.E.2d 97, 99 (1997) (finding the trial court erred in denying the request to waive the right to counsel, noting: "It appears that the trial judge denied the motion to proceed *pro se* based on the fact that the trial judge did not believe that appellant's decision to represent himself in a death penalty case was a good decision. A decision can be made intelligently, with an understanding of the consequences, without the decision itself being a wise one.").

6. This Court also includes repeated references to Inman's desire to plead guilty to spare the victim's family from the *guilt phase* as a type of offer to enforce the Victim's Bill of Rights is legally and factually wrong. In his pleading for "mode of trial," Inman's trial counsel asserted that he wished to have the plea as evidence of remorse, *i.e. to use the legal entry of the plea as evidence in mitigation.* (Order, p. 7, citing R. p. 800-01, plea was "The only way he can *adequately show the remorse* he feels and *acknowledge the moral guilt* that he is dealing with... ***as a subset of that***, wants to alleviate what he sees would be the cruel impact that the media attention ... would have..."); see also R. p. 1202-03 (defense motion to determine mode of trial, (resting in part on *Eddings v. Oklahoma,* 455 U.S. 104 (1982) and *Skipper v. South Carolina,* 476 U.S. 1 (1986)). It is also illogical factually. The sentencing phase incorporates the guilt phase and has more in aggravation. See S.C. Code § 16-3-20 (B) ("In the sentencing proceeding, the jury or judge shall hear ***additional evidence*** in extenuation, mitigation, or aggravation of the

punishment.") (emphasis added). It is unclear what "spectacle" (if trial may be considered a spectacle) the Court considers too harsh. (See Order, p. 15).

7. Further, this Court's reliance on *State v. Harper,* 251 S.C. 379, 162 S.E.2d 712 (1968) is also misplaced. (See Order, p. 17). As a first point, *Harper* does not address the modern statute. As a second point, the very basis for the decision underscores that a statute may not be structured to *chill the assertion of the right to a jury trial*, and does not speak to the theory of a defendant attempting to qualify his right. The structure at issue in *Harper* pressured a defendant to plead to ensure a death sentence was avoided – a punishment for *exercising* the right to a jury trial. *Cf. United States v. Jackson,* 390 U.S. 570, 583 (1968) (striking provision that worked to "deter *exercise* of the Sixth Amendment right to demand a jury trial") (emphasis added).[11] The conclusion that the modern 1977 statutory provision at issue was upheld "in abrogation of the unanimous holding" in *Harper* is without support. (See Order, p. 17). From there, the PCR court concludes the statutory provision "nullifies the right of an accused to a trial – in the sentencing phase – '"by an impartial jury'" in contravention of *Hurst.* (Order, p. 17). For all the reasons cited above, that is an incorrect statement of law. Even so, the PCR court reasons the statutory provision, "abrogates ... the rights guaranteed by the Constitution of the United States and South Carolina 'to a trial by an impartial jury," and creates a *Catch 22* for a defendant...." (Order, p. 19). The PCR court then concludes "Inman, could not freely and voluntarily waive his Fifth Amendment right to plead guilty, upon stipulated facts, before a duly qualified trial jury and the trial judge, in the guilty phase" because the statutory structure does

[11] It is not clear how *State v. Speights*, 263 S.C. 127, 208 S.E. 2d 43 (1974) is relevant. (See Order, p. 17). The Court in *Speights* did acknowledge the *Harper* decision which found unconstitutional a provision that "permitted one to plead guilty and by so doing be assured of a life sentence...." 263 at 134, 208 S.E.2d at 47. The Court in *Speights* directed a life sentence be imposed after the decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

not allow for separate jury sentencing after a plea. (Order, p. 20; pp. 55-58). This is wrong. A careful and fair consideration of the statutory structure shows that no defendant is ever forced to plead guilty. A defendant could choose a jury trial and confess guilt. He may even tell the jury that he does so to ensure the jury sentences him. It has been done before. *See Sigmon v. State*, 403 S.C. 120, 125, 742 S.E.2d 394, 397 (2013) (capital defendant did not plead guilty but "conceded guilt and presented no evidence in his defense" to the jury). What Inman's counsel lobbied for was the reverse of the situation in *Harper, supra.* He wanted to force the state to provide a new hybrid procedure. Nothing in the state or federal constitution allows that result because nothing in either constitution provides a guarantee of a guilty plea. *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("There is, of course, no absolute right to have a guilty plea accepted."); see also Rule 14 (b), SCRCrimP. ("A defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge.").

In the absence of being able to force the state to adopt a procedure that did not exist, this Court then reasons that "Inman had no alternative but to involuntarily forfeit – and not freely and voluntarily waive – his constitutional 'right to trial by an impartial jury,' under the Sixth Amendment, and Article I, Section 14, of the Federal and State Constitutions ... *'to avoid imposing additional burdens on the victims'*." (Order, p. 21). If the dilemma is true, that would still be a choice made by the defendant, not between a plea and trial, but election between his personal desires – a personal decision among available choices. That is a key part of assessing a plea for voluntariness: "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Parke v. Raley*, 506 U.S. 20, 29 (1992) (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

8. Lastly, the PCR court erred in its grant of relief. Even if error occurred that would warrant setting aside the sentencing, there is no error to warrant setting aside the plea. Our Supreme Court has previously found the plea was not conditional. *Inman,* 395 S.C. at 555, 720 S.E.2d at 40. Our Supreme Court also found the plea was knowing and voluntary:

> ... a review of the plea colloquy reveals Inman ***entered his plea knowingly and voluntarily*** as he repeatedly acknowledged that he understood the charges against him, the consequences of his plea, and the rights he was waiving by pleading guilty, *including the right to have a jury determine his guilt and sentence.*

Id., 395 S.C. at 556, 720 S.E.2d at 40 (emphasis added).

Indeed, PCR counsel for Inman asked only for resentencing. (Proposed Order Granting Relief, p. 122). In *Blakely,* the Supreme Court of the United States found only that "petitioner's sentence [was] invalid," and did not invalidate his guilty plea to the crimes. 542 U.S. at 305. And again, the record shows Inman was a competent and informed defendant who clearly expressed his decision to waive his rights to a jury trial. Moreover, and again as our Supreme Court previously found, Inman admitted by stipulation all of the facts supporting the finding of guilt. *Inman,* 395 S.C. at 546, 720 S.E.2d at 35. To grant more than requested, and more than the record could possible support, is an error of law.[12]

---

[12] To the extent this Court may conclude that *Hurst* mandates that a jury *must* consider the evidence in aggravation and mitigation and its relative weight, that would be an incorrect reading of *Hurst.* As the Nebraska Supreme Court stated precisely: "The *Hurst* Court said no such thing." *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018). The Supreme Court in *McKinney* expressly stated that neither *Ring* nor *Hurst* "require jury weighing of aggravating and mitigating circumstances...." 140 S.Ct. at 708. It would be additional error to force a jury sentencing proceeding on a defendant to comply with a requirement that does not exist.

WHEREFORE, having made its motion, and for all the reasons set out above, Respondent, State of South Carolina, respectfully moves this Court to reconsider the ruling, to reverse its grant of relief, and deny post-conviction relief on all grounds.

Respectfully submitted,

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May 1, 2020
Columbia, South Carolina.

ATTORNEYS FOR RESPONDENTS

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH JUDICIAL CIRCUIT
Jerry Buck Inman *a/k/a* Jerry Buck Inmon, S.C.D.C. No. 5256,	)	2020 MAY -8 A 11:13
Applicant,	)	CLERK OF COURT PICKENS COUNTY SOUTH CAROLINA **Case No. 2012-CP-39-918** ***Capital PCR Action***
vs	)	
State of South Carolina,	)	**CERTIFICATE OF SERVICE BY MAIL**
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. Per the March 10, 2020 Order of the Chief Justice, I have this day served a copy of the *Respondent's Rule 59(E) Motion* in the above-captioned matter via email to dianaholt@dianaholtllc.com and charles@groselawfirm.com and by depositing same in the United States mail, postage prepaid to his attorneys of record:

Diana L. Holt, Esquire
Post Office Box 6454
Columbia, South Carolina 29260

E. Charles Grose, Jr., Esquire
404 Main Street
Greenwood, South Carolina 29646

DATED this 1st day of May, 2020.

Angela Bennett

Angela Bennett, Legal Assistant for
Melody J. Brown, Senior Assistant Deputy Attorney General

2020 MAY -8 A 11:13

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Inman v. State: Respondent's Rule 59(e) Motion

ATTACHMENT 1

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF PICKENS	)	
Jerry Buck Inman, #5256,	)	**C/A No.: 2012-CP-39-918**
***a/k/a* Jerry Buck Inmon,**[1]	)	**(Capital PCR Action)**
	)	
Applicant,	)	
v.	)	
	)	**RESPONDENT'S PROPOSED**
State of South Carolina,	)	**ORDER OF DISMISSAL**
	)	
Respondent.	)	
	)	

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY -8 A 11:13

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[1] Applicant has submitted documents to this Court with his last name spelled "Inmon." Because he was referred to in all previous proceedings as "Jerry Buck Inman," and was committed to the Department of Corrections under that name, the Court will refer to Applicant by the last name Inman.

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I. INTRODUCTION TO ORDER

This matter comes before the Court on application for post-conviction filed June 21, 2012, as amended on August 20, 2018. An evidentiary hearing was held August 20-23, 2018 in Pickens County, South Carolina. Applicant declined to attend but gave sworn responses to the Court via telephone. His appointed PCR counsel, Diana Holt, Esq., and Charles Grose, Esq., represented Mr. Inman. Senior Assistant Deputy Melody J. Brown, with Assistant Attorneys General Sherrie Butterbaugh and DeShawn H. Mitchell, represented Respondent.

At the conclusion of the hearing, this Court requested proposed orders in lieu of post-hearing briefing from each party, with the opportunity for each party to respond to the other party's proposed language. After having considered the pleadings, transcripts, testimony and other evidence before the Court, and having also considered argument of counsel and each of the proposed orders and replies, this Court finds post-conviction relief must be denied. Applicant argues S.C. Code §16-3-20(B) is unconstitutional based upon *Hurst v. Florida*, 577 U.S. ___, 136 S.Ct. 616 (2016). Applicant's issue is barred from review on the merits, but even if it was not, Applicant has failed to show the statute is unconstitutional. In his remaining claims of ineffective assistance, Applicant fails to carry his burden of proof. The record of the proceedings, and the testimony received at the PCR hearing support and confirm that trial counsel diligently prepared, and aggressively represented Inman throughout the representation. Further, Applicant cannot meet his burden of showing ineffective assistance of appellate counsel. Appellate counsel made reasoned and careful decisions to raise the particular issues presented. Applicant's remaining freestanding claims are barred by jurisdictional limitations set out in S.C. Code §17-27-20. Thus, the Court denies relief. The Court now issues this order with its findings of facts and conclusions of law as required under S.C. Code § 17-27-80 and 160(D).

II. PROCEDURAL HISTORY

Applicant Inman is presently a safekeeper under a sentence of death for murder and a term of years sentence for other charges, pursuant to orders from the Clerk of Court for Pickens County. His charges all stem from the May 26, 2006 murder of Tiffany Souers, a Clemson University student. Ms. Souers was attacked and murdered in her apartment. She had no ties to Inman prior to his admitted crimes against her.

Inman was indicted at a November 2006 term of General Sessions for Pickens County on the charges of murder (2006-GS-39-2225), kidnapping (2006-GS- 39-2224), criminal sexual conduct in the first degree (2006-GS-39-2223), amended in August 2008, and burglary in the first degree (2006-GS-39-2222). [R. at 1037-1044]. The State, through Solicitor Robert M. Ariail of the Thirteenth Judicial Circuit, timely noticed Inman of its intent to seek the death penalty on August 22, 2006, pursuant to S.C. Code § 16-3-26. By order of March 13, 2007, the Supreme Court of South Carolina assigned the Honorable Edward W. Miller over the matter.

Mode of Trial Challenge

On August 17, 2007, Inman filed a Motion to Determine the Mode of Trial. [R. at 1202-1203]. In the motion, counsel informed the judge of Inman's intent to enter a guilty plea to murder and demand a jury trial for sentencing. [R. at 1202]. The State filed its response noting the case law contrary to Inman's position. [R. at 1204].

A hearing on the motion was held on September 14, 2007. [R. at 777]. At the conclusion of the hearing, Judge Miller denied the request to attempt to enter a guilty plea to the charges. [R. at 830]. A written order was entered on November 15, 2007. Counsel served and filed a notice of appeal from the November 15, 2007 order. However, On January 9, 2008, without requiring a response or pleading from the State, the Supreme Court of South Carolina dismissed the notice

without prejudice. Inman thereafter sought certiorari review from the Supreme Court of the United States. On June 8, 2008, the Supreme Court denied Inman's petition. *Inman v. State of South Carolina*, No. 07-1298, 128 S.Ct. 2098 (June 8, 2008).

Competency Determination Prior to Plea

A hearing in Inman's competency was held on August 19, 2008. [R. at 911]. Judge Miller was again informed that Inman sought to tender a guilty plea to murder. [R. at 913]. Judge Miller heard testimony from Dr. Donna Schwartz-Watts, a defense expert. She stated Inman was competent to understand the proceedings and had the capacity to communicate with counsel. [R. at 916]. She found Inman had a history of a "mood disorder" and being treated for depression. She stated from the first time she met Inman in September 2006, he had a desire to plead guilty and knew what he is doing. She stated that he had made it clear to her that he wished to receive a death sentence and felt he deserved to die for what he had done. [R. at 917-921]. Judge Miller questioned Dr. Schwartz-Watts: "There's no question in your mind that Mr. Inman is competent," to which the doctor responded, "No question, Your Honor." [R. p. 924]. The judge then continued the hearing with addressing Applicant Inman and proceeding with the guilty plea colloquy. [R. at 924].

Guilty Plea

Inman entered guilty pleas to all charges the same day as the competency proceedings, on August 19, 2008. [R. at 924-956]. James W. Bannister, Esq., John W. DeJong, Esq., and Symmes W. Culbertson, Esq., of the Greenville Bar represented Inman. Mr. DeJong was (and still is currently) the chief public defender for Pickens County. Judge Miller deferred sentencing until September 6, 2008.

Summary of Admitted Facts as Included in the Direct Appeal

The Supreme Court of South Carolina later summarized the facts[2] admitted at the guilty plea as follows:

> On the evening of May 25, 2006, Tiffany Marie Souers (the Victim), a rising junior at Clemson University, was alone in her off-campus apartment as her roommates were gone for the day. When one of her roommates returned to the apartment during the afternoon of May 26, 2006, she discovered the Victim's partially-clad body on the bedroom floor. An autopsy revealed the Victim had been sexually assaulted and died as the result of asphyxia due to ligature strangulation with a bathing suit top.
>
> Surveillance photographs taken during the early morning hours of May 26, 2006 captured a male, whose face was covered by a bandana, attempting to use the Victim's ATM card at two different bank machines in Clemson.
>
> On June 5, 2006, law enforcement was able to identify Inman as the Victim's perpetrator based on DNA evidence obtained from the crime scene and processed through the National DNA Database, which had Inman's DNA evidence on file due to his prior out-of-state convictions for sexual offenses in 1987 and 1988. Using this information, law enforcement conducted a well-publicized nationwide search for Inman. On June 6, 2006 at approximately 11:45 p.m., law enforcement apprehended Inman in Dandridge, Tennessee.
>
> Shortly after his arrest, Inman orally confessed to the crimes involving the Victim. Within the course of the next three hours, Inman gave separate written statements to an agent with the Tennessee Bureau of Investigation and to agents with the South Carolina Law Enforcement Division (SLED). In these two statements, Inman again confessed to the charged crimes and recounted in detail the events underlying these crimes. When asked to sign these statements, Inman declined and stated "we still have to go to court."
>
> Ultimately, Inman was extradited to South Carolina and detained in the Pickens County Detention Center where a DNA sample was taken from him and again conclusively matched to the DNA evidence recovered from the Victim and her apartment. Subsequently, a Pickens County grand jury indicted Inman for murder, kidnapping, first-degree criminal sexual conduct, and first-degree burglary....

State v. Inman, 395 S.C. 539, 544–45, 720 S.E.2d 31, 34 (2011).

---

[2] During the plea proceeding, the solicitor read "pretty close to verbatim" from a stipulation of facts signed by Inman and again affirmed by him at the plea. [R. at 938-952].

The Supreme Court noted that Applicant Inman conceded the correctness of the facts during the plea proceeding. *Id.*, 359 S.C. at 546, 720 S.E.2d at 35.

The September Sentencing Proceeding

On September 8-11, 2008, Judge Miller held a non-jury sentencing proceeding as a result of the guilty plea to murder. Testimony was received September 8-9, 2008, from state witnesses Holly Bergman, Christina Morello, G.W. McCoig, Jeffrey Kindley, Suzanne C. [redacted prior victim], Vera P. [redacted prior victim], Michael Hannon, Rhonda Jackson, Jessica G. [redacted prior victim] and Dr. Eric Christensen. [See R. at 36-243]. The defense in mitigation initially presented Dr. David Price, James Aiken, Denise B. [redacted], and Rev. David Hensley. [See R. at 255-410]. Dr. Loring was offered as an expert, but the proceedings broke down after voir dire introduced a licensing question. Counsel made a motion for mistrial alleging the solicitor's questions regarding her license status in South Carolina had "chilled her ability to testify...." [R. at 411-412]. The proceedings were suspended until April 20, 2009.

The April 2009 Sentencing Proceedings

When resumed, the defense presented Dr. Loring, John Mauldin, Esq., Troy Tessier, Esq., Susan Allen, and Dessa Ballard, Esq., on their claim of prosecutorial misconduct. [R. at 631]. Counsel also placed on the record he would have called witnesses from Georgia, but the Court declined to suspend the proceedings again. [R. at 632-634]. Counsel also expressed he would move for a continuance to obtain a new social historian. [R. at 636].

On April 21, 2009, the judge allowed another break for the defense to meet with Dr. Loring. [R. at 655-656].

On April 22, 2009, the defense resumed presentation of their mitigation case and called Kenneth McArthur. Thereafter, the defense declined to call Dr. Loring, with counsel stating, "...

I don't believe it would be in our client's best interest to call any further witnesses for mitigation." [R. at 658]. The Court called Dr. Loring as a court witness. [R. at 662-711]. After arguments, Judge Miller recessed from 3:30 pm to 4:49 pm.

Judge Miller returned to the bench and advised Applicant Inman of his right to testify, which Inman did not wish to do. He also asked the defense to specify which statutory mitigating circumstances they wanted considered. The defense cited to two, six, and seven from the statute. [R. at 741-742]. The Court recessed again at 4:53 pm and reconvened at 6:23 pm. [R. at 742].

Upon his return, Judge Miller announced he found three statutory aggravating circumstances:

> ... pursuant to South Carolina Code of Law Section 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory aggravating circumstances, I find the State has proven beyond a reasonable doubt that the Defendant committed the murder for which he is charged while in the commission of the crimes of kidnapping, burglary in the first degree, and criminal sexual conduct in the first degree.
>
> The circumstances surrounding the murder of Tiffany Souers are savage, brutal, and unconscionable. I find that the State has proven beyond a reasonable doubt that Tiffany Souers home was broken into in the nighttime by the Defendant constituting burglary in the first degree, that she was held against her will constituting kidnapping, and that she was the victim of a forcible rape constituting criminal sexual conduct in the first degree, and that she was, subsequently, choked by the Defendant until she died constituting murder. ...

[R. at 746-747].

Judge Miller also considered evidence of statutory mitigating circumstances and non-statutory mitigation evidence. [R. at 747-752]. The judge noted "... proper sentence in a case in which the death penalty is sought is especially painful and agonizing" realizing it as the "ultimate sentence, which is to be imposed only in the worst cases and only after serious deliberate and careful consideration." [R. at 753]. He resolved:

> ...Regrettably, Jerry Buck Inman falls within a small group of deviant predators who exhibit in their conduct a callous disregard for society and the rights and safety of others.
>
> While this has been one of the hardest decisions of my life, I am firmly convinced that the murder and rape of Tiffany Souers and the characteristics of Jerry Buck Inman warrant the penalty of death. I have carefully considered all relevant facts and circumstances, including the existence of statutory aggravating circumstance, as well as statutory and non-statutory mitigating circumstances. My verdict is not the result of passion, prejudice, or any other arbitrary circumstance.

[R. at 753].

The judge imposed the death sentence for the murder of Tiffany Souers, thirty (30) years, consecutive, for burglary, thirty (30) years, consecutive, for criminal sexual conduct. The kidnapping sentence was subsumed in the murder sentence pursuant to S.C. Code § 16-3-910. [R. at 754]. Judge Miller also issued a written order that same day. [R. at 1045-1053].

The Direct Appeal

Applicant Inman sought an appeal of his plea and sentence. Senior Appellant Defender Joseph L. Savitz and Chief Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Inman in the direct appeal. By final brief of appellant filed June 20, 2011, appellate counsel raised the following issues:

> 1. The judge committed reversible error by accepting Inman's guilty plea, despite defense counsel insistence that the judge's refusal to allow jury sentencing was preserved for review by the Supreme Court on direct appeal, because the defense's position rendered the plea conditional and thus invalid under South Carolina law.
>
> 2. The judge committed reversible error at sentencing by refusing to grant a mistrial and recuse the Solicitor's Office from any further involvement in the case, despite finding prosecutorial misconduct, where the Solicitor threatened a key defense witness with a baseless criminal prosecution and subpoenaed her as a State's witness after the judge granted the defense a continuance to obtain a new expert because of his misconduct.

3. The judge committed reversible error at sentencing by refusing to allow the defense to cross-examine the Solicitor and his Deputy on the issue of prosecutorial misconduct, as the Solicitor's intent was directly relevant to that issue.

[Final Brief of Appellant, p. 4].

Appellate counsel also filed a final reply brief. The State filed its final brief of respondent on June 21, 2011.

The Supreme Court of South Carolina heard oral argument in the appeal on September 21, 2011. On December 28, 2011, the Supreme Court affirmed Inman's guilty plea convictions and sentences including his death sentence. *State v. Inman,* 395 S.C. 539, 544, 720 S.E.2d 31, 34 (2011). In its published Opinion, the Court held:

(1) "Inman's guilty plea was unconditional" and was not subject to be set aside;

(2) The trial "judge did not abuse his discretion in refusing to recuse the Solicitor's office as advocates and declining defense counsel's request to question the Solicitor;"

(3) "Although we find the Solicitor committed prosecutorial misconduct, we conclude Inman's sentence of death was not imposed in violation of his due process rights. The Court agreed "the Solicitor's conduct toward Dr. Loring unequivocally constituted witness intimidation" as found by Judge Miller; but reasoned "the judge correctly denied defense counsel's motion for a mistrial as Inman [did] not establish[] prejudice sufficient to warrant such a severe remedy" where there was judge sentencing; the judge qualified the expert; the expert testified, and "any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his criminal history. Moreover, the judge noted in his oral pronouncement and written order that he "thoroughly considered all mitigating evidence."

Additionally, the Supreme Court conducted the proportionality review pursuant to S.C. Code § 16-3-25(C), and found:

> ...the sentence of death was not the result of passion, prejudice, or any other arbitrary factor, and the judge's finding of three statutory aggravating circumstances for the murder is supported by the evidence. In its case, the State presented evidence of Inman's confessions, which detailed the events of the Victim's murder, as well as testimony from the forensic pathologist that confirmed Inman committed the murder while in the commission of kidnapping, first-degree criminal sexual conduct, and first-degree burglary.
>
> Furthermore, a review of prior cases establishes that the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime.

Inman, 395 S.C. at 567, 720 S.E.2d at 46.

On June 11, 2012, Inman filed Petition for Writ of Certiorari in the United States Supreme Court raising the following questions:

> 1.
>
> Whether the South Carolina Supreme Court's holding that an irrebutable [sic] presumption of prejudice no longer applied where there is deliberate prosecutorial misconduct, since the trial judge found prosecutorial misconduct in this case, and the South Carolina Supreme Court also found such prosecutorial misconduct based on clear witness intimidation, since changing the law retroactively in this manner was fundamentally unfair and violated Due Process?
>
> 2.
>
> Whether the South Carolina Supreme Court's holding that petitioner did not have the right to call the prosecutors as witnesses during his bench trial to prove intentional prosecutorial misconduct violated petitioner's right to Due process [sic] under the Fourteenth Amendment?
>
> 3.
>
> Whether the South Carolina Supreme Court erred by holding the prosecutorial misconduct and witness intimidation in petitioner's case did not result in a death sentence that violated his Due Process rights, because the undisputed intimidation of petitioner's chief mitigation witness, Dr. Marti Loring, had an adverse effect on the ability of the defense to present its case in mitigation as guaranteed by the Eighth Amendment of the United States Constitution?

[Petition for Writ of Certiorari, SCOTUS, p. i].

The State filed its Brief in Opposition on August 15, 2012. The Petition for Writ of Certiorari was denied on October 1, 2012. *Inman v. South Carolina,* 568 U.S. 863, 133 S. Ct.

219 (2012). Petitioner thereafter obtained from the Supreme Court of South Carolina a stay of his sentence in order to pursue the instant PCR action.

III. PCR GROUNDS

Applicant Inman filed his initial application for post-conviction relief on June 21, 2012. The State filed its return to the application on October 18, 2012. He filed amended applications on April 13, 2016, October 20, 2016, and August 20, 2018. The State filed additional returns on May 16, 2016 and October 20, 2016.[3] This Court will address the grounds as raised in the final amendment filed on August 20, 2018, styled "second amended" application, in which Applicant Inman alleges:

> **Ground 10(a)** Mr. Inmon was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.
>
> > **11(a)(1)** Trial counsel was ineffective for advising Mr. Inmon to plead guilty and appeal the trial court judge denying his request to be sentenced by a jury when then existing state law did not allow jury sentencing following a guilty plea in a capital case.
> >
> > **11(a)(2)** Not developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug, and failing to advise the Court, sitting in judgment of Mr. Inmon, of this evidence that supported a verdict of guilty but mentally ill.
>
> **Ground 10(b)** Mr. Inmon was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United

[3] The last amended application filed was filed on the first day of the evidentiary hearing; thus, a return was not possible prior to the evidentiary hearing. None is necessary now in lieu of this Court's direction to submit briefing in the form of proposed orders. At any rate, the August filing appears to be substantially the same as the October 2016 amended application, and, in fact, has an October 2016 date struck through on the signature page.

States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.

11(b) Trial counsel was ineffective during the sentencing phase for:

11(b)(1) Failing to obtain another mitigation expert witness after Dr. Marti Loring would not continue in Mr. Inmon's case because she was intimidated by the prosecutor who threatened to have her arrested if she testified, and Mr. Inmon was prejudiced by the same.

11(b)(2) In the alternative to (11)(b)(1), failing to continue to prepare with Dr. Loring in the event the trial judge reconvened the trial, as in fact occurred, and Mr. Inmon was prejudiced by the same.

11(b)(3) In the alternative to (11)(b)(1) and (11)(b)(2), counsel is informed and believes that trial counsel did obtain another mitigation expert witness but failed to prepare and present that witness to testify and render an expert opinion, and Mr. Inmon was prejudiced by counsel's deficient performance.

11(b)(4) Failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.

11(b)(5) Developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug and failing to advise the Court, sitting in decision of what punishment to mete out to Mr. Inmon, of this extraordinarily powerful mitigation evidence that was and is a treatable medical condition Mr. Inmon, [sic] and Mr. Inmon was prejudiced by counsel's failures.

11(b)(6) Failing to object to the rush to the forgone judicial conclusion that the sentence would be death. This ground is based on the deposition testimony of former Solicitor Robert M. Ariail:

> And Judge Miller had an agenda, probably one of the better agendas. And that was: Let's get through this case. You know, I know what the decision – I know what the verdict is going to be. Let's get through it and quit interrupting.

11(b)(7) In the alternative to 11(b)(1), (2), (3), (4), (5), and (6), intentionally not presenting powerful, available mitigation evidence in

order to create an issue for post-conviction relief. This alternate ground for relief is based on the deposition testimony of former Solicitor Robert M. Arial. If Solicitor Ariail is correct, then such conduct amounts to intentional sandbagging for which no strategic justification exists.

Ground 10(c) Mr. Inmon was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the appeal of his capital trial.

11(c) Appellate counsel was ineffective for:

11(c)(1) Not appealing the trial court judge denying Mr. Inmon his request to plead guilty and have his sentence determined by a jury when that right is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and trial counsel had preserved that issue for appellate review.

11(c)(2) Not appealing Mr. Inmon's motion to continue his sentencing hearing so that he would have sufficient time to obtain another mitigation expert witness after Dr. Marti Loring who refused to participate in Mr. Inmon's case because she was intimidated by the prosecutor.

Ground 10(d) S.C. Code Ann. Section 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

11(d) S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inmon his right to have a jury determine the existence of aggravating circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

Ground 10(e) Mr. Inmon's death sentence was obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

11(e) The capital sentencing scheme in South Carolina violates the Constitution because its methods for the imposition and review of capital punishment suffers the same infirmities as the statute rejected as unconstitutional by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) because:

(1) South Carolina's capital sentencing statute, as written by the General Assembly and construed by the South Carolina Supreme Court, does not perform the constitutionally mandated narrowing function.

(2) South Carolina's sentencing system permits discrimination on the basis of race.

(3) The South Carolina Supreme Court consistency fails to fulfill its statutory and constitutional obligation to conduct a meaningful proportionality review in capital cases.

(4) The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose.

Ground 10(f) The cumulative effect of all of counsel's failures entitle Mr. Inmon to the relief sought because he was also prejudiced by the synergistic impact of the constitutional failures.

Ground 10(g) Mr. Inmon was denied the right to a fair trial – as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial because of prosecutorial misconduct.

11(g) Both the trial court judge and the South Carolina Supreme Court found prosecutorial misconduct regarding Solicitor Ariail's treatment of Dr. Marti Loring. Dr. Loring was traumatized by this misconduct and was unable to inform the sentencing judge with powerful mitigation evidence known to her that would have resulted in the imposition of a life sentence.

Ground 10(h) Mr. Inmon was denied the right to a fair trial – as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial because of the rush to the forgone conclusion that the sentence would be death.

11(h) This ground is based on the deposition testimony of former Solicitor Robert M. Ariail:

> And then we went to a - - a staged - - that would be my word - - staged intimidation of a witness who was never intimidated. And then we went to a four-month recess or a

> six-month - - whatever it was - - in the middle of the death penalty trial. And after that, then we tried to recess. The defense has done nothing to prepare for the retrial to start, apparently. That's what it seemed to indicate. And the judge orders it to start anyway. So then we've got to deal with the issue of sabotage from the defense of not bring this woman back and creating a huge appellate or a PCR issue. So we had to make a decision as to do we seek a subpoena of this woman from out of state? Do we ask the court for the subpoena? Well, how do we go about doing all these things?
>
> Deposition of Robert Ariail at pp. 34-35.

[Second Amended Application, filed August 20, 2018, pp. 2-8].

IV. RELEVANT LAW

Standard of Review for Post-Conviction Relief Claims

The scope of this Court's jurisdiction in post-conviction relief matters is set out in S.C. Code § 17-27-20(a), which provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
>
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
>
> (2) That the court was without jurisdiction to impose sentence;
>
> (3) That the sentence exceeds the maximum authorized by law;
>
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> (5) That his sentence has expired, his probation, parole, or conditional release unlawfully revoked, or he is otherwise held unlawfully held in custody or other restraint; or
>
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition,

> proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

Section (b) further limits the jurisdiction of the PCR court as follows: "This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction." S.C. Code § 17-27-20(b). Because a PCR action is not a substitute for those proceedings, a PCR applicant cannot assert any issues in his PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."); *see also Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993) ("The Simmons rule gives effect to the Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal.").

While previously heard or unheard freestanding trial or direct appeal issues are not cognizable, the general factual basis for the previously unheard issues may be reached by and through an allegation of ineffective assistance of counsel. *Drayton*, 312 S.C. at 9, 430 S.E.2d at 520 ("Issues that could have been raised at trial or on direct appeal cannot be asserted in an application for post-conviction relief absent a claim of ineffective assistance of counsel."); *see also Cummings v. State*, 274 S.C. 26, 28, 260 S.E.2d 187, 188 (1979) ("At trial, respondent failed to object to the imposition of the sentence and, therefore, waived the right to have that sentence reviewed on direct appeal, or to raise such issue on Post-Conviction absent an allegation of ineffective assistance of counsel."). Ineffective assistance of counsel claims constitute the

general nature of issues appropriate for post-conviction relief actions. *See, e.g., Al-Shabazz v. State,* 338 S.C. 354, 367, 527 S.E.2d 742, 749 (2000) (discussing jurisdiction pursuant to S.C. Code § 17-27-20(a), and finding "A typical PCR claim of ineffective assistance of counsel falls into this category....").

To establish that Sixth Amendment counsel was ineffective, a PCR applicant must show that counsel's representation fell below an objective standard of reasonableness, and but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Simpson v. Moore*, 367 S.C. 587, 595–96, 627 S.E.2d 701, 706 (2006). "[W]hen a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee v. United States,* ___ U.S. ___, ___, 137 S. Ct. 1958, 1965 (2017) (quoting *Hill v. Lockart,* 474 U.S. 52, 59 (1985)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Strickland*, 466 U.S. at 694.

Relief will not be granted on a showing of mere error by defense counsel. Rather, prejudice must also be shown. 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 *Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998), the court instructed that prejudice may be found in a capital sentencing proceeding "when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it

independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" 332 S.C. at 333, 504 S.E.2d at 823 (quoting *Strickland*, 466 U.S. at 695).[4] Again, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*, (quoting *Strickland*, 466 U.S. at 694).

Further, a defendant is entitled to a due process right of effective assistance in his first appeal. *Evitts v. Lucey*, 469 U.S. 387 (1985). The *Strickland* deficient performance and prejudice test applies to determine the merits of any claims of ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). However, "it is difficult to demonstrate that counsel was incompetent" as for the most part, deficient performance may be shown "only when ignored issues are clearly stronger than those presented . . . ." *Smith v. Robbins*, 528 U.S. at 288 (quoting *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)). "To prove prejudice, the applicant must show that, but for counsel's errors, there is a reasonable probability he would have prevailed on appeal." *Anderson v. State*, 354 S.C. 431, 434, 581 S.E.2d 834, 835 (2003).

In either case, 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 ... 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).

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[4] The direction the reviewing court must "reweigh" the evidence does not imply statutory schemes delineated as "weighing and non-weighing," rather implies considering the whole of the testimony for determination of whether there is a reasonable probability of a different result. *See generally Lovitt v. True*, 403 F.3d 171, 181 (4th Cir. 2005) (applying analysis to non-weighing state). *Cf. Brown v. Sanders*, 546 U.S. 212, 216–17 (2006) ("...our jurisprudence has distinguished between so-called weighing and non-weighing States. The terminology is somewhat misleading, since we have held that in *all* capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence.").

Guilty Plea Standard of Review and Restrictions

A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed. *Blackledge v. Allison,* 431 U.S. 63 (1977). Therefore, statements made during a guilty plea should be considered conclusive unless a criminal inmate presents valid reasons why he should be allowed to depart from the truth of his statements. *Crawford v. United States,* 519 F.2d 347 (4th Cir. 1975); *Edmonds v. Lewis,* 546 F.2d 566 (4th Cir. 1976).

A guilty plea must be "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford,* 400 U.S. 25, 31 (1970); *see Boykin v. Alabama,* 395 U.S. 238, 242 (1969) (requiring an affirmative showing that a guilty plea was entered intelligently and voluntarily). Entering a guilty plea results in a waiver of several constitutional rights; therefore, the Due Process Clause requires that defendants enter into guilty pleas voluntarily, knowingly, and intelligently. *Boykin*, 395 U.S. at 238. "A defendant's knowing and voluntary waiver of the constitutional rights which accompany a guilty plea may be accomplished by colloquy between the Court and the defendant, between the Court and defendant's counsel, or both." *Pittman v. State,* 337 S.C. 597, 600, 524 S.E.2d 623, 625 (1999).

"It is beyond dispute that a guilty plea must be both knowing and voluntary." *Parke v. Raley*, 506 U.S. 20, 29 (1992). *See also Boykin v. Alabama*, 395 U.S. 238, 242 (1969) ("a guilty plea should only be accepted where the record evidences 'an affirmative showing that it was intelligent and voluntary.'"). What is key to the analysis in reviewing the plea for voluntariness is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Raley*, 506 U.S. at 29 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). However, "[w]hen a criminal defendant has solemnly admitted in open

court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was incompetent. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

Even when a defendant claims that his attorney was "ineffective" and that therefore his plea was not "voluntary," courts have held that "the trial court's proper plea colloquy cured any misunderstanding he may have had about the consequences of his guilty plea." *Ramos v. Rogers*, 170 F.3d 560, 561 (6th Cir. 1999); *see also Baker v. United States*, 781 F.2d 85, 90 (6th Cir. 1986) (a "defendant's plea agreement consists of the terms revealed in open court"). "Entry of a plea of guilty is not some empty ceremony, and statements made to a ... judge in open court are not trifles that defendants may elect to disregard." *United States v. Loutos*, 383 F.3d 615, 619 (7th Cir. 2004) (quoting *United States v. Stewart*, 198 F.3d 984, 987 (7th Cir. 1999)); *see also United States v. Gwiazdzinski*, 141 F.3d 784, 788 (7th Cir. 1998) ("The purpose of the Rule 11 colloquy is to expose coercion, and the district judge must be able to rely on the defendant's sworn testimony at that hearing."). A defendant's "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge*, 431 U.S. at 74.

The United States Supreme Court has held:

> ...a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.

Tollett v. Henderson, 411 U.S. 258, 267 (1973).

It is within these standards and restrictions that this Court has considered the claims and

evidence. An individual discussion of the claims follows.

V. RULING ON THE INDIVIDUAL GROUNDS

On the first day of the evidentiary hearing, this Court entertained argument and discussion on the ground regarding the constitutionality of S.C. Code 16-3-20; in particular, the constitutionality of the provision that a defendant's decision to pursue a bench trial or guilty plea mandates judge sentencing in the bifurcated capital proceeding:

> B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years to life. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. **If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. ...**

S.C. Code Ann. § 16-3-20 (emphasis added).

Applicant's counsel relied upon *Hurst v. Florida*, and maintained the statute was invalid under that case. [See, for example, PCR Tr. at 23-24; 35-36; 70; 78]. The Court similarly considered the issue under *Hurst* throughout the proceeding. [See, for example, PCR Tr. p. 177]. The issue raised in the application, though, is not precisely that issue. The relevant issue as raised in the second amended application is:

> **Ground 10(d)** S.C. Code Ann. Section 16-3-20, allowing for judge sentencing, violates the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.
>
> > **11(d)** S.C. Code Ann. Section 16-3-20, as written by the General Assembly and construed by the South Carolina Supreme Court, denied Mr. Inmon his right to have a jury determine the existence of aggravating

> circumstances, consider statutory and non-statutory mitigating circumstances, and determine whether a death sentence should be imposed.

Even so, this Court will consider the issue as argued which is whether *Hurst* renders the statute unconstitutional as argued by Inman at the evidentiary hearing.

Respondent argues the issue cannot be reached because it is a freestanding claim that falls in the category of direct appeal claims. This Court agrees. However, if *Hurst* is a new rule, then Inman may avoid that limitation. See generally S.C. Code § 17-27-45 (B) ("When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist."). *Hurst,* though, did not create a new rule. Rather, the Supreme Court applied its 2002 ruling in *Ring v. Arizona,* 536 U.S. 584 (2002), to the Florida procedure at issue in *Hurst. See Hurst,* 136 S.Ct. at 621 ("We granted certiorari to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring.* 575 U.S. ___, 135 S.Ct. 1531, 191 L.Ed.2d 558 (2015). We hold that it does, and reverse."). *See also Dunlap v. Paskett,* No. 1:99-CV-559, 2019 WL 1274862, at *5 (S.D. Ohio Mar. 20, 2019) ("... this Court is of the view that *Hurst* did not announce a new constitutional rule or watershed rule of criminal procedure, but rather, simply applied *Apprendi* and *Ring.*"); *Lambrix v. Sec'y, DOC,* No. 2:17-CV-541-FTM-99CM, 2017 WL 6017760, at *1 n.1 (M.D. Fla. Oct. 2, 2017), *appeal dismissed,* 872 F.3d 1170 (11th Cir. 2017), *cert. denied sub nom. Lambrix v. Jones,* 138 S. Ct. 312, 199 L. Ed. 2d 202 (2017) ("The Supreme Court in Hurst

plainly and expressly applied the standard it first set forth in Apprendi v. New Jersey, 530 U.S. 466 (2000), and later applied to capital cases in Ring v. Arizona, 536 U.S. 584 (2002), to Florida's capital-sentencing scheme; it neither expanded the Apprendi/Ring rule nor announced a new rule."); *United States v. Con-ui,* No. 3:13-CR-123, 2017 WL 1393485, at *2 (M.D. Pa. Apr. 18, 2017) (" ... *Hurst* stands for the proposition that a capital sentencing scheme under which a jury makes a sentencing recommendation and a judge makes the critical findings needed for the imposition of a death sentence violates the Sixth Amendment's right to a jury trial. It appears, therefore, that *Hurst* merely applied *Ring*'s holding to Florida's capital sentencing procedure."); *Sneed v. Jenkins*, No. 5:17 CV 83, 2017 WL 564821, at *4 (N.D. Ohio Feb. 13, 2017) ("The Supreme Court in *Hurst* plainly and expressly *applied* the standard it first set forth in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and later applied to capital cases in *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's capital-sentencing scheme; it neither expanded the *Apprendi/Ring* rule nor announced a new rule.") (emphasis in original); *State v. Lotter,* 917 N.W.2d 850, 864 (Neb. 2018) ("*Hurst* merely applied *Ring.*").

Inman's plea was entered August 19, 2008. *Ring*, decided in 2002, was available precedent. In fact, Inman concedes *Ring* was raised in his challenge to mode of trial. [See PCR Tr. at 36]. Critically, though, the Supreme Court of South Carolina has already determined in Inman's direct appeal that "an appellate challenge to section 16-3-20(B)" would have been allowed "[u]nder the mandatory appeal procedures in capital case," citing S. C. Code § 16-3-25(A). *Inman,* 395 S.C. at 555, 720 S.E.2d at 40 and n. 14. Thus, the bar in *Simmons* directly applies. At any rate, because *Ring* was available, *Hurst,* which applied *Ring,* provides no new rule of law or basis for an exception to the PCR statute jurisdictional limitations and procedural

bars.[5] *See Lee v. State*, 244 So. 3d 998, 1003 (Ala. Crim. App. 2017) ("Because the decision in Hurst did not create a new rule, Lee's Ring/Hurst claim was subject to the procedural bars" in state's post-conviction relief procedure).

This Court has even more guidance in this case from the Supreme Court of South Carolina apart from whether the issue is a direct appeal issue barred by *Simmons*. It has weighed in on the lack of merit. As our Supreme Court said in Inman's direct appeal, the issue has been settled against Inman's present position:

> ... even if Inman preserved his challenge to section 16–3–20(B), he specifically abandoned this issue on appeal as he correctly recognizes that this issue has been decided against his position. See *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009), *cert. denied*, —— U.S. ——, 130 S.Ct. 3329, 176 L.Ed.2d 1229 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16–3–20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments; noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005) (adhering to *Downs* and rejecting claims that section 16–3–20(B) was unconstitutional); *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004) (citing *Downs* and concluding section 16–3–20(B) was constitutional); *Downs*, 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of section 16–3–20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing).

Inman, 395 S.C. at 556, 720 S.E.2d at 40.

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[5] Florida also ties applicability to *Ring*. See *Hitchcock v. State*, 226 So. 3d 216, 217 (Fla.), *reh'g denied*, No. SC17-445, 2017 WL 4118830 (Fla. Sept. 18, 2017), *cert. denied sub nom. Hitchcock v. Fla.*, 138 S. Ct. 513, 199 L. Ed. 2d 396 (2017) (reaffirming its precedent denying retroactive application to "those defendants whose death sentences were final before Ring"). *See also Robinson v. State*, 260 So. 3d 1011, 1014 (Fla. 2018) ("Prisoners whose sentences of death were final before the United States Supreme Court issued its decision in *Ring* are not entitled to retroactive application of *Hurst v. Florida* and *Hurst. Asay v. State*, 210 So.3d 1, 22 (Fla. 2016). We have repeatedly reaffirmed this holding, *see Hitchcock v. State*, 226 So.3d 216 (Fla. 2017)...").

This Court is bound to follow the precedent of the Supreme Court of South Carolina.

The record shows that Inman tendered his plea knowing the statute mandated that he be sentenced by the judge. He chose to enter his guilty plea with that knowledge. That is a waiver. As our Court has previously found, *Ring* is not implicated. *State v. Downs,* 361 S.C. 141, 146, 604 S.E.2d 377, 380 (2004) ("... *Ring* did not involve jury-trial waivers and is not implicated when a defendant pleads guilty.") (collecting cases). In *Downs,* the Court also noted that the record supported the defendant "was informed that by pleading guilty he waived his right to a jury trial on both guilt and sentencing" and did "not argue his waiver was made involuntarily, unknowingly, or unintelligently." *Id.,* 361 S.C. at 147, 604 S.E.2d at 380. Similarly, here, there was no deprivation of the right, there was a waiver. *See also Blakely v. Washington,* 542 U.S. 296, 310 (2004) ("...nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding.").

Reviewing the same constitutional challenge in a federal habeas context, the District Court of South Carolina, in a separate capital guilty plea review, has recently rejected the position Inman offers to this Court. *Mahdi v. Stirling,* No. CV 8:16-3911-TMC, 2018 WL 4566565, at *40–43 (D.S.C. Sept. 24, 2018).[6] The District Court rejected the challenge on the

[6] As noted by the District Court in its opinion, Mahdi also attempted a successive state PCR action to challenge Section 16-3-20. The Honorable Doyet A. Early, III, in an order of June 29, 2017, dismissed the application on procedural grounds. Mahdi attempted to appeal but the Supreme Court of South Carolina denied the petition for certiorari review. [2018 WL 4566565, at 4-5]. Further, Mahdi attempted to gain review by the United States Supreme Court, but his petition was denied. *Mahdi v. South Carolina,* No. 18-6110, 2018 WL 4681536, at *1 (U.S.S.C. Dec. 3, 2018). The State advised the Supreme Court of the United States in its brief in opposition that this issue was being raised in this case and in state and federal litigation for death sentenced inmate Stephen Corey Bryant. The issue in Mr. Bryant's case was not litigated in his successive

merits. The District Court's ruling is sound and supports the argument Respondent offers here – that *Hurst* did not create a new rule, but was an application of *Ring*. Moreover, the Court held the logic of *Ring* is not applicable when the defendant pleaded guilty, admitted relevant facts, and waived his right to a jury.

For purposes of this issue, the Court finds Defendant Mikal Mahdi is a similarly situated South Carolina capital defendant. Mahdi pleaded guilty and was sentenced pursuant to the restrictions of S.C. Code § 16-3-20 by the plea judge. In his habeas petition, Mahdi challenged the constitutionality of S.C. Code § 16-3-20. The ruling of the District Court on the merits of the claim in the *Mahdi* case – particularly as it is a federal court applying federal law – is directly on point with the issue presented here and is persuasive:

> *GROUNDS THREE & FOUR - CONSTITUTIONALITY OF SOUTH CAROLINA'S DEATH PENALTY STATUTE*
>
> In Ground Three, Mahdi claims South Carolina's death penalty statute, S.C. Code Ann. § 16-3-20, is unconstitutional because it automatically precludes jury sentencing following a guilty plea. Although this claim was not presented in Mahdi's original PCR application, Mahdi asserts it is appropriate for habeas review because the United States Supreme Court's decision in *Hurst v. Florida,* U.S. _, 136 S.Ct. 616 (2016), established a new constitutional rule requiring jurors to make all factual findings necessary for imposition of the death penalty and that rule applies retroactively to Mahdi's sentence. Respondents contend *Hurst* did not create a new rule of constitutional law, but was an application of *Ring v. Arizona,* 536 U.S. 584 (2002), to Florida's capital sentencing scheme.
>
> The court previously addressed this issue in its order denying Mahdi's motion to stay (ECF No. 91) and agreed with Respondents, finding "[t]he holding in *Hurst* was not a significant change in the law as the Supreme Court simply applied prior precedent, its holdings in *Ring* and *Apprendi,* to Florida's capital sentencing statutes." (ECF No. 91 at 4); *see also Hurst,* 136 S.Ct. at 621-22 (granting certiorari "to resolve whether Florida's capital sentencing scheme violates the Sixth Amendment in light of *Ring*" and analyzing Florida's statute under *Ring's* framework). In addition, the court found the holding in *Hurst* did not

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PCR, as the PCR judge denied, on procedural grounds, a motion to amend to include the claim in the limited successive action.

apply retroactively. (ECF No. 91 at 4-5 (citing *Schriro v. Summerlin,* 542 U.S. 348, 358 (2004) (holding that *"Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review"); *United States v. Sanders,* 247 F.3d 139 (4th Cir. 2001) (holding the new rule announced in *Apprendi* not retroactively applicable to cases on collateral review); *Tyler v. Cain,* 533 U.S. 656, 663 (2001) (holding that a "new rule of constitutional law" is "made retroactive to cases on collateral review by the Supreme Court" only if the Supreme Court holds as much). Mahdi has not provided the court with reason to alter these findings.

Further, the court finds South Carolina's capital sentencing procedures have not violated Mahdi's constitutional rights. In *Ring,* the Supreme Court found that Arizona's capital sentencing structure violated the Sixth Amendment right to a jury trial in capital prosecutions. Under Arizona's statute, "following a jury adjudication of a defendant's guilt of first-degree murder, the trial judge, sitting alone, determine[d] the presence or absence of the aggravating factors required" to impose the death penalty. *Ring,* 536 U.S. at 588. Applying its reasoning from *Apprendi,* the Court found that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" a defendant has a right to submit those factors to a jury for determination. *Id.* at 609. Thus, *Ring* established that when a defendant exercises his right to a jury trial on a capital offense, he is entitled to have a jury determine any aggravating factors necessary to impose a death sentence.

In *Hurst,* the Court applied its reasoning in *Ring* to Florida's capital sentencing scheme. In Florida, "[a] person who ha[d] been convicted of a capital felony [would] be punished by death" only if an additional sentencing proceeding "result[d] in findings by the court that such person [would] be punished by death." Fla. Stat. § 775.082(1) (2010) (amended 2016). Under this statute, if a jury convicted the defendant of a capital felony, a sentencing judge would conduct an evidentiary hearing before the jury and the jury would issue an "'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Hurst,* 136 S. Ct. at 620 (citing Fla. Stat. § 921.141(1)-(2) (2010) (amended 2016)). "Notwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, [would then] enter a sentence of life imprisonment or death." Fla. Stat. § 921.141(3) (2010) (amended 2016). Thus, although the court afforded some weight to the jury's recommendation, "[l]ike Arizona at the time of *Ring,* Florida [did] not require the jury to make the critical findings necessary to impose the death penalty." *Hurst,* 136 S. Ct. at 622. Because this procedure allowed a judge to increase a defendant's maximum penalty based on his own factfinding, the Court held Hurst's sentence violated the Sixth Amendment. *Id.*

The South Carolina Supreme Court has distinguished South Carolina's statute from Arizona's (and Florida's) because, in South Carolina, "a defendant

convicted by a jury can be sentenced to death only if the jury also finds an aggravating circumstance and recommends the death penalty." *State v. Downs,* 604 S.E.2d 377, 380 (S.C. 2004); *State v. Wood,* 607 S.E.2d 57, 61 (S.C. 2004). Thus, if a capital defendant in South Carolina exercises his right to a jury trial, a jury must determine both his guilt and sentence. However, if a capital defendant pleads guilty, and waives his right to a jury trial, *Ring* is not applicable. *See id.* (finding *Ring* "did not involve jury-trial waivers and is not implicated when a defendant pleads guilty" under South Carolina's death penalty statute); *Lewis v. Wheeler,* 609 F.3d 291, 309 (4th Cir. 2010) (discussing a challenge to Virginia's capital sentencing scheme, which is functionally equivalent to South Carolina's, and finding *Ring* did not hold "that a defendant who pleads guilty to capital murder and waives a jury trial under the state's capital sentencing scheme retains a constitutional right to have a jury determine aggravating factors").

During his colloquy with Judge Newman, Mahdi expressed, under oath, an understanding of his right to a jury trial and sentencing; what that trial and sentencing would require, including the State's burden of proof; the nature of the charges against him and possible sentences, including death; and that if he pled guilty, Judge Newman would determine his sentence, not a jury. *(See* App. A003219-32). Along with waiving his right to a jury trial (App. A003227), Mahdi expressly and voluntarily waived his right to jury sentencing (App. A003225). In addition, Mahdi admitted to the facts of the crime as stated by the Solicitor. (App. A003233-43).

Mahdi argues that, although he pled guilty to grand larceny and second-degree burglary and admitted to the relevant facts, in order to find the related statutory aggravating circumstances and impose the death penalty, Judge Newman had to find the additional fact that Mahdi murdered Captain Myers while committing these crimes with the use of a deadly weapon. (ECF No. 75 at 31). However, Mahdi specifically admitted to this fact during his guilty plea:

> **THE COURT:** And did you, on or about July 18th, 2004, at round the same time and date as the murder enter the building belonging to James E. Myers and Amy Tripp Myers without their consent, with intent to commit a crime therein? And while in the building or during the immediate flight or leaving the building, were you armed with a deadly weapon? And did you cause physical injury, including the killing of Mr. Myers with the pistol during this same burglary?
>
> **DEFENDANT MAHDI:** Yes, sir, Your Honor.
>
> **THE COURT:** And did you steal the officer's - - the 2003 Dodge Ram truck in the possession of the officer and owned by the City of Orangeburg?

DEFENDANT MAHDI: Yes, sir, Your Honor.

(App. A003243-44).

> Mahdi also asserts *Hurst* requires jurors to consider "statutory and non-statutory mitigating factors, the specific circumstances of the crime, [and] the character of the defendant." (ECF No. 75 at 32). This argument misses the central holding of *Apprendi, Ring,* and *Hurst* - juries must find facts necessary to *increase* a defendant's penalty. These cases do not address mitigation.
>
> Given Mahdi's voluntary waiver and admission to the relevant facts, judicial sentencing did not violate Mahdi's Sixth Amendment rights. *See Blakely v. Washington,* 542 U.S. 296, 303, 310 (2004) (holding that under *Apprendi,* a judge may impose any sentence authorized "on the basis of the facts . . . admitted by the defendant" and noting "nothing prevents a defendant from waiving his *Apprendi* rights"). Accordingly, Mahdi's constitutional challenge to South Carolina's death penalty statute fails on the merits.

Mahdi v. Stirling, No. CV 8:16-3911-TMC, 2018 WL 4566565, at *40–43 (D.S.C. Sept. 24, 2018).

In particular, the *Lewis v. Wheeler* case, as relied upon in the District Court order, well-illustrates the point as Virginia's statute, like South Carolina's, provides a judge will sentence when a guilty plea is entered: "When a defendant pleads guilty and waives his or her right to a jury determination of guilt, however, Va.Code Ann. § 19.2-257 provides that the trial judge will conduct the sentencing proceeding alone, determine whether an aggravating factor or factors exist, and make the determination of whether death is the appropriate sentence." *Lewis v. Wheeler,* 609 F.3d 291, 308 (4th Cir. 2010). The Fourth Circuit resolved that the precedent simply did not support the argument forwarded:

> Lewis contends that any reasonable attorney or jurist would have concluded after *Ring* that a defendant who pleads guilty to a capital offense-and waives his right to a jury pursuant to a state statute that mandates that a judge conduct the sentencing proceeding when such a guilty plea is entered-retains this constitutional right to have a jury determine the existence of aggravating factors. However, neither *Apprendi* nor *Ring* stand for that proposition. In both cases, the

> challenged sentencing procedures denied defendants the option of having a jury determine a sentence enhancement, or aggravating factor, *regardless* of whether the defendant pleaded guilty or not guilty to the charged offense. In *Apprendi,* the defendant pleaded guilty but expressly preserved his right to challenge any hate-crime enhancement. And in *Ring,* the defendant was convicted of capital murder by a jury. Thus, in neither case did the defendant waive his right to a jury determination of facts upon which the enhancement or aggravating factor rested.

Lewis v. Wheeler, 609 F.3d 291, 310 (4th Cir. 2010). *See Mullens v. State,* 197 So. 3d 16, 38 (Fla. 2016), *cert. denied sub nom. Mullens v. Fla.,* 137 S. Ct. 672, 196 L. Ed. 2d 557 (2017) (collecting cases from jurisdictions "where defendants who pleaded guilty to capital offenses automatically proceeded to judicial sentencing" where the "courts have held that *Ring* did not invalidate their guilty plea and associated waiver of jury factfinding.").

In short, Inman's position here – like the defendant's position in *Lewis* and in Mahdi's federal habeas challenge – fails on the merits because of the waiver of jury proceedings. It is a different process under scrutiny, and a different matter of law, than that addressed in *Ring* and *Hurst.*

This is a matter of knowing waiver – and the record here can only be interpreted as reflecting a knowing waiver. The record shows Judge Miller was extremely careful to ensure that Inman understood a plea would result in Judge Miller being the sentencer. The guilty plea record is probative. "A guilty plea is a solemn, judicial admission of the truth of the charges against an individual; thus, a criminal inmate's right to contest the validity of such a plea is usually, but not invariably, foreclosed." *Garren v. State,* 423 S.C. 1, 12, 813 S.E.2d 704, 710 (2018) (quoting *Dalton v. State*, 376 S.C. 130, 137, 654 S.E.2d 870, 874 (Ct.App. 2007)). "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison,* 431 U.S. 63, 74 (1977). "Indeed, where a thorough colloquy is conducted, courts must exercise

caution in setting aside the guilty plea." *Garren,* 423 S.C. at 12, 813 S.E.2d at 710. The record here greatly undermines the legal claim for relief.

Inman personally waived his right to a jury trial, and personally professed, time and again, that he understood he would be sentenced by the judge. The judge explained Inman had the right to a jury and that a jury would hear the case in two phases – guilt and sentencing. [R. at 929-30]. He explained a plea would waive the right to have a jury decide guilt and sentencing. In particular, the record shows:

> THE COURT: Do you understand that if you enter a plea of guilty that you waive and give up your right to a jury trial to have a jury decide the guilt phase? And, by doing that, you give up your right to have a jury decide the sentencing phase.
>
> Do you understand that?
>
> MR. BANNISTER: Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> THE COURT: Okay. And do you understand that you could impanel a jury, and that you could get in front of that jury in the guilt phase and admit your guilt and have that jury decide your sentence?
>
> Do you understand that?
>
> MR. BANNISTER: Judge, I would object to that question, the way it's asked. I don't believe he's got that right, if I'm understanding it the way you're asking it.
>
> THE COURT: Well, I don't want to be - - make it [21]confusing.
>
> But if you were to impanel a jury in the guilt phase, you could testify and admit to your guilt in front of that jury and have that jury then in a sentencing phase sentence you.
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> THE COURT: Okay. And do you - -

MR. BANNISTER: Judge - -

THE COURT: - - understand by doing that that you give up that right?

Yes, sir, Mr. Bannister.

MR. BANNISTER: Judge I need to, I guess at least, put on the record, at this point, that in March, we raised the issue that the Defendant sought to enter a guilty plea, as he's doing today, and then proceed to a jury trial sentencing. And we believe that that was an option that he should be entitled based on the fact of his Sixth Amendment right to a jury trial, his Eighth Amendment right to present mitigation, and his Fourteenth Amendment right to present a complete defense.

You determined, prior to this proceeding, that he did not have that option. I believe that that issue has been preserved for review. But to the extent that I need to state it again for the record, I'm saying that we raised that issue and we believe it's part of this case no matter what going forward. But that's been part of my explanation to him about where we go.

So, with that on the record, go ahead.

THE COURT: Well, I want to tell you, Mr. Inman, that, in South Carolina, we do not have conditional guilty pleas. And the law is very clear about that. Whether or not this issue is preserved for appeal is not something that I will address, and I have no control over it.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All right. Now, and I would tell you that there are - - I have no - - and I don't have an opinion about whether or not what your attorney claims - - what he thinks about the preservation of that issue for appeal is. But I can tell you that the law is very clear. There are no conditional pleas. And if you enter a plea of guilty, you can't do it on a condition.

Do you understand that?

You can't hold something out in abeyance by entering this guilty plea.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All right.

MR. BANNISTER: And, Judge, I guess what I want to say is, I want to be sure that there's a clear distinction on the record between what you're asking him to waive, which is his ability to stand up in front of a jury and tell them he's guilty versus going through a formal guilty plea and then proceeding to a jury trial having entered the guilty plea. He cannot do that. But I think the way the question was worded to him, it sounded like that was an option. And it's simply not. I mean - -

THE COURT: Well, I don't want to get into confusing semantics. But if you enter this plea and I accept it, you are giving up your right to have a jury impaneled.

And let me tell you, there are significant rights which attach to the selection of a jury in a capital case. And part of that is already in place. A lengthy and comprehensive juror questionnaire has been sent to potential jurors. That has been provided to your counsel and to the State. They are able to learn many things about jurors. And, additionally, at the time, if you were to go forward with a jury tail, you and the State would have an opportunity to individually question potential jurors to make a - - to find out information about whether or not they could follow the law and be impartial in your case.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: And if you enter this plea and I accept this plea, you are giving that right up.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: All right. And are you doing this of your own free will?

DEFENDANT INMAN: Yes, sir.

THE COURT: Okay. Has anybody - - this is what you want to do?

DEFENDANT INMAN: Yes.

THE COURT: It's not at someone elses suggestion; is that correct?

DEFENDANT INMAN: Yes, sir.

THE COURT: It is at someone elses suggestion?

DEFENDANT INMAN: No. I mean, that's correct.

[R. at 930-34].

Judge Miller then went over the other specific rights Inman was waiving including, the presumption of innocence; the burden of proof beyond a reasonable doubt; the right of confrontation and cross-examination; the right to remain silent; the right to challenge seized evidence or statements made. [See R. at 934-35]. Inman advised he understood and still wanted to plead guilty to all charges. [R. at 936]. Judge Miller asked: "Are you guilty?" to which Inman replied, "Yes, sir." [R. at 936]. Inman affirmed the detailed statement of facts offered by stipulation. [See R. at 937 – 952]. At that point the following occurred which again underscores the waiver at issue here:

> THE COURT: I just want to - - do you understand that if I accept this plea, you are giving up your right to have a jury make this determination on your sentence with respect to the murder case?
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes.

[R. at 952].

Defense counsel again asserted "just for the record," that:

> MR. BANNISTER: He's been put in a position where he's got to make a choice between Constitutional provisions, one is the Fourteenth Amendment, Sixth Amendment, and Eighth Amendment right to present a complete defense, which would include the mitigation of his guilty plea. The other is the right to a jury trial and have a sentence determine what sentence he would receive. He has to choose between those two.
>
> We say the choice itself is Unconstitutional. And we - - I'm just stating that again for the record. You've already decided that that's not the case. And I just want to make sure it is preserved.

[R. at 953].

Inman repeated, though, that he understood there were no conditional pleas in South Carolina. [R. at 953]. Judge Miller then returned to what the choice of a jury would offer:

> THE COURT: But you understand that a jury's verdict would have to be unanimous.
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> THE COURT: All 12 persons on the jury would have to agree to a verdict.
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> THE COURT: And you understand that if one of the 12 people couldn't make up their mind that the law would require that the sentence would be life.
>
> Do you understand that?
>
> DEFENDANT INMAN: Yes, sir.
>
> **THE COURT: And you're giving that right up and you're requesting that the Court be the fact finder and the determiner of the sentence; is that right?**
>
> **DEFENDANT INMAN: Yes.**

[R. at 954] (emphasis added).

Judge Miller then ensured that no one had "made any promise, prediction, or prophesy to [Inman] about what they think my sentence might be," and Inman responded, "No, sir." [R. at 954]. Judge Miller explained further:

THE COURT: And I want to tell you right now that this is the first time I've been exposed to these facts, and that I have not made up my mind, and that I will listen fairly and impartially to everything that's presented to me.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: But, at the same time, you don't get the right to send me a questionnaire, and you don't get the right to question me the way you would jurors.

Do you understand that?

DEFENDANT INMAN: Yes, sir.

THE COURT: **And you still want to go forward?**

DEFENDANT INMAN: Yes, sir.

[R. at 954-55] (emphasis added).

Further still, the State, through Solicitor Ariail, wished to ensure that the sentence would be imposed based upon the Judge's "determination of the facts," to which Inman responded, "Yes, sir." [R. at 955-56]. Judge Miller thereafter accepted the plea. [R. at 956].

After the plea was entered, Solicitor Ariail expressed a concern that defense counsel's injection of his comments about preservation of an appeal was an attempt to make it a conditional plea. He asked Judge Miller to direct to Mr. Inman a specific question "does he understand by waiving and giving up those rights that he is, from the law's perspective waiving the right to be tried by a jury in the sentencing phase?" [R. at 957]. Defense counsel Bannister objected to the question. [R. at 957]. The Court suggested that he had already asked that question, but again questioned Inman:

... Mr. Inman, I direct this to you. Because in the end, you get advice from your attorneys. But this decision is yours. I don't - - the law is clear in South Carolina that you cannot enter a conditional guilty plea, which means you

cannot plead guilty and reserve some issue with respect to the guilt phase for the Appellate Courts to rule on.

Mr. Bannister may disagree with me.

MR. BANNISTER: And I want to state, for the record, that I do.

THE COURT: Okay.

MR. BANNISTER: And I have advised him that I believe this issue is preserved and will survive the guilty plea.

[R. at 958].

The Court advised that he and defense counsel disagreed, but focused the inquiry on what Inman specifically understood. [R. at 959-61]. With counsel's repeatedly assertions, Judge Miller nearly rejected the plea, [see R. at 960], but Inman's responses were clear and unequivocal. Judge Miller stated to Inman, "I want your plea to not be dependent on that issue." [R. at 961]. Inman and defense counsel had an off the record discussion before Inman specifically and repeatedly responded he wished to continue with the plea. [R. at 961-963]. Inman confirmed he discussed "the issue of the jury trial versus a guilty plea" with his attorneys and still wished to plead guilty. [R. at 963]. Again, Judge Miller accepted the plea. [R. at 963].

There is little question the issue was clearly and repeatedly explored. It is simply not logical to conclude on this record that Inman did not understand that he would be sentenced by the judge if he pleaded guilty.[7]

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[7] An "off shoot" argument that is occasionally raised in connection with *Hurst* is that the Supreme Court opinion mandates that a jury must consider the evidence in aggravation and mitigation and its relative weight. As the Nebraska Supreme Court stated precisely: "The *Hurst* Court said no such thing." *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018). *See also Clark v. Dunn*, No. CV-0454-WS-C, 2019 WL 1119354, at *2 (S.D. Ala. Mar. 11, 2019) (finding *Hurst* applied *Ring,* and rejecting petitioner's argument that a jury must consider the evidence in aggravation and mitigation, concluding the argument "is a red herring."); *Castillo v. Filson,* 2017 WL 4127745, at *4 (D. Nev. Sept. 18, 2017) ("Castillo's claim extends the holding in *Hurst*

Also, if there could be any question left after review of the extensive record of the plea, there could be no question in light of the representation volunteered by Inman at the PCR hearing. After this Court questioned Inman via telephone about his appearance and testimony at the hearing, Inman requested[8] to make a statement to the Court:

> APPLICANT INMAN: I understand that there's a question of when I pled guilty, that I was asking for a jury trial. That's false. When I pled guilty, it was with the understanding that I wanted a judge sentencing and not a jury sentencing. And I understood that, and, again, that's what I wish for.

[PCR Tr. at 193].

There is no evidence that somehow impugns the clear statements made – there was a knowing, intelligent and voluntary waiver.

Substantively, this ground does not support relief legally or factually. This Court declines to find error in the Supreme Court of South Carolina opinion, or in the District Court's order in *Mahdi*, or the Fourth Circuit's logic in *Wheeler*. There simply is no error. *Ring*, and the Court's later decision applying *Ring* in *Hurst*, do not support Inman's argument. Factually, the record well supports waiver as demonstrated above, and as confirmed by the applicant, personally, in the PCR proceeding.

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beyond its cognizable bounds. Neither *Ring* nor *Hurst* holds that the weighing of aggravating and mitigating circumstances is an "element" that must be submitted to the jury."); *Runyon v. United States*, 228 F. Supp. 3d 569, 634 (E.D. Va. 2017) ("...Hurst does not mention the weight a jury should give to the aggravating and mitigating factors, as it is concerned with whether a judge may take over the jury's role in determining these factors."). More precisely relevant to this case, however, is the knowing and intelligent waiver of the jury. The applicant has personally confirmed to this Court that he wanted judge sentencing and not jury sentencing. [PCR Tr. at 193]. That concludes the matter.

[8] Before allowing the statement, this Court asked the applicant if he wished to consult with counsel before making the statement to the Court, and Applicant responded, "No, sir." [PCR Tr. at 192-193].

Even so, procedurally, this ground is not available. The issue presented is a direct appeal issue and cannot be heard on the merits. *Simmons, supra*; *Drayton, supra.* Moreover, the constitutionality of the statute in regard to this very challenge – a guilty plea resulting in judge sentencing – has been repeatedly upheld by the Supreme Court of South Carolina. *Inman, supra.* If heard, the issue would be found without merit, and would afford no relief.

The Court now turns to the remaining issues and addresses those issues in the order in which they appear in the amended application.

> **Ground 10(a)** Mr. Inmon was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the guilt-or-innocence phase of his capital trial.

Inman presents two separate issues in this ground according to his alleged facts in support of the claim:

> **11(a)(1)** Trial counsel was ineffective for advising Mr. Inmon to plead guilty and appeal the trial court judge denying his request to be sentenced by a jury when then existing state law did not allow jury sentencing following a guilty plea in a capital case.

> **11(a)(2)** Not developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug, and failing to advise the Court, sitting in judgment of Mr. Inmon, of this evidence that supported a verdict of guilty but mentally ill.

PCR counsel stated they would withdraw these claims at the beginning of the PCR hearing, [PCR Tr. at 22], and again prior to Applicant's statement made via telephone, [PCR Tr. at 167]. This Court will accept and allow the offer to withdraw the claims as it would find Inman would fail to carry his burden of proof.

Applicant has not shown but for counsel's advice regarding counsel's issue on jury sentencing that Applicant would not have plead guilty.

Counsel's advice regarding the jury sentencing rested upon a legal matter pressed by trial counsel, but has no bearing whatsoever on Applicant Inman's decision to plead guilty. That is dispositive of the issue.

The decision to plead guilty is the client's decision to make, not the attorney. *McCoy v. Louisiana*, 584 U.S. ___, ___, 138 S. Ct. 1500, 1508 (2018) ("Some decisions, however, are reserved for the client—notably, **whether to plead guilty**, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal.") (emphasis added). That decision can be unfairly influenced by counsel's wrong advice. However, that is not the case here and there is simply no evidence that *any* advice from counsel negatively influenced Applicant Inman's decision to plead guilty, nor does anything in the PCR proceeding dilute the evidence of Applicant Inman's continually noted strong resolve to plead guilty.

The Supreme Court has expressed that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies," but "should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee v. United States*, __ U.S. ___, 137 S. Ct. 1958, 1967 (2017). Here, though, there is no "post hoc" assertion from the applicant that he would not have pled guilty but for counsel's advice. Inman provides no testimony whatsoever to support that he would have chosen to go to trial but for advice by his plea attorneys. Moreover, the record shows repeated contemporaneous-to-plea indications Inman wished to enter a plea of guilty. In particular, the Court notes Inman told Dr. Schwartz-Watts (now "Dr. Maddox") he wanted to plead guilty to the murder of Tiffany Souers. [R. at 916-21]. As outlined above, the record of

the guilty plea proceeding shows it was Inman's decision to enter a plea of guilty, and Inman understood that there were no conditional guilty pleas in South Carolina, and he could not plead guilty and preserve issues related to the guilty plea if he pled guilty. Further, at the PCR hearing, Inman himself reaffirmed his consistent response throughout his plea that he understood he was pleading and, as such, that he would be sentenced by Judge Miller. [See PCR Tr. at 191 and 193]. In his PCR testimony, trial counsel Bannister agreed not only did the applicant wish to plead guilty from the very beginning of his representation, but also that he also wished to receive the death penalty. [PCR Tr. at 254-261; see also 288-289 and 336-337]. Co-trial counsel, Mr. Culbertson similarly testified that it was "always" the applicant's intent to plead guilty. [PCR Tr. at 629-630]. The third member of the defense team, Mr. DeJong, similarly testified at the PCR proceedings that the plea option and the statutory provisions on judge sentencing were discussed with Applicant. [PCR Tr. at 649-650]. Mr. DeJong clarified that counsel explained the statute to the applicant and explained specifically that pleading guilty would result in judge sentencing. [PCR Tr. at 653].[9]

Consequently, Applicant Inman cannot show prejudice because there is no reasonable probability Inman would not have pled guilty and would have proceeded to trial but for the advice from counsel. Again, this Court will allow the withdrawal of the claim.

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[9] Moreover, Mr. DeJong additionally testified that after reviewing feedback from a mock trial type of presentation, "it was the pretty much the consensus of the team that a jury trial was not necessary not in the best interest, but the allegations we had to deal with would have been more than an uphill battle in front of a jury." [PCR Tr. at 653-654]. This Court finds trial counsel carefully considered options in advising the applicant, carefully prepared what was a very difficult case for the defense to prepare, and diligently pursued the strategy after diligent and reasonable consideration of alternatives. Petitioner has failed to carry his burden of proof to show otherwise. He certainly would fail to carry his burden on this allegation, which factors greatly into the Court's decision to allow the withdrawal.

Allegation of failing to develop possible evidence of a sexual disorder and to advise the court of this evidence that supported a verdict of guilty but mentally ill

For all the reasons set out above, Inman has not met his burden of proof in showing ineffective assistance of counsel and resulting prejudice. Again, there is no evidence the applicant would have insisted on trial but for counsel's advice. Moreover, Inman's PCR counsel conceded they lacked evidence to present in support of the claim particularly as to the alleged evidence to support a verdict of guilty but mentally ill, [PCR Tr. at 22 and 167], and no evidence supportive of this claim was submitted. To the contrary, Dr. Maddox testified that she could not opine that the condition she found to exist would support a verdict of guilty but mentally ill:

> Q. ... you testified that even in as early as August 2008, you needed to complete your evaluation with regard to whether or not Mr. Inman met the criteria for guilty but mentally ill.
>
> A. Yes.
>
> Q. Okay. And does he?
>
> A. No.
>
> Q. And you're able to say that now because of the additional evaluations that have taken place?
>
> A. That's correct. And also further interview with him.
>
> Q. Okay.
>
> ...
>
> ... I had suspicions. I know what his illness is. I have documents from even 2006 where, in my opinion, his capacity was impaired, but because he consistently and to this day will always state "I have total control of my urges," so my opinion, he knows what he feels. But that opinion, even though I have suspicions that he's feigning well in that area, I had to base on the statements that he's told me many times that he had total control over his urges, although I doubt that.

[PCR Tr. at 558-559].

In sum, after what was scrupulous and critical consideration of the evidence with the assistance of a well-qualified expert, the evidence does not lend any actual support for this ground. This Court agrees with the applicant that he cannot carry his burden of proof. Again, this Court will allow the withdrawal of the claim.

> **Ground 10(b)** Mr. Inmon was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution—during the sentencing phase of his capital trial.
>
> **11(b)** Trial counsel was ineffective during the sentencing phase for:
>
> **11(b)(1)** Failing to obtain another mitigation expert witness after Dr. Marti Loring would not continue in Mr. Inmon's case because she was intimidated by the prosecutor who threatened to have her arrested if she testified, and Mr. Inmon was prejudiced by the same.
>
> **11(b)(2)** In the alternative to (11)(b)(1), failing to continue to prepare with Dr. Loring in the event the trial judge reconvened the trial, as in fact occurred, and Mr. Inmon was prejudiced by the same.
>
> **11(b)(3)** In the alternative to (11)(b)(1) and (11)(b)(2), counsel is informed and believes that trial counsel did obtain another mitigation expert witness but failed to prepare and present that witness to testify and render an expert opinion, and Mr. Inmon was prejudiced by counsel's deficient performance.
>
> **11(b)(4)** Failing to investigate, develop, and/or present mitigation evidence that was available to trial counsel at the time of the sentencing hearing, including but not necessarily limited to social history information and adaptability to incarceration, and Mr. Inmon was prejudiced by the same.
>
> **11(b)(5)** Developing information through experts retained by the defense that Mr. Inmon's sexual misconduct was the result of a rare medical condition that was treatable and controllable with a common drug and failing to advise the Court, sitting in decision of what punishment to mete out to Mr. Inmon, of this extraordinarily powerful mitigation evidence that was and is a treatable medical condition Mr. Inmon, [sic] and Mr. Inmon was prejudiced by counsel's failures.

11(b)(6) Failing to object to the rush to the forgone judicial conclusion that the sentence would be death. This ground is based on the deposition testimony of former Solicitor Robert M. Ariail:

> And Judge Miller had an agenda, probably one of the better agendas. And that was: Let's get through this case. You know, I know what the decision – I know what the verdict is going to be. Let's get through it and quit interrupting.

11(b)(7) In the alternative to 11(b)(1), (2), (3), (4), (5), and (6), intentionally not presenting powerful, available mitigation evidence in order to create an issue for post-conviction relief. This alternate ground for relief is based on the deposition testimony of former Solicitor Robert M. Arial. If Solicitor Ariail is correct, then such conduct amounts to intentional sandbagging for which no strategic justification exists.

There is no merit to this ground and all of its subparts. Applicant Inman failed to meet his burden of proof to show trial counsel rendered deficient performance in representation and/or that deficient performance resulted in *Strickland* prejudice.

These issues, though separated out, fall into three different categories – the presentation of social history and/or adaptability in mitigation; the presentation of sexual disorder evidence in mitigation; and failure to object to a "rush to judgment." The Court will address the issues in this more manageable presentation. The following specific law guides the Court:

Relevant Law

The *Strickland* standard must be applied with scrupulous care lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-90. The Sixth Amendment requires counsel in a capital case conduct a reasonable and thorough investigation into mitigation evidence and present that which is favorable to the defendant at sentencing.[10] *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v.*

[10] Several of the Supreme Court capital cases reference the ABA guidelines, but the Court has long, and repeatedly, made clear that such guidelines are not mandatory: "No particular set

Taylor, 529 U.S. 362, 296 (2000); *see also Strickland, supra.* However, counsel is not required to submit all potential mitigating evidence in every case, but can make reasonable strategic decisions not to present certain mitigation evidence if the decision not to present such evidence is objectively reasonable under the circumstances, particularly where the evidence could be seen as damaging to the defense. *Wiggins*, 539 U.S. at 533 (quoting *Strickland)*; *Burger v. Kemp,* 483 U.S. 776, 793(1987) (when defendant's background is "by no means uniformly helpful" to him since it "suggest[s] violent tendencies," it is reasonable to choose not to present it); *St. Pierre v. Walls,* 297 F.3d 617, 633 (7th Cir. 2002) ("Historical facts that show a defendant has a condition or proclivity toward violence are often aggravating, not redeeming or mitigating factors").

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of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland,* 466 U.S. at 688-689. *See also Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) ("... 'American Bar Association standards and the like' are 'only guides' to what reasonableness means, not its definition") (quoting *Strickland*). The concurring opinion in *Van Hook* clarified the Court's duty, and pointedly set out disagreement with setting the ABA guidelines apart in a "privileged position" in evaluating Sixth Amendment issues: "It is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution, and I see no reason why the ABA Guidelines should be given a privileged position in making that determination." *Id.* (Alito, J., concurring). Additionally, our state appellate courts have adhered to the Supreme Court's distinction placing the guidelines in proper perspective of "guides" alone, as well. *See also generally State v. Blakely*, 402 S.C. 650, 664,742 S.E.2d 29, 36 (Ct. App. 2013) ("Although Blakely argues the ABA standards involving joinder and severance of cases preclude prosecution, we believe these standards are not controlling or dispositive. While our [state] supreme court and [the South Carolina Court of Appeals] have, on occasion, referred to ABA standards, our jurisprudence has not adopted the standards as a rule of court."). There has been no acceptance of the private organization's guidelines as more than that in this jurisdiction. This Court declines to accept the ABA guidelines as the definitive guides or "inexorable commands" as to do otherwise would be contrary to clear Supreme Court precedent, and the precedent of this state. *Bobby, supra.* However, the Court accepts that trial counsel, particularly Mr. Bannister, was guided by ABA rules, among other rules, such as the ethical rules of this jurisdiction as also mentioned in his testimony. The Supreme Court has indicated that inquiry should be case specific and this Court approached its review in that manner. *See Strickland, supra.*

The Supreme Court has "emphasize[d] that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins v. Smith,* 539 U.S. at 533. However, a court will consider counsel's choices in light of the "limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Id.*, quoting *Strickland,* at 690-91. "A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.'" *Id.*, quoting *Strickland,* at 691.

To carry his burden of establishing *Strickland* prejudice, the applicant must "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.'" *Wong v. Belmontes,* 558 U.S. 15, 19–20 (2009) (quoting *Wiggins v. Smith,* 539 U.S. 510, 535 (2003)). Where missed or omitted evidence is merely cumulative to other "humanizing evidence" already presented in mitigation, an applicant cannot carry his *Strickland* burden. *Id.*, at 22. Where missed or omitted evidence would have also resulted in the introduction of negative evidence for the applicant, he, again, cannot carry his *Strickland* burden. *Id.*

Failure to obtain and present another mitigation expert witness, or alternatively, preparing Dr. Loring to testify at sentencing - Claims (b)(1) through (b)(4)

Applicant fails to carry his *Strickland* burden. He fails to show another mitigation expert witness would have presented anything significantly different from his background than Dr. Loring was able and allowed to present. Further, the record supports the additional information adduced at the PCR hearing concerning Applicant's mother was not presented at sentencing at

the direction of and in compliance with applicant's consistent wishes that his mother not been shown in a negative light. At any rate, the information was not clearly mitigating as to the applicant's personal characteristics (though it did demonstrate extra evidence of his background); did not introduce a new concept in mitigation; and, was clearly cumulative to other evidence presented. Further, as the evidence alone did not introduce a new concept in mitigation, and was cumulative to other evidence submitted concerning his mother's illness, her inability to care sufficiently for her children or protect her children, when considered alongside the evidence in mitigation actually presented, and the evidence in aggravation, this Court finds no reasonable probability of a different result under the appropriate *Strickland* analysis. Having not convinced this Court of prejudice, Applicant is not entitled to relief.

In the direct appeal opinion, the Supreme Court of South Carolina Supreme Court summarized the sentencing phase presentation as follows:

> On September 8, 2008, the judge commenced the non-jury sentencing proceeding. In presenting its case for statutory aggravating circumstances, the State called two of the law enforcement officers to whom Inman confessed to the charged crimes. Additionally, Dr. Eric Dean Christensen, the forensic pathologist who conducted the Victim's autopsy, certified the Victim's death was caused by "asphyxia due to ligature strangulation." He further testified that there was "extensive bruising" on the Victim's body, which he believed was consistent with a physical struggle and the Victim being restrained. He also found physical evidence that suggested "traumatic sexual relations."
>
> In terms of Inman's criminal history, the State offered extensive evidence of Inman's prior convictions in Florida and North Carolina as well as evidence of two unadjudicated incidents that occurred after Inman was released from the Florida Department of Corrections on September 1, 2005.
>
> Subsequently, defense counsel initiated the case for mitigation. As the defense's first expert witness, counsel called Dr. David Richard Price, a forensic psychologist/neuropsychologist and clinical psychologist, who interviewed Inman and reviewed records regarding Inman's family, his prior crimes, his terms of incarceration, and his mental health records.

> Based on these records, Dr. Price concluded that Inman suffered from the following: major depressive disorder, recurrent type; major depressive disorder with psychotic features; bipolar disorder; psychorhythmic disorder; schizoid personality disorder; dissociative identity disorder; and sexual paraphilia. In making these diagnoses, Dr. Price took into account Inman's extensive psychiatric history and his childhood, which included "pretty significant" records indicating that Inman had been sexually abused, physically abused, grew up in a "very unstable environment," suffered with a mother who was schizophrenic and an alcoholic father, began using drugs at an early age, and was incarcerated at age seventeen. Dr. Price also testified that Inman had attempted suicide on seven occasions, six of which occurred while he was incarcerated. He further stated that Inman believed the death penalty was the appropriate punishment for the murder of the Victim. Ultimately, Dr. Price opined that Inman committed the crimes against the Victim while he was under the influence of a mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.

State v. Inman, 395 S.C. 539, 547–48, 720 S.E.2d 31, 35–36 (2011).

When the defense called Dr. Marti Loring as an expert in "trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing cases," the solicitor asked in voir dire:

> ... whether Dr. Loring had "performed services under [her] licensed clinical social worker status" and whether she was licensed in South Carolina. Upon receiving Dr. Loring's response that she was not licensed in South Carolina, the Solicitor directed the judge's attention to section 40–63–200 of the South Carolina Code,[5] which deals with the unauthorized practice of social work within the State of South Carolina. The Solicitor also pointed out that the statute "carries both civil and criminal penalties for violation." Based on this statute, the Solicitor argued that Dr. Loring was "not qualified as an expert in this state to testify or to render those services until she gets licensed."
>
> [FN 5] S.C. Code Ann. § 40-63-200(A) (2011) ("A person who practices or offers to practice as a social worker in this State in violation of this chapter or a regulation promulgated under this chapter ... is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.").

Id., 395 S.C. at 548–49, 720 S.E.2d at 36 and n. 5.

The defense argued the solicitor attempted to intimidate the witness, and claimed the witness "may need to assert her Fifth Amendment privilege not to incriminate herself by answering the questions" the defense wished to pose. *Id.,* 395 S.C. at 549, 720 S.E.2d at 36. "The judge overruled the Solicitor's objection [to qualification of the expert] as he believed the intent of the statute was 'to prevent persons from opening offices to conduct treatment in this state,'" which was distinguishable from Dr. Loring being retained as an expert for the defense. *Id.* The Supreme Court described the continuing complaint as follows:

> After the judge determined that Dr. Loring was qualified to testify, defense counsel argued that the Solicitor's attempt to intimidate Dr. Loring constituted a violation of Inman's due process rights to present his defense. The Solicitor disputed this allegation and stated he could grant Dr. Loring immunity from prosecution in Inman's case. However, he clarified that he was not authorized to grant immunity for the other South Carolina cases in which she had testified.
>
> Dr. Loring then expressed her concern about testifying and was granted an opportunity to consult with Bill Godfrey, an attorney who was present in the courtroom. When court reconvened, Dr. Loring stated she felt "threatened as a witness" and, as a result, invoked her Fifth Amendment right against self-incrimination upon the advice of counsel. Despite assurances by the judge that she would be granted immunity in Inman's case and prior cases, Dr. Loring maintained that she would not testify as she believed she would be "in violation of a criminal statute [that] would affect [her] professional reputation in other cases and in other jurisdictions."
>
> The judge then held in abeyance any motions regarding Dr. Loring's testimony and permitted defense counsel to call its remaining four witnesses in mitigation.
>
> The next day, defense counsel moved for a mistrial based on the Solicitor's *voir dire* of Dr. Loring. Specifically, counsel characterized the Solicitor's actions as prosecutorial misconduct. As additional support for this motion, defense counsel referenced an earlier capital case where the Solicitor had confronted another defense witness with a potential violation of section 40–63–200 of the South Carolina Code. Counsel claimed that in both of these instances the Solicitor had violated the South Carolina Rules of Professional Conduct and section 16–9–340, which makes it a crime to intimidate a witness "by threat or force" or to "attempt to obstruct or impede the administration of justice in any court." Because counsel did not believe the actions of the Solicitor could be rectified, defense counsel moved for a mistrial as well as the recusal of the Solicitor's office in the case. In

> addition, defense counsel requested that the judge implement a sentence of life without parole as he claimed the Solicitor's conduct was "intentional."
>
> In response, the Solicitor contended that he had neither threatened Dr. Loring nor moved to indict her "even though, theoretically, she would have violated the statute from a prior case."
>
> At the conclusion of these arguments, counsel for Dr. Loring informed the court that Dr. Loring would not testify and intended to invoke her Fifth Amendment privilege against self-incrimination.
>
> The judge did not rule on the mistrial motion, but instead granted a continuance in order for defense counsel to retain another social historian. The judge, however, added that he "wouldn't rule that Dr. Loring [was] completely out of the case."

Id., 395 S.C. at 549–50, 720 S.E.2d at 36–37 (footnotes omitted).

The Supreme Court also set out that "[s]even months later, the judge held a hearing ... to consider whether Dr. Loring should be released as a witness given the defense did not intend to call her and had retained another social historian." *Id.*, 395 S.C. at 550, 720 S.E.2d at 37. The defense also objected to "the State's out-of-state witness subpoena." *Id.* Judge Miller, though, "declined to withdraw his certification of the subpoena and state the case would proceed the following week." *Id.*, 395 S.C. at 551, 720 S.E.2d at 37.

The report of events to Judge Miller indicated that Dr. Loring was not at home during the time Georgia authorities attempted to serve a warrant for her arrest. [11] *Id.* [See also R. at 456,

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[11] Trial counsel Bannister testified that Dr. Loring had been in the home when the Georgia authorities were trying to reach her, and had telephone people seeking advice on what to do, including, he believed, co-trial counsel, Mr. Culbertson. [PCR Tr. at 291]. That is contrary to what Dr. Loring testified to before Judge Miller, [R. at 482], and in her PCR testimony, [PCR Tr. at 300], but consistent with Mr. Culbertson's recollection in his PCR testimony, [PCR Tr. at 637, "She called me late one evening very fearful because the police were pounding her door trying to get in she believed to arrest her, at that point."]. Mr. Culbertson advised her not only to call her attorney, Mr. Godfrey, but also "... if she was really at home and if she knew it was the police that were looking for her, that she should make herself available to the police." [PCR Tr. at 638]. Further, a district attorney in Georgia handling the material witness warrant for the local solicitor's office recalled during a discovery deposition one of his investigators saw Dr. Loring

465 and 476-477]. Defense counsel and Dr. Loring's counsel alleged the events connected to service of the material witness subpoena "constitutional additional evidence of the Solicitor's attempt to intimidate Dr. Loring." *Id.*, 395 S.C. at 551, 720 S.E.2d at 38. The Supreme Court of South Carolina noted in the opinion the Dr. Loring said, under oath, "she could not 'assure [the court] a hundred percent that going through all this would not have an impact on [her]." *Id.*, 395 S.C. at 551, 720 S.E.2d at 38. The complete statement under oath to Judge Miller is as follows:

> Well, I would have to truthfully tell you that his is a very alarming experience. And I cannot assure you a hundred percent that going through all this would not have an impact on me.
>
> However, I, certainly, come prepared today for whatever the Judge asks with all the equipment I've developed for this case, and for which our center has been paid for this case, to do my very best, to do a professional and thorough job in the role of mitigation expert.

[R. at 483].

As indicated in the Supreme Court opinion, the defense objected to her attendance and expressed they did not wish to call Dr. Loring as a witness. *Id.*, 395 S.C. at 553, 720 S.E.2d at 38. [See also R. at 468].[12] Dr. Loring's attorney conveyed to the Court prior to her testimony:

> ... that she had reviewed the file for four or five hours. I know that she has reviewed the file some yesterday and, I'm sure, last night.
>
> ...
>
> She has her charts and her pictures here. And she told me this morning - - since we did talk about the fact that she might be called as ... [a] Court's witness

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in the house when they arrived to serve the warrant, but she would not answer the door. [Applicant Exhibit 47 at 10; 35].

[12] Trial counsel Bannister had the opportunity to communicate with Dr. Loring during the break in the proceedings. E-mails between counsel and Dr. Loring were introduced during the PCR evidentiary hearing, though trial counsel Bannister testified that the communication was not substantive to the case but to Dr. Loring's issues with testifying here and in other jurisdictions. [PCR Tr. at 301-302].

... She did tell me that she felt like she was protected by the Court.

[R. at 641].

Even so, Judge Miller still allowed additional time for counsel to speak with the witness:

> What I'm telling you is that I will give you an opportunity - - I'll break for you to meet with Dr. Loring. As a matter of fact, we will do that. And you can make a decision whether or not you want to talk to her or not. I'm going to give you that opportunity. She is prepared. She was prepared to go forward in September. She is prepared to go forward today.
>
> Now, we're not going to create an issue out of thin air. So we will be adjourned until tomorrow morning at 10:00
>
> (WHEREUPON, the proceedings were concluded at approximately 10:20 a.m., to be reconvened on Wednesday, April 22, 2009).

(R. at 655).

When resumed on April 22nd, the Defense called Applicant's stepfather then rested. [R. at 656-658]. The Court called Dr. Loring, who first ensured her comfort with the proceedings, and offered to have the solicitor completed exit the courtroom at her request, to which she responded, "No, sir. I don't feel that's necessary." [R. at 663]. Judge Miller asked if she had had enough time to prepare, and she stated she "had time" to prepare but did not have the opportunity to do "re-interview family members, the Defendant, and consult with the Defense team members, who would be helpful to me." [R. at 666]. When asked by the Court if she had any "caveat" to place on the record, she stated:

> You Honor, I believe that I am not at risk testifying, thanks to Your Honor and to my excellent attorney, Attorney Bill Godfrey. And I'm, certainly, willing to testify and to do my very best. But I'm worried and anxious that I have not received attorney guidance for six months, have not seen Mr. Inman for that period of time, nor have I re-interviewed his family members for the last six months.

[R. at 667].

She qualified her statement that she had called Applicant's "stepfather ... mother, and ... sister," but did not discuss the "case" substantively, as she "thought [she] was off the case." [R. at 667]. She also stated that she did not have "important information" on materials for court, specifically item 8 "as a result of what I've just talked about." [R. at 667]. Her item 8, according to her testimony, reflected a number of violent events *witnessed* by the applicant. [R. at 684-685].[13] She advised Judge Miller:

> ... Because I didn't think I was a witness in the case until recently, I didn't have an opportunity to go back and re-interview family members. I couldn't find in my notes what those other violent events that he witnessed were. And when I did find out I was going to be a witness, I was not able to interview his mother, because she's ill at this time.
>
> ...
>
> Nor was I able to consult with the Defense team, including the investigator, to find that out as I normally would in a normal case.
>
> ...
>
> I think that's a very important bit of information - - not a bit, a very important couple of pieces of information. And I'm very sorry not to have that to share with the Court.
>
> ...
>
> ... I'm usually effective and comprehensive. And I apologize for that not being the case.

[R. at 684-685].

The materials for court were made in anticipation of testifying at the prior proceedings. [R. at 701]. In cross-examination, Dr. Loring testified that some materials were as to allegations

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[13] The record supports the great familiarity with the events in the applicant's life when Dr. Loring added to her testimony at the prompting of the deputy solicitor to complete prior indications she would speak later about her notation of the animals on the genogram. [R. at 702-703].

that applicant committed other sexual assaults or criminal acts were not on the information on her charts, and when asked if that was important to her, she responded: "The answer to that question is, clearly, *a matter of strategy* in regard to what I was told by the Defense team." [R. at 709] (emphasis added).

After Dr. Loring testified, Judge Miller asked for anything else Dr. Loring might feel was important, and counsel Bannister objected based upon "attorney-client" privilege. [R. 691]. Dr. Loring stated: "... I myself am struggling to figure out the difference between what I think I just heard was attorney-work product and the more I would like to tell you. And I'm sure I should be able to figure it out." [R. at 692]. After consultation with her attorney, she continued to express that the disconnect Applicant experienced in his youth, including "trance-like states," episodes similar to sleepwalking without knowledge of movements, "staring off into space," and "behav[ing] in ways that he would later seem to be unaware of." [R. at 692-693].[14] She said the remainder of her thoughts on the matter were "interwoven with consultations with the defense team. They seem to be attorney-work product," and declined to share more. [R. at 694]. Trial counsel Bannister stated, "Based on the prior arguments we've made and the record that we, currently, have, I still believe it's in my client's best interest that I should not participate in asking her any questions or illiciting [sic] those opinions." [R. at 695].

The Supreme Court considered in the direct appeal the wealth of information received during the additional sentencing proceeding and the impact on sentencing:

> Over defense counsel's objections, the judge called and questioned Dr. Loring as a "court witness." Dr. Loring testified she compiled a social history about the life

[14] The Court notes the defense expert presented at sentencing opined that Applicant Inman entered a type of "fugue state" or "disassociated state" when he traveled for the purpose of committing sexual assaults, and disassociation could be termed "a type of defense mechanism" occasioned by abuse. [R. at 269-270].

> and family of Inman by interviewing Inman and members of his family as well as reviewing Inman's medical history, school records, and prison records. Relying on these records and interviews, Dr. Loring chronicled in detail the physical and sexual abuse that Inman endured during his childhood. She further testified as to Inman's use of drugs at an early age, his diagnosed mental illness, his suicide attempts, and his criminal history.
>
> Throughout the questioning, defense counsel repeatedly sought to limit the testimony of Dr. Loring as counsel believed her opinions implicated attorney-work product as they had been previously discussed amongst the defense team.
>
> After hearing closing arguments and Inman's personal statement, the judge sentenced Inman to death for murder and imposed two consecutive thirty-year sentences for first-degree burglary and first-degree criminal sexual conduct. In reaching this decision, the judge explained in both his oral and written order that the State had proven beyond a reasonable doubt three statutory aggravating circumstances to warrant the death penalty. Specifically, the judge found that Inman murdered the Victim while in the commission of kidnapping, first-degree burglary, and first-degree criminal sexual conduct.
>
> In terms of mitigating factors, the judge found Inman committed the murder while under the influence of mental or emotional disturbances as there was evidence that Inman suffered from long-term mental health disorders. Despite these mental health disorders, the judge emphasized that these disorders did not excuse Inman from criminal responsibility for his actions involving the Victim.

Inman, 395 S.C. at 553–54, 720 S.E.2d at 39 (footnotes omitted).

This Court accepts that trial counsel Bannister had a good-faith basis for asserting the claim of privilege. Mr. Bannister's testimony at the PCR evidentiary hearing indicated the applicant had consistently been reluctant to have mitigation presented. [PCR Tr. at 126]. Co-trial counsel, Mr. Culberson similarly testified at PCR to Applicant's reluctance to present mitigation involving his family, most specifically his mother. [PCR Tr. at 634]. Moreover, it is established that some facts in a defendant's background are more aggravating than useful in mitigation. *St. Pierre v. Walls, supra.* Therefore, the record supports the inference there were items or events within the background known to Dr. Loring that trial counsel reasonably believed should not have been presented, or his client specifically directed him not to present, and trial

counsel Bannister adequately objected to prevent background evidence from being heard by the sentencing judge. With this, the Court has no quarrel.

Trial counsel also testified at length that he believed the solicitor was wrong (and the Supreme Court of South Carolina agreed with that position in the direct appeal). *State v. Inman,* 395 S.C. at 563, 720 S.E.2d at 44 ("We find the Solicitor's conduct toward Dr. Loring unequivocally constituted witness intimidation. Even if the Solicitor was legitimately concerned about Dr. Loring's qualifications as an expert witness, he could have filed a motion to disqualify her, which could have been addressed in a pre-trial hearing without the presence of Dr. Loring."). However, trial counsel Bannister testified that the licensing question was not completely unexpected, and he had actually prepared for the possibility that the solicitor would ask a licensing question. Counsel testified he was researching the issue in July 2008 before the August 2008 plea, which was well-before the September 2008 sentencing when the breakdown in proceedings occurred. [PCR Tr. at 202]. The defense team's research was "not entirely clear" that Dr. Loring could question people under her Georgia license without violating a licensing statute, and the concern was not just here, but her work in other jurisdictions, as well. [PCR Tr. at 209-210]. The defense team – all prior to the September 2008 sentencing proceeding – even considered obtaining a "temporary certification" for her. [PCR Tr. at 307-308]. Even so, he also confirmed she testified in a capital sentencing proceeding in Spartanburg the October *after* the September 2008 sentencing proceedings broke down. [PCR Tr. at 214]. Though he considered Dr. Loring's "personality" as "a very sensitive one," counsel conceded he did not prepare her for the question at all. [PCR Tr. at 208, 213 and 306].

Mr. Bannister testified that this defense was "playing for the fumble" in the case. PCR Tr. at 199; 202-203; see also 221 "... we were realistic about what our chances were, we still wanted

to put up the best case that we could have..."]. He testified that he did not believe the solicitor understood the impact of the question he posed. [PCR Tr. at 203]. He noted his belief a similar issue had eventually resulted in a life sentencing in the unrelated case. [PCR Tr. at 199]. Trial counsel Bannister confirmed that he believed that had he had a jury, as he wished, that the question to Dr. Loring would have prompted a mistrial that would have allowed him to gain an automatic default life sentence. [PCR Tr. at 207 and 215]. He also testified he used a substantial portion of the break in the proceedings to work on a "prosecutorial misconduct memorandum" and attempt to persuade the prosecution to forgo the death penalty. [PCT Tr. at 286]. He actively worked to turn the "fumble" to a life sentence. He testified he pursued a mistrial in hopes of gaining a life sentence, and also entered negotiations with the solicitor. [PCR Tr. at 207, 215, and 309-312; see also R. at 642-643]. Counsel testified to his thought process at the time:

> So what I [was] hearing from people that I believe were close to the solicitor was that he was upset that he had let things get this far, that he had created this issue, and that this might be the moment where we could go in like in the Laney case and try to get a resolution. That's my memory of it. Or to some extent that it was like, okay, nobody knows what's getting ready to happen next. I mean, you know, we had the mistrial issues coming at some point.
>
> Q. But didn't you have a meeting with him and Betty Strom?
>
> A. We did. We did. And that meeting took place after I had completed the draft, a pretty finalized draft of the motion for prosecutorial misconduct.
>
> Q. And his response to you was, "I can't do that," correct?...
>
> A. Eventually. But that would have been after I got this e-mail that's in Applicant's Exhibit 15.
>
> Q. His response to you was, "I can't do a life sentence because the facts of this case don't support it."

A. He didn't really give me a reason that I remember, just that he wasn't going to do that. And I'm not even sure he told me that. It might have come through different channels and said it's not going to happen...

[PCR Tr. at 311-312].

However, trial counsel Bannister also testified that not having Dr. Loring did "put us in a bind..." [PCR Tr. at 206]. Quite candidly, credibly, and persuasively, Mr. Bannister testified he considered but declined to question Dr. Loring at the second proceeding as he believed the proceeding to be unfair, that the witness had been compromised and would be uncomfortable in the courthouse, and basically because the court was attempting to "fix" what had previously occurred. [PCR Tr. at 291]. Trial Counsel Bannister testified that he had consulted with an attorney with experience in ethical matters before his refusal to participate. [PCR Tr. at 293-296]. He testified the trial judge "wanted me to engage with Dr. Loring, and I made a decision not to do that because I didn't think it was fair." [PCR Tr. p. 296]. Trial counsel Bannister also testified that Dr. Loring was to be his last witness in the mitigation case, but he developed two other witnesses for the second hearing, Applicant's minster and Applicant's stepfather. [PCR Tr. at 297-298].[15] He testified Applicant "had an Eighth Amendment right to put up any mitigation, and they were trying to dictate how that was going to happen" and "they were limiting what we

[15] The record shows that Mr. Bannister attempted to call the Reverend David Michael Hensley at the September 2008 proceedings, but Applicant personally asserted the priest-penitent privilege, see S.C. § 19-11-90, and refused to allow Rev. Hensley to testify about their communications. [R. at 402-404]. Mr. Bannister did present very limited testimony from Rev. Hensley on participation in religious ceremony. [R. at 405]. The Court advised Applicant that he could change his decision and have the communications disclosed at any time before the close of the case. [R. at 406]. The record supports trial counsel's many reference to the applicant giving strong direction as to the scope of mitigation. *See McCoy v. Louisiana,* 138 S. Ct. at 1508 ("...To gain assistance, a defendant need not surrender control entirely to counsel."); *Gardner v. Ozmint,* 511 F.3d 420, 427 (4th Cir. 2007) (declining to find ineffective assistance where "although burdened by an uncooperative client, defense counsel made significant efforts to develop and present mitigation evidence.").

could put up without really knowing because they didn't know what we knew." [PCR Tr. at 296-297]. The record from the sentencing April 2009 sentencing proceeding shows the following position, after the representation of Applicant's stepfather, Kenneth McArthur:

> MR. BANNISTER: Your Honor, at this point, based on the previous motions, both oral and written, that we've made, the issues that we've raised in there, I don't believe it would be in our client's best interest to call any further witnesses for mitigation.
>
> So that would close our mitigation case.

[R. at 658].

Trial counsel Bannister, during his PCR testimony, acknowledged the trial judge's statement in the record, as quoted, directly from the record, below:

> THE COURT: All right. Well, I'm going to call Dr. Loring. I think she would aid the fact finder, me, I guess, in the determination of the resolution of this case.
>
> And I want to put in the record that she was the number one choice for the social historian in this case, and that the Defense has had no contact with her since September. That's what was represented in the Court. She was rehabilitated. She's up here, despite the fact that she failed to testify in September because of the - - her feelings of intimidation, which I did rule was prosecutorial misconduct, but did not rise to the level of requiring mistrial or reversal because of the lack of prejudice, which is cured in part by her presence - - voluntary presence today.
>
> So I think it's necessary to put her up to ensure that these claims of due process violation are put to rest. So I'm going to call her as a witness.

[R. at 658-659; see also PCR Tr. at 298-299].

Trial counsel Bannister testified that he was "frustrated" and that "there was more to it than just the social history that I wanted to get out." [PCR Tr. at 303-306 and 317]. However, trial counsel Bannister argued against the Court calling Dr. Loring. [R. at 659-660]. The Court reminded counsel that Dr. Loring was "up here voluntarily...." [See R. at 661]. The judge, speaking to defense counsel, had previously specifically set out:

> Well, I just - - I mean, there's been all this talk about how she doesn't think she's up to speed and all that. But I just - - I had an e-mail from Mr. Godfrey on the morning of April 16th, before - - apparently before - - according to her testimony, before she was aware of any South Carolina subpoena, in which Mr. Godfrey said that she will testify without any fear or apprehension. I have talked with her at length about this. And the e-mail to me was dated April 16, 2009, at 11:12 a.m.
>
> So, having said that - - however - - and, as I said in my e-mail, the presentation of your evidence is up to you, as long as it's relevant and competent.
>
> ...
>
> ... there are no specifics, in the record, about why she wouldn't be up to speed or what her apprehension would be.
>
> So that may be your position that she's not up to speed. But she's a professional. I don't know how many of these cases she's done. I think she does it pretty much on a regular basis. And I found her to be very professional. But, again, it is your choice as to what evidence you want to present.

[R. at 598-600].

In his PCR testimony, trial counsel agreed the issue of prosecutorial misconduct had been litigated, both at trial and one appeal, but added that he, nonetheless, was "still mad about it." [PCR Tr. at 3040-306]. However, the key to establishing prejudice is a showing of what was missed, or kept from the sentencing judge, so that this Court may properly evaluate whether counsel made a *reasonable* choice in preventing the presentation of evidence. *Strickland, supra.* Applicant failed in his burden of proof.

Applicant failed to elicit the evidence counsel knowingly kept out, or to challenge that specific decision. In fact, Applicant's PCR counsel objected to the question when the question was posed on cross-examination of trial counsel Bannister. [PCR Tr. at 279]. Trial Counsel Bannister responded that it was a difficult question, and presented no particular piece of evidence or category of evidence that was not presented. [PCR Tr. at 279-280]. Counsel testified more to

additional "developments" since the break in the proceedings, but still did not offer any specific example. [PCR Tr. at 280-281].

In trial co-counsel's testimony, Mr. Culbertson was similarly asked what was omitted from the mitigation presentation, and while he appeared to indicate that some items may have been omitted, he did not identify any such items and also asserted work product privilege. [PCR Tr. at 642-643]. As to information on Applicant's mother, Mr. Culbertson confirmed that trial counsel was aware of Dr. Loring notes concerning Applicant's mother, and specifically allegations she had attempted to murder and mutilate him testifying, "yes, I did hear that from Dr. Loring." [PCR Tr. at 635]. Mr. Culbertson also testified that there was no other source for that disclosure, and, when counsel:

> ... got that as part of Dr. Loring's report, I mentioned that - - I asked him about that. And honestly, sitting her today, I will tell you that I believe Jerry was upset that we had heard that or knew about that, but I honestly don't recall if he admitted to knowing that or not.
>
> Q: Were there discussions with him about presenting that evidence at trial?
>
> A: Oh, yes, yes. He was - - yes. There were - - yes. We discussed that with him.
>
> Q: And what was his answer?
>
> A: He did not want us to present that at trial. In fact, he didn't want us to present anything at trial that touched upon or reflected upon his mother.

[PCR Tr. at 635-363].

Dr. Maddox, in her PCR testimony, also confirmed Applicant's anger concerning anyone discussing his mother. In referencing Dr. Loring's testimony about "specific instances of child abuse or things he's witnessed," Dr. Maddox testified some abused children do not recall certain history, while some do. [PCR Tr. at 499-500]. She testified Applicant Inman:

> ...has memory deficits that you see with it and gets very angry when anyone tries to discredit his mother in any way. I think Dr. Loring had kind of touched on that. One of the issues he has is - - that's always been an issue for him is he doesn't want anybody to present his mother in any kind of negative light.

[PCR Tr. at 500].

Dr. Maddox also testified at the PCR hearing that the applicant was very displeased with Dr. Price's testimony about his mother:

> ... He was very upset with Dr. Price. When I saw him many years later, he was very upset, that he felt that Dr. Price had characterized his mother as unfit, and that angered him greatly.

[PCR Tr. at 594].

Applicant also failed to present another social historian or other expert on history or adaptability at the hearing to support a claim that trial counsel was deficient in representation and the deficiency prejudiced Inman in the presentation of mitigation evidence. The Supreme Court has been very clear on an applicant's burden in this regard:

> This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.

Bannister v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) (emphasis in original). Mere speculation is not enough to carry his burden. *Id.* (quoting *Glover v. State,* 318 S.C. 496,498-99, 458 S.E.2d 538, 540 (1995)).

Inman did present Dr. Loring at the PCR hearing. Dr. Loring, however, appeared to reference only one area of the social history that apparently was not touched upon in the trial presentation – the allegation that Inman's mother tried to kill him and had thoughts of mutilating him. [PCR Tr. at 351-352]. Though Dr. Loring indicates that it was only her faulty memory from trauma that prevented the testimony, the record shows she specifically and knowingly

withheld some information, and additionally, she made a promise to Inman not to place his mother in a bad light:

> Your Honor, Jerry's mother, Vera, also, has been diagnosed with mental illness. Jerry Buck Inman consented to my doing mitigation, as much as I was able to do, with only one condition, that I show respect to his mother, which I intend to do. I would say to you that she is a very loving and gracious woman, who through her whole life after Jerry was born with all of her potential, did her best to look after Jerry, to be considerate of him, and to protect him in every way she was able. And he is very devoted to her with good cause.

[R. p. 673].

This Court disagrees with Dr. Loring's assessment that the evidence does not place his mother in a bad light. [PCR Tr. at 387-388]. Though Dr. Loring may have, and has expressed, sympathy for the mother's mental illness, an attempt to murder and had thoughts of mutilating her son would likely be logically received by the vast majority of individuals as placing the mother in a bad light, including the applicant. Therefore, the contemporaneous-to-trial expressed qualification that she would honor Applicant Inman's direction by not revealing the at-times murderous act or malicious thoughts of his mother,[16] is a more compatible fit with common understanding. Moreover, this Court notes Mr. Culbertson's testimony that the defense was aware of the allegations *from Dr. Loring's report*. [PCR Tr. at 636]. This information was written, not subject solely to memory. Thus, it is inconsistent to assert the information was

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[16] The mother's own personal issues were described at sentencing. Dr. Loring testified the mother "struggled with great handicaps, Your Honor, through no fault of her own whatsoever. And then [sic] handicaps included hospitalizations. They included such diagnoses as depression, schizophrenia, and hearing voices of reference. Your Honor, voices of reference refer to voices that someone who's very disturbed hears within their own head. They're not real. And some of these voices told her to kill herself. We're, certainly, very glad she's alive today. But she has struggled with very severe mental illness, which is well documented in the many records that the excellent investigator was able to get for me, and I was able to review. There were a lot of records for that." [R. at 673-674].

omitted solely by faulty memory. Further still, there is no information on the prepared genogram or other offered document which would have been prepared for the sentencing proceeding that supports the information would have been offered and discussed but for faulty memory. [17]

Again, the greater evidence – and in particular the contemporaneous-to-trial evidence – does not support the allegation that memory issues, of whatever cause or reason, created an omission concerning Applicant's mother's attempts to harm him.

Moreover, cases abound that resolve an applicant "cannot be permitted to manufacture a winning IAC claim by sabotaging her own defense, or else every defendant clever enough to thwart her own attorneys would be able to overturn her sentence on appeal." *Owens v. Guida*, 549 F.3d 399, 412 (6th Cir. 2008). *See also Schriro v. Landrigan*, 550 U.S. 465, 475 (2007) ("... the Court of Appeals first addressed the State's contention that Landrigan instructed his counsel not to offer any mitigating evidence. If Landrigan issued such an instruction, counsel's failure to investigate further could not have been prejudicial under *Strickland*. "); *Gardner v. Ozmint, supra*; *Autry v. McKaskle,* 727 F.2d 358, 361 (5th Cir. 1984) ("By no measure can Autry block his lawyer's efforts and later claim the resulting performance was constitutionally deficient.").

At any rate, if counsel did perceive a missed area of mitigation, he had every opportunity to question the witness to bring the testimony out for consideration of the trial judge, but chose not to do so for strategic reasons. As the Supreme Court found in the direct appeal:

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[17] This Court declines to decide what memory issue exist or existed or possible causes. It is not necessary to the resolution of this issue. The Court does note that Dr. Loring's doctor retained for purposes of this litigation opined that his memory testing of Dr. Loring indicated that her memory was overall intact. [See R. p. 415 and 434]. Thus, this Court perceives no issue with competency of the witness to testify at the PCR hearing based on medical infirmity and evaluates the testimony as it would anyone else's testimony in light of the record and other evidence.

> Because Dr. Loring testified, Inman cannot claim he was prejudiced as his counsel declined the opportunity to question Dr. Loring. *Williams,* 326 S.C. at 135, 485 S.E.2d at 102 (recognizing that governmental intimidation of a witness can be deemed harmless error where the witness nonetheless testifies).

Inman, 395 S.C. at 566, 720 S.E.2d at 45.

This Court agrees. This is especially so in regard to information on Applicant's mother's abuse and thoughts. Counsel not only had the information, but discussed it with applicant.

Further, the parties and judge discussed whether there was a "self-made post-conviction relief issue" by defense counsel's treatment of the issue, [R. at 600-604]; however, Judge Miller placed on the record that counsel was not ineffective under the *Strickland* standard for his choices made at sentencing, [R. p. 433-434], and also underscored when the parties reconvened that "we're not going to set this case up for failure." [R. at 604]. Judge Miller acknowledged the defense strategy, but stated he did not "want Mr. Inman to be prejudiced because ... the Defense benefits ... could benefit in an appellate review from not having Dr. Loring testify." [R. at 602-603].

After a review of the entirety of the information before this Court, this Court similarly declines to find counsel deficient. But even if counsel could be deemed deficient in this respect, the applicant has not shown the deficient performance in presentation of mitigation prejudiced him as the fact that his mother tried to kill him and had thoughts of mutilating him shows a dangerous and unstable childhood – an extremely unfortunate fact repeated brought out in the sentencing and carefully considered by the sentencing judge. [See R. p. 751; and 1051(sentencing order)].

Moreover, the presentation at trial included not just Dr. Loring, but other experts as well.

Dr. Randy Price had already testified extensively regarding Inman's social history and background and his mental illnesses. [R. at 255-314]. Inman's sister testified similarly including to his childhood sexual abuse, the death of Inman's grandfather and its impact upon Inman, and to Inman's mother's mental illness. [R. at 383-401]. Counsel also introduced Dr. Maddox opinion on competency which included Applicant's mental health background, and also received her report detailing Inman's mental illnesses, drug addiction, and mental illness in his family. [R. at 913-923].[18]

The failure to bring out that particular information regarding the mother's actions and thoughts – which could have been brought out through other family members, as well – was not prejudicial in light of the overwhelming evidence of a dangerous and unstable childhood. *See Wong v. Belmontes, supra; see also Buckner v. Polk*, 453 F.3d 195, 206 (4th Cir. 2006)(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 (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). Further, when the additional evidence is consider against the viciousness of the entirety of the applicant's crimes against the victim, and other evidence in

[18] Though prison adaptability evidence was not specifically mention at the hearing, the allegations addressed in this section include a reference to prison adaptability testimony. To the extent that allegation has not been abandoned, this Court finds the applicant has not carried his burden of proof as he has not presented evidence in support of the allegation. *Bannister, supra.* Even so, the Court notes trial counsel presented a witness for adaptability testimony, Mr. James Aiken, an experienced and knowledgeable former warden. Mr. Aiken gave a detailed analysis of Applicant's behaviors, background, and security issues and opined that he would be held at the " highest level" of security and on lockdown twenty-three hours a day. [R. pp. 364-383]. Applicant could not carry his burden of deficient performance or resulting prejudice.

aggravation as presenting in sentencing, the applicant cannot show a reasonable probability of a different result. *Strickland, supra.*

The evidence in aggravation introduced at sentencing was overwhelming. *See Plath v. Moore,* 130 F.3d 595, 602 (4th Cir. 1997) (considering the sheer magnitude of the aggravating evidence, defendant failed to show prejudice from counsel's failure to present certain mitigating evidence). Judge Miller found the State proved beyond a reasonable doubt three (3) statutory aggravating circumstances – circumstances that Inman admitted.

The Facts as Stipulated for the Guilty Plea

Applicant pled guilty to first-degree burglary, first-degree CSC, and kidnapping, in addition to the murder of Tiffany. There is no question Inman was the person who killed Tiffany as he confessed numerous times and to different officers, his DNA was found at the crime scene and in Tiffany's vaginal swabs. The facts presented at the guilty plea were undisputed by Inman himself. [R. at 938].

Prior to the Tiffany Souers' rape and murder, Applicant burglarized and raped or attempted to rape two other women, one who lived in Tennessee and one who lived in Alabama. [R. at 120-130; 193-201]. Those crimes were unsolved at the time of the crimes against Tiffany. Applicant targeted Tiffany Souers, seeing her on her porch earlier in the day, but not striking until it was dark and Tiffany was asleep. [R. at 938-939]. By Applicant's own admission, around 1:00 a.m., on May 26th, 2006, he climbed over the porch rail to Tiffany's apartment where he had seen Tiffany standing earlier. [R. at 939-940]. Applicant overpowered Tiffany, bound her hands and began to look for her purse and wallet, including her driver's license, car keys, and ATM card. [R. at 940]. During this time, Applicant questioned Tiffany about the

location of these items. [R. at 940]. Tiffany complied with Applicant's efforts to steal from her including giving Inman her PIN number. [R. at 940].

After locating the items, Applicant raped Tiffany while her hands were bound. [R. at 940]. Tiffany's autopsy revealed she suffered traumatic sexual intercourse. [R. at 942-943]. Applicant then murdered Tiffany by tightening a bikini top around her neck until he strangled her to death. [R. at 940]. The autopsy revealed Tiffany's death was a homicide resulting from asphyxia due to ligature strangulation. [R. at 943]. The bikini top had been twisted so tight around Tiffany's neck the blood flow to her brain was cut off. [R. at 943]. Applicant admitted to police he murdered Tiffany so she could not identify him later. [R. at 947-948]. Applicant left Tiffany's body lying on her bedroom floor almost completely naked and exposed. [R. at 942].

Applicant then drove his Chevy Blazer to the Sun Trust Bank on Tiger Boulevard in Clemson, and after covering his face with bandanas to disguise himself, attempted to use Tiffany's ATM card four different times at 3:22, 3:29, 3:31, and 3:32 a.m. [R. at 940-941]. All attempts failed because he entered the wrong PIN number. [R. at 941]. Applicant then drove to Wachovia Bank on Tiger Boulevard where he attempted to use Tiffany's ATM card two more times, 3:37, and 3:38 a.m. [R. at 941]. Those attempts also failed because the wrong PIN number was used. [R. at 941].

Applicant then drove to his home in Tennessee, discarding the items he had stolen from Tiffany as he drove. [R. at 941-942]. Tiffany's driver's license was found later between Clemson and Anderson. [R. at 942].

A sexual assault kit was performed during the autopsy and vaginal swabs were sent to SLED. [R. at 943]. SLED's forensic lab also found two areas of semen stain on the carpet and

developed a DNA profile. [R. at 942; 944]. SLED's lab processed the vaginal swabs collected at Tiffany's autopsy, and a DNA profile was developed from the semen collected on the swabs. [R. at 944]. The DNA profile from the carpet matched that from the vaginal swabs taken at autopsy. [R. at 944]. The DNA profile was entered into the CODIS national database. [R. at 944]. On June 5, 2006, SLED received a response from CODIS that a match had been found to the DNA profile submitted, and warrants for Applicant's arrest were secured by SLED. [R. at 944-945].

SLED determined Applicant was living in Dandridge, Tennessee, and the Tennessee Bureau of Investigation ("TBI") was notified and requested to locate and arrest him. [R. at 945]. Chief Deputy "Bud" McCoig of the Jefferson County Sheriff's Office spotted Applicant returning to his parents' home shortly after 11:30 p.m. in his Chevy Blazer. [R. at 945]. Upon seeing Deputy McCoig's vehicle, Applicant drove away for about half-a-mile when he was stopped around 11:45 p.m., and arrested. [R. at 945]. McCoig advised Applicant of his *Miranda* rights. Applicant was briefly interviewed by McCoig. [R. at 945-46]. Applicant admitted he burglarized Tiffany's apartment, kidnapped, raped, and murdered her. [R. at 946]. Applicant was then transported to the Jefferson County Sheriff's Office where Applicant and McCoig met with TBI Agent Hannon for the purpose of obtaining a written statement. [R. at 946].

Hannon advised Applicant of his *Miranda* rights using a written form, and Applicant signed it, waived his rights, and agreed to give a statement. [R. at 946-947]. Applicant's statement to these two officers was as follows:

> I went to South Carolina about two weeks ago. I don't remember the exact date. I was just driving. I ended up somewhere around Clemson. I did not know the victim. I just saw her on the balcony of her apartment early in the evening. I drove around for a while until I thought she was asleep. I parked behind her apartment. Her apartment was on the bottom floor.

> I climbed over the rail. The door heading to her apartment was unlocked. I entered the apartment and found her bedroom. I found the victim asleep in her bed - -in her bedroom. I woke the victim. She was startled. I tied her hands behind her. I did not go there to kill her. I don't want to talk about the sex part, but I did have sex with her.
>
> I went and found - - no, excuse me. I used an item I found in her room to tie her up. I did not have anything - - I knew the victim could recognize me. When I knew the victim was dead, I went out the same way I came in. When I left her apartment, I drove back to 1712 Junior Williams Road in Dandridge.
>
> Before I left her apartment, I took some things from her apartment. I took two credit cards. I tried to use one of the cards at a bank. I was not able to use the card, so I threw it away somewhere along the interstate on my way home. I did not know the name on the card. I know the girl in the apartment's name was Tiffany Souers. I saw it on the news here in Tennessee.
>
> The clothes I wore while I was in Tiffany's apartment are in my car. I wore the shoes I have on now. I did not take any other item, except the credit cards. I knew Tiffany was dead because she stopped struggling. I held my hand over her mouth. I strangled her with a bathing suit top, the top of a bathing suit.

[R. at 947-948].

Thereafter, SLED Agents Jeff Kindley and Gene Donohue arrived in Tennessee to interview and obtain a statement from Appicant concerning the murder of Souers. [R. at 948]. Applicant was again advised of his *Miranda* rights and signed a waiver form. [R. at 948-949]. Agents Donohue and Kindley took a statement from Applicant. [R. at 949]. Applicant again admitted to the murder, kidnapping, burglary, and rape of Souers. [R. at 949]. The statement was as follows:

> I live with my cousin, Derrick Adams, in Tennessee. I was not adjusting well to being out of jail. So I decided to get away. I started driving my car through Chattanooga, Georgia, North Carolina, and South Carolina. I ended up around Clemson about two weeks ago. I had run out of money so I was looking for something to rob.
>
> I drove around some apartment complexes. I parked in the back of one of the

apartment complexes and got out to try some doors. The first one I tried was open. I went in the back door after I hopped over the rail. No lights were on and I went in. I went in to the living room and then turned right into the bedroom.

After that, I went into a bedroom and a girl was sleeping there. I put my hand over her mouth and woke her up. She started fighting me and we wrestled. I tied her up with a piece of clothing behind her back. I asked her for her purse and she took her wallet out. I got her credit card and asked her for her PIN and she told me, but I forgot it.

After that, I had sex with her. And then I killed her. I took her bed sheets, her wallet, her car keys, and went out the back door. I put some bandannas over my face and went to the ATM to get some money, but couldn't get any.

I then left and went back to Tennessee. I had seen a girl on the apartment balcony where I went in earlier in the day. But when I went back at 1:00 a.m. - - or 1:30 a.m., I don't think any - - I didn't think anyone was there. I didn't mean for anyone to get hurt. I was just looking for some money.

[R. at 949-950].

Applicant was returned to South Carolina. [R. at 950-951]. Deputy Tony Robinson of Pickens County obtained DNA samples from Applicant for analysis. [R. at 951]. These samples were submitted to SLED's forensic lab. [R. at 951]. A DNA profile was developed from this sample, and it was determined this profile matched the DNA profiles developed from the vaginal swab of Tiffany taken at autopsy and the carpet removed from Tiffany's apartment the morning of her murder. [R. at 951]. The probability of randomly selecting an unrelated individual having a DNA profile matching the semen on these items is approximately 1 in 240 quadrillion. [R. at 951].

On August 19, 2008, Applicant pled guilty and, at the plea hearing, he admitted the above facts, as recited by the solicitor, were true. [R. at 912-964].

The Other Evidence in Aggravation at Sentencing

In the sentencing phase, the State called Suzanne Clavel, who was raped by Applicant just after midnight on December 14, 1987. [R. at 100-101; 108]. Ms. Clavel had been in her apartment asleep when Applicant awakened her, pointing a gun at her head. [R. at 101-102]. Applicant told Clavel to "shut up" and ordered her to tie up her roommate with pre-cut telephone cords he brought with him. [R. at 103]. She complied and tied her roommate's hands and feet. [R. at 103]. Applicant, at gunpoint, tied Clavel's hands behind her back. [R. at 104]. Applicant then raped Clavel vaginally, anally, and vaginally again. [R. at 105]. The sexual assault lasted approximately twenty minutes. [R. at 105]. Clavel's roommate witnessed the entire assault. [R. at 105]. Applicant stole money and car keys. [R. at 106]. When Applicant left, he told Clavel if she called police he would come back and kill her. [R. at 107]. Applicant was apprehended two years later, in 1989, and pled guilty to burglary, kidnapping, rape, and theft of the roommate's car. [R. at 108]. He was sentenced to thirty years in Florida. [R. at 112-113]. He was released in 2005. [R. at 110; 113].

Subsequently, Applicant was convicted of 2nd degree criminal sexual assault on September 26, 1988 for an assault which occurred on January 10, 1988. [R. at 113]. That offense occurred in North Carolina and involved a sexual assault of a male inmate at a county jail. [R. at 113]. Applicant received a twenty year sentence which ran concurrent with his Florida sentence for thirty years. [R. at 113]. Applicant was also charged with attempted escape from prison on February 5, 1991. He was convicted of that offense and received one year in prison on April 8, 1991. [R. at 113].

About nine months after his release from prison in 2005, on May 22, 2006, Applicant broke into the home of Jessica Gann in Sevierville, Tennessee. [R. at 193-195; 201]. Ms. Gann

woke up in her own bed with someone on top of her with a knife to her throat. [R. at 194-195]. It was Applicant. He tied her hands behind her back. [R. at 196]. Gann's small daughter was crying during the incident. [R. at 196]. Applicant attempted to rape Ms. Gann from the rear. [R. at 196-197]. Applicant then turned her over and while holding a knife to her neck raped Ms. Gann. [R. at 197]. He then took her to the bathroom and made her clean herself with shampoo twice. [R. at 198]. Applicant then left the victim's residence. [R. at 199-200]. Ms. Gann saw Applicant on the news two weeks later. [R. at 201]. When interviewed by police about this incident, Applicant confessed to the burglary and rape of Gann [including the rape occurring in the presence of her child] and placing them both in the bathroom after the rape before he fled. [R. at 214-215].

On May 23, 2006, in Rainsville, Alabama, Applicant burglarized the home of Beth Bates Patterson, an employee of the Department of Agriculture. [R. at 120-122]. Applicant cut a hole in a vent in the floor and entered her residence while she was gone. [R. at 129]. While in the home, he found a bank bag in a piano seat that contained cash that belonged to Ms. Patterson's church. [R. at 124]. When Patterson came home, Applicant snuck up behind her and covered her mouth and placed a knife to her throat. [R. at 122]. He tied her hands and feet and placed her on her bed in her bedroom. [R. at 125-126]. He started pulling her pants down and was going to rape her until she told him she was having her menstrual period. [R. at 126]. Applicant checked to see if she was telling the truth, and when he discovered she was having her period, he placed her in a closet still bound, and placed a chair against the closet to lock her in. [R. at 126-128]. He then stole her car and the money belonging to her church and abandoned her car nearby where he had left his car. [R. at 163]. She later identified Applicant after seeing him on CNN wanted for the Souers' murder. [R. at 129]. Applicant confessed to this crime after his

arrest for Souers' murder. [R. at 151]. Applicant admitted his intent was to sexually assault Patterson when he broke into her home. [R. at 181-185]. His confession was corroborated by Patterson's testimony in the sentencing proceeding. [R. at 163-164].

Applicant had numerous disciplinary violations while serving his prison sentences in Florida and North Carolina including assaults and possession of weapons. [R. at 381-382]. At his sentencing proceeding, Applicant admitted he had escaped from prison two different times in the past. [R. at 731]. Applicant spent nineteen years in prison for the burglary, robbery, and sexual assault in Florida and the sexual assault in North Carolina, and less than a year after his release, Applicant began committing the same crimes. But in Tiffany's case, Applicant killed the victim to prevent her from later identifying him. Applicant indicated to Judge Miller the appropriate sentence for the murder of Tiffany Souers was the death penalty, and he could not be rehabilitated. [R. at 731].

The Mitigation Evidence at Sentencing before Judge Miller

Dr. David Price, an expert in forensic psychology, clinical psychology and neuropsychology, testified about his evaluation of Applicant. In his opinion, a factor in the commission of the crime, was Applicant was under the influence of a mental and emotional disturbance, and his capacity to conform his conduct to the requirements of law was substantially impaired. [R. at 258]. Dr. Price reviewed over three-thousand pages, contained in fifteen, three-to-four-inch thick, notebooks full of records about Applicant's family, his incarceration, newspapers, and his mental health treatment records. [R. at 258]. Price confirmed Applicant was the subject of mental health treatment for the nineteen years he was incarcerated. [R. at 259].

Price opined Applicant had a number of mood disorders, including dysthymia (sustained or intermittent depression for over two years), major depressive disorder - recurrent type, major depressive disorder - with psychotic features, bipolar disorder and psycho-rhythmic disorder. [R. at 260]. He noted Applicant had prior diagnosis of personality disorders, including schizoid personality disorder, and opined Applicant could also be diagnosed with dissociative identity disorder and sexual paraphilia. [R. at 260]. Price noted the presence in the records of multiple suicide attempts, suicide ideation, and withdrawal. [R. at 261]. He rated Applicant on the Global Assessment of Functioning with a score of thirty, as someone with serious impairment with the ability to communicate and with judgment and profound impairment in overall ability to function. [R. at 261]. Dr. Price stated the schizoid personality disorder was illustrated by the fact Applicant was an introvert with intermittent relationships within his family. [R. at 265].

In the social history, Dr. Price noted Applicant had a genetic predisposition for his mental disorders because his mother had paranoid schizophrenia and his father was an alcoholic. [R. at 265]. Price testified Applicant was raised in a turbulent and unstable environment, began using drugs at age ten, ran away from home at age thirteen, was living on the streets at age fifteen, and was in jail at age seventeen. [R. at 265-266]. He noted that this disorder is often associated with depression. [R. at 266].

Concerning dissociative identity disorder, Price stated Applicant was not very forthcoming about this illness. [R. at 266-268]. However, Dr. Price learned in discussion with treatment providers and Applicant's pastor, Applicant will assume a different affect and response which is like changing from one identity to another. [R. at 268]. Price testified Applicant's primary identity is a passive-dependent and depressed person who has difficulty with guilt. [R. at 268-69]. Price testified the evidence of depression, self-mutilation by tattooing, and suicidal

ideation supports the diagnosis. [R. at 269]. Also the fact Applicant traveled in his series of sexual assaults is consistent with this diagnosis. [R. at 269].

Dr. Price described Applicant as a serial rapist. [R. at 270]. It "astounded" Price that Applicant was not similarly diagnosed in Florida while in prison or before his release there. [R. at 270-271]. Price felt the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR) suggested Applicant clearly met the criteria. [R. at 271-272].[19]

Dr. Price found Applicant had significant records for being sexually abused, physically abused, living in an unstable environment with a mother with periods of anger who they thought was depressed. [R. at 272-273]. Dr. Price felt that Applicant had one stable relationship - his maternal grandfather - who died when Applicant was young. [R. at 273]. Price testified that Applicant was abandoned by his biological father who had sexually abused Applicant, and Applicant began to act out with conflict at age ten with drugs, failing school, and wound up on the street. [R. at 273]. In reviewing Applicant's crimes, Dr. Price found similarity in the crimes with Applicant's own experiences where his sister was also subject to bondage when she was tied up by Applicant's biological father, and the rapes tended to follow a certain pattern - hand tied,

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[19] The defense called Claude Tournay of the Florida Department of Corrections. He testified he had reviewed the sexual offender screening, and in 2004 it was determined he could not find enough criteria to determine a "paraphilic sexual disorder" or diagnosis of Applicant. [R. at 357]. Tournay testified he found sadistic behavior, child molestation abnormal sexual behavior, and Applicant was being treated for major depression disorder, recurrent. [R. at 358]. Tounay stated an April 2004 letter from the Florida Department of Corrections stating Applicant - convicted of rape - was a sexually violent predator would have required the Department of Children and Family Services to send three psychologists to review and examine the inmate and determine whether he was a threat to society. [R. at 360]. If so, he would have been civilly committed to an institution for crimes which occurred after 1993. [R. at 360]. However, Applicant's crime happened before October 1993. As a psychiatry inmate, the department made a referral to Tennessee and arrangements for Applicant to continue his treatment for his depression following his release. [R. at 360-361].

kneeling down, leaning forward over the bed in an awkward position, suggesting Applicant was acting out what had happened to him and his sister as children. [R. at 275]. According to Dr. Price, this was part of Applicant's "compulsive rape." [R. at 275].

Price stated Applicant felt "shame and loathing about this rape and murder." [R. at 276]. This similar feeling was consistent throughout Applicant's records, noting Applicant had attempted suicide on seven occasions (six while incarcerated). [R. at 276]. Dr. Price described the various ways Applicant attempted to kill himself including slitting his wrist, cutting his jugular vein, swallowing barbed-wire, and trying to starve himself to death. [R. at 279].

Dr. Price testified Applicant stated to him: "I killed a 20 year old college student with everything to live for – I deserve to get the death penalty." This statement is consistent with Applicant's history and also reflected his unhappiness and hopelessness while in prison. [R. at 280-281].

Dr. Price testified he is a national expert in malingering. [R. at 281]. He opined Applicant was not malingering based upon his documented extensive psychiatric history. [R. at 282]. He noted Applicant instead minimizes his problems and is protective of his parents' failings in raising him. [R. at 283]. Price felt Applicant had tried to hinder Price's efforts to get a life sentence for Applicant. [R. at 283]. Price noted Applicant did have talents in being a tattoo artist and had carpentry skills. [R. at 283].

Concerning Applicant's interactions in prison, Dr. Price found Applicant "grew up" in prison and was afraid about being released from prison before these crimes. [R. at 283-284]. Particularly, Applicant had stated that after release from prison in Florida, Applicant planned to work for a year or two, give the money to his mother, and then commit suicide. [R. at 284]. Dr. Price concurred with a North Carolina doctor who stated in records that Applicant was a lost soul

who would continue to be lost based upon his bad genetic loading with the history of a paranoid schizophrenic mother and alcoholic father. [R. at 285]. Dr. Price testified Applicant had been physically and sexually abused and abandoned by his father in the unstable environment. Applicant began getting into trouble at age ten with drug use, by age thirteen he was running away and on the streets. [R. at 285]. Price testified Applicant had a long history of mood disorder and his family had never been able to teach him to develop normal heterosexual relationships. [R. at 285]. Price testified Applicant had a schizoid personality disorder, developed a dissociative identity disorder and sexual paraphilia. [R. at 285].

Price admitted Applicant's history showed he had the ability to make choices inasmuch as he chose to take certain medications rather than others, as chose not kill the victim in Florida, said he would not harm the child in the Tennessee rape, did not kill the North Carolina inmate he sexually assaulted, but did kill Souers. [R. at 308-309]. Concerning death, Dr. Price stated Applicant did not want to die, but thought the death penalty was the appropriate penalty for Souers' murder. Price also testified Applicant was remorseful for Souers' murder, thinking of himself as "scum." [R. at 311].

James Aiken, an expert regarding the assessment of inmate classification and in prison management and prison classification, testified if Applicant was sentenced to life without parole instead of the death penalty, Applicant would be automatically in a "high security status" due to the sentence, the crime he was convicted of, and his cumulative behavior patterns while previously confined. [R. at 369]. Aiken also noted Applicant had some security threat group and gang related issues that concerned him. [R. at 369]. Aiken noted a Swastika tattoo on Applicant which suggested, in the prison setting, membership in a Nazi gang and security threat group. [R. at 371]. Further, because Applicant was a "multiple sex offender," Aiken testified

there was added concern because gangs and security threat groups "hate them" and "will kill them because they have such a distaste for them." [R. at 371-372].

Aiken stated the Department of Corrections would have to put Applicant in a security envelope of a single cell with no free movement or interaction with other inmates, since they do not know who would put a hit on him. [R. at 375-376]. Applicant would have to be moved with a security escort and spend twenty-three hours in lock-up. [R. at 376]. No other inmate could have access to him because it would violate the Department's "the duty to protect." [R. at 377]. Applicant's security status would be the highest level, and Aiken added Applicant's security level was also increased by the publicity and the high profile case nature of the case because the inmate population would know Applicant was a multiple sex offender. [R. at 377; 381]. Aiken also noted some of Applicant's disciplinary violations included possession of weapons to do harm or for his own protection, and his previous suicide attempts increased his security risk. [R. at 381-382]. In summary, Aiken testified if sentenced to life in prison, Applicant would not be able to harm other inmates because of his custody status, but and his life sentence would be harsh.

Applicant's older sister testified in mitigation as well. [R. at 385]. Denise Baker testified about her relationship with Applicant. She had a fond memory of Applicant playing "pee-wee" football and her cheerleading. [R. at 386-387]. Denise described the two of them getting ready for their roles on Saturday mornings and the family routine. [R. at 388-389). Denise also testified about going from their home in the country across the street into a wooded area and sliding along a creek. [R. at 389]. She stated one time they were out there with their cousins and Applicant fell through a soft piece of ice and he cried all the way home, and she noted Applicant cried frequently as a child. [R. at 389-390]. Denise described "sibling rivalry" and fights over

jeans between Applicant and his sisters because he would wear their jeans and leak ink on them. [R. at 390].

Denise also testified Applicant had "seizures" as a child where he would gaze, his body stiffen and shake which would sometimes be accompanied by a high fever. [R. at 391-393]. She stated this set him apart from others and prompted a lack of friends. [R. at 393]. Denise said the family moved frequently and lived in Tennessee, Florida, and North Carolina. [R. at 393]. Denise testified she believed Applicant did not like himself, and he substituted animals in some way for companionship. [R. at 394]. She stated that at one time Applicant shared a bedroom with his grandfather to whom he was very close, and they would talk together for hours. [R. at 394-395]. The grandfather passed away when Applicant was age sixteen, which was a turning point in Applicant's life. [R. at 395]. After his grandfather's death, Applicant began staying out late, became more withdrawn, and once ran away from home and was found sleeping outside a church. [R. at 395-396]. In describing their mother, Denise testified her mother suffered from bipolar disorder and schizophrenia. [R. at 396]. The mother was affected by her medication, and she would hear things, talk to herself, and would "freak out" over the smallest thing. [R. at 396-397].

The sister also described events when Applicant was age three and living in a trailer in Florida. [R. at 397]. She testified she started receiving inappropriate presents such as see-through nightgowns. [R. at 398]. Later they moved to another house in Florida, and Denise testified that her other grandfather, Mr. Inman Sr., would come into the bedroom she shared with Applicant [she was five and Applicant was three] and the grandfather would blindfold her and tie her hands to the bed and turn her over. [R. at 398-399]. Denise testified it was sexual abuse. [R. at 399]. She described the grandfather would leave her in the top bunk and go to the bottom

bunk. [R. at 399]. While Denise did not know what was happening to Applicant, she heard him crying, and they both were threatened. [R. at 399-400]. Denise stated their step-grandfather also "messed with" her. [R. at 400]. She described a conversation she once had with Applicant when she stated that she had been sexually abused and Applicant stated he had been abused also. [R. at 400-401].

Reverend David Hensley, Applicant's pastor while incarcerated in South Carolina, was presented to testify. [R. at 402]. However, Applicant objected to his testimony based upon the priest-penitent privilege which Applicant refused to waive. [R. at 402-405]. The reverend then only described the fact he met with Applicant the Friday before with his Bible, grape juice, wafer, and poured water over Applicant's head. [R. at 405].

Kenneth McArthur, Applicant's step-father, testified he has known Applicant since he was four years old. [R. at 657]. He stated the September hearing was very stressful for McArthur and his wife, Vera, Applicant's mother, because of the potential sentence. [R. at 657]. He stated Vera had been hospitalized in January due to the stress. [R. at 657]. He stated they love Applicant and enjoy having the opportunity to see him in prison. [R. at 657].

Dr. Marti Loring was qualified as an expert "in the field of social history, trauma, and abuse." [R. at 664-665]. Dr. Loring presented a genogram and described the interactions between family members and various problems with drugs, alcohol, mental illness, sexual abuse, and violence. [R. at 670-680]. Dr. Loring also presented a timeline of Applicant's life. [R. at 680-682). She further presented a group of photographs and materials suggesting as a child Applicant was "still miserable and crying," and had indicators of sexual abuse. [R. at 682-683]. Applicant had headaches and suffered from head beatings, he accidentally burned his genitals with spilled bleach without medical attention, he was firmly spanked as a child, he had seizures,

he was exposed to violence in 1980 involving a dog fight with a cat, and his leg was burned in 1981 in a motorcycle accident. [R. at 684-686]. Applicant also began drug use including alcohol, marijuana, cocaine, LSD, and huffing gas beginning in 1981. [R. at 686].

Dr. Loring testified Applicant was exposed in 1984-86 to a sexually abusive step-brother who was later convicted as a pedophile. [R. at 686]. Dr. Loring noted she was unable to locate any pictures of Applicant smiling or happy after age seven. [R. at 687]. In addition, Dr. Loring found Applicant would play with matches and actually set fire to his step-brother's mattress, which is a symptom of sexual abuse. [R. at 687-688]. Additionally, family members gave him alcohol between 1984-86. [R. at 688].

Dr. Loring described while Applicant was fifteen, his maternal grandfather suffered a painful and bloody death with throat cancer. [R. at 688]. She described the closeness between them and the apparent guilt Applicant felt for his grandfather's death. [R. at 688].

She testified Applicant's life in prison was based upon a series of thefts and behaviors and the encouraged use of alcohol led to the downhill path. [R. at 689].

Dr. Loring noted that around age eleven or twelve, Applicant was asking his mother for help, but because of her problems, she could not hear Applicant's requests for help. [R. at 689]. After Applicant was caught looking into a neighbor's window, his windows were nailed shut. [R. at 689-690].

Applicant's suicide attempts were again described by Dr. Loring. [R. at 690]. Dr. Loring stated Applicant was released from prison in 2005 and was out of prison nine months before the present tragedy. [R. at 690]. During that time, Applicant was described as anxious and lost, unable to hold a job or relate to women. [R. at 690]. However, he was able to mentor his sister's son, who idolized him and was able to get his nephew to stop huffing gas. [R. at 690-691]. Dr.

Loring concluded that Applicant's early history revealed he was seen in a "trance-like state" as a child, including the time period it was alleged he was abused as a child. [R. at 693]. She confirmed the genogram and timeline were prepared by her in September for her testimony. [R. at 701). Dr. Loring clarified her earlier testimony about Applicant's father killing dogs and Applicant giving a neighbor a stray dog to care for. [R. at 703]. She confirmed Applicant experienced a bad childhood - exposure to violence, sexual abuse, and loss. Dr. Loring admitted she had reviewed his criminal history including the assaults on females and in prison. [R. at 706-707]. However, she had not reviewed the particular criminal incident in this case. [R. at 708-709].

The evidence presented was copious, but more so was the evidence in aggravation and the level of violence and atrocity in the crime itself. Not the least of these facts is that, prior to the rape, Applicant obtained property for the victim and terrorized her for pin numbers before he savagely committed the sexual crime, and the most glaring fact that he had every opportunity to leave the victim alive and did not. The escalation to murder from all the other crimes cannot be ignored any more than it can be explained.

As a result, considering the evidence in aggravation presented at sentencing, the evidence in mitigation received at Applicant's sentencing hearing, and the new mitigation evidence Applicant offered at his PCR proceeding, along with any additional aggravating evidence that would have come in with the new mitigation, as is required of the reviewing court under *Strickland, supra.* and its progeny, there is no reasonable probability Judge Miller would have returned with a different sentence. *See also Wiggins v. Smith, supra; Wong v. Belmontes, supra.* This ground has no merit and must be dismissed with prejudice.

Failure to develop information from Dr. Schwartz-Watts of a sexual disorder to present during sentencing

This Court finds trial counsel made an informed strategic decision not further retain Dr. Maddox (formerly Dr. Schwartz-Watts) after sufficient investigation. Counsel was aware that Dr. Maddox could disagree with Dr. Price, but Dr. Price's opinion was favored by the defense and supported by his professional opinion and professional norms, [see, for example, R. at 259-262]. Counsel was also aware that Dr. Maddox could further investigate the sexual disorder issue, but in doing so had already uncovered other uncharged rapes and a personality disorder that would be turned over to the prosecution if Dr. Maddox continued. [PCR Tr. at 282-283; and 489-490; 598]. In short, it was a choice of experts. Further, counsel was able to prevent disclosure of damaging as of then unreported rapes that Applicant admitted, and a diagnosis of antisocial personality disorder which had not been offered in the competency evaluation testimony. [See R. at 917]. Further still, the fact that Applicant had a sexual disorder was testified to at the competency hearing, [R. at 917], and by Dr. Price, [R. at 260]. That disorder did not in any way affect the murder or other non-sexual criminal acts documented in the applicant's history. [See R. *] Thus, Applicant has failed to carry his *Strickland* burden of deficient performance and resulting prejudice.

Trial counsel Bannister testified that he recalled Dr. Maddox being retained, and recalled generally testing, including hearing about Dr. Dwyer being involved. [See PCR Tr. at 239-242]. Applicant posed to Mr. Bannister in the PCR hearing a hypothetical question that if the applicant could be diagnosed with biastophilia and treated with therapy and medication, would counsel consider that to be "important mitigation?" [PCR Tr. at 242-243]. Trial counsel declined to respond specifically without knowing more concerning the "clinical elements" for diagnosis,

though he certainly was supportive of treatment that would help his client. [PCR Tr. at 243-244]. He agreed that Dr. Price's testimony reflected a diagnosis of "sexual paraphilia." [PCR Tr. at 273-274]. He also agreed Judge Miller considered the diagnosis, and that Applicant was a "serial rapist." [PCR Tr. at 275-276].

In his cross-examination during his PCR testimony, trial counsel Bannister recalled that Dr. Maddox had questioned the applicant on his sexual history. He disclosed a total of 12 forcible rapes. [PCR Tr. at 282]. Dr. Maddox had also produced a report, which would have to be turned over to the prosecution should she be presented as an expert witness. [PCR Tr. at 282-283]. She had also diagnosed Applicant with antisocial personality disorder, and he did not wish to present that diagnosis:

> ... I'd had personal experience with Mr. Ariail in cross-examining witnesses about antisocial personality disorder. And I did not feel like that was going to be a helpful place for us to be in the mitigation section of our trial.

[PCR Tr. at 283].

Counsel testified that he considered Dr. Maddox and Dr. Dwyer completing the investigation into the sexual disorder, but in comparing Dr. Price's theory, and believed Dr. Price was the better expert for presentation at mitigation:

> ... part of the diagnosis was that he was antisocial personality disorder, which I'd had personal experience with Mr. Ariail in cross-examining witnesses about antisocial personality disorder. And I did not feel like that was going to be a helpful place for us to be in the mitigation section of our trial.
>
> I knew that I had Dr. Price and he had this dissociative personality disorder, which I fel like, from a strategy standpoint, was a better way to marry what had happened in Jerry's life, help explain how that helped create the mental disorder and how that mental disorder then contributed to the crimes. I felt like that the other diagnoses that were part of the report were more of a description of what he had done, but it didn't really - - at least in the written portion of the report didn't really help describe the why of it.

> And, I was really focused, at least in terms of the strategy, on having a why-are-we-here kind of moment in the trial. And I felt like, with Dr. Price with the issue of Florida not having kept him in jail, that helped explain, in a lot of ways, why we ended up where we were, that is, why Mr. Inman had ended up in trial on a murder-rape conviction.
>
> ... Based on reports I was looking at and trying to marry that with the strategy we were putting forward, yes, I believe Dr. Price was going to do that in a better way than the report that I had had from Dr. Maddox.
>
> ...
>
> And I particularly was not interested in getting into a fight over antisocial personality disorder. ...

[PCR Tr. at 283-284].

Applicant bases the instant claim of ineffectiveness on the testimony of Dr. Maddox, now having finished the evaluation initially started, and with her opinions as offered at the PCR hearing. Dr. Maddox opinioned Inman suffers from a sexual paraphilia, "biastophilia, which is what the rape disorder is called." [PCR Tr. at 476].[20] She read an article explanation of the conditions: "Rape is primarily regarded as a crime against sexual integrity. If rape is the only way for an individual to get sexual satisfaction, it meets the criteria for a paraphilia." [PCR Tr. at 478]. She testified she felt it important to have continued the evaluation for the defense team as it would have "explained he had an illness, and it needed to be evaluated to see - - to be fuly evaluated to see if it was something that potentially would be presented to the Court or not. I t explained why he raped so many people." [PCR Tr. at 486]. However, "[i]t wouldn't have been eligible as a defense for the murder, but it would have been eligible *perhaps* for a guilty but mentally ill defense *for her rape*, or, at the most, in the sentencing phase, it would have been

[20] She testified that the common term is "serial rapist" but "serial rapist is not the psychiatric term, biastophilia should be used. [PCR Tr. at 596].

mitigation. It would have been diminished capacity." [PCR Tr. at 487] (emphasis added). He stated "it explain[ed] why he didn't have normal relationships." [PCR Tr. at 488]. She focused her inquiry on "why did he rape this woman," and found the sexual disorder, and opined the sexual disorder is a treatable illness, referencing the treatment program in South Carolina.[21] [PCR Tr. at 496-497]. Dr. Maddox indicated the applicant could be treated by shots and therapy. [PCR Tr. at 502-503]. She testified that confinement in prison was "protective for him because he's not going to have access - - unsupervised access to females. [PCR Tr. at 539]. Dr. Maddox agreed that once diagnosed with antisocial personality disorder, "it can be prejudicial." [PCR Tr. at 544]. She explained: ... Mr, Inman, I had diagnosed him with antisocial traits, and you have to" based on a history of "other criminal acts," but he did not fall into psychopathy, so that a

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[21] Dr. Maddox has worked with and continues to work with and evaluate "sexually violent predators," as defined under S.C. Code § 44-48-20 – individuals who have a mental abnormality the "predisposes the person to commit sexually violent offense." The purpose of the legislation allowing commitment is expressed in the following statement of findings as included in the Sexually Violent Predator Act:

> The General Assembly finds that a mentally abnormal and extremely dangerous group of sexually violent predators exists who require involuntary civil commitment in a secure facility for long-term control, care, and treatment. The General Assembly further finds that the likelihood these sexually violent predators will engage in repeated acts of sexual violence if not treated for their mental conditions is significant. Because the existing civil commitment process is inadequate to address the special needs of sexually violent predators and the risks that they present to society, the General Assembly has determined that a separate, involuntary civil commitment process for the long-term control, care, and treatment of sexually violent predators is necessary. The General Assembly also determines that, because of the nature of the mental conditions from which sexually violent predators suffer and the dangers they present, it is necessary to house involuntarily-committed sexually violent predators in secure facilities separate from persons involuntarily committed under traditional civil commitment statutes. The civil commitment of sexually violent predators is not intended to stigmatize the mentally ill community.

S.C. Code Ann. § 44-48-20.

treatment program would not be feasible. [PCR Tr. at 545-546]. Though she was initially concerned about a guilty but mentally ill possibility for the criminal sexual conduct charge, she found her completed evaluation caused her to reject that possibility. [PCR Tr. at 558]. She agreed the applicant reported a disassociation event during the crime and particularly recalls "her pupils dilating when she was dying...." [PCR Tr. at 563]. She described the even as traumatic for him "even though he's the perpetrator...." [PCR Tr. at 563]. Dr. Maddox disagreed with a disassociation disorder as it "would imply that he chose to rape people..." [PCR Tr. at 567].

On cross-examination, Dr. Maddox testified, based on his history, "... part of what he did ... I think he would go in to rob people and then have sex. And I'm not sure if that's part of the antisocial part of his or if that was part of the justification he used to get into the home to attack the women." [PCR Tr. at 573]. She agreed that though he has "urges" from his sexual disorder, that he was able to exercise control over them sometimes, and particular in this case where he selected Ms. Souers, then waited hours before entering her apartment. [PCR Tr. at 573-574]. She agreed that directly after the murder, he went to the ATM to get money. [PCR Tr. at 574-575]. She agreed the facts of the entirety of the crime can support a conclusion of deliberateness in a course of action. [PCR Tr. at 575]. She indicated, if he had not murdered, and was committed in a SVP program, there was a possibility of release. [PCR Tr. at 576-577]. Other similar individuals had been considered for release, with one she was aware of that had been released, though he re-offended. [PCR Tr. at 577]. She recalled that she tell Judge Miller at the competency hearing before the plea that Applicant "has a sexual disorder." [PCR Tr. at 579]. She testified the DSM would list the disorder as "paraphilic disorder – other," essentially either more rare or with incomplete traits of eight other specified conditions, pedophilia, sadism, masochism, transvestic fetishism, fetishism, voyeurism, frotteurism, and exhibitionism. [PCR

Tr. at 581-582]. She originally considered sexual sadism with the bindings present in the crime, but could not connect that as Applicant indicated the strangling did not happen during the sex act, though independent report that would challenge that would be a concern to her. [PCR Tr. at 583-584]. She agreed that he has a very extensive history of rape, but this is the only murder that is known, which showed an escalation in crimes. [PCR Tr. at 588-589]. When asked, "And that's dangerous when it gets to escalation, isn't it," she replied, "Certainly." [PCR Tr. at 589]. Though he considered whether this was reflecting sadistic behavior, she looked into the possibility, but since he has been incarcerated, there would be limited opportunity for access to victim. [PCR Tr. at 588-589]. She also testified the applicant refused certain test, such as the PPG, that she wanted performed to make a more complete evaluation in particular as to sadism. [PCR Tr. at 590-592]. She also agreed he had a documented history of being non-compliant with medication. [PCT Tr. at 595]. She also agreed that even if Applicant could be treated for the sexual disorder, there was still the robbery and murder in this crime, and that could not be divorced from the sentencing consideration. [PCR Tr. at 595-596]. She testified, "the murder was not the result of mental illness." [PCR Tr. at 596]. She agreed that she indicated to Mr. Bannister around the time of the sentencing proceedings that she could continue evaluation on the sexual disorder, but Applicant had disclosed undetected rapes; she suspected sexual sadism that was as of then not written in any report, and that she had diagnosed him with antisocial personality disorder, which she continued to diagnosis in him. [PCR Tr. at 598-600]. She agreed that if retained, she would have put all her finding in a report. [PCR Tr. at 598-599]. She agreed some of the diagnosis made in the PCR proceedings were affected by time, with personality structure having changed. [PCR Tr. at 605].

In considering the testimony, this Court finds that trial counsel exercise due diligence and made reasonable investigation into alternatives for the defense, including consider possible evidence of the sexual disorder and considering further investigation in light of damaging evidence that could arise. Given the investigation was reasonable, and the strategy deliberate and sound, Applicant has failed to carry his burden under *Strickland. See Wiggins, supra.*

Further, when the evidence with its limitations is considered in context of the case presented in mitigation along with the facts of the crime and other evidence in aggravation, *see supra*, this Court finds the applicant failed to show a reasonable probability of a different result. First, her testimony is limited to a possible cause for the sexual crime, but does not touch upon the burglary, robbery, or other non-sexual crimes. It was, in fact, his history of other crimes that supported her diagnosis of antisocial personality disorder. Second, Dr. Maddox testified if he had been committed and treated, there was a possibility of release. In so explaining her work, she indicated that other individuals who had been released had re-offended. Third, even the ability to treat the sexual disorder was contingent on medication and therapy, yet the evidence of record showed a history of Applicant failing to comply with medication. This Court finds there is no merit to this ground and no *Strickland* prejudice. *See Byrum v. Ozmint,* 339 F.3d 203, 210 (4th Cir. 2003) (counsel not ineffective in failing to present testimony by a psychiatrist and psychologist because suggestions of antisocial behavior which experts found could have been harmful to the defense); *Satcher v. Pruett,* 126 F.3d 561 572 (4th Cir. 1997)(counsel not ineffective for not presenting testimony by a psychologist and psychiatrist who examined defendant for purpose of developing mitigating evidence where they found no psychiatric or neurological disorders, but also found antisocial personality disorder that might make defendant a "future danger"); *Truesdale v. Moore,* 142 F.3d 749, 755 (4th Cir. 1998) (mental health

evidence is a "double edged sword that might as easily condemn a defendant to death as excuse his actions."). As the Supreme Court of South Carolina found in the direct appeal:

> Furthermore, any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his criminal history. Finally, a review of the judge's oral and written orders establishes that he thoroughly considered all mitigating evidence.

Inman, 395 S.C. at 566, 720 S.E.2d at 45.

The Supreme Court's determination remains correct and true even when considering the PCR hearing testimony. Again, Petitioner failed to carry his burden of proof.

Failure to object to "the rush to the forgone judicial conclusion that the sentence would be death," or alternatively, in intentionally failing to present evidence to create an issue of post-conviction relief

Applicant fails to show any admissible and probative evidence of a "forgone judicial conclusion" to substantiate this ground other than a small portion of discovery deposition of a party, which read in context, does not constitute knowledge or inference of knowledge in support of the allegation. If anything, the deposition reflects an opinion based on circumstances plainly set out in the record. Indeed, trial counsel Bannister testified that it appeared to him as he neared the April 2009 sentencing (after the break down in the September 2008 sentencing) that "everyone decided they'd had enough of this case and we were going to get it resolved one way or the other" and added "maybe you could even throw my client in there. Everybody was - - had had enough." [PCR Tr. at 218; see also 292]. Mr. Bannister identified a letter received by the defense wherein the applicant specific requested the defense spend more energy in going forward than in the issue with the solicitor. [PCR at 335]. The opinion "everyone" wanted to move the matter – whether from the solicitor or counsel – does nothing to undermine the careful

consideration Judge Miller evidenced in his approach to the sentencing proceeding. This Court notes Judge Miller's careful consideration of all the evidence before imposing sentence as reflecting in his own the record ruling and his sentencing order, and also his expressed position that he had not made up his mind at the time of the plea. [See R. at 954]. There has been no evidence that Judge Miller prejudged this case before hearing all the evidence in mitigation. The very fact that Judge Miller wanted to hear from Dr. Loring even while counsel attempted to prevent it supports that Judge Miller wanted all the evidence before making his decision. Applicant had failed to carry his burden of proof.

Applicant's alternative suggestion that trial counsel intentionally sandbagged an issue again does not show an infirmity in the proceedings. Trial counsel Bannister testified that he was aware that the solicitor could have challenged Dr. Loring on the licensing issue and prepared for that possibility as early as July 2008 (the plea was August 2008, and sentencing began in September 2008). [PCR Tr. at 202]. He further testified that he was essentially "looking for the fumble" in a case with little possibility of avoiding the State's harshest sentence. [PCR Tr. at 199; 202-203; see also 221 "... we were realistic about what our chances were, we still wanted to put up the best case that we could have..."]. He noted his believe that the issue eventually resulted in a life sentencing in the unrelated case. [PCR Tr. at 199]. Trial counsel Bannister confirmed that he believed that had he had a jury, as he wished, that the question to Dr. Loring would have prompted a mistrial that would have allowed him to gain an automatic default life sentence. [PCR Tr. at 207 and 215]. He also testified he used a substantial portion of the break in the proceedings to work on a "prosecutorial misconduct memorandum" and attempt to persuade the prosecution to forgo the death penalty. [PCT Tr. at 286].

While simultaneously admitting preparation for the licensing challenge, trial counsel Bannister also testified that he was put in a bind by not having another social worker, [PCR Tr. at 206], so he eventually contacted Jan Vogelsang but Ms. Vogelsang was unable to prepare for the April 2009 proceedings. [PCR Tr. p. 212]. He testified that he began to understand that the trial court would be attempting to "fix the error," but felt he should be given the time to work with Ms. Vogelsang, especially in areas regarding sexual abuse, since having heard testimony from Applicant's sister Denise. [PCR Tr. p. 234].[22] It is still unclear exactly what "new" was to be presented. Moreover, trial counsel Bannister testified that his mitigation investigator, Ms. Carolyn Graham, remained the same from Dr. Loring to Ms. Vogelsang. [PCR Tr. at 237-238; see also 287]. Counsel testified, though, "we'd already waited six months, what's another six, right? ... What was the difference? I mean, here we are ten years later, and we're still dealing with this issue ... we could have got it done the right way, we could have put the witness on the stand ... the mistrial might still have stayed alive, but we would have had the testimony that I felt like was necessary for me to satisfy my obligations." [PCR Tr. at 236].

As reviewed above, trial counsel Bannister testified at length as to his opinion that the solicitor's error – for which trial counsel had prepared to address but took no steps to prevents or prepare the witness – was the cause of all ills with the sentencing proceeding, and should have allowed him to obtain a mistrial and a life sentence. This Court notes Judge Miller indicated his believe that trial counsel was focused on preserving a claim more than presenting a case. Trial counsel Bannister's PCR testimony is easily read to support that observation – there is little doubt that he was actively preserving the issues that he thought would result in a life sentence.

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[22] Counsel admitted on cross-examination that evidence of "sexual abuse from Jerry's past c[a]me into evidence ... correct... It came in through Denise. Dr. Price has information about it, and so did Dr. Loring." [PCR Tr. at 267].

But critically, as this Court carefully set out above, deficient performance is not dispositive of an ineffective assistance claim. Rather, an applicant must show both deficient performance *and* resulting prejudice. *Strickland, supra.* Further, if an issue can be disposed of on the absence of prejudice, a post-conviction relief court need not rule on the argument for deficient performance. *Strickland, supra.* This Court finds that the lack of prejudice is dispositive.

Even considering the "new" mitigation evidence (*i.e.,* the mother's attempt to kill Applicant, her thoughts to mutilate him, and more defined sexual disorder) as offered at the PCR hearing, along with the mitigation evidence offered at sentencing before Judge Miller, along with the evidence in aggravation introduced before Judge Miller, and any evidence in aggravation that would have likely come in with the new mitigation evidence offered at PCR, there is no reasonable probability Judge Miller would have returned with a different sentence. Therefore, any deficient performance on a "rush" to complete the process failed to produce *Strickland* prejudice. Applicant has failed in his burden of proof.

> **Ground 10(c)** Mr. Inmon was denied the right to effective assistance of counsel—guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, Sections 3 and 14 of the South Carolina Constitution—during the appeal of his capital trial.
>
> **11(c)** Appellate counsel was ineffective for:
>
> **11(c)(1)** Not appealing the trial court judge denying Mr. Inmon his request to plead guilty and have his sentence determined by a jury when that right is protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and trial counsel had preserved that issue for appellate review.
>
> **11(c)(2)** Not appealing Mr. Inmon's motion to continue his sentencing hearing so that he would have sufficient time to obtain another mitigation expert witness after Dr. Marti Loring who refused to

participate in Mr. Inmon's case because she was intimidated by the prosecutor.

Inman alleges appellate counsel, Mr. Dudek and Mr. Savitz, were ineffective for failing to raise on appeal the issue that Judge Miller erred in denying Inman his request to plead guilty and have his sentence determined by a jury. This Court finds there is no merit to this ground.

Mr. Savitz testified he read the transcript and picked out meritorious issues for the appeal. [PCR Tr. at 513; 521]. He stated he spoke with plea counsel and was involved "early on" in the process, particularly given the prosecutorial misconduct claim raised throughout the proceeding and on appeal. [PCR Tr. at 522]. Mr. Savitz testified the issue involving the trial court's denial of Applicant's mode of trial motion was, in his mind, settled law and he did not think there was an argument to make, "at the time," that the statute was unconstitutional. [PCR Tr. at 522-524]. Mr. Savitz testified he did not raise the issue but, instead, chose to pursue "the idea that it was settled law and that by suggesting otherwise, that the judge had allowed the plea to become conditional." [PCR Tr. at 518; 524].

To show relief is warranted, an 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, 120 S.Ct. 746, 764 (2000) (citation omitted). "'Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome.'" 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, 1234 (4th Cir. 1985).

Given appellate counsel's testimony and the record developed in this case, it cannot be said counsel was deficient. The testimony before this Court demonstrates Mr. Savitz exercised his professional judgment to raise the issues he believed were the strongest on appeal and the ones he thought had the best chance of gaining a new sentencing procedure for Applicant. This Court finds appellate counsel made an informed decision regarding the issues to raise during Applicant's direct appeal particularly given his testimony regarding the prosecutorial misconduct claim, counsel's discussions with colleagues about the nature of the claim, and his belief about its success. Applicant cannot show only the ignored issue is clearly stronger than those presented.

Further, as addressed above, the Supreme Court of South Carolina determined in the appeal that there was no merit to the underlying issue Inman alleges appellate counsel should have raised. The South Carolina Supreme Court has repeatedly rejected this constitutional challenge to S.C. Code Ann. Section 16-3-20(B) including in this very case on direct appeal. *Inman,* 395 S.C. at 555-56, 720 S.E.2d at 40. Therefore, Applicant cannot prove any deficient performance or any resulting prejudice. He has failed in his burden of proof.

Failure to appeal denial of continuance motion made during sentencing

As to the denial of the continuance motion to obtain a mitigation expert other than Dr. Loring, Applicant cannot show he is entitled to relief. Mr. Savitz testified, looking back, "knowing that [the Supreme Court was] not going to grant him a new sentencing based upon prosecutorial misconduct, I would have to say that I would raise that issue" because it would give the Court another option to grant Applicant a resentencing. [PCR Tr. at 525-526]. Mr. Savitz also acknowledged, generally, it is difficult to win denials of motions for continuance on appeal given the standard of review. [PCR Tr. at 526].

Applicant cannot demonstrate either deficiency or prejudice. First, given appellate counsel's testimony it cannot be said counsel was deficient. It was not until reexamining the case years later Mr. Savitz thought he might have given the Supreme Court another option to consider—a clear case of hindsight and what the Supreme Court specifically cautions against. *See Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate that conduct from counsel's perspective at the time."). Further, Applicant cannot demonstrate prejudice where Dr. Loring was presented and testified before Judge Miller, and no other witness testified in PCR. *See Bannister v. State*, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998) ("This Court has repeatedly held a PCR applicant *must produce the testimony* of a favorable witness *or otherwise offer the testimony in accordance with the rules of evidence* at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial.") (emphasis in original).

Addressed above, the one line of information on the mother's attempt to kill Inman was more attributed to the agreement between Dr. Loring and Inman not to portray the mother in a negative light. But at any rate, such a story is, sadly, only cumulatively to the detailed testimony offered in regard to Inman's social history. This included not just Dr. Loring, but other experts as well.

Dr. Randy Price had already testified extensively regarding Applicant's social history and background and his mental illnesses. [R. at pp.258-311]. Applicant's sister testified similarly including to his childhood sexual abuse, the death of Applicant's grandfather and its impact upon Applicant, and to Applicant's mother's mental illness. [R. at pp.385-401]. Plea counsel also introduced Dr. Maddox's report detailing Applicant's mental illnesses, drug addiction, and

mental illness in his family. Appellate counsel was limited to the record before Judge Miller. No prejudice was shown nor could it be shown from the failure to grant a continuance.

As a result, appellate counsel was not deficient and can Applicant show prejudice from the failure to directly appeal Judge Miller's denial of the continuance motion. *See State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (the denial of a motion for continuance is within the sound discretion of a trial judge, and his ruling will not be disturbed absent an abuse of discretion, resulting in prejudice to the defendant); *State v. Babb*, 299 S.C. 451, 385 S.E.2d 827 (1989); *State v. Lytchfield*, 230 S.C. 405, 95 S.E.2d 857 (1957) (reversals for a trial judge's denial of a motion for continuance "are about as rare as the proverbial hen's teeth."). As a result, this ground has no merit and must be dismissed with prejudice.

> **Ground 10(e)** Mr. Inmon's death sentence was obtained in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.
>
> > **11(e)** The capital sentencing scheme in South Carolina violates the Constitution because its methods for the imposition and review of capital punishment suffers the same infirmities as the statute rejected as unconstitutional by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972) because:
> >
> > (1) South Carolina's capital sentencing statute, as written by the General Assembly and construed by the South Carolina Supreme Court, does not perform the constitutionally mandated narrowing function.
> >
> > (2) South Carolina's sentencing system permits discrimination on the basis of race.
> >
> > (3) The South Carolina Supreme Court consistently fails to fulfill its statutory and constitutional obligation to conduct a meaningful proportionality review in capital cases.
> >
> > (4) The death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose.

This issue is procedurally barred from review on the merits. The issue presents a claim (claims) that could have been raised at trial and on direct appeal. Therefore, the issue is barred under *Simmons, supra,* and *Drayton, supra. See also Roscoe v. State*, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) ("In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel."); *Hyman v. State*, 278 S.C. 501, 502, 299 S.E.2d 330, 331 (1983) (holding PCR claim that sentence violated double jeopardy could only be raised in post-conviction relief as a claim of ineffective assistance of counsel); *Peeler v. State*, 277 S.C. 70, 71, 283 S.E.2d 826, 826 (1981) (holding unpreserved issue regarding guilty plea and life sentence could not be raised in PCR as PCR is not a substitute for direct appeal). As a result, this ground also fails to state a claim upon which relief may be granted by this Court. Rule 12(b)(6), SCRCP. This ground must be dismissed with prejudice.

Even if the ground could be reached, it is without merit. The Supreme Court has already reviewed the statute for adherence to *Furman* and found the statute constitutional.

Moreover, the South Carolina Supreme Court conducted its mandated proportionality review and found Applicant's sentence "was not the result of passion, prejudice, or any other arbitrary factor," and further found a review of prior cases established the sentence was proportionate to that in similar cases and was neither excessive nor disproportionate to the crime. *State v. Inman*, 395 S.C. at 566-68, 720 S.E.2d at 46.

Further, as to subpart (2), "South Carolina's sentencing system permits discrimination on the basis of race" there is no cognizable merit to this ground as a matter of state law. *See* S.C. Code Ann. Section 16-3-10 & 16-3-20, 16-3-25, 16-3-26, & 16-3-28. A similar assertion was attempted to be raised and rejected in *Thompson v. Aiken*, 281 S.C. 239, 315 S.E.2d 110 (1984).

In *Thompson*, the South Carolina Supreme Court cautioned against this issue being raised in collateral proceedings:

> The petitioner submitted to the post-conviction court a deposition taken of Professor Raymond Paternoster, University of South Carolina, bolstered by statistical data which he had compiled. We feel it necessary to comment upon this submission in light of our concern expressed in *State v. Truesdale,* 278 S.C. 368, 371, 296 S.E.2d 528, about "unwise depletion of the obviously limited public funds available for the defense of indigents." Because we are convinced that the issue which petitioner sought to raise is not appropriately framed for resolution in the context of a capital case, we would recommend to the bench and bar that judicial resources be applied to more fruitful endeavors.
>
> In the record before us, the petitioner has made an elaborate presentation of testimony and data purporting to show that prosecutors in this State consciously and systematically choose to seek the death penalty in a racially discriminatory manner. As noted by the post-conviction court in its Order, the petitioner has relied upon gross statistics and probabilities. The petitioner has elected not to consider various intangible factors entering into prosecutorial decisions. The petitioner has provided no direct testimony to support his charge that impermissible influences routinely distort the application of capital punishment throughout this State.
>
> In the final analysis, the allegation of statewide "patterns" raised by a specific capital defendant has no real bearing upon his individual guilt or innocence nor upon the correctness of any sentence imposed in his particular case. The commission of an aggravated murder places every potential defendant at risk; he may indeed be ultimately sentenced to death. On the other hand, he may never be caught. He may never be tried, for any number of reasons. He may plead guilty or be tried on a lesser charge. A jury may, for reasons of its own, elect to acquit him or, in sentencing, elect to spare his life. Our role as an appellate court is not to base rulings upon such possibilities. Far less are we entitled to intrude upon the operations of executive officers when we have no more than general data complied for academic purposes.
>
> The petitioner acknowledges that this Court has already settled the scope of proportionality review. *State v. Copeland,* 278 S.C. 572, 586-596, 300 S.E.2d 63, cert. denied, 460 U.S. 1103, 103 S.Ct. 1802, 76 L.Ed.2d 367. Prosecutorial discretion plays no role in such review, yet the sole basis upon which this or any other petitioner could offer a showing of "patterns" would be an argument based on disproportionate punishment. We are not persuaded and accordingly we recommend that the bench and bar focus attention upon real and substantial issues in future capital cases.

Thompson, 281 S.C. at 241-42, 315 S.E.2d at 111.

Further, as to subpart (3), "The South Carolina Supreme Court consistently fails to fulfill its statutory and constitutional obligation to conduct a meaningful proportionality review in capital cases," there is no merit to this ground. In *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984), the United States Supreme Court held that proportionality review, comparing the sentence in the case before the court with the penalties imposed in similar cases, is not constitutionally required. *See also State v. Dickerson*, 395 S.C. 101, 716 S.E.2d 895 (2011),[23] Pleicones, C.J., concurring in result. *See* S.C. Code Ann. Section 16-3-20 & 16-3-25.

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[23] In *Dickerson*, the Supreme Court stated in rejecting a similar proportionality claim raised by the appellant:

> Before the circuit court, Dickerson argued that our current proportionality review is deficient because it fails to examine cases where death was not imposed and cases where death was not sought. *See State v. Copeland,* 278 S.C. 572, 591, 300 S.E.2d 63, 75 (1982). Dickerson primarily relied upon Justice Stevens's statement regarding the denial of certiorari in *Walker v. Georgia*, —— U.S. ——, 129 S.Ct. 453, 172 L.Ed.2d 344 (2008) (memorandum opinion), in which he wrote that examining similar cases "assume[s] that the court would consider whether there were 'similarly situated defendants' who had *not* been put to the death because that inquiry is an essential part of any meaningful proportionality review." *Id.* at 454. In his view, this analysis is "judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court." *Id.* Justice Stevens noted,
>
> > Had the Georgia Supreme Court looked outside the universe of cases in which the jury imposed a death sentence, it would have found numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment. If the Georgia Supreme Court had expanded its inquiry still further, it would have discovered many similar cases in which the State did not even seek death. Cases in both of these categories are eminently relevant to the question of whether a death sentence in a given case is proportionate to the offense. The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant

As noted above, statutory proportionality review was completed by the Supreme Court in this case.

Further, as to subpart (4), "the death penalty is unconstitutional because it is unreliable, arbitrary, and lacks penological purpose," is meritless as it was addressed as a matter of state law in *State v. Shaw*, 273 S.C. 194, 255 S.E.2d 799 (1979), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991), and its progeny. There is no merit to this ground as a free-standing challenge to the death penalty for murder in a collateral proceeding. *See* S.C. Code Ann. Section 16-3-10 & 16-3-20, 16-3-25, 16-3-26, & 16-3-28.

In *Gregg v. Georgia,* 428 U.S. 153 (1976), the Supreme Court rejected the argument that the death penalty is *per se* unconstitutional. The Court recognized the death penalty serves the dual purposes of retribution and deterrence. It recognized that retribution "though unappealing to many, . . . is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs." *Id.*, at 184, 96 S.Ct. at 2930. The *Gregg* court also recognized the complexity of evaluating the deterrent effect of capital punishment, and it wisely noted that the responsibility for making such an evaluation "properly rests with the legislatures." *Id.*, at 186-187, 96 S.Ct. at 2930. The Supreme Court has cited *Gregg* with

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> was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.
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> *Id.* at 455-56 (citations omitted). This issue is not before us on appeal, and it would require us to overrule our prior decision in *Copeland.* However, we note our concern that restricting our statutorily-mandated proportionality review to only similar cases where death was actually imposed is largely a self-fulfilling prophecy as simply examining similar cases where the defendant was sentenced to death will almost always lead to the conclusion that the death sentence under review is proportional.

Dickerson, 395 S.C. at 125 n.8, 716 S.E.2d at 908 n.8.

approval in recent decisions, stating in one case: "[O]ur decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, '[i]t necessarily follows that there must be a [constitutional] means of carrying it out.'" *Glossip v. Gross*, 135 S.Ct. 2726, 2732-33 (2015), citing *Baze v. Rees*, 553 U.S. 35, 47, 128 S.Ct. 1520 (2008). In his concurring opinion, Justice Scalia summarized the state of the law on this very question.

> "Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: it is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that '[n]o person shall be held to answer for a capital ... crime, unless on a presentment or indictment of a Grand Jury,' and that no person shall be 'deprived of life ... without due process of law.'"

Glossip, 135 S.Ct. at 2747.

The Supreme Court recently revisited and reaffirmed its decisions in *Glossip* and *Baze*, and once again recognized "[t]he Constitution allows capital punishment." *Bucklew v. Precythe*, 139 S.Ct. 1112, 1122, 11129 (2019). In *Bucklew*, the Court also acknowledged the importance of resolution to capital cases, stating, "Both the State and the victims of crime have an important interest in the timely enforcement of a sentence" and cautioned courts to "police carefully against attempts to use such [constitutional] challenges as tools to interpose unjustified delay." *Id.* at 1133-34 (citations omitted). The Court summarized further, "Under our Constitution, the question of capital punishment belongs to the people and their representatives, not the courts, to resolve." *Id.* at 1134.

The relief Applicant seeks in this claim—the complete abolition of the death penalty—would properly be achieved by an amendment to the federal Constitution. As it stands, the amended application ignores the Fifth and Eighth Amendments, minimizes the retributive value

of capital punishment, and, if granted, would usurp the legislative prerogative for determining the appropriate penalties available for the worst of offenses.

Even though infrequently imposed, the death penalty provides an appropriate avenue by which society may express its moral outrage against the depravity of murders, like the one committed by Applicant. The death penalty also provides a means of justice for those families of the murdered who seek to have it imposed against the murderer. These considerations should not be lightly overlooked. That lengthy delays exist and that some jurisdictions have halted executions are not support for considering again the constitutionality of the death penalty as it exists today.

By its decisions in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008), and *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court limited the instances in which the death penalty could be imposed. Now, in line with the prevailing standards of decency in our ever evolving society, the death penalty is barred as to rapists of both adult women and children who do not kill, murderers who are mentally retarded (intellectually disabled), and murderers who were under the age of 18 at the time of the crime. In holding the death penalty is violative of the Eighth Amendment in *Coker* and *Kennedy*, the opinion distinguished between the severity and irrevocability of an intentional first degree murder as compared to a non-homicide crime such as rape. *Kennedy*, 554 U.S. at 438, 128 S.Ct. at 2660; *Coker*, 433 U.S. at 598, 97 S.Ct. at 2861. In *Atkins* and *Roper*, the court found murderers who are "mentally retarded" and those who were under the age of 18 to be "categorically less culpable than the average criminal." *Atkins*, 536 U.S. at 316, 122 S.Ct. at 2242; *Roper*, 543 U.S. at 567, 125 S.Ct. at 1194.

Here, the penalty imposed against Inman, a fully culpable adult, is not barred by precedent confining the instances where the death penalty may be imposed and is not offensive to prevailing and evolving standards of decency in today's world.

> **Ground 10(f)** The cumulative effect of all of counsel's failures entitle Mr. Inmon to the relief sought because he was also prejudiced by the synergistic impact of the constitutional failures.

Applicant Inman has failed to show *Strickland* deficient performance or resulting prejudice in his claims before the Court. Thus, as a factual matter, Applicant has failed to demonstrate that there are errors to assess in cumulative fashion. *Simpson v. Moore,* 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) ("Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis. The record simply did not contain 'several errors' for the judge to cumulatively assess."). Even so, as a legal matter, South Carolina has not recognized the concept of cumulative error in PCR cases. *See Lorenzen v. State,* 376 S.C. 521, 657 S.E.2d 771 n. 3 (2008) (declining opportunity to decide whether to recognize cumulative error); *Green v. State*, 351 S.C. 184, 197, 569 S.E.2d 318, 324 (2002) ("Whether the cumulation of several errors, which by themselves are not prejudicial, would warrant relief is an unsettled question in South Carolina."). The Fourth Circuit has rejected this doctrine.

> Next, Fisher argues that the cumulative effect of his trial counsel's individual actions deprived him of a fair trial. We disagree. Having just determined that none of counsel's actions could be considered constitutional error, *see* Lockhart v. Fretwell, 506 U.S. 364, 369 n. 2, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993) ("[U]nder Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice."(emphasis added)), it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

674 (1984). See, *e.g.*, Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir.1986) (considering ineffective assistance claims individually rather than considering their cumulative impact). In fact, in Arnold v. Evatt, 113 F.3d 1352 (4th Cir.1997), *cert. denied*, 522 U.S. 1058, 118 S.Ct. 715, 139 L.Ed.2d 655 (1998), this Court recently rejected a similar request to review the alleged errors of a trial court cumulatively rather than individually. See id. at 1364 ("Based on the findings of this court concerning the individual claims of error, we reject this claim.").

To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now. [FN9] In so holding, we are in agreement with the majority of our sister circuits that have considered the issue. For example, in Wainwright v. Lockhart, 80 F.3d 1226 (8th Cir.), *cert. denied*, 519 U.S. 968, 117 S.Ct. 395, 136 L.Ed.2d 310 (1996), the Eighth Circuit expressly held that an attorney's acts or omissions "that are not unconstitutional individually cannot be added together to create a constitutional violation." Id. at 1233; *see also* Jones v. Stotts, 59 F.3d 143, 147 (10th Cir.1995) (noting that cumulative-error analysis evaluates only effect of matters determined to be error, not cumulative effect of non-errors); United States v. Stewart, 20 F.3d 911, 917-18 (8th Cir.1994) (same); United States v. Gutierrez, 995 F.2d 169, 173 (9th Cir.1993) (same). *But see* Williams v. Washington, 59 F.3d 673, 682 (7th Cir.1995) (stating that "a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir.1991) (noting that a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions"). Accordingly, the district court did not err in refusing to grant habeas relief on this claim.

[FN9]. Fisher relies, in part, on cases considering the cumulative effect of matters actually determined to be constitutional error. In these cases, however, the courts in question merely aggregated all of the actual constitutional errors that individually had been found to be harmless, and therefore not reversible, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless. See, *e.g.*, United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir.1990). Thus, legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.

Fisher v. Angelone, 163 F.3d 835, 852-53 (4th Cir. 1998) *cert. denied,* 526 U.S. 1035 (1999). It is of no little note that the Fourth Circuit noted it was "in agreement *with the majority of our sister circuits* that have considered the issue." *Id.*

Here, as discussed under each individual allegation, Inman has failed to show constitutional error. Given there is no constitutional error, there could be no cumulative error effect. The *Strickland* test, as applied here, is the applicable test and required both a showing of deficient performance and prejudice.

> **Ground 10(g)** Mr. Inmon was denied the right to a fair trial – as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial because of prosecutorial misconduct.
>
> > **11(g)** Both the trial court judge and the South Carolina Supreme Court found prosecutorial misconduct regarding Solicitor Ariail's treatment of Dr. Marti Loring. Dr. Loring was traumatized by this misconduct and was unable to inform the sentencing judge with powerful mitigation evidence known to her that would have resulted in the imposition of a life sentence.

This ground is barred and not cognizable on post-conviction relief. *Simmons, supra; Drayton, supra.* The issue of prosecutorial misconduct and prejudice was fully presented and ruled upon in the direct appeal. *State v. Inman,* 395 S.C. 539, 720 S.E.2d 31 (2011). Further, this ground is barred by the doctrines of collateral estoppel, judicial estoppel, and res judicata. The South Carolina Supreme Court previously decided the claim of prosecutorial misconduct against Solicitor Ariail and found there was no prejudice to Applicant Inman resulting from the prosecutorial misconduct. *Inman,* 395 S.C. at 566, 720 S.E.2d at 46 ("Although we find the Solicitor committed prosecutorial misconduct, we conclude Inman's sentence of death was not imposed in violation of his due process rights."). In particular, our Supreme Court found "any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his

criminal history," and also that Judge Miller "thoroughly considered all mitigating evidence." *Inman,* 395 S.C. at 566, 720 S.E.2d at 45.

Further still, there is no factual merit to this claim. This Court has thoroughly addressed the factual basis in denial of Ground 10, Allegations (1), (2), (3) and (4) above. In sum, Dr. Loring testified at the re-convening of the sentencing hearing on April 20, 2009 that she did not feel intimidated and had been protected by Judge Miller. Additionally, Applicant Inman failed to show prejudice, as is more fully addressed above. The only substantive "forgotten" information appeared to be the Inman's mother tried to kill him and had thoughts of mutilating him. However, the transcript of the sentencing proceeding shows contemporaneous-to-trial reasons for not relating this information independent of personal limitations, if any. Further, Dr. David Price testified extensively as to mitigation history and regarding Inman's life history, as did Inman's sister, Denise, and the evidence in aggravation was overwhelming, as previously set forth above. Applicant fails to show he is entitled to any relief. However, this ground is procedurally barred from review on the merits, and is dismissed on that basis.

> **Ground 10(h)** Mr. Inmon was denied the right to a fair trial – as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial because of the rush to the forgone conclusion that the sentence would be death.
>
> **11(h)** This ground is based on the deposition testimony of former Solicitor Robert M. Ariail:
>
> > And then we went to a - - a staged - - that would be my word - - staged intimidation of a witness who was never intimidated. And then we went to a four-month recess or a six-month - - whatever it was - - in the middle of the death penalty trial. And after that, then we tried to recess. The defense has done nothing to prepare for the retrial to start, apparently. That's what it seemed to indicate. And the judge orders it to start anyway. So then we've got to deal

> with the issue of sabotage from the defense of not bringing this woman back and creating a huge appellate or a PCR issue. So we had to make a decision as to do we seek a subpoena of this woman from out of state? Do we ask the court for the subpoena? Well, how do we go about doing all these things?
>
> Deposition of Robert Ariail at pp. 34-35.

This ground is barred under *Simmons* and *Drayton*. The ground presents a freestanding which could have been raised on direct appeal. In particular, this Court notes trial counsel Bannister's testimony that "everyone" wanted to the move the case, including his client, [PCR Tr. at 218 and 292]; his testimony that he wanted additional time, [PCR Tr. at 236]; and additionally his acknowledgment that the case against Applicant was so solid as to force the defense to "play for the fumble," [PCR Tr. at 199 and 203]. The allegation of "foregone" conclusion – though this Court believes such allegation would not have been successful – could have been raised. The allegation was clearly available to be explored via objection or otherwise at the time of the proceeding. This ground is barred from review. *Id.* Even so, the record shows there is no merit to this ground for the same reasons set out above in dismissal of Ground 11(b)(6).

For this particular claim, though, Applicant Inman takes an answer of former Solicitor Robert Ariail at his 2016 deposition as the sole basis for the allegation. However, the record of the deposition shows Mr. Ariail did not know Judge Miller had any such *alleged* agenda and never communicated such an agenda to him or anyone else involved in the case. [Applicant Exhibit 55]. In fact, Mr. Ariail testified in his deposition Judge Miller never indicated to anyone he was predisposed to any sentence while the case was proceeding and Mr. Ariail stated he and his team "didn't cut corners" because there was always a concern whether Judge Miller would

actually give a death sentence to Applicant. [Applicant Exhibit 55 at 99-100]. Mr. Ariail testified Judge Miller was a "staunch believer" in "defendants' rights and asserting those things" so they did not take a particular sentence for granted. [Applicant Exhibit 55 at 100].

The record in this case shows Judge Miller did not make a rush to judgment, and as the Supreme Court found in its Opinion in the direct appeal in this case, there was no due process violation even considering the prosecutorial misconduct. *Inman, supra.* In fact, the Record shows, and the Supreme Court's Opinion reflects that Judge Miller considered all of the mitigating evidence presented in this case from all of the defense' witnesses and contained in the record.

As a result, there is no merit to this ground, and, if heard, it must be denied and dismissed with prejudice. However, this ground is procedurally barred and is dismissed on that basis.

[signature on next page]

CONCLUSION

Applicant has failed to show he is entitled to relief on any of the claims for all the forgoing reasons. As such, this Court must deny relief.

IT IS THEREFORE ORDERED:

1. The Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this _____ day of _____, 2019.

_____
THE HONORABLE ALEXANDER S. MACAULAY
Presiding Judge

_____, South Carolina.

ATTACHMENT NO. 1

STATE OF SOUTH CAROLINA)	IN THE COURT OF GENERAL SESSIONS
)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS)	
)	C. A. NO.: 2006-GS-39-2222
State of South Carolina,)	2006-GS-39-2223
)	2006-GS-39-2224
Plaintiff,)	2006-GS-39-2225
)	
v.)	
)	**SENTENCING ORDER**
Jerry Buck Inman,)	
)	
Defendant.)	

2009 APR 22 P 6:01
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

The Pickens County Grand Jury indicted the Defendant on November 8, 2006 on charges of Murder, Burglary in the First Degree, Criminal Sexual Conduct in the First Degree, and Kidnapping. Pursuant to S.C. Code § 16-3-26(A), the State timely notified the Defendant that it intended to seek the death penalty for the murder charge on August 22, 2006. I was assigned this case by Order of the Chief Justice of the South Carolina Supreme Court dated March 13, 2007. On August 19, 2008, this court conducted a competency hearing pursuant to S.C. Code § 44-23-410 and State v. Blair, 275 S.C. 529, 273 S.E.2d 536 (1981), and found the Defendant competent to stand trial. This case was scheduled for a jury trial to commence on September 8, 2008. On August 19, 2008, the Defendant pled guilty to Murder, Burglary in the First Degree, Criminal Sexual Conduct in the First Degree, and Kidnapping. On September 8 - 11, 2008, this Court commenced a non-jury sentencing proceeding as a result of the guilty plea. On September 11, 2008, the Sentencing proceeding was adjourned and continued as a result of the defense witness, Dr. Marty Loring, claiming protection under the Fifth Amendment of the United States Constitution and refusing to testify after comments made by the Solicitor which the witness construed as intimidating. The hearing was resumed on April 20, 2009 and the presentation of all legal issues and testimony were concluded on April 22, 2009.

A1

Law

S.C. Code § 16-3-20 provides, in part, that a person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. For purposes of this statute, "life imprisonment" means until death of the offender without the possibility of parole. No person sentenced to life imprisonment pursuant to this statute is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment.

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CLERK OF COURT
RICHLAND COUNTY, SC

When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court is required to conduct a separate sentencing proceeding. In such a proceeding, if a statutory aggravating circumstance is found beyond a reasonable doubt, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. In cases like the present case, where the defendant, in the guilt phase, waives his right to a trial by jury and pleads guilty, the sentencing proceeding must also be conducted without benefit of a jury, and the sentencing decision is to be made by a judge.

In the sentencing proceeding, the judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. The law requires the judge to consider mitigating and extenuating circumstances authorized or allowed by law, as well as certain enumerated statutory aggravating and mitigating circumstances which may be supported by the evidence, pursuant to S.C. Code § 16-3-20(C). The judge is required to examine the evidence and determine the existence of the statutory aggravating circumstance or circumstances. Unless at least one of

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the statutory aggravating circumstances enumerated in this section is found beyond a reasonable doubt, the death penalty must not be imposed.

Finding and consideration of aggravating circumstances

Pursuant to S.C. Code § 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory aggravating circumstances:

I find the State has proven beyond a reasonable doubt that the Defendant committed the murder for which he is charged while in the commission of the crimes of kidnapping, burglary in the first degree, and criminal sexual conduct in the first degree.

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CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

The circumstances surrounding the murder of Tiffany Souers are savage, brutal, and unconscionable. I find that the State has proven beyond a reasonable doubt that Tiffany Souers' home was broken into in the night time by the Defendant (Burglary in the First Degree, 2006-GS-39-2222), that she was held against her will (Kidnapping, 2006-GS-39-2224), that she was the victim of forcible rape (Criminal Sexual Conduct in the First Degree, 2006-GS-39-2223), and that she was subsequently choked by the Defendant until she died (Murder, 2006-GS-39-2225). Having proven the charge of murder, accompanied by three statutory aggravating circumstances, the State is entitled to seek the death penalty for the Defendant.

Finding and consideration of mitigating circumstances

Pursuant to S.C. Code § 16-3-20, I have carefully considered the evidence presented at the sentencing proceeding and make the following findings concerning the existence of statutory mitigating circumstances:

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(1) The Defendant does have a significant history of prior criminal convictions involving the use of violence against another person and is therefore unable to avail himself of this mitigating factor.

(2) The murder was committed while the Defendant was under the influence of mental or emotional disturbance. It is apparent that the Defendant has and continues to suffer from several mental and emotional disturbances.

The Defendant makes no attempt to claim he was not criminally responsible for the murder of Tiffany Souers. However, there is clear evidence that the defendant suffers from numerous and long-standing mental health disorders. The Defendant's witness, Dr. David Price was qualified as an expert in the fields of Forensic Psychology, Clinical Psychology, and Neuro-Psychology. Dr. Price testified that the Defendant had been diagnosed with three Axis I Disorders: 1) Mood Disorders, consisting of Depression, Bi-Polar, Major Depression in the recurrent form, and Major Depression with Psychosis; 2) Dissociative Identity Disorder; and 3) Sexual Paraphilia. The Defendant also suffers from the Axis II disorder of Personality Disorder with Schizophrenia. Some of the effects of these diseases on the Defendant, according to this expert's testimony, were impulsivity, irritability, aggressiveness, agitation, and poor thinking, a profound impairment of ability to function in daily life, bad decisions, flat affect, slow speech, introvert behavior, not forthcoming about himself, and an inability to engage in normal heterosexual relationships. Dr. Price also describes the Defendant as a serial rapist. The Defendant has attempted to commit suicide on seven separate occasions, including cutting his wrist on two occasions, cutting his jugular vein, starvation, cutting his antecubital vein, and swallowing two six inch strands of barbed wire. Dr. Price is a nationally recognized expert on mental health malingering and

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CLERK OF COURT
PICKENS COUNTY, SOUTH CAROLINA

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he opines that the Defendant is not a malingerer. The Defendant was sexually abused as a young child, and Dr. Price testified that the circumstance of this offence and several other of Mr. Inman's offences mimic the sexual abuse which he suffered as a child. Mr. Inman tries to minimize his mental illness and refuses to acknowledge the physical and sexual abuse he suffered at the hands of his parents. Mr. Inman's ability to conform his conduct to the requirements of the law is substantially impaired. On cross examination, Dr. Price testified that Mr. Inman has the ability to make choices to conform to the requirements of the law as evidenced by some of his conduct relating to other victims of his offenses who testified at this hearing. Again, I stress that the Defendant does not claim his disorders excused him from criminal responsibility for his actions, but may have contributed to them for purposes of sentencing only.

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CLERK OF COURT
TICKENS COUNTY
VIRGINIA

(3) There is no evidence the victim was a participant in the defendant's conduct or consented to the act.

(4) There is no evidence of the participation of an accomplice in this murder, and the defendant's participation was not relatively minor.

(5) There was no evidence presented that the defendant acted under duress or under the domination of another person.

(6) As stated above, the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was impaired at the time of the crime due to mental and emotional disturbances, but it did not rise to the level of excusing criminal responsibility.

(7) The Defendant was 35 years old at the time of the crime. His mental acuity is average.

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(8) There is no evidence the Defendant was provoked by the victim into committing the murder.

(9) As stated above, the Defendant was over the age of eighteen at the time of the crime.

(10) The Defendant showed no signs of mental retardation at the time of the crime. "Mental retardation" means significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

Finding and consideration of non-statutory mitigating circumstances

Turning to non-statutory mitigation, I have carefully considered all the evidence. The Defendant, through excellent and well prepared counsel, presented compelling mitigation evidence.

CLERK OF COURT
PASCO COUNTY, FLA.
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There is evidence in the record that the Defendant has suffered a great amount of trauma in his life. He was exposed to violence and sexual abuse at an early age. He was exposed to violence at an early age by witnessing the sexual abuse of his sister, and experiencing physical and sexual abuse from both his biological father and from his older step-brother. He was sexualized at a young age, and has had a history of deviant sexual activity. He has a substance abuse problem that has an apparent genetic component and is also exacerbated by his underlying mental disorders. The defendant's mental disorders are documented above.

The Defendant admitted his guilt to the crime early in the criminal investigation. He made numerous confessions to law enforcement beginning on the day of his arrest, June 26, 2006, in which he confessed to murdering Tiffany Souers.

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The Defendant pled guilty and has acknowledged the brutality of his conduct and also acknowledges that he cannot be rehabilitated. As Dr. Price has described Mr. Inman: he grew up in prison; he is a person with a bad genetic loading of inherited mental disorders whose formative environment did him no favors; he was described as a lost soul who will remain lost. The Court views Mr. Inman as a tortured soul, whose inner demons will never leave him.

I have considerable sympathy for Mr. Inman and the lamentable circumstances of his early life; a person with no opportunity to escape his tragic circumstances. However, while his background lends itself to an understanding of who he has become, it does not excuse his longstanding pattern of violence and his sexually predatory conduct.

As stated above, the State proved beyond a reasonable doubt the existence of more than one aggravating circumstance accompanying the commission of the murder of Tiffany Souers. This crime was horrific and was perpetrated upon one of society's most valuable citizens – a young woman, full of life, energy and vitality, love for her family, with a passion for life and for people, whose own life was marked by her good deeds and generosity to others.

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CLERK OF COURT
JURIES COUNTY
INDIANA

Jerry Buck Inman is a self-described "animal", who has acknowledged that he cannot be rehabilitated. The concept of a fair sentence includes consideration of many factors, such as the seriousness of the crime, the culpability of the offender, characteristics of the offender, need for protection of society, need for punishment and accountability. Determining the proper sentence in a case in which the death penalty is sought is especially painful and agonizing. The death penalty is the ultimate sentence which is to be imposed only in the worst cases and only after serious, deliberate and careful consideration.

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Regrettably, Jerry Buck Inman falls within a small group of deviant predators who exhibit in their conduct a callous disregard for society and the rights and safety of others. While this has been one of the hardest decisions of my life, I am firmly convinced that the murder and rape of Tiffany Souers and the characteristics of Jerry Buck Inman warrant the penalty of death.

I have carefully considered all relevant facts and circumstances, including the existence of statutory aggravating circumstances, as well as statutory and non-statutory mitigating circumstances. My verdict is not the result of prejudice, passion or any other arbitrary circumstance.

2007 APR 27 P 1:58
CLERK OF COURT
GREENVILLE COUNTY, SOUTH CAROLINA

It is therefore the judgment and sentence of this court that the Defendant Jerry Buck Inman be remanded to the South Carolina Department of Corrections, henceforth to be kept in close and safe confinement until the 27th day of July, 2009, upon which day between the hours of six o'clock p.m. and six o'clock a.m. on July 28, 2009, or upon an order of execution issued by the South Carolina Supreme Court, the Defendant Jerry Buck Inman shall suffer death by electrocution or by lethal injection in the manner provided by law.

May God have mercy on your soul.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That for Indictment 2006-GS-39-2225, Murder of Tiffany Souers, you, Jerry Buck Inman, are sentenced to death; and,
2. That for Indictment 2006-GS-39-2222, Burglary in the First Degree, you, Jerry Buck Inman, are committed to the Department of Corrections for a period of thirty years; to run consecutive to the sentence imposed above; and,
3. That for Indictment 2006-GS-39-2223, Criminal Sexual Conduct in the First Degree, you, Jerry Buck Inman, are committed to the Department of Corrections for a period of thirty years; to run consecutive to the sentence imposed above.

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4. That for Indictment 2006-GS-39-2224, Kidnapping, pursuant to S.C. Code § 16-3-910 and because you have been sentenced for Murder, this Court may not impose a sentence for the crime of kidnapping.

IT IS SO ORDERED.

Edward W. Miller
Circuit Court Judge
13th Judicial Circuit

April 22, 2009
Pickens, South Carolina

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2009 APR 22 P 4:58

ATTACHMENT NO. 2

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jerry Buck Inman, Appellant.

Appeal From Pickens County
Edward W. Miller, Circuit Court Judge

Opinion No. 27081
Heard September 21, 2011 – Filed December 28, 2011

AFFIRMED

Chief Appellate Defender Robert M. Dudek, and Senior Appellate Defender Joseph L. Savitz, III, of Columbia, for Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Donald J. Zelenka, of Columbia, and Solicitor William Walter Wilkins, III, of Greenville, for Respondent.

JUSTICE BEATTY: In this capital case, Jerry Buck Inman pleaded guilty to the murder, first-degree burglary, first-degree criminal sexual conduct, and kidnapping of a Clemson University student. The judge

sentenced Inman to death for murder and two consecutive thirty-year sentences for first-degree burglary and first-degree criminal sexual conduct.[1]

On appeal, Inman challenges the judge's acceptance of his guilty plea as he contends it was conditional in that defense counsel maintained Inman was entitled to be sentenced by a jury despite his plea of guilty.[2] Additionally, Inman asserts the judge erred in addressing his allegations of prosecutorial misconduct arising out of the Solicitor's treatment of the defense's expert witness during the sentencing proceedings. Specifically, Inman claims the judge erred in the following respects: (1) refusing to recuse the Solicitor's Office from any further involvement in the case; (2) declining defense counsel's request to question the Solicitor on the issue of prosecutorial misconduct; and (3) declining to grant a mistrial despite a finding of prosecutorial misconduct. We affirm Inman's guilty plea and sentences.

I. Factual/Procedural Background

A.

On the evening of May 25, 2006, Tiffany Marie Souers (the Victim), a rising junior at Clemson University, was alone in her off-campus apartment as her roommates were gone for the day. When one of her roommates returned to the apartment during the afternoon of May 26, 2006, she discovered the Victim's partially-clad body on the bedroom floor. An autopsy revealed the Victim had been sexually assaulted and died as the result of asphyxia due to ligature strangulation with a bathing suit top.

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[1] The judge did not impose a sentence for the kidnapping charge as Inman had been sentenced for the related murder. S.C. Code Ann. § 16-3-910 (2003).

[2] See S.C. Code Ann. § 16-3-20(B) (2003) (outlining bifurcated death penalty proceedings and stating "[i]f trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge").

Surveillance photographs taken during the early morning hours of May 26, 2006 captured a male, whose face was covered by a bandana, attempting to use the Victim's ATM card at two different bank machines in Clemson.

On June 5, 2006, law enforcement was able to identify Inman as the Victim's perpetrator based on DNA evidence obtained from the crime scene and processed through the National DNA Database, which had Inman's DNA evidence on file due to his prior out-of-state convictions for sexual offenses in 1987 and 1988. Using this information, law enforcement conducted a well-publicized nationwide search for Inman. On June 6, 2006 at approximately 11:45 p.m., law enforcement apprehended Inman in Dandridge, Tennessee.

Shortly after his arrest, Inman orally confessed to the crimes involving the Victim. Within the course of the next three hours, Inman gave separate written statements to an agent with the Tennessee Bureau of Investigation and to agents with the South Carolina Law Enforcement Division (SLED). In these two statements, Inman again confessed to the charged crimes and recounted in detail the events underlying these crimes. When asked to sign these statements, Inman declined and stated "we still have to go to court."

Ultimately, Inman was extradited to South Carolina and detained in the Pickens County Detention Center where a DNA sample was taken from him and again conclusively matched to the DNA evidence recovered from the Victim and her apartment. Subsequently, a Pickens County grand jury indicted Inman for murder, kidnapping, first-degree criminal sexual conduct, and first-degree burglary. The Thirteenth Circuit Solicitor's Office timely served Inman with its intent to seek the death penalty.[3]

After a circuit court judge determined that Inman was competent to stand trial,[4] defense counsel filed a motion to determine the mode of trial. In the motion, counsel informed the judge of Inman's intent to enter a guilty plea to the crimes and demand a jury trial for sentencing. After a hearing, the

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[3] S.C. Code Ann. § 16-3-26(A) (2003).

[4] S.C. Code Ann. § 44-23-410 (Supp. 2010).

judge summarily denied the motion on the ground he was "constrained by the existing case law in South Carolina and the statutes."

B.

On August 19, 2008, Inman pleaded guilty to murder, first-degree criminal sexual conduct, first-degree burglary, and kidnapping. During the plea colloquy, the judge informed Inman of the charges, the maximum possible sentences, and the constitutional rights that he was waiving by pleading guilty, including the right to a jury trial. Although Inman indicated he understood these rights, defense counsel interjected that Inman should be entitled to enter a guilty plea and then proceed to a jury trial for sentencing. In response, the judge informed Inman that he could not enter a plea "conditioned" on the preservation of the jury trial issue. Inman stated that he understood and still wished to plead guilty. Inman then admitted his guilt and expressed satisfaction with his defense counsel. Subsequently, Solicitor Robert M. Ariail (the Solicitor) presented a factual basis for the charged offenses that consisted of a stipulated summary of the facts.

When the judge resumed questioning Inman, he again inquired whether Inman understood that by pleading guilty he was waiving his right to have a jury sentence him for the murder conviction. Inman responded in the affirmative. Defense counsel, however, reiterated that Inman should not have to waive the right to have a jury determine his sentence. He emphasized that he "just want[ed] to make sure [the issue] is preserved."

In response, the judge again explained to Inman that he could not accept a "conditional guilty plea." The judge also instructed that he could not determine whether the jury sentencing issue was preserved for appellate review as it was a decision for the South Carolina Supreme Court. Inman indicated that he understood the judge's explanation and expressed his desire to continue the plea proceeding. The judge accepted Inman's plea and instructed that the sentencing proceeding would be held on September 8, 2008.

The Solicitor then expressed his concern that defense counsel's statements about the preservation of an appellate issue effectively made the

plea conditional. Defense counsel disputed the conditional nature of the plea, but assured Inman that the "issue is preserved and will survive the guilty plea."

Based on this exchange, the judge debated whether to accept Inman's plea, but ultimately asked Inman whether his plea was "dependent" on the jury sentencing issue. After conferring with defense counsel, Inman acknowledged that his plea was not based on whether he would succeed on an issue raised on appeal. Inman stated, "I just want to enter the plea and get it over with, just go on from here with the sentencing phase."

At the conclusion of the plea colloquy, the judge accepted Inman's plea and found that it was freely, knowingly, voluntarily, and intelligently made.

C.

On September 8, 2008, the judge commenced the non-jury sentencing proceeding. In presenting its case for statutory aggravating circumstances, the State called two of the law enforcement officers to whom Inman confessed to the charged crimes. Additionally, Dr. Eric Dean Christensen, the forensic pathologist who conducted the Victim's autopsy, certified the Victim's death was caused by "asphyxia due to ligature strangulation." He further testified that there was "extensive bruising" on the Victim's body, which he believed was consistent with a physical struggle and the Victim being restrained. He also found physical evidence that suggested "traumatic sexual relations."

In terms of Inman's criminal history, the State offered extensive evidence of Inman's prior convictions in Florida and North Carolina as well as evidence of two unadjudicated incidents that occurred after Inman was released from the Florida Department of Corrections on September 1, 2005.

Subsequently, defense counsel initiated the case for mitigation. As the defense's first expert witness, counsel called Dr. David Richard Price, a forensic psychologist/neuropsychologist and clinical psychologist, who interviewed Inman and reviewed records regarding Inman's family, his prior crimes, his terms of incarceration, and his mental health records.

Based on these records, Dr. Price concluded that Inman suffered from the following: major depressive disorder, recurrent type; major depressive disorder with psychotic features; bipolar disorder; psychorhythmic disorder; schizoid personality disorder; dissociative identity disorder; and sexual paraphilia. In making these diagnoses, Dr. Price took into account Inman's extensive psychiatric history and his childhood, which included "pretty significant" records indicating that Inman had been sexually abused, physically abused, grew up in a "very unstable environment," suffered with a mother who was schizophrenic and an alcoholic father, began using drugs at an early age, and was incarcerated at age seventeen. Dr. Price also testified that Inman had attempted suicide on seven occasions, six of which occurred while he was incarcerated. He further stated that Inman believed the death penalty was the appropriate punishment for the murder of the Victim. Ultimately, Dr. Price opined that Inman committed the crimes against the Victim while he was under the influence of a mental and emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.

Defense counsel next called Dr. Marti Loring, a Georgia-licensed clinical social worker and board certified expert in traumatic stress who was employed at the Center for Mental Health and Human Development in Atlanta, Georgia. The defense offered Dr. Loring "as an expert in the field of trauma, abuse, forensic and therapeutic interviewing, and as a social historian in capital sentencing cases."

During *voir dire*, the Solicitor inquired whether Dr. Loring had "performed services under [her] licensed clinical social worker status" and whether she was licensed in South Carolina. Upon receiving Dr. Loring's response that she was not licensed in South Carolina, the Solicitor directed the judge's attention to section 40-63-200 of the South Carolina Code,[5] which deals with the unauthorized practice of social work within the State of South

[5] S.C. Code Ann. § 40-63-200(A) (2011) ("A person who practices or offers to practice as a social worker in this State in violation of this chapter or a regulation promulgated under this chapter . . . is guilty of a misdemeanor and, upon conviction, must be fined not more than one thousand dollars or imprisoned for not more than one year, or both.").

Carolina. The Solicitor also pointed out that the statute "carries both civil and criminal penalties for violation." Based on this statute, the Solicitor argued that Dr. Loring was "not qualified as an expert in this state to testify or to render those services until she gets licensed."

In response, defense counsel argued that Dr. Loring's Georgia license was sufficient to qualify her as an expert witness in Inman's case. Counsel objected to the Solicitor's questioning and characterized it as "an inappropriate attempt to intimidate the witness with the authority that this Solicitor has in this state to indict." Counsel added that the Solicitor had put Dr. Loring "in a position where she may need to assert her Fifth Amendment privilege not to incriminate herself by answering the questions that I would otherwise have propounded to her."

The judge overruled the Solicitor's objection as he believed the intent of the statute was "to prevent persons from opening offices to conduct treatment in this state," which was distinguishable from Dr. Loring being retained as an expert for the defense.

After the judge determined that Dr. Loring was qualified to testify, defense counsel argued that the Solicitor's attempt to intimidate Dr. Loring constituted a violation of Inman's due process rights to present his defense. The Solicitor disputed this allegation and stated he could grant Dr. Loring immunity from prosecution in Inman's case. However, he clarified that he was not authorized to grant immunity for the other South Carolina cases in which she had testified.

Dr. Loring then expressed her concern about testifying and was granted an opportunity to consult with Bill Godfrey, an attorney who was present in the courtroom. When court reconvened, Dr. Loring stated she felt "threatened as a witness" and, as a result, invoked her Fifth Amendment right against self-incrimination upon the advice of counsel. Despite assurances by the judge that she would be granted immunity in Inman's case and prior cases, Dr. Loring maintained that she would not testify as she believed she would be "in violation of a criminal statute [that] would affect [her] professional reputation in other cases and in other jurisdictions."

The judge then held in abeyance any motions regarding Dr. Loring's testimony and permitted defense counsel to call its remaining four witnesses in mitigation.

The next day, defense counsel moved for a mistrial based on the Solicitor's *voir dire* of Dr. Loring. Specifically, counsel characterized the Solicitor's actions as prosecutorial misconduct. As additional support for this motion, defense counsel referenced an earlier capital case where the Solicitor had confronted another defense witness with a potential violation of section 40-63-200 of the South Carolina Code. Counsel claimed that in both of these instances the Solicitor had violated the South Carolina Rules of Professional Conduct[6] and section 16-9-340[7], which makes it a crime to intimidate a witness "by threat or force" or to "attempt to obstruct or impede the administration of justice in any court." Because counsel did not believe the actions of the Solicitor could be rectified, defense counsel moved for a mistrial as well as the recusal of the Solicitor's office in the case. In addition, defense counsel requested that the judge implement a sentence of life without parole as he claimed the Solicitor's conduct was "intentional."

In response, the Solicitor contended that he had neither threatened Dr. Loring nor moved to indict her "even though, theoretically, she would have violated the statute from a prior case."

At the conclusion of these arguments, counsel for Dr. Loring informed the court that Dr. Loring would not testify and intended to invoke her Fifth Amendment privilege against self-incrimination.

The judge did not rule on the mistrial motion, but instead granted a continuance in order for defense counsel to retain another social historian. The judge, however, added that he "wouldn't rule that Dr. Loring [was] completely out of the case."

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[6] South Carolina Rules of Professional Conduct, Rule 407, SCACR.

[7] S.C. Code Ann. § 16-9-340 (2003).

Seven months later, the judge held a hearing on April 14, 2009 to consider whether Dr. Loring should be released as a witness given the defense did not intend to call her and had retained another social historian. In his motion, counsel for Dr. Loring objected to the State's out-of-state witness subpoena of Dr. Loring as a necessary and material witness. At the conclusion of the hearing, the judge declined to withdraw his certification of the subpoena[8] and stated that the case would proceed the following week.

On April 15, 2009, a Superior Court in Atlanta, Georgia signed an order directing Dr. Loring to attend a hearing the next day at 3:00 p.m. to determine her material witness status in South Carolina. Because Dr. Loring was at work when the order was left at her residence on the morning of April 16, 2009, she did not appear at the hearing. Later that night, officers attempted to serve a warrant for her arrest. After Dr. Loring's counsel contacted the South Carolina plea judge regarding the Georgia matter, the judge intervened and persuaded the District Attorney's Office in Atlanta to "table" the warrant based on the assurance that Dr. Loring would appear at the Pickens County Courthouse on April 20, 2009.

On April 20-22, 2009, the judge reconvened the sentencing proceedings. At the beginning of the hearing, Dr. Loring's counsel recounted the events in Georgia and argued that this constituted additional evidence of the Solicitor's attempt to intimidate Dr. Loring. As a result, he moved to have Dr. Loring immediately released as a witness in Inman's case.

Defense counsel concurred in these arguments and stated that the "sequence of events in Georgia would go directly to the motion for prosecutorial misconduct and the mistrial that we requested orally on September 11, 2008."

In response, the Solicitor denied any involvement in the Georgia events and claimed it was "every bit the fault of Dr. Loring, under the Georgia system." To counter this statement, defense counsel called Dr. Loring as a witness to testify for the limited purpose of documenting what transpired in

[8] On April 1, 2009, the judge granted the Solicitor's petition to subpoena Dr. Loring as a material witness.

Georgia. Although Dr. Loring came prepared to testify as a mitigation expert, she could not "assure [the court] a hundred percent that going through all this would not have an impact on [her]."

Following Dr. Loring's testimony, defense counsel renewed its motion for the "recusal of the Thirteenth Circuit Solicitor's Office." Counsel contended the Solicitor's actions were intentional in that he knew the elimination of Dr. Loring's testimony would significantly impact Inman's case. In support of this contention, defense counsel offered testimonial and documentary evidence that the Solicitor's office had been involved in a similar incident wherein the Solicitor questioned a defense expert, during the sentencing portion of a capital case, regarding a potential violation of the South Carolina psychologist licensing statutes. In that case, however, the defense withdrew the motion apparently in exchange for the State withdrawing its notice to seek the death penalty.[9]

Additionally, defense counsel offered evidence of two other capital cases, one in 2006[10] and another in 2007[11], where Dr. Loring testified as an

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[9] Because the defense withdrew its motion, prosecutorial misconduct based on witness intimidation was not an issue on appeal. State v. Laney, 367 S.C. 639, 627 S.E.2d 726 (2006). However, the pertinent portions of the Laney trial transcript and defense motions reveal the Solicitor employed an identical tactic to that used against Dr. Loring in questioning defense counsel's expert witness, Dr. Everington, with respect to the lack of a South Carolina psychologist license.

[10] In State v. David Edens and Jennifer Holloway, a 2006 capital trial, Dr. Loring testified as a social historian without any objection from the Solicitor as to her qualifications or lack of a South Carolina license to practice social work. During the jury deliberations, the jurors requested to listen to Dr. Loring's trial testimony. Because the jury could not reach a unanimous verdict as to the death penalty, the defendants were sentenced to life without the possibility of parole. Weeks after the verdict, the Solicitor requested to meet with the jurors over dinner to discuss the verdict. One juror, who attended the dinner, testified the Solicitor appeared upset with the LWOP

expert witness in the defense's case for mitigation. The Solicitor did not challenge Dr. Loring's qualifications in either of these cases.

Defense counsel then sought to recuse the Solicitor's office as advocates and call certain members as witnesses in order to establish the defense's claim of intentional prosecutorial misconduct.

After the judge denied this motion, defense counsel called attorney Desa Ballard as an expert in the field of legal ethics and professional responsibility in South Carolina. Based on her assessment of the Solicitor's conduct, Ballard opined that the Solicitor had violated "a number of rules of professional responsibility in connection with his examination of Dr. Loring, which occurred in September of 2008." In view of the prior allegation of prosecutorial misconduct, Ballard believed the Solicitor was clearly aware that questioning Dr. Loring regarding the potential licensing violation was "improper" and constituted intimidation of a witness.

Defense counsel then declined to call Dr. Loring as witness. Instead, counsel renewed its motion for a mistrial based on prosecutorial misconduct. Counsel reiterated that he wished to call the Solicitor and members of his office as witnesses because he believed the testimony was relevant to the motion. In terms of relief, counsel sought a mistrial and, in turn, the imposition of a life without parole sentence as the Solicitor's deliberate misconduct precipitated the mistrial motion and, thus, implicated double jeopardy.

The judge denied each of defense counsel's motions. In so ruling, the judge initially rejected counsel's argument regarding double jeopardy as the judge found the Solicitor had not "deliberately goaded" the defense into requesting a mistrial. As to the merits of the mistrial motion, the judge concluded the Solicitor's questioning of Dr. Loring was inappropriate and constituted prosecutorial misconduct. However, the judge declined to grant a

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verdict and wanted an explanation as to why the jurors had not voted for a death sentence.

[11] State v. Motts, 391 S.C. 635, 707 S.E.2d 804 (2011).

mistrial as he found the evidence did not support a finding of "deliberate" prosecutorial misconduct. Additionally, the judge concluded that Inman had not been prejudiced as the misconduct occurred during a bench trial as opposed to a jury trial and Dr. Loring had voluntarily appeared at the hearing and was willing to testify.

Immediately thereafter, defense counsel moved for a continuance in order to prepare the mitigation evidence as he had not been in contact with Dr. Loring since the September 2008 hearing and his recently-retained social historian had not completed her research and was not prepared to testify. The judge implicitly denied this motion.

Over defense counsel's objections, the judge called and questioned Dr. Loring as a "court witness." Dr. Loring testified she compiled a social history about the life and family of Inman by interviewing Inman and members of his family as well as reviewing Inman's medical history, school records, and prison records. Relying on these records and interviews, Dr. Loring chronicled in detail the physical and sexual abuse that Inman endured during his childhood. She further testified as to Inman's use of drugs at an early age, his diagnosed mental illness, his suicide attempts, and his criminal history.

Throughout the questioning, defense counsel repeatedly sought to limit the testimony of Dr. Loring as counsel believed her opinions implicated attorney-work product as they had been previously discussed amongst the defense team.

After hearing closing arguments and Inman's personal statement, the judge sentenced Inman to death for murder and imposed two consecutive thirty-year sentences for first-degree burglary and first-degree criminal sexual conduct. In reaching this decision, the judge explained in both his oral and written order that the State had proven beyond a reasonable doubt three statutory aggravating circumstances to warrant the death penalty.[12] Specifically, the judge found that Inman murdered the Victim while in the

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[12] S.C. Code Ann. § 16-3-20(C)(a)(1)(a), (b), (d) (2003 & Supp. 2010) (listing statutory aggravating circumstances that warrant a sentence of death).

commission of kidnapping, first-degree burglary, and first-degree criminal sexual conduct.

In terms of mitigating factors, the judge found Inman committed the murder while under the influence of mental or emotional disturbances[13] as there was evidence that Inman suffered from long-term mental health disorders. Despite these mental health disorders, the judge emphasized that these disorders did not excuse Inman from criminal responsibility for his actions involving the Victim.

Following the denial of his motion to reconsider and for a new trial, Inman appealed his plea of guilty and his sentence of death.

II. Discussion

A. Validity of Guilty Plea

Inman asserts his guilty plea to murder should be vacated on the ground it constituted an invalid conditional guilty plea. In support of this assertion, Inman directs this Court's attention to the portion of the plea colloquy where the judge expressed his opinion that the preservation of the jury sentencing issue was a decision for the Supreme Court. Inman characterizes the judge's statements as erroneous "speculations about appealability." Based on these statements and defense counsel's insistence that the issue was preserved for appeal, Inman claims the judge had a duty to reject the plea as it was conditional.

"In South Carolina, guilty pleas must be unconditional." State v. Downs, 361 S.C. 141, 145, 604 S.E.2d 377, 379 (2004). "[I]f an accused attempts to attach any condition or qualification thereto, the trial court should direct a plea of not guilty." State v. Truesdale, 278 S.C. 368, 370, 296 S.E.2d 528, 529 (1982). "If the trial court accepts a conditional guilty plea, then the plea will be vacated on appeal." Downs, 361 S.C. at 145, 604 S.E.2d at 379. "The basis for this rule is, of course, the settled doctrine that a guilty plea

[13] Id. § 16-3-20(C)(b)(2), (6) (listing mitigating circumstances to be considered in capital sentencing proceedings).

constitutes *waiver* of all prior claims of constitutional rights or deprivations thereof." Truesdale, 278 S.C. at 370, 296 S.E.2d at 529.

Turning to the facts of the instant case, we find that Inman's guilty plea was unconditional. Significantly, Inman never attempted to reserve the right to challenge or deny the merits of his guilt. Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases,[14] Inman was permitted to appeal this secondary sentencing issue; however, any decision as to this issue did not affect the entry or validity of his plea. Cf. Downs, 361 S.C. at 145-46, 604 S.E.2d at 379-80 (concluding appellant's capital guilty plea was unconditional where he never attempted to reserve the right to later deny his guilt, but instead sought to reserve the right to present evidence that he committed the crime while mentally ill, an issue that involved post-sentencing treatment).

Furthermore, even if Inman preserved his challenge to section 16-3-20(B), he specifically abandoned this issue on appeal as he correctly recognizes that this issue has been decided against his position. See State v. Allen, 386 S.C. 93, 687 S.E.2d 21 (2009), cert. denied, 130 S. Ct. 3329 (2010) (noting, in appeal of guilty plea and capital sentence, South Carolina precedent finding that section 16-3-20 does not violate the Sixth Amendment to the United States Constitution and concluding that it also did not violate the Eighth and Fourteenth Amendments; noting that the statute requires the sentencing judge to consider any mitigating circumstances allowed by law and that a defendant is not precluded from offering evidence of his remorse and acceptance of responsibility); State v. Crisp, 362 S.C. 412, 608 S.E.2d 429 (2005) (adhering to Downs and rejecting claims that section 16-3-20(B) was unconstitutional); State v. Wood, 362 S.C. 135, 607 S.E.2d 57 (2004) (citing Downs and concluding section 16-3-20(B) was constitutional); Downs, 361 S.C. at 146, 604 S.E.2d at 380 (discussing constitutionality of

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[14] See S.C. Code Ann. § 16-3-25(A) (2003) ("Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina.").

section 16-3-20(B) and finding capital defendant who pleaded guilty waived his right to jury trial on both guilt and sentencing).

Finally, a review of the plea colloquy reveals Inman entered his plea knowingly and voluntarily as he repeatedly acknowledged that he understood the charges against him, the consequences of his plea, and the rights he was waiving by pleading guilty, including the right to have a jury determine his guilt and sentence. Accordingly, we conclude Inman's plea was valid. See Hill v. Lockhart, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.'" (quoting North Carolina v. Alford, 400 U.S. 25, 31 (1970)); Roddy v. State, 339 S.C. 29, 33, 528 S.E.2d 418, 421 (2000) ("To find a guilty plea is voluntarily and knowingly entered into, the record must establish the defendant had a full understanding of the consequences of his plea and the charges against him.").

B. Sentencing Proceedings

Having found that Inman's guilty plea was valid, we must next assess Inman's issues arising out of the sentencing proceedings.

1. Recusal of Solicitor's Office/Questioning Solicitor as a Defense Witness

Inman claims the judge abused his discretion by declining to recuse the Solicitor's office as advocates[15] and refusing to allow defense counsel to question the Solicitor and members of his staff on the claim of intentional prosecutorial misconduct.

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[15] As we interpret Inman's trial and appellate arguments, we believe Inman is challenging the judge's failure to recuse the Solicitor's office in two contexts: (1) as advocates so that defense counsel could question the Solicitor and members of his staff regarding the claim of prosecutorial misconduct, and (2) as to the entire case due to the finding of prosecutorial misconduct. Accordingly, in the interest of logical progression, we have addressed these two claims separately.

"[A] criminal defendant has a right to call the prosecuting attorney as a witness, subject to the trial court's usual discretion to exclude witnesses or evidence." State v. Quattlebaum, 338 S.C. 441, 453, 527 S.E.2d 105, 111 (2000) (citing State v. Lee, 203 S.C. 536, 28 S.E.2d 402 (1943)). In Quattlebaum, this Court emphasized that "litigants, and especially defendants in criminal cases, should not be hampered in their choice of those by whom they choose to prove their cases." Id. However, a defendant's right to call a prosecuting attorney as a witness is not without limitation as this Court has stated:

> Although a prosecuting attorney is competent to testify, his testifying is not approved by the Courts except where it is made necessary by the circumstances of the case, and, if he knows before the trial that he will be a necessary witness, he should withdraw and have other counsel prosecute the case. The propriety of allowing the prosecutor to testify is a matter largely within the trial Court's discretion.

Lee, 203 S.C. at 540, 28 S.E.2d at 403 (emphasis added). Other jurisdictions have agreed with this Court's limitation on a prosecutor as a defense witness and have further clarified that the testimony "must be relevant and material to the theory of the defense . . . [and] it must not be privileged, repetitious, or cumulative." Johnson v. State, 326 A.2d 38, 45 (Md. Ct. Spec. App. 1974) (citing State v. Lee, 203 S.C. 536, 28 S.E.2d 402 (1943)), aff'd, 339 A.2d 289 (Md. 1975).

It is evident that this Court and courts from other jurisdictions disfavor defense counsel calling a prosecuting attorney to testify in a case in which he is participating as an advocate. See Bennett v. Commonwealth, 374 S.E.2d 303, 313 (Va. 1988) ("[I]t is not desirable for the Commonwealth's Attorney to testify as a witness on a material point in a case. The circumstances are rare indeed where any lawyer may properly testify in a case in which he is participating as an advocate."); see also Erwin S. Barbre, Annotation, Prosecuting Attorney as A Witness in Criminal Case, 54 A.L.R.3d 100 (1973 & Supp. 2011) (analyzing cases where the propriety of a prosecuting attorney's testifying in a criminal case on behalf of the prosecution or on behalf of the defendant was at issue; recognizing that such a decision is

dependent upon the facts of the case, is discretionary, and generally does not require the prosecutor to withdraw or be recused from the case when called on behalf of the defendant).

However, even if a prosecutor is called as a witness by the defense, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting office in its entirety. In fact, "[t]here is no inherent right to disqualification when a member of the state attorney's office is called as a witness in a case prosecuted by a state attorney in the same office, unless actual prejudice can be shown." 81 Am. Jur. 2d Witnesses § 229 (2004 & Supp. 2011); People v. Superior Court of San Luis Obispo, 148 Cal. Rptr. 704, 710 (Cal. Ct. App. 5th Dist. 1978) ("The general rule is that a district attorney's office should not be recused from a case merely because one or more of its attorneys will be called as witnesses for the defense.").

Applying the foregoing to the facts of the instant case, we find the judge did not abuse his discretion in refusing to recuse the Solicitor's office as advocates and declining defense counsel's request to question the Solicitor.

Initially, we note that the judge's determination of prosecutorial misconduct did not necessitate the recusal of the entire Solicitor's office as this allegation primarily involved the Solicitor. See State v. Doran, 731 P.2d 1344 (N.M. Ct. App. 1986) (finding no merit to defendant's contention that entire staff of district attorney's office should have been disqualified where prosecutor testified at pretrial suppression hearing that was conducted by another assistant district attorney).

Furthermore, defense counsel's primary reason for calling the Solicitor as a witness was to establish that he intentionally committed misconduct. Because a determination of prosecutorial misconduct is not necessarily dependent upon the intent of the prosecutor, such testimony was neither relevant nor material to the defense's claim. See People v. Hill, 952 P.2d 673, 683-84 (Cal. 1998) (discussing concept of prosecutorial misconduct and stating "injury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally"; recognizing that the term "prosecutorial misconduct" is a misnomer to the extent it "suggests a prosecutor must act with a culpable state of mind"); Diggs v. State, 531

N.E.2d 461, 464 (Ind. 1988) ("A prosecutor's warning of criminal charges during a personal interview with a witness improperly denies the defendant the use of that witness's testimony regardless of the prosecutor's good intentions."). We emphasize that a determination of a prosecutor's intent is applicable where the prosecutor intentionally goads the defense into moving for a mistrial[16] or the prosecutor's actions implicate the attorney-client relationship.[17] Neither of these situations is present in the instant case.

Finally, any testimony from the Solicitor or members of his staff would have been cumulative as defense counsel submitted significant testimonial and documentary evidence regarding the Solicitor's use of this tactic in prior capital cases. Specifically, defense counsel cited the Laney case and offered evidence in the form of a trial transcript and testimony from the Public

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[16] See State v. Parker, 391 S.C. 606, 612, 707 S.E.2d 799, 802 (2011) (stating that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion" (quoting Oregon v. Kennedy, 456 U.S. 667, 676 (1982))).

[17] Citing Quattlebaum, Inman claims that "deliberate prosecutorial misconduct raises an irrebuttable presumption of prejudice" and, thus, the determination of "intent" is necessary to establish prosecutorial misconduct. Quattlebaum, 338 S.C. at 448, 527 S.E.2d at 109. We clarify that this statement in Quattlebaum is limited to a situation where the prosecutorial misconduct implicates a criminal defendant's attorney-client relationship and does not apply to all cases of prosecutorial misconduct as we held in Williams that prosecutorial misconduct involving witness intimidation required a defendant to demonstrate "both substantial interference and prejudice." State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1999). Recently, we implicitly recognized the limited nature of our holding in Quattlebaum. See State v. Morris, 376 S.C. 189, 200, 656 S.E.2d 359, 365 (2008) (finding the "irrebuttable presumption of prejudice" found in Quattlebaum was inapplicable where Appellant had not shown prosecutorial misconduct and had not demonstrated his prosecution was unconstitutional, improper, or that the government pursued a civil action or investigation solely to obtain evidence for a criminal prosecution).

Defender that established the Solicitor employed a line of questioning as used against Dr. Loring to a defense expert regarding a potential violation of the South Carolina psychologist licensing statutes. Defense counsel also offered evidence that the Solicitor, in two capital trials that preceded Inman's case, did not challenge Dr. Loring's lack of a South Carolina license to practice social work. Based on this evidence, defense counsel was able to support its theory that the Solicitor knew the line of questioning was objectionable and only employed it in Inman's case after he realized that jurors in the Edens/Holloway case relied heavily on Dr. Loring's testimony in sentencing the defendants to LWOP rather than death.

In view of the foregoing, we find the judge did not abuse his discretion in declining to recuse the Solicitor's office and refusing to permit defense counsel to call the Solicitor and members of his staff as witnesses. See Lee, 203 S.C. at 542, 28 S.E.2d at 404 (concluding trial judge did not err in refusing to allow defense counsel to call solicitor as witness where testimony would have been merely cumulative); see also Cooper v. State, 847 S.W.2d 521 (Tenn. Crim. App. 1992) (holding trial court did not err in refusing to allow defendant to call district attorney general and assistant attorney general as witnesses on issue of State's abuse of discretion in pursuing death penalty where defendant did not allege facts to show how his constitutional rights were violated); Bennett v. Commonwealth, 374 S.E.2d 303 (Va. 1988) (concluding trial court did not abuse its discretion in denying defendant's request to question Commonwealth's attorney on witness stand concerning reasons for which continuance had been granted and concerning possible violations of court order).

2. Witness Intimidation

Having found the judge did not abuse his discretion in refusing to recuse the Solicitor's office as advocates and declining to permit defense counsel to question the Solicitor and members of his staff, we must determine whether the Solicitor's *voir dire* of Dr. Loring constituted witness intimidation and, in turn, prosecutorial misconduct.

Inman asserts the judge erred in refusing to grant a mistrial and recuse the Solicitor's office from any further involvement in the case despite a

finding of prosecutorial misconduct arising out of the Solicitor's intimidation of Dr. Loring using "baseless criminal prosecution" and the subpoena of Dr. Loring as a State's witness.

In contrast, the State claims the judge properly denied the motion for a mistrial and recusal of the Solicitor's office. In support of this claim, the State argues that there was no misconduct as the *voir dire* was appropriate based on the applicable South Carolina licensing statute. However, even if the Solicitor committed misconduct, the State contends it was not prejudicial to Inman as the Solicitor granted Dr. Loring immunity from prosecution and she voluntarily testified during the sentencing hearing.

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19 (1967). "This right is a fundamental element of due process of law." Id.

As this Court has recognized, the constitutional right of a defendant to call witnesses requires that they be called without intimidation from the State. State v. Williams, 326 S.C. 130, 485 S.E.2d 99 (1997). In Williams, this Court explained:

> "Improper intimidation of a witness may violate a defendant's due process right to present his defense witnesses freely if the intimidation amounts to 'substantial government interference with a defense witness' free and unhampered choice to testify.'" . . . Where substantial interference is found, the next issue is whether the error can be deemed harmless. United States v. Saunders, supra. The rule in the Fourth Circuit appears to be that governmental intimidation can be deemed harmless error where the witness nonetheless testifies. Compare United States v. Teague, 737 F.2d 378 (4th Cir. 1984) (harmless where defendant was not denied either all or the helpful part of the witness' testimony as a result of the attempted intimidation) with United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982). Under this

> rule, the intimidation in this case could not be deemed harmless. We decline, however, to adopt such an automatic reversal rule and hold that in order to obtain relief, a defendant must demonstrate both substantial interference and prejudice.

Id. at 135, 485 S.E.2d at 102. However, even if the defendant demonstrates substantial interference and prejudice, a new trial is not always the requisite remedy. Instead, "[t]he remedy to be afforded a defendant in this situation is determined by the facts and circumstances of each case, depending on the prejudice suffered by the defendant." Id. at 136, 485 S.E.2d at 103.

In analyzing a claim of prosecutorial misconduct based on alleged witness intimidation, this Court has acknowledged the prosecutor's "fundamental power" to "bring charges against a person the prosecutor believes has committed a crime." State v. Needs, 333 S.C. 134, 145, 508 S.E.2d 857, 862 (1998). This power is, nevertheless, subject to "constitutional constraints." Id. For example, a prosecutor may not "lob baseless threats or charges at a potential defense witness in an effort to prevent the witness from testifying." Id. at 146, 508 S.E.2d at 863; see Lisa A. Wenger, Annotation, Admonitions Against Perjury or Threats to Prosecute Potential Defense Witness, Inducing Refusal to Testify, As Prejudicial Error, 88 A.L.R.4th 388 (1991 & Supp. 2011) (analyzing state and federal cases where prosecutor informs defense witness that that witness could face perjury charges or other prosecution if the witness testified).

We find the Solicitor's conduct toward Dr. Loring unequivocally constituted witness intimidation. Even if the Solicitor was legitimately concerned about Dr. Loring's qualifications as an expert witness, he could have filed a motion to disqualify her, which could have been addressed in a pre-trial hearing without the presence of Dr. Loring. By challenging Dr. Loring as soon as she took the stand, the Solicitor's method of questioning can only be viewed as an intimidation tactic. The Solicitor's claimed grant of immunity to Dr. Loring did not negate the atmosphere of intimidation as Dr. Loring repeatedly testified that she felt threatened.

Secondly, based on the testimonial and documentary evidence the defense presented on this issue, it is clear the Solicitor knew this line of

questioning was objectionable as it had formed the basis of a previous allegation of prosecutorial misconduct in the Laney case.

Furthermore, at the time of the September 2008 sentencing hearing, the Solicitor was on notice from this Court that an out-of-state expert witness's failure to comply with South Carolina licensing requirements did not preclude the witness from testifying. In fact, the Court had specifically held on February 25, 2008 that the lack of a South Carolina professional license was merely a factor for the judge to consider as to the witness's qualifications as an expert. Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 658 S.E.2d 80 (2008) (discussing Baggerly and finding trial judge erred in disqualifying expert witness on the basis that witness failed to comply with South Carolina's home inspection licensing requirements, but concluding the error was harmless); see Baggerly v. CSX Transp., Inc., 370 S.C. 362, 635 S.E.2d 97 (2006) (recognizing conflict between Rule 702, SCRE's qualification for experts and a statute that defined the practice of engineering to include the offering of expert technical testimony; holding non-compliance with licensing requirements or with statutory law in specialized areas does not require trial judge to automatically refuse to qualify a witness as an expert); see also RE: Act No. 385 of 2006—relating to defining the "practice of medicine", S.C. Sup. Ct. Order dated Aug. 24, 2006 (staying the application of amendment to section 40-47-20(36) of the South Carolina Code and, in turn, permitting out-of-state physicians to offer testimony without seeking a South Carolina medical license before offering the testimony). Despite this Court's clear directive, the Solicitor combatively challenged Dr. Loring's lack of a South Carolina social worker license.

Finally, the Solicitor's decision to subpoena Dr. Loring as a witness, after the defense severed its ties with her, provides additional evidence of witness intimidation. Although the judge granted the State's petition to certify Dr. Loring as a material witness, the method of procuring her appearance at the sentencing hearing supports Inman's claim of witness intimidation. We believe it was disingenuous for the Solicitor to assert that there was no wrongdoing on the part of the State regarding the events that took place in Georgia. Based on Dr. Loring's testimony, it was clear that she was not attempting to abscond from Georgia and purposefully decline to appear at the sentencing hearing. Thus, we find the Solicitor's initiation of

the events in Georgia went beyond a necessary course of action. See Berger v. United States, 295 U.S. 78, 88 (1935) ("[A prosecutor] may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."), overruled on other grounds by Stirone v. U.S., 361 U.S. 212 (1960).

Based on the foregoing, we find there is evidence to support the judge's finding of prosecutorial misconduct as the Solicitor's actions were done for no other purpose than to intimidate Dr. Loring.[18]

3. Mistrial

Having concluded that the Solicitor's actions constituted prosecutorial misconduct, the question becomes whether a mistrial was warranted.

"The prejudicial effect of prosecutorial misconduct is determined by (1) the cumulative effect of such misconduct; (2) the strength of the properly admitted evidence of the defendant's guilt; and (3) the curative actions taken by the court." United States v. Anwar, 428 F.3d 1102, 1112 (8th Cir. 2005) (citations omitted).

The decision to grant or deny a mistrial is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion amounting to an error of law. State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999). The granting of a motion for a mistrial is an extreme measure that should be taken only when the incident is so grievous

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[18] We will not tolerate witness intimidation from anyone, including the Solicitor's office. Furthermore, we are deeply concerned that the Solicitor's behavior represents a pattern of misconduct that continues to undermine our state's system of justice. Specifically, this Court is concerned with the "win at all costs" attitude that appears to permeate the Solicitor's office. Because the plea judge determined that the Solicitor's conduct was not intentional, we reluctantly defer to that factual finding. However, we note that in the future such misconduct may result in disciplinary proceedings.

the prejudicial effect can be removed in no other way. State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999).

As will be discussed, we find the judge correctly denied defense counsel's motion for a mistrial trial as Inman has not established prejudice sufficient to warrant such a severe remedy.

First, any assessment of prejudice to Inman must be viewed from the posture of a bench trial as opposed to a jury trial. It is well-established that it is a near insurmountable burden for a defendant to prove prejudice in the context of a bench trial as a judge is presumed to disregard prejudicial or inadmissible evidence. See Cole v. Commonwealth, 428 S.E.2d 303, 305 (Va. Ct. App. 1993) ("A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both. Consequently, we presume that a trial judge disregards prejudicial or inadmissible evidence." (citations omitted)); see also People v. Jackson, 949 N.E.2d 215, 229 (Ill. App. Ct. 2011) ("In a bench trial, the danger of prejudice due to the trial judge's questions to a witness is lessened.").

Here, the judge correctly considered that Dr. Loring did not have a South Carolina social worker's license merely as a factor in her qualifications as an expert witness. Having found Dr. Loring qualified as an expert witness, the judge properly called and questioned her as a court's witness. Because Dr. Loring testified, Inman cannot claim he was prejudiced as his counsel declined the opportunity to question Dr. Loring. Williams, 326 S.C. at 135, 485 S.E.2d at 102 (recognizing that governmental intimidation of a witness can be deemed harmless error where the witness nonetheless testifies).

Furthermore, any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his criminal history. Finally, a review of the judge's oral and written orders establishes that he thoroughly considered all mitigating evidence.

Although we find the Solicitor committed prosecutorial misconduct, we conclude Inman's sentence of death was not imposed in violation of his due process rights. See 16C C.J.S. Constitutional Law § 1644 (Supp. 2011) ("The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of the prosecutor."). Accordingly, we find the judge did not abuse his discretion in declining to grant a mistrial.[19]

III. Proportionality Review

Based on our decision to affirm Inman's guilty plea and the judge's rulings regarding the sentencing proceedings, we must assess Inman's sentence of death as it is this Court's duty to conduct a proportionality review of Inman's death sentence. S.C. Code Ann. § 16-3-25(C) (2003).[20]

"The United States Constitution prohibits the imposition of the death penalty when it is either excessive or disproportionate in light of the crime and the defendant." State v. Wise, 359 S.C. 14, 28, 596 S.E.2d 475, 482 (2004). In conducting a proportionality review, we search for similar cases in which the sentence of death has been upheld. Id.; S.C. Code Ann. § 16-3-25(E) (2003) (providing that in conducting a sentence review the Supreme Court "shall include in its decision a reference to those similar cases which it took into consideration").

After reviewing the entire record, we conclude the sentence of death was not the result of passion, prejudice, or any other arbitrary factor, and the

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[19] In light of our decision, we need not address Inman's related issue that the Solicitor's office should have been recused due to a finding of prosecutorial misconduct.

[20] See S.C. Code Ann. § 16-3-25(C) (2003) (providing that Supreme Court shall determine whether: (1) the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; (2) the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; and (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant).

judge's finding of three statutory aggravating circumstances for the murder is supported by the evidence. In its case, the State presented evidence of Inman's confessions, which detailed the events of the Victim's murder, as well as testimony from the forensic pathologist that confirmed Inman committed the murder while in the commission of kidnapping, first-degree criminal sexual conduct, and first-degree burglary.

Furthermore, a review of prior cases establishes that the death sentence in this case is proportionate to that in similar cases and is neither excessive nor disproportionate to the crime. See State v. Stanko, 376 S.C. 571, 658 S.E.2d 94 (2008) (death sentence warranted where defendant was convicted of murder, ABWIK, criminal sexual conduct, kidnapping, and armed robbery); State v. Evins, 373 S.C. 404, 645 S.E.2d 904 (2007) (death sentence warranted where defendant was convicted of murder, kidnapping, first-degree criminal sexual conduct, and grand larceny); State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004) (death sentence upheld where jury found aggravating circumstances of criminal sexual conduct, kidnapping, armed robbery, physical torture, and burglary); State v. Whipple, 324 S.C. 43, 476 S.E.2d 683 (1996) (death sentence upheld where defendant was convicted of murder, criminal sexual conduct, armed robbery, and grand larceny of a motor vehicle).

IV. Conclusion

In conclusion, we hold Inman entered a valid guilty plea as the entry of the plea was not conditioned on the preservation or outcome of the jury sentencing issue. Moreover, even if Inman properly preserved this issue, he has abandoned it on appeal and this Court has repeatedly rejected his argument. As to the propriety of the sentencing proceedings, we conclude the judge did not abuse his discretion in denying Inman's requests to recuse the Solicitor's office as advocates and to question members of the office. Although we find the Solicitor committed prosecutorial misconduct in his treatment of Dr. Loring, we conclude that Inman was not sufficiently prejudiced to warrant the grant of a mistrial.

AFFIRMED.

KITTREDGE, J., concurs. PLEICONES, J., concurring in a separate opinion. TOAL, C.J., and HEARN, J., concur in both opinions.

JUSTICE PLEICONES: I concur with the majority but write separately to elucidate my views of State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000), to the extent they differ from those expressed by the majority.

I agree with the majority that Quattlebaum should be limited to its facts. A one-size-fits-all solution is a poor response to prosecutorial misconduct. "The granting of a motion for a mistrial is an extreme measure which should be taken only where an incident is so grievous that prejudicial effect can be removed in no other way." State v. Beckham, 334 S.C. 302, 310, 513 S.E.2d 606, 610 (1999) (citing State v. Kelsey, 331 S.C. 50, 502 S.E.2d 63 (1998)). As the United States Supreme Court has noted, interests beyond the supervision of prosecutorial behavior are implicated by a decision to grant a new trial. United States v. Hasting, 461 U.S. 499, 506-507 (1983). Although the duty to curb prosecutorial misconduct is compelling, other weighty concerns are also at stake, including the need to conserve judicial resources and to avoid imposing additional burdens on victims. Id. at 509. The Hasting Court rebuked the court below for failing to "consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events." Id. at 507.

Even where constitutional protections are implicated, a new trial is called for only in situations where the defendant's right to a fair trial is fundamentally compromised. Id. at 509 ("[T]he Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations."). This is so because "the aim of due process 'is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.'" Smith v. Phillips, 455 U.S. 209, 219 (1982) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Likewise, I believe that we should seek to avoid a rule unduly punishing the citizens of this State for the misdeeds of solicitors. A rule that turns on whether the misconduct was intentional would have such an effect in some cases. As the Court notes parenthetically, "[t]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of

the prosecutor" (citing 16C C.J.S. Constitutional Law § 1644 (Supp. 2011)). Thus, fairness should be the touchstone of the inquiry, and only in a limited set of exceptional circumstances should prejudice be presumed.

Direct intrusion into and eavesdropping on the defendant's confidential communications with counsel, as occurred in Quattlebaum, is the sort of violation that is likely to taint the entire trial, making it fundamentally unfair. But this is an exception, not the general rule. As the majority clarifies, Quattlebaum did not overrule prior case law that, under different facts, mandates an inquiry into whether the prosecutorial misconduct resulted in prejudice before a new trial is granted.

With regard to witness intimidation, the established rule in this State is that "in order to obtain relief, a defendant must demonstrate both substantial interference and prejudice." State v. Williams, 326 S.C. 130, 135, 485 S.E.2d 99, 102 (1997). In the present case, there is no claim that any substantive mitigating testimony was lost. Indeed, there is no claim that any testimony was lost. The defendant's expert witness investigated appellant's social background and was able to testify to her opinions regarding it. Appellant claims only that the effectiveness of the expert's testimony on mitigating factors pertinent to sentencing was diminished by the solicitor's misconduct.

Even assuming that the effectiveness of the testimony was reduced by the solicitor's attempts to intimidate the witness, the testimony was given before a judge, not a jury. A judge is presumed to weigh evidence properly. See Ross v. Jones, 58 S.C. 1, 35 S.E. 402, 405-406 (1900). As the majority recognizes, the record shows that the sentencing judge was fully aware of the solicitor's conduct and related events surrounding the expert's testimony, even finding that it was prosecutorial misconduct. We must presume that he took them into account in considering the testimony.

The solicitor's conduct in this case was inexplicable and reprehensible. In light of the aggravated nature of the crime and the fact that the sentencing hearing took place before a judge, it is difficult to comprehend how the solicitor believed that intimidating an expert witness would be more likely to ensure a death sentence than to create a risk of reversal. See United States v. Teague, 737 F.2d 378, 382 (4th Cir. 1984) (describing prosecutors' warnings

to defense witnesses of the consequences of perjury as "dangerous and foolish . . . because they can violate a defendant's due process right to present his defense witnesses freely" and thereby risk upsetting a guilty verdict). Despite the behavior of the solicitor, I would not ascribe a uniform "attitude" to the solicitor's office. I would limit myself to the facts appearing in the record, which do not implicate the entire office. Moreover, I cannot assume without more evidence that the solicitor was responsible for the manner in which Georgia authorities handled the matter. Whatever the appropriate response to the solicitor's conduct may be, it does not include reversal.

Thus, for the reasons set forth above, I concur in the judgment of the majority.

TOAL, C.J. and HEARN, J., concur.

2020 MAY -8 A 11: 13

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Inman v. State: Respondent's Rule 59(e) Motion

ATTACHMENT 2

understand that this court may find the absence of your testimony actually gives rise to an adverse inference, that is, a failure to testify means that your testimony would not have been favorable to you if you did testify?

APPLICANT INMAN: Yes, sir.

THE COURT: You understand that?

APPLICANT INMAN: Yes, sir.

THE COURT: Do you understand an adverse inference will mean the Court may consider in the absence of your testimony to be taken as a fact you believe your plea was voluntary and that no mistake of counsel affected your decision? Do you understand that?

APPLICANT INMAN: Yes, sir.

THE COURT: Do you understand that this is your one opportunity to present testimony for the state record?

APPLICANT INMAN: Yes, sir.

THE COURT: Do you understand -- I'm going to repeat it because this is essential and crucial. Do you understand this is your one opportunity to present testimony for the state record -- state court record?

APPLICANT INMAN: Yeah.

There's -- there's one statement I would like to make.

THE COURT: Very well. Do you want to consult with your attorneys?

APPLICANT INMAN: No, sir.

THE COURT: All right. State your question.

APPLICANT INMAN: I understand that there's a question of when I pled guilty, that I was asking for a jury trial. That's false. When I pled guilty, it was with the understanding that I wanted a judge sentencing and not a jury sentencing. And I understood that, and, again, that's what I wish for.

THE COURT: Very well. But you do understand if you fail to be present for testimony in the state court, your decision should be made with full knowledge that the decision is a final one? Do you understand that?

APPLICANT INMAN: Yes, sir.

THE COURT: All right. Any further questions from the State?

MS. BROWN: Yes, sir. I'd like to ---

MR. GROSE: We object.

THE COURT: All right. I'm just asking if there are any in the context of what was stated on these questions.

MR. GROSE: We just maintain our objection that the State cannot ask questions.

THE COURT: All right. Very well. All right. Any questions from the applicant?

MS. HOLT: One moment, Your Honor.

THE COURT: Any questions from the applicant?

ALAN WILSON
ATTORNEY GENERAL

2020 MAY -8 A 11:12

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

May 1, 2020

The Honorable Harold P. Welborn
Pickens County Clerk of Court
Post Office Box 215
Pickens, South Carolina 29671

Re: **Jerry Buck Inman, #5256 *a/k/a* Jerry Buck Inmon v. State of South Carolina**
2012-CP-39-918
Capital PCR Action

Dear Mr. Welborn:

Enclosed please find the original and one (1) copy of the *Respondent's Rule 59(E) Motion* for filing in your office in connection with the above referenced case. Please file the original motion and return a certified copy to me in the self-addressed envelope provided for your convenience.

Sincerely,

Melody J. Brown
Senior Assistant Deputy Attorney General

MJB:ab
Enclosure

cc: The Honorable Alexander S. Macaulay (via email and U.S. Mail-with enclosure)
E. Charles Grose, Jr., Esquire (via email and U.S. Mail-with enclosure)
Diana L. Holt, Esquire (via email and U.S. Mail-with enclosure)
Victim Advocacy Division

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	Case No. 2012-CP-39-00918
Jerry Buck Inmon,	)	
Applicant,	)	
vs.	)	**Response in Opposition to the State's Rule 59(e), SCRCP Motion**
State of South Carolina,	)	
Respondent.	)	

2020 MAY 12 A 11:46

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

To: The Honorable Alexander S. Macaulay, Presiding Judge by Special Assignment of the Supreme Court of South Carolina

Jerry Inmon responds to the State's Rule 59(e), SCRCP motion ("State's Motion") as follows:

1) The State's Motion, at 5-6 (numbered ¶ 3), contends this Court "repeatedly relies on the actions and assertions of trial counsel rather than Inman regarding the decision to plead guilty, and the voluntariness of Inman's decision," and points to Mr. Inmon's statements at the PCR hearing. This Court, however, properly "look[ed] to contemporaneous evidence," *Lee v. United States*, ___ U.S. ___, ___, 137 S. Ct. 1958, 1967 (2017), including counsel's statements during the plea colloquy and PCR testimony, to determine Mr. Inman's desire to plead guilty and appeal his right to have twelve independent jurors determine his sentence. By relying on *Blakely v. Washington*, 542 U.S. 296, 307 (2004), Mr. Inmon, through counsel, conveyed his desire that his guilty plea not grant the sentencing court the constitutional authority to make findings of fact that could enhance the potential sentence. This Court, accordingly, made a factual finding that Mr. Inmon's

> trial counsel did not waive his insistence that his client was entitled to have jury to determine and recommend his sentence pursuant to the bifurcated capital

> sentencing scheme provided by S.C. Code Ann. § 16-3-20, and assiduously sought to have the right for his client to have "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

Order, at 46; *see also* Order, at 24 ("But, Inman, personally and by and through his counsel, could not 'freely and voluntarily waive,'" his rights). Additionally, trial counsel testified at the evidentiary hearing that Mr. Inmon, prior to and at the time of his guilty plea, wanted the jury sentencing "issues to be preserved." PCR Tr. 336.

2) The State contends this Court "also impermissibly considers whether the right to a jury trial *should* be waived." State's Motion at 8-10 (numbered ¶ 5) (emphasis original). The State is mistaken. This Court properly considered whether Mr. Inmon's guilty plea met the constitutional standard of voluntariness, noting Mr. Inmon, "personally and by and through his counsel, could not 'freely and voluntarily waive,'" his rights. Order at 24; *See also* Order, at 20 (Mr. Inmon "could not freely and voluntarily waive his Fifth Amendment right.").

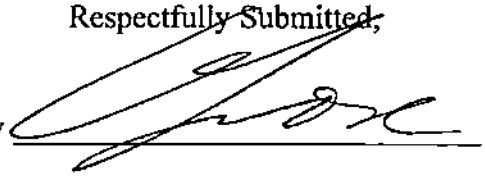
3) The State contends this Court "erred in its grant of relief," arguing "there is no error to warrant setting aside the plea." State's Motion at 13 (numbered ¶ 8). As seen, the Court made a finding of fact that Mr. Inmon's guilty plea was involuntary. Having found the guilty plea involuntary, this Court was obligated to invalidate the plea and order a new trial. The State is not entitled to an unconstitutional conviction any more than it is entitled to an unconstitutional sentence. Additionally, the circuit courts of our state always have the authority to grant such other and further relief as deemed just and proper.

(conclusion on next page)

CONCLUSION

For the foregoing reasons, this Court should deny the State's Rule 59(e), SCRCP motion.

Respectfully Submitted,

By 

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Email: Charles@groselawfirm.com

May 8, 2020.

2020 MAY 12 A 11:46
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS	)	
	)	2020 MAY 12 A 11:48 No. 2012-CP-39-00918
Jerry Buck Inmon,	)	
Applicant,	)	
	)	CLERK OF COURT PICKENS COUNTY SOUTH CAROLINA
vs.	)	
	)	
State of South Carolina,	)	
Respondent.	)	
	)	

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466

May 8, 2020
Greenwood, South Carolina

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF PICKENS	)	
		2020 MAY 20 P 2:39
Jerry Buck Inman, #5256,	)	**C/A No.: 2012-CP-39-918**
***a/k/a* Jerry Buck Inmon,**	)	**(Capital PCR Action)**
	)	
Applicant,	)	CLERK OF COURT PICKENS COUNTY SOUTH CAROLINA
v.	)	**RESPONSE TO APPLICANT'S**
State of South Carolina,	)	**RULE 59(E) MOTION**
	)	
Respondent.	)	

In an Order filed April 21, 2020, this Court granted post-conviction relief on one issue and denied relief on a series of other issues. On April 30, 2020, Applicant Inman served a Rule 59(e), SCRCP motion on Respondent. Applicant essentially requests more specific findings and/or rulings on the issues denied; and, also to add a ground to the issue upon which relief was granted. Respondent relies on the previous arguments as presented through its proposed order of dismissal and agrees the issues denied should be denied as indicated in that proposed order. Further, Respondent submits the additional ground Applicant wishes to add to the issue upon which relief was granted is without merit. In support of its position, Respondent would respectfully submit:

1. This Court provided in the Order that certain issues raised by Applicant were "not addressed as further proceedings upon remand shall be consistent with the proper conduct of the trial" in light of the order of relief. (Order, p. 4). These include:

Ground 10 (b), Ineffective assistance of Trial Counsel [sentencing];

Ground 10 (c), [Ineffective assistance of] Appellate Counsel;

Ground 10 (e), Challenges to Capital Sentencing Statute;

Ground 10 (f), Cumulative Effect of Errors;

Ground 10 (g), Denial of Fair Trial Due to Prosecutorial Misconduct;

Ground 10 (h) Denial of Fair Trial based on Rush to Forgone Conclusion that the Sentence Would be Death

(Order, pp. 3-4).

This Court also made the additional findings:

- the record of the proceedings, and the testimony received at the PCR hearing support and confirm that trial counsel diligently prepared, assiduously and aggressively represented Inman throughout the representation

- both trial and appellate counsel made reasoned and careful decisions to raise and present the particular issues involved at the time

(Order, p. 4).

This Court then found: "Applicant's remaining freestanding claims are bar[r]ed by jurisdictional limitations set out in S.C. Code § 17-27-20, accordingly, the Court denies that relief." (Order, p. 4). The record before the Court supports these findings and conclusions.

As an initial matter, it is inescapable that this Court allowed Applicant ample opportunity to develop and present his claims, which were heard over the course of a multi-day evidentiary hearing. At the conclusion of the receipt of evidence, this Court allowed both parties to brief their positions in the form of a proposed order. Applicant's claims were presented (apart from the Ground (a) which was withdrawn), argued, and fully considered by the Court. There is little chance the Court failed to consider the claims. Indeed, the Court found no ineffective assistance, specifying that it found each attorney – trial level and appellate level – made reasonable strategic decisions regarding the particular claims pressed in this action. Respondent's proposed order set out in full the ample facts that support that finding. The prior arguments from Respondent's proposed order are incorporated as if repeated verbatim. However, there are certain critical

points from the prior proposed order that Respondent will make reference to in this response for the Court's convenience, should the Court wish to amend the Order with fuller explanation and support for the denial.

2. Respondent has listed out the claims this Court referenced in the Order. Ground (a) is not listed. Applicant seeks a ruling on one of the two allegations in Ground (a) (ineffective assistance/guilt phase)(see Motion, p. 7 – referencing allegation trial counsel was ineffective in advising Applicant to plead guilty); however, that allegation was withdrawn at the PCR hearing. (PCR Tr. at 22 and 167; see also Respondent's Proposed Order, pp. 40-42). Applicant is not entitled to a ruling on the merits.

3. Applicant also seeks reconsideration of the ruling that the freestanding claims are barred by statute, and requests fact finding. (Motion, p. 8). Applicant argues that the statute does not bar claims of prosecutorial misconduct. Id. This argument apparently refers to the allegations in Ground (g). However, Applicant neglects to consider that this claim of prosecutorial misconduct was not only raised in the appeal, but addressed in the appeal. *State v. Inman,* 395 S.C. 539, 720 S.E.2d 31 (2011). Applicant may not re-raise the issue in PCR. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in a petitioner's trial which could have been reviewed on appeal may not be asserted for the first time, or reasserted, in post-conviction proceedings."). Thus, the Court correctly dismissed the claims. See S.C. Code § 17-27-20 (B) ("This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction."). The dismissal also includes Grounds (e) and (h). Again, these freestanding claims – particularly claims against the statute – were available to be raised during the circuit court proceedings. Consequently, the Simmons Doctrine bars the claims: "The Simmons rule gives effect to the

Legislature's clear intent that the post-conviction relief procedure is not a substitute for appeal or a place for asserting errors for the first time which could have been reviewed on direct appeal." *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant has failed to show that the claims were not available to be raised at trial and in direct appeal. (See also Respondent's proposed order, pp. 99-106; pp. 108-111). This Court properly found the claims barred.

4. Applicant suggests the Court re-visit and resolve his claim regarding cumulative error in accord with his proposed order. (Motion, pp. 5-6). The cumulative error argument in Ground (f) is resolved by finding no ineffective assistance or other errors. Applicant lacks the one basic rule of cumulative error – there must be more than one error to consider. *See Simpson v. Moore*, 367 S.C. 587, 604, 627 S.E.2d 701, 710 (2006) ("Because the PCR court found that only one of Simpson's allegations had merit, there was no need to conduct a cumulative-error analysis. The record simply did not contain 'several errors' for the judge to cumulatively assess."). This Court properly found the claim should be denied.

5. Applicant also seeks specific rulings on ineffective assistance of counsel claims. Again, Respondent relies on the complete arguments as presented in its proposed order, but will suggest consideration of certain key facts that the Court may wish to incorporate into its more general ruling.

a. Regarding Mitigation from Dr. Maddox, (Motion pp. 2-3) (Ground 10(b)(4) and (5)): Trial counsel specifically expressed the reasons he stopped the evaluation by Dr. Maddox, not the least of which was because she had uncovered additional unreported rapes, and indicated a personality trait that defense counsel feared would jeopardize a part of the defense. (See PCR Tr. pp. 282-284). This was not inadvertence but a choice on selection of a witness – particularly a choice to shield the defense from offering a personality disorder that was likely to be

underscored, negatively, by the State. Further, counsel selected another doctor (Dr. Price) as he saw that doctor's opinion fit better in the narrative that had been developed based on Applicant's history. (See PCR Tr. pp. 283-284). (See also Respondent's proposed order, pp. 85-92). Also, the PCR testimony for this issue was limited in impact to the overall case for several reasons: the focus was on the sexual disorder (which is the same disorder but referenced differently by Dr. Price, see PCR Tr. p. 596), but not the murder, (see PCR p. 486-87); the facts show that he was able to exercise control over the urges, particularly shown and reflected in the circumstances of the crime in that he waited hours to break in the victim's apartment, (see PCR Tr. pp. 573-575); and, some of the diagnosis made for PCR were affected by time, with personality structure having changed, (PCR Tr. p. 605). In sum, what could have been actually available to counsel at the time of trial was difficult to decipher, but what was definitely available could lead to detrimental results. *See Wong v. Belmontes*, 558 U.S. 15, 25 (2009) ("A heavyhanded case to portray Belmontes in a positive light, with or without experts, would have invited the strongest possible evidence in rebuttal—the evidence that Belmontes was responsible for not one but two murders."). Similarly, here, in addition to evidence of the personality disorder that counsel wished to avoid sharing with the prosecution, alerting the prosecution of the admission of other uncharged rapes would not be part of a reasonable defense strategy. And again, Applicant failed to separate what would have been available at the time of trial in comparison with the PCR opinion. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). And all circumstances must be considered in the prejudice analysis, including the additional aggravating evidence that would also be

available. *Wong v. Belmontes,* 558 U.S. at 26 ("the reviewing court must consider all the evidence—the good and the bad—when evaluating prejudice."). Even so, because there was evidence of a disorder presented at sentencing, and in light of the overwhelming evidence of aggravation, there could be no reasonable probability of a different result. *Id.*, at 27 ("*Strickland* does not require the State to 'rule out' a sentence of life in prison to prevail. Rather, *Strickland* places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different."). But, again, counsel made a reasonable strategic decision on the choice of expert. (See also Respondent's proposed order, pp. 85-92).

Further, Applicant suggests that counsel was ineffective in failing to discover and present evidence of "unspecified trauma." (Motion, p. 5). Dr. Maddox testified at the PCR hearing that Applicant recalls, from the murder, his victim's "pupils dilating when she was dying," and she opined that was traumatic for him "even though he's the perpetrator...." (PCR Tr. p. 563). The necessary description of the traumatic event adds aggravation along with any possible mitigation. Consequently, it is not likely that Applicant could carry his burden of proof of deficient performance and prejudice.

For all these reasons, as set out here and in Respondent's proposed order, the record supports this Court's conclusion that Applicant failed to show ineffective assistance.

b. Regarding Omitted Social History Evidence, (Motion, pp. 4-5) (Grounds 10(b) (1)(2)(3) and (4): Applicant failed to show any particular point that counsel failed to develop and present. The evidence showed that the only possible omitted evidence related to reports Applicant's mother tried to kill him and had thoughts of mutilating him. (See PCR Tr. pp. 351-52). However, the testimony at the PCR hearing also confirmed that Applicant prohibited the defense team from presenting evidence that would show his mother in a negative light, and that

prohibition was also contemporaneously noted in a sentencing phase passage from the mitigation specialist. (See PCR Tr. pp. 126 and p. 634; pp. 635-363; p. 500; p. 594; R. p. 673). There is no indication in the record that the evidence was missed: To the contrary, trial counsel testified they were aware of the allegations. (PCR Tr. p. 635). Further, Applicant failed to show that counsel attempted to present that evidence or even that the witness actually failed to remember (though that would be ineffective assistance of expert – a claim upon which relief may not be granted as it is not a constitutionally recognized or protected right). Applicant in PCR objected to questions on what was kept out by his objections at sentencing, and counsel failed to state any particular fact or category of fact that was not presented. (See PCR Tr. pp. 279-281; 642-643). In looking at counsel's PCR testimony in full measure on this point, Applicant proved that counsel *did not wish to present* the mitigation expert in the resumed hearing under the circumstances, and *actively thwarted the witness from testifying* because of those circumstances. (See, for example, PCR Tr. pp. 199, 202-203, 207-215, 221, 286, 291, 309-312). Counsel explained his strategy, and this Court accepted the strategy as reasoned and sound. (See also Respondent's proposed order, pp. 47-84). The record supports the Court's finding that counsel did not provide deficient representation. Further, the record supports that Applicant could not show prejudice.

Initially, he cannot show prejudice where Applicant himself thwarted the presentation of evidence. *See Gardner v. Ozmint,* 511 F.3d 420, 427 (4th Cir. 2007) ("although burdened by an uncooperative client, defense counsel made significant efforts to develop and present mitigation evidence. Given these facts, we cannot say that the state court acted unreasonably in concluding that counsel's actions" were not deficient). Further, the items of individual snippets may be new, but the showing of childhood abuse was not. The defense presented evidence of Applicant's dangerous and unstable childhood. Further still, the additional evidence, sadly cumulative in

nature, has to be considered along with the viciousness of the crime. Applicant fails to demonstrate that he can carry his burden of showing *Strickland* prejudice. (See Respondent's Proposed Order, pp. 67-84).

c. Also as to Mitigation, Applicant requests the Court reconsider Applicant's allegation that appellate counsel was ineffective, (Motion, p. 4 and 7) (Ground 10(c)(2)). In regard to not appealing the jury sentencing issue, appellate counsel testified that he did not consider the argument meritorious and approached the issue as an improper, conditional plea. (PCR Tr. p. 522-524). The Supreme Court, in the direct appeal, found that there was— as appellate counsel had reasoned — no merit to the issue. *Inman,* 395 S.C. at 555-56, 720 S.E.2d at 40. In regard to not appealing the denial of his continuance motion, Appellate counsel conceded such issues are generally not successful, (see PCR Tr. p. 526), and the record here supported there would be little hope of success where the plea judge took care to suspend the proceedings and have the mitigation specialist testify. Even so, counsel testified that in hindsight that he would have raised the issue to have provided the South Carolina Supreme Court with another option. (See PCR Tr. p. 525-526). However, this is the type of backwards looking testimony that *Strickland* prohibits. 466 U.S. at 689. Further, there is no basis to find prejudice in light of the fact that the mitigation specialist testified, and there was no testimony at the PCR hearing as to what evidence, if any, was blocked by trial counsel in his effort to preserve the position that the solicitor's action detrimentally affected the proceedings such that the defense may be able to obtain a deal for sentencing. Again, the record shows that Petitioner cannot carry his burden of proof. When prohibited hindsight is extracted from the analysis, as it must be, the remainder of the PCR testimony shows appellate counsel carefully winnowed the issues to those he found most persuasive – exactly what appellate counsel should do. *Smith v. Murray*, 477 U.S.

527, 536 (1986) ("process of 'winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence, is the hallmark of effective appellate advocacy") (quoting *Jones v. Barnes,* 463 U.S. 745, 751-752 (1983)). (See Respondent's Proposed Order, pp. 95-99). The record supports the Court's finding that appellate counsel exercised sound professional judgment in both of the matters raised. Further, the record supports that Applicant failed to show a stronger issue was overlooked. Again, he cannot show ineffective assistance of appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 288 (2000) (generally finding appellate counsel ineffective when "ignored issues are clearly stronger than those presented.") (internal citation and quotation marks omitted). Applicant failed in his burden of proof.

6. This Court found the portion of S.C. Code § 16-3-20(B) providing that judge sentencing must follow a guilty plea, is unconstitutional based upon the decision of *Hurst v. Florida*, 577 U.S. ___, ___, 136 S.Ct. 616 (2016). In his Rule 59(e) motion, Applicant asserts that the Court should also consider an Eighth Amendment basis for the claim the statute is unconstitutional. (Ground 10(d)). Respondent maintains that the ruling granting relief is incorrect and served a Rule 59(e) motion on May 1, 2020 on that issue. Respondent further submits that the Eighth Amendment claim is without merit, first because it is procedurally barred under the Simmons Doctrine and S.C. Code § 17-27-20 (B), and this issue may not be considered on the merits. (See also Attachment 1, Respondent's Proposed Order of Dismissal, pp. 24-25). Additionally, the logic is flawed. The Eighth Amendment secures the right to present, and have considered, evidence of the *defendant's character*, and circumstances of the crime. *See, e.g., Woodson v. North Carolina,* 428 U.S. 280 (1976). An entry of a guilty plea is not an aspect of the defendant's character or circumstance of the crime. Further, there are many

ways to present evidence on remorse and acceptance of responsibility – nothing prevents the admission of evidence of the defendant's personal thoughts of remorse. The District Court of South Carolina has recently held in rejecting the same claim in a different case:

> ... should a capital defendant choose to proceed with a jury trial, nothing in the statute precludes that defendant from showing the jury the relevant aspects of his character—his remorse and acceptance of responsibility—in other ways. Thus, either scenario preserves a capital defendant's Eighth and Fourteenth Amendment right to present his sentencer with any mitigating aspect of his character, and the statute preserves the defendant's right to choose whether that sentencer will be a jury or a judge.

Allen v. Stephan, No. 0:18-CV-01544-DCC, 2020 WL 1446717, at *36 (D.S.C. Mar. 25, 2020).

To put a fine point on it, nothing exists in law that would compel a prosecutor or a judge to accept a plea under the terms and conditions a defendant (or in this case, his counsel) wishes. Rule 14 (b), SCRCrimP, "[a] defendant may waive his right to a jury trial only with the approval of the solicitor and the trial judge." Bluntly, there is no right to plead guilty. *Santobello v. New York*, 404 U.S. 257, 262 (1971). The offer to plead guilty is itself a fact that may be presented to the jury because that is specifically in control and reflective of a defendant's offer to accept responsibility. *See, for example, United States v. Fell*, 372 F. Supp. 2d 773, 784 (D. Vt. 2005), *aff'd*, 531 F.3d 197 (2d Cir. 2008) ("It is Fell's *offer* to plead guilty that bears on his acceptance of responsibility. The Government's *response* to Fell's offer is not relevant."); *United States v. Brandon Michael Council*, No. 4:17-CR-00866-RBH, 2019 WL 3940759, at *4 (D.S.C. Aug. 21, 2019) ("the Court will allow Defendant to introduce evidence (in the potential penalty phase) of his *offer* to plead guilty because—as Defendant argues—it is relevant to his acceptance of responsibility").

Further still, the Supreme Court of South Carolina has already held that there is no Eighth Amendment violation in this regard, and rejected the argument "that, had [the defendant]

proceeded to trial on the issue of guilt or innocence, he would have been unable to convey to the jury his acceptance of guilt and sense of remorse." *State v. Allen*, 386 S.C. 93, 102, 687 S.E.2d 21, 26 n. 7 (2009). Also, the Supreme Court of South Carolina, in *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005), after granting a motion to argue against precedent, reaffirmed the statute is not unconstitutional and reasoned:

> The constitutionality of Section 16–3–20(B) ***does not rest on a defendant's desire for a particular outcome, his sense of remorse, or his rationale for committing a particular crime.*** Instead, it rests, inter alia, on whether the statute comports with the right to a jury trial as established by this Court and the United States Supreme Court in interpreting the state and federal constitutions. See U.S. Const. amend VI; S.C. Const. art. I, § 14. Accordingly, we adhere to our opinion in *Downs* and reject Appellant's arguments for the reasons expressed in that case. ***Section 16–3–20(B) is not unconstitutional in light of Ring, supra, and a capital defendant may be sentenced only by a judge pursuant to that statute after knowingly and voluntarily waiving his right to a jury trial.***

362 S.C. at 418–19, 608 S.E.2d at 433 (emphasis added).

Additionally, Inman personally affirmed during these PCR proceedings his desire to plead guilty and be sentenced by the judge:

> APPLICANT INMAN: I understand that there's a question of when I pled guilty, that I was asking for a jury trial. ***That's false.*** When I pled guilty, it was with the understanding that I wanted a judge sentencing and not a jury sentencing. And ***I understood that, and, again, that's what I wish for.***

(Attachment 2, PCR Tr. pp. 192-93) (emphasis added).

Applicant chose to plead guilty and to be sentenced by the judge. That waiver was knowing and voluntary by Applicant's own, personal, repeated admissions. To conclude otherwise is unsupported by fact and law.

WHEREFORE, having made its reply to Applicant's motion, Respondent submits that the record supports the Court's findings that Applicant failed to show an entitlement to relief on

any of the claims apart from the one upon which relief was granted. Respondent maintains the grant of relief is unsupported by fact and law. Applicant's additional Eighth Amendment ground also lacks merits. For all the arguments presented here, and in Respondent's own Rule 59(e) motion, Respondent urges the Court to reconsider the ruling and deny relief.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

May 13, 2020
Columbia, South Carolina.

2020 MAY 20 P 2:39
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)	IN THE COURT OF COMMON PLEAS IN THE ELEVENTH JUDICIAL CIRCUIT
Jerry Buck Inman *a/k/a* Jerry Buck Timmon, S.C.D.C. No. 5256,	)	2020 MAY 20 P 2:39
Applicant,	)	CLERK OF COURT PICKENS COUNTY SOUTH CAROLINA **Case No. 2012-CP-39-918** ***Capital PCR Action***
vs	)	
State of South Carolina,	)	**CERTIFICATE OF SERVICE BY MAIL**
Respondent.	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. Per the March 10, 2020 Order of the Chief Justice, I have this day served a copy of the *Respondent's Response to Applicant's Rule 59(E) Motion* in the above-captioned matter via email to dianaholt@dianaholtllc.com and charles@groselawfirm.com and by depositing same in the United States mail, postage prepaid to his attorneys of record:

Diana L. Holt, Esquire
Post Office Box 6454
Columbia, South Carolina 29260

E. Charles Grose, Jr., Esquire
404 Main Street
Greenwood, South Carolina 29646

DATED this 13th day of May, 2020.

Angela Bennett, Legal Assistant for
Melody J. Brown, Senior Assistant Deputy Attorney General

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

THE STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS 2020 MAY 20 P 1:32)	Case No. 2012-CP-39-00918
Jerry Buck Inmon, Applicant,)	**Reply to State's Response to Mr. Inmon's Rule 59(e), SCRCP Motion**
vs.)	
State of South Carolina, Respondent.)	

To: The Honorable Alexander S. Macaulay, Presiding Judge by Special Assignment of the Supreme Court of South Carolina

Jerry Inmon responds to the State of South Carolina response to his Rule 59(e), SCRCP motion ("State's Response") as follows.

A. Clarification Regarding Claims 10(a)&11(a).

The State's Response, at 3 (numbered ¶ 2), contends Mr. Inmon is not "entitled to a ruling on the merits" of the claims found in paragraphs 10(a)&11(a) of his Second Amended PCR Application (Corrected). A close review of the record indicates Mr. Inmon has been completely consistent. At the evidentiary hearing, counsel for Mr. Inmon stated, "Having reviewed the record and reviewed the Supreme Court's opinion in this [case], Mr. Bannister preserved that issue and appellate counsel was the one who abandoned it." PCR Tr. 22, lines 19-25; *see also id.*, at 67, lines 6-12 (counsel reiterating Mr. Inmon is "going forward on the appellate counsel issue). Mr. Inmon's Rule 59(e) motion, at 7, stated:

> Section III(A) of Mr. Inmon's proposed order suggested how the Court might resolve these two issues [regarding trial counsel's advice to plead guilty and appeal judge sentencing and appellate counsel abandoning the judge sentencing issue]. Based on the direct appeal opinion, Mr. Inmon believes trial counsel preserved this issue for review. *Inman*, 395 S.C. at 555, 720 S.E.2d at 40 ("Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B),

> which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases, [Inmon] was permitted to appeal this secondary sentencing issue.").[1] To the extent the State contends there is an ambiguity in the direct appeal opinion, Mr. Inmon respectfully requests this Court make specific findings of fact and conclusions of law to resolve these issues.

(footnote original). Mr. Inmon's position at the evidentiary hearing, in Section III(A) of his proposed order, and his Rule 59(e) motion has remained consistent.

B. Freestanding Claims.

The State's Response, at 3-4 (numbered ¶ 3), contends several of Mr. Inmon's claims are not authorized by the Uniform Post-Conviction Relief Procedures Act; however, the State never addressed Mr. Inmon's argument that claims of prosecutorial misconduct are authorized by the Act. *See, e.g., Kyles v. Whitley*, 514 U.S. 419, 436 (1995); *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006), *Gibson v. State*, 334 S.C. 515, 518, 514 S.E.2d 320, 321 (1999). Mr. Inmon's post-conviction investigation turned up evidence of prosecutorial misconduct not known to trial counsel or the trial judge.

C. Dr. Donna Maddox.

The State's Response, at 4-6 (numbered ¶ 5(a)), contends trial counsel's decision not to use Dr. Maddox as an expert "was not inadvertence but a choice on selection of a witness." The Standard of Review section of Mr. Inmon's proposed order states:

> "If the State contends the alleged deficiency resulted from a strategic decision made at trial, counsel must articulate a valid reason for employing a certain strategy." *Freiburger v. State*, 413 S.C. 243, 247, 775 S.E.2d 391, 393 (Ct. App. 2015). *And see Ingle v. State*, 348 S.C. 467, 470, 560 S.E.2d 401, 402 (2002). "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik v. State*, 409 S.C. 214, 236, 761 S.E.2d 757, 768 (2014).

[1] Sentencing issues can be raised on direct appeal following a guilty plea. *E.g. State v. Brown*, 426 S.C. 63, 824 S.E.2d 476 (Ct. App. 2019); *State v. Boggs*, 388 S.C. 314, 696 S.E.2d 597 (Ct. App. 2010).

Section III(C)(1) of Mr. Inmon's proposed order, at 115-16, quotes trial counsel's testimony that the defense team searched for treatment options for Mr. Inmon, did not "know what biastophilia is," and "wanted medication to help him." Thus, the State has not established a valid strategic reasons for not presenting this evidence. *Weik, Ingle,* and *Freiburger, supra.*

The State's Response, at 6 (numbered ¶ 5(a)), misstates Dr. Maddox's testimony about trauma suffered by Mr. Inmon by limiting it to Mr. Inmon's recollection of the decedent's death. For a detailed discussion of Mr. Inmon's social history and Dr. Maddox's diagnoses, see Sections B and C of Mr. Inmon's Rule 59(e) motion and Sections III(B) and III(C) of Mr. Inmon's proposed order.

D. Dr. Marty Loring.

The State's Response, at 6-8 (numbered ¶ 5(b)), disingenuously minimizes the testimony by Dr. Loring about Mr. Inmon's social history. For a complete discussion of Dr. Loring's testimony and Mr. Inmon's social history, see Section III(B) of Mr. Inmon's proposed order.

The State also attempts to shift the blame for Dr. Loring's trial testimony from the former Solicitor's misconduct to trial counsel. The former Solicitor's misconduct, which led to Dr. Loring not recalling all the information known to her secondary to her diagnosis of PTSD, is the law of the case, and this Court should reject the State's invitation to revisit those findings. "Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571, 776 S.E.2d 397, 403 (Ct. App. 2015). Our Supreme Court held the former "Solicitor's conduct toward Dr. Loring unequivocally constituted witness intimidation." *State v. Inman*, 395 S.C. 539, 563, 720 S.E.2d 31, 44 (2011).

E. Appellate Counsel.

The State's Response, at 8-9 (numbered ¶ 5(c)), contends, "In regard to not appealing the jury sentencing issue, appellate counsel testified that he did not consider the argument meritorious and approached the issue as an improper, conditional plea." Approaching the issue as a conditional plea was an error of law and, therefore, not a valid strategic decision. *Weik, Ingle,* and *Freiburger, supra; see also Inman*, 395 S.C. at 555, 720 S.E.2d at 40 ("Any condition that he sought to attach to the plea involved an appellate challenge to section 16-3-20(B), which mandates that a judge rather than a jury determine sentencing in a capital case if the defendant enters a guilty plea. Under the mandatory appeal procedures in capital cases, [Inmon] was permitted to appeal this secondary sentencing issue."). *And see Brown* and *Boggs, supra.*

Additionally, appellate counsel testified at the evidentiary hearing that he had no recollection or reading *Blakely v. Washington*, 542 U.S. 296, 307 (2004), *People v. Montour*, 157 P.3d 489, 497 (Colo. 2007); *State v. Page*, 2006 S.D. 2, ¶ 71, 709 N.W.2d 739, 762 (2006); *State v. Piper*, 2006 S.D. 1, ¶ 48, 709 N.W.2d 783, 803 (2006); and *State v. Louviere*, 833 So. 2d 885, 895 (La. 2002), admitting, "I don't even know what the cases stand for." PCR Tr. at 516-17. "Decisions made in ignorance of relevant, available information cannot be characterized as strategic." *Weik*, 409 S.C. at 236, 761 S.E.2d at 768.

Trial counsel testified the motion to continue the case to replace Dr. Loring with a new mitigation witness was "a huge deal." PCR Tr. 315-16; *see also* Mr. Inmon's proposed order, Section III(B). Regarding the failure to appeal the denial of the continuance motion, appellate counsel testified this issue was preserved for appeal. PCR Tr. at 518-19. The State's Response, at 8-9 (Numbered ¶ 5(c)), references appellate counsel's testimony that appealing continuance motions are "hard to win" but overlooks the rest of counsel's answer stating, "[B]ut then again, I

don't know that I had a case with this degree of prosecutorial misconduct in it in my 26 years of appellate defense." PCR Tr. at 526. The State's Response, at 8-9, acknowledges appellate counsel's testimony that he should have appealed this issue and given our Supreme Court the option of giving Mr. Inmon "a resentencing based on something that was relatively uncontroversial," PCR Tr. 525, but argues this testimony is "backward looking testimony that *Strickland*[2] prohibits" (footnote added). In addition to appellate counsel's testimony, this Court should look to the contemporaneous evidence. The former Solicitor's misconduct towards Dr. Loring caused a delay in the trial which was accompanied with a promise by the trial judge to allow sufficient time for the defense to get a new mitigation witness; however, the trial judge did not allow sufficient time. Pressing forward with Dr. Loring's testimony, the trail judge acknowledged, "I'm not getting all the information, because of some form of legal gamesmanship." R. 694-96. Mr. Inmon, accordingly, established prejudice resulting from not having sufficient time to prepare a new mitigation witness, and trial counsel was deficient for not appealing this issue. *Strickland; Southerland v. State*, 337 S.C. 610, 524 S.E.2d 833 (1999); *Patrick v. State*, 349 S.C. 203, 562 S.E.2d 609 (2002). Appellate counsel did not advance a valid strategic reason for not appealing this issue. *Weik, Ingle*, and *Freiburger, supra.*

F. Eighth Amendment.

The State's Response, at 9-11 (numbered ¶ 6), contends, "The Eight Amendment secures the right to present, and have considered, evidence of the *defendant's character*, and circumstances of the crime" (emphasis original). In its order granting post-conviction relief filed on April 21, 2020, *e.g.* at 6, this Court repeatedly noted Mr. Inmon's "strong desire to acknowledge his guilt," "not want[ing] to put the victim's family through the spectacle of a courtroom proceeding

[2] Strickland v. Washington, 466 U.S. 668 (1984).

regarding his guilt," and desire "to alleviate the cruel impact the attendant media attention would have on everyone involved," all of which go far beyond Mr. Inmon's acceptance of responsibility and show his genuine compassion for the victim's family. These findings of fact speak to Mr. Inmon's character in a manner not recognized by the sentencing order.

Additionally, this Court should not overlook how trial counsel intended to present the guilty plea to the jurors as mitigation.

> Trial counsel also argued, "A guilty plea is mitigation," citing *State v. Brouwer*, 346 S.C. 375, 550 S.E.2d 915 (Ct. App. 2001) and pointing out, "for those that plead guilty, the fact itself is Constitutionally permissible consideration in sentencing, a consideration that is not present when one is found guilty by a jury." Trial counsel argued *Brouwer* recognized, "[g]uilty pleas are recognized as a significant step towards rehabilitation." Trial counsel asserted Mr. Inmon's Sixth amendment right to a jury trial and his Eight Amendment right to present mitigation. Counsel argued *Apprendi*,[3] *Ring*[4] and *Blakely* and pointed to a pre-*Blakely* case in Louisiana and post-*Blakely* cases in South Dakota and Colorado.

Mr. Inmon's proposed order at 3-4 (footnotes added).

G. *State v. Allen* and *State v. Crisp*.

The State cites *State v. Allen*, 386 S.C. 93, 687 S.E.2d 21 (2009) and *State v. Crisp*, 362 S.C. 412, 608 S.E.2d 429 (2005). Neither of these cases considered *Blakely*. In fact, our Supreme Court has never considered *Blakley* in the context of our state's capital sentencing procedure.

H. Mr. Inmon's Statements.

The State's Response, at 11, points to Mr. Inmon's statements at the evidentiary hearing. This Court, however, properly "look[ed] to contemporaneous evidence," *Lee v. United States*, ___ U.S. ___, ___, 137 S. Ct. 1958, 1967 (2017), including counsel's statements during the plea colloquy and PCR testimony, to determine Mr. Inman's desire to plead guilty and appeal his right

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[3] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

[4] *Ring v. Arizona*, 536 U.S. 584 (2002)

to have twelve independent jurors determine his sentence. By relying on *Blakely*, Mr. Inmon, through counsel, conveyed his desire that his guilty plea not grant the sentencing court the constitutional authority to make findings of fact that could enhance the potential sentence. This Court, accordingly, made a factual finding that Mr. Inmon's

> trial counsel did not waive his insistence that his client was entitled to have jury to determine and recommend his sentence pursuant to the bifurcated capital sentencing scheme provided by S.C. Code Ann. § 16-3-20, and assiduously sought to have the right for his client to have "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."

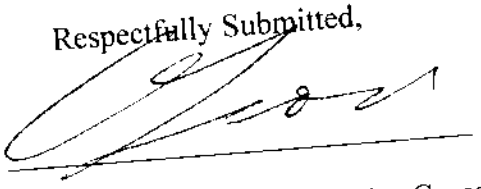
Order, at 46; *see also* Order, at 24 ("But, Inman, personally and by and through his counsel, could not 'freely and voluntarily waive,'" his rights). Additionally, trial counsel testified at the evidentiary hearing that Mr. Inmon, prior to and at the time of his guilty plea, wanted the jury sentencing "issues to be preserved." PCR Tr. 336. The clearest, most contemporaneous evidence that Mr. Inmon wanted to live and avoid traumatizing the victim's family is the plea agreement he signed vowing to accept a life sentence. PCR Ex. 13.

CONCLUSION

For the reasons set forth in Mr. Inmon's Rule 59(e) motion and this reply, this Court should reconsider its order dated April 17, 2020, make specific findings of fact and conclusions of law, and grant Mr. Inmon post-conviction relief on additional grounds.

(signature on next page)

Respectfully Submitted,

By 

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May 18, 2020.

THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF PICKENS)
) Case No. 2012-CP-39-00918
Jerry Buck Inmon,)
Applicant,)
)
vs.)
)
)
State of South Carolina,)
Respondent.)
)

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2020 MAY 20 P 1:32

I certify that I have served a copy of this pleading on the State of South Carolina by placing a copy in the US Mail, postage prepaid, on the date reflected below, addressed to

Melody J. Brown, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

By _____

E. Charles Grose, Jr.
The Grose Law Firm, LLC
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Greenwood, SC 29646
(864) 538-4466

May 18, 2020
Greenwood, South Carolina

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
OCT 10 2012
S.C. Supreme Court

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JERRY BUCK INMAN,

APPELLANT

MOTION FOR A STAY OF EXECUTION AND
FOR THE APPOINTMENT OF A
POST-CONVICTION RELIEF JUDGE

Counsel for Jerry Buck Inman moves this Court for a stay of execution and to appoint a post-conviction relief judge so that post-conviction counsel can be appointed by that judge.

I.

This Court affirmed petitioner's convictions and death sentence in State v. Jerry Buck Inman, Op. No. 27081, Shearouse's Adv. Sh. #46 (filed December 28, 2011). This Court denied rehearing on January 25, 2012.

II.

A petition for rehearing was filed on January 11, 2012. As stated, this Court denied

rehearing on January 25, 2012.

III.

A petition for writ of certiorari to the United States Supreme Court, *Jerry Buck Inman v. South Carolina*, No. 11-10798, was then filed on June 11, 2012. The Court denied certiorari in its order dated October 1, 2012. A copy of that order is attached to this motion.

IV.

Petitioner now can and will raise numerous grounds of ineffective assistance of counsel in an application for post-conviction relief. In his application for post-conviction relief, while reserving the right to amend once counsel is appointed, petitioner will assert, at a minimum, the following grounds:

V.

1.

Whether counsel was ineffective, in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, by failing to retain another expert to continue to work on petitioner's mitigation or defense case after Dr. Marti Loring was intimidated by the solicitor and the trial judge refused to grant a mistrial?

2.

Whether counsel was ineffective, in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, for assuring Dr. Loring continued working on the case after the judge recessed the case following the solicitor intimidating Dr. Loring?

3.

Whether counsel was ineffective, in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, by not spending adequate time involving petitioner's family and clergy member in Tennessee especially given the long recess in his case.

This list is not exhaustive, and will likely expand, once appointed post-conviction counsel has had the opportunity to investigate. The above grounds are merely offered to show that numerous issues of ineffective assistance of counsel exist in this case.

VI.

Present counsel cannot take a position on other issues of ineffective assistance of appellate counsel. That is a matter for post-conviction counsel and the post-conviction court to determine.

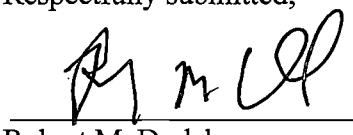
VII.

Based on the above, petitioner requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel. This will allow petitioner to pursue his state court post-conviction relief action in the Pickens County Court of Common Pleas.

WHEREFORE, counsel for Jerry Buck Inman requests that this Court issue a stay of execution and appoint a post-conviction relief judge so that the appointed post-conviction relief judge can hold a hearing to appoint post-conviction counsel so that petitioner can pursue post-conviction relief with the assistance of counsel in the Pickens County Court of Common Pleas upon the grounds of ineffective assistance of counsel, and any other grounds that may arise from post-

conviction counsel's investigation of this case.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

October 10, 2012

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Pickens County

Edward W. Miller, Circuit Court Judge

THE STATE,

RESPONDENT,

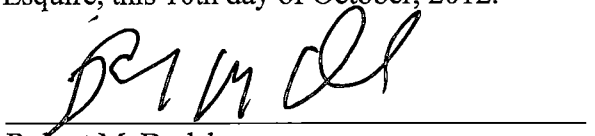
V.

JERRY BUCK INMAN,

APPELLANT

CERTIFICATE OF SERVICE

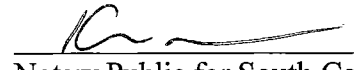
The undersigned attorney hereby certifies that a true copy of the motion for a stay of execution and to appoint a post-conviction relief judge in the above-referenced case has been served upon opposing counsel, Donald J. Zelenka, Esquire, this 10th day of October, 2012.



Robert M. Dudek
Chief Appellate Defender

Attorney for Appellant

SUBSCRIBED AND SWORN TO before me
this 10th day of October, 2012.


(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
OCT 16 2012
S.C. Supreme Court

Appeal from Pickens County
Edward W. Miller, Circuit Court Judge

THE STATE,

Respondent,

v.

JERRY BUCK INMAN,

Petitioner.

RETURN TO PETITION FOR STAY OF EXECUTION PENDING POST-CONVICTION RELIEF

The Respondents, above-named, hereby make a Return to the Petition for a Stay of Execution to allow him to file a petition for a writ of certiorari in the United States Supreme Court. Respondent submits under *In Re Stays of Execution In Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), that since at least one of the three proffered issues is preserved, a stay to allow certiorari is appropriate. The Respondent would show this Court the following:

I.

The South Carolina Supreme Court affirmed the judgment of conviction and sentence of death on December 28, 2011 in State v. Inman (Jerry Buck), 395 S.C. 539, 720 S.E.2d 31 (2011). A timely petition for rehearing was filed on January 11, 2012. On January 25, 2012, the Supreme Court of South Carolina denied the petition for rehearing. The remittitur was issued on the same

date, January 25, 2012.

The direct appeal from the conviction and sentence of death was stayed pending the filing and pursuit of a petition for writ of certiorari to the United States Supreme Court in Inman v. South Carolina, No. 11-10798. The South Carolina Supreme Court entered a stay of execution on February 23, 2012 pending certiorari proceeding in the U.S. Supreme Court. Certiorari was denied by the United States Supreme Court on October 1, 2012. Inman v. South Carolina, _ U.S. _ (U.S. October 1, 2012)(cert denied).

II.

PENDING PCR PROCEEDINGS

Inman v. State, 2012-CP-39-918.

The Petitioner made application for post-conviction relief dated June 19, 2012,[1] filed June 21, 2012 in Pickens County and received from the Clerk of Court on June 25, 2012 by the Office of the Attorney General. Inman v. State of South Carolina, 2012-CP-39-918. The application was prepared and filed by his appellate counsel, Robert M. Dudek. In the June 25, 2012 application, counsel Dudek raised the following allegations:

I. Ineffective Assistance of Counsel

A. Counsel was ineffective for failing to obtain another mitigation expert after Dr. Loring no longer wished to participate because she was intimidated.

B. In the alternative, counsel should have continued to prepare with Dr.

[1]Pursuant to § 17-27-160(A), "The filing of the application does not automatically stay any sentence of death.."

Loring in the event the judge called the case back to trial as occurred here. *Inman v. State, Application for Post-Conviction Relief,* p. 3, Section 10, 11.

The Respondent State of South Carolina made a Return pursuant to § 17-27-160(B) on October 16, 2012. (Copy attached).

III.

The Petitioner, through appointed appellate counsel Robert M. Dudek, asserts in his October 10, 2012 pleading before this Court that he intends to file an application for post-conviction relief in Pickens County raising the following allegations, at a minimum:

I. Whether counsel was ineffective , in derogation of petitioner's right under the Sixth Amendment to the United States Constitution , by failing to retain another expert to continue to work on petitioner's mitigation or defense case after Dr. Marti Loring was intimidated by the solicitor and the trial judge refused to grant a mistrial?

II. Whether counsel was ineffective , in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, for assuring Dr. Loring continued working on the case after the judge recessed the case following the solicitor intimidating Dr. Loring?

III. Whether counsel was ineffective , in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, by not spending adequate time involving petitioner's family and clergy members in Tennessee especially given the long recess in the case.

Motion, p. 2-3.

III.

Respondent note that these claims will be evaluated in any state PCR setting under the mandates of *Strickland v. Washington*, 466 U.S. 668 (1984).

IV.

In this Court's written order in In Re Stays on April 8, 1996, this Court stated as follows:

> If the defendant desires a stay to pursue state post-conviction relief, the defendant must, within ten (10) days of the date of the issuance of the execution notice, file a motion to stay with this Court, setting forth the issues intended to be raised in the application for post-conviction relief. [If the general nature of the issues are appropriate for post-conviction relief], this Court will assign a circuit judge to the case and issue a stay of execution.

In Re Stays, 321 S.C. 546 [bracketed portion not included in published order in West].

Respondents submit that the issues intended to be raised, under the prior precedent of this Court are of "the general nature of issues are appropriate for post-conviction relief," and the entry of the stay would be otherwise be appropriate. However, Respondent submits that under a Strickland v. Washington, 466 U.S. 668 (1984) and Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) analysis, the Petitioner cannot satisfy his burden of proof on his proffered claims as set forth in the attached Return to the Application for Post-conviction relief.

V.

Therefore, Respondents leave it to this Court under the discrete circumstances presented and the meritless allegation based upon the unique record before this Court on whether this mere presentation of allegations satisfy ""the general nature of issues are appropriate for post-conviction relief," to require the granting of a stay to allow the assignment of a state post-conviction relief judge, appointment of two (2) qualified counsel pursuant to § 17-27-160 to

allow a PCR proceeding to held consistent with Section 17-27-160 and In Re: Stays.

WHEREFORE, Respondent has made a Return to the Motion.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

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

October 16, 2012.

ATTACHMENT

RESPONDENT'S October 16, 2012 Return - Inman v. State, 2012-CP-39-918

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)))	IN THE COURT OF COMMON PLEAS
JERRY BUCK INMAN, #5256 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	)))))))))))	C/A No. 2012-CP-39-918 RETURN OF RESPONDENTS TO APPLICATION FOR POSTCONVICTION RELIEF AND REQUEST FOR STATUS CONFERENCE AND APPOINTMENT OF COUNSEL

The Respondent State of South Carolina hereby makes a Return pursuant to § 17-27-160(B) to the application for post-conviction relief dated June 19, 2012,[1] filed June 21, 2012 and received from the Clerk of Court on June 25, 2012 by the Office of the Attorney General. The application was prepared and filed by his appellate counsel, Robert M. Dudek. The Respondent will serve Mr. Dudek with this Return.

The direct appeal from the conviction and sentence of death was stayed pending the filing and pursuit of a petition for writ of certiorari to the United States Supreme Court in Inman v. South Carolina, No. 11-10798. The South Carolina Supreme Court entered a stay of execution on February 23, 2012 pending certiorari proceeding in the U.S. Supreme Court. Certiorari was denied by the United States Supreme Court on October 1, 2012. Inman v. South Carolina, _ U.S.

[1]Pursuant to § 17-27-160(A), "The filing of the application does not automatically stay any sentence of death.."

_ (U.S. October 1, 2012)(cert denied).

On October 10, 2012, the Applicant made a motion for a stay of execution to allow assignment of a judge and pursuit of this PCR proceeding. At the time of this filing, a particular judge has not been assigned nor has counsel been appoinjted pursuant to Section 17-27-160 and In Re Stays of Execution, 321 S.C.544, 471 S.E.2d 140 (1996). The Respondent would show this Court the following:

I.

The Applicant, Jerry Buck Inman, #5256, is presently a safekeeper pending a sentence of death and also serving a term of years sentence pursuant to orders from the Clerk of Court for Pickens County.

The Appellant, Jerry Buck Inman, was indicted at the November 2006 term of the Court of General Sessions for Pickens County for murder (2006-GS-39-2225), kidnapping (2006-GS-39-2224), criminal sexual conduct in the first degree (2006-GS-39-2223), and burglary in the first degree (2006-GS-39-2222). The circumstances of the charges involve the May 26, 2006 murder of Tiffany Souers.

The State, through Solicitor Robert M. Ariail of the Thirteenth Judicial Circuit timely noticed Inman of its intent to seek the death penalty on August 22, 2006 pursuant to S.C. Code, Section 16-3-26 (1976). On March 13, 2007, the Honorable Edward W. Miller was assigned by Order of the South Carolina Supreme Court to the case.[2]

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[2] On August 17, 2007, Inman filed a Motion to Determine the Mode of Trial. In the motion counsel informed the judge of an intent to enter a guilty plea to murder and demand a jury trial for sentencing. ROA. 1202. The state informed the court that it did not consent to this plea in light of precedent of the South Carolina Supreme Court. ROA 1204.

A hearing was held on September 14, 2007 concerning the mode of trial motion. The

The Proceedings Prior to the Guilty Plea

On August 19, 2008, a competency hearing was held. Judge Miller was again informed that Inman sought to tender a guilty plea to murder. R. 913, August 19, 2008, Tr.p. 3, l. 20-21. The hearing initially concerned Inman's competency to stand trial was held.[3] The Appellant was determined to be competent to stand trial.

Inman then entered guilty pleas to the charges on that date. ROA p. 911-975, August 19, 2008 Tr. p. 1- 65. He was represented by James W. Bannister, John W. DeJong, and Symmes W. Culbertson of the Greenville Bar. Judge Miller stated that sentencing was deferred until September 6. Id. Tr.p. 54.

As to the factual basis of the plea, the South Carolina Supreme Court described the crime in the following manner:

> On the evening of May 25, 2006, Tiffany Marie Souers (the Victim), a rising junior at Clemson University, was alone in her off-campus apartment as her roommates were gone for the day. When one of her roommates returned to the

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trial judge denied the request to attempt to enter a guilty plea to the charges. ROA, 830. Sept. 14, 2007 Tr.p. 54. A written order was entered on November 15, 2007. ROA _.

The Petitioner filed a notice of appeal from the November 15, 2007 Order to the South Carolina Supreme Court. On January 9, 2007, without requiring a response or pleading from the State, the South Carolina Supreme Court entered its Order dismissing the notice of appeal "without prejudice."

The Petitioner's counsel next sought certiorari to the United States Supreme Court. On June 8, 2008, the United States Supreme Court denied the petition for writ of certiorari. Inman v. State of South Carolina, No. 07-1298, 128 S.Ct. 2098 (June 8, 2008).

[3]Dr. Donna Schwartz-Watts testified as a defense expert at the competency portion. She stated that he was competent to understand the proceedings and had the capacity to communicate with counsel. ROA. 916, August 19, 2008 Tr.p. 6. She found he had a history of having a "mood disorder" and being treated for depression. She stated from the first time she met Inman in September 2006 he had a desire to plead guilty and knows what he is doing. She stated that he had made it clear to her that he wished to receive a death sentence and felt he deserved to die for what he had done. ROA. 920-21, August 19, 2008 Tr.p. 10-11.

apartment during the afternoon of May 26, 2006, she discovered the Victim's partially-clad body on the bedroom floor. An autopsy revealed the Victim had been sexually assaulted and died as the result of asphyxia due to ligature strangulation with a bathing suit top.Surveillance photographs taken during the early morning hours of May 26, 2006 captured a male, whose face was covered by a bandana, attempting to use the Victim's ATM card at two different bank machines in Clemson.

On June 5, 2006, law enforcement was able to identify Inman as the Victim's perpetrator based on DNA evidence obtained from the crime scene and processed through the National DNA Database, which had Inman's DNA evidence on file due to his prior out-of-state convictions for sexual offenses in 1987 and 1988. Using this information, law enforcement conducted a well-publicized nationwide search for Inman. On June 6, 2006 at approximately 11:45 p.m., law enforcement apprehended Inman in Dandridge, Tennessee.

Shortly after his arrest, Inman orally confessed to the crimes involving the Victim. Within the course of the next three hours, Inman gave separate written statements to an agent with the Tennessee Bureau of Investigation and to agents with the South Carolina Law Enforcement Division (SLED). In these two statements, Inman again confessed to the charged crimes and recounted in detail the events underlying these crimes. When asked to sign these statements, Inman declined and stated "we still have to go to court ."

State v Inman (Jerry Buck), 395 S.C. 539, 720 S.E.2d 31 (2011).

The September Sentencing Proceeding

On September 8-11, 2008, Judge Miller held a non-jury sentencing proceeding as a result of the guilty plea to murder. Testimony was received from state witnesses Holly Bergman, Christina Morello, G.W. McCoig, Jeffrey Kindley, S._____ C_____, V____ P_____, Michael Hannon, Rhonda Jackson, J_____ G____ and Dr. Eric Christensen. R., September 8, 2008 Tr. P. 1-243.[4] The defense in mitigation initially presented Dr. David Price, Dr,. Marti Loring and Claude Tournay, James Aiken, D_____ B_____ and Rev. David Hensley. ROA p. 255-410.

The State's Case at Sentencing.

Evidence was presented through the victim's roommate, **Holly Bergman**, that Tiffany

[4]The "September 8, 2008 Tr." encompasses the proceedings from September 8-11, 2008.

Souers was a Clemson civil engineering major and a dedicated student. ROA p. 39-40. She was described as being close to her family and would constantly be on the telephone with her mother and with her siblings. She was able to give good advice. She was described further as very outgoing and easily made friends. ROA p. 41-42. In describing how Tiffany's death affected her, it was like losing a sister. ROA p. 43. The violence of her death made it more difficult. ROA p. 43-44.

On cross-examination, it was pointed out that Tiffany was also involved in national charity organizations. She was also described as a dedicated member of the Catholic Church. ROA p. 47.

Another roommate, **Christina Morello**, similarly described Tiffany Souers. She presented photographs of school events at Clemson that they participated in. ROA p. 50-52. She described the victim's contagious laugh. ROA p. 53. She also helped in the community in addition to her school work. Her death affected Ms. Morello in many ways. ROA p. 54-55.

She noted that everyone who met Tiffany was her friend. In addition, she was the type of person that showed compassion and cared for others. ROA p. 57.

Chief Deputy G. W. McCoig of the Jefferson County Sheriff's Department in Dandridge Tennessee testified concerning the arrest of Inman on June 6, 2006. ROA p. 60. He stated he stopped after a brief car chase and placed him under arrest. ROA p. 64-65. After reading his Miranda rights, Inman spoke with the officer. During the conversation about the college student, Inman described himself: "after that shit right there, I'm a f__ing animal. ROA p. 68, ll. 21-25.

South Carolina State Law Enforcement Division Agent Jeffrey Kindley testified he

responded to Tennessee after Inman's arrest. Inman made a statement, after waiving Miranda rights. ROA p. 80-86. He described the belongings from Ms. Souers apartment being thrown out as he was driving. back to Tennessee and hiding the sheets in the woods. ROA p. 90-91. In describing with Inman the extradition process and whether the charges qualified for the death penalty Inman stopped him and declared: "That's what I want. I killed a 20-year old college student with everything to live for. And he said he deserved the death penalty." ROA p. p. 94; ll. 1-5, p. 98, l. 22 - p. 99, l. 2.

S.___ C.___ described an event with Inman which occurred December 14, 1987. ROA p. 101. She stated that she was awakened in her apartment by a man with a revolved. She described being tied up by him and being told for her to tie up her roommate. ROA p. 103. With a gun to her head and hands tied, she was penetrated vaginally and anally. ROA p. 105. The assault lasted 20 minutes. Her roommate was forced to watch. He took money and keys, then threatened to kill them if they called the police. As a result, Inman pled guilty to the crime. ROA p. 108.

The prosecution published Inman's **prior convictions**. These included: 1). Dec. 14, 1987 - Sexual Battery - S._ C._ - 30 years (8-18-1989), 2). Robbery - 30 years, 3). Armed Burglary - 30 years, 4).Grand Theft Motor Vehicle - 5 years, 5). Kidnapping (2 counts) - 30 years, 6). Aggravated Assault - 5 years, 7). July 10, 1998 - Second Degree Sexual Assault - 20 years - (N.C.) - 9-26-88, and 80. Attempted Escape - February 5, 1991 - one year,.ROA p. 112-13.

B._ B._ P._ testified concerning a May 23, 2006 incident with Inman. ROA p. 120. She described taking her daughter to the bus stop that morning. She described returning home at lunch when someone came from behind her, covered her mouth and put a knife to her throat.

ROA p. 122. She screamed and he placed her on the floor tying her hands behind her back. ROA p. 123. He stated he had found $250, after she had denied having cash in the house. He then forced her into the bedroom from the kitchen. He then forced her pants and underwear down and saw she was on her period. ROA p. 126-27. At that point, he put her into a bedroom closet and told her he was going to take her car and stash it. ROA p. 127. After he left she was able to get to the phone and hit re-dial. The police determined that he had entered the house by cutting a hole in the floor. ROA p. 129. Two weeks later, she saw Inman's photo on CNN and identified him as her attacker. ROA p. 129-130.

Michael Hannon of the Tennessee Bureau of Investigations testified that he responded to Chief McCoig on June 6, 2006 concerning Inman. ROA p. 139-140. He described getting a waiver from Inman on June 7, 2006 at 12:30 a.m. ROA p. 143-46. Subsequently, he stated he spoke with Inman concerning an incident in Rainsville, Alabama. ROA p. 151-52, 157-163. In the statement he gave concerning the May 23, 2006 incident, Inman described breaking into the house by cutting a hole in the vent. ROA p. 163. He stated he entered the house and found a blue bank bag with cash. However, once inside, the owner returned. He confirmed he intended to have sex with her, but she told him she was on her period and he put her into a closet. ROA p. p. 163, ll. 10-17. He took the money bag and her car which he drove a short distance and parked it and then switched back to his car. ROA p. 163. He described leaving Alabama and then going to South Carolina. ROA p. p. 163, ll. 22-25. He stated that when he got to South Carolina, he was not there a whole day before the incident with Tiffany in Clemson. ROA p. 163-64.

Michael Hannon testified about a subsequent statement Inman made after his arrest describing the rape of a mother with the child in the bedroom. ROA p. 214-15.

Rhonda Jackson, an investigator with the DeKalb County Sheriff's Department in 2006, testified that they developed a suspect from the interview she had with B._ P._ after she called when she saw the picture of Inman on CNN. ROA p. 169. After she gave Chief McCoig the details of the crime, he agreed to interview Inman about the incident. She subsequently came to Pickens County and interviewed him on June 8, 2006. ROA p. 173-181. Inman gave a detailed statement about the entry into the home and his intent to rape her and the fact he could not do so "because she told me she was on her period... she was a single mom and had a little..." ROA p. p. 183, ll. 2-5. He described leaving.

J._ G._ from Sevierville, Tennessee testified on May 22, 2006, she woke up and found someone on top of her with a knife to her throat around 5:00. ROA p. 193. He asked her where the money and jewelry was located and she showed him. When they returned to the bedroom, he tied her hands with her bra behind her back. ROA p. 196. Her little girl was crying. He demanded that if she cooperated no one would get hurt. ROA p. 196, ll. 19-23. With her knees on the floor, the man unsuccessfully attempted to rape her from the rear, and then turned her over, continuing to hold the knife against her neck. ROA p. p. 197, ll. 13-20. At that point, he raped her. ROA p. p. 197, l. 23 - p. 198, l. 12. He then took her to the bathroom and made her clean herself with shampoo twice. ROA p. 198. He continued to make them get items and place them on bed. He then placed her and her daughter into the bathroom. ROA p. 200. After ten (10) minutes she left the bathroom, got her purse, and then called the police. ROA p. 200. She next saw him about 2 weeks later on the evening news. ROA p. 201.

On September 9, 2008, **Dr. Eric Christiansen, the forensic pathologist**, testified about the cause and manner of death of Tiffany Souers. He certified that she died as a result of

asphyxia due to ligature strangulation. ROA p. p. 223, ll. 8-9. A bathing suit top was used. He stated she was rendered unconscious before she died. ROA p. 232. He found evidence of trauma or traumatic sexual relations in damage to her body. ROA p. 234. She had extensive bruising around both wrists which suggested a struggle while restrained and bruising above her ankles.

The Defense Case in Mitigation

Dr. David Price

Dr. David Price , an expert in forensic psychology, clinical psychology and neuropsychology, testified about an evaluation of Inman.[5] He affirmed stated that he had an opinion that at the time of the crime, a factor in the commission of the crime, Inman was under

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[5] Prior to the beginning of the mitigation testimony, Solicitor Ariail returned to an earlier motion he had made concerning expert witnesses requesting the disclosure of the underlying data. ROA p. 250. In particular, he noted that the experts would be testifying about their opinions based upon underlying data that had not been provided to the State. Solicitor Ariail stated that the disclosure would speed up the process. As he stated: "if fact we don't know what it is [and] I'm not sure who their experts are." ROA p. 250, l. 8-11. He requested first, a reasonable amount of time prior to the testimony of the experts of the underlying data upon which they are going to rely, pointing out Dr. Schwartz-Watts prior disclosed report which noted data that the state did not have. He stated this xwas necessary for appropriate and meaningful cross-examination. Second, he requested that since they do not have the documents, that when the experts arrive that he underlying data is brought with them to court. ROA p. 251. Lastly, Solicitor Ariail stated, in a manner to give the court a heads up about the manner that some witnesses had testified in the past. In particular, he pointed out that Dr. Loring, who had a Ph. D. In social work, had a testimonial style that was a "rambling recitation of rank hearsay." ROA p. 251, l. 17-21. As such, he declared it was difficult to keep things clear on what was her opinion under SCRE Rule 703 and what was "hearsay." Solicitor Ariail noted that he was not objecting to "opinions", but did have objection to the parroting of totally uncorroborated hearsay. ROA p. 252-253.

Counsel Bannister objected to the disclosure of the reports and data, contending that would be "per se ineffective." ROA p. 253, l. 23-25. The Solicitor stated that he did not want a "report," but the data underlying the opinion, i.e, if the expert says that they looked at prison records from Florida, I want to see the prison records that they reviewed, which is allowed and required under SCRE Rule 703. ROA p. 254. The Court stated he would return to this issue later.

the influence of mental and emotional disturbance, and that his capacity to conform his conduct to the requirements of law was substantially impaired. ROA p. 258. He stated that he had reviewed 15 three to four inch thick notebooks which included records about his family, his incarceration, newspapers, and his mental health treatment records of over 3,000 pages. He confirmed Inman was the subject of mental health treatment for the 19 years he was incarcerated. ROA p. 259. He opined that Inman had a number of mood disorders, including dysthymia (sustained or intermittent depression for over 2 years), major depressive disorder - recurrent type, major depressive disorder - with psychotic features, bipolar disorder and psychorhythmic disorder. ROA p. 260. He noted that Inman had prior diagnosis of personality disorders, including schizoid personality disorder and he opined that he could also be diagnosed with dissociative identity disorder and sexual paraphilia. ROA p. 260. He noted the presence in the records of multiple suicide attempts, suicide ideation and withdrawal. ROA p. 261. He rated him of the Global Assessment of Functioning with a 30 as someone with serious impairment with the ability to communicate and with judgment and profound impairment in overall ability to function. Id. Dr. Price stated the schizoid personality disorder was illustrated by the fact he was an introvert with intermittent relationships within his family.

In the social history, Dr. Price noted that Inman had a genetic predisposition for the mental disorders because his mother had paranoid schizophrenia and father was an alcoholic. ROA p. 265. He stated Inman was raised in a turbulent and unstable environment, began using drugs at age 10, ran away at age 13, living on the streets at 15 and in jail at 17. Id. He noted that this disorder is often associated with depression.

Concerning dissociative identity disorder, he stated that Inman was not very forthcoming

about his illness. However, Dr. Price learned that in discussion with treatment providers and his pastor, Inman will assume a different effect and response which is like changing from one identity to another. He stated that the primary identity is a passive-dependant and depressed person that has difficulty with guilt. ROA p. 268-269. He stated that the evidence of depression , self-mutilation by tattooing and suicidal ideation supports the diagnosis. ROA p. 269. Also that he traveled in his series of sexual assaults is consistent. ROA p. 269.

Dr. Price describe Inman as a serial rapist. He felt it "astounded " him that he was not similarly diagnosed in Florida. He felt the Rapid Risk Assessment for Sexual Offender Recidivism (RRASOR) suggested that he clearly met that criteria. ROA p. 271-272.

Dr. Price found that Inman had significant records for being sexually abused, physically abused, living in an unstable environment with a mother with periods of anger who they thought was depressed. ROA p. 272-273. Dr. Price felt that Inman had one stable relationship - his maternal grandfather who died when he was young. He was abandoned by his father who had sexually abused him and began to act out of conflict at age 10 with drugs, failing school, and winding up on the street. ROA p. 273. In reviewing Inman's crimes, he found similarity from the victim's crimes with Inman's own experiences where his sister was also subject to bondage when she was tied up and the rapes tended to follow a certain pattern - hand tied , kneeling down, lean forward over the bed in an awkward position, suggesting that he was acting out what had happened to him. ROA p. 275. This was part of his "compulsive rape." ROA p. 275. He stated that Inman felt 'shame and loathing about this rape and murder." ROA p. 276. This similar feeling was consistent throughout his records, noting that he had attempted suicide on 7 occasions (six while incarcerated). Id. Dr. Price described the various ways he attempted to kill

himself including slit wrist, cutting his jugular vein, swallowing barbed-wire, and trying to starve himself. ROA p. 279.

Dr. Price stated that Inman's stated that "I killed a 20 year old college student with everything to live for - I deserve to get the death penalty[6]" statement is consistent with Inman's history and also reflected in his unhappiness and hopelessness while in prison. ROA p. 280-81.

Dr. Price opined that he is a national expert in malingering. He felt that Inman was not malingering based upon his extensive psychiatric history. He noted that Inman instead minimizes the problems and is protective of his parents failings in raising him. ROA p. 283. He felt that Inman had tried to hinder Price's effort to get a life sentence. ROA p. 283. He noted that Inman had talents in being a tattoo artist and had carpentry skills.

Concerning his interaction in prison, Dr. Price found that Inman grew up in prison and was afraid about being released. Particularly, he had stated that after release he had planned to work for a year or two give the money to his mother and then commit suicide. ROA p. 284. Dr. Price concurred with a North Carolina doctor that Inman was a lost soul who would continue to be lost based upon his bad genetic loading with the history of a paranoid schizophrenic mother and alcoholic father. He had been physically and sexually abused and abandoned by his father in the unstable environment. He began getting into trouble at age 10 with drug use, by 13 he was running away and on the streets. Inman had a long history of mood disorder and his family had never been able to teach him to develop normal heterosexual relationships. He had a schizoid personality disorder, developed a dissociative identity disorder and developed sexual paraphilia.

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[6]See also, ROA p. 299, Defense exhibit 11.

ROA p. 285. [7]

On cross-examination, Dr. Price conceded that he did not bring the 15 notebooks with him that he reviewed to prepare his opinion and testimony. ROA p. 304-305. He stated that he received the material from counsel Bannister's office. Importantly, he admitted that he was influenced by every document he read. Id. At that point, Solicitor Ariail renewed his request to see all the notebooks that Dr. Price reviewed. ROA p. 306. During the questioning, Dr. Price confirmed that as to child abuse, sometimes Inman would report it happened and other times he would not report it. ROA p. 307-308. He admitted that the history showed the Inman had the ability to make choices inasmuch as he did not kill the victim in Florida, said he would not harm the child in Tennessee, did not kill the North Carolina inmate, but did kill Souers. ROA p. 308-309. Concerning death, Dr. Price stated that Inman did not want to die, but thought that the death penalty was the appropriate penalty and that he was remorseful for it, thinking of himself as "scum." ROA p. 311.

The defense adjourned for the evening seeking to resolve the record production of material reviewed by Dr. Price and the requested disclosure to the State pursuant to SCRE Rule 705. ROA p. 320-323.

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[7] At that point, the defense proffered a series of exhibits. The Solicitor - noting that no foundation had been laid and they were not authenticated or certified - stated that the exhibits were pure hearsay. ROA p. 287.

Counsel Bannister asserted that since this was a penalty phase of a capital case "rules of evidence are more lax than they would be in the guilt phase of a trial." ROA p. 288, l. 1-4. He opined that it would be more expedient to simply mark the exhibits and have them put in the record so the judge could read them He felt that they should come in as medical records or business records from the prison. Exhibits 3 - 20 were then marked. Dr. Price stated these exhibits were considered by him in making his opinion. ROA p. 291. See ROA p. 294-304.

Dr. Marti Loring

The testimony of **Dr. Marti Loring, a LCSW licensed clinical social worker and board certified expert in traumatic stress** is involved in arguments II and III.[8] For purposes of this portion, on September 8, 2009, Dr. Loring was called to testify in mitigation. ROA p. 324-325. After she was initially *voir dired*, she was qualified as an expert in areas of abuse, trauma, social histories and forensic interviewing. Id. R., P. 326. However, it was briefly developed during the state questioning that Dr. Loring had failed to comply with the state licensing law for out of state licensed social workers. ROA p. 328, l. 1-3.See S.C. Code Ann. § 40-63-200. The prosecution in making the objection to her qualification provided the statute to Judge Miller noting that it carried civil and criminal sanctions. ROA p. 328, l.. 19-25. Although she was granted immunity, Dr. Loring initially invoked her Fifth Amendment and initially refused to testify after receiving advised from personal counsel Bill Godfrey, even after being granted immunity. [Dr. Loring would later testify as a Court Witness].

Mitigation Continues

Claude Tournay

The defense then called **Claude Tournay of the Florida Department of Corrections**. He testified that he had reviewed the sexual offender screening and that in 2004 it was determined that he could not find enough criteria to determine a "paraphilic sexual disorder" or diagnosis. Id ROA p. 357, l. 21-25. He testified that in January 2004, he found sadistic behavior, child molestation abnormal sexual behavior and that Inman was being treated for major depression

[8]Respondent incorporates the procedural history set out in that portion by reference to those arguments.

disorder, recurrent. ROA p. 358. Tounay stated that a April 2004 letter from the Florida Department of Corrections stating that Inman - convicted of rape - was a sexually violent predator would have required the Department of Children and Family Services to send three psychologists to review and examine the inmate and determine whether he was a threat to society. If so , he would have been civilly committed to and institution for crimes which occurred after 1993. ROA p. 360. However, Inman's crime had happened before October 1993. However, as a psychiatry inmate, the department made a referral to Tennessee and arrangements for Inman to continue his treatment for his depression. ROA p. 362-63.

James Aiken

James Aiken, an expert regarding the assessment of inmate classification and expert in prison management and prison classification, testified that based upon his record review, Inman would be automatically in a "high security status" due to the life without parole sentence he would receive, that crime he was convicted and his cumulative behavior patterns while previously confined. R. Tr.p. 369. He also noted that Inman had some security threat group and gang related issues that concerned Aiken a great deal. ROA p. 369. He noted the presence of a Swastika tattoo, which suggests in the prison setting membership in a Nazi gang and security threat group. ROA p. 371. Because Inman is a "multiple sex offender," Aiken testified that it gave him added concern because gangs and security threat groups hate them "and will kill them because they have such a distaste for them." ROA p. 371-372. This is because he has the tattoo and is a multiple sex offender. ROA p. 372.

Aiken stated that because of these factors the correctional department would have to put Inman in a security envelope of a single cell with no free movement or interaction with other

inmates since they do not know who would put a hit on him. He would have to be moved with a security escort and 23 hour lock up. ROA p. 376. He stated no other inmate could have access to him because it would violate "the duty to protect." ROA p. 377. Aiken stated that Inman's security status would be "SL-3" which is the highest level.

On cross-examination, Aiken added that his security level is also increased by the fact of publicity and that it was a high profile case that would be known within the inmate population that Inman was a multiple sex offender. Aiken also found significant in his prior prison record evidence of self-mutilation and multiple disciplinaries , including attempted suicide and attempted escapes. He noted that some of his disciplinaries included possession of weapons for either to do harm or for his own protection.

Family Member

The **Appellant's older sister** testified about her relationship with Inman. She stated that she had a fond memory of him playing "pee-wee" football and she was a cheerleader. She described them getting ready for their roles on Saturday mornings and the family routine. ROA p. 388-89. She also testified about in winter going out from their home in the country across the street into a wooded area and sliding along a creek. She stated that one time they were out there with their cousins and Inman fell through a soft piece of ice and he cried all the way home, noting that he cried frequently as a child. ROA p. 390. She described "sibling rivalry" and fights over jeans between Inman and his sisters because he would wear their jeans and leak ink on them. She stated that he had "seizures" where he would daze, his body stiffen and shake and would sometimes be accompanied by a high fever. ROA p. 392-93. She stated this set him apart from others and prompted a lack of friends. She said that the family moved frequently and lived in

Tennessee, Florida, Texas, and North Carolina. ROA p. 393.

She said that Inman loved pets. She felt, however that Inman did not like himself. She stated that at one time Inman had to share a bedroom with his grandfather to whom he was very close and would talk together for hours. The grandfather passed away when he was 16, which was a turning point in his life. ROA p. 395. Afterwards, Inman began staying out late, became more withdrawn and once ran away from home and was found sleeping outside a church. ROA p. 396.

In describing their mother, she said that she suffered from bipolar disorder and schizophrenia. She said that the mother was affected by her medication and would hear things, talk to herself, and would freak out over the smallest thing. ROA p. 396-97.

The sister described events when he was age three and living in a trailer in Florida. She stated that she started receiving inappropriate presents such as see through nightgowns. Later they moved to another house in Florida and she claimed that her other grandfather, Mr. Inman Sr. would come into the bedroom she shared with the Appellant [she was 5 and he was 3] and the grandfather would blindfold her and tie her hands to the bed and turn her over and she recalled that it was sexual abuse. She described that the grandfather would leave her in the top bunk and go to the bottom bunk. While she did not know what was happening to the Inman, she heard him crying and they both were threatened. Id. She stated that the step-grandfather also messed with her. ROA p. 400. She described a conversation that she once had with Inman when she stated that she had been sexually abused and he stated that he had been abused also. ROA p. 400-401.

Rev. David Hensley

Reverend David Hensley, Inman's pastor, was presented to testify. However, Inman objected to his testimony based upon the priest -penitent privilege which Inman refused to waive.

ROA p. 402-405. Rev. Hensley then only described the fact that he met with Inman the Friday before with his Bible, grape juice, wafer, and poured water over Inman's head. ROA p. 405.

April 20, 2009 Proceedings

On April 20, 2009, the matter was re-convened for the sentencing hearing. At the outset, counsel Godfrey for Dr. Loring returned with a motion requesting that she be released from her out of state subpoena or for alternate relief. **ROA, 446-47, April 20, 2009 Tr.p. 8-9.**[9] At the hearing, Judge Miller stated that he wanted the defense to consider calling Dr. Loring as a witness in mitigation. He stated that she was ready willing and able to come testify voluntarily. Counsel Bannister stated that he had certain motions and that they were not in a position to call her as a witness.[10] Counsel called Public Defender John Mauldin as a witness on the misconduct claim. Mr. Mauldin testified about the circumstances concerning the Michael Laney case. ROA 510-549, Tr.p. 72-111. It was essentially his position that the Solicitor office had agreed to a life sentence based upon a desire to have a misconduct claim dropped concerning its questioning of an expert witness, Dr. Everington on the issue of mental retardation. [11]

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[9]As set forth below in Argument One, Judge Miller had refused to vacate his certification of Dr. Loring as an material out of state witness at proceedings on April 14, 2009. See ROA 1021-1034, April 14, 2009, Tr.p. 1-14.

[10]The defendant made a motion to recuse the 13th Circuit Solicitors Office based upon a claimed prosecutorial misconduct based upon the incidents concerning Dr. Loring. ROA 499-501, Tr.p. 61-63, a motion to determine the role of Solicitor Ariail and the Prosecution team, and a motion to suspend proceedings. Solicitor Ariail responded in writing and orally concerning the claim that they were involved in Dr. Loring's potential arrest and included an affidavit from Mr. Geary in Georgia to support the position. ROA 506-07, Tr.p. 68-69. Response to Motion, ROA 1243.

[11]In its response to the motion, the Solicitor's office presented a different version of the circumstances that lead up to the life sentence. *Response to Renewed Motion for Mistrial.* ROA 1207. The questioning concerning Dr. Everington was whether she had exceeded the scope of her

This was a matter that the state disputed within its questioning. ROA 549-555, Tr.p. 111-117. The record revealed that the objection to Dr. Everington's testimony in Laney was not to her qualification as an expert in mental retardation, but that she was not qualified in S.C. to administer IQ tests and that only a licensed psychologist could do that type of interpretation. ROA 556, Tr. 118. The claimed terms of a proposed agreement were set out in State Exhibit 25. ROA 565-66, Tr.p. 127-128. However, the initial negotiation was not successful and rejected by the state. ROA 566-67, Tr.p. 128-129. It was developed that the Laney motions based upon alleged prosecutorial misconduct were never ruled upon by a judge and were withdrawn after the death notice was withdrawn. Mauldin confirmed that the stated reason for the state's withdrawal was the victim's family concerns and endless litigation on mental health issues..." ROA 578-79, Tr.p. 140-141.

Laney's other lawyer, Troy Tessier also testified concerning the Laney matter. ROA 580-87, Tr.p. 142-149.

Susan Allen, a juror in the Edens and Holloway case, testified about a dinner the Solicitor's office held for the jurors in the case after the trial was completed. ROA 588-89, Tr.p. 150-151. She stated the issues raised by the office was to seek out what factors influenced them the most in not giving the death penalty. ROA 592-93, Tr.p. 154-155. On cross-examination, the voluntary contact concerning the dinner was pointed out consistent with Judge Hayes instructions to jurors. ROA 595, Tr.p. 157.

Judge Miller again made inquiry of the defense concerning the defense of its intent to call

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qualifications as an expert witness - a claim that was ultimately supported by the Board of Psychology. *Exhibit 2 to Response.* ROA. _ . The pleading also addressed other collateral issues raised concerning the motions and its contested factual issues.

a social historian, noting this case is going forward. The court was concerned because Dr. Loring is present and ready to go, "but we are not going to set this case up for failure." ROA 603-04, Tr.p. 165-166.

Judge Miller then denied the defense request to call Solicitor Ariail and other prosecutors concerning the raising of an improper issue related to the lack of licensing of Dr. Loring and why the issue was not raised in the earlier trial. ROA 604-05, Tr.p. 166-167.

Desa Ballard , a lawyer who concentrates on legal ethics and professional responsibility, testified that the Solicitor had violated a number of rules of professional responsibility in connection with his earlier examination of Dr. Loring. R. 611, Tr.p. 173.

At the conclusion of the testimony, Judge Miller stated that he would not suspend the proceedings. ROA 633, Tr.p. 195. He further stated that Dr. Loring was going to come and he would not remove them as advocates in the case. ROA 633, Tr.p. 195.

The April 21, 2009 Proceeding

On Tuesday, April 21, 2009, defense counsel Bannister again advised Judge Miller that the defense was not going to call Dr. Loring as a witness. ROA 639, April 20, Tr. p. 201. Judge Miller stated that he was considering calling Dr. Loring as a "court's witness." ROA 639, Tr. p. 201, ll. 5-6. He stated that his client had pled guilty and asked him to be the sole fact finder in the case. [Defense counsel Bannister concurred with that statement: "That's correct."]. ROA . 639, Tr. p. 201, ll. 11-14. The judge stated that Dr. Loring was the first choice by the defense and "I believe that she can testify without fear." ROA 640, Tr. p. 202, ll. 15-16. After Loring's counsel confirmed that she had gone over the subject matter the prior evening, Judge Miller stated that she had earlier spent up to 9 to 10 hours preparing. Counsel Godfrey stated that she had previously

stated she had reviewed the files 4 to 5 hours, reviewed the file yesterday, has her charts and pictures since they had talked about her testifying as a witness and she had advised him that she felt protected by the court. ROA 641, Tr. p. 203, ll. 7-21.

Counsel Bannister renewed his motion for a mistrial based upon the prosecutorial misconduct claim. ROA 642, Tr. 204. He requested that a life without parole sentence he entered under the 5th Amendment Double Jeopardy Clause. ROA 643, Tr. 205.

The State opposed the motion, citing Fields v. J. Haynes Waters Builders, 376 S.C. 545, 658 S.E.2d 80, 86 (2008), which allowed a court in qualifying an expert witness to look at the statutory requirements for licensing.[12] The State argued that there was no prejudice from the conduct. Dr. Loring is there and able to testify which shows there was no witness intimidation. She was neither threatened nor intimidated. Further, the State noted that this was a bench trial where the trial judge is presumed to be able to differentiate what it feels is improper. ROA 645, Tr. 207.

Judge Miller initially rejected the double jeopardy motion. He concluded that there was no evidence the State deliberately goaded the defense to make the mistrial motion. ROA 645, Tr. p. 207, ll. 15-19. However, he did not accept the State's position on Fields because there is no question that whether a person is licensed in particular state is a significant factor in determining whether they should be qualified, but when the Solicitor brought up the criminal sanctions, it was improper. ROA 646, Tr. 208. However, the trial judge found it was immediately addressed and resolved with the grant of immunity. ROA 646, Tr. p. 208, ll. 4-7. Judge Miller opined in light of

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[12] The State made a written "Response to Renewed Motion for Mistrial and Memorandum" which is incorporated by reference. ROA 1214-1241 "Response").

the administrative order, Baggerly and Fields, that there was no criminal conduct in the witness who arrives solely to testify as an expert witness. ROA 646, Tr. p. 208, ll. 15-18. Relying upon U.S. v. Golding, 168 F.3d 700 (4th Cir. 1999) for a reversal the remarks must be improper (which he found) and such comments or remarks must have prejudicially affected the defendant's substantial rights so as to deprive him of a fair trial.

Judge Miller noted that this was not a jury trial, but a bench trial and the result might have been different. He found that the defendant's rights were not prejudicially affected. Particularly, he found that Dr. Loring was prepared to testify before it occurred and is prepared to testify now according to her attorney. ROA 647, Tr. p. 209, ll. 21-25. Judge Miller stated that in his capacity as fact-finder he is interested in hearing everything that might bear on his decision. He does not find "deliberate prosecutorial misconduct." ROA 648, Tr. 210. Counsel Bannister asserted that had they been provided a jury with the plea, the result would have been different,

Counsel Bannister next moved for a continuance. He stated that on September 11 when DROA Loring took the 5th, the matters were suspended and he was directed to either fix the problem with DROA Loring or find another social historian. Counsel stated that while he thought it was a red herring until the Supreme Court spoke on the issue, the issue was still decided against them on the licensing issue. The only available expert he asserted he could find was Jan Vogelsang who he sought funding for on January 2 and had less than 4 months to prepare. ROA 651-52, Tr. 213-14. As he asserted at the April 14 hearing, he declared she could not be prepared by April 20. ROA 653, Tr. 215.

Judge Miller noted that there had been discussions throughout that this case was to restart on April 20. ROA 653, Tr. p. 215, ll. 21-25. He stated that according to Ms. Vogelsang's

affidavit she would not be prepared to testify until the first quarter of 2010. ROA 654, Tr. p. 216, ll. 1-13 [It was April 2009 at that time].

Judge Miller stated that Dr. Loring was prepared to testify and had done all her work. He noted that she had been on the case a long time and the court wanted to hear from her. However, he stated that he would not allow the prosecutors to intimidate her. R. 654-55, Tr. 216-17. Judge Miller stated that this case will be finished this week and Vogelsang could be put up. R. 655, Tr. 217.

Counsel Bannister stated he needed a ruling on his continuance and thought he was being told it was denied.

Judge Miller clarified that he would break to let them meet with Dr. Loring since she was present and was prepared to go forward. R. 655, Tr. p. 217, ll. 13-19.

April 22, 2009 Proceeding

On Wednesday April 22, the defense returned to its case in mitigation. R. 656, Tr. 218.

Kenneth McArthur

Kenneth McArthur, Inman's step-father, testified that he has known Inman since he was four years old. R. 657, Tr. 219. He stated that the September hearing was very stressful for McArthur and his wife, Vera, because of the potential sentence. He stated Vera had been hospitalized in January due to the stress. He stated they love Inman and enjoy having the opportunity to see him in prison. R. 657, Tr. p. 219, ll. 17-24.

At that point, based upon their prior motions, counsel Bannister declared that he was not calling further witnesses. R. 658, Tr. p. 220, ll. 8-12.

The Court Declares Its Intent to Call Dr. Loring

Judge Miller then declared his intent to call Dr. Loring. R. 658, Tr. p. 220, ll. 14-17. He stated that (1) she would aid the fact-finder in the resolution of the case, (2) she was the number one choice for social historian in the case, but the defense has stated it had no contact with her since September, (3) she has been rehabilitated and despite the fact that she refused to testify in September because of her feelings of intimidation (which he ruled was prosecutorial misconduct which did not rise to the level to require reversal or mistrial) which is cured in part by her presence today. "I think it's necessary to put her up to ensure that these claims of due process violations are put to rest." R. 658-59, , Tr. p. 220, l. 14 - p. 221, l. 6.

Defense counsel Bannister objected citing Riddle v. State, 314 S.C. 1, 443 S.E.2d 557 (1994) and SCRE Rule 614. While admitting the right to call a witness was within the court's discretion, he contended it was limited in State v. Anderson, 304 S.C. 551, 406 S.E.2d 152 (1991) to a situation in a criminal case where four prerequisites exist:

> (1) the prosecution must be unwilling to vouch for the veracity or integrity of the witness; (2) a close relationship must exist between the accused and the potential court's witness, *e.g.*, accomplices and family members; (3) there must be evidence that the prospective witness was an eyewitness to the transaction upon which the prosecution is based, gave a sworn statement concerning the pertinent facts, and the statement has been contradicted or it is probable that it will be contradicted; and (4) the testimony the witness is to relate must be material, such that without the testimony a miscarriage of justice would likely result.

R. 659-660, Tr. 221-22. Counsel contended that the prerequisites were not met in this case. R. 660, Tr. p. 222, ll. 15-22.

After the defense renewed its motions, the trial judge reminded the defense that Dr. Loring was here voluntarily. R. 661, Tr. p. 223, l. 13.

Judge Miller noted that the notes to SCRE Rule 614 recognize that it is different that the requirements in State v. Anderson, supra. R. 661, Tr. p. 223, ll. 20-24. Second, the trial judge noted that the defense did not contact Dr. Loring and it was not until January that the Court saws the request for funding of a different expert after three (3) months. R. 662, Tr. p. 224, ll. 1-3. Further, Judge Miller noted that he had not been informed that Ms. Vogelsang would not be prepared to testify for another year from that date. R, 662, Tr. p. 224, ll. 3-8. However, being aware of that, the defense did not re-contact Dr. Loring to see if she could be rehabilitated and if she would testify.

> It leads me to the conclusion that counsel for the Defendant is more interested in pursuing the misconduct issue than in presenting a full defense. And as a result the assertion that due process is violated is disingenuous because defense counsel has perpetrated the failure to prepare for the social history.

R. 662, Tr. p. 224, ll. 11-16. At that point, Judge Miller called Dr. Loring.

Dr. Marti Loring - Court Witness

Upon the questioning by Judge Miller, Dr. Loring initially indicated that it would not be necessary to have Solicitor Ariail removed from the courtroom to make her feel comfortable. R. 663, Tr. p. 225, ll. 9-20. After revealing her educational and employment background, Dr. Loring was qualified as an expert "in the field of social history, trauma, and abuse." R. 664-65, Tr. p. 226, l. 21 - p. 227, l. 11. After some initial questioning, Dr. Loring stated that she was willing to testify and to do her best, noting that she had not received attorney guidance [from the defense team, not her personal lawyer Mr. Godfrey], had not seen Inman nor had interviewed anyone else since the six months. She admitted she had checked on the well being of health of the step-father, mother, and sister, but had no case discussion with them. R. 667, Tr. 229.

Counsel Bannister made an objection as to "how the witness was procured" and the process as a court witness. R. 668, Tr. 230.

Dr. Loring presented a genogram [Court Exhibit 4] and described in narrative form the different types of interaction between the family members and their problems with drugs, alcohol, mental illness, sexual abuse and violence. R. 670-680, Tr. 232-242. Dr. Loring also presented a timeline of Inman's life. [Court Exhibit 5] R. 680-82, Tr. 242-44. Dr. Loring further presented a group of photographs and material suggesting as a child that Inman was "still miserable and crying" (R. 682, Tr. p. 244, ll. 22-25) and had indicators of sexual abuser. R. 683, Tr. p. 245, ll. 2-6. She stated that he had headaches and suffered from head beatings, that he accidentally burned his genitals with spilled bleach without medical attention, that he was firmly spanked as a child, that he had seizures, that he was exposed to violence in 1980 involving a dog fight with a cat, that his leg was burned in 1981 in a motorcycle accident. R. 684-86, Tr. 246-48. He also began drug use including alcohol, huffing gas, marijuana, cocaine, and LSD beginning in 1981. R. 686, Tr. 248.

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Dr. Loring then concluded that Inman's early history revealed that he was seen in a "trance-like state" as a child, including the time period it was alleged he was abused as a child. R. 693, Tr. p. 255, ll. 4-18. This history was consistent with his later history of bipolar and having major depression with psychotic features. However, she felt the second half of her conclusions may be interwoven with attorney-client matters. R. 694, Tr. p. 256, ll. 6-14. Counsel Bannister continued his objection to potential disclosure. R. 694-95, Tr. 256-57.

Judge Miller then declared that he was concerned that he was not getting all the

information "because of legal gamesmanship." R. 696, Tr. p. 258, ll. 5-7. He noted she was no longer under "intimidation" and that because of the immunity there was no valid 5th Amendment claim. The defense had made no effort to contact her. Judge Miller repeated that he believed the defense position was disingenuous when the mistrial motion was based upon their reliance on her expertise which they had felt was significant. R. 696-97, Tr. 258-59.

The defense then briefly cross-examined Dr. Loring that it would not be uncommon for new data to become available over seven (7) months. R. 697-98, Tr. 259-60. Dr. Loring stated that she had not reviewed any psychological profile prepared by the government in the case to her recollection. R. 698-99, Tr. 260-61.

Defense counsel Bannister ended his questioning. He then re-affirmed his prior motions. R. 699-700, Tr. p. 261, l. 4 - p. 262, l. 5.

Judge Miller re-affirmed his earlier order denying the prosecutorial misconduct motion. R. 700, Tr. p. 262, ll. 6-23. Importantly, he declared: "The defense counsel now is participating in the limitation of this evidence [of Dr. Loring] that they intended to offer, which contributes to any Constitutional violation that might exist." R. 700, Tr. p. 262, ll. 20-23.

The prosecution, through Deputy Solicitor Strom, briefly cross-examined Dr. Loring. She confirmed that the genogram and timeline were prepared by her in September for her testimony. R. 701, Tr. 263. Dr. Loring clarified her earlier testimony about Inman's father killing dogs and Jerry giving a neighbor a stray dog to care for. R. 703, Tr. 265. She confirmed that Inman experienced a bad childhood - exposure to violence, sexual abuse, and loss. Dr. Loring admitted that she had reviewed his criminal history including the assaults on females and in prison. R. 706-07, Tr. 268-69. however, she had not reviewed the particular criminal incident in this case. R.

708-09, Tr. 270-71. Dr. Loring was then released. R. 711, Tr. 273.

Counsel Bannister again closed his mitigation case and renewed his prior motions. R. 719, Tr. 281. These included his motion for jury trial sentencing and objection to the trial court calling Dr. Loring as a witness. R. 719-20, Tr. p. 281, l. 8 - p. 282, l. 4.

Closing Arguments and Inman's Request in Sentencing

Closing arguments were then made. R. 720-731, Tr. 282-293 (Solicitor Ariail). Appellant Inman made a personal statement briefly noting his prior history of possibly being molested and abuse is shared with millions, that he had been prison his entire life, that he can't be rehabilitated and had escaped twice. R. 731, Tr. p. 293, ll. 12-22. He declared "in all reality, there's only one viable sentence to impose for someone like me. And I ask that you impose that sentence." R. 731-32, Tr. p. 293-94, l. 1. Counsel Bannister then made his argument plea in mitigation. R. 732-39, Tr. 294-301.

Judge Miller then took a recess. He then made inquiry of Inman concerning his right to testify. Inman declared he did not wish to testify. R. 740-41, Tr. 302-03. He stated he had discussed it with his lawyers earlier today. R. 741, Tr. p. 303, ll. 5-8.

Judge Miller was advised by the defense to consider statutory mitigators #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 ("age or mentality of the defendant at the time of the crime'). R. 742, Tr. p. 304, ll. 3-4.

The Sentencing

At 6:23 p.m., Judge Miller returned to the courtroom. He entered an Order sentencing the

Appellant to death finding the statutory aggravating factors of burglary in the first degree, kidnapping and criminal sexual conduct in the first degree. R. 743-755, Tr. 305-317. Judge Miller further entered a written sentencing order on April 22, 2009. R. 1045-1053. He also sentenced Inman to thirty (3) years consecutive for burglary in the first degree, 30 years consecutive for criminal sexual conduct in the first degree, and no sentence for kidnapping. R. 754-55, Tr. 316-17.

A motion to reconsider and new trial was made by counsel on jj23, 2009. ROA _. Judge Miller denied the motion on July 17, 2009 and filed July 28, 2009. R. 1248.

THE DIRECT APPEAL

A timely appeal was filed on August 4, 2009. In the direct appeal, the Petitioner asserted the following questions presented:

1. The judge committed reversible error by accepting Inman's guilty plea, despite defense counsel insistence that the judge's refusal to allow jury sentencing was preserved for review by the Supreme Court on direct appeal, because the defense's position rendered the plea conditional and thus invalid under South Carolina law.

2. The judge committed reversible error at sentencing by refusing to grant a mistrial and recuse the Solicitor's Office from any further involvement in the case, despite finding prosecutorial misconduct, where the Solicitor threatened a key defense witness after the judge granted the defense a continuance to obtain a new expert because of his misconduct.

3. The judge committed reversible error at sentencing by refusing to allow the defense to cross-examine the Solicitor and his Deputy on the issue of prosecutorial misconduct, as the Solicitor's intent was directly relevant to that issue.

Final Brief of Appellant, p. 4.

The South Carolina Supreme Court affirmed the convictions and death sentence on December 28, 20112 in State v Inman (Jerry Buck), 395 S.C. 539, 720 S.E.2d 31 (2011). In its pertinent part to this proceeding, the Court held that: (1) trial court acted within its discretion in

refusing to recuse Solicitor's Office as advocates and declining defendant's request to question Solicitor for purposes of asserting prosecutorial misconduct claim;(2) manner in which State conducted voir dire of defense expert concerning her licensing status and whether she was subject to civil and criminal penalties for practicing social work without a license unequivocally constituted witness intimidation; (3) State's prosecutorial misconduct in intimidating a defense witness did not necessitate declaration of mistrial; and (4) sentence of death was appropriate punishment. A petition for rehearing was denied on February 23, 2012.

The Applicant made a Petition for Writ of Certiorari in the United States Supreme Court. It was docketed on ___ . In the petition, Inman, through counsel Dudek made the following questions presented:

I. Whether the South Carolina Supreme Court's holding that an irrebutable presumption of prejudice no longer applied where there is deliberate prosecutorial misconduct, since the trial judge found prosecutorial misconduct in this case, and the South Carolina Supreme Court also found such prosecutorial misconduct based on clear witness intimidation, since changing the law retroactively in this matter was fundamentally unfair and violated Due Process?

II. Whether the South Carolina Supreme Court's holding that petitioner did not have a right to call the prosecutors as witnesses during his bench trial to prove intentional prosecutorial misconduct violated petitioner's right to Due Process under the Fourteenth Amendment?

III. Whether the South Carolina Supreme Court erred by holding the prosecutorial misconduct and witness intimidation in petitioner's case did not result in a death sentence that violated Due Process rights, because the undisputed intimidation of petitioner's chief mitigation witness, Dr. Marti Loring , had an adverse effect on the ability of the defense to present its case in mitigation as guaranteed by the Eighth Amendment to the United States Constitution?

Inman v. State, petition for writ of certiorari, p. 1. The Respondent , through below-sigbed counsel made a Brief in Opposition on August 26, 2012. On October 1, 2012, the United States

Supreme Court denied the petition for writ of certiorari. Inman v. South Carolina, 11-10798, - U.S. _ (U.S. Oct. 1, 2012).

Respondent attaches and incorporates by reference the following:

DIRECT APPEAL DOCUMENTS

1. Final Brief of Appellant.
2. Final Brief of Respondent.
3. Final Reply Brief of Appellant.
4. State v Inman (Jerry Buck), 395 S.C. 539, 720 S.E.2d 31 (2011).
5. Petition for rehearing by Appellant.
6. State v. Inman, Order, (S.C.S.Ct. February 23, 2012) (petition for rehearing denied).
7. Record on appeal

II.

In his application for post-conviction relief filed June 21, 2012, through his appellate counsel, Robert Dudek, the Applicant raised the following claims:

I. Ineffective Assistance of Counsel

A. Counsel was ineffective for failing to obtain another mitigation expert after Dr. Loring no longer wished to participate because she was intimidated.

B. In the alternative, counsel should have continued to prepare with Dr. Loring in the event the judge called the case back to trial as occurred here.[13]

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[13]In the motion for a stay filed in the South Carolina Supreme Court dated October 10, 2012, the Applicant asserted that he would raise at a minimum the following grounds:

I. Whether counsel was ineffective , in derogation of petitioner's right under the

III.

Respondent respectfully submits that the Applicant will be unable to show a Sixth Amendment violation in this case on the specified issues in light of the record in this case.

On September 10, 2008, Dr. Marti Loring, a LCSW licensed clinical social worker and board certified expert in traumatic stress was called to testify. ROA p. 324-325. Evidence was presented that Dr. Loring had done research therapy focused on abuse trauma. She stated that she had a Masters degree from Bryn Mawr College School of Social Work and a PhD Sociology with a major in Social Psychology from Emory University. ROA p. 325. She stated that she had testified in South Carolina before and courts in other states. She stated that she had been previously qualified in areas of abuse, trauma, social histories and forensic interviewing. Id. R., P. 326. She declared that she had never failed to be qualified as an expert in those areas. Id. Dr. Loring was then offered as an expert in the field of trauma, abuse, forensic and therapeutic interviewing and as a social historian in capital sentencing cases. ROA p. 327, ll. 1-3.

Then Solicitor Ariail *voir dired* her on whether as part of her services in this case had she performed services under her licensed clinical social worker status, which she admitted that she

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Sixth Amendment to the United States Constitution , by failing to retain another expert to continue to work on petitioner's mitigation or defense case after Dr. Marti Loring was intimidated by the solicitor and the trial judge refused to grant a mistrial?

II. Whether counsel was ineffective , in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, for assuring Dr. Loring continued working on the case after the judge recessed the case following the solicitor intimidating Dr. Loring?

III. Whether counsel was ineffective , in derogation of petitioner's right under the Sixth Amendment to the United States Constitution, by not spending adequate time involving petitioner's family and clergy members in Tennessee especially given the long recess in the case.

Motion, p. 2-3.

did by interviewing Inman and having conversations with him. Id. Tr.p. 327, l. 9-17. She admitted that a fee for those services was being paid to the Center for Mental Health, but denied that she was getting any money for her services. ROA p. 327, ll. 18-25. She declared that she was not licensed in South Carolina. ROA p. 328, ll. 1-3. However, she stated that "custom" is that her license is honored across the country whenever she goes into different states. ROA p. 328, ll. 7-10.

Solicitor Ariail then directed Judge Miller's attention to S.C. Code Ann. § 40-63-200 which concerned the unauthorized practice of social work. ROA p. 328, l. 11-14. He next noted that a person practicing social work within the state must be licensed prior to performing the services, citing specifically S.C. Code Ann. § 40-63-30. ROA p. 328-329. He noted to Judge Miller that it carried both civil and criminal penalties for violation. He stated that based upon that, he would submit that she is "not qualified as an expert in this state to testify or render those services until she gets licensed." ROA p. 328, ll. 19-23. Judge Miller asked that he be provided with a copy of the statute after Solicitor Ariail referred to it. ROA p. 328, l. 25.

In response to the defense argument about his comments, Solicitor Ariail stated that he was raising the licensing issue for the purpose of voir dire. He noted that whether or not he presented an indictment against her was a totally separate issue. ROA p. 331, ll. 1-2. Judge Miller opined that the intent of the statute, § 40-63-200, was to prevent unlicensed persons from opening an office and practicing social work and treatment. ROA p. 331, l. 3-16. He declared that he distinguished what Dr. Loring has done as a retained expert for the defense from that definition of the statute of § 40-63-20. He overruled the objection and concluded that Dr. Loring can testify. ROA p. 331, ll. 17-21.

After the court determined that Dr. Loring was qualified, [ROA p 331, ll. 3-21], counsel Bannister cited State v. Williams, 485 S.E.2d 99, at 102-103 referencing witness intimidation. He complained that Solicitor Ariail's attempt to make the testimony potentially fit within the criminal statute was an attempt to intimidate the witness and thereby violates the defendant's due process rights. He claimed that this was a substantial governmental interference. Counsel Bannister then declared that he did not believe that she would be able to testify absent some assertion from the Solicitor that he would either grant immunity or have some sort of protection for her for it not to be an issue. The prosecution expressly granted immunity from prosecution for her particular acts related to Mr. Inman's case since the trial judge had concluded that she was qualified as a witness that could testify in the area of social work as to the Inman case. ROA p. 333, ll. 2-23. However, he acknowledged that he did not have authority to grant immunity concerning other acts which might have already occurred. ROA p. 333-335. The Court then inquired of defense counsel Bannister if that was satisfactory, and counsel Bannister initially declared: "yes," but suggested that it was a red herring to start with. ROA p. 333, ll. 25.

After Dr. Loring consulted with her personal counsel [Bill Godfrey], she returned to court and pled the Fifth Amendment, stating that "she felt threatened as a witness in this case, and in other cases in which I've testified in South Carolina at this time." ROA p. 336, ll. 17-24. Judge Miller restated that the Solicitor had granted her immunity so that she would not be prosecuted for your work in this case. ROA p. 337, ll.1-3. She provided the court with a list of prior cases that she had testified in South Carolina and noted that this issue had been raised once before and "it was immediately put to rest." ROA p. 338, ll. 4-7. Dr. Loring, after another break, stated that she had been advised that she had been threatened in regards to her previous cases.

ROA p. 344, ll. 9-10. She stated that her (legal) advice was "that to testify when I'm told that I would be in violation of a criminal statute would affect my professional reputation in other cases and jurisdictions. ROA p. 344, ll. 9-15

On September 11, 2008, defense counsel made a motion for a mistrial based upon the Solicitor's voir dire of Dr. Loring. Counsel Bannister referred to State v. Williams (Brad), 326 S.C. 130, 485 S.E.2d 99 (1997) and the fact that Solicitor Ariail had cited a statute that it was a crime to practice social work without a South Carolina license. ROA p. 411-12. On behalf of Dr. Loring, counsel Bill Godfrey declared that Dr. Loring sees this issue as a major storm and was upset about testifying in this case. ROA p. 431. He stated that she is licensed in Georgia and has been put on notice by the Solicitor that she was violating a criminal statute. Godfrey declared that Dr. Loring was going to take the 5th Amendment. ROA p. 431, ll. 20-21. Judge Miller then questioned how does she invoke this when she has been granted immunity. ROA p. 431-32. He stated that she had testified in other cases and that there was no statute of limitations. "No one is able to assure her that there are not similar laws in [Tennessee and Michigan]" where she had interviewed people. He stated that she has to declare each year if anything of a criminal or quasi-criminal nature comes up and it could affect her license in Georgia. ROA p. 432.

Judge Miller deferred the decision on how to handle Dr. Loring's refusal to testify. However, he did not rule out Dr. Loring's participation and also stated that if she determines she does not want to participate, he would allow him to show how he was prejudiced. ROA p. 435. The court then adjourned.

On April 20, 2009, the matter was re-convened for the sentencing hearing. At the outset, counsel Godfrey for Dr. Loring returned with a motion requesting that she be released or for

alternate relief. R. 446-47, April 20, 2009 Tr.p. 8-9. He stated that trial court had previously declined to withdraw its earlier certification that she was a material witness. He described proceedings subsequent to that date in Georgia when the Georgia authorities attempted to enforce the out of state subpoena and Judge Miller intervened. He noted that the Georgia circumstances represented further intimidation of her. He urged that she was not a proper witness any more as she was no longer part of the defense team. R. 451, April 20, 2009 Tr.p. 13. If not able to release her, counsel Godfrey argued in the alternative that the matter be suspended so that he can investigate what happened in Georgia and the circumstances surrounding the circumstances of the threats. R. 452-53, Tr.p. 14-15. Counsel Bannister asserted that the defendant's right to witnesses was again chilled by these acts on the part of the state. Judge Miller, however, questioned how it would be chilled since he had declared that he did not intend to call her as his witness. R. 456-57, Tr.p. 18-19. Solicitor Ariail noted in response that the affidavit of Mr. Geary reflects that the Solicitor's Office had nothing to do with the actions in Atlanta and in fact communicated after the judge's email to have the authorities stand down, when the Atlanta authorities thought Dr. Loring was evading service of the subpoena. R. 460-61, Tr.p. 22-23.

Judge Miller subsequently stated that at the September hearing that noted that he had not completely ruled Dr. Loring out of the case. R. 467, Tr.p. 29. Counsel Bannister stated that absent the September 11, 2008 events, she would have been their witness, but in light of the Solicitor's conduct and the newer events in Georgia, they did not intend to call her as a witness. Whether she is a witness for other purposes was left to the judge. R. 468, Tr.p. 30.

Dr. Loring testified at the motion hearing concerning the events the prior week in Atlanta when she learned that a subpoena was being served at her home. R. 472-73, Tr.p. 34-35. After

getting the paperwork on her return home from writing, she contacted counsel Godfrey since the hearing date on the document in Georgia was missed. She then learned the police had been at her house, but the neighbors explained that she was not home. R. 477-78, Tr.p. 39-40.

She then stated that she had discussions with her counsel and Georgia authorities that she was glad to come to S.C. if the judge wanted her to be here. R. 479, Tr.p. 41, ll. 10-24. She stated she arrived last night to be sure to be here. R. 479-80, Tr.p. 41-42. Upon questioning from counsel Bannister, she stated that she was upset and frightened when she learned about the events in Georgia, did not purposely avoid service of the subpoena and would have been at the Georgia hearing. R. 481, Tr.p. 43. Further, while she found the chain of events alarming, she came prepared for whatever the judge asks with all her equipment and what they had done in her role as mitigation expert. R. 483-84, Tr.p. 45-46.

Judge Miller questioned her concerning a letter that the Department of Labor Licensing and Regulation had issued dated April 16, 2009. She stated that the letter assuaged her fears before the other activities occurred. R. 495-97, Tr.p. 57-59. [Court Exhibit 3, ROA 1201]. He then asked Dr. Loring to remain. Judge Miller then addressed that he had been contacted by Bill Godfrey the evening of April 16 and advised the police in Georgia had been trying to arrest Dr. Loring . He stated he later called Ben Norris with Georgia law enforcement who advised him that he had been advised to stand down concerning the bench warrant. He then called Mr. Geary with the District Attorneys Office who advised him that he had received a call from S.C. to stand down and the problem was solved. R. 497, Tr.p. 59.

Judge Miller then stated that he wanted the defense to consider calling Dr. Loring as a witness in mitigation. He stated that she was ready willing and able to come testify voluntarily.

Counsel Bannister stated that he had certain motions and that they were not in a position to call her as a witness. Counsel then called a series of witnesses in an attempt to show the solicitors intent in questioning the Dr. Loring. Subsequently, Judge Miller again made inquiry of the defense concerning the defense of its intent to call a social historian, noting this case is going forward. The court was concerned because Dr. Loring is present and ready to go, "but we are not going to set this case up for failure." R. 603-04, Tr.p. 165-166. Judge Miller then denied the defense request to call Solicitor Ariail and other prosecutors concerning the raising of an improper issue related to the lack of licensing of Dr. Loring and why the issue was not raised in the earlier trial. R. 604-05, Tr.p. 166-167.

At the conclusion of the testimony, Judge Miller stated that he would not suspend the proceedings. 633, Tr.p. 195. He further stated that Dr. Loring was going to come and he would not remove them as advocates in the case. R. 633, Tr.p. 195.

On Tuesday, April 21, 2009, defense counsel Bannister advised Judge Miller that the defense was not going to call Dr. Loring as a witness. R. 639, April 20, Tr. p. 201. Judge Miller stated that he was considering calling Dr. Loring as a "court's witness." Id. R. 639, Tr. p. 201, ll. 5-6. He stated that his client had pled guilty and asked him to be the sole fact finder in the case. [Defense counsel Bannister concurred with that statement: "That's correct."]. Id. R. 639, Tr. p. 201, ll. 11-14. The judge stated that Dr. Loring was the first choice by the defense and "I believe that she can testify without fear." R. 640, Tr. p. 202, ll. 15-16. After Loring's counsel confirmed that she had gone over the subject matter the prior evening, Judge Miller stated that she had earlier spent up to 9 to 10 hours preparing. Counsel Godfrey stated that she had previously stated she had reviewed the files 4 to 5 hours, reviewed the file yesterday, has her charts and pictures since

they had talked about her testifying as a witness and she had advised him that she felt protected by the court. Id. R. 641, Tr. p. 203, ll. 7-21. Counsel Bannister renewed his motion for a mistrial based upon the prosecutorial misconduct claim. Id. R. 642, Tr. 204. He requested that a life without parole sentence he entered under the 5th Amendment Double Jeopardy Clause. Id. R. 643, Tr. 205.

Subsequently, Dr, Loring testified as a court witness. R. 658, Tr. p. 220, ll. 14-17. After revealing her educational and employment background, Dr. Loring was qualified as an expert "in the field of social history, trauma, and abuse." R. 664-65, Tr. p. 226, l. 21 - p. 227, l. 11. After some initial questioning, Dr. Loring stated that she was willing to testify and to do her best, noting that she had not received attorney guidance [from the defense team, not her personal lawyer Mr. Godfrey], had not seen Inman nor had interviewed anyone else since the six months. She admitted she had checked on the well being of health of the step-father, mother, and sister, but had no case discussion with them. R. 667, Tr. 229.

Counsel Bannister made an objection as to "how the witness was procured" and the process as a court witness. R. 668, Tr. 230.

Dr. Loring presented a genogram [Court Exhibit 4] and described in narrative form the different types of interaction between the family members and their problems with drugs, alcohol, mental illness, sexual abuse and violence. R. 670-680, Tr. 232-242. Dr. Loring also presented a timeline of Inman's life. [Court Exhibit 5] R. 680-82, Tr. 242-44. Dr. Loring further presented a group of photographs and material suggesting as a child that Inman was "still miserable and crying" (R. 682, Tr. p. 244, ll. 22-25) and had indicators of sexual abuser. R. 683, Tr. p. 245, ll. 2-6. She stated that he had headaches and suffered from head beatings, that he accidentally

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Judge Miller re-affirmed his earlier order denying the prosecutorial misconduct motion.

R. 700, Tr. p. 262, ll. 6-23. Importantly, he declared: "The defense counsel now is participating in the limitation of this evidence [of Dr. Loring] that they intended to offer, which contributes to any Constitutional violation that might exist." R. 700, Tr. p. 262, ll. 20-23.

The Sixth Amendment to the Constitution secures to all criminal defendants "the right to the effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (citation omitted). A prisoner seeking collateral relief from his conviction or sentence under Strickland "must demonstrate both that counsel's performance was deficient, and that the defense was thereby prejudiced." Tice v. Johnson, 647 F.3d 87, 102 (4th Cir.2011). In view of the latitude customarily afforded criminal defense lawyers in formulating strategy, deficient performance will not be adjudged unless, "in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S.Ct. 2052. We are thereby constrained to "indulge a strong presumption" that counsel performed reasonably. Id. at 689, 104 S.Ct. 2052.

In the event that the presumption of reasonable performance is successfully rebutted, relief remains unavailable "if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104 S.Ct. 2052. The defendant must therefore demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694, 104 S.Ct. 2052. The analysis "requires the court deciding the ineffectiveness claim to 'consider the totality of the evidence before the judge or jury.' " Elmore v. Ozmint, 661 F.3d 783, 858 (4th Cir.2011) (quoting Strickland at 695, 104 S.Ct. 2052). In evaluating the evidence, however, "[w]e are not bound ... to view the facts in the light most favorable to the prosecution,"

Tice, 647 F.3d at 111, and the requisite prejudice may be established short of showing that adequate performance "would have resulted ultimately in the defendant's acquittal," id. (quoting Kyles v. Whitley, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)). As dictated by Kyles and Tice, then, Inman may prevail on the prejudice prong though he be unable to show that competent counsel would have secured for him a life sentence, rather than death. Under the discrete circumstances presented in this case, Inman will likely fail in his burden of presenting a reasonable probability that Judge Miller would have sentenced Inman to life rather than death. In determining that a new sentencing hearing was not warranted based upon the Dr. Loring issue, the Supreme Court concluded:

> Here, the judge correctly considered that Dr. Loring did not have a South Carolina social worker's license merely as a factor in her qualifications as an expert witness. Having found Dr. Loring qualified as an expert witness, the judge properly called and questioned her as a court's witness. Because Dr. Loring testified, Inman cannot claim he was prejudiced as his counsel declined the opportunity to question Dr. Loring. Williams, 326 S.C. at 135, 485 S.E.2d at 102 (recognizing that governmental intimidation of a witness can be deemed harmless error where the witness nonetheless testifies).
>
> Furthermore, any testimony that was potentially excluded was arguably cumulative to that of Dr. Price, who testified in detail regarding Inman's childhood, his family, his mental health disorders, and his criminal history. Finally, a review of the judge's oral and written orders establishes that he thoroughly considered all mitigating evidence.
>
> Although we find the Solicitor committed prosecutorial misconduct, we conclude Inman's sentence of death was not imposed in violation of his due process rights. See 16C C.J.S. Constitutional Law § 1644 (Supp.2011) ("The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, and not the culpability of the prosecutor."). Accordingly, we find the judge did not abuse his discretion in declining to grant a mistrial.

#94.

Inman, supra. Further, the Supreme Court concluded that the death sentence was proportionate.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel may raise a questions of fact that

cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. *See* Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V. CONCLUSION

Each and every allegation in the Application, not hereinabove either expressly admitted, denied, qualified or explained is hereby denied.

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed. In the alternative, that the Court should direct the Applicant to timely serve and file a Amended Application for Post-Conviction Relief specifying all grounds for relief with particularity pursuant to Rule 12(e) within sixty(60) days of the service of this Return and/or after appointment of new counsel, consistent with the policy of In Re Stays, 321 S.C. 544, 471 S.E.2d 140 (1996) and S.C. Code § 17-27-160.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
(Counsel of Record)

P. O. Box 11549
Columbia, SC 29211
(803) 734-3601

By: _____
ATTORNEYS FOR RESPONDENT

October 16, 2012

RECEIVED

OCT 16 2012

S.C. Supreme Court

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the Return to Petition for Stay of Execution in the foregoing action on Robert M. Dudek, Chief Appellate Defender at the South Carolina Office of Indigent Defense, P. O. Box 11330, Columbia, S.C. 29211 by depositing in the InterAgency mail, postage prepaid this 16th day of October 2012.

DONALD J. ZELENKA

The Supreme Court of South Carolina

The State, Respondent,

v.

Jerry Buck Inman, Appellant.

Appellate Case No. 2009-135566

ORDER

Appellant pled guilty to murder, first degree burglary, first degree criminal sexual conduct and kidnapping. He was sentenced to death and two additional thirty year terms of imprisonment. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011). The Court denied the petition for rehearing. The United States Supreme Court denied certiorari on October 1, 2012. Inman v. South Carolina, 2012 WL 2192440 (U.S.S.C.)

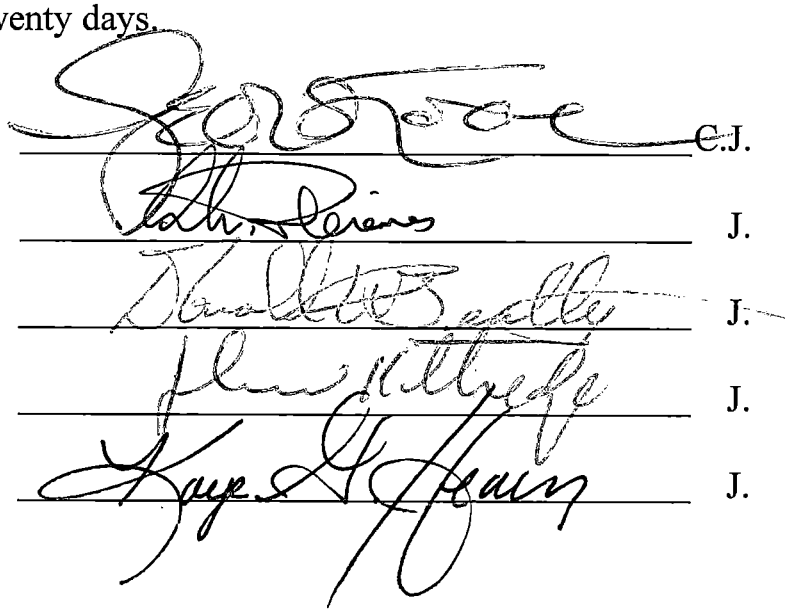
Appellant now seeks a stay of execution, pursuant to *In re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he can pursue post-conviction relief (PCR). The State does not oppose the motion.

The request for a stay of execution is granted. The stay shall remain in effect to the extent provided by this Court in *In re Stays of Execution in Capital Cases*.

The Honorable Alexander S. Macauley is hereby assigned to the PCR action appellant has filed. Judge Macauley shall retain jurisdiction over this case regardless of where he may be assigned to hold court and may schedule such hearings as may be necessary at any time without regard to whether there is a term of court scheduled.

Judge Macauley shall conduct a hearing on appellant's desires regarding counsel within thirty days of the date of this order. Within sixty days of the date of this order, Judge Macauley shall issue a scheduling order setting forth the schedule that shall be followed in this matter, including the date of the hearing on the merits.

The scheduling order may be amended as necessary. A copy of the scheduling order and any amended scheduling order shall be provided to counsel, this Court and Court Administration. In addition to appellant's obligation to notify the Clerk of this Court of the status of this matter every sixty days under In re Stays of Execution in Capital Cases, supra, Judge Macauley is requested to provide the Clerk of this Court and Court Administration with an update on the status of this matter every one hundred and twenty days.



C.J.

J.

J.

J.

J.

Columbia, South Carolina

October 31, 2012

cc:
Alan McCrory Wilson
Robert Michael Dudek
John W. McIntosh
William Walter Wilkins, III
Joseph L. Savitz, III
Donald J. Zelenka

The Honorable Alexander S. Macauley
Motte L. Talley

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2012 NOV 29 A 11:32

STATE OF SOUTH CAROLINA)	**COURT OF COMMON PLEAS**
)	**THIRTEENTH JUDICIAL CIRCUIT**
COUNTY OF PICKENS)	
)	**2012-CP-39-00918**
JERRY B. INMAN,)	
)	
Applicant,)	
)	
vs.)	**ORDER APPOINTING COUNSEL**
)	
STATE OF SOUTH CAROLINA,)	
)	
Respondent.)	

This matter comes before the Court for appointment of legal counsel, pursuant to S.C. Code §§ 16-3-26(B)(I) and 17-27-160(B) (2004 Cum.Supp.), and other applicable law, to represent Applicant, Jerry Inman, in his post-conviction relief action challenging his convictions and death sentences.

Applicant pleaded guilty to the murder, first-degree burglary, first-degree criminal sexual conduct, and kidnapping of a Clemson University student. The trial judge sentenced Inman to death for murder and to two consecutive thirty-year sentences for first-degree burglary and first-degree criminal sexual conduct. On direct appeal, the Supreme Court affirmed Mr. Inman's convictions and death sentence. 395 S.C. 539, 720 S.E.2d 31 (2012) *cert. denied*, --- S.Ct. ---, 2012 WL 2192440 (Mem)(October 1, 2012). Thereafter, the South Carolina Supreme Court vested this Court with exclusive jurisdiction of this case by order dated October 31, 2012. That order requires the Court to inquire of Mr. Inman's desires regarding appointment of counsel and appoint counsel within thirty days of the date of that order.

This Court was notified that attorneys Diana L. Holt and E. Charles Grose, Jr., have met with Mr. Inman, and as officers of the Court, they notified the Court that Mr. Inman indicated his

strong desire to be appointed PCR counsel to represent him and that he had a specific preference to have this Court appoint Ms. Holt and Mr. Grose as his counsel. The Court finds that Mr. Inman has indicated his desire to have counsel appointed and that he specifically desires that the Court appoint Ms. Holt and Mr. Grose as his counsel.

The Court inquired in writing of counsel for the State, Assistant Deputy Attorney General Donald J. Zelenka, concerning the State's position on the matter. The State indicated that it had no objection to the appointment of counsel, as long as the counsel are qualified as required by S.C. Code 1976 § 17-27-160. The Court finds that Ms. Holt and Mr. Grose have the requisite experience to serve as counsel for Mr. Inman's death penalty PCR.

Ms. Holt has been lead counsel in several death penalty PCRs and has taught and attended CLE programs related to capital litigation at the PCR stage. The South Carolina Supreme Court has certified Ms. Holt to serve as lead counsel in a death penalty trial. She has been a member of the South Carolina Bar for just over eighteen years, and has continuously been a member in good standing since her licensure in 1994. Ms. Holt's practice is primarily limited to representing individuals facing death penalty trials (since 1999) and death-sentenced individuals in their death penalty PCR efforts (since 1992, as a non-lawyer and since 1994, as a lawyer). Ms. Holt has never been found to have rendered ineffective assistance of counsel by any court in this state or country. The Court finds that Ms. Holt meets the requirements of S.C. Code § 17-27-160 to serve as counsel for Mr. Inman.

Mr. Grose has practiced law in South Carolina for twenty years. For sixteen of these years, he was a public defender and handled numerous murder cases. Mr. Grose has experience representing capital defendants in both the trial and appellate courts. *See State v. Bixby*, 388 S.C. 528, 698 S.E.2d 572 (2010); *State v. Steven A. Tinch*, Abbeville County Case Number 2006-GS-

01-417, 419; *State v. Domonique O. Brown*, Laurens County Case Number 2007-GS-30-220; *State v. Anthony A. Myers*, Greenwood County Case Number 2000-GS-24-1170; and *State v. Barry L. Ervin*, Greenwood County Case Number 1998-GS-24-1770. Mr. Grose's capital experience also includes representing death sentenced inmates in post-conviction relief. See *John Kennedy Hughey v. State*, Abbeville County Case Number 2000-CP-01-212. The Court finds that Mr. Grose meets the requirements of S.C. Code 1976 § 17-27-160.

Based on the foregoing facts and conclusions of law, the Court hereby appoints Diana L. Holt and E. Charles Grose to represent Mr. Inman, effective *nunc pro tunc* to November14, 2012.

AND IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Judge
Presiding by Special Order of the Supreme Court

November 19, 2012
Walhalla, South Carolina

We So Consent:

Donald J. Zelenka
Senior Assistant Deputy Attorney General
South Carolina Attorney General's Office
P.O. Box 11549
Columbia, South Carolina 29211
803-734-3601
Attorney for the State

Jerry Buck Inman
Applicant

We So Accept:

Diana L. Holt
Diana Holt, LLC
Post Office Box 6454
Columbia, South Carolina 29260-6454
803.782.1663 (Office)

E. Charles Grose, Jr.
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 20646
(864) 992-3433

ORIGINAL

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

FORM 5

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS 2012 JUN 21 P 12:11)

IN THE COURT OF COMMON PLEAS

Jerry Buck Inman #5256)

Full name and prison number (if any) of Applicant.)

2012-CP-39-918

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), andt shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure thatall answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Instituion

2. Name and location of Court which imposed sentence Pickens County Court of General Sessions

3. Name(s) of co-defendant(s) (if any) _____

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

   (a) 2006-GS-39-02222

   (b) 2006-GS-39-02223

   (c) 2006-GS-39-02224

   (d) 2006-GS-39-02225

Revised 3/2003

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

(a) April 22, 2009- Death Sentence

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty X

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Supreme Court

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:
i. Affirmed

ii. _____

iii. _____

(c) the date of each such result:

i. December 28, 2011

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011)

ii. _____

iii. _____

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel in derogation of the Sixth Amendment to the United States Constitution

(b) _____

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Counsel was ineffective for failing to obtain another mitigation expert after Dr. Marti Loring no longer wished to participate because she was intimidated

(b) In the alternative, counsel should have continued to prepare with Dr. Loring in the event the judge called the case back to trial as occurred here.

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? None other than the mandatory appeal to the State Supreme Court

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes.

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Petition for Certiorari in the United States Supreme Court on direct appeal.

ii. n/a

iii. n/a

iv. n/a

(b) the name and location of the Court in which each was filed:

i. United States Supreme Court, Washington, D.C.

ii. n/a

iii. n/a

iv. n/a

(c) the disposition thereof:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(d) the date of each such disposition:

i. n/a

ii. n/a

iii. n/a

iv. n/a

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. n/a

ii. n/a

iii. n/a

iv. n/a

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. n/a

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. n/a

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) This is the first PCR

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. James W. Bannister, Esquire, P.O. Box 10007, Columbia, SC 29603

ii. John W. Dejong, Esquire, 214 E. Main St. Ste. B240, Pickens, SC 29671

iii. Symmes W. Culbertson, Esquire, P.O. Box 10066, Greenville, SC 29603

iv. Joseph L. Savitz, III, Esquire, 1330 Lady Street, Ste. 401, Columbia, SC 29211

v. Robert M. Dudek, Esquire, 1330 Lady Street, Ste. 401, Columbia, SC 29211

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Mr. Bannister - trial

ii. Mr. Dejong- trial

iii. Mr. Culbertson - trial

iv. Mr. Savitz - appeal

v. Mr. Dudek - appeal

19. State clearly the relief you seek in filing this application:

New Trial

20. Are you now under sentence from any other court that you have not challenged?

No

2012-CP-39-918

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of PICKENS)

I, Jerry Buck Inman, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Jerry Inman

SWORN to and subscribed before me this 19th day of June, 2012.

(L.S.)
Notary Public

My Commission Expires: Sept 22, 2018

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2012 JUN 21 P 12: 11

Revised 3/2003

2012-CP-39-918

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Jerry Buck Inman, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Jerry Inman
Applicant

SWORN or affirmed to and subscribed before me this 19th day of June, 2012.

Warren T. Peyton
Notary Public

My Commission Expires: Sept. 22, 2018

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2012 JUN 21 P 12: 11

Revised 3/2003

STATE OF SOUTH CAROLINA COUNTY OF PICKENS	)))	IN THE COURT OF COMMON PLEAS
JERRY BUCK INMAN, #5256 Applicant, vs. STATE OF SOUTH CAROLINA, Respondent.	))))))))))))	C/A No. 2012-CP-39-918 RETURN OF RESPONDENTS TO APPLICATION FOR POSTCONVICTION RELIEF AND REQUEST FOR STATUS CONFERENCE AND APPOINTMENT OF COUNSEL

The Respondent State of South Carolina hereby makes a Return pursuant to § 17-27-160(B) to the application for post-conviction relief dated June 19, 2012,[1] filed June 21, 2012 and received from the Clerk of Court on June 25, 2012 by the Office of the Attorney General. The application was prepared and filed by his appellate counsel, Robert M. Dudek. The Respondent will serve Mr. Dudek with this Return.

The direct appeal from the conviction and sentence of death was stayed pending the filing and pursuit of a petition for writ of certiorari to the United States Supreme Court in Inman v. South Carolina, No. 11-10798. The South Carolina Supreme Court entered a stay of execution on February 23, 2012 pending certiorari proceeding in the U.S. Supreme Court. Certiorari was denied by the United States Supreme Court on October 1, 2012. Inman v. South Carolina, _ U.S.

[1]Pursuant to § 17-27-160(A), "The filing of the application does not automatically stay any sentence of death.."

_ (U.S. October 1, 2012)(cert denied).

On October 10, 2012, the Applicant made a motion for a stay of execution to allow assignment of a judge and pursuit of this PCR proceeding. At the time of this filing, a particular judge has not been assigned nor has counsel been appoinjted pursuant to Section 17-27-160 and In Re Stays of Execution, 321 S.C.544, 471 S.E.2d 140 (1996). The Respondent would show this Court the following:

I.

The Applicant, Jerry Buck Inman, #5256, is presently a safekeeper pending a sentence of death and also serving a term of years sentence pursuant to orders from the Clerk of Court for Pickens County.

The Appellant, Jerry Buck Inman, was indicted at the November 2006 term of the Court of General Sessions for Pickens County for murder (2006-GS-39-2225), kidnapping (2006-GS-39-2224), criminal sexual conduct in the first degree (2006-GS-39-2223), and burglary in the first degree (2006-GS-39-2222). The circumstances of the charges involve the May 26, 2006 murder of Tiffany Souers.

The State, through Solicitor Robert M. Ariail of the Thirteenth Judicial Circuit timely noticed Inman of its intent to seek the death penalty on August 22, 2006 pursuant to S.C. Code, Section 16-3-26 (1976). On March 13, 2007, the Honorable Edward W. Miller was assigned by Order of the South Carolina Supreme Court to the case.[2]

---

[2] On August 17, 2007, Inman filed a Motion to Determine the Mode of Trial. In the motion counsel informed the judge of an intent to enter a guilty plea to murder and demand a jury trial for sentencing. ROA. 1202. The state informed the court that it did not consent to this plea in light of precedent of the South Carolina Supreme Court. ROA 1204.

A hearing was held on September 14, 2007 concerning the mode of trial motion. The

The Proceedings Prior to the Guilty Plea

On August 19, 2008, a competency hearing was held. Judge Miller was again informed that Inman sought to tender a guilty plea to murder. R. 913, August 19, 2008, Tr.p. 3, l. 20-21. The hearing initially concerned Inman's competency to stand trial was held.[3] The Appellant was determined to be competent to stand trial.

Inman then entered guilty pleas to the charges on that date. ROA p. 911-975, August 19, 2008 Tr. p. 1- 65. He was represented by James W. Bannister, John W. DeJong, and Symmes W. Culbertson of the Greenville Bar. Judge Miller stated that sentencing was deferred until September 6. Id. Tr.p. 54.

As to the factual basis of the plea, the South Carolina Supreme Court described the crime in the following manner:

> On the evening of May 25, 2006, Tiffany Marie Souers (the Victim), a rising junior at Clemson University, was alone in her off-campus apartment as her roommates were gone for the day. When one of her roommates returned to the

---

trial judge denied the request to attempt to enter a guilty plea to the charges. ROA, 830. Sept. 14, 2007 Tr.p. 54. A written order was entered on November 15, 2007. ROA _.

The Petitioner filed a notice of appeal from the November 15, 2007 Order to the South Carolina Supreme Court. On January 9, 2007, without requiring a response or pleading from the State, the South Carolina Supreme Court entered its Order dismissing the notice of appeal "without prejudice."

The Petitioner's counsel next sought certiorari to the United States Supreme Court. On June 8, 2008, the United States Supreme Court denied the petition for writ of certiorari. Inman v. State of South Carolina, No. 07-1298, 128 S.Ct. 2098 (June 8, 2008).

[3]Dr. Donna Schwartz-Watts testified as a defense expert at the competency portion. She stated that he was competent to understand the proceedings and had the capacity to communicate with counsel. ROA. 916, August 19, 2008 Tr.p. 6. She found he had a history of having a "mood disorder" and being treated for depression. She stated from the first time she met Inman in September 2006 he had a desire to plead guilty and knows what he is doing. She stated that he had made it clear to her that he wished to receive a death sentence and felt he deserved to die for what he had done. ROA. 920-21, August 19, 2008 Tr.p. 10-11.

apartment during the afternoon of May 26, 2006, she discovered the Victim's partially-clad body on the bedroom floor. An autopsy revealed the Victim had been sexually assaulted and died as the result of asphyxia due to ligature strangulation with a bathing suit top.Surveillance photographs taken during the early morning hours of May 26, 2006 captured a male, whose face was covered by a bandana, attempting to use the Victim's ATM card at two different bank machines in Clemson.

On June 5, 2006, law enforcement was able to identify Inman as the Victim's perpetrator based on DNA evidence obtained from the crime scene and processed through the National DNA Database, which had Inman's DNA evidence on file due to his prior out-of-state convictions for sexual offenses in 1987 and 1988. Using this information, law enforcement conducted a well-publicized nationwide search for Inman. On June 6, 2006 at approximately 11:45 p.m., law enforcement apprehended Inman in Dandridge, Tennessee.

Shortly after his arrest, Inman orally confessed to the crimes involving the Victim. Within the course of the next three hours, Inman gave separate written statements to an agent with the Tennessee Bureau of Investigation and to agents with the South Carolina Law Enforcement Division (SLED). In these two statements, Inman again confessed to the charged crimes and recounted in detail the events underlying these crimes. When asked to sign these statements, Inman declined and stated "we still have to go to court ."

State v Inman (Jerry Buck), 395 S.C. 539, 720 S.E.2d 31 (2011).

The September Sentencing Proceeding

On September 8-11, 2008, Judge Miller held a non-jury sentencing proceeding as a result of the guilty plea to murder. Testimony was received from state witnesses Holly Bergman, Christina Morello, G.W. McCoig, Jeffrey Kindley, S._____ C_____, V____ P_____, Michael Hannon, Rhonda Jackson, J_____ G____ and Dr. Eric Christensen. R., September 8, 2008 Tr. P. 1-243.[4] The defense in mitigation initially presented Dr. David Price, Dr,. Marti Loring and Claude Tournay, James Aiken, D_____ B_____ and Rev. David Hensley. ROA p. 255-410.

The State's Case at Sentencing.

Evidence was presented through the victim's roommate, **Holly Bergman**, that Tiffany

[4]The "September 8, 2008 Tr." encompasses the proceedings from September 8-11, 2008.

Souers was a Clemson civil engineering major and a dedicated student. ROA p. 39-40. She was described as being close to her family and would constantly be on the telephone with her mother and with her siblings. She was able to give good advice. She was described further as very outgoing and easily made friends. ROA p. 41-42. In describing how Tiffany's death affected her, it was like losing a sister. ROA p. 43. The violence of her death made it more difficult. ROA p. 43-44.

On cross-examination, it was pointed out that Tiffany was also involved in national charity organizations. She was also described as a dedicated member of the Catholic Church. ROA p. 47.

Another roommate, **Christina Morello**, similarly described Tiffany Souers. She presented photographs of school events at Clemson that they participated in. ROA p. 50-52. She described the victim's contagious laugh. ROA p. 53. She also helped in the community in addition to her school work. Her death affected Ms. Morello in many ways. ROA p. 54-55.

She noted that everyone who met Tiffany was her friend. In addition, she was the type of person that showed compassion and cared for others. ROA p. 57.

Chief Deputy G. W. McCoig of the Jefferson County Sheriff's Department in Dandridge Tennessee testified concerning the arrest of Inman on June 6, 2006. ROA p. 60. He stated he stopped after a brief car chase and placed him under arrest. ROA p. 64-65. After reading his Miranda rights, Inman spoke with the officer. During the conversation about the college student, Inman described himself: "after that shit right there, I'm a f__ing animal. ROA p. 68, ll. 21-25.

South Carolina State Law Enforcement Division Agent Jeffrey Kindley testified he