ORIGINAL

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
J. C. "Buddy" Nicholson, Jr. , Circuit Court Judge
(Capital Case - PCR Action)
Appellate Case No. 2009-136506

Brad Keith Sigmon,

Petitioner,

vs.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

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1.

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2.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendments rights, for failing to request a charge on the statutory mitigating circumstance of age or mentality, when evidence presented at trial established that petitioner was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand?

3.

Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence?

(BOP, p. 4).

STATEMENT OF THE CASE

Petitioner, Brad Keith Sigmon, is presently incarcerated as a safekeeper at Lieber Correctional Institution pursuant to a sentence of death and orders of commitment from the Clerk of Court for Greenville Court arising from his convictions for burglary first degree and the murders of David Larke and Gladys Larke.

Charges and Trial

On July 11, 2001, the State filed and served a Notice of Intent to Seek the Death Penalty for the murder charges to be brought against Petitioner. (PCR App. pp. 2379-2380). John P. Abdalla, Esq., of the Greenville County Public Defender's Office, and Frank L. Eppes, Esq., of the Greenville County Bar, were appointed to represented Petitioner. On September 27, 2001, the Honorable Joseph J. Watson, Circuit Court Judge, was assigned jurisdiction over the case. (PCR App. p. 2388).

A Greenville County Grand Jury returned six (6) true-billed indictments in November 2001 charging Petitioner with assault and battery with intent to kill (2001-GS-23-7627); kidnapping and possession of a weapon during the commission of a crime of violence (2001-GS-23-7628); burglary, first degree (2001-GS-23-7629); murder of David Larke[1] (2001-GS-23-07630); murder of Gladys Larke (2001-GS-7631); and grand larceny (2001-GS-23-07632). On July 15, 2002, the State called the two murder charges and the burglary, first degree, charge for trial. [2] (PCR App. p. 119, line 2 - p. 120, line 15). The Honorable Robert M. Ariail, Solicitor, tried the case, along with Deputy Solicitor Betty C. Strom, and Assistant

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[1] The indictments actually reflect the last name as "Lark" however, the "Larke" spelling is used throughout the trial transcript, and in the Order of Dismissal, thus, will be used in this brief.

[2] These were the charges that dealt specifically with entry into the Larke's home and murder of the Larkes, and did not include the charges stemming from Petitioner's subsequent assault on Ms. Barbare.

Solicitors Mindy Hervey and Lori Reese. On July 17, 2002, after extensive qualification and *voir dire*, the jury was selected and sworn. (PCR App. p. 1203, line 1 - p. 1211, line 7; p. 1214, lines 4-5). The jury trial, guilt phase, began on July 18, 2002. On July 19, 2002, the jury returned guilty verdicts on both murder charges and the burglary, first degree, charge. (PCR App. p. 1705, lines 15-25). The lower court observed the mandatory twenty-four (24) hour waiting period, S.C. Code § 16-3-20(B), and began the jury trial, penalty phase, on July 20, 2002. On July 21, the jury returned and informed the trial judge, the jury had found beyond a reasonable doubt, the presence of three (3) statutory aggravating circumstances:

1) two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct;

2) the murder was committed while in the commission of burglary;

3) the murder was committed while in the commission of physical torture.

(PCR App. p. 2118, lines 9-18).

The jury recommended death. (PCR App. p. 2118, lines 18-24). The judge then sentenced Petitioner to thirty (30) years imprisonment for burglary, first degree, and imposed a sentence of death for the two murders. (PCR App. p. 2124, lines 5-25). Petitioner filed a timely notice of intent to appeal.

Direct Appeal

Eleanor Duffy Cleary, Assistant Appellate Defender of the South Carolina Office of Appellate Defense, represented Petitioner on appeal. Appellate counsel filed a Final Brief of Appellant in the Supreme Court of South Carolina on September 30, 2005, and raise the following single issue:

> Does the Sixth Amendment to the United States Constitution mandate that the element or elements that increase the offense of murder to capital murder must

> be included in the charging document in order to comply with the requirement the accused be informed of the nature and cause of the accusation?

(PCR App. p. 2398).

The State, through Assistant Attorney General Melody J. Brown, filed a Final Brief of Respondent on September 16, 2005. (PCR App. pp. 2411-2426). The Supreme Court of South Carolina heard oral argument on the issue on November 1, 2005, and subsequently issued an opinion affirming the conviction and sentence on December 19, 2005. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2006). (PCR App. pp. 2429-2433). Petitioner filed a timely petition for rehearing that was denied on January 13, 2006. Petitioner filed a petition for writ of certiorari in the United States Supreme Court on November 8, 2004. Robert M. Dudek, Assistant Appellate Defender, represented Petitioner. Appellate counsel presented the following question for consideration:

> Whether the South Carolina Supreme Court's holding that the aggravating circumstances necessary to render a murder defendant eligible for a sentence of death under South Carolina law do not have to be alleged in the charging document is fundamentally inconsistent with this Court's application of the Sixth Amendment in *Ring v. Arizona*.

(USSC Cert. Petition, p. 1).

The State filed a Brief in Opposition on May 22, 2006. The Supreme Court of the United States denied the petition on June 26, 2006.

PCR Action

On August 11, 2006, by order of the Supreme Court of South Carolina, Judge Nicholson, Jr., was vested with exclusive jurisdiction over the PCR action. On October 13, 2006, Petitioner filed his first PCR application. (PCR App. pp. 2435-2441). On November 8, 2006, Judge Nicholson held a hearing in the Berkley County Courthouse regarding Petitioner's intention to pursue a PCR action and whether Petitioner desired counsel. (PCR

App. pp. 2442-2456). Having found both that Petitioner wished to purse PCR and to have counsel appointed, the undersigned appointed William H. Ehlies, Esq., and Teresa L. Norris, Esq., by order dated November 29, 2006. On November 13, 2006, the State, through Assistant Attorney General Melody J. Brown, made a return to the application. On June 4, 2008, Petitioner filed an amended application:

> 9(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*
>
> (10)(b) During the trial and sentencing phase, Applicant's counsel failed to adequately preserve various issues for appellate review, including, but not limited to, the following:
>
> (i) Counsel failed to object to the improper cross-examination of James Aiken, an expert presented to testify concerning Applicant's adaptability to confinement, about the day to day circumstances of prison life, Record on Appeal (ROA) 1823-1827, 2146-49, and improper argument about Applicant becoming part of the "power structure" in prison, ROA 2191.
>
> (ii) Counsel failed to object to the Solicitor's improper closing arguments expressing his personal opinions as an elected official on why he believed death was the appropriate punishment. *See* ROA 2188.
>
> (iii) Counsel failed to adequately request a charge on the statutory mitigating circumstances of age or mentality, based on he evidence of drugs and alcohol at the time of the offenses, or to properly address the trial court's erroneous understanding that "mentality" referred only to evidence of mental retardation or limited intellectual abilities. *See* ROA 2177, 2232.
>
> (iv) Counsel failed to object to the trial court's instructions defining mitigating circumstances as evidence that "simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable, ROA 2232, which improperly narrowed the mitigation evidence to exclude evidence of Applicant's adaptability to confinement and other mitigation.
>
> (v) Counsel failed to object to the trial court's instruction that non-statutory mitigation evidence is only evidence the

"defendant claims serves the same purpose" as statutory mitigating circumstances, which improperly denigrated non-statutory mitigation evidence that is equally as significant under the law as statutory mitigating circumstances.

Counsel's omissions were both unreasonable and prejudicial. *Smith v. Robbins*, 528 U.S. 259 (2000); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Strickland v. Washington*, 466 U.S. 668 (1984).

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

(10)(b) During the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel in numerous ways, including, but not limited to, the following:

(i) Counsel sought to play the videotape made of Applicant's call to his mother shortly after his arrest during the cross-examination of Gatlinburg Police Officer Carrie Harbin, but incurred errors in playing the tape. Although the court offered to allow the playing of the tape later, counsel never addressed the issue again and the jury was never allowed to hear the actual statements or shown the very emotional nature of Sigmon's initial confession. *See* ROA 1501-12.

(ii) Counsel subpoenaed Dr. Martin, a mental health examiner for the Greenville County Detention Center who examined and treated the Applicant during pretrial confinement, but failed to call and present him as a witness to testify about Applicant's depressive disorder. *See* Record on Appeal (ROA) at 1442, 2013.

Counsel's omissions were both unreasonable and prejudicial in sentencing. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984).

9(c) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution in that counsel attempted to blame the victims, primarily the Applicant's former girlfriend, which resulted in additional aggravation evidence and prejudice to Applicant.*

(i) Counsel called the two ex-husbands and the husband of Applicant's former girlfriend, who was the daughter of the victims in an attempt to shift some of the blame for Appli-

cant's behavior to her, which resulted only in additional aggravation evidence being presented. See ROA 1948-52, 2031-38, 2039-41.

(ii) Counsel requested and obtained an instruction on the statutory mitigating circumstance of provocation by the victim mitigator, ROA 2178, which only continued the prejudice of the attempt to shift blame to Applicant's former girlfriend through the testimony of her previous and current husbands.

Counsel's omissions were both unreasonable and prejudicial in sentencing. *Wiggins v. Smith*, 539 U.S. 510 (2003); *Strickland v. Washington*, 466 U.S. 668 (1984).

(PCR App. pp. 2478-2481).

Petitioner submitted a trial brief dated June 16, 2008, addressing only the issues of the amended application. (PCR App. pp. 2484-2498). Respondent submitted a trial brief on July 14, 2008, filed July 21, 2008. (PCR Supplemental Appendix, pp. 1-18). On July 22, 2008, Petitioner moved for summary judgment. (PCR App. pp. 2500-2517). Respondent made a response in opposition on August 1, 2008, which was filed on August 5, 2008. (PCR App. pp. 2518-2542).

An evidentiary hearing was convened on August 4, 2008. (See PCR App. p. 2718). Petitioner was present and represented by counsel, Mr. Ehlies and Ms. Norris. The State was represented by Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry. Petitioner's motion for summary judgment was denied and the evidentiary hearing held. (PCR App. p. 2757, lines 17-23). Petitioner immediately rested on the depositions and the arguments presented in the summary judgment motion, and did not present any witnesses or evidence.[3] (PCR App. p. 2758, line 11 - p. 2761, line 19).

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[3] Respondent objected to the admission of depositions as Petitioner used discovery depositions not intended for use as a substitute for trial testimony. (See PCR App. pp. 2758-2761). The use of these pre-trial, discovery depositions, Respondent submits, unfairly skews the position and recollection of counsel, not allowing for full development of the testimony, and is contrary to

Respondent moved for a directed verdict which was denied. (PCR App. p. 2761, line 22 - p. 2762, line 14). Respondent called Frank L. Eppes, Esq., former trial counsel for Petitioner. The hearing concluded thereafter. Judge Nicholson took the matter under advisement. Judge Nicholson requested additional briefing on the possibility of equity relief on the prison conditions evidence issue, and both parties submitted briefs. (PCR App. pp. 2844-2845; Supplemental Appendix, pp. 19-27). On July 14, 2009, Judge Nicholson issued a written Order of Dismissal, filed July 20, 2009. (PCR App. pp. 2846-2893). Petitioner appealed.

Petitioner filed a petition for writ of certiorari in this Court on April 21, 2010, and raised the following issues:

> 1. Whether defense counsel provided ineffective representation, in derogation of petitioner's rights under the Sixth and Fourteenth Amendments, by failing to object to the improper cross-examination of James Aiken

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the South Carolina Civil Rules of Procedure, Rule 32. (See also PCR App. p. 2702, Eppes Discovery Deposition, "I wish I'd — you know, I'd had time to read the whole transcript and then try to recreate the whole thing in my mind, but I have not been able to do that."). Petitioner showed no cause to use a discovery deposition due to "unavailability of the witness." See Rule 32 (a)(3). *See also Tatman v. Collins*, 938 F.2d 509, 511 (4th Cir. 1991) (finding discovery deposition may be used at trial "*if the witness is unavailable* as described in Rule 32(a)(3)."") (emphasis added); *Bouygues Telecom, S.A. v. Tekelec*, 473 F.Supp.2d 692, 696 (E.D.N.C. 2007) ("while the court does not doubt the general trustworthiness of the testimony taken at the discovery depositions in question, the testimony, particularly that elicited by defendant, may well not be as complete as it would have been had the depositions been noticed as *de bene esse* depositions"); Federal Practice & Procedure § 2142 (April 2012 Update) ("The restrictions imposed by Rule 32 make it clear that the federal rules have not changed the long–established principle that testimony by deposition is less desirable than oral testimony and should ordinarily be used as a substitute only if the witness is not available to testify in person."). Both counsel were present for the hearing and Mr. Eppes testified. (See PCR App. pp. 2762 and 2805). Further, our Court of Appeals has previously noted a disadvantage in having to rely on discovery depositions in certain trial situations. *See Logan v. Gatti,* 289 S.C. 546, 549, 347 S.E.2d 506, 507- 508 (Ct.App. 1986) ("The deposition taken by defendants' attorney was not a *de bene esse* deposition to preserve testimony but purely a discovery deposition taken on the motion of defendants' attorney."). *See also Ducas v. State*, 84 So.3d 1212, 1217 (Fla.App. 3 Dist. 2012), *quoting State v. Lopez,* 974 So.2d 340, 347 (Fla. 2008) ("Discovery depositions, such as those taken here, are neither 'intended as an opportunity to perpetuate testimony for use at trial' nor 'designed as an opportunity to engage in adversarial testing of the evidence.'"). Again, the use of such depositions here as a substitute for trial (*i.e.* post-conviction relief hearing) testimony should, at the least, be tempered by the very fact that the deposition was not intended to be used as a substitute for trial testimony either by agreement or necessity.

on daily prison conditions evidence and the state's closing argument on life imprisonment being "like a small town with a restaurant" based on the evidence since this Court has repeatedly held such evidence is improper and inadmissible, and counsel here clearly did not understand the issue and they therefore could not have had a strategic reason not to object to the evidence and argument?

2. Whether petitioner's death sentence should be vacated as being based on an impermissible arbitrary factor in violation of the Eighth Amendment and South Carolina Code § 16-3-25(C)(1) where the jury heard evidence and argument about the alleged privileges and amenities available to prisoners since petitioner had no control over the conditions of incarceration?

3. Whether defense counsel was ineffective, in derogation of petitioner's Sixth Amendment and Fourteenth Amendment rights, for failing to object to the solicitor's improper closing argument wherein the solicitor told the jury that in his personal opinion "as the solicitor of this circuit" that he sought the death penalty because some people are so "mean and evil" they did not deserve to live, and that the jury should sent a message that "this type of conduct will not be tolerated in Greenville County" since this argument injected an arbitrary factor in violation of South Carolina Code § 16-3-25-(C)(1) and the Eight and Fourteenth Amendment to the United States Constitution?

4. Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendments rights, for failing to request a charge on the statutory mitigating circumstance of age or mentality, when evidence presented at trial established that petitioner was extremely intoxicated at the time of the murders, having consumed large quantities of beer and crack cocaine beforehand?

5. Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth Amendment rights, for failing to object to the trial court's instructions that a non-statutory mitigating circumstance was one the defendant "claims" lessens his culpability since this improperly impugned the legitimacy of non-statutory mitigating evidence?

6. Whether trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth Amendment rights, by requesting and obtaining the statutory "mitigating" circumstance of "provocation by the victim" based on the testimony of three defense witnesses who were called to testify about their bad relationships with appellant's ex-girlfriend, in an effort to shift the blame to her for her parents' murder, since this offensive strategy was very likely to inflame the jury?

(Petition for Writ of Certiorari, pp. 1-2).

The State filed a return to the petition on June 21, 2010. Petitioner filed a reply on August 9, 2010. On December 16, 2011, this Court granted the petition as to Issues 3, 4, and 5 of the petition. Petitioner filed the Brief of Petitioner on April 20, 2012. This return follows.

STATEMENT OF FACTS

On April 27, 2001, at approximately 8:00 a.m., Petitioner entered the home of sixty-two (62) year old David Larke, surprised Mr. Larke in his kitchen, and struck him repeatedly with a baseball bat. Petitioner then saw Mr. Larke's fifty-nine (59) year old wife enter the kitchen. Petitioner chased her back into her living room where he repeatedly struck her with the same baseball bat. He returned to the kitchen and continued beating Mr. Larke. He then went back to the living room and continued beating Mrs. Larke. (PCR App. p. 1516, line 14 - p. 1517, line 17). Mr. Larke sustained a total of nine (9) crushing blows to the skull, and bruising on his ears, left shoulder, and a defense wound on the back of his right hand. His "skull was basically almost broken in two." (PCR App. p. 1634, lines 9-12). Mrs. Larke also received nine (9) injuries to her skull and had defensive wounds to her forearms, wrists, and elbows. She had also inhaled blood into her lungs. The forensic pathologist called at trial testified that both victims would have died in approximately three (3) to five (5) minutes from the severity of the beatings. (PCR App. p. 1627, line 3 - p. 1649, line 2).

Petitioner knew the Larkes through their daughter, Becky Barbare, with whom Petitioner had previously had a relationship. At the time of the murder, Ms. Barbare had been attempting to oust Petitioner from her home and was staying with her parents, who lived next door to her. (PCR App. p. 1369, line 21 - p. 1371, line 1; p. 1508, line 5 - p. 1511, line 9; p. 1599, line 6 - p. 1603, line 5). According to Petitioner's statement, he waited for Ms. Barbare to take her small children to school, then entered the Larke home and attacked Ms. Barbare's parents. After killing Mr. and Mrs. Larke, and taking a gun from their home, Petitioner waited for Ms. Barbare to return. He captured her, and forced her into her white Nissan Pathfinder. She tried to escape and he shot at her. (PCR App. p. 1516, line 6 - p. 1520, line 11). Several witnesses actually saw Ms. Barbare's escape attempts and the shooting. The

witnesses testified that Ms. Barbare leaped from the car while it was moving. After she tumbled out, Petitioner turned the car around and went back to her. (PCR App. p. 1266, line 5 - p. 1268, line 19; p. 1273, line 17 - p. 1274, line 16; p. 1296, lines 20-25; p. 1584, line 4 - p. 1585, line 23). Petitioner stopped the car, exited, walked up to Ms. Barbare, and shot her several times. (PCR App. p. 1274, line 15 - p. 1276, line 5). She survived and told the witnesses that Petitioner told her he had "tied up" or had killed her parents. (PCR App. p. 1278, lines 21-25; p. 1285, lines 4-10). Officers were dispatched to the Larke home and found their dead bodies. (PCR App. p. 1325, line 1 - p. 1326, line 22).

An involved manhunt ensued. (PCR App. p. 1374, line 8 - p. 1378, line 10). Petitioner was eventually located, ten (10) days later, in a campground in Tennessee, by tracing a call he made to his mother who was cooperating with the investigation. (PCR App. p. 1389, line 8 - p. 1390, line 19). Petitioner made another telephone call to his mother in front of the booking officer. The officer related the substance of the conversation in which Petitioner confessed to the murders. (PCR App. p. 1398, line 5 - p. 1438, line 20). Petitioner also confessed to both Tennessee officers and Greenville County detectives. (PCR App. p. 1459, line 5 - p. 1474, line 19; State's Exhibit 11; p. 1495, line 17 - p. 1529, line 24; State's Exhibit 15).[4] In addition to his full, and repeated, confessions, Petitioner also indicated that "Geno" was supposed to have helped him but ran out on him before Petitioner had entered the Larke home. (PCR App. p. 1516, lines 1-21).

Eugene Strube testified at trial that the night before the murders, he and Petitioner left the home of a mutual friend, hid Petitioner's car, and entered a nearby trailer Petitioner

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[4] The full tape of the Tennessee interview was admitted in the PCR hearing. (PCR App. p. 2795; p. 2890). The tape contains multiple confessions to the double murder and Petitioner's clearly expressed continued infatuation with victim Barbare, often in sexual terms.

claimed was his. (PCR App. p. 1577, line 14 - p. 1580, line 19; p. 1583, lines 14-19). While at the trailer, Petitioner and Strube drank beer and smoked crack cocaine. (PCR App. p. 1580, line 21 - p. 1663, line 1). Petitioner asserted that "he was going to get Becky for leaving him the way she did;" that he would "tied her parents up;" and, that he was going to "take care of Becky's parents, so he can get ahold of Becky...." (PCR App. p. 1581, lines 4-9; p. 1582, lines 20-22). Petitioner packed a bag with an extension cord, duct tape, stockings, and socks. He also had a baseball bat. He would later take these items with him as he left the next morning. (PCR App. p. 1581, line 19 - p. 1582, line 3; p. 1583, lines 7-13). Mr. Strube stayed with Petitioner through the night and even accompanied him to the Larke home the next morning. However, he refused to enter and left before Petitioner entered. (PCR App. p. 1582, line 12 - p. 1583, line 6). The trailer the two stayed in the night before the murders was next to the Larke home, and was, apparently, Ms. Barbare's home. (PCR App. p. 1582, line 23 - p. 1583, line 19; p. 1369, line 24 - p. 1370, line 18).

At trial, Petitioner did not contest his guilt. Defense counsel advised the jury in opening statements: "You're going to find Brad Sigmon guilty... he confessed to it. He confessed to it more than one time...[your] job is to reach the ultimate decision in this case, whether Brad Sigmon lives or dies... you may wonder, well, why are we here? Well, I'll tell you... Because if Brad Sigmon were to plead guilty, he wouldn't have a right to a jury determine his sentence." (PCR App. p. 1255, line 12 - p. 1256, line 23). Petitioner addressed the jury at the close of the guilt phase: "Ladies and gentlemen of the jury, I am guilty." (PCR App. p. 1683, lines 11-15).

ARGUMENT

It is well established that this "Court gives great deference to the PCR court's findings of fact and conclusions of law." *Simpson v. Moore*, 367 S.C. 587, 595, 627 S.E.2d 701, 705 (2006). It is equally well established that this "Court will sustain the PCR judge's findings regarding ineffective assistance of counsel if there is *any* probative evidence to support those findings." *Humphries v. State*, 351 S.C. 362, 373, 570 S.E.2d 160, 166 (2002) (emphasis added); *Franklin v. Catoe*, 346 S.C. 563, 568, 552 S.E.2d 718, 721 (2001). Here, there is ample support for the PCR judge's findings and his legal conclusions. His rulings on the instant issues should be affirmed.

In the three issues presented, Petitioner makes three distinct claims of ineffective assistance of counsel. To have been entitled to relief on an ineffective assistance claim in this PCR action, Petitioner must have demonstratred to the PCR judge that (1) trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See also Franklin v. Catoe*, 346 S.C. at 571, 552 S.E.2d at 722-723. "The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application." *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The PCR judge found that Petitioner failed in his burden of proof. His ruling is well and fully supported by the trial record and PCR record. Again, the PCR judge's rulings should be affirmed.

Petitioner's arguments will be addressed separately in light of this standard of review, and the *Strickland* test.

I.

The PCR judge correctly rejected Petitioner's allegation that counsel was ineffective when he failed to object to two passages in the solicitor's closing argument as neither of the two comments, when read in context, were objectionable.

Petitioner claims two specific portions of the solicitor's closing arguments were objectionable as personal thoughts and opinion on the correct sentence which diminished the jury's sense of responsibility.[5] (BOP, pp. 7-8). He submits counsel was ineffective in failing to object. Id. Further, Petitioner apparently claims *Strickland* prejudice is established because, in his view, the two comments injected an arbitrary factor in violation of the Eight and Fourteenth Amendments to the United States Constitution and S.C. Code § 16-3-25 (C)(1).[6] The record does not support his arguments.

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[5] Petitioner liberally used portions of the discovery depositions in asserting counsel performed deficiently. (See BOP, pp. 8-9). Again, Respondent objected to the use of the deposition. Respondent maintains that reliance on the discovery depositions alone unfairly skews counsel's testimony. See note 3, *infra*. Moreover, to the extent Petitioner asserts within brief that counsel were inexperienced in capital matters, (see BOP, p. 5), Respondent notes that Petitioner is not asserting counsel lacked the qualifications to have been appointed for the trial of a capital case.

[6] Free-standing trial error claims are not cognizable in PCR. S.C. Code § 17-27-20 (b) provides: "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." Because a PCR action is not a substitute for those proceedings, a PCR applicant may not assert issues in this PCR action that could have been raised at trial and on direct appeal. This prohibition has long been recognized. *See Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1975) ("Errors in 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."). Moreover, S.C. Code § 16-3-25 (C)(1) review is mandated upon affirmance of the conviction on direct appeal. *See State v. Inman*, 395 S.C. 539, 566, 720 S.E.2d 31, 46 (2011) ("Based on our decision to affirm Inman's guilty plea and the judge's rulings regarding sentencing proceedings, we must assess Inman's sentence of death as it is this Court's duty to conduct a proportionality review" pursuant to Section 16-3-25 (C)); S.C. Code § 16-3-25 (A) (prompting provision "upon the judgment becoming final in the trial court"); S.C. Code § 16-3-25 (F) ("The sentence review shall be in addition to the direct appeal, if taken, and the review and appeal *shall be consolidated* for consideration.") (emphasis added). *See also State v. Motts*, 391 S.C. 635, 649, 707 S.E.2d 804, 811 (2011) ("Although Motts is entitled to waive his personal right to a direct appeal, we hold that he cannot waive this Court's statutorily-imposed duty to review his capital sentence."). Further, that review was previously accomplished on direct appeal

Relevant Facts:

The solicitor's entire argument spans less than twelve (12) full pages in the two thousand, two hundred and fifty (2250) page transcript. (See PCR App. pp. 2058-207). Petitioner complains of two comments within that limited argument.

The first comment Petitioner would now challenge was made after the solicitor had advised the jury of the gravity of the decision and referenced factors to consider in granting mercy or sentencing a defendant to death. (PCR App. pp. 2059-2061). The solicitor first noted that the jury was charged with determining if the State proved the circumstances in aggravation: "... the law only allows the State to seek the death penalty in those cases in which a jury finds an appropriate aggravating circumstance." (PCR App. p. 2059, lines 18-20). The solicitor, in turning to the consideration of punishment, stated, "the State has asked for the death penalty and we think its appropriate in this case." (PCR App. p. 2060, lines 17-18). There was no objection to this statement, and Petitioner does not contest that statement in this action. Further, the solicitor specifically and plainly underscored the jury's role: "The government has entrusted you, through legislation and judicial decisions to make this decision. ... said in their wisdom that the best people to make this decision are the citizens of the local community. And that is you." (PCR App. p. 2061, lines 2-8). The solicitor stated that the focus was on the "appropriate punishment for the crime committed and the person who committed it." (PCR App. p. 2061, line 24-p. 2062, line 1). He acknowledged that the process of making that decision is "tough," but the "responsibility" was one "the government

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pursuant to the statutory terms. (See PCR App. pp. 2432-2433). Thus, the *Strickland* test is controlling in this review.

places upon its citizens." (PCR App. p. 2062, lines 7-11). The solicitor commented on the expected request for mercy by the defense, and argued why mercy should not be given. (PCR App. p. 2063, lines 8-24).[7] The solicitor continued: "Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, Solicitor Ariail, why do you thing that the death penalty is appropriate in this case.?" (PCR App. p. 2063, line 25 - p. 2064, line 3). The solicitor commented that he had once been advised "by a juror in another case on voir dire," in connection with that juror's thoughts on the death penalty, that "they're mean and evil people that live in the world that do not deserve to continue to live with us, regardless of how confined they are." (PCR App. p. 2064, lines 1-10). He continued immediately thereafter to state: "And that's what the basis of our request for the death penalty is. There are certain mean and evil people that live in this world that do not deserve to continue to live with us." (PCR App. p. 2064, lines 10-13). The solicitor then argued:

> The death penalty is about accountability. It is about accountability for bad choices. Brad Sigmon made bad choices. Brad Sigmon, evidence through his bad choices that he is an evil person. And Brad Sigmon deserved the ultimate punishment in this case, because he made those bad choices, and because he showed no mercy, and because his crimes were so brutal, and that's why the State is asking that you hold Brad Sigmon accountable, and the death penalty is the proper punishment.

(PCR App. p. 2064, lines 14-23).

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[7] *See, e.g., State v. Anderson*, 306 S.W.3d 529, 543 (Mo. 2010) ("the argument that mercy is for the weak and innocent was rhetoric designed to emphasize the State's position that mercy was inappropriate in this case" and was permissible argument).

Petitioner complains the solicitor's argument referencing "mean and evil people" was inappropriate. Petitioner's argues: "[H]is claim that he had discussed seeking the death penalty against a prior defendant with a juror during *voir dire*, and that *he agreed with her response* that 'mean and evil people' should die, further bolstered his role as the arbiter of the appropriate sentence *in this case*. (BOP, p. 11). He concedes, though, the record shows that the solicitor argued "*that's what the basis of our* ***request*** *for the death penalty is*. There are certain mean and evil people that live in the world that do not deserve to continue to live...." (BOP, p. 10). (See also PCR App. p. 2063, line 25 - p. 2064, line 13).

The second comment Petitioner complains of is one referencing the solicitor's request, in his position as solicitor, for the jury "to send a message." (BOP, p. 8). In context, the comment reads as follows:

> It is a function of our government, and you have been entrusted with that, and your decision will ring like a bell in this community as what is the standard for appropriate conduct and when the death penalty is proper. And there are people, there are people who will argue that the death penalty is not a deterrent. But my response as the solicitor of this circuit is, it is a deterrent to this individual and that is what we are asking, is to deter Brad Sigmon and send the message that this type of conduct will not be tolerated in Greenville County, or anywhere in this State. And let that decision that you reach ring like a bell from this courthouse, that people will understand that we will not accept brutal behavior such as this. Thank you.

(PCR App. p. 2070, lines 1-15).

The PCR judge reviewed these comments in detail and in context, and found that neither of these comments would justify an objection. (PCR App. pp. 2876-2877). He found "neither comment suggested 'the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make.' *State v. Woomer,* 277 S.C. 170, 175, 284

S.E.2d 357, 359-360 (1981)." (PCR App. p. 2877). The PCR judge's ruling is well supported by the record and case law.

Discussion:

While a solicitor should not express that he has already reviewed the facts and found, in his own opinion, the defendant deserves a sentence of death in such a way as to diminish the jury's role or responsibility, *Woomer, supra*, the mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. *See State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). The harm to avoid is an argument that "attempt[s] to minimize the jury's sense of responsibility for appellant's fate by stressing that [the solicitor] himself had already made the same decision he was asking them to make." *State v. Butler*, 277 S.C. 543, 545, 290 S.E.2d 420, 421 (1982), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991). "When a solicitor's personal opinion is explicitly injected into the jury's determinations as though it were in itself evidence justifying a sentence of death, the resulting death sentence may not be free from the influence of any arbitrary factor as required by S.C. Code Ann. § 16-3-25(C)(1), and the Eighth Amendment to the United States Constitution." *Butler*, 277 S.C. at 546, 290 S.E.2d at 421; *Woomer*, 277 S.C. at 175, 284 S.E.2d at 359. The comments at issue here are much more aligned with the proper "involvement in the process" comments in *Bell* than the improper "diminished responsibility" comments in *Butler* and *Woomer*. A review of the actual comments in those cases is helpful in considering the difference.

In both *Butler* and *Woomer*, the solicitors' comments at issue were more than mere acknowledgment of the solicitor's part in the process. The solicitors in those cases pointedly told the jurors that they had already made the decision, based on a review of all the evidence:

> I can share with you just to a small degree this morning how each and everyone of you feel, because as I stated yesterday before that in order for this case to get moving as far as the death penalty was concerned I first had to make that decision, you see, and I have in my opinion, based upon the evidence in this case, overall, decided that if we are going to have a death penalty law on the books that if there were any facts that could ever justify it this case justifies it, justifies it.

Butler, 277 S.C. at 546, 290 S.E.2d at 421.

> ... the initial burden in this case was not on you all. It was on me. I am the only person in the world that can decide whether a person is going to be tried for his life or not. I mean I had the same thing you all did. I had to make up my mind in regards to this and under the law, if there is any question about it, you ask the judge, I have to make the first decision as to whether or not a person is going to be tried for the electric chair.

Woomer, 277 S.C. at 175, 284 S.E.2d at 359.

This Court has used these very comments in *Butler* and *Woomer* to form a template by which to evaluate what comments are deemed unacceptable as diminishing the jury's sense of responsibility. For example, in *State v. Koon*, 278 S.C. 528, 298 S.E.2d 769 (1982), *overruled on other grounds State v. Patterson*, 290 S.C. 523, 351 S.E.2d 853 (1986), this Court considered the comments on appeal as follows:

> ... appellant alleges that the solicitor injected his personal opinion into the jury's deliberations. We agree. The solicitor made the following statements during his closing argument at the sentencing phase:
>
> > ... I, as Solicitor and chief prosecuting officer in this county, must make the decision whether or not the State of South Carolina must seek the death penalty .... So, you see, you are not alone in your decision. I have already made that decision....
> >
> > I made that decision some months ago.
> >
> > And if I can do it, you can ....

278 S.C. at 538, 298 S.E.2d at 774.

This Court held: "This is precisely the same argument that required reversal of the death sentences in *State v. Butler* ... and *State v. Woomer* ...." *Id.*

Similarly, again using this template, this Court "condemned" the argument in *State v. Sloan*, 278 S.C. 435, 298 S.E.2d 92 (1982), on the same logic:

> ...the solicitor attempted to minimize the jury's sense of responsibility for appellant's fate by stressing that many others had already made the decision he was asking them to make.
>
> > "... Some people have done that. The legislature did it when they passed the death penalty law. The governor did it when he signed it into being. The officers did it when they signed the arrest warrant. The grand jury did it when they signed this indictment. I did it when I signed my name on the Notice informing them the State would seek the death penalty. And you're being called on now ... The people before you have signed their names ... Would you do like others and sign your name...?"
>
> We condemned similar arguments in *State v. Woomer,* supra and *State v. Butler,* S.C., 290 S.E.2d 420 (1982). The argument was no less improper here.

278 S.C. at 440-441, 298 S.E.2d at 95.

In contrast, the arguments found to be proper in *Bell* are distinctly different. The solicitor in *Bell*, though he argued vigorously for the death penalty, left the decision to the jury. Again, specific reference to the comments at issue are illustrative of the point. In *Bell*:

> ... one Solicitor stated during his closing argument that if "this [wasn't] a case in which a jury should impose the death penalty, if this [wasn't] the type of case in which the State should seek the death penalty and expect the death penalty, then there is none." The Solicitor also implored the jury 'to do what's right.' He stated that if 'it was not right in this case, it was never right."

302 S.C. at 33, 393 S.E.2d.

This Court found:

> ... the Solicitor's comments in *Woomer* and *Butler* are easily distinguishable from the instant case. Here, the Solicitor did not inject his personal opinion concerning the death penalty into the proceedings. Nor did the Solicitor

> comment on his involvement in deciding whether or not to prosecute for the death penalty. The Solicitor's comments did not diminish the role of the jury to decide Bell's fate, thus, we hold that the argument was proper.

Bell, 302 S.C. at 34, 393 S.E.2d at 373.

This Court also noted that "[t]he Solicitor did not challenge the jury by telling them what he would do if the jury failed to impose a death sentence," and again, found the comments were not improper. *Id; citing State v. Plath*, 277 S.C. 126, 284 S.E.2d 221 (1981) *and State v. Davis*, 239 S.C. 280, 122 S.E.2d 633 (1961).

Again, using the arguments in *Butler* and *Woomer* as templates to demonstrate improper arguments, the arguments at issue here simply are not improper. The solicitor repeatedly reminded the jury of their duty to determine the appropriate sentence. (See, for example, PCR App. p. 2061, lines 2-4 ("The government has entrusted you ... to make this decision); p. 2061, lines 9-14 ("in sentencing ... you carry out the function of the judge"); p. 2062, lines 9-10 ("it is a responsibility that the government places upon its citizens"); p. 2068, lines 1-5 ("And the State has asked you and I told you in the beginning we were going to ask you to impose the death penalty. And we think that is an individualized assessment of this crime."); p. 2069, lines 15-22 (in determining appropriateness of a death sentence, "It can only be applied by you, through a consensus of talking, and reasoning, and listening, and thinking and putting on record what you believe is the appropriate punishment for each crime."). Respondent also notes that the fact that the jury was charged with the responsibility of the decision was also emphasized by the trial judge in his instructions. (PCR App. p. 2097, lines 8-18 ("it now becomes your duty to decide what sentence that his Court shall impose upon the defendant"). Even so, Petitioner complains that the solicitor's comments were improper, in part, because they were made in connection with statements acknowledging he represented the State. (See BOP, pp. 11-12). However, the jury was well aware that the

solicitor represented the State, and they would have been equally well aware the State was seeking a death sentence. But, importantly, they were reminded and instructed that the decision on sentencing was a jury decision. If mere reference to a solicitor's involvement in the proceedings at all would be considered error, such a holding would essentially have the effect of disallowing any argument from the solicitor. Consequently, the comments must stand or fall on the basis of the comments alone.

This Court has repeatedly stated that a solicitor's closing argument should be premised on seeking justice. *See Vasquez v. State*, 388 S.C. 447, 698 S.E.2d 561 (2010); *State v. Finklea*, 388 S.C. 379, 697 S.E.2d 543 (2010); *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). A solicitor, like any other advocate, may also be zealous and may "prosecute vigorously," without being unduly prejudicial in his argument. *Finklea*, 388 S.C. at 387, 697 S.E.2d at 547-48. *See also State v. Murrell*, 665 S.E.2d 61, 75-76 (N.C. 2008) (rejecting claim of error, finding "the prosecutor merely sought to fulfill the well-recognized 'duty to advocate zealously that the facts in evidence warrant imposition of the death penalty.' Thus, the prosecutor was advocating the State's position as to the Issues and Recommendation as to Punishment form rather than expressing a personal opinion or desire that defendant be sentenced to death.") (internal citations omitted). Further, the solicitor has the right to make persuasive arguments to the jury. *State v. Bell*, 293 S.C. 391, 404, 360 S.E.2d 706, 713 (1987) (argument where solicitor "referred to appellant as 'different from the rest of us'; (2) suggested he was appearing on behalf of [victim]; (3) referred to [victim] as the only witness from whom the jury would not be able to hear; and, (4) referred to the protections of the legal process being afforded appellant and said appellant gave [victim] no similar protections," found "the solicitor's argument was eloquent, but we believe it was

within acceptable limits."). Indeed, the United States Supreme Court has written of one called upon to prosecute:

> ... he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He 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.

Berger v. United States, 295 U.S. 78, 88 (1935).

The United States Supreme Court, thus, recognizes a duty to "prosecute with earnestness and vigor" and further recognizes such vigor may include inflicting "hard blows," simply not "foul ones." *Id.*

It is not (and could not be) error for the solicitor to argue that the case presented – the case in which the State is without question seeking a death sentence – supports imposition of this most serious penalty. The arguments reviewed and approved in *State v. Cain*, 297 S.C. 497, 508-509, 377 S.E.2d 556, 562 (1988), well illustrate this fact along with confirming the propriety of the "send the message" argument:

> Appellant attacks three (3) portions of the summation. First, the solicitor informed the jury that a death penalty verdict would send a message to surrounding counties that "[y]ou don't do that [murder] in Chesterfield County without paying the price." Next, the assistant solicitor equated the van in which the murders were committed with a courtroom, noting that "Adams and ... Kemmerlin didn't have the benefit of having 12 people good and true, their peers, to sit on their trial ... The murderer picked the courtroom ... [and] was their jury." Finally, the assistant solicitor argued that the facts justified imposition of the death penalty:
>
> > How do I know it was bad enough? Because I brought you something that will make you grimace when you look at it, worse than anything you thought existed in Chesterfield County.
>
> ...

> The first and third challenged comments here, when viewed in the context of the entire summation, were no more than recommendations by the solicitor as to the appropriateness of the death penalty based on evidence adduced at trial. The "send a message" argument here certainly did not rise to the level of arousing juror passion or prejudice. The third challenged comment did not improperly inject the solicitor's personal opinion, but rather served as a legitimate reminder of the gruesome nature of the crime.

Cain, 297 S.C. at 508-509, 377 S.E.2d at 562.

In light of the arguments approved in *Bell* and in *Cain*, the argument here on the appropriateness of the death penalty and "sending a message" were proper. There was no cause to object, much less prejudice to the defendant. *See also State v. Johnson*, 306 S.C. 119, 133, 410 S.E.2d 547, 555 (1991) (finding following statement no improper, "I feel that it would have to be and would hope that you would agree a verdict of death by electrocution" reasoning "the comment did not diminish the role of the jury."). The PCR judge properly found no error. (PCR App. pp. 2877-2878). *See State v. Shuler*, 353 S.C. 176, 188-189, 577 S.E.2d 438, 444 (2003) (acknowledging "[g]eneral deterrence arguments are admissible" and finding the argument that if death imposed it may "cause somebody else thinking of murder not to do it," found not to inject "an arbitrary factor (fear or personal responsibility)").

The comment referencing "mean evil people" and the death penalty again goes to the jury's process of determining the appropriate sentence, and it was directly tied to same in the solicitor's argument. (PCR App. p. 2063, line 25 - p. 2064, line 25, "Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, Solicitor Ariail, why do you thing that the death penalty is an appropriate punishment in this case" and explaining not only that some "do not deserve to continue to live" and that the death sentence is about "accountability" again tying the facts of the case in directly.). There is nothing inherently improper in using the term "evil." *See Kinder v. Bowersox*, 272 F.3d 532, 552 (8th

Cir. 2001)(finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, " *Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*" but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.")(emphasis in original). *See also State v. Anderson*, 306 S.W.3d 529, 543 (Mo. 2010) (upholding use of quote, " The only thing necessary for evil to triumph is for good men to do nothing."); *State v. Gregory*, 147 P.3d 1201, 1255 (Wash. 2006) (reviewing solicitor's characterization of defendant ("evil" and "menace to society") and finding no error: "the prosecutor is entitled to draw inferences from the evidence and these inferences could have been justified given Gregory's criminal history and the facts of this case"); *People v. Wilson*, 628 N.E.2d 472, 485 (Ill. Ct. App. 1 Dist. 1993) ("The prosecutor may also refer to the defendant as an evil man and comment on the particularly brutal nature of a crime if his statements are supported by the evidence.").

Further, the PCR judge correctly found that neither of the statements "put a challenge to the jury." (PCR App. p. 2748, lines 10-19). (See also PCR App. p. 2878). Indeed, the record reflects that the solicitor never told the jury he "expected" the death penalty or he had made his decision and expected them to join him; rather, the solicitor guided the jury with some thoughts to consider – he also argued for death on these facts and for this individual, requesting the jury return a verdict for same. When reviewed in context, as the comments must be, there was no possibility the argument worked to diminish the jury's sense of responsibility. *See Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 (2007) (appellate court "must review the argument in the context of the entire record"). Moreover, the PCR judge

found particularly telling that defense counsel – whether objecting or not – did not respond to any of the solicitor's arguments as a personal opinion argument. Rather, defense counsel stated that the solicitor *asked* the jury to return a death sentence, and that only the jury would decide. (PCR App. p. 2878; p. 2748, line 20 - p. 2749, line 4; p. 2070, line 23 - p. 2071, line 9) (emphasis added). (See also PCR App. p. 2070, lines 22-25, "Now the Solicitor has asked if you its [sic] appropriate. He said that the government trusts you to be judge and jury."). Again, when read (and also apparently when heard) in context, the comments do not support that the solicitor voiced a personal opinion that would diminish the jury's sense of responsibility.

In sum, the PCR judge found, and the record fully supports, that there was no improper personal opinion (*i.e.* lessening the duty or responsibility of the jury) or even demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment. *See State v. Smart*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982), *overruled on other grounds State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991) (cautioning such comments must be case specific and defendant specific). Further, the PCR judge found that the comments were not inflammatory or otherwise improper on their face that would warrant an objection. (PCR App. P. 2877). *Compare Northcutt*, 372 S.C. at 222, 641 S.E.2d at 881 (solicitor's statement in child murder case that there would be an "open season on babies in Lexington County" if death sentence was not recommended was improper as "[t]he sole purpose of this statement was to inflame the jury"). Lastly, the PCR judge found that even if the comments could possibly constitute error, and counsel rendered deficient performance in failing to object, counsel's failure to object would be harmless in light of the tremendous evidence in aggravation. (PCR App. p. 2878). "When a defendant challenges

a death sentence, prejudice is established when 'there is a reasonable probability that, absent [counsel's] errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. State*, 332 S.C. 329, 333, 504 S.E.2d 822, 823 (1998), *quoting Strickland*, 466 U.S. at 694. The record well supports this alternative finding, as well. There is no question of guilt, and the record reflects the brutal double murder of Petitioner's estranged girlfriend's parents. Petitioner planned the crime, waiting throughout the night to enter the home, and mercilessly inflicted multiple brutal blows with a baseball bat. Each victim's skull was broken. He then kidnapped the daughter. (See PCR App. p. 1516, line 6 - p. 1520, line 11). Petitioner's own description of the murders is as follows:

> After I hit David on the heard, I saw Gladys right behind him. She ran back towards the living room ... I ran after her. When I got to the living room [she] was sitting in one of the chairs. She was just sitting there, and I hit her a couple of times in the head with the baseball bat. Then I went back in the kitchen and David was still moving, so I hit him some more. Then I went back to the living room and Gladys was still moving, so I hit her again.

(PCR App. p. 1517, lines 9-17).

Respondent notes that the jury found the State had proven beyond a reasonable doubt the presence of three (3) statutory aggravating circumstances: 1) two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct; 2) the murder was committed while in the commission of burglary; and 3) the murder was committed while in the commission of physical torture. (PCR App. p. 2118, lines 9-18).

In light of this record, even if the solicitor's comments at issue here were somewhat improper and counsel was deficient in failing to object, there could be no prejudice. But this Court need not look at the prejudice prong because the record well supports that counsel was

not deficient in failing to object to the referenced comments. The comments were not improper.

Again, the record fully and fairly supports the PCR judge's decision. His ruling should be affirmed.

II.

The PCR judge correctly rejected Petitioner's allegation of ineffective assistance of counsel in failing to request a charge on the "statutory mitigating circumstance of age or mentality" based on intoxication where the evidence at trial failed to support Petitioner was intoxicated at the time he murdered his two victims, much less that he was "extremely intoxicated" as Petitioner now contends.

Relevant Facts:

As Petitioner concedes, the trial judge considered whether to charge the "age and mentality" statutory mitigating circumstance as found in S.C. Code § 16-3-20 (C)(b)(7). (BOP, p. 18). (See also PCR App. p. 2053, lines 11-23). However, the trial judge found the circumstance to be more in line with evidence demonstrating "education level, or mental retardation, or something like that." (PCR App. p. 2053, lines 1921). Defense counsel did not offer any argument in response. Id. The trial judge gave the following charge on statutory mitigating circumstances:

> ... you must also consider the following mitigating circumstances. One, the defendant has no significant history of criminal – prior criminal convictions involving the use of violence against another person. Two, the murder was committed while the defendant was under the influence of a mental or emotional disturbance. Three, the capacity of the defendant to appreciate the criminality of his conduct, or conform his conduct to the requirements of law as substantially impaired. And fourth, the defendant was provoked by the victim into committing the murder.

(PCR App. p. 2108, lines 9-19).

The trial judge also instructed the jury: "You must also consider any non-statutory mitigating circumstances." (PCR App. p. 2108, lines 19-21).

In the PCR action, Petitioner claimed he was entitled to also have the "age and mentality" mitigating circumstance charged due to evidence of intoxication at the time of the murder. (See PCR App. pp. 2491-2493). The PCR judge found that Petitioner lacked factual

support for the charge. (PCR App. p. 2879). Petitioner complains here that the record does not support the PCR judge's factual conclusion that there was no evidence of intoxication at the time of the crime to warrant the charge. (BOP, p. 20).

Discussion:

"In deciding which statutory mitigating circumstances may be supported, the trial judge is concerned only with the existence of the evidence, not its weight." *State v. Hughey*, 339 S.C. 439, 455, 529 S.E.2d 721, 729 (2000), *overruled on other grounds Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009). *See also State v. Caldwell,* 300 S.C. 494, 388 S.E.2d 816 (1990). It is not error to decline to give a charge that is not supported by the evidence. *Hughey*, 339 S.C. at 456, 388 S.E.2d at 730.

This Court has held "when there is evidence that the defendant *was intoxicated at the time of the crime*, the trial judge is required to submit the mitigating circumstances in § 16-3-20(C)(b)(2), (6), and (7)." *State v. Vazsquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on different grounds State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006).[8] (emphasis added). Evidence of intoxication at the time of the crime is absent from the record. Therefore, counsel did not render deficient representation in failing to object, and Petitioner cannot show prejudice.

Without doubt, the record reflects drug use and drinking *prior* to the murders, the night before the crime, (See PCR App. p. 1578, line 6 - p. 1582, line 22, Strube Testimony

[8] This Court clarified in *Evans* that defense counsel must request the mitigating circumstance or the matter is not preserved for review on appeal. 371 S.C. at 31, 637 S.E.2d at 315.

that they drank beer and smoked crack cocaine the night before the murders[9] ; p. 1996, line 4 - p. 2004, line 12, Dr. Morton's testimony on the "aftereffects" (as termed by the solicitor) of cocaine use)[10], but does not support an allegation of intoxication during the crime. *See Vazsquez*, 364 S.C. at 301, 613 S.E.2d at 363 ("the evidence indicated that Appellant may have had drinks, but this is not enough to warrant a charge to the jury for the mitigating factors outlined in § 16-3- 20(C)(b)(2), (6), and (7)."). *See also Evans*, 371 S.C. at 31, 637 S.E.2d at 315 (drawing evidentiary distinction: "Although there is some evidence of drinking in the days leading up to the incident, intoxication at the time of murders is not at issue here.").

Further, Respondent notes that defense counsel did not argue "at the time of crime intoxication" in closing, but argued that Petitioner was simply under mental and emotional distress. (PCR. p. 2079, line 11 - p. 2080, line 2080, line 3). Moreover, Defense Counsel Eppes testified at the PCR hearing that counsel "talked about drugs that Mr. Sigmon had been using and drinking," but could not recall discussion on intoxication. (PCR App. p. 2772, lines 1-2). Mr. Eppes testified clearly that he didn't "remember ever thinking that [Petitioner] was drunk." (PCR App. p. 2772, lines 5-8).

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[9] Petitioner characterizes Strube's testimony as Petitioner stayed awake all night. (Petition, p. 25; BOP, p. 16). The testimony does not reflect such a statement. Strube indicates that Petitioner was up as he awoke, but there is no statement that Petitioner was awake the entire night, and no statement that Petitioner used more drugs or drank without Strube. To the contrary, a logical inference from the testimony is that Petitioner was the more sober of the two and was biding his time to attack the two victims.

[10] This characterization is also consistent with the passage from Dr. Morton's testimony quoted in the petition at p. 26, and BOP, p. 16, noting "violent behavior" in people both during and after drug use; and his opinion, "whether he's using at the time or going through some of the withdrawal, ... it would effect [sic] his ability to make good decisions, problem solve, make sense out of his world."

Further still, the PCR judge noted that the Tennessee tape showed Petitioner "stated he was straight, sober, thinking properly by his own admission, and that he was not on drugs." (PCR App. pp. 2879-2880). (See also Exhibit 1-A, Tennessee Tape).

The PCR judge correctly found there was no prejudice "in two distinct ways." (PCR App. p. 2880). "First, that the evidence of purported drug use and alcohol use before the crime was before the jury and the jury was charged to consider his mental state," and "second, because of the[] strong evidence in aggravation, including three statutory circumstances in aggravation, including torture, in this brutal double murder of an elderly couple in their home." Id. The PCR judge reasoned that because the jury was charged to consider his mental state "that failure to charge one other rather general mitigating circumstance[] could not be said to have negatively affected consideration of the evidence and the other charges." Id. This is consistent with this Court's precedent. *See Jones v. State*, 332 S.C. at 339, 504 S.E.2d at 827 (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendant's mental condition was clearly before the jury, the trial court charged several other mitigating factors relating to mental condition, and the jury found the existence of five aggravating factors). *See also State v. Stanko*, 376 S.C. 571, 578, 658 S.E.2d 94, 97-98 (2008) (though finding issue not preserved for review on direct appeal, the Court noted that no prejudice occurred when the jury heard the cited evidence, and was advised of other statutory mitigating factors regarding appellant's mental state).

In sum, the nub of the issue in order to determine either deficient performance or prejudice is whether there was evidence of intoxication at the time of the crime. There was not. Moreover, as the PCR judge noted, the jury was charged on two separate mitigators involving mentality – (b)(2), murder committed while under the influence of mental or

emotional disturbance, and (b)(6), capacity to appreciate the criminality of conduct or conform conduct was substantially impaired. (See PCR App. p. 2108, lines 13-18). Given these charges, the jury surely knew to consider Petitioner's mental condition at the time of the crime, based on the evidence before it. Further still, the jury was instructed they could return a life sentence for any reason or no reason at all, even where the jury had found one or more circumstances in aggravation. (See PCR App. pp. 2107, lines 1-13; p. 2109, line 23 - p. 2111, line 13). The number of circumstances charged could have no direct or definable affect on a jury's determination in light of these instructions. For all these reasons, there could be no *Strickland* prejudice.

Again, the record, and precedent, fully and fairly support the PCR judge's findings of facts and conclusions of law. The PCR judge's ruling should be affirmed.

III.

The PCR judge correctly rejected Petitioner's assertion that counsel was ineffective in not objecting to the trial judge's instruction that a "non-statutory mitigating circumstance is one the defendant 'claims' lessens his culpability" as, when the parsed, complained of sections are reviewed in context, the charge as a whole, was complete and without error

Relevant Facts:

The PCR judge found that the trial judge charged the jury that "they could consider both statutory and non-statutory mitigating circumstances, and could, for any reason, recommend a life sentence. (PCR App. pp. 2881-2882, citing to PCR App. p. 2107, (R. p. 2231), lines 1-13). Moreover, the judge specifically charged:

> ... a mitigating circumstance is neither a justification or an excuse for the murder. It's [sic] simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable...

(PCR App. p. 2108, lines 1-4).

The trial judge continued, and defined statutory and non-statutory mitigating circumstances. The trial judge instructed as to a non-statutory mitigating circumstance:

> ... A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims served the same purpose. That is to reduce the degree of this guilt in the offense. ...

(PCR App. p. 2108, line 23 - p. 2109, line 1).

The trial judge continued and instructed the jury, as to burden of proof:

> ... it is not necessary for you to find the existence of a statutory or non-statutory mitigating circumstance beyond a reasonable doubt. In other words, the reasonable doubt burden does not apply to the defense mitigating circumstances, either statutory or non-statutory....

(PCR App. p. 2109, lines 4-10). (See also PCR App. p. 2107, "There are three conditions you should consider in reaching your decision, whether the existence of a statutory mitigating circumstance was supported by the evidence, whether the existence of any non statutory mitigating circumstance was supported by the evidence, and whether for any reason you think, or for no reason at all the defendant should be sentence[d] to life imprisonment."; p. 2111, lines 103-13, "You may also consider any other factor in mitigation of the offense and you can impose a sentence of life imprisonment again for no reason at all.").

The PCR judge, after reviewing the charge as a whole and finding it sufficient, rejected Petitioner's argument as it was based upon a "parsing" of the jury instructions "to suggest the 'penalty phase instructions impinged upon the jury's ability to properly consider all mitigating evidence offered by' the defense." (PCR App. p. 2881). The PCR judge concluded:

> ...when considered as a whole, as the charges must be, and in light of the explicit instruction introducing the concept of mitigating circumstances (both statutory and non-statutory and including the concept of the rejection of a death sentence "for any reason"), there simply is no expectation that a reasonable juror would restrict consideration of the mitigating evidence to only evidence of non-guilt issues (i.e. "less culpable"), or somehow limit consideration of any factor not listed in the statute. ...

(PCR App. pp. 2881-2882).

Moreover, the PCR judge concluded that even if some minor error existed, there could be no viable claim of prejudice, in light of the overwhelming evidence of guilt and circumstances of aggravation, especially where the issue concerned "different language for the same concept." (PCR App. p. 2882).

Again, the record, and precedent, fully and fairly support the PCR judge's findings of facts and conclusions of law.

Discussion:

"A jury instruction must be viewed in the context of the overall charge." *State v. Hicks,* 330 S.C. 207, 218, 499 S.E.2d 209, 215 (1998). "The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." *Id.*

Petitioner complains the "instructions impinged upon the jury's ability to properly consider all mitigating evidence offered by petitioner by erroneously suggesting that only circumstances directly related to the offense, such as petitioner's mental status at the time of the offense, were relevant to the jury's sentencing calculus." (BOP, p. 23). This argument was rejected in *State v. Hughey*, 339 S.C. 439, 529 S.E.2d 721 (2000), *overruled on other grounds Rosemond v. Catoe*, 383 S.C. 320, 680 S.E.2d 5 (2009).

In *Hughey*, the appellant "argue[d] the jury charge was confusing to a reasonable juror because it implies that non-statutory mitigating circumstances are not circumstances the law *requires* a jury to consider." Id. The trial judge in *Hughey* gave the following definition in his charge:

> A non-statutory mitigating circumstance is one which is not provided for by statute, but is one which the defendant contends serves the same purpose. That is to lessen or reduce the degree of the defendant's guilt in the commission of the crime of murder.

Hughey, 339 S.C. at 458, 529 S.E.2d at 731. That is almost the exact definition given by the trial judge in this case:

> ... A non-statutory mitigating circumstance is one that is not provided for by statute, but it is one which the defendant claims served the same purpose. That is to reduce the degree of this guilt in the offense. ...

(PCR App. p. 2108, line 23 - p. 2109, line 1).

Thus, *Hughey* should control. This Court, in finding no error, found the following additional instructions aided in properly guided the jury:

> Now while there must be some evidence which supports a finding by you of the existence of one or more statutory or non-statutory mitigating circumstances, it is not necessary that you find the existence or a circumstance or circumstances beyond a reasonable doubt. *And you may recommend a sentence of life imprisonment and [sic] whether or not you find the existence of a statutory or nonstatutory mitigating circumstance.*
>
> In making your determination as to which sentence to recommend in these cases, you should consider the statutory aggravating circumstances, the statutory mitigating circumstances, and *any non-statutory mitigating* circumstances in arriving at your decision....
>
> Simply stated, you may recommend a sentence of life imprisonment for *any reason or for no reason at all* other than as an act of mercy. (emphasis added).

339 S.C. at 458-59, 529 S.E.2d at 731.[11]

This Court found:

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[11] In *Rosemond*, this Court disagreed only with the specific verbiage of one phrase of one sentence – the phrase "other than as an act of mercy." There is no indication that the charge as a whole was incorrect, or that this Court even considered the charge as a whole. Because the Court's analysis was "phrased focused," *Rosemond* appears to affect only the language "other than as an act of mercy," which is now disapproved of for use in the State. 383 S.C. 329-30, 680 S.E.2d at 10. The opinion offers no analysis, though, of the sufficiency of the charge as a whole, or an analysis as to whether the remainder of the charge would have "cured" the possibility of misuse of this phrase. *See Boyde v. California*, 494 U.S. 370, 380-83 (1990) ("the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence ... Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation."). *See also Estelle v. McGuire*, 502 U.S. 62 n.4 (1991) (adopting *Boyd* in order to "speak with one voice on this issue"). Thus, the applicability of *Rosemond* is strictly limited.

> Considering the jury charge as whole, a reasonable juror would understand that either a statutory or a non-statutory jury circumstance could reduce the sentence to life imprisonment. Hughey contends the trial judge's instruction was erroneous because the charge defined non-statutory circumstances as those "the defendant contends" the jury should consider, not what the law *authorizes* the jury to consider. The jury charge adequately apprised the jury of the function of non-statutory mitigating circumstances because it repeatedly emphasized that both statutory and non-statutory circumstances should be considered when forming a recommendation. In fact, the judge instructed the jury that they could recommend life imprisonment for "any reason or no reason at all." *See State v. Atkins,* 303 S.C. 214, 399 S.E.2d 760 (1990) (upholding a jury charge where the judge stressed the jury could recommend a life sentence "for any reason or no reason").
>
> Moreover, the jury charge in the present case is similar to other charges of non-statutory mitigating circumstances upheld by this Court. The jury charge authorized the jury to recommend life imprisonment even if they did not find the existence of mitigating circumstances. Similar jury instructions have been found adequate by this Court. *See State v. Hicks,* 330 S.C. 207, 499 S.E.2d 209 (1998) (upholding a jury charge which permitted a jury to impose a life sentence even if they did not find mitigating circumstances); *State v. Sims,* 304 S.C. 409, 405 S.E.2d 377 (1991) (jury charge was found proper where it authorized jury to consider any mitigating evidence presented); *State v. Singleton,* 284 S.C. 388, 326 S.E.2d 153 (1985) (instruction proper where judge states the jury may consider "any mitigating circumstances ... which are supported by evidence.").

339 S.C. at 459-60, 529 S.E.2d at 732.

Thus, the definition was not improper, nor the instructions as a whole infirm.

Petitioner's assertion the PCR judge's order is "inaccurate" because of the finding "the instruction, taken as a whole, were sufficient," (BOP, p. 25), simply cannot be squared with the record as demonstrated above. Further, his reliance on *Cage v. Louisiana*, 498 U.S. 39 (1990), is wholly misplaced.

First and foremost, *Cage* has been overruled. Second, Petitioner's argument relies specifically on the language of *Cage* (*i.e.* that a reasonable jury *could* have understood the

charge in the way Petitioner suggestions, see BOP, pp. 25-26), that the Supreme Court disavowed in *Estelle v. McGuire*, 502 U.S. 62 (1991):

> We acknowledge that language in the later cases of *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and *Yates v. Evatt,* 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), might be read as endorsing a different standard of review for jury instructions. See *Cage, supra,* 498 U.S., at 41, 111 S.Ct., at 329 ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole"); *Yates, supra,* 500 U.S., at 401, 111 S.Ct., at 1892 ("We think a reasonable juror would have understood the [instruction] to mean ..."). In *Boyde,* however, we made it a point to settle on a single standard of review for jury instructions—the "reasonable likelihood" standard—after considering the many different phrasings that had previously been used by this Court. 494 U.S., at 379–380, 110 S.Ct., at 1197–1198 (considering and rejecting standards that required examination of either what a reasonable juror "could" have done or "would" have done). So that we may once again speak with one voice on this issue, we now disapprove the standard of review language in *Cage* and *Yates,* and reaffirm the standard set out in *Boyde.*

502 U.S. at 72 n. 4. *See also Kornahrens v. Evatt*, 66 F.3d 1350, 1363 (4th Cir. 1995) ("we have since recognized that in conducting a *Cage* analysis, courts must look to the entire context of the jury charge and not just the offending language, reversing only if there is a 'reasonable likelihood' that the jury would have applied the instruction in an unconstitutional manner"). Petitioner's argument should be rejected.

At bottom, "the charge provided, even if it found a statutory aggravating circumstance, the jury could impose a life sentence" such that "the jury was instructed it was authorized to impose a life sentence even if it did not find any mitigating circumstances." *Hicks*, 303 S.C.. at 218, 499 S.E.2d at 215. This is an added charge that is not specifically required. *Id.* Even so, such a charge significantly reduces any possibility of *Strickland* prejudice for failure to object to the wording of the trial judge's definition of mitigating circumstances. However, the judge's charge closely follows the definition also reviewed and approved in *Hughey*. There would have been no cause to object, thus, no basis for filing

deficient performance. Simply, when reviewed as a whole, there is not a "reasonable likelihood" that the jury would have understood the definition to have directed them to scale back or reduce consideration and/or impact of any of the evidence in the mitigation case.

Again, the PCR judge's order is fully supported by the record and this Court's precedent. His ruling should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the findings and conclusions of the PCR judge should be affirmed.

Respectfully submitted,

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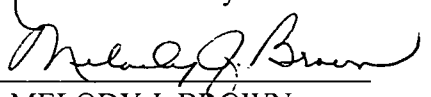
BY: 
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July 23, 2012.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
J. C. "Buddy" Nicholson, Jr. , Circuit Court Judge
(Capital Case - PCR Action)
Appellate Case No. 2009-136506

Brad Keith Sigmon, Petitioner,

vs.

State of South Carolina, Respondent.

PROOF OF SERVICE

I, Melody J. Brown, certify that I have served the State's *Brief of Respondent* on Petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorneys of record :

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This 23rd day of July, 2012.

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July 23, 2012

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

Re: The State v. Brad Keith Sigmon
Appeal from Greenville County

Dear Mr. Shearouse:

Enclosed please find the original and fourteen (14) of the ***Brief of Respondent***, dated July 23, 2012, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Melody J. Brown
Senior Assistant Attorney General

Enclosures

cc: Robert M. Dudek, Chief Appellant Defender
Elizabeth A. Franklin-Best, Esquire
William H. Ehlies, II, Esquire