

The Supreme Court of South Carolina

Brad Keith Sigmon, Petitioner,

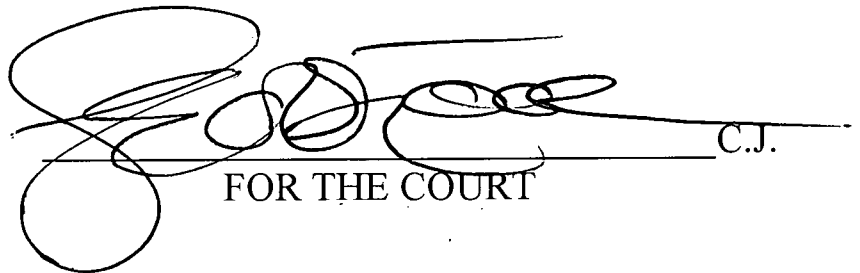
v.

State of South Carolina, Respondent.

Appellate Case No. 2009-136506

ORDER

Petitioner requests an extension to serve and file the brief of petitioner and additional copies of the appendix and alleges there are extraordinary circumstances justifying this extension. The extension is granted until April 20, 2012. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.



C.J.
FOR THE COURT

Columbia, South Carolina

April 19, 2012

cc: Elizabeth Anne Franklin-Best

Melody Jane Brown

Robert Michael Dudek

William Harry Ehliens, II

STATE OF SOUTH CAROLINA

 ORIGINAL

IN THE SUPREME COURT

Appeal from Greenville County

J.C. Buddy Nicholson, Jr., Circuit Court Judge

RECEIVED

APR 18 2012

BRAD KEITH SIGMON,

S.C. Supreme Court

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
THE BRIEF OF PETITIONER AND
ADDITIONAL COPIES OF THE APPENDIX**

The undersigned counsel would respectfully request a **final two day extension, until Friday, April 20, 2012**, in which to file the brief of petitioner and additional copies of the appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The brief of petitioner and additional copies of the appendix in this case are due to be served and filed today.

2. Counsel is on the public defender's conference planning committee and a meeting was called today **that was unplanned that counsel will attend**. Counsel filed the initial brief of appellant and designation of matter in State v. David Lewis with this Court, April 13, 2012. Counsel filed the initial brief of respondent in State v. Robert Jolly #2 with the Court of Appeals on April 6, 2012. Counsel filed the brief of petition in State v. David M. Rocquemore with this Court on April 4, 2012. Counsel had an oral argument on March 29, 2012, in State v. Randy Vickery before the Court of Appeals. Counsel filed

the initial reply brief in the death penalty case of State v. Stephen Christopher Stanko with this Court on March 26, 2012. Counsel filed the initial brief of respondent and designation of matter in State v. Robert Jolly #2 with the Court of Appeals on Friday, March 23, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Matthew Taylor Hinton with the Court of Appeals on Thursday, March 22, 2012. Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in State v. Terrell McCoy with this Court on March 16, 2012. Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel filed the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel also had a further meeting on State v. Richard Gagnon on March 15, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

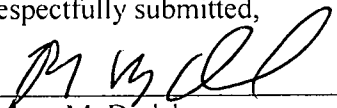
Co-Counsel, Elizabeth A. Franklin-Best, filed the return to petition for writ of certiorari in Jeremiah Dicapua v. State with this Court today, April 11, 2012. Counsel filed the petition for writ of certiorari from the Court of Appeals in State v. James P. Austin with this Court on March 28, 2012. Counsel also filed the petition for writ of certiorari from the Court of Appeals in State v. Michael D. Jackson with this Court on March 28, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Cedric Flood with the Court of Appeals on March 27, 2012. Counsel also filed the petition for writ of certiorari in Reina Garrido v. State with this Court on March 27, 2012. Counsel filed the petition for writ of certiorari from the Court of Appeals in State v. Reico Lamont Welch with this Court on March 19, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Marquis Breeland with the Court of Appeals on March 14, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Ervin Outz with the Court of Appeals on March 14, 2012.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

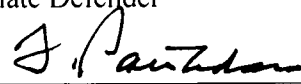
4. As indicated by signature below, Melody J. Brown, of the South Carolina Attorney General's Office, does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request **a final two day extension, until April 20, 2012** within which to file the brief of petitioner and additional copies of the appendix in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the brief of petitioner and additional copies of the appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



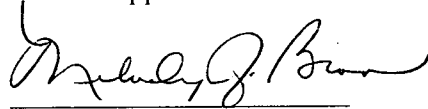
Robert M. Dudek
Chief Appellate Defender
Elizabeth A. Franklin-Best
Appellate Defender



T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

April 18, 2012

I do not oppose:



Melody J. Brown

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable J. C. Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

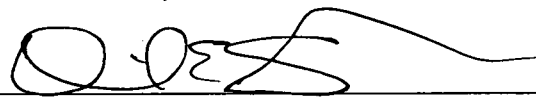
ORDER

For good cause shown, the request for an extension to serve and file the brief of petitioner and the additional copies of the appendix is granted and extended until April 18, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

March 20, 2012

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehlires, II, Esquire
Assistant Attorney General Melody J. Brown

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

J.C. Buddy Nicholson, Jr. , Circuit Court Judge

RECEIVED

MAR 19 2012

S.C. Supreme Court

BRAD KEITH SIGMON,

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
THE BRIEF OF PETITIONER AND
ADDITIONAL COPIES OF THE APPENDIX**

The undersigned counsel would respectfully request **a final thirty day extension, until April 18, 2012**, in which to file the brief of petitioner and additional copies of the appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The brief of petitioner and additional copies of the appendix in this case are due to be served and filed today.

2. Counsel filed the petition for writ of certiorari to the Court of Appeals and accompanying appendix in State v. Terrell McCoy on March 16, 2012. Counsel had an oral argument in State v. Christopher Heller before the Court of Appeals on March 13, 2012. Counsel will file the petition for rehearing in State v. Garvin Duvall with the Court of Appeals on March 15, 2012. Counsel also plans to file the initial brief of appellant and designation of matter in State v. Donald Petty with the Court of Appeals on March 15, 2012. Counsel and co-counsel are also having a further meeting on State v. Richard

Gagnon on March 15, 2012. Counsel filed the return to the petition for writ of certiorari in Michael A. Hough v. State with this Court on March 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Charles Berlin Pennell with the Court of Appeals on March 5, 2012. Counsel also filed the brief of petitioner in State v. Miama Kromah with this Court on March 5, 2012. Counsel is currently working on the death penalty case of Richard Bernard Moore v. State with co-counsel Susan B. Hackett. Counsel filed the five issue death penalty brief in the case of State v. Steven Barnes on February 22, 2012, with this Court. Counsel argued part of the case of State v. Kathy Salley along with Matt Bogan of the Nelson-Mullins firm before this Court on February 22, 2012 after the Court of Appeals sought certification. On February 23, 2012, counsel argued part of the case of State v. Chris Anthony Liverman before this Court, also along with Matt Bogan. Counsel filed a petition of for writ of certiorari with the United States Supreme Court in the death penalty case State v. William O. Dickerson on February 15, 2012. Counsel argued State v. Gavin Duvell before the Court of Appeals on February 16, 2012. Counsel argued part of, along with Reid Sherard of the Nelson-Mullins firm, the murder case of State v. Richard Bill Niles, Jr. with the Court of Appeals on Tuesday, February 14, 2012. Counsel is reading the state's brief in the death penalty case of State v. Steven Stanko where he anticipates filing a reply brief. Counsel also is working on the brief of petitioner with co-counsel in the death penalty case of State v. Brad Sigmon. In addition to the above, counsel has very extensive administrative duties on a daily basis as the Chief Appellate Defender.

Co-Counsel, Elizabeth A. Franklin-Best, Counsel diligently works to keep up with her case load. Counsel filed the initial brief of appellant and designation of matter in State v. Marquis Breeland with the Court of Appeals on March 14, 2012. Counsel also filed the initial brief of appellant and designation of matter in State v. Ervin Outz with the Court of Appeals on March 14, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Anthony Hackshaw, which included seven issues on appeal, with the Court of Appeals on March 8, 2012. Counsel had an oral argument before the Court of Appeals in State v. Nathaniel Murray on March 1, 2012. Counsel filed the petition for rehearing in State v. Jomar Antavis Robinson with the Court of Appeals on March 1, 2012. Counsel had an oral argument before the Court of Appeals in

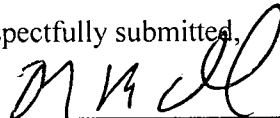
State v. Donna Buie on February 28, 2012. Counsel filed the petition for writ of certiorari from the Court of Appeals and accompanying appendix on February 27, 2012, with this Court in State v. David Lee Coward. Counsel filed the five issue death penalty brief in the case of State v. Steven Barnes with this Court on February 24, 2012.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

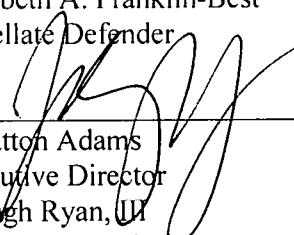
4. As indicated by signature below, Melody J. Brown, of the South Carolina Attorney General's Office, does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request **a final thirty day extension, until April 18, 2012** within which to file the brief of petitioner and additional copies of the appendix in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the brief of petitioner and additional copies of the appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



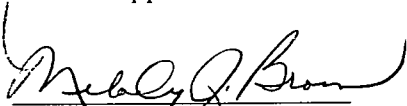
Robert M. Dudek
Chief Appellate Defender
Elizabeth A. Franklin-Best
Appellate Defender



T. Patton Adams
Executive Director
J. Hugh Ryan, III
General Counsel

March 19, 2012

I do not oppose:



Melody J. Brown

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

For good cause shown, the request for an extension to serve and file the brief of petitioner and the additional copies of the appendix is granted and extended until March 19, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Sandra J. Shealy
Chief Deputy CLERK

Columbia, South Carolina

February 17, 2012

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehliens, II, Esquire
Assistant Attorney General Melody J. Brown

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

J.C. Buddy Nicholson, Jr. , Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
THE BRIEF OF PETITIONER AND
ADDITIONAL COPIES OF THE APPENDIX**

The undersigned counsel would respectfully request a thirty day extension, in which to file the brief of petitioner and additional copies of the appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The brief of petitioner and additional copies of the appendix in this case are due to be served and filed today.

2. Counsel filed the petition for writ of certiorari in the United States Supreme Court in State v. William O. Dickerson on February 15, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Jason Will Williams with the Court of Appeals on February 8, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Stephania Murray with the Court of Appeals on February 2, 2012. Counsel filed the petition for writ of certiorari in Anthony Lamar Brown v. State with this Court on January 13, 2012. Counsel had an oral argument in State v. Jimmy

 ORIGINAL

RECEIVED

FEB 16 2012

S.C. Supreme Court

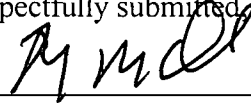
Paul McKerley before the Court of Appeals on January 11, 2012. Counsel filed the petition for writ of certiorari in Damian Lamar Blackmon v. State with the Supreme Court on January 9, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Chamar Scott with the Court of Appeals on January 5, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Manuel Marin with the Court of Appeals on January 3, 2012. Counsel is working on the death penalty case of State v. Steven Barnes wherein the brief will be filed on February 23, 2012. Counsel must also prepare for oral arguments in the Court of Appeals and in this Court. Counsel will argue State v. Chris Anthony Liverman with this Court on February 23, 2012. Counsel also must argue the murder case of State v. Garvin Duvall on February 16, 2012 before the Court of Appeals. Counsel is also preparing a PowerPoint presentation for the Best Practices Seminar sponsored by the South Carolina Commission on Indigent Defense and the Charleston Law School to be given in Charleston on February 24, 2012. Counsel received the State's brief in the death penalty case of State v. Steven Stanko which he will also have to read and research for a reply brief. Moreover, two other major cases have just arrived in this office that require attention: Marion Lindsey v. State, a death penalty PCR case, and Steven Beckham v. State, which originally was a death penalty case at the trial level.

Co-Counsel, Elizabeth A. Franklin-Best, is currently working on the initial brief of appellant and designation of matter in the death penalty case of State v. Steven Barnes, which is due with this Court on February 24, 2012 and has a 2344 page transcript. Counsel filed a petition of rehearing in State v. Justin McBride with the Court of Appeals on January 30, 2012. Counsel had an oral argument in State v. Osiel Gomez Narciso before this Court on January 25, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. Leslie Twyman with the Court of Appeals on January 20, 2012. Counsel filed the initial brief of appellant and designation of matter in State v. James Moore on January 19, 2012 with the Court of Appeals. Counsel had an oral argument before the Court of Appeals in State v. Lonnie Wayne Gregory on January 10, 2012. Counsel filed the petition for rehearing in State v. David Lee Coward with the Court of Appeals on January 4, 2012. Counsel also filed the petition for rehearing in State v. Reico Lamont Welch with the Court of Appeals on January 4, 2012.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty day extension within which to file the brief of petitioner and additional copies of the appendix in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the brief of petitioner and additional copies of the appendix be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender
Elizabeth A. Franklin-Best
Appellate Defender

February 16, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

J.C. Buddy Nicholson, Jr. , Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

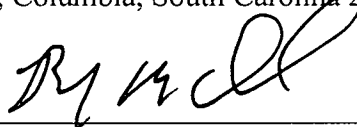
V.

THE STATE,

RESPONDENT

CERTIFICATE OF SERVICE

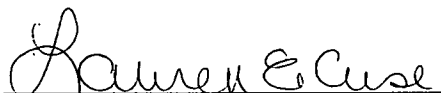
The undersigned attorney hereby certifies that a true copy of the petition for extension of time in which to file the brief of petitioner and additional copies of the appendix in the above referenced case has been served upon Melody J. Brown, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, South Carolina 29201, this 16th day of February, 2012.



Robert M. Dudek
Chief Appellate Defender
Elizabeth A. Franklin-Best
Appellate Defender

ATTORNEY FOR PETITIONER.

SUBSCRIBED AND SWORN TO before me
this 16th day of February, 2012.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: August 23, 2014 .

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

v.

State of South Carolina,

Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

The request for an extension to serve and file the brief of petitioner and also file the additional copies of the appendix is granted and extended until February 16, 2012. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY *Sandra L. Shealy*
Chief Deputy CLERK

Columbia, South Carolina

January 17, 2012

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehlires, II, Esquire
Assistant Attorney General Melody J. Brown



ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

January 17, 2012

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JAN 17 2012

S.C. Supreme Court

Re: Brad Keith Sigmon v. The State

Dear Mr. Shearouse:

The brief of petitioner and additional copies of the appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the brief of petitioner and additional copies of the appendix.

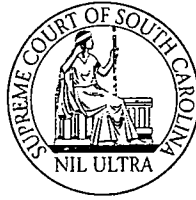
By copy of this letter, I am informing Melody J. Brown, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD:lec

cc: Melody J. Brown, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

December 16, 2011

Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

William H. Ehlires, II, Esquire
310 Mills Ave., Ste. 201
Greenville, SC 29605

Re: Sigmon, Brad Keith v. State

Dear Counsel:

Enclosed is the Order granting your Petition for Writ of Certiorari in the above entitled matter.

It will be necessary for you to furnish this office with an additional thirteen (13) copies of the appendix within thirty (30) days from the date of this letter.

Brief of Petitioner should be served and filed on or before January 16, 2012. The brief is not properly filed until we have proof of service.

Brief of Respondent should be served and filed within thirty (30) days after petitioner's brief is filed. We must have proof of service. Any reply brief should be served and filed within ten (10) days after filing of respondent's brief.

Sigmon, Brad Keith v. State
Page two
December 16, 2011

Very truly yours,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

CLERK

DES/dmh

Enclosure

cc: Assistant Attorney General Melody J. Brown

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

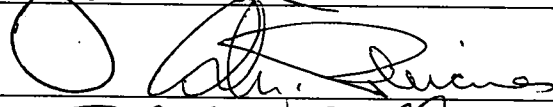
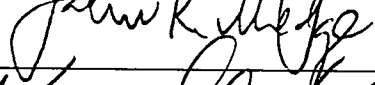
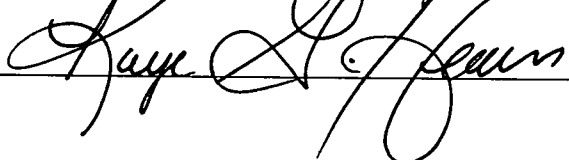
v.

State of South Carolina,

Respondent.

ORDER

This matter is before the Court on a petition for a writ of certiorari. The petition for a writ of certiorari is granted as to Petitioner's Questions 3, 4, and 5. The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j), SCACR.

 C. J.
 J.
 J.
 J.
 J.

Columbia, South Carolina

December 16, 2011

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

 ORIGINAL

RECEIVED

AUG - 9 2010

S.C. SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

REPLY TO THE RETURN TO
PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

WILLIAM H. EHLIES, II
Pro-bono
Attorney at Law

Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605
(864)232-3503

ATTORNEYS FOR PETITIONER.

INDEX

INDEX 1

ARGUMENT.....2

CONCLUSION 6

ARGUMENT

1.

The state continues to attempt to muddle the clear holding of *State v. Plath* that was reiterated in *State v. Bowman* and *State v. Burkhardt* that evidence that life in prison is like being in a “small town with a restaurant” is improper. Further, the state’s assertion that PCR counsel had the expert guidance of John Mauldin in its decision not to object to this prison conditions evidence is entirely refuted by the record.

The state writes, in an attempt to counter petitioner’s correct assertion that “defense counsel was not well versed in capital litigation,” and did not understand his prison condition issue, that “well-experienced capital litigator, John Mauldin, Public Defender of Greenville County, aided the defense and gave the defense team James Aiken’s name as a witness.” Return to Petition for Writ of Certiorari at 16. James Aiken is a very common penalty phase defense witness on the convicted defendant’s ability to adapt to prison. Recommending James Aiken as a penalty phase witness hardly constituted expert guidance.

The state also ignored the testimony of defense counsel Frank Eppes where he bitterly complained that Chief Public defender Mauldin “scooted” “on Friday afternoon at 5:00.” Eppes said: “This is a point of contention that he and I have continued to discuss for the past six years. He referred to that as me being “Parteed,” which Mr. Ehliel will understand. The former public defender before Mr. Mauldin was a Mr. Partee, who would frequently make himself unavailable at critical junctures in the trial.” App. 2702, l. 24 – 2703, l. 17.

It is not petitioner’s mere assertion that defense counsel did not understand that this prison condition evidence, the record in this clearly shows the lack of understanding and the failure to research the issue. Eppes acknowledged during his deposition that his pre-trial motion to exclude

the evidence of Department of Corrections Administrator James Sligh was limited to his testimony about *death row*. Eppes admitted: “I can tell you categorically that I had no clue at the time that there was a way to exclude evidence of living conditions in a penitentiary.” App. 2659, ll. 2 – 7. Eppes further acknowledged, “[O]bviously [that] shows that I didn’t know that it [daily prison evidence] was inadmissible. Tr. 2659, ll. 23 – 24. The fact that Sligh did not ultimately testify is irrelevant since the state placed the inadmissible prison condition evidence before the jury without objection during its cross-examination of James Aiken.

The states citation to Blume, Johnson, and Sunley, Competent Capital Representation: The Necessity of Knowing and Heeding what jurors tells us about mitigation, 36 Hofstra L.Rev. 1035 (2008) regarding jurors being concerned about escape and security measures in place in prison is puzzling given that there was no evidence of escape in this case. As for security measures, James Aiken gave his normal testimony, when he believes a defendant *can adapt*, that the defendant could function well in the regimented structure of the prison and would not likely be a threat.

This Court has held repeatedly that any evidence about prison life, such as the risk of escape, must be individual *to the defendant on trial* because the jury is only concerned with the defendant’s character -- not prison conditions in general which are beyond his control. As this Court wrote in State v. Burkhardt, 371 S.C. 482, 487 – 488, 640 S.E.2d 450, 453:

We have long held that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crimes. State v. Copeland, 278 S.C. 572, 300 S.E.2d 63 (1982). The jury’s sole function is to make a sentencing determination based on these factors and not to legislate a plan of punishment. State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987). “Such determinations as the time, place, manner, and conditions of execution or incarceration . . . are reserved . . . to agencies other than the jury.” State v. Plath, Plath II, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) (emphasis added). Based on this reasoning, we have disallowed defense evidence regarding the process of electrocution,

State v. Plath, Plath I, 277 S.C. 126, 284 S.E.2d 221 (1981), and expert testimony regarding the deterrent effect of capital punishment. State v. George, 323 S.C. 496, 476 S.E.2d 903 (1996).

Recently, in State v. Bowman, 366 S.C. 485, 623 S.E.2d 378 (2005), the defendant challenged on appeal the admission of evidence regarding general prison conditions. Although we found the issue was not preserved for review, we cautioned the state and the defense bar that such evidence is not relevant to the question of whether a defendant should be sentenced to death or life imprisonment. 366 S.C. at 498 – 99, 623 S.E.2d at 387.

In State v. Bryant, 372 S.C. 305, 642 S.E.2d 582 (2007) this Court once again reiterated the principle established in State v. Plath that evidence involving escape and prison conditions are not relevant: “We emphasize that how inmates, other than the defendant on trial, are treated in prison . . . is inappropriate evidence at a capital trial and admonish both the State and the defense that the penalty phase should be focused solely on a defendant and any evidence introduced in the penalty phase should be connected to that particular defendant. State v. Bryant, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007), quoting State v. Bowman, 366 S.C. 485, 498 – 499, 623 S.E.2d 378, 385 (2005).

The state in this case continues to put forth its untenable argument that prison conditions evidence is admissible to counter Skipper¹ prison adaptability evidence. Skipper, of course, abrogated State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982), which held that such prison adaptability evidence mitigating evidence was irrelevant.

Finally, the state cites the PCR judge’s conclusion that there was “no probability” that absent this evidence the juror “would have concluded that the balance of aggravating and mitigating circumstances did not warrant death . . .” Return to Petition for Writ of Certiorari at 22. However, this Court more recently noted “the evaluation of the consequences of an error in the sentencing

phase of a capital case [is] more difficult because of the discretion that is given to the sentencing jury. A capital jury can recommend a life sentence for any reason or no reason at all.” See, State v. McClure, 342 S.C. 403, 409, 537 S.E.2d. 273, 275 (2000). See, also, Vasquez v. State, Op.No. 26852 (August 9, 2010) at p. 16.

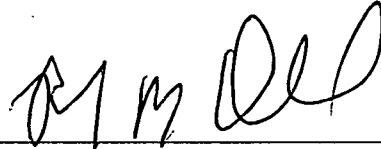
The prison conditions evidence in this case is intellectually indistinguishable from the prison conditions evidence in Burkhart and Bowman. The evidence and argument that life imprisonment without parole was like living a “small town with a restaurant” in this case was extraordinarily prejudicial. This purpose of it was to convey to the jury that petitioner would not be adequately punished for his crime due to the “country club” nature of prison life.

¹ Skipper v. South Carolina, 476 U.S. 1 (1976).

CONCLUSION

By reason of the foregoing argument, and each of petitioners's arguments in his petition for writ of certiorari, the writ should be granted on each issue raised in the petition.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

William H. Ehlies, II
Pro-bono
Attorney at Law

ATTORNEYS FOR PETITIONER

This 9th day of August, 2010

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

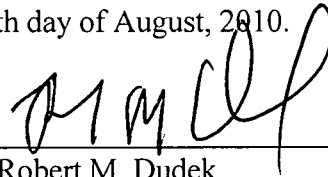
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the reply to the return to petition for writ of certiorari in this case have been served on Melody J. Brown, Esquire, this 9th day of August, 2010.



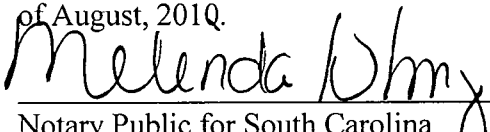
Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

William H. Ehlires, II
Pro-bono
Attorney at Law

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 9th day
of August, 2010.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2018

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas

JUN 23 2010

J. C. "Buddy" Nicholson, Jr., Circuit Court Judge

S.C. SUPREME COURT

~~RECEIVED~~

~~JUN 24 2010 Brad Keith Sigmon,~~

~~S.C. SUPREME COURT~~

Petitioner,

vs.

State of South Carolina,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

PETITIONER'S QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	11

I.

The PCR judge correctly found that the defense first introduced general prison conditions evidence in the direct testimony of their prison adaptability and prison conditions expert, James Aiken; thus, the State was allowed to properly, and fairly, cross-examine Mr. Aiken on prison conditions. Petitioner's allegation that trial counsel was ineffective for failing to objection to the State's cross-examination of James Aiken is without merit.	13
--	----

II.

Petitioner's present argument that counsel was ineffective for failing to object to other arguments based on the purportedly improper cross-examination is procedurally barred from review as it was not raised to and ruled upon by the PCR judge. Petitioner challenged only the "power structure" argument based on the purportedly improper cross-examination regarding prison conditions.	23
---	----

III.

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.	26
---	----

IV.

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 intoxication" as Petitioner now contends.	30
---	----

V.

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. 33

VI.

Petitioner claims that counsel was ineffective in requesting and obtaining the “provocation by the victim” statutory mitigating circumstance charge based upon evidence supporting the theory that Petitioner reacted to Becky Barbare’s ill treatment of him. This issue was not raised to or ruled upon by the PCR judge and is procedurally barred. At any rate, the record is clear that the trial judge charged the jury on this circumstance based upon the murder victim’s expressed intent to go for his gun. 35

CONCLUSION 40

PETITIONER'S QUESTIONS PRESENTED

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 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 send 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, pp. 1-2).

STATEMENT OF THE CASE

Petitioner, Brad Keith Sigmon, Petitioner 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 represent 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 Larke¹ (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

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 return.

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 the death sentence 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 arguments on the issue on November 1, 2005, and subsequently issued the 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 October 13, 2006, Petitioner filed his first PCR application. On August 11, 2006, by order of the Supreme Court of South Carolina, Judge Nicholson was vested with exclusive jurisdiction over the PCR action. 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. Having found both that Petitioner wished to pursue 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 the 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 emotion 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 Applicant'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). 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. (PCR App. p. 2718). Petitioner was present and represented by counsel, Mr. Ehliess 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). 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). On July 14, 2009, Judge Nicholson issued a written Order of Dismissal, filed July 20, 2009. (PCR App. pp. 2846-2893).

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

³ Respondent objected to the admission of depositions as Petitioner used discovery deposition, 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 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.").

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 attempt 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 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 "tier 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

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.

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 should be affirmed.

Petitioner raises six (6) ineffective assistance claims. To be entitled to relief on an ineffective assistance claim, Petitioner must show 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, 104 S.Ct. 2052 (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). Issues II and VI are procedurally barred as they were not raised to, and ruled upon by the PCR judge. *Humbert v. State*, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). On the remaining issues, Petitioner simply failed to show *Strickland* error and prejudice. Thus, the PCR judge properly denied relief.

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

I.

The PCR judge correctly found that the defense first introduced general prison conditions evidence in the direct testimony of their prison adaptability and prison conditions expert, James Aiken; thus, the State was allowed to properly, and fairly, cross-examine Mr. Aiken on prison conditions. Petitioner's allegation that trial counsel was ineffective for failing to objection to the State's cross-examination of James Aiken is without merit.

Prior to trial, defense counsel filed a motion to prevent the State from presenting evidence in their case, through witness James Sligh, concerning "information that Death Row provides more security, and tougher living conditions than maximum security facilities." (PCR App. p. 2836). The trial judge so limited the testimony. (PCR App. pp. 1723-1724). The State did *not* call Mr. Sligh and the State presented no evidence on prison conditions. (See PCR App. pp. 1746-1791). However, during the defense case, defense counsel called James Aiken. Defense counsel requested that Mr. Aiken be qualified as an expert in "[p]rison adaptability, Your Honor, *and the condition of prisons.*" (PCR App. p. 2006, lines 22-25)(emphasis added).⁵ He was so qualified without objection. *Id.*

Petitioner concedes that defense counsel Eppes testified that it was his intent to show that prisons are "hellish places" and Petitioner would not "have a pleasant life" if sentenced

⁵ Petitioner has repeatedly overlooked this clear evidence of intent. Instead, he refers to Mr. Aiken either as "the defense expert on Applicant's adaptability to confinement" only, or simply assumes all prison related evidence is adaptability evidence. (See PCR App. p. 2487; Petition, p. 16 "The PCR judge accepted the state's flawed argument that the state can 'respond' to prison adaptability evidence with evidence of the privileges and amenities that a prisoner has while incarcerated." and "... it is clear that prison adaptability – as in this case by way of James Aiken – is constitutionally mandated if available."). (See also PCR App. p. 2733, lines 15-25, "... Aiken was testifying about adaptability. Everything he said was these are the conditions of prison and we are telling you that this prisoner will adapt to those and not be a risk to others in the community of prison or their supervisors.")). This Court has already rejected Petitioner's argument. Not all evidence of security conditions will be admissible as evidence of adaptability: "We are aware of the tension between evidence regarding the defendant's adaptability to prison life, which is clearly admissible, and this restriction on the admission of evidence regarding prison life *in general*. ... evidence of the defendant's characteristics may include prison conditions if narrowly tailored to demonstrate the defendant's personal behavior in those conditions." *State v. Burkhardt*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007).

to life without the possibility of parole. (Petition, p. 12). (See also PCR App. p. 2711, line 4 - p. 2712, line 19).⁶ Mr. Eppes further conceded that such evidence was *not* evidence of adaptability, but conditions testimony, and also conceded that the issue was introduced through Mr. Aiken's direct testimony. (PCR App. p. p. 2660, line 8 - p. 2661, line 4; p. 2710, line 6 - p. 2711, line 3; p. 2804, lines 2-10; p. 2766, line 17 - p. 2767, line 8; p. 2797, lines 1-3). Accordingly, the PCR judge found: "When the issue is reviewed in context ... the record supports there was no basis for an objection for either the cross-examination or resulting argument." (PCR App. p. 2869). The PCR judge found that defense counsel had introduced *general* prison conditions evidence in their case, and the State was allowed cross-examination on same. (PCR App. p. 2870). Moreover, the PCR judge found that this very issue was addressed in the 1984 *State v. Plath* opinion, and this Court found "[t]he State was entitled to make this response." *State v. Plath*, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628 (1984). (PCR App. p. 2870). Because the cross-examination responded to evidence elicited by the defense on direct, there was no proper objection to be made. *Id.* See also *State v. Taylor*, 333 S.C. 159, 174-175, 508 S.E.2d 870, 878 (1998)("cross-examination of matters which were addressed in direct-examination is not objectionable").⁷

⁶ Petitioner curiously relies on Mr. Abdallah's deposition at the start of his argument even though Mr. Eppes made the argument and presented the evidence, and Mr. Abdallah clearly stated this was Mr. Eppes' issue. (See Petition p. 13; PCR App. p. 2601, lines 4-14). Moreover, Petitioner incorrect recounts the testimony as Mr. Abdallah thought the evidence of "day to day conditions of incarceration" was not admissible, and "should not have come in." (Petition, p. 13). Mr. Abdallah actually testified that "we were trying to stay away from anything that made it sound like was going to be an easy time," but that he and Mr. Eppes were "on the same page with believing that this was the right philosophy for the case or the theory of the case." (PCR App. p. 2599, lines 10-15; p. 2601, lines 4-14). Again, Petitioner is blending concepts, when the evidence quite clearly shows a distinction.

⁷ Petitioner concedes that the argument before the PCR judge was that the evidence of general prison conditions on cross (excluding his own offered evidence from the analysis), constituted a statutory violation; therefore, prejudice, in this analysis, should be presumed. (Petition, p. 11). (See also PCR App. p. 2728, lines 4-10; p. 2738, lines 21-25). The PCR judge rejected the

The record conclusively shows that defense counsel wished to elicit testimony about the harshness of prison life and did so.⁸ Given that this testimony was intentionally elicited by defense counsel on direct, the solicitor was entitled to cross-examine the witness on the conditions issue:

...defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. ... The State was entitled to make this response. The appellants have shown no prejudice therefrom.

State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628 (1984)(emphasis added). The PCR judge's ruling is fully supported by precedent.

Respondent notes that the *Plath* case is relied upon in the majority opinion in *State v. Burkhart*, 371 S.C. 482, 487-488, 640 S.E.2d 450, 453 (2007), for the principle that general conditions of confinement are not proper considerations for the jury. But the *Burkhart* court also acknowledged a difference between evidence of adaptability (i.e. evidence of the *defendant's* behavior in prison or "narrowly tailored" evidence of prison conditions to show *personal* behavior in those conditions), and general evidence of prison conditions. 371 S.C. at 488, 640 S.E.2d at 453. Petitioner has not challenged counsel's decision to present general conditions evidence. The focus remains on what, if any, objection could have been properly made to the cross-examination. As the PCR judge properly found, there was no identifiable objection to be made.

presumption of prejudice argument. (PCR App. p. 2862-2866). That ruling has not been appealed.

⁸ At the PCR hearing, Petitioner argued: "It doesn't make any difference how the defense plays." (PCR App. p. 23, line 20). The PCR judge appropriately rejected such a baseless assertion.

Petitioner, on appeal, insinuates that defense counsel was not qualified, and was not knowledgeable; thus, his decision not to object to the cross-examination was based on ignorance. (Petition, p. 13). Again, this conflates the issue of cross-examination and submission of evidence on direct. Further, the issue of qualification was not an issue raised in the application or to the PCR judge. Even so, the intent of the barb is to demonstrate that defense counsel was not well versed in capital litigation, and simply “missed” the entire issue.⁹ Petitioner ignores, however, the extensive testimony that a well-experience capital litigator, John Mauldin, Public Defender of Greenville County, not only aided the defense team in preparation and voir dire, but also gave the team Mr. Aiken’s name as a witness to call *specifically to testify the defendant’s age would likely make him a victim in prison*. (PCR App. 2702, line 24 - p. 2705, line 11; p. 2765, line 7 - p. 2766, line 2767, line 4). Further, Petitioner ignores the PCR judge’s footnote in which he referenced that evidence of this type was being offered and admitted in several contemporaneous capital trials.¹⁰ (PCR App. p.

⁹ Petitioner starts his argument with a broad pronouncement that the *concept* of whether prison life is “hellish” is “not a legitimate consideration for the jury.” (Petition, p. 13). However, this Court has consistently focused on the *evidence* admitted. That is not necessarily one in the same. For instant, one may argue deterrence, but cannot introduce evidence on same. See *State v. George*, 323 S.C. 496, 476 S.E.2d 903 (1996).

¹⁰ In fact, even after the 2007 Burkhardt decision, death penalty opponents continue to assert that security conditions should be offered by the defense to address jury concerns of violence in prison. See Blume, Johnson and Sundby, *Competent Capital Representation: The Necessity of Knowing and Heeding What Jurors Tell Us About Mitigation*, 36 Hofstra L.Rev. 1035 (2008)(“a juror may be worried that the defendant will escape. Here, the testimony of prison officials, or more often, former prison officials concerning security conditions for inmates sentenced to life imprisonment and the success of the applicable security measures in the past may be necessary” citing ABA Guidelines 10.11, commentary & nn. 291, 309-11). Likewise, death penalty opponents also continue to challenge these evidentiary prohibitions from other jurisdictions. See Tanner, “‘Continuing Threat’ to Whom?: Risk Assessment in Virginia Capital Sentencing Hearings,” 17 Cap. Def. J. 381, 408 (2008)(challenging Virginia’s prohibition as violation of the right “to present a complete defense,” noting “[q]uestions by jurors also indicate that sentencers want to know more about the specific prison conditions that might affect the defendant’s potential for violence in prison.”).

2872, n. 9). This is an area that obviously had movement prior to the *Burkhart* ruling.¹¹ But, as defense counsel Eppes testified at the evidentiary hearing, he “did not anticipate the subsequent rulings in the ... *Burkhart* case. That really shows that that stuff is just not admissible under any circumstances.” (PCR App. p. 2796, lines 10-13). (See also PCR App. p. 2561, line 19 - p. 2563, line 12, “we intended to offer a witness about that issue [i.e. prison conditions] ... I thought it was admissible. Obviously, since then the Supreme Court has explained itself very clearly.”). Lastly, Petitioner suggests that defense counsel acted out of some-type of inevitability that the *State* would introduce the evidence, and he had to “get involved in a contest with the solicitor about whether life in prison was like a small town with a restaurant or whether it was ‘a hellish place.’” (Petition, p. 13). Again, Petitioner must ignore the record to make such an argument. The State did not submit such evidence. Further, petitioner must ignore the clear testimony that defense counsel *wanted* to submit evidence regarding the likelihood Petitioner would be a victim, and to argue what “hellish” places prisons are, to make such an argument. Defense counsel specifically asked, on direct examination:

Q ... Where would an inmate that was sentenced to life without parole
be housed?

¹¹ Petitioner at the hearing, in fact, labeled the Bowman and *Burkhart* rulings “rulings in frustration,” (PCR App. p. 2731) – an implicit concession that evidence was being introduced and the issue was being addressed repeatedly. Respondent further notes that the solicitor’s concept of why prison conditions became relevant was not in ignorance or misunderstanding of *Plath*, but in response to the defense initiative to charge the definition of a life sentence as life without the possibility of parole – to explain what that really means as a punishment – something that was clearly not an issue at the time *Plath* was decided. (See PCR App. p. 1722). That intervening action was the catalyst for the “conditions” issue re-emergence. But even that was not unlimited. As the Petitioner noted, the solicitor objected to the explanation of why corrections officials would have a difficult time in “keeping him from being harmed by predator inmates,” as beyond adaptability evidence, and his objection was sustained. (See PCR App. p. 2734, lines 1-3; p. 2020, lines 16-25). That merely reflects that Petitioner was not allowed to go into testimony about other inmates, and does not reflect some type of agreement that the general security evidence testimony was converted into permissible adaptability evidence.

A He would be housed in a maximum security environment and will remain there.

Q *And that would be regardless of what his classification, or what the records showed, correct?*

A He will be behind gun towers and fences for the remainder of his life because of his community behavior.

Q *Tell me a little bit about the way the day is structured in a maximum security facility?*

(PCR App. p. 2014, line 16 - p. 2015, line 1). And, Mr. Aiken did. He recounted a life of “constant security from staff,” “constant[] monitor[ing],” “you are around violent people continuously,” “bodily harm,” “victimiz[ation],” searches, including body cavity searches, and that lethal force may be used against an inmate “for the protection of the society, the staff and other inmates.” He also referenced a “regiment[al]” schedule, such as counting, and being told where to be when, wearing certain color coded clothes, and possible use of restraints, including “leg irons, belly chains” or electrical shock. (See PCR App. pp. 2014-2017). There is a quantifiable difference, as conceded by defense counsel, between that testimony and Mr. Aiken’s subsequent testimony that, based upon review of Petitioner’s prison records, he believed that Petitioner would adapt. (See PCR App. p. 2018-2021). In other words, defense counsel elicited testimony on general conditions, including purported security options then available (Mr. Aiken was not at that time associated with SCDC, PCR App. pp. 2007-2010), to paint a picture of a “hellish” place and to infer that corrections could successfully contain him, even if he was *not* adaptable to prison life. Nothing is tied directly to Petitioner in the long recitation of general prison conditions. Thus, it was inadmissible.

“The jury’s sole function is to make a sentencing determination based on [the character of the defendant and the circumstances of the crime] and not to legislate a plan of

punishment.” *Burkhart*, 371 S.C. at 487, 640 S.E.2d at 453. Purportedly available security measures to insure compliance is nothing more than a referendum on the Department of Corrections’ ability to contain a danger. It speaks nothing of a defendant’s character. *See, for example, State v. Hanna*, 767 N.E.2d 678, 702 (Ohio 2002)(“Testimony about prison conditions was of questionable relevance, since evidence about future conditions of confinement involves speculation as to what future officials in the penal system will or will not do. Such evidence did not relate to appellant, his background or the nature and circumstances of the crime and therefore is not mitigating.”); *Burns v. Commonwealth of Virginia*, 541 S.E.2d 872, 893 (Va. 2001) (“the relevant inquiry is not whether Burns *could* commit criminal acts of violence in the future but whether he *would*.”) (emphasis in original); *United States v. Edelin*, 180 F.Supp.2d 73 (D.C. 2001)(granting government’s motion to preclude evidence of “Bureau of Prisons’ Ability to incapacitate Tommy Edelin from Inflicting Future Harm” by way of evidence of general prison conditions, including evidence from proposed expert James Aiken on security procedures and classification); *United States v. Johnson*, 223 F.3d 665, 674 - 675 (7th Cir. 2000) (“ while the defendant was of course entitled to counter the government’s evidence that he would be a continued menace to society while in prison, that being evidence offered to establish an aggravating factor, he should not have been permitted to present to the jury, as he was, evidence of the existence of maximum-security federal prisons decked out with control units, in order to establish a mitigating factor. A mitigating factor is a factor arguing against sentencing *this* defendant to death; it is not an argument against the death penalty in general.”) (internal

citations omitted).¹² In attempting to salvage relief on appeal, Petitioner misapprehends the record and the judge's ruling.

First, Petitioner incorrectly argues that the State suggested, and the PCR judge subsequently accepted, that *Burkhart* “announced a new rule of law.” (Petition, p. 14). This is wholly irreconcilable with the State’s argument reflected on the record, (PCR App. pp. 2528-2529; p. 2744, line 18 - p. 2747, line 15), and the PCR judge’s ruling, (PCR App. p. 2870-2873). The argument and ruling are based on defense counsel’s candid concession that the questions he posed on direct examination were meant to elicit general prison conditions testimony, and his concession that this Court has subsequently made very clear that such evidence is not be used by either the State or the defense. (PCR App. p. 2871-2872). Second, Petitioner incorrectly argues the PCR judge found that “defense counsel was not ineffective for failing to object to the daily prison conditions evidence” based on then existing precedent. (Petition, p. 16). Petitioner misstates the ruling and confuses the issue. Petitioner has *never* argued that counsel was ineffective in eliciting general prison conditions evidence. Rather, the issue presented was whether there was any appropriate objection to be made to a cross-

¹² But see *People v. Salcido*, 186 P.3d 437, 48 (Cal. 2008)(prosecutor’s reference to “leisure time” activities, “such as reading, watching television, writing letters, or communicating with friends or relatives and suggest[ing] those activities also would be available to defendant even in a maximum security prison” was argument in response to defense witness’ testimony “concerning the harsh realities of life in prison without the possibility of parole.”); *State v. Jaynes*, 549 S.E.2d 179, 198-199 (N.C. 2001)(prosecutor’s “comments reasonably ‘served to emphasize the [s]tate’s position that the defendant deserved the penalty of death rather than a comfortable life in prison.’”).

As the Supreme Court noted in *Lockhart v. Ohio*, while mandating that mitigation evidence must be allowed: “Nothing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.” 438 U.S. 586, 605 n. 12, 98 S.Ct. 2954 (1978). Thus, the States are free to decide such evidentiary matters. Our State has come down on the side of excluding the evidence.

examination on issues introduced in direct. The answer is, clearly, there was not. The PCR judge found response, in this narrow circumstance, was possible under *Plath*.¹³

As to improper closing argument on the testimony, the PCR judge found that Petitioner only contested one portion of the argument – the “power structure” argument. (PCR App. p. 2874). This is directly supported by the amended application. (PCR App. p. 2478-2479). Petitioner has not challenged the finding that the “power structure” argument was based on Ms. Tomberlin’s testimony, not Mr. Aiken’s, or the conclusion that the comment “lacks the necessary nexus to the cross-examination evidence” to be evaluated in context of the prison conditions evidence issue. (PCR App. pp. 2874-2875). Petitioner’s argument on appeal, though, references an entirely different closing argument going to a short reference to the cross-examination testimony regarding leisure activities, meals, clothes and health care. (Petition, p. 9). The PCR judge, clearly, found the remaining argument was not challenged, and, at any rate, the solicitor’s comments as to prison conditions were proper as they were supported by the evidence at trial. (PCR App. pp. 287-2875).

Moreover, the PCR judge properly found Petitioner could not prove prejudice on this record for a variety of reasons. First, the PCR judge properly rejected Petitioner’s notion that prejudice must be presumed due to the *Burkhart* ruling, and instead relied on the *Strickland*

¹³ Petitioner also appears to conflate the evidence in *Plath*. There were two separate lines of evidence – general prison conditions and adaptability evidence tied directly to the defendant. The United States Supreme Court in *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2, 106 S.Ct. 1669 (1986), specifically noted: “We do not hold that all facets of the defendant’s ability to adjust to prison life must be treated as relevant and potentially mitigating” and agreed with the *Plath* court that some general prison conditions evidence may properly be deemed irrelevant. The evidence the Court considered on appeal, and found admissible was “evidence suggesting that [Skipper] had been a well-behaved and disciplined prison” which the Court found “highly relevant” in sentencing. *Id.* Respondent has never argued in this case, at any time, that adaptability evidence is not admissible. Respondent does challenge, however, Petitioner’s wholesale adoption of Mr. Aiken’s testimony as all admissible under “prison adaptability,” (Petition, p. 16), even where clear the testimony merely describes general prison conditions.

error and prejudice analysis. (PCR App. p. 2862-2866). Second, there could be no error and prejudice where there could be no proper objection to cross-examination of an issue introduced on direct. (PCR App. p. 2874). Third, there was no prejudice (and no due process violation) where each side was allowed to address the evidence, and a “level playing” field resulted. (PCR App. p. 2875). Fourth, the PCR judge found there was no “reasonable probability” that absent the evidence, the jury “would have concluded that the balance of aggravating and mitigating circumstances did not warrant death,” citing *Jones v. State*, 332 S.C. 329, 340, 504 S.E.2d 822, 829 (1998), as the evidence in aggravation was “overwhelming,” and “includ[ed] the finding of torture, burglary first degree, and the murder of not one but two elderly victims in a vicious and personal beating with a baseball bat, the victims having been surprised in their own home.” (PCR App. p. 2876).¹⁴ These facts are fully and fairly supported by the record. Again, having ample evidence in the record to support the PCR judge’s findings and conclusions, the Petition for Writ of Certiorari should be denied.

¹⁴ Petitioner maintains that this is not the correct standard. (Petition, p. 15). He prefers a test that always reads whether “at least one juror would have struck a different balance.” *Id.* The United States Supreme Court has used that general wording, but has never disavowed the *Strickland* prejudice test. See *Wiggins v. Smith*, 539 U.S. 510, 534-537, 123 S.Ct. 2527 (2003) (“there is a reasonable probability that at least one juror would have struck a different balance” but clearly relying upon *Strickland*, and “reweigh[ing] the evidence in aggravation against the totality of available mitigating evidence”). In fact, the Court has repeatedly resisted attempts to shift the burden to the State and or reduce the test to a mere catch all that the defense had “nothing to lose” by offering evidence, or different argument, that *may* have made a difference. *Wong v. Belmontes*, ___ U.S. ___, 130 S.Ct. 383, 390-391 (2009) (“While the Court of Appeals quoted the pertinent language from *Strickland*, that court elsewhere suggested it might have applied something different. In explaining its prejudice determination, the Ninth Circuit concluded that ‘[t]he aggravating evidence, even with the addition of evidence that Belmontes murdered Howard, is not strong enough, in light of the mitigating evidence that could have been adduced, to rule out a sentence of life in prison.’ But *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.”)(internal citations omitted); *Knowles v. Mirzayance*, ___ U.S. ___, 129 S.Ct. 1411, 1419 (2009)(noting “no Supreme Court precedent establishing a ‘nothing to lose’ standard for ineffective-assistance-of-counsel claims” and relying on the *Strickland* test).

II.

Petitioner's present argument that counsel was ineffective for failing to object to other arguments based on the purportedly improper cross-examination is procedurally barred from review as it was not raised to and ruled upon by the PCR judge. Petitioner challenged only the "power structure" argument based on the purportedly improper cross-examination regarding prison conditions.

The PCR judge found that Petitioner challenged only the "power structure" argument in connection with the purportedly improper cross-examination. (PCR App. p. 2874). This is directly supported by the amended application. (PCR App. p. 2478-2479). Petitioner's argument on appeal, though, references an entirely different closing argument going to a short reference to the cross-examination testimony regarding leisure activities, meals, clothes and health care. (Petition, p. 18). The issue is procedurally barred from review as it was not raised to and ruled upon by the PCR judge. *Humbert v. State*, 345 S.C. 332, 338, 548 S.E.2d 862, 866 (2001). Moreover, the issue is without merit.

In addition to finding that only the "power structure" argument was raised, the PCR judge reviewed the argument in total and found, in the alternative, that the solicitor's comments as to prison conditions were proper as they were supported by the evidence at trial. (PCR App. pp. 2874-2875). Again, no specific argument, such as the argument Petitioner forwards now, was forwarded below; however, the record fully and fairly supports this alternative finding, that no error is apparent on the face of the argument, given that the solicitor's comments were brief, and the solicitor is entitled to argue the facts of record. *See generally State v. Tucker*, 324 S.C. 155, 169, 478 S.E.2d 260, 267-268 (1996) ("the solicitor must confine his arguments to the evidence in the record and its reasonable inferences" and finding "one isolated" comment not prejudicial). Petitioner's argument to the contrary is incorrect for several different reasons.

First, Petitioner again incorrectly argues the PCR judge found that “day to day prison conditions evidence was admissible.” (Petition, p. 19). At issue was whether counsel was ineffective in failing to object to the solicitor’s cross-examination. As argued, in detail, above, defense counsel elicited general prison conditions evidence on direct. The State had the right to reply. *Plath*. There is no error.

Second, Petitioner also incorrectly argues that the admission of the evidence violates S.C. Code § 16-3-25(C)(1). (Petition, p. 18). Respondent first notes this Court reviewed the case under S.C. Code § 16-3-25(C)(1), and *affirmed* the conviction and sentence. (PCR App. p. 2432). At any rate, the statutory review is part of the direct appeal review. *Id.*, Section A (referencing review “upon judgment becoming final in the trial court”), and Section F (“sentence review shall be in addition to direct appeal, if taken, and the review and the appeal shall be consolidated for consideration”). In sum, what may be error in direct appeal will not automatically constitute a showing of “fundamental fairness shocking to the universal sense of justice” or denial of due process. *See, e.g., Williams v. Ozmint*, 380 S.C. 473, 478-479, 671 S.E.2d 600, 602 (2008)(recognizing different burdens of proof from direct appeal to collateral litigation); *Franklin v. State*, 346 S.C. 563, 552 S.E.2d 718 (2001)(finding issue of violation of statutory right that would be reversible error on direct appeal must be analyzed under *Strickland* error and prejudice in post-conviction relief, noting harmless error analysis may even be applied to weightier constitutional violations).

Third, Petitioner argues the solicitor’s argument essentially led to a sentence of death upon evidence of conditions over which he had no control. (Petition, p. 19). Again, this argument was not raised below, or addressed below. Even so, to the extent he argues a due process violation for failing to provide an opportunity to rebut the State’s evidence, his

argument fails. As the PCR judge found, the defense offered the evidence. The State was merely responding. (PCR App. p. 30). Moreover, the defense argued harshness of prison life in their request for a life sentence to be deemed an appropriate punishment. (PCR App. p. 2082, line 23 - p. 2083, line 24). In fact, it should be noted, that the State's argument was substantially shorter, merely reflecting that the sentence was not quite as hopeless and abysmal and the defense would contend. (PCR App. p. 2067, lines 10-21). What would be patently unfair is to accept Petitioner's interpretation that all of his evidence, general and specific, may come in under label of adaptability, without the State being able to respond. Not only does that lead the jury to consider irrelevant matters, but matters skewed to the defense and unfairly presented. Surely any petitioner would be in a better position if he or she is able to present anything he or she wishes to present, and the State is unable to respond. But, a petitioner must adhere to the rules of evidence and basic fairness.

Lastly, the PCR judge found that there was overwhelming evidence of guilt, and overwhelming evidence in aggravation, such that there is no reasonable probability that the jury would have decided differently. (PCR App. p. 2876). The record fully supports the PCR judge's findings and his conclusions of law.

However, the instant issue is procedurally barred. Therefore, the Petition for Writ of Certiorari should be denied.

III.

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.

The PCR judge identified two specific passages that Petitioner claims were objectionable. (PCR App. p. 2876). (See also PCR App. p. 2490 (Applicant's Trial Brief, p. 7, issue framed as "Improper closing arguments expressing the Solicitor's personal opinions.")). First, after the solicitor had advised the jury of the gravity of the decision and referenced the factors to consider, the solicitor commented that he had once been advised, in connection with a juror's consideration of 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 1-13). Second, was a passage where the solicitor referenced himself when arguing that a death sentence is a deterrent:

It is a function of our government 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 found that neither of these comments would justify an objection, but were permissible comments. 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). 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 PCR judge specifically found at the PCR hearing, during argument on the summary judgment motion, that neither of the statements "put a challenge to the jury." (PCR App. p. 2748, lines 10-19). (See also PCR App. p. 2878). 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, but argued for death on these facts and for this individual, requesting the jury return a verdict for same. Moreover, the PCR judge found that defense counsel's reaction to the comments in his own closing argument was telling. 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). (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."). 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 demand for a sentence. The focus firmly remained on the defendant, his acts, and his appropriate punishment. See *Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982) (cautioning such comments must be case specific and defendant specific).

The comment referencing "mean evil people" and the death penalty, 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. 2061, lines 2-8, "The government has entrusted you, through legislation and judicial decisions to make this decision. It is not only entrusted to

you, but it's thrust upon you. It is has said in its wisdom, the courts and the Legislatures have said in their wisdom that the best people to make this decision are the citizens of the local community. And that is you.”; p. 2186, lines 7-15 (referencing the jury's tough decision, but their decision); 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.) *See also 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).

The PCR judge also noted that “[g]eneral deterrence arguments are admissible in the penalty phase of a capital trial.” *State v. Shuler*, 353 S.C. 176, 189, 577 S.E.2d 438, 444 (2003).

Further, the PCR judge found that the comments are not inflammatory or otherwise improper on their face. *Compare State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007)(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, the error would be harmless in light of the tremendous evidence in aggravation. (PCR App. p. 2878). *See also Jones, supra.*

Again, the record fully and fairly supports the PCR judge's decision. The Petition for Writ of Certiorari should be denied.

IV.

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 intoxication" as Petitioner now contends.

The PCR judge found that Petitioner lacked factual support for the charge. (PCR App. p. 2879). The record reflects drug use and drinking the night before the crime, (See PCR App. p. 1578, line 6 - p. 1582, line 22, Strube Testimony that they drank beer and smoked crack cocaine the night before the murders¹⁵; p. 1996, line 4- p. 2004, line 12, Dr. Morton's testimony on the "aftereffects" (as termed by the solicitor) of cocaine use)¹⁶, but does not support an allegation of intoxication during the crime. *See generally 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) ("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)."). Respondent notes that defense counsel did not argue "at the time of crime intoxication" in closing, but that Petitioner was simply under mental and emotional distress. (PCR. p. 2079, line 11 - p. 2080, line 2080, line 3).

¹⁵ Petitioner characterizes Strube's testimony as Petitioner stayed awake all night. (Petition, p. 25). 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.

¹⁶ This characterization is also consistent with the passage from Dr. Morton's testimony quoted in the petition at p. 26, 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."

Moreover, Defense Counsel Eppes testified 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). He also testified that he didn’t “remember ever thinking that he was drunk.” (PCR App. p. 2772, lines 5-8). Further, 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). Lastly, the PCR judge noted the defense counsel candidly admitted that he reviewed the written proposed charge and would have objected if he had seen anything incorrect. (PCR App. p. 2880). (See also PCR App. p. 2772, lines 18-21).

Further, 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.* Moreover, the PCR judge relied specifically on this Court’s precedent in finding no evidence of prejudice. *Id.* See *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998)(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). *Id.*

To the extent Petitioner argues that counsel failed to "educate" the judge on the fact that "mental retardation is encompassed by statutory mitigation (10)," (Petition, p. 28), Petitioner raises an issue not raised to and ruled upon by the trial judge, which is procedurally barred. *Humbert, supra*. Even so, such an argument is little more than mere distraction. The issue is whether there was evidence of intoxication at the time of the crime. There was not. Even if it was error for the counsel not to educate the trial judge, there could be no possible prejudice where mental retardation has never been an issue. Moreover, as the PCR judge noted, the jury was charged on two separate mitigators involving mentality, (2) murder committed while under the influence of mental or emotional disturbance, and (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.

Again, the record, and precedent, fully and fairly support the PCR judge's findings of facts and conclusions of law. The Petition for Writ of Certiorari should be denied.

V.

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

"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). Moreover, as the PCR judge correctly noted: "The test for sufficiency of a jury charge is what a reasonable juror would have understood the charge to mean." *Id.* 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. (Citing to PCR App. p. 2107, lines 1-13). Moreover, the judge specifically charged:

... a mitigating circumstance is neither a justification or an excuse for the murder. It's 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 no 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).

The PCR judge, after reviewing the charge as a whole and finding it sufficient, rejected Petitioner's argument as it was clearly 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. The Petition for Writ of Certiorari should be denied.

VI.

Petitioner claims that counsel was ineffective in requesting and obtaining the “provocation by the victim” statutory mitigating circumstance charge based upon evidence supporting the theory that Petitioner reacted to Becky Barbare’s ill treatment of him. This issue was not raised to or ruled upon by the PCR judge and is procedurally barred. At any rate, the record is clear that the trial judge charged the jury on this circumstance based upon the murder victim’s expressed intent to go for his gun.

The record reflects a recurring theme in the defense questions, presentation of evidence, and argument, that attempted to explain Petitioner’s actions in the context of his reaction to Becky Barbare’s treatment of him. (*See, for example*, R. p. 2037, lines 1-8 (“something pushed his buttons”); p. 2072, lines 12-17 (“That relationship is what this case is all about... Brad Sigmon did not want that relationship to end. He went nuts, bonkers, whacko, out of his mind”). Ms. Barbare is the daughter of the two victims in this case. As noted above, the subsequent criminal acts upon Ms. Barbare were not tried in conjunction with the instant charges. In sentencing, defense counsel argued, in part:

... He believed he should still be with her. He saw her on the phone with another man. He knew that his relationship has started while she was married, on the phone with another man. That was the trigger. That was what snapped in his head. He saw that his relationship, that his relationship had begun when her relationship with Troy Barbare ended, and he saw a recurrent pattern in this relationship...

(PCR App. p. 2073, line 25- p. 2074, line 7).

In his statement to the jury, Petitioner confessed his “obsession”:

... Was I obsessed with her? Yes.... What set me off? Go back three years. The second time Becky left Troy for me...

(PCR App. p. 2085, lines 15-24).

Further, Petitioner consistently blamed his own reaction to her actions. He not only informed the jury that her actions “set him off,” but also that “[a]ll I could see was her in bed with the man she’s married to now. I don’t hate her. I hate what I did.” (PCR App. p. 2087, lines 20-23). He also informed the jury that he does not “know how to let go” in relationships and he prefers to dominate the women in life. (PCR App. p. 2088, lines 2-18).

Defense counsel presented evidence in furtherance of their “trigger” theory. *See State v. Atkins*, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990)(“In a capital sentencing trial, the jury’s function is to determine appropriate punishment based upon the *circumstances of the crime* and the characteristics of the defendant.”)(emphasis in original). Petitioner contested the presentation of this evidence in the PCR action; however, the PCR judge found no error in counsel’s decision to present such evidence under their “obsession ‘trigger’ and ‘love sick’ theory, and to present a mitigation case” on same “was reasonable as it was complimentary and compatible with [Petitioner’s] prior Tennessee confession and [Petitioner’s] statement to the jury.” (See PCR App. p. 2885-2890).¹⁷ The PCR judge’s ruling on this evidence/theory issue has not been contested on appeal.

The record reflects that defense counsel requested a duress charge that would support the theory that Ms. Barbare was “the trigger.” (See PCR App. p. 2052, line 14 - p. 2053, line 1). However, the provocation charge was not given in response to an argument on that theory, rather, the trial judge reasoned:

¹⁷ Respondent notes that defense counsel carefully weighed the differing considerations before presenting this evidence, including the possibility of presenting other mitigating evidence (i.e. that Petitioner was good to Ms. Barbare’s son. (See PCR App. pp. 2699-2701; pp. 2777-2780). His theory was not to blame, but to explain, and to seek some measure of understanding or mercy. (PCR App. p. 2701).

... Defendant was provoked by the victim in committing the murder, I'll leave. I find there is sufficient evidence in the record. And the reason is the action of Mr. Larke saying he was going to get his gun, that would be a mitigating factor as opposed to - - you know, that might have been an impulse to have him do something, so I would leave that....

(PCR App. p. 2053, line 25 - p. 2054, line 8).

Petitioner argues here that counsel was ineffective in seeking and obtaining the charge based on Ms. Barbare's treatment of Petitioner. He argues counsel was not entitled to the charge because Ms. Barbare was not a murder victim, and counsel did not understand that was not the basis for the charge. (Petition, p. 40). This argument differs wholly from his argument forwarded in PCR court. (PCR App. p. 2516, Argument in Applicant's Trial Brief, arguing the jury's possible misinterpretation of the charge absent an argument explaining the charge in terms of the murder victim's conduct). Petitioner is procedurally barred from raising the argument that Petitioner was not entitled to the charge. *See, e.g., State v. Byram*, 326 S.C. 107, 113, 485 S.E.2d 360, 363 (1997)(issue procedurally barred where party argues different ground on appeal).

As established in Petitioner's trial brief, in the PCR action, Petitioner argued that counsel failed to specify the supporting facts for the "provocation" mitigating charge within his closing argument, and that the jurors would interpret that as "blaming the victim," Ms. Barbare. (PCR App. p. 2516). Respondent notes that Petitioner's assertion on appeal that "counsel mistakenly believed they were entitled to the charge based on their 'trigger theory'" is not supported by *any* reference to the record. (Petition, p. 40). Again, the issue is procedurally barred from review as it is wholly different from the issue raised below. At any rate, his position is wholly untenable for several reasons. First, he conceded below that the charge was properly given under the *only* factual basis referenced on the record – the murder

victim's statement he was going to get a gun. (PCR App. p. 2515). (See also PCR App. p. 2053, line 24 - p. 2054, line 6). Second, he concedes on appeal that "Ms. Barbare was not a victim" as to the murder charges at trial. (Petition, p. 40). Thus, there is no *direct* connection for the jury to make. Third, Petitioner argued below that the statutory mitigating circumstance was given in error as a strategy to "blam[e] a victim in a capital case is 'an offensive argument to the jury.'" (PCR App. p. 2516). He now concedes that the statutory mitigating circumstance is not always improper. (Petition, p. 41). However, he continues to argue that "*in this case*, counsel simply did not understand the factual basis upon which it was given." (Petition, p. 41). Again, there is no basis for such an assertion. This confusion of factual support is also evident in the case cited in support of Petitioner's argument (both below and on appeal). He cites to *State v. Hoffman*, 768 So.2d 542 (La. 2000), for the principle that "blaming the victim in a capital case is 'an offense argument to the jury,'" (PCR App. p. 2516, Petition, p. 43), yet, as a factual matter *Hoffman* case is completely distinguishable.

In *Hoffman*, the defendant was found guilty of abducting a woman at her car as she was attempting to leave after working late. After being forced to withdraw money, she was taken to a secluded area and raped. She was then marched, naked, to a small dock and shot execution style. Defense counsel in that case suggested the murdered woman was "naive" and "not prepared" for the dangers of working in an inner city environment. In short, there were no facts supporting any provocation; rather, counsel indulged in a gratuitous attack on an innocent victim. That substantially differs from the instant case where Ms. Barbare was not the murder victim, and further, where this record was replete with evidence, not the least of which was Petitioner's own statements, that he did what he did because of his obsession

with Ms. Barbare. And it should be noted that the fact of the relationship was uncontested, as was the fact of the breakup. This was not a case of random violence, but violence inspired by a domestic relation that soured. *Hoffman* is simply not comparable to the instant case.

In sum, the charge, on the basis for which it was actually offered, was not contested. However, even if the jury was to misinterpret the charge, the charge was consistent with a concerted effort to show that Petitioner's actions were in response to Ms. Barbare's treatment of him, which, in turn, was consistent with his own statements. There is no error.

Moreover, Petitioner wholly fails to address the PCR judge's findings that if error could be found, there could be no prejudice:

Applicant has failed to establish error. Moreover, even if error could be found on this record, Applicant has failed to establish prejudice for three reasons: 1) there is a factually distinguishable basis for the charge that is not challenged; 2) the fact of Applicant's obsessive infatuation with Ms. Barbare was part and parcel of the case and would be addressed within trial, by Applicant's confession alone if nothing else; and 3) the tremendous amount of evidence in aggravation in this brutal double murder of Ms. Barbare's parents in their own home. Applicant cannot show that but for a minor distinguishing argument on a factually distinguishable basis for the charge the jury would not have returned a sentence of death.

(PCR App. p. 2892).

On this record, even if there would be error in obtaining the charge, there could be no prejudice. Again, the record fully and fairly supports the PCR judge's findings of facts and conclusions of law.

However, the issue presented is procedurally barred. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

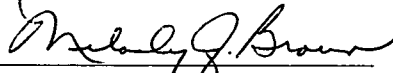
Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

BY: 
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

June 21, 2010.
Columbia, South Carolina.

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

APR 21 2010

Certiorari to Greenville County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

S.C. SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. DUDEK
Chief Appellate Defender

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

WILLIAM H. EHLIES, II
Pro-bono
Attorney at Law

Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605
(864)232-3503

ATTORNEYS FOR PETITIONER.

INDEX

INDEX	i
ISSUES PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	

1.

Defense counsel provided ineffective representation, in violation of petitioner's rights under the Sixth and Fourteenth Amendments, by failing to object to the improper cross-examination of James Aiken on daily prison conditions evidence and the closing argument on life imprisonment being "like a small town with a restaurant" based on that 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 3

2.

Petitioner's death sentence should be vacated as being based on an impermissible arbitrary factor under Eighth and Fourteenth Amendments and S.C. Code § 16-3-25(C)(1) where the jury heard evidence about how good daily conditions in prison were for one sentence to life imprisonment since this evidence of prison being like a "small town with a restaurant" caused petitioner to be sentenced to death based on circumstances he could not control 18

3.

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 send 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 Eighth and Fourteenth Amendment to the United States Constitution 20

4.

Trial counsel rendered ineffective assistance of counsel 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.....25

5.

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 33

Trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth 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 petitioner's ex-girlfriend, and thereby blame her for her parents' murders, since this patently offensive strategy was very likely to inflame the jury 36

CONCLUSION 45

ISSUES PRESENTED

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 on daily prison conditions evidence and the state's closing argument on life imprisonment being "like a small town with a restaurant" based on that 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 send 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 Eighth 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 and Fourteenth 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?

STATEMENT OF THE CASE

Petitioner Brad Keith Sigmon was indicted at the November 2001 term of the Greenville County grand jury for two counts of murder, one count each of burglary in the first degree, grand larceny, assault and battery with intent to kill, kidnapping, and possession of a weapon during the commission of a violent crime. The state served its notice of intent to seek the death penalty. App. 2379.

Petitioner's case was called for trial on July 18, 2002, before the Honorable Joseph J. Watson, and a jury. App. 5. Frank Eppes, Jr. and John Abdalla represented petitioner. The solicitors were Robert Ariail, Betty Strom, Mindy Hervey, and Lori Reese. App. 5. The state elected to proceed on the two murder indictments and the first-degree burglary indictment. The jury found appellant guilty on these counts. App. 1705, ll. 15-24.

After the twenty-four hour waiting period, the sentencing phase commenced. At the conclusion of the sentencing phase on July 21, 2002, the jury recommended death. App. 2118, ll. 9-24. Judge Watson then sentenced petitioner to death for murder, and thirty years in prison for burglary in the first degree. App. 2124, ll. 12-25.

Petitioner's convictions and sentences were affirmed on direct appeal. See State v. Sigmon, 366 S.C. 552, 623 S.E.2d 648 (2005); App. 2429-2433. Rehearing was denied by this Court on January 13, 2006. The United States Supreme Court denied certiorari in Sigmon v. South Carolina, 548 U.S. 909 (2006).

Petitioner filed an application for post-conviction relief in the Greenville Court of Common Pleas on October 13, 2006. App. 2435-2440. An appointment hearing was held on November 6,

2006 before the Honorable J.C. Nicholson, Jr. App. 2442. Teresa Norris and William H. Ehlied, II, were appointed PCR counsel during this hearing. App. 2446, l. 13 – 2451, l. 20.

On November 15, 2006, the state filed a Return and motion to dismiss the capital PCR action. App. 2458-2476. Petitioner filed an amended application for post-conviction relief on June 4, 2008. App. 2477-2483; App. 2813-2819. Petitioner filed his trial brief on June 20, 2008. App. 2484-2499; App. 2820-2835. Petitioner then moved for summary judgment in his motion dated July 22, 2008. App. 2500-2517. The state then filed its response in opposition to the motion for summary judgment on August 5, 2008. App. 2518-2542.

The depositions of trial counsel John Abdalla and Frank Eppes, Jr. were taken on June 27, 2008. App. 2580-2717. A post-conviction hearing was convened on August 4, 2008 before the Honorable J. C. Nicholson, Jr. App. 2718. The PCR judge issued an order of dismissal dated July 14, 2009. App. 2846-2893. This petition for a writ of certiorari follows.

ARGUMENT

1.

Defense counsel provided ineffective representation, in violation of petitioner's rights under the Sixth and Fourteenth Amendments, by failing to object to the improper cross-examination of James Aiken on daily prison conditions evidence and the closing argument on life imprisonment being "like a small town with a restaurant" based on that 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.

Relevant Facts

John P. Abdalla acknowledged he had never served as counsel in any capacity in a death penalty case prior to appellant's case. App. 2587, ll. 3–12. This was also the first death penalty case in any capacity for co-counsel Frank Eppes. App. 2646, ll. 4–7. Counsel Eppes recalled, "when we took the case I told Abdalla that any disagreements we had, even if he was lead counsel, that I was going to be the final word on it. And he thought I was joking. I wasn't." App. 2646, ll. 4–16.

As will be seen infra, it became apparent during the trial, the post-conviction depositions that were entered into evidence, and during the post-conviction relief hearing that neither counsel Abdalla or counsel Eppes understood the law pertaining to the inadmissibility of daily prison conditions evidence dating back to State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) and State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970). App. 2486 – 2490. The

following exchange occurred with counsel Eppes at his deposition concerning his pre-trial motion to exclude the evidence of Department of Corrections Administrator James Sligh:

Q. Okay. And the motion itself is limited to his comments *about death row*.

A. Uh-huh. Yes.

Q. And was that your intent?

A. I - - - yeah. *Yes*, I read the transcript today as well, our argument about this motion in the transcript. And it refreshed my recollection that my concern was with the contrast of the two conditions, conditions on death row vis-a-vis conditions, you know, of a prison life without parole, and *I can tell you categorically that I had no clue at the time that there was way to exclude evidence of the living conditions in a penitentiary.*

App. 2659, ll. 2 – 17. (emphasis added).

Eppes admitted, “[O]bviously [that] shows that I didn’t know that it [daily prison conditions evidence] wasn’t admissible.” App. 2659, ll. 23 – 24. Eppes added, “I wish I could tell you what I was thinking at the time.” App. 2662, ll. 13 – 18.

Abdalla stated his memory of the Sligh motion was that “Sligh was going to testify to, as I recall, was the (sic) country club nature of the prison and we were trying to stay away from anything that made it sound like it was going to be an easy time.” App. 2599, l. 4 – 2600, l. 1. Abdalla said he did not think evidence about prison conditions “should come in.” App. 2599 -2601. Abdalla acknowledged he was “lead counsel” in this case. App. 2602, ll. 10 – 11. However, see the forceful remarks of Eppes supra that he had the final say on all matters, which Abdalla did not contradict.

During the penalty stage of the trial the defense called James Aiken as a witness. Aiken is president of J.E. Aiken and Associates. App. 2005, ll. 6 – 21.

Aiken testified after reviewing the applicable records on petitioner that his “assessment of him [petitioner] as a prison inmate is that he can be incarcerated in a prison setting for the remainder of his life without causing an undue risk of harm to staff, inmates, as well as to the general community.” App. 2010, l. 13 – 2017, l. 23.

It is important to know that the proposed testimony of Jimmy Sligh was discussed earlier during the penalty phase. Solicitor Ariail argued the defense, “[h]ammered this jury in its venire - - I mean its voir dire over and over again, this is life without parole, life without parole. He’s coming out in a pine box one way or another, yatta yatta yatta, but I want to show them where he’s living, *because this is nothing more than a small town that’s got a restaurant and all that.*” App. 1722, ll. 1 – 25. (emphasis added).

The following exchange occurred between the judge and the solicitor:

The Court: They don’t have any objection to the life without parole [evidence].

Mr. Ariail: Well, I thought that’s what we were arguing about.

The Court: No, they said they did not. Their objection is to then saying what life is like on death row.

Mr. Ariail: Well, I wasted all that argument. I thought they were objecting to that.

The Court: No.

Mr. Ariail: I thought you asking me why I needed to justify it.

The Court: No. Their objection is to - - to telling them about life on death row.

Mr. Ariail: Well, if you’ve got a right to tell them about life on -
- -

The Court: *I'm not saying you have a right to tell them about that, but they're not objecting to it, so we're not - -*

Mr. Ariail: Well, I hadn't thought about that aspect of it.

The Court: Okay. Well, I have always been under the impression that aggravating circumstances are limited to statutory aggravating circumstances with the addition of character of the defendant, with the addition of victim impact. And I have never known, you know, a category of other non-statutory aggravating circumstances.

Mr. Ariail: Okay.

The Court: All right. *So I'm going to limit you to - - Mr. Sligh's testimony to life - - a day in the life of a life sentence.* All right. Anything else?

App. 1723, l. 1 – 1724, l. 7. (Emphasis added).

The colloquy then changed to other evidentiary matters. App. 1724, l. 8 – 1725, l. 3.

The state got the daily prison conditions evidence before the jury during the cross-examination of James Aiken. The solicitor established that Aiken was last with the South Carolina Department of Corrections in 1989. App. 2022, ll. 1 – 6. The solicitor then immediately launched into his daily prison conditions presentation by asking Aiken if a prisoner would have “visitation available to him every weekend.” Aiken confirmed that prisoner’s had the right to visitation but that it was within the “purview of the Department of Corrections, whether it’s a weekend or not.” App. 2022, ll. 7 – 13. Aiken also confirmed that a prisoner could “watch television, have recreation . . . various things provided by the Department of Corrections” as well as the right to “check out books and read books” from the library. App. 2022, l. 14 - 2023, l. 24.

The solicitor also had Aiken agree that prisoners had access to the telephone and to “call home, call friends, call whoever he wanted to, call as long as it was a collect call.” App. 2023, ll. 5–

18. Aiken also said that inmates could purchases items from the canteen by “debit card where he has credit in there.” App. 2023, l. 19 – 24. The solicitor also discussed with Aiken how many times in a week an inmate could shower. App. 2023, l. 25 – 2024, l. 11. Aiken also confirmed that prisoners had the right to take “educational classes” in prison and they could receive mail, magazines, “Sports Illustrated, whatever he wants.” App. 2024, l. 15 – 2025, l. 7. Prisoners were also allowed to go to church. In addition prisoners could have contact visitation or non-contact visitation at the discretion of the administration. App. 2025, l. 3 – 2026, l. 2.

The solicitor told the jurors in closing:

And you may think life imprisonment is serious business, but you still have your visitation with your family. You still have your mail. You still have your TV. You still eat three meals a day. Somebody washes and takes care of your clothes. You get all the benefits of health care, and recreation. All of those things are provided for you.

Sure, your life is limited. Your life is limited to a smaller confinement in that you don’t have the freedom to move about. Life in prison carries a lot of benefits with it and that’s why it’s not proper in this case. He would still have the freedom to see his children, something that these children of Gladys and David Larke will never have the opportunity to do.

And I said to you earlier and this is serious business for serious people. And it’s serious consideration time for serious punishment. And the state has asked you and I told you in the beginning we were going to ask you to impose the death penalty.

App. 2067, l. 10 – 2068, l. 3.

In his amended application for post-conviction relief filed June 4, 2008, petitioner argued the failure to object to the improper cross-examination of James Aiken about the day to day circumstances of prison life constituted ineffective assistance of counsel in violation of South

Carolina Law and the Sixth and Fourteenth Amendments to the United States Constitution. App. 2478 – 2479.

The petitioner filed a pre-hearing trial brief with the court on June 20, 2008. App. 2484-2498. Petitioner noted that “when counsel’s conduct is based on an erroneous understanding of the law ‘counsel made no tactical choice.’” Luchenburg v. Smith, 79 F.2d 388, 392-393 (4th Cir. 1996). App. 2485. Petitioner stated that counsel had failed to object “to the state’s improper evidence and argument concerning the day to day circumstances of prison life and the solicitor’s personal opinions concerning the appropriateness of the death penalty.” App. 2486.

Petitioner argued that the state asserted its intent to have James Sligh testify concerning the daily life of a prisoner and “what advantages this individual has.” App. 2486. Petitioner recounted how the solicitor even categorized prison, in his argument on the admissibility of this testimony, as “nothing more than a little town that’s got a restaurant and all that.” App. 2486-2487. While the judge expressed doubt about the admissibility of this testimony, the judge ultimately stated that defense counsel “were not objecting to it” and the “court restricted only the intended evidence about the day to day conditions on death row.” App. 2487.

Petitioner argued that the prison conditions evidence and argument was admitted in direct violation of this Court’s holding in State v. Plath, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984) where this Court held that determination as to the “time, place, manner and conditions of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury. The jury’s sole function is a capital sentencing proceeding is individual selection of either the death penalty or life imprisonment based upon the circumstances of the crime and the characteristics of the individual defendant.” App. 2488. Petitioner also noted that this court reiterated this

principle in State v. Bowman, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005) and State v. Burkhart, 371 S.C. 482, 487, 640 S.E.2d 450, 452-453 (2007).

As will be seen infra, petitioner argued that this type of evidence is extremely prejudicial and requires reversal because the entire subject matter injects “an arbitrary factor into the jury sentencing considerations” in violation of S.C. Code §16-3-25 (C)(1). See State v. Burkhart, 371 S.C. at 488-489, 640 S.E.2d at 453. Petitioner also argued this evidence violated the Eighth Amendment’s prohibition against cruel and unusual punishment when a death sentence, as here, is predicated on mere “caprice” or “factors that are constitutionally impermissible or totally irrelevant to the sentencing process.” Citing Johnson v. Mississippi, 486 U.S. 578, 585 (1988) (quoting Zant v. Stephens, 462 U.S. 862, 884-885, 887 n. 24 (1983). Petitioner stated that defense counsel was ineffective for failing to be familiar with the longstanding rule that evidence in a capital sentencing trial must be relevant to the character of the defendant or the circumstances of the crime. Citing State v. Plath and State v. Atkinson, 253 S.C. 531, 535, 172 S.E.2d 111 (112) (1970) quoting State v. White, 142 A.2d 65, 68 (N.J. 1958)

The legislature committed to the jury the responsibility to determine in the first instance whether punishment should be life or death. It charged another agency with the responsibility of deciding how a life sentence shall be executed. The jurors perform their task completely when they decide the matter assigned to them upon the evidence before them. What happens thereafter is of no concern of theirs.

App. 2488 - 2490.

In the deposition of defense counsel Eppes, he stated that he had re-read the prison conditions testimony and he stated: “I can say almost categorically that I had no idea that I should object to that at the time . . . I thought it was admissible. Obviously, since then the

Supreme Court has explained itself very clearly . . . and my response to that today would be much different than it was then.” App. 2667, ll. 2 - 14. Eppes later admitted: “I still have no knowledge of what the law was then. But at that time the solicitor was surely talking about what a country club Lee County and other maximum security ones are, and they’re just not. *They’re hellish places and I wanted to convey that to the jury.* That this is not a person who would have a pleasant life. They would just be alive.” App. 2712, ll. 10 - 19. (emphasis added).

Discussion

It is apparent that defense counsel did not know the law on this subject. Counsel thought he had to get involved in a contest with the solicitor about whether life in prison was like a small town with a restaurant or whether it was “a hellish place.” This Court long ago in State v. Plath and State v. Atkinson supra ruled that this is not a legitimate consideration for the jury.

This was the first death penalty case for both trial attorneys. They still had the responsibility for knowing the applicable law, and it is clear they did not understand that the evidence of day to day conditions of incarceration was not admissible as this court held in State v. Plath and State v. Adkinson and reiterated in State v. Bowman and State v. Burkhardt. In fact, as seen, the attorneys had the argument backwards. They wanted to exclude evidence about the day to day conditions on death row.

While defense counsel Abdalla testified in his deposition, which was admitted into evidence, that he thought such evidence should not have “come in,” neither counsel Abdalla or counsel Eppes objected to the cross-examination of James Aiken or the solicitor’s closing argument based on that evidence. App. 2599, l. 16 – 2601, l. 14.

In State v. Plath, 281 S.C. 1, 313 S.E.2d 619, 627 (1984), this Court clearly stated that the Department of Corrections controls the conditions of imprisonment and not the defendant. As PCR counsel argued “such determination as to time, place, manner and condition of execution or incarceration . . . are reserved by statute . . . to agencies other than the jury.” This Court also wrote it was highly improper for the defense to paint a picture of life imprisonment as slavery and capital punishment as “an ineffective instrument of deterrence, a crude device for expressing

social approval, and even a counter-productive approach to control of crime.” State v. Plath, 313 S.E.2d at 626. This ship sailed long ago.

This Court also stated that “a jury does not need to know how often [the capital defendant] will take a shower or whether or not he will be lonely and withdrawn during his tenure [in prison].” State v. Plath, 313 S.E.2d at 627. Here, PCR counsel for the state candidly acknowledged what she had to, that the solicitor did present such evidence and argument to the jury. App. 2744, l. 24- 2745, l. 4. The state was therefore left to argue that State v. Bowman and State v. Burkhardt announced a new rule of law for the first time, and to argue that defense counsel therefore was not ineffective. That is simply wrong but petitioner understands it is the only argument the state can make here.

Moreover, defense counsel Eppes acknowledged he wanted to counter the state’s evidence of prison as a “country club Lee county” by trying to paint prison as a “hellish place.” It is clear this is exactly what this Court forbade in State v. Plath. It is clear that both defense attorneys in this case were not aware of the law that during a capital sentencing proceeding the evidence and argument must be about the character of the defendant and the circumstances of the crime. Counsel here wanted evidence about life on death row excluded and they could not be said to have made a tactical choice to allow this evidence before the jury where it is clear they had an erroneous understanding of the law. Luchenburg v. Smith, 79 F.3rd 388, 392-393 (4th Cir. 1996).

Defense counsel here were ineffective in violation of appellant’s rights under the Sixth and Fourteenth amendments to the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

As defense counsel argued below:

“A finding of prejudice under Strickland requires that an applicant ‘must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” Strickland, 466 U.S. at 694. Strickland defined ‘reasonable probability’ as a ‘probability sufficient to undermine confidence in the outcome’ of the proceeding. Id. at 692. This test is not, however, an outcome determinative inquiry. In other words ‘[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.’ Id. at 694. Thus, ‘a defendant need *not* show that counsel’s deficient conduct more likely than not altered the outcome in the case.’ Id. at 693 (emphasis added). To the contrary, prejudice is established if ‘there is a reasonable probability that *at least one juror* would have struck a different balance’ but for counsel’s errors. Wiggins v. Smith, 539 U.S. 510, 537 (2003) (emphasis added).” App. 2485 - 2586. The PCR court wrote that:

“[A]pplicant’s argument that the failure to object was not based on strategy because defense counsel stated in depositions that they did not think the evidence of prison conditions was objectionable, (Applicant’s Motion for Summary Judgment, App. 2507; App. 2735), similarly misses the mark. While the statements relied upon are referenced in the deposition, so are the statements that defense counsel *wished to elicit testimony about the harshness of prison life*. Mr. Eppes clearly stated at his deposition that he wanted to show, through his own witness, Mr. Aiken, that Applicant would not be a predator in prison, and did not offer that testimony simply as evidence of adaptability. App. 2659 - 2661. Further, Mr. Eppes stated that he wanted to portray prison life in harsh reality, and “[t]hat this is not a person who would have a pleasant life.” App. 2710 - 2712. He used same in his closing argument to the jury. App. 2711; App. 2206 - 2207. During the hearing, Mr. Eppes

testified similarly that part of the reason he called Mr. Aiken was to establish that Applicant would most likely be a victim in SCDC, which, he admitted, again, was not adaptability evidence.” App. 2804.

App. 2871. (emphasis added).

The PCR court incorrectly found that “under settled precedent at that time,” defense counsel was not ineffective for failing to object to the daily prison conditions evidence and argument based on that evidence. App. 2873 - 2874. The PCR judge accepted the state’s flawed argument that the state can “respond” to prison adaptability evidence with evidence of the privileges and amenities that a prisoner has while incarcerated. This was wrong on several levels.

First, the Supreme Court in Skipper v. South Carolina, 476 U.S. 1 (1986) held that the sentencing judge or jury cannot be precluded from considering any relevant mitigating evidence. In Skipper that excluded evidence was the testimony of jailers and a regular visitor regarding Skipper’s good behavior and adaptability to prison. See, also Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982). In Skipper, the trial court ruled that such prison adaptability evidence was irrelevant under State v. Koon, 278 S.C. 528, 298 S.E.2d 769 (1982). Consequently, it is clear that prison adaptability -- as in this case by way of James Aiken -- is constitutionally mandated if available.

Further, the PCR court’s ruling fails to recognize that this Court in State v. Plath and State v. Adkinson held that day to day prison conditions evidence is of no concern to the jury and inadmissible. The jury should be focused on the character of the defendant and the circumstances of the crime when deciding between life and death. Thus, it was error for the PCR

court to conclude that it was permissible for the defense to try and portray to the jury the “hellish” conditions of day to day prison life.

It is clear counsel in this case did not object to the cross-examination of James Aiken about prison conditions out of the ignorance of the law, and such ignorance can never be a permissible strategy. See Wiggins v. Smith, supra. Petitioner should be granted a new sentencing trial.

Petitioner's death sentence should be vacated as being based on an impermissible arbitrary factor under Eighth and Fourteenth Amendments and S.C. Code § 16-3-25(C)(1) where the jury heard evidence about how good daily conditions in prison were for one sentence to life imprisonment since this evidence of prison being like a "small town with a restaurant" caused petitioner to be sentenced to death based on circumstances he could not control.

Relevant Facts

As seen, the state offered a plethora of day to day prison conditions evidence, as the solicitor admitted, to try and convince the jury that life imprisonment was like life in a small town with a restaurant. App. 2022, l. 1 – 2026, l. 2. The fact the solicitor's entire cross-examination, with the exception of having Aiken admit he had not worked for the Department of Corrections since 1989, was devoted to day to day prison conditions evidence proves his mission was carried out. From there, as seen above the solicitor in his argument returned to his theme of prisoners having visitation, getting mail, watching TV, eating three meals a day, having someone else wash their clothes, and having health care and recreation. App. 2067, l. 10 – 2068, l. 3.

In State v. Burkhardt, 371 S.C. 428, 487, 640 S.E.2d 450, 452 – 453 (2007), this Court held that this prison conditions evidence injects inadmissible arbitrary factor into the jury sentencing considerations in violation of S.C. Code § 16–3-25(C)(1). PCR counsel here correctly argued that this evidence constitutes an impermissible arbitrary factor in violation of the Eighth Amendment prohibition against cruel and unusual punishment. This is true because the Eighth Amendment is violated when a death sentence is predicated on mere caprice or on factors that are constitutionally

impermissible or totally irrelevant to the sentencing process. See Johnson v. Mississippi, 486 U.S. 578, 585 (1988) *quoting Zant v. Stephens*, 462 U.S. 862, 884 – 885, 887 n.24 (1983). PP. 2489.

The PCR court ruled that this day to day prison conditions evidence was admissible so it obviously rejected petitioner's argument that constituted an impermissible arbitrary factor in violation of the Eighth Amendment. See App. 2869-2876.

Petitioner did not have any control over the daily conditions of his imprisonment, and it violated the essential demands of fairness to use those alleged conditions of his daily incarceration to earn a death sentence against him. Petitioner's death sentence cannot stand since it was based upon an arbitrary factor in violation of the Eighth Amendment and South Carolina Code §16-3-25(C)(1). See Johnson v. Mississippi, Zant v. Stephens, supra. This Court should therefore vacate petitioner's death sentence. See State v. Burkhardt, supra.

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 send 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 Eighth and Fourteenth Amendment to the United States Constitution.

Relevant Facts

During the solicitor's closing argument at sentencing, he asserted that "the state has asked for the death penalty and we think it is appropriate in the case. He also reminded the jury that the State of South Carolina "is represented through me and my staff." App. 2060, ll. 17 – 18; App. 2062, l. 25 – 2063, l. 7. The solicitor then argued:

Mercy is an appropriate human nature response, but mercy belongs to those who deserve it.

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 think that the death penalty is an appropriate punishment in this case? And I can best summarize it by a response that I got from a juror in another case on voir dire, and that juror said, as to her response in her argument for the death penalty, that they're are mean and evil people who live in this, who do not deserve to continue to live with the rest of us, regardless of how confined they are. 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.*

App. p. 2063, l. 23 – 2064, l. 13. (emphasis added).

In addition at the conclusion of the argument, the solicitor added:

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.

App. p. 2070, ll. 6 – 15. (emphasis added). There was no objection to this argument.

In his amended application for post-conviction relief, petitioner alleged he was denied his right to the effective assistance of counsel during the sentencing phase in violation of the Sixth and Fourteenth Amendment rights because defense counsel failed to object to the solicitor's improper closing argument above expressing his personal opinions as an elected official on why he believed the death penalty was the appropriate punishment. App. 2477 – 2479. In petitioner's trial brief, he argued that the solicitor's closing argument was improper because it related the solicitor's private decision to seek and personal opinion that the penalty was appropriate in this case. This argument injected an arbitrary factor in the sentencing trial in violation of South Carolina Code §16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. App. 2490 – 2491.

During counsel Abdalla's deposition, which was admitted into evidence, he testified that such a personal comment by the solicitor that he personally felt the death penalty was the correct sentence would be improper and inadmissible. App. 2603, ll. 5 – 20; app. 2226, ll. 4-5; app. 2760, l. 6 – 2761, l. 11. Defense counsel said he hoped he knew this argument was improper during the trial but stated "I can't remember ever knowing that," but, defense counsel then acknowledged it

was his responsibility to object to the argument. App. 2602, l. 12 – 2603, l. 9. Defense counsel later admitted that he did not recall if he thought the argument was improper at the time and stated “if I objected it was inappropriate. If I didn’t I either missed it or was oblivious. I don’t know. I don’t recall.” App. 2627, l. 3 – 2628, l. 17. Suffice it to say he articulated no legitimate tactical reason for failing to object.

During the deposition counsel Eppes he was asked to re-read the above argument by the solicitor. The following exchange occurred between him and post-conviction counsel:

Q. Okay. How do you react at this date to that testimony?

A. You make me want to go look up the law and see if he can do that. My - - my thought right now would be that the solicitor cannot give them an answer of why he thinks the death penalty is appropriate in that way. I think he can argue for the death penalty and, obviously, give reasons he thinks the death penalty is appropriate as part of his argument. The death penalty is appropriate because of blah, but I’m not sure that the solicitor is allowed to give his personal opinion.

Q. How he arrived at the decision - - -

A. Yes.

Q. - - - to seek the death penalty? Would that be a fair statement?

A. I would - - - I would agree that I think - - - in looking at that right now I think that’s highly suspect.

Q. Okay. And why would it not have appeared that way to you in July of 2002?

A. I have no idea.

App. 2660, l. 19 – 2970, l. 19.

In the order of dismissal, the judge found that the solicitor did not attempt to minimize the juror's own sense of responsibility by stressing he himself had already made the same decision that he was asking them to make. The PCR court found the argument was not improper and was "minor in comparison with the tremendous amount of evidence an aggravation . . ." App. 2878.

Discussion

In State v. Woomer, 277 S.C. 170, 284 S.E.2d 357 (1991) this Court held, "when a solicitor's personal opinion is explicitly injected into the jurors deliberations as though it were itself evidence justifying a sentence of death, the resulting sentence may not be free from the influence of any arbitrary factor as required by S.C. Code § 16-3-25(C)(1), and by the Eighth Amendment to the United States Constitution. State v. Woomer, 284 S.E.2d at 359 *citing* Gardner v. Florida, 430 U.S. 349 (1977); Beck v. Alabama, 447 U.S. 625 (1980).

In Woomer, the solicitor told the jurors that he had decided to seek the death penalty against the defendant, and "so I have had to go through the same identical thing that you all do. It is not easy." State v. Woomer, 284 S.E.2d at 359.

The argument in this case was no less prejudicial than the argument this Court condemned in State v. Woomer. Here the solicitor stated that it was a fair and appropriate question for the jury to ask him "Solicitor Ariail, why do you think that the death penalty is an appropriate punishment in this question?" The solicitor then explained that he thought death was the appropriate punishment and his person opinion and that he could "best summarize it" by what a former juror had told him during a prior case on voir dire -- that there were certain people that are so mean and evil they "do not deserve to continue with the rest of you, regardless of our confined they are. *And 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 . . .” App. 2063, l. 25 – 2064, l. 13. (emphasis added). The solicitor later said his response “as the solicitor of this circuit” to people who said that death was not a deterrent was that the death penalty petitioner “and send a message that this type of conduct will not be tolerated in Greenville County, or anywhere in this state.” App. 2070, ll. 2 – 15.

This argument, when considered in context, diverted the attention of the jurors from the evidence before them to an improper consideration of the solicitor’s personal feelings, in his representative capacity, as to why he thought that petitioner deserved the death penalty. This argument was totally improper. See State v. Smart, 278 S.C. 515, 517, 299 S.E.2d 686, 687 (1982). It injected in arbitrary factors into the sentencing procedure in violation of S. C. Code § 16-3-25 (C)(1) and the Eighth and the Fourteenth Amendments to the United States Constitution. See State v. Butler, 277 S.C. 543, 290 S.E.2d 420 (1983). App. 2491.

Petitioner should be granted a new sentencing trial.

Trial counsel rendered ineffective assistance of counsel 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.

The evidence adduced at trial showed that petitioner was extremely intoxicated at the time of the murders. The murders of Gladys and David Larke occurred around 8:00 am on April 27th, 2001. On April 25, 2001, petitioner arrived at the home of his employee, Charles Hall, and Mr. Hall “could tell he had been drinking,” though he “seemed coherent.” App. 1614, ll. 22-23. Petitioner also reported earlier at work that he had been drinking since 8:00 am. App. 1616, ll. 13-18.

On April 26, 2001, petitioner reported that he had used approximately fifty dollars worth of crack cocaine and drank two mixed drinks and a half- bottle of Peppermint Schnapps. App. 1981, ll. 2-20. Around 9:00 pm, petitioner met up with Eugene Strube. The two brought some beer before to petitioner’s former home, which was next door to the victims’ home. App. 1578, l. 1- 1579, l. 7. In the house, according to Strube, petitioner “drank a six-pack” of beer, App. 1593, ll. 6 - 14, and the two were “smoking some crack.” App. 1581, ll. 1. While Strube got sick off “the first hit,” they each smoked “a couple hundred dollars worth” of crack, “through the evening” until they ran out. App. 1589, l. 1 - 1594, l. 5. Strube went to sleep around 1:00 a.m. while petitioner remained awake throughout the night. App. 1582, ll. 14-22; App. 1593, ll. 6-24.

Ultimately, Strube abandoned his agreement to assist petitioner as petitioner entered the victims' home prior to 8:30 a.m. and the crimes ensued. App. 1583, ll. 2-6.

Dr. Alexander Morton, Jr., a professor and pharmacist at the Medical University of South Carolina in Charleston, South Carolina, and defense expert witness, also provided testimony regarding the effects of alcohol and cocaine use at the time of the murders. As he testified to the jury, his area of specialty is "drugs that affect the human brain. [He] specialize[s] specifically in substances of abuse and any psychiatric medications." App. 1966, ll. 8 -11.

A: Well, his—his actions are consistent with a significant number of people that have used large amounts of cocaine, both during and after—after their use, and that is violent behavior. That is behavior that doesn't make sense, of agitation, impulsive type behavior.

App. 1997, ll. 6-11.

A: The use of drugs and alcohol would certainly impair his ability to think clearly, whether he's using at the time or going through some of the withdrawal, so it would effect his ability to make good decisions, problem solve, make sense out of his world.

App. 1998, ll. 1-5.

Q: Well, let me ask it this way. He has—do you know the facts of the case?

A: Yes, I do.

Q: All right. When Brad went in there and was hitting the Larkes with the baseball bat, you know about that?

A: Yes, I saw—I saw the crime photos of that.

Q: Eight to nine times in the head. Is there anything that is consistent there with your theories of depression of any other theories you have?

A: It's more consistent with a symptom we see with cocaine use, in that people do repetitive behaviors. From my understanding, he hit both of those people number—a number of times, more than he needed to.

Q: Right.

A: And so it's almost like once he started, he did not stop, and that is something you see with animals that are being studied with cocaine. You see it with patients that have taken too much cocaine, not violence, but I have also seen it in three patients that I've worked with that have stabbed people. They didn't stab them once or twice, but they stabbed them over 100 times. So they—once they started they did not stop.

App. 2000, l. 16- 2001, l. 12.

S.C. Code Ann. §16-3-20(C)(b) provides for the mitigating circumstances which may be charged to the jury if the evidence warrants. The judge charged the following:

(1) The defendant has no significant history of prior criminal conviction involving the use of violence against another person; (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 was substantially impaired; and, (8) The defendant was provoked by the victim into committing the murder. The judge refused to charge (7) The age or mentality of the defendant at the time of the crime. App. 2108, ll. 10-21.

During discussion with the trial court judge regarding which statutory mitigating factors to charge the jury, trial counsel sought a charge on “[t]he age or mentality of the defendant at the time of the crime,” based on “testimony about his mental state.” App. 2053. See S.C. Code §16-3-20(7). The court determined however, that this was adequately covered by an instruction for

the jury to consider that “[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.” See S.C. Code §16-3-20(C)(b)(6). In other words, the judge refused to provide both statutory mitigators (6) and (7) to the jury because, as he explained, “[he] always thought mentality would be like education level, or mental retardation, or something like that.” App. 2053, ll. 20-21. Trial counsel did not correct this misapprehension of the law, nor point out that mental retardation is encompassed by statutory mitigator (10)¹

MR. EPPES: His age is not a mitigating factor, Your Honor. Mentality was there because there’s been testimony about his mental state.

THE COURT: Okay. That would be covered by four. I’ve always thought mentality would be like education level, or mental retardation, or something like that.

MR. EPPES: Yes, Your Honor, I understand. That’s fine.

App. 2053, ll. 16-23.

The trial court judge did not otherwise charge the jury that voluntary intoxication could be considered mitigating. Cf. State v. Plemmons, 296 S.C. 76, 370 S.E.2d 871 (1988). The judge charged the jury with the following mitigators:

“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 was

¹ S.C. Code Ann. §16-3-20(c)(b)(10): The defendant had mental retardation at the time of the crime. “Mental retardation” means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.

substantially impaired. And fourth, the defendant was provoked by the victim into committing the murder. You must also consider any non-statutory mitigating circumstances.”

App. 2108, ll. 10-21.

Counsel rendered ineffective assistance of counsel for failing to correct the judge’s misunderstanding of the law and obtain the instruction or, alternatively, to preserve the issue for appeal because evidence of voluntary intoxication requires the giving of statutory mitigating factors 2, 6, and 7. State v. Pierce, 289 S.C. 430, 435, 346 S.E.2d 707, 711 (1986) (“In this case, the trial judge was required by law to instruct the jury on statutory mitigating circumstances 2, 6, and 7, given the evidence showing Pierce was using drugs and extremely intoxicated during the commission of the crime”); State v. Stone, 350 S.C. 442, 449, 567 S.E.2d 244, 248 (2002) (“We have specifically rejected the contention that a charge on one mitigator is sufficient to cover the others.”); State v. Young, 305 S.C. 380, 409 S.E.2d 352 (1991) (“We have recently held that where there is evidence the defendant was intoxicated at the time of the crime, the trial judge is *required* to submit the statutory mitigating circumstances in §16-3-20(C)(b)(2), (6) and (7)”)(emphasis in original). See State v. Plemmons, *supra*. (“We hold statutory mitigating circumstances (2), (6), and (7) are required when there is evidence of intoxication only in the absence of a specific charge regarding intoxication as a mitigating circumstance.”).

Trial counsel did not offer a strategic reason for the failure to correct the judge’s misunderstanding, or otherwise preserve the issue for appellate review:

Q: Okay. All right. So, if you would accept my statement that you did, in fact, offer and request a charge on number seven, and the judge talked to you about that, and he offered to you that six embraced seven—take a look at six and tell me if you see a distinguishing feature if you—in your legal capacity?

A: Oh, yeah.

Q: Okay.

A: I see a difference.

Q: Do you know why you didn't argue with the judge about that? About there being a difference, and that you can't agree as to his reading of the law?

A: I do not. . . .

A: I definitely see a distinction between six and seven, and I have no memory of raising Cain about it or at the time I thought it was important to raise Cain about it.

App. 2675, l. 19 - 2676, l. 22.

The other trial counsel, John Abdalla, at the time of the PCR hearing, was unaware of the law regarding the submission of these statutory mitigators to the jury. App. 2604, l. 21 - 2608, l. 1.

The order of dismissal is inaccurate when it found that there was no evidence "to support an allegation of intoxication during the crime itself." App. 2879. This finding ignores the evidence at trial that petitioner had consumed copious amounts of alcohol and cocaine right before the murders, and the expert testimony establishing that his conduct was consistent with the ingestion of cocaine. Ample evidence was adduced at trial to support the jury instruction. That petitioner was under the influence of drugs and alcohol was significant enough to the state that it argued the jury should not consider it as an excuse for petitioner's conduct:

"There are no excuses put forward, even though Ms. Furtick and Mr. Morton tried to say there were excuses, or wanted to say there were excuses. I call that the Flip Wilson. . . . Flip's response was always, the devil made me do it. The devil made me do it. And I said that in my closing to you at the guilt phase,

that somewhere along the way you were going to here (sic) somebody else was responsible. Was it going to be the cocaine? Was it going to be alcohol? . . . And it wasn't the cocaine. It wasn't the alcohol. It was a mean and evil person who committed a heinous act."

App. 2065, l. 17- 2066, l. 15.

The order denying PCR is also inaccurate when it asserts that petitioner has failed to show prejudice:

"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. That was clearly before the jury such that failure to charge one other rather general mitigating circumstances (sic) could not be said to have negatively affected consideration of the evidence and the other charges; and second, because of there (sic) strong evidence in aggravation, including three statutory circumstances in aggravation . . ."

App. 2880.

The order of dismissal's finding on this issue is contrary to well-established South Carolina law, and the failure to give all appropriate statutory mitigating instructions violates the 8th amendment of the federal constitution. See McKoy v. North Carolina, 494 U.S. 433 (1990) ("State capital sentencing instructions which prevent sentencing jury from considering any mitigating factor that jury does not unanimously find, violated Eighth Amendment by preventing sentencer from considering all mitigating evidence, as it prevents jurors from giving effect to evidence which they believe calls for a sentence less than death, even if all jurors agree that some mitigating circumstance exists, unless jurors unanimously find existence of the same mitigating circumstance."); Mills v. Maryland, 486 U.S. 367, 384 ("Under our cases, the sentencer must be permitted to consider all mitigating evidence. The possibility that a single juror could block such consideration, and consequently require the jury to impose the death penalty, is one we dare not

risk.”); Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). Respectfully, petitioner asks this Court to grant his petition for writ of certiorari.

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.

During the sentencing phase instructions to the jury, the trial court improperly diluted the significance of mitigation evidence:

"Now, a mitigating circumstance is neither a justification or an excuse for the murder. It's (sic) simply lessens the degree of one's guilt. This is it makes the defendant less blameworthy, or less culpable . . .

"So what is 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 serves the same purpose. That is to reduce the degree of his guilt in the offense."

App. 2108, l. 1 - 2109, l. 10.

The trial court's penalty phase 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. Part of petitioner's case in mitigation concerned his adaptability to confinement, his cooperation with law enforcement, and acceptance of responsibility. None of these characteristics had any relationship to petitioner's blameworthiness for the offenses for which he was tried and, thus, were precluded from consideration by the restrictive definition of mitigation provided to the jury. Further, the court's description of non-statutory mitigators as those "not provided for by law," led the jury to believe

that these circumstances did not have official sanction, thereby diminishing the weight given to these factors. See Estelle v. Williams, 425 U.S. 501, 503 (1976) (“To implement the presumption [of innocence], courts must be alert to factors that may undermine the fairness of the fact-finding process. In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.”).

One of the most settled Eighth Amendment principles is that a defendant in a capital case is entitled both to present and to have considered any relevant mitigating evidence. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddings, *supra*, Skipper, *supra*; Hitchcock v. Dugger, 481 U.S. 393 (1987). Any procedure that precludes the sentencer from giving full and fair consideration to mitigating evidence creates the unacceptable risk that the death penalty will be imposed in spite of factors warranting a lesser sentence. The trial court’s instructions improperly precluded the jury from contemplating all relevant evidence to make an individualized sentencing decision.

This issue was raised in petitioner’s motion for summary judgment and argued in petitioner’s trial brief. App. 2511- 2513, 2829- 2830. The order of dismissal addresses the claim on its merits. App. 2881- 2882.

Trial counsel’s failure to object to these charges was deficient and prejudicial and was not based on any strategic consideration. Strickland v. Washington, 466 U.S. 668 (1984). Counsel did not have much appreciation for the value of statutory mitigators in a capital trial:

I really thought that the facts were the thing that was going to carry the day, not any charge that Judge Watson happened to give about mitigation.

App. 2680, ll. 17-21.

The order of dismissal is inaccurate when it asserts that the instructions, taken as a whole, were sufficient. App. 2881. In Cage v. Louisiana, 498 U.S. 39 (1990), the United States Supreme Court reversed the conviction finding that a jury instruction that included the phrase “moral certainty” could allow a “reasonable juror [to] have interpreted the instruction to allow a finding of guilt on a degree of proof below that required by the due process clause.” Id. at 330. Similarly, the instruction given by the judge in this case could have allowed a “reasonable juror” to have given less consideration to the non-statutory mitigators argued by appellant which may resulted in a juror striking a different balance on the question of life in prison or death. Counsel was ineffective for failing to make the objection. Wiggins v. Smith, 539 U.S. 510 (2003).

Trial counsel rendered ineffective assistance of counsel, in derogation of petitioner's Sixth and Fourteenth 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 petitioner's ex-girlfriend, and thereby blame her for her parents' murders, since this patently offensive strategy was very likely to inflame the jury.

During the discussion of instructions on mitigation, defense counsel sought and obtained an instruction on the statutory mitigating circumstance of provocation by the victim, that the court agreed to give based on "the action of Mr. Larke saying he was going to get his gun when petitioner entered the victims' home." App. 2054, ll. 1-7. Counsel, however, apparently had a different reason why they wanted the jury charge. They believed they were entitled to that charge based on their bizarre, untenable "trigger theory" that the victims' daughter Rebecca Barbare's conduct precipitated the events that led petitioner to murder her parents.

Counsel presented the two ex-husbands and the current husband of Barbare in an attempt to shift some of the blame for petitioner's behavior to her. This resulted in additional aggravating and offensive evidence being presented to the jury for their consideration in the penalty phase of petitioner's trial.

Ricky Sims, who was Rebecca Barbare's first husband, testified very briefly until the jury was excused following the state's objection to testimony about "any violence" in the relationship. App. 1826, l. 6 - 1827, l. 15. Defense counsel then called Troy Barbare, Rebecca Barbare's second husband, to testify that she began dating him while she was separated, but not

divorced, from Sims. After a sidebar following the state's objection about the "the course" of their relationship, App. 1908, ll. 3-7, counsel elicited no relevant information other than the fact that Rebecca had been dating petitioner during a separation from Barbare, but then continued the marriage with Barbare. App. 1910. The state's objection to testimony about possible orders of protection or the basis for Barbare's divorce from her were then sustained. App. 1912.

Counsel elicited the following testimony from Troy Barbare:

Q: Okay. Now, during this period of time, you and Brad had words a couple of times, didn't you?

A: The only time we had words was when she decided that she was wanting to go back to him, and he called me one night to tell me some stuff about my wife or whatever, and I told him he basically wasn't telling me nothing I didn't already know, because I had been, you know, with her for a period of about seven, eight years or so at the time.

Q: Did he ever apologize to you for that?

A: Yes, sir, about a week after me and her got back together, he called the house, Becky answered the phone and she handed the phone to me, and I got on the phone and he told me [he] was sorry for what he had said that night when he called me, and I apologized to him.

App. 1911, ll. 1-15.

Counsel then called Keith Merrill, Barbare's third husband, to testify. This testimony included no helpful information and instead included information that Merrill was only an "acquaintance" of Barbare until she ended her relationship with petitioner and petitioner leaving him threatening messages on his voicemail. App. 1915 - 1916. The threats were specific that if Barbare "didn't stay away from her" petitioner would "kill" him. App. 1916, ll. 21-22. This testimony also included information that Merrill had taken her out of town to eat prior to the

murders because “she didn’t get to do a lot, because she felt like she was being watched all the time, whenever she went to work.” App. 1917, ll. 14-19.

Counsel elicited the following testimony from Merrill during trial:

Q: Did there come a time when she ended her relationship she had and ya’ll started talking to one another?

A: When she ended her relationship I didn’t start talking to her until I received a phone call from Brad.

Q: Okay. Brad Sigmon called you? What did he say?

A: He was – he was pretty mad about, he found a card, a business card of mine where I had dropped off at the dry cleaners, which I had not only given to Becky but I’d given to a few other people that she worked with and from what I gathered when he called me and left voice messages, I finally—I didn’t know who he was. I called his—I called him back when he left the number. So after I had gotten five or six phone threats on my voice mail, I asked who he was, and he told me who he was, and at the time I thought it was just something where Becky had tried to make him jealous or whatever. And so I called Becky and asked her, you know, because I got the number to Milliken Cleaners, and I called and asked her why she was giving me a card to her boyfriend, are you trying to make him jealous or something, and she said, no, we split up, I moved back in with my parents, and he broke into the car, into her car, got in her purse and took out her wallet, which had a few other business cards.

App. 1915, l. 16 - 1916, l. 22. Counsel’s own witness generated this additional, highly aggravating evidence during the penalty phase of petitioner’s trial.

During closing arguments counsel focused on petitioner’s relationship with Rebecca Barbare as the provocation for her parents’ murders:

The relationship is what this case is all about. Rebecca Barbare ended her relationship with Brad Sigmon. Brad Sigmon did not want that relationship to end. He went nuts, bonkers, whacko, out

of his mind. He did the most horrible thing a person can do. He did it twice and killed two people.

Now, I spoke before about a trigger. And I told you I was looking at all this evidence, over and over again, trying to remember, trying to find something, and I found the trigger. I found it, I'm convinced of it. I want to show it [to] you because I think it's important. Now, you saw today, two of the people we put up, Mr. Barbare, who is Ms. Barbare's second husband, and Mr. Merrill, who is Ms. Barbare's husband. This is Brad's confession. Remember, I talked about it before. I said there's two and a half pages in here about him and Becky, him and Becky, him and Becky, him and Becky.

App. 2072, l. 14 - 2073, l. 3.

He saw her on the phone with another man. He knew that his relationship had started while she was married, on the phone with another man. That was the trigger. That was what snapped in his head. He saw that his relationship, that his relationship had begun when her relationship with Troy Barbare ended, and he saw a recurrent pattern in this relationship. His life is all about patterns.

App. 2074, ll. 1-8.

Counsel then referred to the testimony of Barbare's second and third husbands and petitioner's confession that included "two and half pages" about his relationship with her and detailed the information from that confession. App. 2072, l. 22 - 2074, l. 17. Counsel did not argue the provocation mitigation factor or Mr. Larke's mentioning a gun when petitioner entered his home. Thus, the jury, hearing the court's instruction to consider that "the defendant was provoked by the victim into committing the murder," App. 2108, ll. 18-19, would have understood this to mean that Ms. Barbare provided the provocation or, in the words of defense counsel, "the trigger." App. 2072, l. 18.

Counsel's conduct was deficient and prejudicial because blaming a victim in a capital case is "an offensive argument to the jury." State v. Hoffman, 768 So.2d 542, 577 (La. 2000).

The order of dismissal is inaccurate when it states:

The argument appears to imply that the statutory mitigating circumstance should never been used as it would "blame the victim," but does not tie the argument to the threatened use of a gun by the actual victim, but to Ms. Barbare—a factual based challenge. Thus, it appears he suggests only a factual based argument. However, Ms. Barbare was not "the victim" of the murder charge, so his logic fails . . . At any rate, the charge was consistent with a concerted effort to show that Applicant's actions were in response to Ms. Barbare's treatment of him, which were also consistent with Applicant's own confession and his statements to the jury.

App. 2891- 2892.

The order misconstrues the basis for the ineffectiveness claim. Petitioner's argument has been that Barbare was not the "victim" in the sense contemplated by the statute. Nevertheless, the evidence trial counsel presented and argued to the jury blamed her for the death of her parents. This argument was offensive, and did not justify the judge's charging that mitigator to the jury. Counsel, in short, did not understand the factual basis upon which the judge granted the request. The judge specifically noted the testimony that Mr. Larke was going to retrieve a gun as the basis for giving the charge to the jury. Instead, counsel mistakenly believed they were entitled to the charge based on their "trigger theory." Not only was this belief not grounded in the law—since Ms. Barbare was not a victim, and thus this "trigger theory" would not have justified the giving of the charge to the jury, but it resulted in the jury's express consideration of an offensive jury argument. The jury was charged that they should consider, as "mitigating," counsel's argument that Ms. Barbare bears responsibility for her parents' murders. The claim

then is not that “the statutory mitigating circumstance should never be used as it would “blame the victim”” but that, *in this case*, counsel simply did not understand the factual basis upon which it was given.

The order of dismissal is also inaccurate when it states that:

“[T]his Court finds counsel’s assessment of the evidence reasonable. Applicant has failed to show error. Moreover, this Court finds counsel’s strategy to develop an obsession “trigger” and “love sick” theory and to present a mitigation case was reasonable as it was complimentary and compatible with Applicant’s prior Tennessee confession and Applicant’s statement to the jury.”

App. 2889.

But in petitioner’s statement to the jury, he expressly rejected defense counsel’s “trigger” theory and firmly took responsibility for his actions:

“I don’t hate her. I hate what I did. My family raised me to be better than that. They raised me to do right. And it ain’t the drugs. It ain’t the alcohol. It ain’t her. It was me. . . .

And every relationship I’ve ever had, after—sometimes after five months, sometimes after a few years, I guess my personality is so dominating to them that—that it pushes them away. I’m not saying it’s her fault. It’s not her fault. It’s my fault. I didn’t know what was wrong with me.”

App. 2087, l. 23- 2088, l. 19.

Defense counsel’s “trigger theory” then did not comport with petitioner’s acceptance of responsibility, in addition to its being highly offensive. Counsel’s performance was deficient.

Counsel testified at the PCR hearing as to their theory of the case:

But it was our theory of the case that—that Becky basically tormented Brad as they were breaking up in a really cruel and malicious way, and that she created and exacerbated the situation

by her actions, by tormenting him, and by being nice and then ugly, and—and that she had put him in a situation where he was—he became a stalker basically.

App. 2678, ll. 2-12.

Becky was—well, Becky was mean as a snake, for lack of a better way to say it, to Brad. I don't have any reason to think ill of her in any other context, but their relationship was dramatic and hypersexual. And she used that to torment him during the breakup.

App. 2679, ll. 15-21.

At the PCR hearing, counsel testified that they expressly requested the mitigator based on this “trigger theory”:

We were—we were trying to show that it was . . . Becky's pattern of behavior to have a man, find another man. There would be some interim conflict, and then she'd leave one for the next one over and over again. And that was her pattern, and she'd done it three or four times, and we were trying to show that. And, in addition to that, her husband, I think he was her husband at the time, Mr. Barbare, said that, you know, Brad had mouthed off about threats to him, but—but he'd always kind of treated their son okay and always kind of treated him okay. And so we thought that the story was useful. And then, frankly, the last husband, the guy that she met at the dry cleaners when she was going out with Brad, I really—I thought it was useful for that same story. . . .

Q: So there again it was really fit into your strategy of the case because it reflected the character of Becky Barbare . . .

A: It showed that she was—you know, that she like to, you know, leave one man for another and kind of agitate the situation some, yeah, that would be—that would be the reason for it. . . .

Q: And he charged eight. But my point and the question is, if I'm being clear . . . but my question to you is you asked for, received and argued eight on the idea that Becky was provoking by her nature and conduct Brad Sigmon?

A: Yes.

App. 2698, l. 14- 2701, l. 19.

In Hoffman, *supra*, trial counsel in a capital case argued that the victim's naivety contributed to her own murder. During opening argument, counsel argued, repeatedly, that the victim was "not prepared to go into the lion's den every day." Id. at 576. This theme continued during the trial:

During cross-examination of the victim's mother, counsel tried to establish the victim lacked experience working in the inner city. This tactic ultimately backfired after the victim's mother testified her daughter worked in the Los Angeles area before moving to New Orleans. Next, defense counsel sought to emphasize the victim's unpreparedness by asking the victim's husband . . . about his wife's familiarity with the door and window locks on her car . . . Counsel also asked the victim's husband whether he "ever ask[ed] her to go through a sort of fire drill or practice session of what to do if certain things happen . . . Finally, counsel elicited testimony concerning his wife's habit of working late at night.

Id. at 576-77.

The court, in Hoffman found that "[n]otwithstanding the rudeness counsel displayed by urging such an offensive argument to the jury" the appellant there was not prejudiced by defense counsel tactics. The court noted that counsel "wisely" avoided blaming the victim during the penalty phase of the trial, and that counsel made an effort at damage control. Id. at 577. The court also noted that counsel appealed for mercy during the penalty phase. Id.

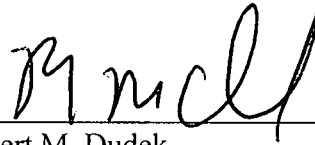
Here, the offensive argument was the centerpiece of defense counsel's mitigation strategy during the penalty phase of petitioner's capital trial. To that end, they requested the inapplicable statutory mitigator, and made an argument contrary to petitioner's own acceptance of responsibility. The "trigger theory" was an offensive argument to the jury because it blamed

Barbare's parents' murders on her volatile relationships, and her promiscuous sexual behavior, and counsel was ineffective for failing to realize its inflammatory character or its inapplicability to their client's case. Petitioner was denied his right to effective assistance of counsel in derogation of his rights under the Sixth and Fourteenth Amendments.

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be granted to allow full briefing of these issues.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

William H. Ehlies, II
Pro-bono
Attorney at Law

ATTORNEYS FOR PETITIONER

This 21st day of April, 2010.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Greenville County
J. C. Buddy Nicholson, Jr., Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

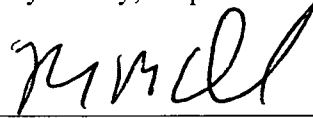
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Melody J. Brown and Anthony Mabry, Esquire this 21st day of April, 2010.



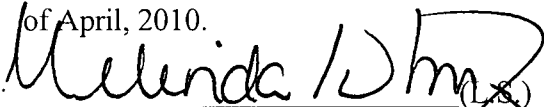
Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

William H. Ehlies, II
Attorney at Law

ATTORNEYS FOR PETITIONER

SWORN TO BEFORE ME this 21st day
of April, 2010.



Notary Public for South Carolina
My Commission Expires: October 30, 2018.

The Supreme Court of South Carolina

Brad Keith Sigmon, Petitioner,
v.
State of South Carolina, Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

Petitioner seeks a third extension of time to serve and file the Reply to Return to Petition for Writ of Certiorari in the above entitled matter. The request for an extension is granted and extended until August 9, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

July 28, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehlers, II, Esquire
Assistant Attorney General Melody J. Brown



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

1330 Lady Street, Suite 401
Post Office Box 11433
Columbia, South Carolina 29211-1433
Telephone: (803) 734-1343
Facsimile: (803) 734-1345
E-Mail: executive@sccid.sc.gov

T. Patton Adams, Esq., Executive Director
Hugh Ryan, Deputy Director and General Counsel
Lisa A. Graves, Assistant Director

July 26, 2010

RECEIVED

JUL 27 2010

S.C. SUPREME COURT

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Brad Keith Sigmon v. The State

Dear Mr. Shearouse:

In absence of Patton Adams, Executive Director of the South Carolina Commission on Indigent Defense and Hugh Ryan, Deputy Attorney and General Counsel for the South Carolina Commission on Indigent Defense and pursuant to instructions from Mr. Ryan, I ask that you accept this cover letter as an attempt to comply with the Court's order dated March 18, 2009, in regard to extension requests.

In the attached motion for an extension of time, Chief Appellate Defender, Robert M. Dudek seeks a final ten business day extension of time to file the reply to the state's return to petition for writ of certiorari. Based on that and his extremely heavy case load, as outlined in the motion, he was unable to complete the reply to the state's return.

Thank you for allowing me to bring this to your attention. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Lisa Campbell
Assistant Director
South Carolina Commission on
Indigent Defense

Original

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

JUL 26 2010

S.C. SUPREME COURT

Appeal from Greenville County
J.C. Buddy Nicholson, Jr. , Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
THE REPLY TO THE STATE'S RETURN FOR
PETITION FOR WRIT OF CERTIORARI
BASED ON EXTRAORDINARY CIRCUMSTANCES**

The undersigned counsel would respectfully request **a final ten business day extension, until August 9, 2010** in which to file the reply to the return to the petition for writ of certiorari in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The reply to the return to the petition for writ of certiorari in this murder case is due to be served and filed today having been extended by prior orders of this Court.

2. Counsel is working with co-counsel Charles Grose on the brief in State v. Jimmy Paul McKerley. This brief is presently forty-five pages long and is in the rewriting stage. Counsel is working on the death penalty case of State v. William Dickerson. The transcripts in

that case are 4,261 pages long. The brief will consist of at least three issues, one of them a novel issue. Counsel also is writing the brief in opposition in the United States Supreme Court from the state's certiorari petition from this Court in the case of State v. Kenneth Navy which is due August 2, 2010. In addition counsel must file the White v. State brief in the murder case of State v. Roger Bostick with this Court this week. Counsel also must file the petition for rehearing in the murder case of State v. Darian Robinson with the Court of Appeals tomorrow, Tuesday, July 27, 2010. Counsel filed a petition for rehearing in the case of State v. Brandon V. Johnson on Wednesday, July 14, 2010 in the Court of Appeals. Counsel and co-counsel filed a brief in the death penalty case of State v. Jerry Buck Inman on Monday, June 28, 2010, with this Court as well. Counsel filed a petition for writ of certiorari in the United States Supreme Court in the death penalty case of State v. Charles Christopher Williams on Wednesday, June 23, 2010. Counsel had an oral argument in the death penalty case of State v. Louis Winkler and in the murder case of State v. Damon Jones in this Court on Thursday, June 24, 2010. Counsel filed a merit brief in the murder case of State v. William J. Henry on Friday, June 18, 2010 with the Court of Appeals. On Wednesday, June 16, 2010, counsel filed a merit brief in the homicide by child abuse case of State v. Kathy Salley with the Court of Appeals. Counsel also assisted the client, Quincy Allen, with filing an application for post conviction relief in the Richland County Court of Common Pleas that same day, June 2, 2010. Counsel also has many administrative duties as Chief Appellate Defender in addition to his full and heavy caseload of death penalty and murder cases.

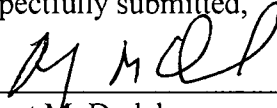
3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the

caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request **a final ten business day extension, until August 9, 2010**, within which to file the reply to the return to the petition for writ of certiorari in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the reply to the return to the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,

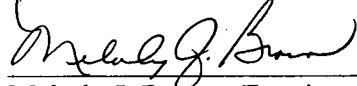


Robert M. Dudek
Chief Appellate Defender

T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

July 26, 2010

I DO NOT OBJECT:



Melody J. Brown, Esquire

The Supreme Court of South Carolina

Brad Keith Sigmon, Petitioner,
v.
State of South Carolina, Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

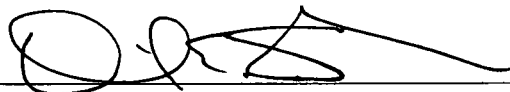
ORDER

Petitioner seeks a second extension of time to serve and file the Reply to Return to Petition for a Writ of Certiorari in the above entitled matter. The request for an extension is granted and extended until July 26, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



CLERK

Columbia, South Carolina

July 20, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehlires, II, Esquire
Assistant Attorney General Melody J. Brown

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 ORIGINAL

Appeal from Greenville County

J.C. Buddy Nicholson, Jr., Circuit Court Judge

RECEIVED

JUL 19 2010

BRAD KEITH SIGMON,

S.C. SUPREME COURT

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
THE REPLY TO THE STATE'S RETURN FOR
PETITION FOR WRIT OF CERTIORARI
BASED ON EXTRAORDINARY CIRCUMSTANCES**

The undersigned counsel would respectfully request a ten day extension in which to file the reply to the return to the petition for writ of certiorari in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following extraordinary circumstances:

1. The reply to the return to the petition for writ of certiorari in this murder case was due to be served and filed on Friday, July 16, 2010 having been extended by prior orders of this Court.

2. Counsel is working on the death penalty case of State v. William Dickerson. The transcripts are 4,261 pages long. Counsel is also working on the United States Supreme Court's Brief in Opposition in the case of State v. Kenneth Navy. Counsel filed a petition for

rehearing in the case of The State v. Brandon V. Johnson on Wednesday, July 14, 2010 in the Court of Appeals. Counsel and co-counsel filed a brief in the death penalty case of State v. Jerry Buck Inman on Monday, June 28, 2010, with this Court as well. Counsel filed a petition for writ of certiorari in the United States Supreme Court in the death penalty case of State v. Charles Christopher Williams on Wednesday, June 23, 2010. Counsel had an oral argument in the death penalty case of State v. Louis Winkler and in the murder case of State v. Damon Jones in this Court on Thursday, June 24, 2010. Counsel filed a merit brief in the murder case of State v. William J. Henry on Friday, June 18, 2010 with the Court of Appeals. On Wednesday, June 16, 2010, counsel filed a merit brief in the homicide by child abuse case of State v. Kathy Salley with the Court of Appeals. Counsel filed a merit brief in the murder case of State v. Harold Lee Jackson on June 10, 2010 with the Court of Appeals. Counsel had an oral argument before this Court in the case of State v. Amos Mattison on June 8, 2010. Counsel then argued the murder case of State v. Perry Strickland before this Court at 12:30 p.m. that same day. Counsel also filed a stay of execution with this Court in the death penalty case of State v. Quincy Allen on June 2, 2010. Counsel also assisted the client, Quincy Allen, with filing an application for post conviction relief in the Richland County Court of Common Pleas that same day, June 2, 2010. Counsel also has many administrative duties as Chief Appellate Defender in addition to his heavy caseload of death penalty and murder cases.

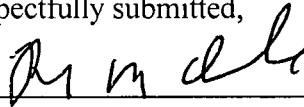
3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the

caseload will hopefully become more manageable in the near future, and less extensions will need to be requested.

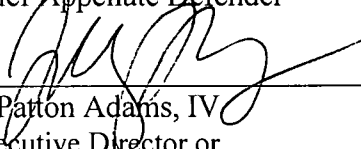
4. As indicated by her consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request a ten day extension within which to file the reply to the return to the petition for writ of certiorari in this case based upon the above extraordinary circumstances. Counsel respectfully requests that the time limits for filing the reply to the return to the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



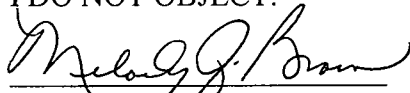
Robert M. Dudek
Chief Appellate Defender



T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

July 19, 2010

I DO NOT OBJECT:



Melody J. Brown, Esquire

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

The request for an extension to serve and file the Reply to Return to Petition for a Writ of Certiorari is granted and extended until July 16, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

July 7, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehlires, II, Esquire
Assistant Attorney General Melody J. Brown



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

July 6, 2010

RECEIVED

JUL 06 2010

S.C. SUPREME COURT

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

Re: Brad Keith Sigmon v. The State (capital case)

Dear Mr. Shearouse:

The reply to the return to the petition for writ of certiorari in the above referenced case is due to be served and filed today. However, because of my current caseload, I have been unable to complete this reply for service. Therefore, I am requesting a ten day extension in which to file and serve the reply.

By copy of this letter, I am informing Melody J. Brown, Esquire, of the Attorney General's Office, of my request.

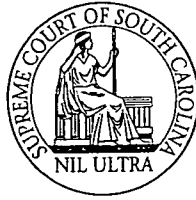
Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/mwl

cc: Melody J. Brown, Esquire
Elizabeth A. Franklin-Best, Esquire
William H. Ehlires, II, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

June 24, 2010

Assistant Attorney General Melody J. Brown
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Re: Sigmon, Brad Keith v. State

Dear Counsel:

The following Order has been endorsed on your Motion to Exceed Twenty-Five Page Limit for a Return to Petition for Writ of Certiorari in the above entitled case on appeal.

"Granted.

s/ Jean H. Toal C.J.
For the Court

June 24, 2010."

By copy of this letter we are advising opposing counsel any reply to the return should be served and filed within ten (10) days of the date of this letter.

Very truly yours,

CLERK

DES/dmh

The State v. Brad Keith Sigmon

Page Two

June 24, 2010

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



HENRY McMASTER
ATTORNEY GENERAL

June 21, 2010

RECEIVED

JUN 23 2010

S.C. SUPREME COURT

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 six (6) of the *Return to Petition for Writ of Certiorari*, dated June 21, 2010, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

~~RECEIVED~~
~~JUN 24 2010~~
~~S.C. SUPREME COURT~~

Sincerely,

Melody J. Brown
Assistant Attorney General

Enclosures

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

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO GREENVILLE COUNTY
Court of Common Pleas
J.C. "Buddy" Nicholson, Jr., Circuit Court Judge

RECEIVED

JUN 21 2010

S.C. SUPREME COURT

Brad Keith Sigmon,

Petitioner,

vs.

State of South Carolina,

Respondent.

MOTION TO EXCEED TWENTY-FIVE PAGE LIMIT FOR A
RETURN TO PETITION FOR WRIT OF CERTIORARI

Undersigned counsel for Respondent respectfully moves for an order allowing her to file a return to the petition for writ of certiorari in excess of the twenty-five (25) page limit imposed by Rule 243(g), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The return to the petition for writ of certiorari in this capital post-conviction relief action is due to be served and filed in this Court, today, June 21, 2010.
2. On April 15, 2010, counsel for Petitioner petitioned to exceed the twenty-five (25) page limit for his petition for writ of certiorari. On April 22, 2010, this Court granted Petitioner's petition to exceed the page limit for petitions. The filed petition is forty-five (45) pages. Petitioner raises six (6) issues.

3. Counsel for Respondent has completed the return to the petition. To adequately address the procedural bars and the substance of Petitioner's claims, Respondent has prepared a forty (40) page return. Respondent has diligently attempted to trim the return but finds it necessary to request the Court's permission to exceed the standard page limit.

4. Undersigned counsel for Respondent has discussed this motion with opposing counsel, Robert M. Dudek, Chief Appellate Defender. Mr. Dudek informs counsel that he has no objection to this motion.

5. Respondent will serve and conditionally submit the return today, pending resolution of this motion.

WHEREFORE, undersigned counsel would respectfully request an order from this Court granting Respondent permission to exceed the twenty-five page limit of Rule 227(e)(3), SCACR, and accept the conditionally filed return.

HENRY D. MCMASTER
Attorney General

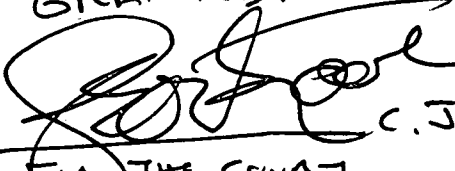
JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

By: 

MELODY J. BROWN
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-6305
ATTORNEYS FOR RESPONDENT

GRANTED.
 C.J.
FOR THE COURT
June 24, 2010

June 21, 2010
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

Brad Keith Sigmon,	_____	Petitioner,
	vs.	
State of South Carolina,	_____	Respondent.

PROOF OF SERVICE

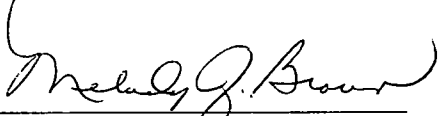
I, Melody J. Brown, certify that I have served the State's *Motion to Exceed Page Limit* on petitioner by depositing a copy of same in the United States mail, postage prepaid, addressed to his attorneys of record :

Robert M. Dudek, Chief Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

Elizabeth A. Franklin-Best, Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

William H. Ehlies, II, Esq.
Building A, Suite 201
310 Mills Avenue
Greenville, SC 29605

This 21st day of June, 2010.



MELODY J. BROWN
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727
ATTORNEY FOR RESPONDENT



HENRY McMASTER
ATTORNEY GENERAL

June 21, 2010

RECEIVED

JUN 21 2010

S.C. SUPREME COURT

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 six (6) of the *Motion to Exceed Page Limit*, dated June 21, 2010, along with proof of service, in the above-referenced case.

Thank you for your cooperation in this matter.

Sincerely,

Melody J. Brown
Assistant Attorney General

Enclosures

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



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

June 21, 2010

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

RECEIVED

JUN 21 2010

S.C. SUPREME COURT

Re: Brad Keith Sigmon v. The State

Dear Mr. Shearouse:

The appendix and petition for writ of certiorari in the above-referenced case was served and filed with this Court on April 21, 2010. However, the respondent's trial brief and the memorandum of law on the availability of equity relief in post-conviction relief proceedings were requested to be included in the appendix by the respondent. Therefore, counsel is requesting that this Court accept this supplemental appendix containing these documents.

As indicated by signature below, Melody J. Brown, of the Attorney General's Office, consents to this request.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/mwl

I consent:

Melody J. Brown, Esquire

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Nicholson, Jr.

Greenville County

Trial Court Case No. 2006-CP-23-06547

ORDER

The request for an extension to serve and file the Return to Petition for a Writ of Certiorari is granted and extended until June 21, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

May 24, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
William H. Ehlires, II, Esquire
Assistant Attorney General Melody J. Brown



HENRY McMASTER
ATTORNEY GENERAL

May 21, 2010

RECEIVED

MAY 21 2010

S.C. SUPREME COURT

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:

The Return to Petition for Writ of Certiorari in the above-entitled action is due to be filed and served today, May 21, 2010. Due to my heavy caseload, I will not be able to complete the Return in a timely fashion. For this reason, I respectfully request an extension of thirty (30) days within which to file the Return to Petition for Writ of Certiorari.

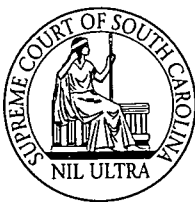
By copy of this letter I am informing opposing counsel of this request. Thank you for your consideration.

Sincerely,

Melody J. Brown
Assistant Attorney General

MJB/epj

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



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 22, 2010

Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
South Carolina Commission on Indigent Defense
P O Box 11589
Columbia, SC 29211

Re: Sigmon, Brad Keith v. State

Dear Counsel:

The following Order has been endorsed on your Petition to Exceed Twenty-Five Page Limit for a Petition for a Writ of Certiorari in the above entitled case on appeal.

“Granted.

s/ Jean H. Toal C.J.
For the Court

April 22, 2010.”

By copy of this letter we are advising opposing counsel of the action of the Court in this matter.

Very truly yours,


CLERK

DES/dmh

Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
Page Two
April 22, 2010

cc: Assistant Attorney General Melody J. Brown

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

J. C. Buddy Nicholson, Jr., Circuit Court Judge

 ORIGINAL

RECEIVED

APR 15 2010

S.C. SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION TO EXCEED TWENTY-FIVE
PAGE LIMIT FOR A PETITION FOR
A WRIT OF CERTIORARI

The undersigned counsel would respectfully request an order allowing him to file a petition for writ of certiorari in this case in excess of the twenty-five page limit imposed by Rule 227(e)(3), SCACR. In support of this motion, counsel would respectfully show the Court:

1. The petition for a writ of certiorari and appendix in this case are due to be served and filed in this Court on Wednesday, April 21, 2010. The Appendix is in excess of two thousand eight hundred pages, and numerous meritorious issues were raised during post-conviction hearing that are being raised in the petition for writ of certiorari.

2. Counsel does not think that justice to the highly unusual facts of this death penalty case can be done in the twenty-five pages authorized by Rule 227(e) (3), SCACR.

3. Consequently, counsel respectfully moves that this Court allow him to file a petition for a writ of certiorari in excess of twenty-five pages. Counsel will make every effort for brevity, and hopefully the petition will be about forty pages in the final analysis.

4. Melody J. Brown, of the Office of the Attorney General, does not oppose this motion

WHEREFORE, undersigned counsel would respectfully request an order from this Court granting him the right to exceed the twenty-five page limit of Rule 227(e)(3), SCACR.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

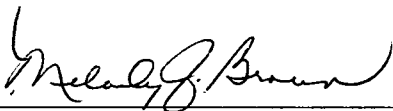
Elizabeth A. Franklin-Best
Appellate Defender

William H. Ehlires, II
Attorney at Law

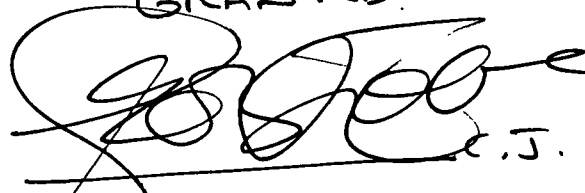
ATTORNEYS FOR PETITIONER

April 15, 2010

I DO NOT OPPOSE THIS REQUEST:



Melody J. Brown, Esquire

GRANTED.

FOR THE COURT
April 22, 2010

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

v.

State of South Carolina,

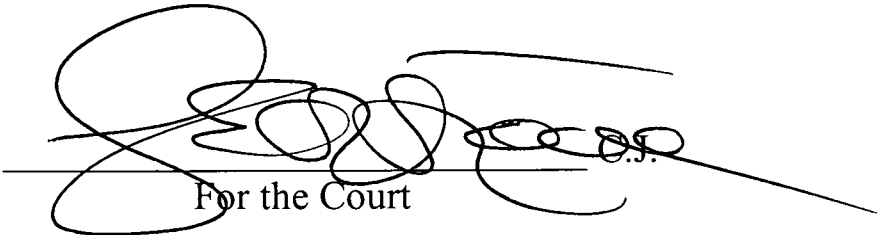
Respondent.

The Honorable J. C. Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

Petitioner seeks a fifth extension of time for an additional ten (10) working days to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until April 21, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.


For the Court

Columbia, South Carolina

April 8, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
Assistant Deputy Attorney General Donald J. Zelenka
Assistant Attorney General Melody J. Brown

Original

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Greenville County

J.C. Buddy Nicholson, Jr. , Circuit Court Judge

RECEIVED

APR 07 2010

S.C. SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX BASED ON
EXTRAORDINARY CIRCUMSTANCES**

The undersigned counsel would respectfully request a **final ten working day** extension until April 21, 2010, in which to file the petition for writ of certiorari and appendix in the above-referenced **death penalty** case. Counsel would respectfully show the Court the following circumstances:

1. The petition for writ of certiorari and appendix in this case is due to be served and filed today in this death penalty case, having been extended by prior orders of this Court.

2. Counsel is preparing for an oral argument before this Court tomorrow in State v. Marlon Rivera. Counsel filed a brief in the murder trial case of State v. Terrell McCoy with the

Court of Appeals on Friday, April 2, 2010. Counsel also filed a brief with the Court of Appeals in the murder trial case of State v. Antonio Moultrie on Thursday, April 1, 2010. In addition, counsel filed a brief in the murder trial case of State v. William Allen Owens with the Court of Appeals on Monday, March 29, 2010. Counsel Friday, March 26, 2010, filed a motion for a stay of execution in this Court in the case of State v. Charles Christopher Williams. In addition, counsel filed a merit brief in the murder trial case of State v. Jose Herrera on Friday, March 19, 2010 with the Court of Appeals. Counsel also filed a brief in the murder trial case of State v. Shawn Williams on March 18, 2010 with the Court of Appeals. Counsel on Wednesday, March 17, 2010 argued the case of State v. Ricky Brannon before this Court. Counsel on Tuesday, March 16, 2010 filed a petition for writ of certiorari in the United States Supreme Court in the death penalty case of Quincy Jovan Allen v. State of South Carolina. Counsel on Monday, March 15, 2010 filed a petition for writ of certiorari in the United States Supreme Court in the case of Christopher Lee Pride v. State of South Carolina. In addition, counsel filed a three issue brief in the murder case of the State v. Aurelio Vincent Ottey on Friday, March 12, 2010 with the Court of Appeals and the transcript in that case was 1069 pages long. Counsel also filed a petition for writ of certiorari Wednesday, March 10, 2010 in the case of State v. Miama Kromah with this Court. Counsel further filed a brief in the murder case of State v. Kassem Stephens Tuesday, March 9, 2010 with the Court of Appeals. In addition, counsel has many administrative duties as Chief Appellate Defender, including death penalty case oversight.

3. Co-Counsel Elizabeth A. Franklin-Best filed a petition in the case of Jahzeel Webster v. The State with this Court on Monday, April 5, 2010. On March 8, 2010 counsel filed the initial brief of appellant and designation of matter on State v. Mitchell Douglas Watts. On March 8, 2010, counsel filed the petition for writ of certiorari and appendix in Donnie Baker

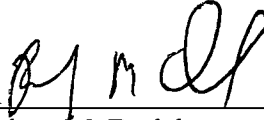
v. State. On March 15, 2010, counsel filed the brief of petitioner in Robert Anthony James v. State and the petition for writ of certiorari and appendix on John Stewart v. State. On March 16, 2010, counsel filed the petition for writ of certiorari and appendix in Donnie Baker v. State. On March 26, 2010, counsel filed the initial brief of appellant in State v. Michael Jackson and the petitions for writ of certiorari and appendices in Jalal Beyah v. State and James Reynolds v. State. On March 31, 2010 counsel filed a petition for rehearing in State v. George King. Co-counsel has an extremely heavy caseload and is also attempting to do the cases that have been extended first in order to lessen the number of extensions needed in the future. In addition, Hank Ehliens, of Greenville remains on the appeal as pro-bono third chair counsel

4. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become manageable in the near future.

5. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

WHEREFORE, the undersigned counsel would respectfully request **final ten working day** extension until April 21, 2010, in which to file the petition for writ of certiorari and appendix in this **death penalty** case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

Elizabeth A. Franklin-Best
Appellate Defender

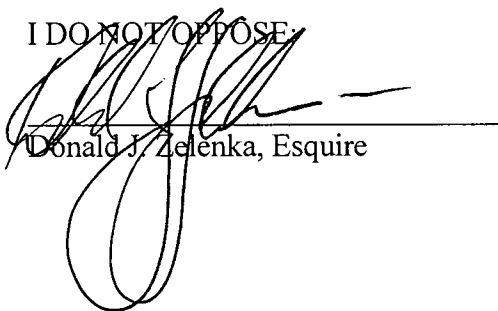
William Ehlires, II (Pro-bono)
Attorney at Law



T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

April 6, 2010

I DO NOT OPPOSE:



Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Nicholson, Jr.

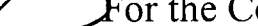
Greenville County

Trial Court Case No. 2006-CP-23-06547

ORDER

Petitioner seeks a fourth extension of time to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter, and asserts that extraordinary circumstances justify this extension. The opposing party consents to the extension. The request for an extension is granted until April 7, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.



For the Court C.J.

Columbia, South Carolina

March 9, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County

J.C. Buddy Nicholson, Jr. , Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX BASED ON
EXTRAORDINARY CIRCUMSTANCES**

The undersigned counsel would respectfully request what counsel will make every effort to be a **final thirty day** extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. However, counsel respectfully ask the Court **not** to make this a no further extension order given our extraordinary workload. In support of this motion, counsel would respectfully show the Court the following circumstances:

1. Petition for writ of certiorari and appendix in this case is due to be served and filed today, in this murder case, having been extended by prior orders of this Court.
2. Counsel is filing a merit brief today, March 8, 2010 in the case of State v. Brain Amburgey. Counsel also has a brief due tomorrow in State v. Kassem Stephens.

RECEIVED
MAR - 8 2010
S.C. SUPREME COURT

In addition, counsel has a **United States certiorari petition due in the State v. Christopher Pride on March 15, 2010** and a **United States certiorari petition due in the State v. Quincy Allen on March 16, 2010**. Counsel also has an oral argument in the case of **State v. Ricky Brannon with the Supreme Court Wednesday, March 17, 2010**. Counsel also has a death penalty remand competency hearing in Jeffrey Motts in Greenville before Judge Garrison Hill on March 23, 2010. Counsel filed the brief in the case State v. Ranger Alvizures on Friday, March 5, 2010 with the Court of Appeals. Counsel filed the brief of petitioner in the case of State v. Damon Jones on March 3, 2010 with this Court. Counsel also filed the brief in the murder case of State v. Jamal Gathers with the Court of Appeals on Friday, February 26, 2010 and the transcript was 643 pages long. Counsel filed the initial three issue merit brief in the murder case of State v. Sammy Scott with this Court on Monday, February 22, 2010. The transcript was 570 pages long. Counsel also gave a presentation for the Best Practices CLE seminar in Charleston on Friday, February 19, 2010. Counsel filed the petition for rehearing with this Court in the death penalty case of State v. Charles Christopher Williams Tuesday, February 23, 2010. Counsel filed the reply brief Tuesday, February 16, 2010, in the death penalty case of State v. Louis Winkler with this Court. Counsel filed the initial brief in the murder case of State v. Derrick McDonald Friday, February 12, 2010 with this Court and the transcript was 1771 pages long. Counsel also filed the initial brief in the murder case of State v. Christopher Heller Thursday, February 11, 2010 with this Court and the transcript in this case was 1021 pages long. Counsel filed the brief of petitioner in the murder case of State v. Amos Lamont Mattison Wednesday, February 10, 2010 in this Court. Counsel had an oral argument in the murder case of State v. Victor Hernandez before the Court of Appeals on

Tuesday, February 9, 2010. In addition, counsel has many administrative duties as Chief Appellate Defender, including death penalty oversight.

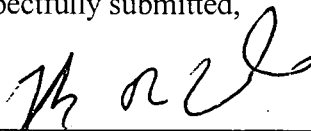
3. Co-Counsel Elizabeth A. Franklin-Best filed a petition in the case of Terrance Bradshaw v. The State with this Court on Wednesday, March 3, 2010. On February 2, 2010, co-counsel filed the petitions for writ of certiorari and appendices Angelia T. Hensley v. State and Crawford Williams V. State. On February 4, 2010, co-counsel filed the initial brief of appellant and designation of matter on State v. Terry Arnail Dunovant and State v. Vincent Pitts. Co-Counsel also filed the petition for writ of certiorari and appendix on Betran D. Waring v. State. On February 8, 2010 co-counsel filed the Reply Brief on State v. Willie Chambers, the initial brief of appellant and designation of matter on State v. Willie Long and the petition for writ of certiorari and appendix on Julian John Carter v. State. On February 17, 2010, co-counsel filed the initial brief of appellant and designation of matter in State v. Lindy Jones.

4. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become manageable in the near future.

5. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

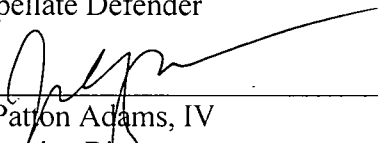
WHEREFORE, the undersigned counsel would respectfully request a **final thirty day** extension in which to file the petition for writ of certiorari and appendix in this case. Counsel for petitioner would respectfully request that this Court consider not making this “a no further extension.” Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

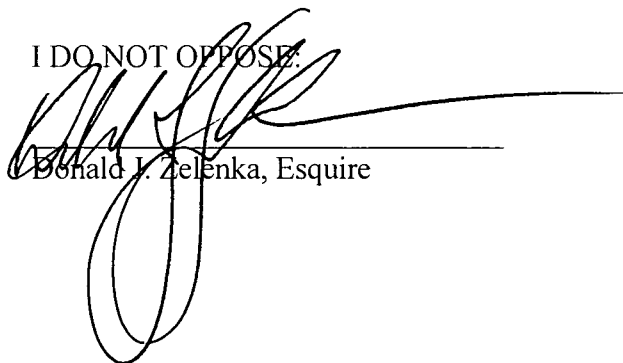
Elizabeth A. Franklin-Best
Appellate Defender



T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

March 8, 2010

I DO NOT OPPOSE.



Donald J. Zelenka, Esquire

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

Petitioner seeks a third extension of time to serve and file the Petition for a Writ of Certiorari and Appendix in the above entitled matter. The request for an extension is granted and extended until March 8, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must show the existence of extraordinary circumstances, state what actions are being taken to insure that no further extension will be required, and be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

February 8, 2010

cc: Chief Appellate Defender Robert M. Dudek
Appellate Defender Elizabeth A. Franklin-Best
Assistant Attorney General Melody J. Brown

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Appeal from Greenville County
J.C. Buddy Nicholson, Jr. , Circuit Court Judge

FEB - 5 2010

S.C. SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

THE STATE,

RESPONDENT

PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following circumstances:

1. Petition for writ of certiorari and appendix in this case is due to be served and filed today, in this murder case, having been extended by prior orders of this Court.
2. Counsel is working on the brief in the case of State v. Derrick McDonald which is in excess of 1700 pages. This brief will be due on or before Friday, February 12, 2010. Counsel must prepare and argue the murder case of State v. Hernandez before the Court of Appeals on Tuesday, February 9, 2010. Counsel also must file the brief of petitioner in State v. Otis Mattison on Wednesday, February 10, 2010 in this Court and the brief in the murder case State v. Christopher Heller is due Thursday, February 11, 2010 with

the Court of Appeals and the transcript in that case is over 1,000 pages. Counsel also must file a reply brief in the death penalty case of State v. Winkler on Tuesday, February 16, 2010. Counsel had an oral argument in the Court of Appeals in the murder case of the State v. John Brayboy on Tuesday, February 2, 2010. Counsel had to be on standby to testify in the post-conviction murder case of The State v. Thaddeus Curry on Friday, January 29, 2010. Counsel filed the petition for writ of certiorari in this Court from the Court of Appeals in the kidnapping and criminal sexual conduct in the first degree case of The State v. Randy Thomas on Thursday, January 28, 2010. Counsel conducted separate meetings for the attorneys and support staff on Thursday, January 27, 2010. Counsel also had a Public Defender Association Board meeting that same day. Counsel also filed the brief in the murder case The State v. Terrance Johnson with the Court of Appeals on Tuesday, January 26, 2010. Counsel is also working on his presentation for the Best Practices CLE seminar in Charleston on February 19, 2010. Counsel filed a petition for writ of certiorari to the Court of Appeals in the case of The State v. Kevin Odem with this Court on Friday, January 22, 2010. Counsel had an oral argument in the murder case State v. Hercules Mitchell on January 20, 2010 in the Court of Appeals. Counsel filed the brief in State v. Angela Baggott with the Court of Appeals on Tuesday, January 19, 2010. In addition, counsel filed the brief of appellant in the case of State v. Ladrequez Polk on Friday, January 15, 2010 with the Court of Appeals. Counsel filed the petition for rehearing in the case State v. Florence Evans on Thursday, January 14, 2010 with the Court of Appeals. Counsel is also working on the death penalty competency to be executed remand case of State v. Jeffrey Motts, and he has been consulting with his expert. In addition, counsel filed a return to the petition for writ of certiorari in the murder case of State v. Charles Q. Jackson in this Court on Wednesday, January 13, 2010. Counsel also had a deposition in the death penalty case State v. James Nathaniel Bryant, III on Thursday, January 14, 2010. Counsel filed the brief of respondent in the murder case of State v. Marlon Rivera with this Court on Friday, January 8,

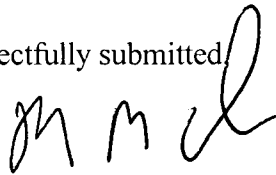
2010. Counsel filed the initial brief of appellant in the murder case of State v. Anthony Quinton Scott on Wednesday, January 6, 2010 with the Court of Appeals, as well as the brief of respondent in the case of State v. Ricky Brannon in the Court of Appeals that same day. In addition, counsel has many administrative duties as Chief Appellate Defender including death penalty oversight in addition to his very heavy caseload.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become manageable in the near future.

4. As indicated by his consent below, counsel for the state graciously consents to or does not oppose this request.

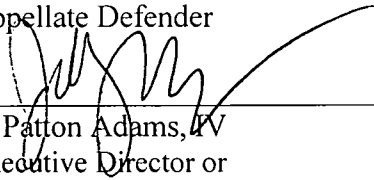
WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case. Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted



Robert M. Dudek
Chief Appellate Defender

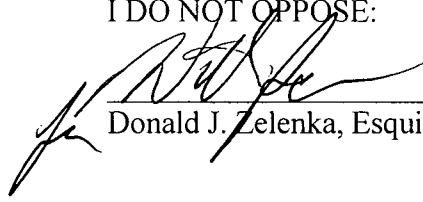
Elizabeth A. Franklin-Best
Appellate Defender



T. Patton Adams, IV
Executive Director or
J. Hugh Ryan, III
General Counsel

February 5, 2010

I DO NOT OPPOSE:



Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

January 25, 2010

The Honorable Daniel E. Shearouse
Clerk of Court
The South Carolina Supreme Court
P.O. Box 11330
Columbia, SC 29211

Re: Brad Sigmon v. The State (Capital Case)

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix is due on the above-referenced death penalty case on Friday, February 5, 2010. Please add Elizabeth A. Franklin-Best, Appellate Defender as co-counsel to this case as her name has been inadvertently left off of the extension requests that have been filed.

Please do not hesitate to contact me if you have any questions or need any additional information.

Sincerely,

Robert M. Dudek
Chief Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire

RECEIVED
JAN 25 2010
S.C. SUPREME COURT

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

For good cause shown, the request for a second extension of time to serve and file the Petition for a Writ of Certiorari and Appendix is granted and extended until February 5, 2010. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause and must be signed by the appropriate attorneys.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLERK

Columbia, South Carolina

January 7, 2010

cc: Acting Chief Appellate Defender Robert M. Dudek
Assistant Attorney General Melody J. Brown

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
J.C. Buddy Nicholson, Jr. , Circuit Court Judge

ORIGINAL

RECEIVED

JAN - 6 2010

BRAD KEITH SIGMON,

S.C. SUPREME COURT

PETITIONER,

V.

THE STATE,

RESPONDENT

**PETITION FOR EXTENSION TO FILE
PETITION FOR WRIT OF CERTIORARI
AND APPENDIX**

The undersigned counsel would respectfully request a thirty day extension in which to file the petition for writ of certiorari and appendix in the above-referenced case. In support of this motion, counsel would respectfully show the Court the following circumstances:

1. Petition for writ of certiorari and appendix in this case is due to be served and filed today, in this murder case, having been extended by one prior order of this Court.
2. Counsel filed a petition for rehearing in the murder juvenile case of In the interest of: Walter M., a Minor Under the Age of Seventeen on Wednesday, December 30, 2009 in the Court of Appeals. Counsel is filing the brief in the murder case of State v. Anthony Quinton Scott today, January 6, 2010 with the Court on Appeals as well as the brief of respondent in the case of State v. Ricky Brannon which is also due in this Court, today, January

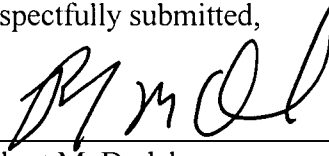
6, 2010. Counsel filed a petition for a stay of execution in the death penalty case of State v. Quincy Allen on Thursday, December 17, 2009 and took him the paperwork necessary for him to sign at the Super Maximum Unit Tuesday, December 22, 2009, so that he can have his petition for writ of certiorari filed in the United States Supreme Court. Counsel filed the petition for writ of certiorari on the case of State v. Lemond Holland on Friday, December 18, 2009 in this Court. Counsel filed a merit brief in the murder case of State v. Darrell Nathaniel Mitchell on Friday, December 11, 2009 with the Court of Appeals. Counsel filed a merit brief in the murder case of State v. Andre Tayson Boone in which the transcript is in excess of one thousand six hundred forty-five pages on Tuesday, December 8, 2009, with the Court of Appeals. Counsel filed a petition for rehearing in the murder case of State v. Gene Tony Cooper, Jr. on Friday, December 4, 2009 with the Court of Appeals. Counsel also filed a motion for the appointment of outside counsel in the death penalty case of State v. Abdiyyah Alkebulanyahh, a/k/a Tyree Roberts with this Court on Wednesday, December 2, 2009. Counsel argued the right to counsel case of State v. Christopher Lee Pride on Tuesday, December 1, 2009, in this Court. In addition, counsel has many administrative duties as Acting Chief Appellate Defender, and also has an extremely heavy caseload of mostly murder and death penalty cases at this time.

3. This request is made in good faith, and not for purposes of delay. Counsel intends to continue to work on the cases with more than three extensions first so that the caseload will hopefully become manageable in the near future, and less extensions need to be requested.

WHEREFORE, the undersigned counsel would respectfully request a thirty-day extension in which to file the petition for writ of certiorari and appendix in this case.

Counsel requests that the time limits for filing the petition for writ of certiorari be held in abeyance pending a ruling on this motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County
J.C. Buddy Nicholson, Jr. , Circuit Court Judge

BRAD KEITH SIGMON,

PETITIONER,

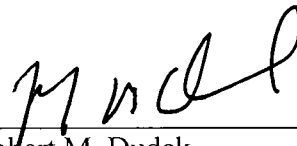
V.

THE STATE,

RESPONDENT

CERTIFICATE OF SERVICE

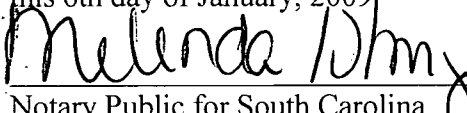
The undersigned attorney hereby certifies the petition in which to file the petition for writ of certiorari and appendix in the above referenced case has been served upon Donald J. Zelenka, Esquire, Assistant Deputy Attorney General, Office of the Attorney General, Rembert Dennis Building, 1000 Assembly Street, Rm. 519, Columbia, SC 29201, this 6th day of January, 2009.



Robert M. Dudek
Acting Chief Appellate Defender

ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 6th day of January, 2009.



(L.S.)

Notary Public for South Carolina

My Commission Expires: October 30, 2018 .

The Supreme Court of South Carolina

Brad Keith Sigmon,

Petitioner,

V.

State of South Carolina,

Respondent.

The Honorable J. C. Buddy Nicholson, Jr.
Greenville County
Trial Court Case No. 2006-CP-23-06547

ORDER

For good cause having been shown, the time for serving and filing the
Petition for Writ of Certiorari and Appendix in the above entitled matter is
hereby extended until January 6, 2010.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY

CLÈRK

Columbia, South Carolina

December 8, 2009

cc: Acting Chief Appellate Defender Robert M. Dudek
Assistant Attorney General Melody J. Brown



ORIGINAL

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332
Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1397

Robert M. Dudek, Acting Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender
Joseph L. Savitz, III, Senior Appellate Defender

December 7, 2009

RECEIVED

DEC - 7 2009

S.C. SUPREME COURT

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

Re: Brad Keith Sigmon (capital case)

Dear Mr. Shearouse:

The petition for writ of certiorari and appendix in the above referenced case are due to be served and filed today. However, because of my current caseload, I have been unable to complete this petition for service. Therefore, I am requesting a thirty day extension in which to file and serve the petition.

By copy of this letter, I am informing Donald J. Zelenka, Esquire, of the Attorney General's Office, of my request.

Thank you for your assistance in this matter. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Robert M. Dudek
Acting Chief Appellate Defender

RMD/mwl

cc: Donald J. Zelenka, Esquire



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

ORIGINAL

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

RECEIVED

OCT 07 2009

S.C. SUPREME COURT

October 7, 2009

The Honorable Daniel E. Shearouse
Clerk, S.C. Supreme Court
Post Office Box 11330
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Brad Keith Sigmon v. State of South Carolina

10/6/2009

I would appreciate you beginning our time limits from the above dates, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Melinda W. Long
Legal Assistant



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1343
Facsimile: (803) 734-1397

Joseph L. Savitz, III, Chief Attorney
Wanda H. Carter, Deputy Chief Attorney

September 1, 2009

Ms. Stacy L. Sheppard
Circuit Court Reporter
100 Lunsford Lane
Lexington, SC 29072

Dear Ms. Sheppard:

RECEIVED
SEP 01 2009
S.C. SUPREME COURT

Our office has been requested to perfect the appeal arising out of:

Brad Keith Sigmon

Indictment #:

County: Berkeley

Date of Trial: November 8, 2006

Presiding Judge: J. C. Buddy Nicholson, Jr.

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

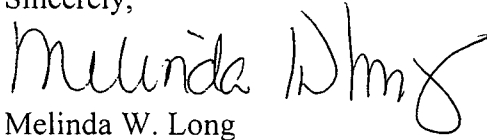
If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Stacy L. Sheppard
September 1, 2009
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Melinda W. Long". The signature is fluid and cursive, with a large, stylized "M" and "L".

Melinda W. Long
Legal Assistant

xc: S.C. Supreme Court
Attorney General's Office

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

2009 AUG 17 P 2:49

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

J. C. Nicholson, Jr., Circuit Court Judge

CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMER

Case No. 06-CP-23-6547

RECEIVED

AUG 19 2009

S.C. SUPREME COURT

Brad Keith Sigmon,

Appellant,

-vs-

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Brad Keith Sigmon, a death sentenced inmate, appeals the order and judgment of the circuit court dismissing his application for post-conviction relief with prejudice. The appellant received written notice of entry of this order and judgment on July 22, 2009.

August 17, 2009.



WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
hank@ehlieslaw.com

Other Counsel of Record:

Melody Jane Brown, Esq.
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

2009 AUG 17 P 2:49

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMER

J. C. Nicholson, Jr., Circuit Court Judge

RECEIVED

Case No. 06-CP-23-6547

AUG 19 2009

S.C. SUPREME COURT

Brad Keith Sigmon,

Appellant,

-vs-

State of South Carolina,

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Melody J. Brown, Assistant Attorney General by depositing a copy of it in the United States Mail, postage pre-paid, on August 17, 2009 addressed to Post Office Box 11549, Columbia, South Carolina 29211, and by fax transmittal to 803-734-4035 on August 17, 2009 and by e-mail to agmbrown@ag.state.sc.us on August 17, 2009.



WILLIAM H. EHLIES, II
ATTORNEY FOR THE APPELLANT
Building A, Suite 201
310 Mills Avenue
Greenville, South Carolina 29605
864-232-3503
hank@ehlieslaw.com

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

JUDGMENT IN A CIVIL CASE
CASE NO: 2006CP2306547

Brad Keith Sigmon vs. South Carolina State Of

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.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other:
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy:
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED:

☐ See attached order;

☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 20th day of July, 2009, and a copy mailed first class this 20th day of July, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Eleanor Duffy Cleary Office of Appellate
Defense 1122 Lady St., Ste. 940 Columbia, SC
29201

Teresa L. Norris Center For Capital Litigation
P.O. Box 11311 Columbia, SC 29211

✓ William H. Ehli II 310 Mills Ave., Ste. 201
Greenville, SC 29605

Melody Brown
Assistant Attorney General
P O Box 11549
Columbia SC 29211-1549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS

BRAD KEITH SIGMON, #6008,)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)

Respondent.)

C/A No.: 2006-CP-23-6547
(CAPITAL PCR)

ORDER OF DISMISSAL WITH PREJUDICE

FILED
CLERK
COURT
JUL 20 12:03

This matter is before this Court by way of an application for post-conviction relief ("PCR") filed on October 13, 2006, by death-sentenced inmate Brad Keith Sigmon ("Applicant"), and the amended PCR application filed June 4, 2008. The allegations have been fully briefed, and evidence and argument presented at a motions and evidentiary hearing held August 4, 2008. For all the reasons set forth in the instant order, this Court, after careful consideration of all the evidence and argument, denies relief, with prejudice, and dismisses the application:

I.

STATEMENT OF FACTS

On April 27, 2001, at approximately 8:00 a.m., Applicant 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. Applicant then saw Mr. Larke's fifty-nine (59) year old wife enter the kitchen. Applicant 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

continued beating Mrs. Larke. (R. p. 1577, line 14 - p. 1578, line 17).¹ 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." (R. p. 1716, 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. (R. p. 1709, line 3 - p. 1731, line 2).

Applicant knew the Larkes through their daughter, Becky Barbare, with whom Applicant had previously had a relationship. At the time of the murder, Ms. Barbare had been attempting to oust Applicant from her home and was staying with her parents, who lived next door to her. (R. p. 1430, line 21 - p. 1432, line 1; p. 1569, line 5 - p. 1572, line 9; p. 1681, line 6 - p. 1685, line 5). According to Applicant'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, Applicant 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. (R. p. 1577, line 6 - p. 1581, line 11). Several witnesses actually saw Ms. Barbare's escape attempt and the shooting. The witnesses testified that Ms. Barbare leaped from the car while it was moving. After she tumbled out, Applicant turned the car around and went back to her. (R. p. 1327, line 5 - p. 1329, line 19; p. 1334, line 17 - p. 1335, line 16; p. 1357, lines 20-25; p. 1666, line 4 - p. 1667, line 23). Applicant stopped the car, exited, walked up to Ms. Barbare, and shot her several times. (R. p. 1335, line 15 - p. 1337,

¹ "R. p." refers to the Record on Appeal filed with the Return. This Court will use the designation "PCR Transcript" to refer to the separate transcript of the PCR proceedings.

line 5). She survived and told the witnesses that Applicant told her he had “tied up” or had killed her parents. (R. p. 1339, lines 21-25; p. 1346, lines 4-10). Officers were dispatched to the Larke home and found their dead bodies. (R. p. 1386, line 1 - p. 1387, line 22).

An involved manhunt ensued. (R. p. 1435, line 8 - p. 1439, line 10). Applicant 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. (R. p. 1450, line 8 - p. 1451, line 19). Applicant made another telephone call to his mother in front of the booking officer. The officer related the substance of the conversation in which Applicant confessed to the murders. (R. p. 1459, line 5 - p. 1499, line 20). Applicant also confessed to both Tennessee officers and Greenville County detectives. (R. p. 1520, line 5 - p. 1535, line 19; State’s Exhibit 11; R. p. 1556, line 17 - p. 1590, line 24; State’s Exhibit 15).² In addition to his full, and repeated, confessions, Applicant also indicated that “Geno” was supposed to have helped him but ran out on him before Applicant had entered the Larke home. (R. p. 1577, lines 1-21).

Eugene Strube testified at trial that the night before the murders, he and Applicant left the home of a mutual friend, hid Applicant’s car, and entered a nearby trailer Applicant claimed was his. (R. p. 1659, line 14 - p. 1662, line 19; p. 1665, lines 14-19). While at the trailer, Applicant and Strube drank beer and smoked crack cocaine. (R. p. 1662, line 21 - p. 1663, line 1). Applicant asserted that “he was going to get Becky for leaving him the way she did;” that he would “tier her parents up;” and, that he was going to “take care of Becky’s parents, so he can get ahold of Becky....” (R. p. 1663, lines 4-9; p. 1664, lines 20-22). Applicant packed a bag with an extension cord, duct

² The full tape of the Tennessee interview was admitted in the PCR hearing. (PCR Transcript, p. 78, lines 8-16). This tape contains multiple confessions to the double murder and Applicant’s clearly expressed continued infatuation with victim Barbare, often in sexual terms.

tape, stockings, and socks. He also had a baseball bat. He would later take these items with him as he left the next morning. (R. p. 1663, line 19 - p. 1664, line 3; p. 1665, lines 7-13). Mr. Strube stayed with Applicant through the night and even accompanied him to the Larke home the next morning. However, he refused to enter and left before Applicant entered. (R. p. 1664, line 12 - p. 1665, 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. (R. p. 1664, line 23 - p. 1665, line 19; p. 1430, line 24 - p. 1431, line 18).

At trial, Applicant 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." (R. p. 1316, line 12 - p. 1317, line 23). Applicant addressed the jury at the close of the guilt phase: "Ladies and gentlemen of the jury, I am guilty." (R. p. 1765, lines 11-15).

II.

PROCEDURAL HISTORY

Applicant is presently incarcerated as a safekeeper at Lieber Correctional Institution pursuant to orders of commitment and execution 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. The procedural history of the case is as follows:

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 Applicant. (R. pp. 2503-04). 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 represent Applicant. On September 27, 2001, the Honorable Joseph J. Watson, Circuit Court Judge, was assigned jurisdiction over the case. (R. p. 2512).

A Greenville County Grand Jury returned six (6) true-billed indictments in November 2001 charging Applicant 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 Larke³ (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.⁴ (R. p. 113, line 2 - p. 114, line 15). The Honorable Robert M. Ariail, Solicitor, tried the case, along with Deputy Solicitor Betty C. Strom, and Assistant Solicitors Mindy Hervey, and Lori Reese. On July 17, 2002, after extensive qualification and *voir dire*, the jury was selected and sworn. (R. p. 1243, line 1 - p. 1251, line 7; p. 1254, 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. (R. p. 1787, lines 15-25). The lower court observed the mandatory twenty-four (24) hour waiting period, S.C.

³ The indictments actually reflect the last name as "Lark" however, the "Larke" spelling is used throughout the trial transcript and will be used in this Order.

⁴ 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 his subsequent assault on Ms. Barbare.

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.

(R. p. 2242, lines 9-18).

The jury recommended death. (R. p. 2242, lines 18-24). The judge then sentenced Applicant to thirty (30) years imprisonment for burglary, first degree, and imposed the death sentence for the two murders. (R. p. 2248, lines 5-25). Applicant 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 Applicant 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?

(BOA, p. 3).

The State, through Assistant Attorney General Melody J. Brown, filed a Final Brief of

Respondent on September 16, 2005. The Supreme Court of South Carolina heard oral arguments on the issue on November 1, 2005, and subsequently issued the opinion affirming the conviction and sentence on December 19, 2005. *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2006). Applicant filed a timely petition for rehearing that was denied on January 13, 2006.

Applicant filed a petition for writ of certiorari in the United States Supreme Court on November 8, 2004. Robert M. Dudek, Assistant Appellate Defender, represented Applicant. 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 October 13, 2006, Applicant filed a PCR application and alleged the following errors in trial counsel's representation:

- 9(a) Ineffective assistance of counsel for failing to preserve various issues for appellate review, including but not limited to, failing to request charges relating to manslaughter and self-defense; failing to object to hearsay statements made by defendant's ex-girlfriend, who did not testify at trial; failing to object to evidence of prior bad acts and prejudicial testimony about the defendant.
- 9(b) Counsel failed to conduct an adequate background check for evidence in mitigation and to fully develop defendant's mental distress at the time of the

offenses.

(PCR Application, p. 3).

On August 11, 2006, by order of the Supreme Court of South Carolina, the undersigned was vested with exclusive jurisdiction over the PCR action. On November 8, 2006, this Court held a hearing in the Berkley County Courthouse regarding Applicant's intention to pursue a PCR action and whether Applicant desired counsel. Having found both that Applicant wished to pursue PCR and to have counsel appointed, the undersigned appointed William H. Ehliès, 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, Applicant filed an amended application and raised the following allegations:

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 the 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 emotion 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 Applicant'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).

(Amended PCR Application, pp. 2-5).

Applicant submitted a trial brief dated June 16, 2008, addressing only the issues of the above amended application. Respondent submitted a trial brief on July 14, 2008, filed July 21, 2008. On July 22, 2008, Applicant moved for summary judgment. Respondent made a response in opposition on August 1, 2008, which was filed on August 5, 2008.

A hearing was convened on August 4, 2008, before this Court. Applicant was present and represented by counsel, Mr. Ehliès and Ms. Norris. The State was represented by Assistant Attorney General Melody J. Brown and Assistant Attorney General Anthony Mabry. Applicant's motion for summary judgment was denied and the evidentiary hearing held. Applicant rested on the depositions

and the arguments presented in the summary judgment motion. Respondent moved for a directed verdict which was denied. Respondent called Frank L. Eppes, Esq., former trial counsel for Applicant. At the conclusion of the hearing, this Court took the matter under advisement.

After having considered the record, the evidence adduced at the PCR hearing, and argument of counsel, this Court now issues the instant Order of Dismissal.

III.

DISCUSSION

First, this Court finds that only the allegations of the amended application shall be addressed, as these are the allegations specifically set forth by Applicant in the final amendment, and the only allegations presented to this Court in Applicant's trial brief, through the motion for summary judgment, and through the evidence and argument at the evidentiary hearing. Therefore, this Court finds that the allegations of the initial application have been specifically and intentionally withdrawn, and will not be addressed in the instant order. Moreover, Issue 9(b)(ii) of the amended application has been withdrawn. (PCR Transcript, p. 24, lines 15-21). Therefore, only the remaining allegations of the amended application will be addressed in the instant order.

A.

Motion for Summary Judgment

Applicant moved for summary judgment on all the issues presented in the amended application save for one, Issue 9(b)(ii), which was withdrawn. (PCR Transcript, p. 24). Applicant submitted depositions of trial counsel, John P. Abdalla, Esq., and Frank L. Eppes, Esq., and relied upon those depositions and the transcripts of record previously filed with Respondent's return, which were also made an exhibit for the motion. (PCR Transcript, pp. 8-9). The main thrust of Applicant's

argument, however, was that relief was necessitated on the first issue, pursuant to *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007), where Applicant alleged that counsel was ineffective in failing to object to cross-examination of defense witness James Aiken, and “improper argument about Applicant becoming part of the ‘power structure’ in prison.” (See PCR Transcript, p. 10; pp. 24-25). Applicant conceded this case was tried before *Burkhart*. (Applicant’s Trial Brief, p. 6; PCR Transcript p. 19, lines 13-14). Applicant conceded the testimony at issue was presented through his own witness, Mr. James Aiken. (Applicant’s Motion for Summary Judgment, p. 5; Applicant’s Trial Brief, p. 4). (See also PCR Transcript, p. 10). Applicant argued, however, that counsel should have objected to the cross-examination and the subsequent argument as such could not constitute fair questioning or fair response as the evidence should not have been admitted in the first place. He argued the evidence was inadmissible for two reasons 1) it violated Applicant’s rights under the 14th and 8th Amendment which prohibits arbitrary factors from being admitted in the sentencing phase; and 2) the evidence introduced an arbitrary factor and a violation of state statute S.C. Code § 16-3-25 (c). (PCR Transcript, pp. 10-11). (See also Applicant’s Motion for Summary Judgment, p. 6; Applicant’s Trial Brief, p. 5). This Court notes there was no objection to either the cross-examination or the solicitor’s argument based on the evidence - - a fact discussed at the hearing. (See PCR App. p. 30). Applicant also argued that trial counsel should have been aware of the inadmissible nature of the questions and arguments as there is a history of same going back to the 1984 case, *State v. Plath*.⁵ (PCR Transcript, p. 11). Finally, Applicant argued that the *Strickland v. Washington*⁶ analysis was not applicable as the issue of prejudice was settled by *Burkhart*, and that prejudice must

⁵ *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984).

⁶ *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).

be presumed as the cross-examination elicited, and the argument at issue relied upon, information found in *Burkhart* to have introduced an arbitrary factor which was fatal to the fairness of the proceeding. (PCR Transcript, pp. 19-23; Applicant's Motion for Summary Judgment, pp. 6-7; Applicant's Trial Brief, p. 6). (See also PCR Transcript, p. 23, line 20, "It doesn't make any difference how the defense plays.").

Respondent submitted that the record shows that, "Mr. Aiken was qualified as an expert in prison adaptability and prisons conditions," at defense counsel's request, and defense counsel specifically expressed his intention and strategy to present evidence and argue prison conditions in sentencing in his deposition. (PCR Transcript, p. 25, lines 14-25). (See also Respondent's Response in Opposition to Applicant's Motion for Summary Judgment, pp. 10-11; Eppes Depo. pp. 25 and 77; R. p. 2130). Respondent submitted the solicitor's questions on cross-examination were proper based on the direct examination, and the closing argument based on same constituted fair response. (PCR Transcript, pp. 37-39; Respondent's Response in Opposition to Applicant's Motion for Summary Judgment, p. 7-13; Respondent's Trial Brief, pp. 6-8). Under *State v. Plath*, 281 S.C. 1, 313 S.E.2d 619 (1984), the lack of prejudicial error under fair response was well accepted, and there could be no valid objection to be made. (PCR App. p. 26; Respondent's Response in Opposition to Applicant's Motion for Summary Judgment, p. 11-12; Respondents' Trial Brief, p. 7). Moreover, had the issue (or issues) been raised on direct appeal, neither would have afforded relief, even under *Burkhart*, as there was no objection to the cross-examination or argument. (PCR Transcript, p. 30, relying on *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005)).

As to other arguments, specifically those arguments by the solicitor that Applicant contested as injecting personal beliefs or opinion, Respondent relied upon the record in that the record reflected

only a request for the death sentence, not a personal determination or demand or any sense of a lessening of the jury's role. (PCR App. p. 31; Respondent's Response in Opposition to Applicant's Motion for Summary Judgment, pp. 14-16; Respondent's Pre-Trial Brief, pp. 8-10).

Lastly, Respondent submitted the correct standard for all the errors alleged in this particular action would be *Strickland* error and prejudice, and, when one considers there is virtually no mitigating evidence of any significance, but a wealth of aggravating evidence, there was no possibility, much less a reasonable probability, that had the admission of the evidence and the argument not have been allowed, there is a reasonable probability the jury would not have returned a death sentence. *See Jones v. State*, 332 S.C. 329, 504 S.E.2d 822 (1998). The lack of prejudice based on the record was also relied upon in the other issues presented. (PCR Transcript, pp. 39-40; Respondent's Response in Opposition to Applicant's Motion for Summary Judgment; Respondent's Pre-Trial Brief).

General Law Governing Summary Dismissal

"The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." S.C. Code § 17-27-70(c). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008).

"Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id*, quoting *Nelson v. Charleston County Parks & Recreation Comm'n*, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct.App.2004). "All

ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against the movant.” *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). See also *Stewart v. State Farm Mut. Auto. Ins. Co.*, 341 S.C. 143, 149, 533 S.E.2d 597, 600 (Ct.App. 2000).

Ruling Denying Applicant's Motion for Summary Judgment

After reviewing the memorandum in support and memorandum in opposition to the motion for summary judgment, the depositions, the transcript in the record on appeal, the argument of counsel, and in considering the evidence in the light most favorable to the non-moving party, I denied Applicant's motion for summary judgment, and directed Applicant to continue with the presentation on the merits. (PCR Transcript, p. 40). The arguments and the record show that, while many of the material facts are not in dispute, some facts are in dispute, the inferences from even those facts not in dispute are themselves in dispute, and the application of case law is most definitely in dispute. Therefore, I find that Applicant has not shown that he is entitled to judgment as a matter of law.

B.

Evidentiary Hearing

This Court, after having reviewed the evidence received at the PCR hearing, the argument of counsel, the record and pleadings in this action, and having made a credibility assessment of the witness presented, makes the following findings of facts and conclusions of law:

General Law of Ineffective Assistance of Counsel

To establish that counsel was ineffective, a PCR applicant must show that counsel's

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

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

To effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Butler v. State*, 286 S.C. 444-45, 334 S.E.2d 815 (1985). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690; *Butler*, 286 S.C. at 455, 334 S.E.2d at 815-16, and an applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance, *Strickland*, 466 U.S. at 689; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. As set out above, counsel must be given latitude in the art of advocacy, which, necessarily, allows for

strategic decisions. “Where counsel articulates a valid reason for employing a certain strategy, such conduct will not be deemed ineffective assistance of counsel.” *Watson v. State*, 370 S.C. 68, 72, 634 S.E.2d 642, 644 (2006), citing *Stokes v. State*, 308 S.C. 546, 419 S.E.2d 778 (1992).

Lastly, as noted, relief will not be granted on showing of mere error. Prejudice must also be shown. *Strickland*, 466 U.S. at 687. The standard of “prejudice” differs depending upon whether it is related to guilt phase issues or penalty phase issues. In order to prove “prejudice” in the guilt phase, an applicant must show that but for counsel’s errors, there is a reasonable probability the result of the trial would have been different. *Johnson v. State*, 325 S.C. 182, 480 S.E.2d 733 (1997). In *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.” Again, “[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Jones*, 504 S.E.2d at 823-824.

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

- 9(a)(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.

First, this Court rejects Applicant’s contention, as made in the motion for summary judgment, that the *Strickland* error and prejudice analysis is inapplicable to this issue. (See PCR Transcript, p. 23; Applicant’s Motion for Summary Judgment, pp. 6-7; Applicant’s Trial Brief, p. 6). The

Strickland test has been consistently applied to the vast majority of ineffective assistance of counsel claims. See, e.g., *Williams v. Taylor*, 529 U.S. 362, 391, 120 S.Ct. 1495 (2000) (“the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims”). Applicant contends prejudice is established in this instance because the evidence admitted and the argument by the solicitor premised on that evidence violated both S.C. Code § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. (PCR Transcript, pp. 10-11; pp. 17-19; Applicant’s Motion for Summary Judgment, p. 6; Applicant’s Trial Brief, p. 6). Applicant’s pronouncement of counsel’s presumed deficiency is incorrect. The “deficiency” at issue is not resolved solely by review of the type of evidence admitted. The “deficiency” at issue here is whether defense counsel erred in failing to object and, if error, whether the error was prejudicial. *Strickland, supra*. In other words, the issue is not whether admission of the evidence was a violation of state statute, or the Eighth and Fourteenth Amendments; rather, the question is whether there is a Sixth Amendment violation i.e. ineffective assistance of counsel, which is a separate and distinct analysis encompassing review of the entire record. *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052 (“a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury”). For example, if there is any evidence to support a self-defense charge, and that charge was not given, and the issue was preserved and raised on direct appeal, the standard of review allows for reversal. See, e.g., *State v. Light*, 378 S.C. 641, 650, 664 S.E.2d 465, 469 (2008) (“If there is any evidence in the record from which it could reasonably be inferred that the defendant acted in self-defense, the defendant is entitled to instructions on the defense, and the trial judge's refusal to do so is reversible error.”). However, if the same type of issue is raised in collateral litigation not as a freestanding claim but as an ineffective assistance of counsel claim, the issue is viewed through the

lens of *Strickland* error and prejudice, which dictates that a prejudice analysis be conducted in view of the entire record. *See Jackson v. State*, 355 S.C. 568, 573-574, 586 S.E.2d 562, 565 (2003)(“while Jackson would have been entitled to a self-defense charge, we conclude the instruction would not have affected the outcome of trial due to the overwhelming evidence of Jackson's guilt”). *See also Franklin v. Catoe*, 346 S.C. 563, 571, 552 S.E.2d 718, 722 - 723 (2001)(acknowledging violation of statutory right to address jury in guilty phase would be reversible error if properly preserved and presented on direct appeal, but convicted defendant required to show *Strickland* prejudice in order to obtain relief on an ineffective assistance of counsel claim). Additionally, though Applicant suggests that any strategy of not objecting to the cross-examination or argument would be *per se* unreasonable, (see Applicant’s Motion for Summary Judgment, p. 8), there are concerns of strategy and waiver that must be analyzed. *See generally Watson, Plath*.

This Court also finds that Applicant’s analysis is flawed in its reliance on a “presumption of prejudice” theory at all in this context. There is no presumption of prejudice for allegations of Sixth Amendment violations, except in three, very “narrow circumstances,” outlined as follows:

First, prejudice is presumed when the defendant is completely denied counsel “at a critical stage of his trial.” *Cronic*, 466 U.S. at 659, 104 S.Ct. 2039, 80 L.Ed.2d 657. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer “entirely fails to subject the prosecution's case to meaningful adversarial testing,” thus making “the adversary process itself presumptively unreliable.” *Id.* Third, the Court identified certain instances “when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* (citing *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). A finding of per-se prejudice under any of these three prongs is “an extremely high showing for a criminal defendant to make.” *Brown v. French*, 147 F.3d 307, 313 (4th Cir.1998).

Nance v. Ozmint, 367 S.C. 547, 551-552, 626 S.E.2d 878, 880 (2006). *See also Lorenzen v. State*,

376 S.C. 521, 529-530, 657 S.E.2d 771, 776 (2008). "Absent these narrow circumstances of presumed prejudice under *Cronic*, defendants must show actual prejudice under *Strickland*." *Nance*, 367 S.C. at 552, 626 S.E. 2d at 880. As noted above "[a]ctual prejudice requires the defendant to 'show that there is 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.*, quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.⁷

Applicant here claims none of these limited three circumstances, and they are clearly not applicable. Applicant was represented by able counsel who critically examined the record and considered strategy, and sought the advice and guidance of a well-seasoned capital defense attorney, John Mauldin, Esq., (Eppes Depo. at pp. 68-70; PCR Transcript, pp. 48-49), and had ample time to prepare, (Abdallah Depo. at p. 46). At any rate, Applicant simply relies on the fact the evidence should not have been admitted, which is far removed for a basis for presumption of prejudice under the above cited authority. Moreover, this stance actually fails to address the issue raised at all - - whether counsel was ineffective in failing to object to the cross-examination and the argument in this

⁷ There are actually narrow exceptions on both sides of the vast majority of cases, as noted in the following passage from the United States Supreme Court:

Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed. 466 U.S., at 692, 104 S.Ct. 2052. And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix v. Whiteside*, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).

Williams v. Taylor, 529 U.S. 362, 391-392, 120 S.Ct. 1495 (2000).

However, there is no basis for the presumption of prejudice Applicant offers in the instant matter.

particular case. Such a position certainly does not offer, or even hint at, a basis for an objection to cross-examination specifically responsive to the direct testimony, as we have here, and the mere allegation of which is particularly questionable given the nature of cross-examination itself. *See, e.g., State v. Taylor*, 333 S.C. 159, 174-175, 508 S.E.2d 870, 878 (1998)(“cross-examination of matters which were addressed in direct-examination is not objectionable”). Nor, does such a position identify what valid objection, if any, could be made to argument fairly based on the record. *See generally State v. Copeland*, 321 S.C. 318, 324, 468 S.E.2d 620, 624 (1996)(solicitor’s arguments properly based on evidence of record and reasonable inferences). A review of the salient facts brings focus to this issue.

Relevant Facts

Defense counsel called Mr. James Aiken as an expert in prison adaptability and prison conditions. (R. p. 2130, lines 24-25). As such, counsel posed questions concerning both prison adaptability and prison conditions. (See R. p. 2138, line 16 - p. 2145, line 9). In response to these questions, Mr. Aiken describe a life of “gun towers and fences,” constant supervision, threat of predators, a lack of personal autonomy, subject to full body searches, including body cavity searches, a “completely structured” environment, the threat of lethal force for non-compliance, state issued color-coded uniforms, and the use of restrains including leg irons, belly chains, and shock belts. (R. p. 2138, line 18 - p. 2141, line 15). Mr. Aiken testified in reference to Applicant’s incarceration that, if he was the warden, his “biggest problem would be keeping [Applicant] from being harmed by predator inmates.” (R. p. 2144, lines 17-18). In response, the solicitor, on cross-examination, asked Mr. Aiken about the available benefits of television, recreation, libraries, telephone, canteen, shower, education, mail, personal locker space, and contact with family. The entire cross-examination at

issue spans less than four (4) pages in the entire trial transcript. (R. pp. 2146-2150).

Prior to Mr. Aiken's testimony, the trial judge held an *in camera* hearing on defense counsel's motion to limit the testimony of State's witness, James Sligh. (R. p. 1823, lines 1-3). Mr. Abdallah's statements at his deposition reflect that defense counsel wanted to prohibit any testimony by Mr. Sligh suggesting a "county club atmosphere." (Abdallah Depo. at p. 20). The record shows that during the *in camera* hearing on the matter at trial, defense counsel drew a distinction in the testimony expected from Mr. Sligh and the testimony they would ultimately offer through Mr. Aiken. Counsel stated prior to beginning the penalty phase:

... what Mr. Sligh has testified to before is a day in the life of a prisoner life without parole and then he's talked about how horrible - - how much worse death row is, how the security on death row is tighter and restrictions are more, and what does is it gives the jury things about punishment other than death to consider, and that's not proper testimony. They should be considering life or death. *If they want to consider the conditions in life without parole, that's fine*, but if they want to consider the conditions on death row, that may be something that sways them. Well, they say, he's tight - - locked up a little tighter - -

R. p. 1823, lines 12-24 (emphasis added).

During closing arguments, the solicitor made the following argument referencing prison conditions:

... And we may think life imprisonment is serious business, but you still have your visitation with your family. You still have your mail. You still have your TV. You still eat three meals a day. Somebody washes and takes care of your clothes. You get all the benefits of health care, and recreation. All of those things are provided for you.

Sure, your life is limited. Your life is limited to a smaller confinement in that you don't have the freedom to move about. Life in prison carries a lot of benefits with it and that's why it's not proper in this case. He would still have the freedom to see his children, something that these children of Gladys and David Larke will never have the opportunity to do.

(R. p. 2191, lines 10-23).

Applicant specifically complains, however, about a “power structure” argument, which was made immediately before the above argument:

Let me tell you why life imprisonment is not the appropriate sentences in this case. Brad Sigmon is a manipulator. I said that in my earlier statement. I knew that Ms. Tomberlin was going to testify in this portion of the case. I knew what she was going to say. I knew what his whole life was about. He’s a manipulator. He’s a controller. He’s an intimidator. He’s a smoozer, and that’s why he doesn’t deserve life imprisonment. He would simply become a part of the power structure. He would become the inmate’s advisor, their lawyer. He would become that person in the prison setting that would be a leader.

(R. p. 2190, line 23 - p. 2191, line 9).

Ms. Tomberlin, referenced in that argument, testified that she was married to Applicant for a time. She divorced Applicant on the grounds of habitual drunkenness and physical cruelty, and she was granted a divorce in December of 1990, having proven her grounds. (R. p. 1867, line 18 - p. 1870, line 16). She testified at length as to their tumultuous relationship, including his physical and verbal abuse, threats to take one of their children from her, and control over her dress and appearance. She also testified she eventually shot him after he began to choke her and told her he would kill her. (See R. p. 1870, line 18 - p. 1887, line 6).

Evidence Presented at the Motion Hearing and Subsequent Evidentiary Hearing

In the motion hearing, PCR counsel introduced the depositions of defense counsel John Abdullah, Esq., and Frank Eppes, Esq. Respondent objected to introduction of the deposition in lieu of live testimony as the deposition were discovery deposition, not taken in anticipation of the use as a substitute from trial testimony. This Court overruled the objection, accepted the depositions, but allowed Respondent latitude in offering live testimony to supplement the depositions. (PCR Transcript pp. 41-43). Applicant called Mr. Eppes to testify. Mr. Eppes testified that he contacted

Mr. Aiken at the suggestion of John Mauldin, Esq., the Public Defender for the Thirteenth Judicial Circuit, and an lawyer experienced in capital trial litigation. (PCR Transcript, p. 49). Counsel wished to call Mr. Aiken, "to say that Brad, because of his age, would be - - would likely be a victim or a person that would not cause any trouble in a prison situation, and he would adapt well to prison, I believe, are the two or three things." (PCR Transcript, p. 49, line 24 - p. 50, line 4). Mr. Eppes also testified that some of the evidence he elicited from the witness was clearly not evidence of adaptability. (PCR Transcript, p. 87). Moreover, he stated in his deposition that one reason he did not object to general prison conditions evidence was that he had his own witness he intended to present on general prison conditions associated with a life without parole sentence. (Eppes Depo., pp. 24-26; pp. 75-77). (See also R. p. 1823, lines 12-24).

Discussion

As previously set out, Applicant contends that defense counsel was ineffective for failing to object to the solicitor's cross-examination, and further, that defense counsel failed to object when the solicitor referenced same in his closing argument. When the issue is review in context, however, the record supports there was no basis for an objection for either the cross-examination or resulting argument. The cross-examination was relevant and in response to the testimony given on direct.

A similar issue was addressed in *State v. Plath*:

It should not be necessary in the future for this Court to remind the bench and bar of the strict focus to be maintained in the course of a capital sentencing trial. In the case before us, *defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind*, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. We read both the State's cross-examinations and subsequent jury arguments in light of the record as a whole. We find nowhere that the Solicitor sought to predict or to argue that these appellants would escape or would be improvidently released. Rather, his argument,

particularly in its concluding passage, simply placed before the jury the stark choice between death and life imprisonment, emphasizing that his job was concluded and that the decision was to rest with them. His references to the cross-examinations just discussed strike the candid reader as merely reminders to the jury that life imprisonment was by no means as hopeless as defendants would have it believed. *The State was entitled to make this response. The appellants have shown no prejudice therefrom.*

State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628 (1984)(emphasis added).

Applicant curiously relies upon this same case in making his argument that defense counsel should have known to object. (PCR Transcript, p. 11; Applicant's Motion for Summary Judgment, pp. 6-7; Applicant's Trial Brief, pp. 5-7). However, he misses the point that counsel had offered his witness and intentionally elicited conditions testimony in the instant case. *Plath* settles this issue against him.

This Court specifically notes Applicant's concession that "this case was tried before *Bowman* or *Burkhart*,"⁸ (Applicant's Trial Brief, p. 6), cases which clearly prohibit defense counsel (as well as the State) from presenting such testimony in the penalty phase. *See State v. Burkhart*, 371 S.C. 482, 488, 640 S.E.2d 450, 453 (2007)(noting that case was tried before *Bowman*'s specific prohibition); *State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005)("We take this opportunity, however, to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character."). Here, as in *Plath*, the defense voluntarily elicited the testimony as part and parcel of their case in the penalty phase. This is a major distinction from *Burkhart* where the defense objected to the evidence from the State, and had not put in such evidence, but merely

⁸ *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), and *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

“attempted to counter the testimony of the State’s witness with evidence regarding the harshness of prison life....” *Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453. The State here simply succinctly and fairly responded. There could be no proper basis for objection. Applicant has failed to show counsel was ineffective in failing to object to the solicitor’s questions in light of the direct examination on prison conditions.

Further, Applicant’s argument that the failure to object was not based on strategy because defense counsel stated in the depositions that they did not think the evidence of prison conditions was objectionable, (Applicant’s Motion for Summary Judgment, p. 8; PCR Transcript, p. 20), similarly misses the mark. While the statements relied upon are referenced in the deposition, so are the statements that defense counsel wished to elicit testimony about the harshness of prison life. Mr. Eppes clearly stated at his deposition that he wanted to show, through his own witness, Mr. Aiken, that Applicant would not be a predator in prison, and did not offer that testimony simply as evidence of adaptability. (Eppes Depo., pp. 24-26). Further, Mr. Eppes stated that he wanted to portray prison life in harsh reality, and “[t]hat this is not a person who would have a pleasant life.” (Eppes Depo., pp. 75-77). He used same in his closing argument to the jury. (Eppes Depo. at p. 76). (See also R. pp. 2206-2207). During the hearing, Mr. Eppes testified similarly that part of the reason he called Mr. Aiken was to establish that Applicant would most likely be a victim in SCDC, which, he admitted, again, was not adaptability evidence. (PCR Transcript, p. 87).

Though Applicant in PCR offered that some evidence of conditions could flow to adaptability concerns, it is clear, from the trial court record, and Mr. Eppes’ testimony, that the harsh and miserable conditions of living a life without parole sentence was part and parcel of the defense case.

(See PCR Transcript, p. 16; pp. 35-36; pp. 82-83; p. 87). (See also Eppes Depo., pp. 24-32; pp. 75-76; R. pp. 2206-2207). Moreover, there was a clear distinction in defense counsel's mind as to evidence to be presented by the State's witness (Mr. Sligh) and evidence to be presented by the defense witness (Mr. Aiken); however, that difference was not adaptability compared to conditions. The difference was comparing security on death row as opposed to security in general life population. (PCR Transcript, pp. 52-53; pp. 82-83). (See also R. p. 1823, lines 12-24). Contrary to Applicant's argument that counsel was aware of the inadmissibility of the evidence by reference to the Sligh motion, the motion and argument simply highlights a distinction between death row restriction and general life restriction. There is a subtlety to the argument that appears to have been overlooked by Applicant.

As to Applicant's argument that the trial judge gave notice to defense counsel that such evidence was not admissible, (See PCR Transcript, p. 15), the trial judge's comments do not support that conclusion, when read in context. The trial judge expressed a limitation on the State's presentation of such evidence as evidence of aggravation, but he specifically stated that such evidence may be proper reply. (R. p. 1824, line 24 - p. 1825, line 2).

This Court has considered Mr. Eppes' statements from his deposition that his approach now, given the referenced recent cases, would be different, (Eppes Depo., p. 32), but at the time of trial, he intended to offer his own witness concerning prison conditions, (Eppes Depo., p. 24). There was definitely precedent at the time of trial that general conditions evidence should not be admitted; however, there was no "reversible precedent" at the time or free standing error.⁹ According to *Plath*

⁹This Court notes that other cases demonstrate that the concept of this evidence being introduced in the defense case is reflected in several published opinions. See *State v. Bryant*, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007)(defense counsel presented social worker who testified

(1984), if a defendant offered the evidence, and the defense responded, there was no prejudice, and the defendant was not entitled to relief. Now, under *Burkhart*, at least on direct appeal, admission of such evidence is not just an evidentiary issue where prejudice is considered, but the admission, if there is a preserved issue to consider concerning the admission, may be considered under mandatory review of the death sentence pursuant to state statute. While perception of the genre of evidence has not changed, there is most definitely a change in resulting impact of admission of the testimony, again, at least on direct appeal review. However, here, the allegation is not whether counsel erred in seeking admission of general conditions evidence in the defense case. This Court does not have that issue before it to address. The rather narrow issue before the Court is whether counsel erred in failing to object to the solicitor's cross-examination and argument. Accordingly, under settled precedent at the time, there was no prejudice as counsel presented such evidence and the State merely succinctly responded.

The inescapable conclusion is that defense counsel wanted to offer both adaptability evidence and general conditions evidence. Given that general conditions evidence was intentionally elicited

“on the dismal conditions of prison life in general” and complained on appeal that witness should have been allowed to opine that a death sentence was more merciful than a life sentence); *State v. Hill*, 361 S.C. 297, 307, 604 S.E.2d 696, 701 (2004)(“Pinkney, a shift supervisor at Lee Correctional Institute, described prison conditions for inmates according to their classification”). This is also supported by the very statement in *Bowman* reiterated in *State v. Bryant* directed to both the State and defense concerning the evidence. See *State v. Bryant*, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007)(“in *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), where although the admissibility of testimony on prison conditions had not been preserved for review, this Court warned” of inadmissibility and “admonish[ed] both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant” and then “reiterate[d] this admonishment in our opinion today and remain firm in our view that testimony seeking to portray life imprisonment as preferable to capital punishment is improper, particularly where, as here, the expert's testimony did not focus specifically on the defendant, but on prison conditions generally.”).

by defense counsel on direct, the solicitor was entitled to cross-examine the witness on the conditions issue. *See State v. Taylor*. Moreover, the lack of prejudicial error under such circumstances was acknowledged in well established precedent:

...defendants elected to enter the forbidden field of social policy and penology. It is neither surprising nor can it be deemed prejudicial that the State responded in kind, attempting to show through defendants' own witnesses that life imprisonment was not the total abyss which they portrayed it to be. ... The State was entitled to make this response. The appellants have shown no prejudice therefrom.

State v. Plath, 281 S.C. 1, 15-16, 313 S.E.2d 619, 627-628, cert. denied 467 U.S. 1, 106 S.Ct. 1669 (1984)(emphasis added). *See also State v. Woomer*, 278 S.C. 468, 472, 299 S.E.2d 317, 319 (1982)(evidence of defendant's prior escape was proper reply to defense evidence of good conduct while in prison).

Here, as in *Plath*, and without the guidance specifically given in the later cases of *Bowman* (November 2005 Opinion) and *Burkhart* (January 2007 Opinion), the defense (at the July 2002 trial) voluntarily elicited the testimony as part and parcel of their case in the penalty phase. The State merely succinctly and fairly responded. There could be no proper basis for objection. Moreover, since the evidence was in the record, and both defense and the State argued prison conditions based on the evidence, the record based responsive argument cannot support proof of error, as there could be no reasonable basis for an objection. *See State v. Cooper*, 334 S.C. 540, 553, 514 S.E.2d 584, 591 (1999)(“solicitor has a right to state his version of the testimony and to comment on the weight to be given such testimony”). This Court notes as to the “power structure” argument Applicant complains of, that argument appears to not be based on the cross-examination but upon the “power structure” comments elicited on direct examination, (See R. p. 2134, line 15 - p. 2135, line 11), and the testimony of Ms. Tomberlin, who was directly referenced in the argument. This lacks the

necessary nexus to the cross-examination evidence to consider in contact of Applicant's issue. The remaining arguments as to conditions, again under *Plath*, were not prejudicial as such arguments were succinct and confined to the evidence elicited in fair response.

Finally, this Court finds that the record rebuts any allegation of a due process violation in the presentation of this evidence. There is nothing that Applicant was not allowed to address or rebut; rather, there was a level playing field for all parties - - the very goal of due process. *See generally Gardner v. Florida*, 430 U.S. 349, 362, 97 S.Ct. 1197 (1977)(finding a due process violation where "death sentenced was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain"). It is difficult to see any prejudice, much less a reasonable probability that but for admission of the evidence that the result of the proceeding would have been different.

In sum, Applicant has failed to show error and prejudice where the defense essentially received what was requested, that is to introduce evidence (of their own choosing and though a defense witness as opposed to a prosecution witness (Mr. Sligh)), and to argue that the punishment of life imprisonment was an extraordinarily harsh sentence, and the State merely cross-examined the defense witness on same. Not only was this case tried without the benefit of *Burkhart*, it is also specifically distinguishable from *Burkhart* in the major respect of who offered the evidence when, and whether there is fair response. Moreover, the record demonstrates that the balance of evidence on each side fails to support a finding of prejudice on this record.¹⁰ Lastly, given the overwhelming

¹⁰ *See John Richard Wood v. State of South Carolina*, C/A 2005-CP-23-4737, wherein the PCR judge declined to find prejudice in similar circumstances: "Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State's evidence on this issue, it would not have been allowed to make its own points along these lines as well. Given the

evidence of aggravating circumstances, and the limited mitigation, there could be no “reasonable probability that, absent [counsel’s] errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Jones*, 332 S. C. at 340, 504 S.E.2d at 829. There is overwhelmingly strong evidence in aggravation, including the finding of torture, burglary first degree, and the murder of not one but two elderly victims in a vicious and personal beating with a baseball bat, the victims having been surprised in their own home. Applicant has not established error on these particular facts, however, if error could be shown, he has not established prejudice such that would entitle him to a new proceeding.

Applicant is not entitled to any relief.

- 9(a)(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.

Applicant alleges two passages were objectionable and defense counsel failed to object - - first, counsel failed to object to a comment that the solicitor considered the death penalty appropriate for “certain mean and evil people that live in the world that do not deserve to continue to live with us,” and, second, counsel failed to object to the solicitor’s reference to himself when arguing that a death sentence is a deterrent. (Applicant’s Trial Brief, p. 7). Neither of these comments would justify an objection.

In review of such issues, “[t]he relevant question is whether the solicitor’s comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.” *State*

overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State’s and defense’s evidence of conditions of confinement does not establish *Strickland* prejudice.” Order of Dismissal with Prejudice, filed December 19, 2007.

v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974). Comments reflecting the solicitor's specific decision to seek a death sentence in a given case in an attempt to lessen the jury's responsibility or role are improper. *Id.* See also *Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982). Here, however, neither comment at issue 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). 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). Thus, these comments did not offend the prohibition.

Moreover, the comments are not inflammatory or otherwise improper on their face. Compare *Northcutt, supra*. (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 improper as "[t]he sole purpose of this statement was to inflame the jury"). Further, the arguments are clearly tailored to the specific crime and to Applicant himself, and again, are not improper on the face of the record. See *Smart*, 278 S.C. at 526, 299 S.E.2d at 692-693 (cautioning such comments must be case specific and defendant specific). See also *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). Moreover, "[g]eneral deterrence

arguments are admissible in the penalty phase of a capital trial.” *See State v. Shuler*, 353 S.C. 176, 189, 577 S.E.2d 438, 444 (2003).

Here, the comments never “challenge” the jury or lessen the sense of duty. In fact, as noted in the hearing, defense counsel, who clearly was present and heard the tenor and tone of the argument, when responding to same, characterized them as the solicitor asking for a verdict, and stating the “government trusts you to be judge and jury. The only way Brad Sigmon dies is if all 12 of you decide that that is the appropriate punishment.” (R. p. 2194, line 23 - p. 2195, line 2). Not only does a review of the transcript not demonstrate an impermissible argument, it is clear that defense counsel did not object, and actually contemporaneously characterized the solicitor’s closing as *asking* for a verdict and *acknowledging* the jury’s role.

This court find the arguments do not offend the referenced prohibitions. At any rate, if error, these less than clearly erroneous statements are so minor in comparison with the tremendous amount of evidence in aggravation, as more fully outlined above, that such a purported error could not reasonably be said to have affected sentencing. *Jones, supra*.

Again, Applicant is not entitled to any relief.

- 9(a)(iii) Counsel failed to adequately request a charge on the statutory mitigating circumstances of age or mentality, based on the 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.

Applicant contends that counsel was ineffective in failing to obtain an instruction that “(1) the murder was committed under influence of mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired; and (3) the age or mentality of defendant at the time of crime”

based on evidence of intoxication. (Applicant's Trial Brief, pp. 9-10). The record shows the trial judge charged two of those circumstances - - specifically, mental disturbance and substantial impairment - - but did not charge the "age or mentality of the defendant" provision. (R. p. 2232, lines 5-21). The judge also charged the jury could consider any non-statutory mitigating circumstance. (R. p. 2232, line 22 - p. 2233, line 10).

Applicant lacks factual support to show intoxication at the time of the crime. The record supports drug use and drinking the night before the crime, (See R. p. 1660, line 6- p. 1664, line 22; p. 2123, line 13- p. 2124, line 1¹¹), but does not support an allegation of intoxication during the crime itself. Therefore, the general rule that all three circumstances are charged together in cases of intoxication does not apply. *See generally 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) ("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)."). In fact, Mr. Eppes testified at the hearing that counsel "talked about drugs that Mr. Sigmon had been using and the drinking" but could not recall discussions on intoxication. He testified however, that he did not "remember ever thinking that he was drunk." (PCR Transcript, p. 55). This Court notes that the

¹¹ These cites are taken from testimony from defense expert Dr. Morton regarding the effect on Applicant of cocaine and alcohol use the night before the murders. Dr. Morton also made reference to reliance on prior diagnoses of "recurrent major depressive disorder" and "chemical dependency disorders." (R. p. 2099, lines 19-25; p. 2103, lines 1-13). Again, the jury was charged on the mitigating circumstances of acting under the influence of a mental or emotional disturbance, and capacity to appreciate the criminality of conduct or his ability to conform was substantially impaired, apparently related to his mental state, outside the suggestion of intoxication, at the time of the crime, (R. p. 2232, lines 5-21). Counsel argued in closing not intoxication, but that Applicant was under mental and emotional distress. (R. p. 2203, line 11 - p. 2204, line 3).

Tennessee tape which was admitted reflects that Applicant stated he was straight, sober, thinking properly by his own admission, and that he was not on drugs.

Moreover, Mr. Eppes testified the trial judge provided counsel with a written proposed charge, that he reviewed the charge in detail, and that, had he believed the charge erroneous in any form or fashion, he would have objected. Counsel for Respondent specifically questioned whether he had a strategic reason for not objection. Mr. Eppes denied any such strategic reason by answering, "If I seen anything wrong with the charge that I knew was wrong with the charge, I would have objected." (PCR Transcript, p. 55).

Applicant has failed to carry his burden of proof, and has not demonstrated error. Moreover, he failed to establish prejudice in two distinct ways. 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. That was clearly before the jury such that failure to charge one other rather general mitigating circumstances could not be said to have negatively affected consideration of the evidence and the other charges; and second, because of there strong evidence in aggravation, including three statutory circumstances in aggravation, including torture, in this brutal double murder of an elderly couple in their home. When considering the effect of the omission, Applicant simply cannot demonstrate prejudice such that would entitled him to relief. *Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998) (finding no prejudice by the absence of an additional statutory mitigating factor on mental state where the issue of defendants 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).

Applicant is not entitled to any relief.

- 9(a)(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.
- 9(a)(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.

The above issues may be resolved by a review of the charge language. When reviewed as a whole, the charge is sufficient.

"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.* Here, the trial judge initially and clearly instructed the jurors that they could consider both statutory and non-statutory mitigating circumstances, and could, for any reason, recommend a life sentence. (R. p. 2231, lines 1-13). Applicant undertakes a parsing of the remainder of the charge to suggest the "penalty phase instructions impinged upon the jury's ability to properly consider all mitigating evidence offered by" the defense. (Applicant's Trial Brief, p. 10). However, 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. (Applicant's Trial Brief, p. 10). The jury was adequately instructed.

Applicant has failed to demonstrate error. Moreover, even if error could be shown on these facts, he has failed to prove prejudice. The evidence of guilt is overwhelming, as is the evidence specifically offered in aggravation, including the finding of three separate statutory circumstances of aggravation, including torture, in this brutal double murder of an elderly couple in their own home. There could be no reasonable probability the result would have been different had the judge's instruction contained different language for the same concept. *Jones, supra*.

Applicant is not entitled to any relief.

- 9(b)(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 emotion nature of Sigmon's initial confession. *See* ROA 1501-12.

At trial, in cross-examination of Carrie Harbin, a dispatcher and jailer with the Gatlinburg Police Department, defense counsel attempted to play portions of the Tennessee Tape, but, due to technical difficulties, was not able to do so. (R. p. 1510, line 3 - p. 1512, line 9). The trial judge, outside the presence of the jury, advised as follows:

... I'm going to let you cross-examine this witness without any tape or video. The rule allows you to put it in. You don't have to put it in on cross-examination. If you think it's relevant to the portions of this statement that he published, you can put it in later. Go ahead and cross-examine her.

(R. p. 1512, lines 10-16).

Counsel continued cross-examination and referenced multiple statements (along with

descriptions of Applicant's emotional behavior) apparently taken from the tape, which the officer could confirm. (See R. p. 1513, line 18 - p. 1519, line 2). Thus, it appears that even if some error may be found in regard to the presentation of the tape, the evidence on the tape that defense counsel wanted before the jury was before the jury; thus, Applicant has failed to demonstrate error and prejudice under *Strickland*.

Moreover, Mr. Eppes clearly testified that there were portions of the tape that he did not wish to come in, as he considered portions harmful to Application. (PCR Transcript, p. 56). In particular, he testified that, as to the Tennessee tape, there were portions that he wished to play for the jury, and attempted to play, but, due to technical difficulties, he was unable to play; however:

I was able to read off that transcript as if it was the tape and I could put the inflection where I wanted to. So I, frankly, was just as happy at the time to read off the transcript.

(PCR Transcript, p. 57, lines 20-23).

The whole of the Tennessee tape was submitted at the PCR hearing. This Court has reviewed the tape. The tape clearly has emotional parts, but also reflects repeated confessions and describes his unfaltering total infatuation with Ms. Barbare in mostly sexual terms. Troubling for defense counsel would have to be Applicant's assertions that Applicant meant to kill Beck Barbare, that she was the one that "made him crazy," and that her "parents are dead because of her." There are other statements that he intended to kill Ms. Barbare, and one statement that he intended to kill Ms. Barbare and her new boyfriend, by catching them together in bed and beating them both to death. Additionally, there are multiple descriptions of his detailed escape plan, including his statement that he laughed when a store clerk said he looked like the suspect he had seen on television. It is more than reasonable to attempt to keep the whole of this tape out.

Though Mr. Eppes vacillated to some degree regarding his satisfaction of the presentation to the jury, he ultimately testified: "At the time, at the time I was not that interested - - I was not interested in putting the tape in." (PCR Transcript, p. 58, line 13 - p. 59, line 1). In redirect, he testified, "I thought the solicitor was going to play the tape because I thought on the whole the tape was bad for Mr. Sigmon." (PCR Transcript, p. 86, lines 6-8).

All in all, defense counsel successfully admitted only the most favorable portions in a way that showcased the favorable sides of the testimony, and he expressed satisfaction with the presentation, and expressed that as a result of presenting the evidence in a different way, he was "not interested" in then having the tape in evidence. This Court finds counsel's strategic decision, even though made in consideration of the technical difficulties, was none the less reasonable in light of the totality of the circumstances. *Watson, supra*. Of course, the record is clear that the trial judge would have allowed counsel to play the tape later if counsel had deemed that necessary. This was certainly not an avenue foreclosed to counsel. This fact strengthens counsel's assertion that he was simply well pleased with the presentation made, and not just thwarted by uncooperative technology. Even so, even if one were to disagree with counsel's decision and find error, there is no prejudice for three reasons. First, it is most likely that if Applicant had played portions of the tape with Applicant weeping, the State would have requested either all or some of the remaining portions be played. The remaining portions are incredibly damaging to Applicant. Second, the essence of the favorable portions from the tape was before the jury. Third, there is overwhelming evidence of guilt, and tremendous evidence in aggravation, this brutal murder of two people in their own home. There could be no reasonable probability that the sentencer would have decided differently had counsel played this particular tape. *Jones, supra*.

Applicant is not entitled to any relief.

- 9(b)(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.

As mentioned above, this allegation was withdrawn at the hearing, and is not addressed herein on the merits. (See PCR Transcript, p. 24, lines 15-17).

- 9 (c)(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 Applicant's behavior to her, which resulted only in additional aggravation evidence being presented. *See* ROA 1948-52, 2031-38, 2039-41.

The record reflects a recurring theme in the defense questions, presentation of evidence, and argument that attempted to explain Applicant's actions in the context of his reaction to Becky Barbare's treatment of him. (*See, for example*, R. pp. 2161, lines 1-8 ("something pushed his buttons"); p. 2196, lines 12-17 ("That relationship is what this case is all about... Brad Sigmon did not want that relationship to end. He went nuts, bonkers, whacko, out of his mind"). Counsel argued, in part:

... He believed he should still be with her. He saw her on the phone with another man. He knew that his relationship has started while she was married, on the phone with another man. That was the trigger. That was what snapped in his head. He saw that his relationship, that his relationship had begun when her relationship with Troy Barbare ended, and he saw a recurrent pattern in this relationship...

(R. p. 2197, line 25- p. 2198, line 7).

When this relationship ended, it was devastating to him. He called Keith Merrill and begged him to leave her along [sic]. Keith Merrill wasn't even a factor then. But as soon as he saw that business card, Brad Sigmon started reacting, because he knew his relationship was in trouble.

(R. p. 2204, lines 20-25).

Logically, it appears that counsel presented the ex-husbands in furtherance of the express "trigger" theory. Further, the testimony is consistent with Applicant's own statements to the jury, which included:

... Was I obsessed with her? Yes.... What set me off? Go back three years. The second time Becky left Troy for me...

(R. p. 2209, lines 15-24).

... She answered the phone, and I said, hey, baby, what you doing. I'm on the phone with Keith, you piece of s***. All I can see was what she did to Troy three years before that... All I could see was her in bed with the man she's married to now...

(R. p. 2211, lines 17-23).

In fact, Mr. Eppes testified at the hearing that this was his intended strategy to "show that Miss Barbere had a habit of hooking up with the next guy before she left the previous one, for lack of a better way to describe it." (PCR Transcript, p. 60, line 22 - p. 61, line 1). Though counsel realized that some damaging testimony could come in, such as when he asked Mr. Barbare about "words" exchanged with Applicant, he did not consider that "it rose to the level that it was aggravating." (PCR Transcript, p. 60, lines 8-20). He made a strategic decision to elicit the evidence he thought most important to support his theory. (PCR Transcript, pp. 61-62). He explained in detail:

Mr. Sigmon had confessed four ways from Sunday to these two horrible killings of the parents of Miss Larke, and there was no way around that. There was no defense effectively because he had confessed in Tennessee. He confessed when he got back. He about confessed on channel 4. And what we were trying to show with the defense was that he had this cockamamie plan to try to get to talk to Becky, or kidnap her, and that the plan went awry almost immediately. And within the space of I believe less than two minutes, Mr. and Mrs. Larke had been killed. There's no obviously, excuse for their killing; however, Mr. Sigmon is someone who was abandoned a good bit in his life and had real problems with people who left him or broke up with him. *And a lot of Miss Larke's behavior kind of egged him on, for lack of a better*

way to say it. And we were trying to show that the stresses of the break up, particularly when he's living right next door to her and her parents, were such that he snapped and in an instant did a horrific thing; and he was somebody that ought to be given life instead of death.

(PCR Transcript, p. 62, line 20 - p. 63, line 16)(emphasis added).

Moreover, Mr. Eppes testified that he used the testimony from Mr. Merrill's testimony as a basis for part of his closing argument, urging a life sentence "for a love-sick idiot that snapped and in less than two minutes ended the lives of two people... [d]estroyed one family and shook his own to the foundation." (PCR Transcript, p. 66, line 22 - p. 67, line 14).

This Court has reviewed the testimony complained of in regard to the three witness, Mr. Sims, Mr. Babare, and Mr. Merrill. Applicant points to one question defense counsel posed to Mr. Ricky Sims, who was married at one time to Becky Barbare, about possible violence between Mr. Sims and Ms. Barbare. (Applicant's Motion for Summary Judgment, p. 15). The record shows that after the State's objection to the question, counsel explained to the trial judge:

... it's relevant to the defense because in fact the State presented a witness that testified that she shot Mr. Sigmon. Yeah, his first wife of course. And we're trying to establish a patter of Mr. Sigmon getting involved with relationships that are not very healthy. And Ricky Sims we believe can offer testimony about a relationship that was not healthy...

(R. p. 1950, lines 19-p. 1951, line 1).

Counsel also argued that their psychologist would testify "about his drug abuse and patterns of his behavior. And the social worker is going to testify about his relationships past and present, or I should say up to the point of this event and the relevance they have, which would be the proper foundation, I believe for this witness." (R. p. 1951, line 21 - p. 1952, line 3). The trial judge would not allow the testimony until counsel could lay the foundation. (R. p. 1952, lines 4-5).

Second, Applicant points to testimony of Troy Barbare, who was also married to Becky Barbare for a time. Mr. Barbare testified that Ms. Barbare began a relationship with Applicant while still married, then she would go back and forth between them for a while. (See R. p. 2034, line 3 - p. 2035, line 25). Mr. Barbare testified that during that time, Applicant called him once when Ms. Barbare was going back to Mr. Babare, to “tell me some stuff about my wife, or whatever, and I told him he basically wasn’t telling me nothing I didn’t already know” and also testified that Applicant apologized to him and that he apologized to Applicant. (R. p. 2035, lines 3-17). He was asked about “an order of protection” but the State’s objection was sustained. (R. p. 2036, lines 3-11). Mr. Babare also testified that Applicant “got along good” with Troy, Jr. (R. p. 2036, line 25 - p. 2037, line 23).

Applicant also complains of the testimony of Keith Merrill, Ms. Barbare’s third husband. (Applicant’s Motion for Summary Judgment, p. 16). Mr. Merrill testified that he meet Ms. Barbare at her work, and shortly thereafter began receiving threatening calls from Applicant. (R. p. 2039, line 7 - p. 2040, line 22). At one point he opined Ms. Barbare, “didn’t get to do a lot, because she felt like she was being watched all the time, whenever she went to work,” and then testified that at some point before the Larkes were killed that he “ said, if you want to get away, meet me at Walmart, we’ll go have lunch at Chimney Rock, we’ll go take some pictures, and that’s we did.” (R. p. 2041, lines 11-19).

The testimony supports the very reasons Mr. Eppes gave for eliciting the testimony. Moreover, the testimony gives some support to Mr. Eppes theory, which he expressed in closing argument, that this incident was confined to the circumstances - - specifically Applicant obsessive infatuation with Ms. Barbare. Counsel was correct in anticipating some minor evidence would be

elicited that was unfavorable; however, it was just that - - minor evidence. Specifically, Mr. Barbare spoke only of a heated phone call over his wife, and expressed that Applicant and he apologized to each other. Moreover, Mr. Babare offered that Applicant had a good relationship with Troy, Jr. In total, the evidence was favorable in eliciting 1) the positive relationship with Troy, Jr., 2) a minor phone call that resolved in apologies from both parties, not just Applicant, and 3) gave support for counsel's argument that this incident was confined to the circumstances. This Court agrees finds counsel's assessment of testimony as more helpful than harmful soundly reasonable. As to Mr. Merrill's testimony, his testimony is more negative than Mr. Barbare's but similar in that he testified only of threats and no physical altercations, and his testimony spans only approximately four pages in the over two thousand page record. Moreover, Ms. Barbare's relationship with Mr. Babare and Applicant at the same time, and her involvement with Mr. Merrill and Applicant at the time of the murders would be reference by Applicant himself in statement to the jury. (R. p. 2209, line 15 - p. 2214, line 4). In context, his testimony is relative minor. There was no testimony of any consequence, in this regard, by Mr. Sims.

Again, this Court finds counsel's assessment of the evidence reasonable. Applicant has failed to show error. Moreover, this Court finds counsel's strategy to develop an obsession "trigger" and "love sick" theory and to present a mitigation case was reasonable as it was complimentary and compatible with Applicant's prior Tennessee confession and Applicant's statement to the jury. Moreover, even if error could be shown, there could be no prejudice as the evidence reference was relatively brief, contained some positive character evidence, and the tension regarding Mr. Merrill's involvement would already be part and parcel of the case. Additional, as previously discussed, there was a wealth of evidence in aggravation in this brutal double murder of a elderly couple in their own

home. Applicant cannot show prejudice such that would entitle him to relief. *Jones, supra*.

Applicant is not entitled to any relief.

- 9(c)(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.

As noted above, the record reflects a recurring theme that attempted to explain Applicant's actions in the context of his reaction to Becky Barbare's treatment of him. The record reflects that counsel requested charges that would support the theory that Barbare was "the trigger." (See R. p. 2176, line 14 - p. 2177, line 1). However, the provocation charge referenced herein was not given in response to an argument on that theory, rather, the trial judge reasoned:

... Defendant was provoked by the victim in committing the murder, I'll leave. I find there is sufficient evidence in the record. And the reason is the action of Mr. Larke saying he was going to get his gun, that would be a mitigating factor as opposed to - you know, that might have been an impulse to have him do something, so I would leave that....

(R. p. 2177, line 25 - p. 2178, line 6).

Applicant apparently does not contend that it was error to seek and receive this charge; however, Applicant now argues that because counsel failed to specify the supporting facts for the mitigating charge within his closing argument, that the jurors would interpret that as "blaming the victim," Ms. Barbare. (Applicant's Motion for Summary Judgment, p. 17). This position confuses several positions. The argument appears to imply that the statutory mitigating circumstance should never be used as it would "blame the victim," but does not tie the argument to the threatened use of a gun by the actual victim, but to Ms. Barbare - - a factual based challenge. Thus, it appears he suggests only a factual based argument. However, Ms. Barbare was not "the victim" of the murder

charge, so his logic fails. This confusion of factual support is also evident in the case cited in support of Applicant's argument. Applicant cites to *State v. Hoffman*, 768 So.2d 542 (La. 2000), for the principle that "blaming the victim in a capital case is 'an offense argument to the jury'," yet, as a factual matter *Hoffman* case is completely distinguishable.

In *Hoffman*, the defendant was found guilty of abducting a woman at her car as she was attempting to leave after working late. After being forced to withdraw money, she was taken to a secluded area and raped. She was then marched, naked, to a small dock and shot execution style. Defense counsel in that case suggested the murdered woman was "naive" and "not prepared" for the dangers of working in an inner city environment. In short, there were no facts supporting any provocation; rather, counsel indulged in a gratuitous attack on an innocent victim. That substantially differs from the instant case where Ms. Barbare was not the murder victim, and further, where this record was replete with evidence, not the least of which was Applicant's own statements, that he did what he did because of his obsession with Ms. Barbare. And it should be noted that the fact of the relationship was uncontested, as was the fact of the breakup. This was not a case of random violence, but violence inspired by a domestic relation that soured. *Hoffman* is simply not comparable to the instant case. In fact, it is completely distinguishable.

Alternatively, though Applicant was also charged with crimes against Ms. Barbare, the solicitor did not pursue those charges in the instant case, (R. p. 2282, line 1- p. 2287, line 17; p. 153, lines 12-20). Defense counsel argued that the surprise of not calling Ms. Barbare's charges affected their trial preparation, including preparation for the penalty phase. (R. p. 157, line 3 - p. 158, line 10). At any rate, the charge was consistent with a concerted effort to show that Applicant's actions were in response to Ms. Barbare's treatment of him, which were also consistent with Applicant's

own confession and his statements to the jury.

Applicant has failed to establish error. Moreover, even if error could be found on this record, Applicant has failed to establish prejudice for three reasons: 1) there is a factually distinguishable basis for the charge that is not challenged; 2) the fact of Applicant's obsessive infatuation with Ms. Barbare was part and parcel of the case and would be addressed within trial, by Applicant's confession alone if nothing else; and 3) the tremendous amount of evidence in aggravation in this brutal double murder of Ms. Barbare's parents in their own home. Applicant cannot show that but for a minor distinguishing argument on a factually distinguishable basis for the charge, the jury would not have returned a sentence of death.

Applicant is not entitled to any relief.

IV.

CONCLUSION

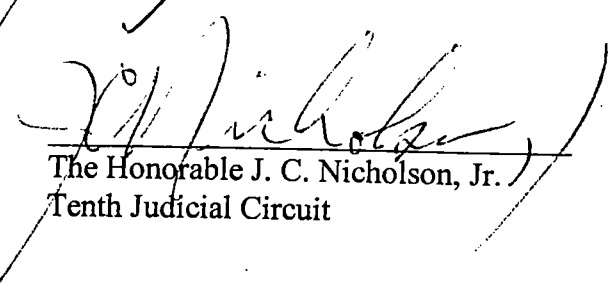
Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

IT IS THEREFORE ORDERED THAT:

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

IT IS SO ORDERED this 14 day of July, 2009.

Anderson, South Carolina.


The Honorable J. C. Nicholson, Jr.
Tenth Judicial Circuit

WILLIAM H. EHLIES, P.A.
ATTORNEY AT LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
864-232-3503
FACSIMILE NUMBER 864-232-4854
EIN: 57-0703576

August 17, 2009

RECEIVED

AUG 19 2009

S.C. SUPREME COURT

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

Re: Brad Keith Sigmon vs. the State of South Carolina

Dear Mr. Shearouse:

Enclosed for filing, please find our Notice of Appeal pursuant to Rule 203 (d)(1)(A)(i) in the above matter together with Proof of Service and a Copy of the Order on appeal. Please file accordingly and return our clocked copy in the envelope provided. I have not enclosed a filing fee because this is an indigent death sentence individual.

Sincerely yours,



WILLIAM H. EHLIES, II

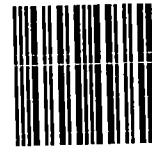
Email: hank@ehlieslaw.com

enclosures

cc: Melody J. Brown, Assistant Attorney General



1000



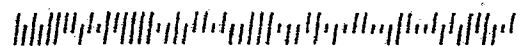
29211

U.S. POSTAGE
PAID
GREENVILLE, SC
29602
AUG 17, '09
AMOUNT

\$2.41
00056076-10

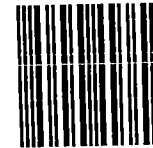
WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
(864) 232-3503

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





1000



29211

U.S. POSTAGE
PAID
GREENVILLE, SC
29602
AUG 17, '09
AMOUNT

\$2.41
00056076-10

WILLIAM H. EHLIES, P.A.
ATTORNEY-AT-LAW
BUILDING A, SUITE 201
310 MILLS AVENUE
GREENVILLE, SOUTH CAROLINA 29605
(864) 232-3503

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

