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

BRIEF OF PETITIONER

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on
Indigent Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

efense

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

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

ISSUES PRESENTED

1.

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?

2.

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

3.

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

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. 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 at his subsequent PCR deposition: "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.

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. Ehlies, 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.

Petitioner sought certiorari on six separate issues. The state filed a return. This Court granted certiorari as to issues three, four and five. Those issues have been renumbered in this brief of petitioner as issues one through three.

ARGUMENT

1.

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 world, 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 the death penalty, and his 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. Counsel articulated no legitimate tactical reason for failing to object to the solicitor's improper arguments.

During the deposition counsel Eppes 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 in aggravation . . ." App. 2878.

Discussion

A prosecutor's argument violates due process if it "infect[s] the trial with unfairness." Darden v. Wainwright, 477 U.S. 168, 181(1986). 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, *in his personal opinion*, the appropriate punishment, 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 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 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 imposing the death penalty on petitioner "[will] 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.

The controlling United States Supreme Court precedent is well-settled and longstanding: the Eighth Amendment requires capital sentencing to be an individualized decision-making process. See Jones v. United States, 527 U.S. 373, 381 (1999) ("In order for a capital sentencing scheme to pass constitutional muster, it must perform a narrowing function with respect to the class of persons eligible for the death penalty and must also ensure that capital sentencing decisions rest upon an individualized inquiry."); Romano v. Oklahoma, 512 U.S. 1, 7 (1994) ("States must ensure that 'capital sentencing decisions rest on [an]individualized inquiry,' under which the 'character and record of the individual offender and the circumstances of the particular offense' are considered." (*quoting* McCleskey v. Kemp, 481 U.S. 279, 303 (1987)); Harmelin v. Michigan, 501 U.S. 957, 995 (1991)("We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that the punishment is 'appropriate[.]'") (*citing* Woodson v. North Carolina, 428 U.S. 280, 305(1976)).

The solicitor's closing argument was wholly improper because he informed them, in no uncertain terms, that he, in his representative capacity, had "made the decision" that the death penalty was the appropriate penalty in this case. Additionally, his claim that he had discussed seeking the death penalty against a prior defendant with a juror during *voir dire*, and that *he agreed with her response* that "mean and evil people" should die, further bolstered his role as the arbiter of the appropriate sentence *in this case*. These "assurances" made by the solicitor (that as an experienced solicitor he has deemed this the appropriate sentence, and that at least one other juror in

a capital case agrees that "mean and evil people" should die) diminished the jurors' responsibility in issuing a death verdict in this case.

> "A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role."

Caldwell v. Mississippi, 472 U.S.320, 332 (1985).

Taken in conjunction with the solicitor's repeated reminders to the jurors during *voir dire* that he represented the State of South Carolina, the Solicitor's actions amounted to an overall strategy designed to minimize the jurors' responsibility in rendering a death verdict. See App. 255, ll. 11-13; 286, ll. 15-18 ("Mr. Childress, my name is Bob Ariail, and I'm the Solicitor for Greenville, Pickens County, which is your State's attorney, State Prosecutor, District Attorney, whatever you call them. May call—in South Carolina we call it Solicitor."); App. 303, ll. 18-21 ("Ms. Sullivan, my name is Bob Ariail. He just introduced us, and I will be representing the State in this case, and since—on TV they may call me the District Attorney, but State's Prosecutor."); App. 326, ll. 13-20 ("Mr. Sanders, my name is Bob Ariail, and I'm the Solicitor for Greenville, Pickens Counties. That's the person who does the prosecution of criminal cases, and in this case, or in any case in which the State seeks the death penalty, it's my responsibility along with my staff, Ms. Strom, in the blue suit, and Ms. Hervey, one of my assistants, to represent the State in a case that we believe is appropriate for the death penalty."); App. 395. l. 25 -396, l. 4; App. 452, ll. 11-16; App. 479, ll. 11-17; App. 508, ll. 17-23; App. 528, ll. 17-22 ("Ms. Martin, my name is Bob Ariail. I'm the Solicitor, which in South Carolina is the State's attorney who would be representing the State

seeking—in any criminal case in which the State seeks the death penalty, the Solicitor is the one responsible for bring the case to the jury."); App. 553, ll. 14-20; App. 572, ll. 16-19; App. 593, ll. 15-18; App. 670, ll. 6-10; App. 694, ll. 1-3; App. 717, ll. 3-10; App. 742, ll. 2-7; and App. 933, ll. 4-13. The Solicitor also informed the jury that he was experienced in making these decisions, after "doing this for some 26, 27 years . . .". Tr. 1245, l. 18- 1246, l. 15 ("But *we know so much about it* and *have done it* (referring to being involved in the capital jury selection process) *so many times*, it's hard to communicate it to somebody in a sense that you really understand it.") (emphasis added). These statements were calculated to give the jurors confidence in the state's decision-making regarding its decision to seek the death penalty in this particular case, and minimized the jurors' roles in adjudicating the penalty.[1] See Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (noting the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case.")

The solicitor's argument, with its assurances the death penalty was necessitated in this case, and that he agreed with another capital juror's belief that "mean and evil people" should die, 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

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[1] It is clear that this particular Solicitor is much invested in securing death verdicts, as evidenced by his request to meet with capital jurors, in an earlier case, over dinner, weeks after this jury did not come to a unanimous verdict with respect to penalty for defendants, David Edens and Jennifer Holloway, to discuss the verdict. "One juror, who attended the dinner, testified the Solicitor appeared upset with the LWOP verdict and wanted an explanation as to why the jurors had not voted for a death sentence." State v. Inman, 395, S.C. 539, n. 10, 720 S.E.2d 31, n. 10 (2011). And see Id. n. 18 ("We will not tolerate witness intimidation from anyone, including the Solicitor's office. Furthermore, we are deeply concerned that the Solicitor's behavior represents a pattern of misconduct that continues to undermine our state's system of justice. Specifically, this Court is concerned with the "win at all costs" attitude that appears to permeate the Solicitor's office . . . we note that in the future such misconduct may result in disciplinary proceedings."

deserved the death penalty. This argument was totally improper. See State v. Smart, 278 S.C. 515, 517, 299 S.E.2.d 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 phase trial.

2.

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 in the tree cutting business, Charles Hall, and Hall "could tell he had been drinking," though he "seemed coherent." App. 1614, ll. 22-23. Hall admitted that he later told that police that on Wednesday, April 25, 2001: "[B]rad came to work and said he had been drinking since 8:00 a.m." 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. Dr. Alex Morton, an expert in psychopharmacology and addictions, testified that petitioner's "continuing drug use" would effect his continuing "mental functioning and psychological functioning." App. 1974, ll. 11-20; app. 1981, ll. 14-20.

Around 9:00 p.m. that evening petitioner met up with Eugene Strube. "[H]e [petitioner] asked me if I wanted to go out with him, and I said, sure, and we got in my car . . ." The men bought some beer at a gas station, and brought the beer to petitioner's former home, which was next door to the victims' trailer. App. 1578, l. 1 - 1579, l. 7. In the house, according to Strube,

petitioner "drank a six-pack" of beer, and the two men smoked "a good bit of crack." App. 1593, ll. 6 – 1694, l. 5.

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. "I was exhausted. And he [petitioner] was strolling back and forth." And App. 1582, ll. 14-22; App. 1593, ll. 6-24.

Ultimately, that morning Strube abandoned his agreement to assist petitioner. "We got to the back of that – the other trailer, and I said, man, I can't do this, you know, this isn't right, and he said, good, get the hell out of here." Strube said he "got the hell out of there," and when he quickly left petitioner was "heading towards the other trailer," where petitioner entered the victims' home prior to 8:30 a.m. and the crimes ensued. App. 1582, l. 12 – 1583, l. 9.

As stated, Dr. Alexander Morton, Jr., provided testimony regarding the effects of alcohol and cocaine use at the time of the murders. 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.

> 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.

> 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 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 S.C. Code §16-3-20(C)(b)(**6**)**:** "[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." .

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. (emphasis added). Trial counsel did not correct this misapprehension of the law, nor point out that mental retardation is encompassed by statutory mitigator (10)[2]

> 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. (emphasis added).

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[2] 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.

The trial court 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 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.*"); (emphasis added). 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. (emphasis added).

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 Eighth 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). Petitioner should be granted a new sentencing phase trial.

3.

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.

Defense counsel concluded his closing argument on what would be these non-statutory mitigating circumstances:

> Now, I want to stop – I want to close with two more points. And these two points are pretty simple. The first one is, Brad Sigmon is not a very bad individual. He's not a very bad prisoner.

> His role in life may be – well, his role in life is to end his days as a prisoner, and he is pretty accomplished at it. *He's polite. He treats the officers with respect. He's not a threat to anyone. You heard from Mr. Aiken, he's not going anywhere.* He's going to be in maximum security with the meanest, nastiest people in the State of South Carolina. He's going to be there until he draws his last breath.
>
> The Solicitor talks about how nice the pen is. I can't talk to that. Anybody who thinks that the penitentiary is a nice place has never been there.
>
> ***
>
> Now, in closing the Solicitor wanted you to have your verdict ring like a bell. The verdict against this man who made a horrible mistake in the blink of an eye, a verdict against this man who became so caught up in this relationship, this relationship that was over, that he did the most horrible thing a man can do, he wants you to take that verdict and ring like a bell. Ring like a bell as a deterrent. Let me tell you what you're verdict is going to do to deter if you vote for the death penalty. Let me tell you it's going to deter three things. *It's going to deter peaceful surrender. Brad Sigmon surrendered as peaceful as a lamb. It's going to deter confessions. He confessed three times.* And the most important thing of all, it's going to deter mothers, and families, and brothers and sisters from trying to get their relatives to turn themselves in. They sent him to the authorities, because they were concerned about him. . .

Tr. 2082, ll. 11-22; tr. 2083, l. 25 – 2084, l. 18. (emphasis added).

None of these factors concerned petitioner's blameworthiness for the offenses for which he was tried. Each factor however -- adaptability to prison, acceptance of responsibility and remorse -- were legitimate reasons not to impose the death penalty regardless of the nature of the crime. However, the jury was precluded from their 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.

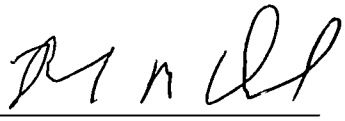
The order of dismissal is inaccurate when it asserts that the instructions, taken as a whole, were sufficient. App. 2881. In Cage v. Louisiana, 498 U.S. 39 (1990), the United States Supreme Court reversed the conviction finding that a jury instruction that included the phrase "moral certainty" could 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).

CONCLUSION

By reason of the foregoing arguments, petitioner should be granted a new sentencing trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of April, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Greenville County

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

BRAD KEITH SIGMON,

PETITIONER,

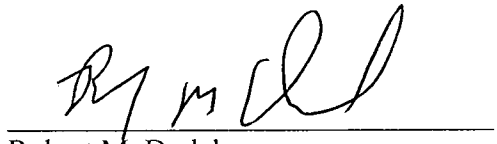
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

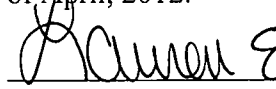
I certify that a true copy of the brief of petitioner, in this case has been served on Melody J. Brown, Esquire, this 20th day of April, 2012.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of April, 2012.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014