

# VOLUME SIX OF SIX

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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VOLUME SIX  
2501 - 2893

Appeal from Greenville County

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

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S.C. SUPREME COURT

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

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## APPENDIX

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ROBERT M. DUDEK  
Acting Chief Appellate Defender

HENRY DARGAN MCMASTER  
Attorney General

ELIZABETH A. FRANKLIN-BEST  
Appellate Defender

JOHN W. MCINTOSH  
Chief Deputy Attorney General

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

---

DONALD J. ZELENKA  
Assistant Deputy Attorney General

WILLIAM H. EHLIES, II  
Attorney at Law

MELODY J. BROWN  
Assistant Attorney General

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

J. ANTHONY MABRY  
Assistant Attorney General

P. O. Box 11549  
Columbia, S. C. 29211  
ATTORNEYS FOR RESPONDENT

ATTORNEYS FOR PETITIONER.

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In assessing whether counsel's conduct was reasonable under the *Strickland* standard, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. Attorneys in capital cases "must be conversant with constantly new interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State." *Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992). See also *United States v. Mooney*, 497 F.3d 397, 404 (4<sup>th</sup> Cir. 2007) (Counsel in criminal cases are charged with the responsibility of conducting "appropriate investigations, both factual and legal, to determine if matters of defense can be developed").

If counsel fails to object to prejudicial legal errors at trial, a valid strategy cannot be found where "counsel . . . fail[s] to object to comments which constitute an error of law and are inherently prejudicial." *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). See also *Von Dohlen v. State*, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) (counsel's conduct deficient in failing to object to improper argument asking the jurors to place themselves in the victim's shoes); *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004) (counsel's conduct deficient and prejudicial in failing to object to the solicitor's improper comparison between the worth of the defendant's life and the lives of the victims). Likewise, a valid strategy cannot be found when the professed strategy is invalid under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Finally, when counsel's conduct is based on an erroneous understanding of the law "counsel made no tactical 'choice.'" *Luchenburg v. Smith*, 79 F.3d 388, 392-93 (4<sup>th</sup> Cir. 1996).

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<sup>1</sup>Subpart (ii) of Ground 9(b) of the Amended Application, related to Dr. Martin, is hereby

A finding of prejudice under *Strickland* requires that an applicant “must show that there is a reasonable probability that, but for counsels’ 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).

Summary judgment is appropriate under Rule 56(c), which provides, in pertinent part, that upon a motion for summary judgment:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Rule 56(e) further provides that once a motion for summary judgment is filed, “an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.” *See also Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003).

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withdrawn.

There is no genuine issue as to any material fact in this case. Trial defense counsel have both been deposed. These depositions and the trial record and exhibits are the totality of the possible evidence on these issues. In addition, there are no credibility questions to address because both of the counsel testified consistently with the other. Thus, no issue—let alone a genuine issue—of material fact exists and this Court can rule on the issues without conducting the scheduled evidentiary hearing, which would simply duplicate the testimony already given by counsel.

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.*

During the trial and sentencing phase, Applicant's counsel failed to adequately preserve various issues for appellate review, including failing 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. Counsel also failed to ensure appropriate instructions to the jury in sentencing by failing to adequately request a charge on the statutory mitigating circumstance of age or mentality, by failing to object to the restrictive definition of mitigating circumstances as evidence that "simply lessens the degree of one's guilt," and by denigrating non-statutory mitigation evidence as only evidence the "defendant claims serves the same purpose" as statutory mitigating circumstances.

**(i) Improper evidence concerning the day to day circumstances of prison life.**

Prior to opening statements in the sentencing phase, defense counsel moved to limit the anticipated testimony of James Sligh, an employee of the South Carolina Department of Corrections. Record on Appeal (ROA) 1823. The state asserted an intent to have him testify

concerning "the day in the life of a prisoner in – serving life without parole, what privileges, what amenities [sic], what advantages this individual will have." ROA 1823. The solicitor even categorized prison, in argument on admissibility of this testimony, as "nothing more than a small little town that's got a restaurant and all that." ROA 1825. The court expressed some doubt about the admissibility of this testimony because "aggravating circumstances are limited to statutory aggravating circumstances with the addition of character of the defendant, with the addition of victim impact." ROA 1826-27. Nonetheless, because the court noted that defense counsel were "not objecting to it," ROA 1826, the court restricted only the intended evidence about the day to day conditions on death row, ROA 1827.

While the state did not present the testimony of Mr. Sligh, the state pursued this line of evidence and argument in cross-examination of Jim Aiken, the defense expert on Applicant's adaptability to confinement. During this examination, the solicitor elicited information that an individual serving a sentence of life imprisonment without parole would "have regularly scheduled visitors" and "contact visitation or non-contact visitation . . . at the discretion of the administrator." ROA 2146, 2149-50. He would also have access to television; recreation; "a library to work on law materials, or to check out books and read books"; telephone to "call home, call friends, call whoever he wanted to, call as long as it was a collect call"; canteen; showers at least "three times a week"; "educational classes"; mail, including magazine subscriptions such as "Sports Illustrated"; and a "personal locker in his bunk area where he can keep his own personal effects." ROA 2146-49. The solicitor also implied that "if a family member[] dies, he gets to go to the funeral." ROA 2146. Defense counsel posed no objection to any of this testimony.



The solicitor further extended this line with his closing argument asserting that "life imprisonment is not the appropriate sentence in this case." ROA 2190.

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.

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."

ROA 2191. Still defense counsel posed no objection.

Counsel's failure to object was deficient because the evidence and argument by the solicitor violated both S.C. Code § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution.

As the South Carolina Supreme Court recognized long ago:

Such determination as the time, place, manner, and conditions of execution or incarceration . . . are reserved by a statute . . . to agencies others than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and the characteristics of the individual defendant.

*State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).

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 no concern of theirs.

*State v. Atkinson*, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970) (quoting *State v. White*, 142 A.2d 65, 78 (N.J. 1958)).

The conditions of incarceration do not reflect the circumstances of the crime or the characteristics of the defendant. As the court said in *Plath*, “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].” 281 S.C. at 15, 313 S.E.2d at 627.

As subsequently explained in more detail:

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. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole.

*State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005). Thus, it is clearly error to elicit testimony about the “privileges” or “benefits” of an inmate given a life without parole sentence, such as “access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors.” *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 452-53 (2007). Furthermore, this type of evidence is extremely prejudicial and requires reversal because “this entire subject matter inject[s] an arbitrary factor into the jury’s sentencing considerations” in violation of S.C. Code § 16-3-25(C)(1). 371 S.C. at 488-89, 640 S.E.2d at 453. Likewise, the Eighth Amendment’s prohibition against cruel and unusual punishment 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.’” *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n.24 (1983)).

While this case was tried before *Bowman* or *Burkhart*, counsel's conduct was still deficient in failing to be familiar with the constitutionally mandated requirement and "long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime," *Burkhart*, 371 S.C. at 488, 604 S.E.2d at 453, as well as the clear statements in *Plath* and *Atkinson*.

Counsel's conduct is also not excused by strategy. Frank Eppes, the counsel that addressed this issue in motions and presented the testimony of Mr. Aiken, testified that he "had no clue at the time that there was a way to exclude evidence of the living conditions in a penitentiary." Eppes at 24. In short, he testified: "I can say almost categorically that I had no idea that I should object to that at the time. . . . I thought it was admissible." *Id.* at 32. John Abdalla, on the other hand, testified that they "were trying to stay away from anything that made it sound like [prison] was going to be an easy time," Abdalla at 20, and that he believed this type of testimony should not come in, *Id.* at 21. Thus, counsel either had no idea it was objectionable or thought it was objectionable but simply failed to object. Either way, counsel's conduct was not reasonable strategy.

Prejudice is clear where much of Applicant's case for life was his adaptability to confinement, which would have been viewed possibly as aggravating evidence in conjunction with this arbitrary and irrelevant information.

**(ii) Improper closing arguments expressing the Solicitor's personal opinions.**

During the solicitor's closing argument in sentencing, the solicitor asserted that "the State has asked for the death penalty and we think it's appropriate in the case," ROA 2184, and

reminded the jury that the State of South Carolina "is represented through me and my staff,"

ROA 2187. The Solicitor went further, however.

Now, when we asked for the death penalty, it's a fair and appropriate question for you to say back to me, Solicitor Arial, 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 [sic] 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 the world that do not deserve to continue to live with us.

ROA 2187-88. 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.

ROA 2194.

The Solicitor's argument was improper because it related the solicitor's private decision to seek and personal opinion that the death penalty is appropriate in this case. "Such reference could divert the attention of jurors from the evidence before them to an improper consideration of the solicitor's personal views." *State v. Smart*, 278 S.C. 515, 517, 299 S.E.2d 686, 687 (1982). In short, this argument injected an arbitrary factor in the proceedings in violation of S.C. Code § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. *State v. Woomey*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981); *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982).

Defense counsel's failure to object to this argument was not based on any strategic reason. Mr. Eppes testified that, at present, he is not certain and that it is "highly suspect" that the solicitor can "give them an answer of why he thinks the death penalty is appropriate in that way," particularly in "his personal opinion." Eppes at 35. The bottom line:

I typically listen to argument and—I'm not a person who's shy about objecting during the opposition's closing arguments. And reading this right now it strikes me as something objectionable, and at the time I have no memory of it striking me that way.

*Id.* at 38.

I can't go back and put myself in my mind to tell you whether I didn't object out of ignorance or out of strategy at that point.

*Id.* at 78. Mr. Abdalla, on the other hand, testified that he was certain that personal opinion comments "would be improper" and that he believes he was aware of this in 2002. Abdalla at 24. "If I didn't [object] I either missed it or was oblivious. I don't know. I don't recall." *Id.* at 48. Thus, again, regardless of whether counsel was not listening and missed it, was listening and did not realize it was objectionable, or was listening, realized it was objectionable, and still made no objection without a reasonable strategic basis, counsel's conduct was deficient and prejudicial. *Strickland, supra.*

**(ii) Failure to request a charge on the statutory mitigating circumstance of age or mentality.**

The trial evidence established that around 8:00 p.m. on April 25, 2001, Applicant arrived at the home of his employee, Charles Hall, and Mr. Hall "could tell he had been drinking," although he "seemed coherent." ROA 1696. Applicant had also reported earlier at work that he had been drinking since 8:00 a.m. ROA 1698.

On April 26, 2001, Applicant reported that he had used approximately fifty dollars worth of crack cocaine and drank two mixed drinks and a half a bottle of Peppermint Schnapps. ROA 2105. Around 9:00 p.m. Applicant met up with Eugene Strube. The two bought some beer before going to Applicant's former home, which was next door to the victims' home. ROA 1660-61. In the house, according to Strube, Applicant "drank a six-pack" of beer, ROA 1675, and the two were "smoking some crack" ROA 1663. While Strube got sick off "the first hit," ROA 1671, they each smoked "a couple hundred dollars worth" of crack, ROA 1676, "through the evening" until they ran out. Strube went to sleep around 1:00 a.m. while Applicant remained awake throughout the night. ROA 1664, 1675. Ultimately, Strube abandoned his agreement to assist Applicant as Applicant entered the victims' home prior to 8:30 a.m. and the crimes ensued. ROA 1326.

With respect to the statutory mitigating circumstances to be charged, defense counsel sought a charge on "[t]he age or mentality of the defendant at the time of the crime,"<sup>2</sup> based only on "testimony about his mental state." ROA 2177. 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 law was substantially impaired."<sup>3</sup> The court's expressed reasoning was that "mentality would be like education level, or mental retardation, or something like that." ROA 2177. Defense counsel did not pursue the point further and conceded the issue. ROA 2177. The court, thus, did not instruct on "age or mentality," ROA 2232, and defense counsel posed no further objection, ROA 2237.

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<sup>2</sup>S.C. Code § 16-3-20(C)(b)(7).

<sup>3</sup>S.C. Code § 16-3-20(C)(b)(6).

Counsel's failure to correct the trial court's misunderstanding of the law and obtain the instruction or, alternatively, to preserve the issue for appeal was deficient because evidence of alcohol and drug use and intoxication requires instruction on the statutory mitigating circumstances 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. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986).

The failure to allow the jury to properly consider this mitigating circumstance was both state law error and a violation of the Eighth and Fourteenth Amendment requirements that the jury be allowed to consider any relevant mitigating circumstances concerning the circumstances of the crime and the character of the defendant. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Counsel's failure to object is not explained by strategy. Both counsel testified that they did not recall their thinking at the time of trial. Eppes at 41. Abdalla at 27. Abdalla went further, however, and indicated that he may also have had the same misunderstanding the judge had about the "mentality" mitigating circumstance. Specifically, Abdalla testified it "appears to be more mentally retarded." Abdalla at 27. Either way, again there was no reasonable strategic basis for the failure to correct the trial court's misunderstanding and to adequately pursue the instruction on the "age or mentality" mitigating circumstance.

**(iii)&(iv) Failure to object to the trial court's instructions improperly narrowing the scope of mitigating circumstances.**

During the sentencing phase instructions to the jury, the trial court improperly charged the jury that a mitigating circumstance is one which "simply lessens the degree of one's guilt.

That is it makes the defendant less blameworthy, or less culpable.” ROA 2232. Likewise, the trial court instructed the jury that a non-statutory mitigating circumstance “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.” ROA 2232-33.

The trial court’s penalty phase instructions impinged upon the jury’s ability to properly consider all mitigating evidence offered by Applicant by erroneously suggesting that only circumstances directly related to the offense, such as Applicant’s mental status at the time of the offense, were relevant to the jury’s sentencing calculus. Part of Applicant’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 Applicant’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.

One of the most well-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 v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *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. *Lockett, supra*. The trial court's instructions improperly precluded the jury from contemplating all relevant evidence to make an individualized sentencing decision.

Trial counsel's failure to object to these charges was deficient and not based on any strategic consideration. Mr. Eppes testified only that he had "absolutely no memory" of the charges or his thinking process at the time of time. Eppes at 48. Mr. Abdalla testified similarly. Abdalla at 29-31. Thus, again there was no strategic consideration involved and Applicant was prejudiced.

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 by admission of the videotape made of Applicant's confession call to his mother shortly after his arrest.*

During the trial and sentencing phase, Applicant's counsel failed to provide effective assistance of counsel by failing to play the videotape made of Applicant's confession call to his mother shortly after his arrest.

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

Counsel's conduct was deficient and not based on strategy. Mr. Eppes explained what happened when he attempted to play the video. "[W]e tried it, and we tried it, and we tried it. And 30 minutes later we tried it some more, and we never got it to work." Eppes at 55. He also

testified, when asked why the video issue was not addressed again in sentencing, "I don't have a memory of thinking about it during the mitigation phase, and I frankly can't tell you why or why not." *Id.* at 56. Mr. Abdalla similarly testified that the video was not played only due to technical issues and an inability to "get the equipment in court to operate properly." Abdalla at 35. Thus, it is clear that counsel did not have a strategy not to present this evidence and, in fact, intended to present it.

Counsel's failure to do so was both unreasonable and prejudicial in sentencing because the jury was never allowed to hear the actual statements or shown the very emotional and remorseful nature of Applicant's initial confession. *Strickland, supra.*

*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.*

Counsel's conduct was deficient in presenting 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.

Specifically, 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. ROA 1950. Counsel then called Troy Barbare, who was Rebecca Barbare's second husband, to testify briefly that she began dating Barbare while she was separated but not divorced from Sims. After a sidebar following the state's objection about "the course" of their relationship, ROA 2032, counsel elicited no relevant information other than the fact that she had

been dating Applicant during a separation from Barbare, but then continued the marriage with Barbare. ROA 2034. The State's objection to testimony about possible orders of protection or the basis for Barbare's divorce from her were then sustained. ROA 2036.

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 Sigmon and Sigmon was leaving him threatening messages on his voice mail. ROA 2039-40. The threats were specific that if Barbare "didn't stay away from her" Applicant would "kill" him. ROA 2040. 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." ROA 2041.

During the course of instructions on mitigation, however, defense counsel sought and obtained an instruction on the statutory mitigating circumstance of provocation by the victim, which the court agreed to give based on "the action of Mr. Larke saying he was going to get his gun" when Applicant entered the victims' home. ROA 2178.

During closing arguments, however, counsel focused on Applicant's relationship with Rebecca Barbare as the provocation.

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.

ROA 2196. Counsel then mentioned the testimony of Barbare's second and third husbands and Applicant's confession that included "two and half pages" about his relationship with her and detailed the information from the confession. ROA 2196-98. Counsel made no mention of the provocation mitigation factor or of Mr. Larke mentioning a gun when Applicant 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," ROA 2232, would have understood this to mean that Ms. Barbare provided the provocation or, in the words of defense counsel, "the trigger," ROA 2196.

Counsel's conduct was deficient and not based on reasonable strategy. To the extent counsel's conduct may have been motivated by strategy, albeit an unreasonable one, there is no factual dispute about what the strategy was and, thus, this issue is again one that is appropriate for summary judgment.

Specifically, Mr. Eppes testified that the defense wanted to show Ms. Barbare's "pattern of behavior to have a man, find another man." Eppes at 63. They also sought to show through Mr. Barbare that Applicant had treated "their son okay." *Id.* at 64. Through Mr. Miller they also sought to show that he and Ms. Barbare "went to live in the house where her mom and daddy were killed, which to me just seemed a little macabre." *Id.* Mr. Abdalla's testimony about the overall theory was similar. Abdalla at 38-41.

Counsel's unreasonable conduct was 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).

**Conclusion**

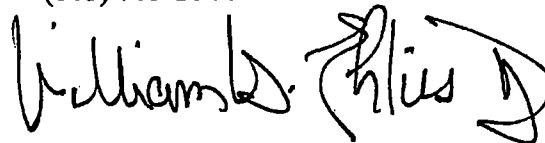
For the foregoing reasons, counsel's conduct in each instance was deficient, not based on reasonable strategy, and separately and cumulatively prejudicial in sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Florida v. Nixon*, 543 U.S. 175 (2004). Thus, summary judgment should be granted.

Respectfully submitted,

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

Teresa L. Norris  
Blume Weyble & Norris, LLC  
P.O. Box 11744  
Columbia, SC 29211  
(803) 765-1044

By:



July 22, 2008.

|                           |   |                                       |
|---------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA   | ) |                                       |
|                           | ) | IN THE COURT OF COMMON PLEAS          |
| COUNTY OF GREENVILLE      | ) |                                       |
| BRAD KEITH SIGMON, #6008, | ) |                                       |
|                           | ) | C/A No.: 2006-CP-23-6547              |
| Applicant,                | ) | (CAPITAL PCR)                         |
| vs.                       | ) |                                       |
|                           | ) | RESPONSE IN OPPOSITION TO APPLICANT'S |
| STATE OF SOUTH CAROLINA,  | ) | MOTION FOR SUMMARY JUDGMENT           |
|                           | ) |                                       |
| Respondent.               | ) |                                       |
| _____                     | ) |                                       |

An evidentiary hearing is scheduled to begin on August 4, 2008. On July 22, 2008, Applicant filed a Motion for Summary Judgment. Respondent submits the motion should be denied and the hearing should be held as scheduled. Applicant asserts that trial counsel have been deposed on the issues, and, relying solely on the trial record and the depositions of trial counsel, Frank Eppes, Esq., and John Abdallah, Esq., and exhibits thereto, submits that he is entitled to judgment as a matter of law. Motion, p. 1. Respondent disagrees, and, in support of this position, would respectfully show the Court:

#### *Summary Judgment*

"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

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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). “In general, if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented.” *Baird v. Charleston County*, 333 S.C. 519, 529-530, 511 S.E.2d 69, 74 - 75 (1999).

*Evidence Relied Upon in Support of Motion for Summary Judgment*

As referenced above, Applicant claims “[b]oth trial defense counsel have been deposed on the issues” of ineffective assistance of counsel, and the only relevant evidence is their depositions, including exhibits, and the trial record. Motion, pp. 1 and 4. Such assertion is particularly specious given that one allegation is based on videotape evidence not in the record that would necessarily not be available for the Court to review to determine whether counsel’s actions concerning same were reasonable, or its omission harmless in light of the remaining record. See Allegation 9(b)(allegation of ineffective assistance for failure to play tape for the jury). Even so, Applicant relies, in great part, on depositions which were taken in discovery. These depositions were not *de bene esse*, and counsel did not have the benefit of a full review of the record of the trial or their main file prior to the taking of the deposition. See Eppes Depo. at pp. 16, 20, and 67; Abdallah Depo. at pp. 12, 44 and 50-51,

54-55.<sup>1</sup> In fact, Mr. Abdallah specifically stated, when asked about the Gatlinburg videotape, "...I guess I should review it before August 4<sup>th</sup>." Abdallah Depo. at p. 51.<sup>2</sup> In essence, the evidence relied upon was taken in anticipation of a full evidentiary hearing being held. Moreover, the lack of clarity in the answers specifically weigh against summary judgment. "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). Applicant has simply parsed and extracted portions of the depositions to rely upon to assert there is no question of material fact. To the contrary, not only should he not ignore the facts and inferences unfavorable to him, "[a]ll ambiguities, conclusions, and inferences arising in and from the evidence must be construed most strongly against" him. *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). Moreover, Respondent disagrees with the assertion that "no credibility questions" exist, as there are differences with the deposition answers, in scope and completeness, as discussed more fully *infra*. Where matters of credibility are at issue, summary judgment should not be granted. *See generally True v. Monteith*, 327 S.C. 116, 120-121, 489 S.E.2d 615, 617 (1997)(summary judgment inappropriate where credibility must be determined). Again, Applicant has failed to show a matter ripe for summary judgment.

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<sup>1</sup> The individual pages of the depositions referenced within this document are attached and incorporated by reference.

<sup>2</sup> Mr. Abdallah freely admitted that, though having received correspondence from Respondent, he had not discussed the case, and, in fact, knew very little about the action. Abdallah Depo. at pp. 12-14; pp. 43-44. *Compare* Eppes Depo. at pp. 16-20; pp. 72-73.



*Allegations of the PCR Action*

Applicant has withdrawn (9)(b)(ii) of the amended application. Motion, p. 2, n. 1. He now seeks summary judgment on all remaining issues which are as follow:

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)(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.
- (10)(b)(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.
- (10)(b)(iii) Counsel failed to adequately request a charge on the statutory mitigating circumstances of age or mentality, based on he evidence of drugs and alcohol at the time of the offenses, or to properly address the trial court's erroneous understanding that "mentality" referred only to evidence of mental retardation or limited intellectual abilities. *See* ROA 2177, 2232.
- (10)(b)(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.
- (10)(b)(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.

(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)(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.

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.*

(10)(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.

(10)(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.

Amended Application, pp. 2-5; Motion, pp. 4, 8, 10, 12, and 14.

#### *General Law on 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 (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 automatically render counsel’s assistance constitutionally ineffective. *Strickland*, 466 U.S. at 689. *Bell v. Evatt*, 72 F.3d 421, 429 (4<sup>th</sup> 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.

Lastly, as noted above, 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, 340, 504 S.E.2d 822, 829 (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.

*Discussion of the Issues in Opposition to Motion for Summary Judgment*

- 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.

The defense 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, 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 restraints 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 to this line of testimony, 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. R. pp. 2146-2150. The entire cross-examination at issue spans less than four (4) pages in the entire trial transcript. *Id.*

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. Applicant's Trial Brief, p. 4. He asserts that counsel's failure was deficient because the evidence and argument by the solicitor violated both S.C. Code § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. Motion, p. 6. Applicant's analysis of a deficiency is incorrect. The "deficiency" at issue is not the type of evidence admitted. The "deficiency" at issue 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 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. 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*, 2008 WL 2715948, at 4 (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). Applicant's analysis is fatally flawed. Moreover, the analysis is flawed in its reliance on a presumption of prejudice. 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. 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, and had ample time to prepare, Abdallah Depo. at p. 46. Rather, in argument in support of relief for this issue, Applicant simply relies on the fact the evidence should not have been admitted, which, actually, fails to address the issue raised at all, which was whether counsel was ineffective in failing to object to cross-examination. 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, 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”). Even so, it is apparent that the legal analysis is incorrect.

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, Motion, p. 8, 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 Mr. Aiken’s testimony, that Applicant would not be a predator in prison, and did not offer that testimony simply as evidence of adaptability. Eppes Depo. at p. 25. Further, he 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. at p. 77. He used same in his closing argument to the jury. Eppes Depo.

at p. 76. See also R. pp. 2206-2207. 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. *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 (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). As in *Plath*, there could be no prejudicial error here.

Respondent would also note that Applicant concedes that "this case was tried before *Bowman* or *Burkhart*,"<sup>3</sup> 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. Burkhardt*, 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."). Implicit in this concession is also the concession that prison condition testimony had been introduced in several fairly contemporaneous capital cases before the Supreme

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<sup>3</sup> *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), and *State v. Burkhardt*, 371 S.C. 482, 640 S.E.2d 450 (2007).



Court reversed *Burkhart*, (which is also well supported by the fact that the issues exist in *Bowman* and *Burkhart*). See also *State v. Bryant*, 372 S.C. 305, 317, 642 S.E.2d 582, 589 (2007)(defense counsel presented social worker who testified “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”). See also R. p. 1825-1826. 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”). Again, there could be no proper basis for objection.

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)<sup>4</sup>), and to argue that the punishment of life

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<sup>4</sup> Respondent notes Mr. Abdallah’s statements at his deposition that counsel wanted to prohibit testimony suggesting a “county club atmosphere.” Abdallah Depo. at p. 20. Respondent also notes that counsel, at the trial, 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:

imprisonment was an extraordinarily harsh sentence, and the State merely cross-examined the defense witness on same. This balance of evidence on each side fails to support a finding of prejudice on this record.<sup>5</sup> Moreover, given the overwhelming 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. Applicant has failed to show he is entitled to judgment as a matter of law.

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... 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 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.

The fact that counsel moved to limit Mr. Sligh’s testimony, though discussed at length in the trial brief and the motion, simply is not supportive of the conclusion that counsel should have had an objection to the instant testimony. There is a subtlety to the argument that appears to have been overlooked by Applicant. Even so, as counsel also stated, his approach now, given the referenced recent cases, would be different, *Eppes Depo.* at p. 32, but at the time of trial, he intended to offer his own witness concerning prison conditions, *Eppes Depo.* at p. 24.

<sup>5</sup> See *John Richard Wood v. State of South Carolina*, C/A 2005-CP-23-4737, wherein the PCR judge declined to find prejudice in similar circumstances: “Given the relative equality of presentation by both sides on the issue of conditions of confinement, it cannot be said there is a reasonable probability of a different result. Had counsel objected to the State’s evidence on this issue, it would not have been allowed to make its own points along these lines as well. Given the overwhelming evidence in aggravation and the limited evidence in mitigation, admission of both the State’s and defense’s evidence of conditions of confinement does not establish *Strickland* prejudice.” Order of Dismissal with Prejudice, filed December 19, 2007.

- 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 would respond if asked that he 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; Motion, p. 9. The passages also show, however, that the solicitor clearly *requested* the death penalty, and does not suggest he has already made such a decision for the jury. *Id.* See also R. p. 2187-88. Even so, Applicant argues that "[t]he Solicitor's argument was improper because it related the solicitor's private decision to seek and personal opinion that the death penalty is appropriate in this case." Motion, p. 9. Applicant misapprehends the comments.

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. *State v. Northcutt*, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007). 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). Further, the arguments here 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 (8<sup>th</sup> 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). And, of course, “[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). Again, here, the solicitor clearly *requested* the penalty, and did not assume the penalty or lessen the authority or responsibility of the jury in any way. This is, in fact, the position the counsel took when discussing the argument in his closing. R. p. 2194. Moreover, neither Mr. Eppes nor Mr. Abdullah, in their depositions, testified a valid and clear objection was missed. In fact, upon review of the record at the deposition, Mr. Eppes merely considered the passages “suspect,” Eppes Depo. at p. 35, and Mr. Abdallah, indicated the conversation aspect (including suggesting the jury should ask him what he thought), and the appearance of an argument based on facts not in evidence, struck him as improper, Abdallah Depo. at p. 49. This weighs in favor of finding that these argument simply do not say what Applicant now claims the arguments say. Counsel could not be ineffective in failing to object. Alternative, if the Court should find error in failing to object to either or both of these arguments, the record would not support a finding of prejudice, given the wealth of evidence in aggravation, including the absolutely overwhelming (and admitted) evidence of guilt of a brutal double murder. *See Von Dohlen v. State*, 360 S.C. 598, 613-614, 602 S.E.2d 738, 746 (2004)(“comment, although improper, did not so infect the trial with unfairness as to make the

resulting conviction a denial of due process. *Cf. State v. Gaskins*, 284 S.C. 105, 119, 326 S.E.2d 132, 141 (1985) (solicitor's comment during closing argument in capital case that certain evidence was undisputed because of defendant's failure to testify was harmless error beyond a reasonable doubt in context of entire record and in light of overwhelming evidence of guilt), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991)". Applicant has utterly failed to show he is entitled to judgment as a matter of law.

- 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 counsel was ineffective in failing to request a charge on age or mentality based on evidence of "alcohol and drug use and intoxication" in the record. Motion, p. 12. Applicant is incorrect that "alcohol and drug use" alone require the charges be sought. *See 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)."); *State v. Bowman*, 366 S.C. 485, 494-495, 623 S.E.2d 378, 383 (2005), *abrogated on different grounds State v. Evans*, 371 S.C. 27, 637 S.E.2d 313 (2006) ("Where there is evidence the defendant was extremely intoxicated during the commission of the crime, the failure to instruct the jury on statutory mitigating circumstances (2), (6), and (7) is not harmless error" but evidence of "appellant's history of substance abuse, [and] evidence appellant had been drinking the day of the murder" was not sufficient to show "he was actually intoxicated at the time

of the crime.”). Further, the record does not support that Applicant was intoxicated at the time of the murders. 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 1.<sup>6</sup> That is different, however, than intoxication at the time of the crime. *Vasquez*. Moreover, the defense did not assert Applicant was intoxicated at the time of the crime. The defense clearly maintained Applicant was then suffering from a mental issue, and the jury was charged on the mitigating circumstance of acting under the influence of a mental or emotional disturbance, and capacity to appreciate the criminality of his conduct or his ability to conform was substantially impaired (i.e. (2) and (6)). R. p. 2232. Counsel argued that Applicant was under a mental or emotion disturbance, and that he suffered from addiction, but did not claim intoxication. R. p. 2203-2204. While, at the depositions, Applicant posed general questions concerning language overlap in the statutory mitigating circumstances, See Abdallah Depo. at p. 27; Eppes Depo. at 41, trial counsel ultimately responded with remarks consistent with the closing and with the actual charge given. For instance, Mr. Eppes stated that he recalled the evidence supported Applicant was “wound up like a top” at the time of the double murder, but did not indicate that he believed the evidence also supported that Applicant was then intoxicated. Eppes Depo. at p. 40. Mr. Abdallah stated in his deposition that he recalled evidence that Applicant had used alcohol and drugs the night before, but only indicated definitely that he suffered from “some kind of mental problems.” Abdallah Depo. at p. 50. Applicant’s assertion there is no evidence of strategy is utterly unfounded. Applicant has failed to show either error or

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<sup>6</sup> Respondent has cited the testimony of defense expert Dr. Morton regarding the effect on Applicant of cocaine and alcohol use the night before the murders, which referenced the “secondary” feelings *after* drug use, but he did not specifically testify as to intoxication. R. p. 2123, lines 19-25.

prejudice in light of the record. *Strickland, Jones*. Again, Applicant has failed to show that he is entitled to judgment as a matter of law.

- 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.

"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. 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, and that counsel committed prejudicial error in failing to object "where the instructions improperly precluded the jury from contemplating all relevant evidence to make an individualized sentencing decision." Motion, p. 14. When considered as a whole, however, 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. Therefore, Petitioner could not prove prejudice such that would entitle him to relief under *Strickland*. Respondent agrees that Mr. Eppes stated in his deposition that he had no recall of his considerations at the time, Eppes Depo. at p. 48, but he also clearly stated that it didn't "strike [him] as something [he] though was a big deal at the time" which does not clearly indicate counsel's strategy or a lack of strategy, Eppes Depo. at p. 40. Respondent disagrees the statement, in connection with the record, is susceptible to only one inference - - that "there was no strategic consideration involved" on the part of counsel.

Motion, p. 14. Applicant has failed to show that he is entitled to judgment as a matter of law.

- 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.

Applicant argues that counsel failed to play a videotape made of Applicant's confession call to his mother while being held in Gatlinburg, Tennessee. Motion, p. 14. He claims that failure to play the tape was not based on strategy, but a failure in technical ability to play the tape. Motion, pp. 14-15. The record clearly reflects technical problems with playing the tape during the guilt phase. See R. p. 1538. But the issue here references the penalty phase. Yet, technical issues aside, Mr. Eppes clearly stated at his deposition that "[t]he problems with the tape were when he wasn't crying and he showed his anger it was bad." Eppes Depo. at p. 53. He also stated, "I honestly can't tell you that we talked about using the tape in the mitigation part of the trial. I don't remember, but I remember there were parts of the tape I was really scared of." Eppes Depo. at p. 56. He did recall,



however, that he “felt like with reading my transcript, that Bob and them never questioned, into the record on each of the parts of the taped I wanted to use that - - that we got in what we got in.” Eppes Depo. at p. 56. The record supports counsel’s recollection. Counsel referenced multiple statements (along with descriptions of Applicant’s emotional behavior) apparently taken from the tape, which the officer testifying for the State confirmed, See R. p. 1513, line 11 - p. 1519, line 2, and he referenced the tearful conversation and Applicant’s remorse in his closing in the penalty phase, R. p. 2200. In that counsel submitted the information at the time of trial, in a form preventing exploitation of the possible negative impact, there is no error, regardless of the technical issues regarding the playing of the tape. Even so, if some error may be found in regard to the presentation of the tape, the evidence on the tape was before the jury; thus, Applicant could not prove prejudice under *Strickland*. Just showing a “fancier” case in mitigation in PCR does not establish error and prejudice and the right to a new trial. *See generally, Simpson v. Moore*, 367 S.C. 587, 598 n.2, 627 S.E.2d 701, 707 n.2 (2006), *quoting Jones v. State*, 332 S.C. 329, 339, 504 S.E.2d 822, 827 (1998). Again, Applicant has failed to show that he is entitled to judgment as a matter of law.

- 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.
- 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.

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.

Applicant apparently concedes this is the theme and an intentionally strategy which guided counsel's actions. Motion, p. 16. However, he argues counsel's strategy was unreasonable, and lead

to the prejudicial introduction of more evidence of aggravation, and an argument which could be construed unfavorably. Motion, p. 16. While true there is no factual dispute on the existence of a strategic motive for these actions, there is a dispute as to the interpretation of the facts of record as submitted in support of Applicant's motion. In short, there are factual disputes still existing for determination.

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. Clearly, counsel stated in his deposition that he considered the pros and cons - - i.e. that they elicited both somewhat damaging testimony, but which was supportive of their theory, and also elicited testimony that was strictly mitigating, such as Applicant's kind treatment of Barbare's son in calling the husbands to testify. Eppes Depo. at p. 64. Such recollection is supported by the record. See R. pp. 2035-2038. Further, the testimony regarding Applicant's kindness toward Barbare's son was consistent with and corroborated Applicant's favorable statement to the jury regarding same. R. p. 2213. Without doubt, the testimony established the thought that "Becky had tried to make [Applicant] jealous or whatever." R. p. 2040, lines 6-8. Clearly, the evidence supported the stated purpose for its admission, and, in addition, showed some clear mitigation evidence.

Moreover, 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. Yet, the provocation charge 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 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. 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, not a challenge to the validity of the statutory mitigating circumstance in general. 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'," Motion, p. 17, 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, and Applicant has failed to summarily show the strategy used in the instant case was unreasonable. Moreover, “[i]n a capital sentencing trial, the jury’s function is to determine the appropriate punishment based upon the *circumstances of the crime* and the characteristics of the defendant.” *State v. Atkins*, 303 S.C. 214, 220, 399 S.E.2d 760, 763 (1990)(emphasis in original). “[C]onsideration of the character and record of the individual offender and the circumstances of the particular offense” is considered, in fact, to be “a constitutionally indispensable part of the process of inflicting the penalty of death.” *State v. Woomer*, 278 S.C. 468, 471, 299 S.E.2d 317, 319 (1982), quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). Here, the evidence and argument was necessary to present the context of this particular crime. Further, it appears that any error accrues to the defense’s benefit as the charge on the law seemingly supported the factual theme. Lastly, even if error is found, the husband testimony garnered favorable evidence and merely presented cumulative evidence of the jealousy Applicant felt over Barbare. When considered as a whole, the effect could only be minimal, which would not support a reasonable probability of the jury would have concluded the circumstances did not warrant death. *Jones, supra*. Again, Applicant has failed to show that he is entitled to judgment as a matter of law.

**CONCLUSION**

Based on the foregoing, Respondent submits that Applicant has failed to show an absence of factual issues in the instant matter, and, in fact, when other portions of the depositions are considered, with the record of the trial, a myriad of factual issues, ripe for consideration, are clear and present. Moreover, Applicant has failed to show that he is entitled to judgment as a matter of law. Applicant's motion for summary judgment must be dismissed and the evidentiary hearing should be held as scheduled, to begin Monday, August 4, 2008.

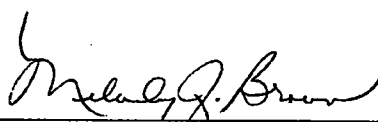
Respectfully submitted,

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, South Carolina 29211  
Telephone: (803) 734-6305

ATTORNEYS FOR RESPONDENT

August 1, 2008.  
Columbia, South Carolina.

1 A. And I said yeah.

2 Q. All right. So that was something that  
3 you undertook voluntarily?

4 A. Yeah.

5 Q. And you had the time, and you felt you  
6 had the skills and expertise to handle  
7 the case as the lead counsel?

8 A. I felt like I did in one hand, and I  
9 feel like I don't know if anybody is  
10 ever qualified to do that. And I'm not  
11 being flippant when I say that.

12 Q. Okay.

13 A. But, of course, I had my insecurities  
14 about me thinking --- you know, it's  
15 always scary a bit going into a  
16 challenge like that. But, yeah, I did  
17 believe. I always feel that I'm going  
18 to come up to the task when most of the  
19 show starts. Yeah.

20 Q. Okay. Tell me, in preparation for this  
21 deposition here today, have you  
22 reviewed any documents?

23 A. No, just a couple of things that were  
24 sent to me, but they really didn't have  
25 anything that I thought were really

1           relevant and --- I mean that I really  
2           --- that helped me so I thought I  
3           either missed out on some stuff,  
4           because I asked Frank which way we were  
5           going so I thought maybe I could think  
6           about it, but, no, I didn't have a  
7           clue.

8       Q.   Okay.

9       A.   So, no.

10      Q.   What was it that was sent to you?  Who  
11           sent it and what was it?

12      A.   Well, the only thing that I have is  
13           just this --- it's parts of the  
14           transcript.

15      Q.   Okay.

16      A.   The Amended Application for PCR Relief.

17      Q.   I'm going to show you then what's  
18           previously been marked to Mr. Eppes'  
19           deposition --- let's see here --- as  
20           Exhibit-One, and ask you if that's the  
21           document ---

22      A.   Yes.

23      Q.   --- that you received?  You've had that  
24           document?

25      A.   Yes, I do.



1 Q. Have you read that document?

2 A. I haven't read it all, no. I looked at  
3 the other thing instead of this.

4 Q. And was the other thing, what is marked  
5 Plaintiff's Exhibit-Number-Two to Mr.  
6 Eppes' deposition?

7 A. Let me see if I have it. For whatever  
8 reason I don't have that with me.

9 Q. Is it a document that you've seen and  
10 read prior to your testimony here  
11 today?

12 A. No. And that doesn't mean I didn't  
13 receive it and set it somewhere, but I  
14 did not read it, no.

15 Q. Okay. All right. Let's go back then  
16 to how you got involved in this case.  
17 Did Judge Watson appoint --- Judge  
18 Watson was the trial judge ---

19 A. That's correct.

20 Q. --- and usually procedurally they  
21 handle all the things, but we have an  
22 administrative judge in criminal  
23 matters.

24 A. Okay.

25 Q. Did Judge Watson appoint you, do you

1 A. And I realize as lead counsel maybe I  
2 should answer that differently, but  
3 that's how I considered it.

4 Q. Okay. Can you tell me what the nature  
5 of this motion is? What was it?

6 A. Well, this was an expert as I recall  
7 who was going to testify from the state  
8 regarding --- in essence without saying  
9 it's future dangerousness. Because  
10 what --- what Sligh was going to  
11 testify to, as I recall, was the  
12 country club nature of the prison and  
13 we were trying to stay away from  
14 anything that made it sound like it was  
15 going to be an easy time.

16 Q. Okay. This motion really doesn't talk  
17 future dangerousness, does it? It  
18 talks more in keeping with what you had  
19 just said about prison conditions.

20 A. Right. And I --- and I guess I'm kind  
21 of merging those. Maybe that was  
22 incorrect, but I knew it had to do with  
23 housing conditions, but I --- I  
24 probably should have stuck with the  
25 first thing I said about country club

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1 Q. Do you see a difference between six and  
2 seven?

3 A. Yeah, I see a difference, but I --- one  
4 is dealing with mental capacity. The  
5 other seems to be --- to me it doesn't  
6 say mental retardation, but number  
7 seven appears to be more mentally  
8 retarded because it's talking about age  
9 or mentality of the defendant, which  
10 would suggest somebody who was acting  
11 at an age that was beneath the age of  
12 the ability to be an adult.

13 Q. Okay.

14 A. A legal adult.

15 Q. Based on your recollection of the facts  
16 in Mr. Sigmon's case do, you find that  
17 six was a relevant request for a  
18 mitigation charge?

19 A. I'm five years from that point now, and  
20 I'm struggling with it. It's a close  
21 one, and I apologize that I can't say  
22 once again with certainty whether I  
23 think it would. I think it's close. I  
24 could see it going either way. I don't  
25 know what my thinking was enough now

1 A. I believe so.

2 Q. Okay.

3 A. And she was returning home, and she did  
4 come back. But I don't think his  
5 intent was ever to kill the parents.

6 Q. Okay.

7 A. I mean they were in a cruel sense  
8 collateral damage. He was trying to go  
9 somewhere else.

10 Q. All right. Okay. I think that's about  
11 it.

12 A. Okay.

13 **CROSS-EXAMINATION**

14 **BY MS. BROWN:**

15 Q. Mr. Abdalla, I'm Melody Brown with the  
16 Attorney General's Office.

17 A. Yes, ma'am.

18 Q. I believe ---

19 A. I need you to speak up a little bit.  
20 I'm going deaf. I'm sorry. You're  
21 very soft.

22 Q. I just have a few questions for you.

23 A. Sure.

24 Q. When we began your deposition you made  
25 reference to some materials that you

1 had received.

2 A. Yes, ma'am.

3 Q. Was that by a letter from me?

4 A. It could have been. I can't --- it  
5 would have had to been from one of you  
6 because I certainly don't have anybody  
7 else I was communicating with.

8 Q. Have you reviewed the entire  
9 transcript?

10 A. Yeah, it was from you.

11 Q. Have you reviewed the entire  
12 transcript?

13 A. I glanced over it, and I just saw the  
14 part that had my name on it, and I read  
15 that part.

16 Q. Okay. So not just the portions that  
17 you received from me, but the entire  
18 transcript from ---

19 A. Oh, no, I didn't review the entire  
20 transcript.

21 Q. Okay.

22 A. I'm sorry.

23 Q. That's okay. You mentioned when you  
24 were going over your qualifications  
25 that you had been appointed on a case

1           went bad. And. ---

2           Q. Do you recall the year?

3           A. No, probably --- I would guess around  
4           2000, '99. Judge Clary was on the  
5           bench.

6           Q. Okay.

7           A. It was Spartanburg if I didn't tell you  
8           that already.

9           Q. Thank you. You'd also mentioned that  
10          this was tried approximately seven  
11          months from the time you received it?

12          A. If I'm correct in my recollection. You  
13          know I don't know for sure when I  
14          received it officially.

15          Q. Do you recall needing additional time?

16          A. At the time I didn't think I needed  
17          additional time. During the trial I  
18          guess there's always a time you'd think  
19          "whoops."

20          Q. Okay. And you mentioned Mr. Mauldin.

21          A. Yes.

22          Q. Did you discuss strategy with Mr.  
23          Mauldin?

24          A. Some. Uh-huh.

25          Q. Did he advise you during the trial?

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1 just to instruct them on a theory but  
2 not to tell them --- not to have a  
3 conversation with them where he's  
4 basically saying the question, "You say  
5 back to me, Solicitor Ariail, why do  
6 you think the death penalty is an  
7 appropriate punishment in this case?"

8 Q. Okay. Conversation would be  
9 inappropriate?

10 A. Right.

11 Q. Okay.

12 A. And discussing other jurors --- juries,  
13 evidence --- he's making statements  
14 that aren't in evidence, talking about  
15 a voir dire that he got from another  
16 juror. Yeah. I would say that's all  
17 inappropriate.

18 Q. Thank you. Going back to the selection  
19 of the mitigating factors or mitigating  
20 circumstances.

21 A. Uh-huh.

22 Q. You had mentioned that since he was  
23 intoxicated you thought that some of  
24 these factors would have been  
25 appropriate?

1 A. Possibly, yes.

2 Q. Was it your opinion that he was  
3 intoxicated, or was it your opinion  
4 that he was drinking, or exactly what  
5 did you believe the evidence supported?

6 A. I believe that he was doing alcohol and  
7 drugs that evening. And although  
8 voluntary intoxication generally is not  
9 an excuse, I do believe it exacerbates  
10 mental problems, and I think there's  
11 little doubt that he has some kind of  
12 mental problems.

13 Q. The videotape.

14 A. Uh-huh.

15 Q. You said was never played. Is there  
16 anything harmful in that tape to your  
17 case, to your strategy?

18 A. Not that I recall. I mean outside of  
19 the obvious that he admits to the  
20 killing. But it was all --- it was  
21 pretty much "weeping testimony" as I  
22 recall, so. But I haven't seen it in  
23 years, so.

24 Q. Okay. Would it be helpful to you to  
25 review it again?



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1 A. Yeah, I guess I should review it before  
2 August 4th.

3 Q. I'm going to back up just a minute.  
4 You said that you were the primary  
5 contact with Mr. Sigmon.

6 A. Correct.

7 Q. You had multiple conversations with  
8 him.

9 A. Uh-huh.

10 Q. And in particular you previously  
11 testified that you spoke to him about  
12 psychological matters.

13 A. Yeah.

14 Q. One of the allegations references a  
15 history. Just a moment, please. One  
16 of the allegations is "Counsel  
17 subpoenaed Dr. Martin, a mental health  
18 examiner for the Greenville County  
19 Detention Center, who examined and  
20 treated the Applicant during pretrial  
21 confinement, but failed to call and  
22 present him as a witness to testify  
23 about Applicant's depressive disorder."  
24 What I want to know, Mr. Abdalla, what  
25 did your client tell you about a

1 don't remember specifics. I remember  
2 having conversations with her, but it  
3 would have had to been determined that  
4 it wasn't going to be beneficial, so we  
5 didn't see any point in proceeding or  
6 we didn't think it was worth going down  
7 that track.

8 Q. Mr. Abdalla, you may have mentioned  
9 this when you first began your  
10 deposition, but what documents did you  
11 review in preparation for this  
12 deposition?

13 A. Pretty much just the Amended  
14 Application.

15 Q. Amended. Okay.

16 A. And the --- and I just looked at the  
17 Application itself.

18 Q. Okay.

19 A. But I didn't review the transcript  
20 except that one part that had my name  
21 in it regarding Dr. Martin. It was  
22 flagged, and so I looked at that.

23 Q. Okay. Have you reviewed anything from  
24 your file ---

25 A. No.

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1 Q. --- in preparation? Where is your file  
2 at this time?

3 A. At the Public Defender Office.

4 Q. Public Defender Office. Have you  
5 maintained custody and control of your  
6 file?

7 A. I haven't but the Public Defender  
8 Office has.

9 Q. The Public Defender Office does. Okay.  
10 Thank you, sir.

11 MS. BROWN: I have no further  
12 questions.

13 MR. EHLIES: No questions.

14 (DEPOSITION CONCLUDED)

15

16

17

18

19

1 read the transcript --- and I'm not  
2 sure how it played out, was when the  
3 --- Brad's wife that shot him, her  
4 cross-examination, you know, it was  
5 really divided into two parts. One on  
6 an afternoon in the penalty phase and  
7 another the next morning. And that  
8 afternoon's cross-examination that I  
9 did I remember at the time thinking,  
10 "Boy, that was terrible." And those  
11 are the --- frankly the two things that  
12 stand out as --- as going poorly.

13 Q. Okay. You've mentioned that you had  
14 available to you certain transcripts.  
15 Can you identify those?

16 A. I got from Ms. Brown a copy of the ---  
17 basically the sentencing phase  
18 transcript, which is --- I brought it  
19 down here. It's pages 1787 through  
20 2248. And I reviewed those quickly  
21 this morning.

22 Q. Okay. And you spoke with Ms. Brown  
23 about --- about the issues, did you?

24 A. Yeah, she and I have talked two or  
25 three times about the trial.

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1 Q. Okay. Have you spoken to anyone else  
2 in preparation for the testimony? Did  
3 you speak with John?

4 A. I've talked --- I've talked to you a  
5 couple of times, and I've talked to  
6 John. John and I have talked in  
7 general terms two or three times.

8 Q. All right. And did you see the  
9 documents pertaining to the pleadings  
10 in the case?

11 A. I believe I have seen your Amended ---

12 Q. Okay.

13 A. --- Application.

14 Q. All right.

15 MR. EHLIES: Let's just put a  
16 sticker on it, Plaintiff's One, to  
17 make sure we're looking at the same  
18 thing.

19 MS. NORRIS: I've got one.

20 MR. EHLIES: I know you do.

21 (Thereupon the court reporter  
22 marked the pertinent documents as  
23 PLAINTIFF'S EXHIBIT-NUMBER-ONE.)

24 Q. All right. I'm going to show you  
25 Plaintiff's One.

1 A. Okay.

2 Q. And prior to your testimony here today  
3 have you seen that document and  
4 reviewed it?

5 A. Yeah.

6 Q. Okay.

7 A. Oh, there's one other thing.

8 (JOHN ABDALLA KNOCKS ON DOOR.)

9 (OFF RECORD COMMENTS)

10 A. One other thing I was tickled with ---  
11 and I'm sorry that I forgot it, but  
12 just seeing what the Applicant was  
13 indicted on, this exhibit, originally,  
14 there were several charges that related  
15 to Becky, the victim in the case whose  
16 parents were killed, and we raised a  
17 bunch of Cain about her psychiatric  
18 history and some other issues. And we  
19 --- we actually had some interesting  
20 cross-examination about her treatment  
21 of Brad, and we anticipated her being a  
22 big part of their case. And on the day  
23 of the trial Bob dropped --- Bob ---  
24 Solicitor Ariail dropped the charges  
25 --- and you can figure out what they

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1           were. I don't remember, but I know the  
2           kidnapping was one of them, which was a  
3           qualifier for the death penalty. And,  
4           frankly, I was really tickled to get  
5           that out of the mix. He was going to  
6           open his trial with six witnesses about  
7           Brad chasing Becky across the field,  
8           but he did drop --- I want to say there  
9           were a couple of ABlix or something  
10          else as well that he dropped that I was  
11          very pleased at the time that he  
12          dropped from the case.

13                   (Thereupon the court reporter  
14                   marked the pertinent documents as  
15                   PLAINTIFF'S EXHIBIT-NUMBER-TWO.)

16       Q. Uh-huh. I'm going to show you what's  
17       been marked now as Plaintiff's Exhibit-  
18       Two to your deposition and ask you if  
19       you had an opportunity to see that. Is  
20       that one of the documents that you  
21       reviewed prior to your testimony?

22       A. Ms. Brown E-mailed me what I believe to  
23       be your Trial Brief, but I can't tell  
24       you by looking at it. If there's only  
25       one Trial Brief then this is it.

1 Q. Okay. This is the Applicant's Trial  
2 Brief?

3 A. Yes.

4 Q. Okay.

5 A. I don't think I looked at the AG's  
6 Trial Brief.

7 Q. All right.

8 A. If there is such a thing.

9 Q. All right. But you've seen Plaintiff's  
10 Exhibit-Two before?

11 A. Yes, I have.

12 Q. Okay. Anything else that you reviewed  
13 in preparation for your testimony here  
14 today? Any other documents or people  
15 you've talked to?

16 A. I have --- I have a nominal file  
17 upstairs that is a bunch of this and  
18 that from the Sigmon case that I didn't  
19 think was important enough to keep with  
20 the --- I put all my --- I took all of  
21 my files to the Public Defender's  
22 Office, and I didn't have anything  
23 other than the trial list that comes up  
24 after the trial that I put in there.

25 Q. Okay.



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24

1           it in the motion.

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

4       A.   Uh-huh. Yes.

5       Q.   And was that your intent?

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

18      Q.   The living conditions globally?

19      A.   Globally. Plus --- plus we intended to  
20          offer a witness about that issue, which  
21          ---

22      Q.   Okay.

23      A.   --- obviously shows that I didn't know  
24          that it wasn't admissible.

25      Q.   Okay. And who would that witness have

1           been?

2           A.   Mr. Aiken, I think is his name.

3           Q.   Okay. And, specifically, what --- what  
4           was it that you were wanting to get  
5           from Mr. Aiken?

6           A.   Well, Mr. Sigmon at that time was 46,  
7           47.

8           Q.   Forty-four I think, but close enough.

9           A.   Okay. He was in his 40s, and amongst  
10          the prison population that's older.  
11          And Mr. Aiken has a Department of  
12          Corrections background, and we wanted  
13          to show that, you know, in life without  
14          parole situation Mr. Sigmon would not  
15          be a predator. He would not be the big  
16          man on the block. He would be prey for  
17          the younger, stronger inmates, and as  
18          he got older the condition would get  
19          worse.

20          Q.   Okay. And did that conform to your  
21          understanding of adaptability to prison  
22          conditions?

23          A.   I can't say that I was trying to get it  
24          in as an adaptability or as --- I'm  
25          sure there's a good chance we were

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1 A. He did.

2 Q. Yeah. And have you had a chance to  
3 kind of read over it?

4 A. I skimmed it, but the thought I can  
5 tell you on that is that I --- I can  
6 say almost categorically that I had no  
7 idea that I should object to that at  
8 the time.

9 Q. Okay.

10 A. I thought it was admissible.  
11 Obviously, since then the Supreme Court  
12 has explained itself very clearly.

13 Q. Okay.

14 A. And my response to that today would be  
15 much different than it was then.

16 Q. Okay. All right. Let's go on then to  
17 another issue. There was some remark  
18 at the closing arguments with Solicitor  
19 Ariail concerning whether the jury had  
20 any help or assistance in making the  
21 decision of life or death and that it  
22 would be fair for them to ask him. Do  
23 you remember that? Did you ever have a  
24 chance to read that testimony?

25 A. I don't remember that.

1 appropriate in that way. I think he  
2 can argue for the death penalty and,  
3 obviously, give reasons he thinks the  
4 death penalty is appropriate as part of  
5 his argument. The death penalty is  
6 appropriate because of blah, but I'm  
7 not sure that the solicitor is allowed  
8 to give his personal opinion.

9 Q. How he arrived at the decision ---

10 A. Yes.

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

13 A. I would --- I would agree that I think  
14 --- in looking at that right now I  
15 think that's highly suspect.

16 Q. Okay. And why would it not have  
17 appeared that way to you in July of  
18 2002?

19 A. I have no idea.

20 Q. Okay.

21 A. I don't --- I don't remember --- I  
22 don't remember it. I don't remember  
23 any thought about it during the --- the  
24 hearing. I was --- typically when I  
25 --- when the solicitor is doing cross-

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1           the evidence in the case? And seven  
2           was "The age or mentality of the  
3           defendant at the time of the crime."  
4           Mental state.

5       A. I don't know. It ---

6       Q. All right.

7       A. --- it certainly doesn't strike me as  
8           something I thought was a big deal at  
9           the time, but I don't know.

10      Q. All right. Let me ask you ---

11      A. He was --- he was wound up like a top.  
12           I mean that was obvious.

13      Q. Brad Sigmon?

14      A. Yes.

15      Q. Or the judge?

16      A. No, Brad Sigmon. The judge was fine.  
17           Brad Sigmon was wound up like a top  
18           when he committed this crime.

19      Q. Okay. All right. So, if you would  
20           accept my statement that you did, in  
21           fact, offer and request a charge on  
22           number seven, and the judge talked to  
23           you about that, and he offered to you  
24           that six embraced seven --- take a look  
25           at six and tell me if you see a

1 distinguishing feature if you --- in  
2 your legal capacity?

3 A. Oh, yeah.

4 Q. Okay.

5 A. I see a difference.

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

10 A. I do not.

11 Q. And kind of develop a little record  
12 there about you were serious about  
13 that, and it was supported by the  
14 evidence, et cetera. As you sit here  
15 today then you say there is in your  
16 mind a distinction between six and  
17 seven?

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

23 Q. Okay. Now there was another one that  
24 kind of played into this, and it was  
25 five. Excuse me. Let me back up on

1 correct law.

2 Q. Okay. And there was some remarks in  
3 the charge from the judge about  
4 mitigation and the evidence and what it  
5 is and what it's for. And did you do  
6 anything yourself, personally, in  
7 preparing the mitigation charges? Were  
8 you the one that was responsible for  
9 going and pulling the ones that you  
10 wanted, or did someone else have that  
11 assignment?

12 A. As I sit here today I have no memory at  
13 all of the jury charge.

14 Q. And how the judge ---

15 A. Or how the charge is --- I have no  
16 memory of it. My --- my assumption  
17 would be that I went to John Mauldin  
18 and asked him, but --- and then took  
19 what he had and looked at it and  
20 studied on it and handed it up, but I  
21 have absolutely no memory of it.

22 Q. All right. If you had seen a charge to  
23 the effect that the jury has the  
24 responsibility and the duty to search  
25 the whole record for any evidence that

1 time. Yeah.

2 Q. Did you consider his emotions at the  
3 time and the jury seeing that to be  
4 important at the time you were trying  
5 the case ---

6 A. Yeah.

7 Q. --- in July of '02?

8 A. Oh, yeah.

9 Q. Why didn't they get to see it?

10 A. It is hard to recreate my thought  
11 processes on this. John may have it.  
12 We talked about it. The problems with  
13 the tape were when he wasn't crying and  
14 he showed his anger it was bad. And I  
15 was a little scared of the ---  
16 particularly the Channel 4 tape. The  
17 Channel 4 tape was not a favorable ---  
18 to me didn't give a favorable  
19 impression of him.

20 Q. Okay.

21 A. And ---

22 Q. On that point, let me interrupt you for  
23 just a second. Who was offering the  
24 tapes potentially as evidence, you or  
25 the prosecutor?



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1 jury with it for so long that I felt  
2 like with reading my transcript, that  
3 Bob and them never questioned, into the  
4 record on each of the parts of the  
5 taped I wanted to use that --- that we  
6 got in what we got in. I honestly  
7 can't tell you that we talked about  
8 using the tape in the mitigation part  
9 of the trial. I don't remember, but I  
10 remember there were parts of the tape I  
11 was really scared of.

12 Q. Okay. There was nothing that prevented  
13 you then from attempting to get it to  
14 play in the mitigation phase?

15 A. There wasn't. I don't have a memory of  
16 thinking about it during the mitigation  
17 phase, and I frankly can't tell you why  
18 or why not.

19 Q. And do you remember very concisely what  
20 it was that was stopping this thing  
21 from working?

22 A. It was probably a formatting problem.  
23 I don't know. We got it to work when  
24 nobody was there, and then it wouldn't  
25 work.

1       about threats to him, but --- but he'd  
2       always kind of treated their son okay  
3       and always kind of treated him okay.  
4       And so we thought that the story was  
5       useful. And then, frankly, the last  
6       husband, the guy that she met at the  
7       dry cleaners when she was going out  
8       with Brad, I really --- I thought it  
9       was useful for that same story. But  
10      the thing that I found most compelling  
11      about his testimony is that they went  
12      to live in the house where her mom and  
13      daddy were killed, which to me just  
14      seemed a little macabre.

15      Q. So there again it was really fit into  
16      your strategy of the case because it  
17      reflected the character of Becky  
18      Barbare, Becky Larke Barbare?

19      A. It showed that she was --- you know,  
20      that she liked to, you know, leave one  
21      man for another and kind of agitate the  
22      situation some, yeah, that would be ---  
23      that would be the reason for it.

24      Q. And is that --- is that why you asked  
25      --- and I forget the number, Mr. Eppes,

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1 MR. EHLIES: Could I have just a  
2 minute and talk with my lawyer?

3 MS. BROWN: I have no problem.

4 MR. EHLIES: Okay. Are we good to  
5 go? Let me look right here. I  
6 think I'm about to wind it up.

7 Q. Have I provoked you in any way to want  
8 to respond to something that you feel  
9 like has been unfair to you that you  
10 would --- you feel like you need  
11 justification you'd like to say?

12 A. No. I wish I'd --- you know, I'd had  
13 time to read the whole transcript and  
14 then try to recreate the whole thing in  
15 my mind, but I have not been able to do  
16 that.

17 MR. EHLIES: Gosh, I think that's  
18 all. Ms. Brown may have some  
19 questions for you.

20 MS. BROWN: Just a few.

21 (OFF RECORD COMMENTS)

22 CROSS-EXAMINATION

23 BY MS. BROWN:

24 Q. Ms. Eppes, I want to go back to what  
25 you had mentioned earlier that John

1 Mauldin helped you with voir dire. Did  
2 he also help you with any other  
3 portions of the trial?

4 A. John Mauldin was very helpful from  
5 Monday to Friday. On Friday afternoon  
6 at 5:00 he scooted, and I couldn't find  
7 him all weekend. This is a point of  
8 contention that he and I have continued  
9 to discuss for the past six years. He  
10 referred to that as me being "Parteed",  
11 which Mr. Ehlires will understand. The  
12 former Public Defender before Mr.  
13 Mauldin was a Mr. Partee, who would  
14 frequently make himself unavailable at  
15 critical junctures in trials.

16 MR. EHLIES: He was famous for it.

17 THE WITNESS: Yes.

18 A. And John Mauldin throughout this trial  
19 was John Abdalla's and I's crutch.  
20 When we had questions that we just  
21 wanted to talk over we'd talk it over  
22 ourselves and typically talk it over  
23 with John Mauldin, too. And during  
24 this trial --- and during this trial we  
25 did that repeatedly. Over the weekend

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- 1       he absconded the jurisdiction, and we  
2       didn't get to talk to him at all about  
3       the jury charge and very much about the  
4       mitigation part of the trial. In  
5       addition to that one, you just raised  
6       something because I don't --- it  
7       obviously didn't play out. We probably  
8       could have dragged the case on into  
9       Monday, and we went a little quicker  
10      than we might would have because I  
11      really felt like charging a jury on the  
12      death penalty on Sunday night gave us a  
13      little bit of an advantage because I  
14      really didn't think a jury would vote  
15      to kill somebody on a Sunday night. In  
16      retrospect that was obviously wrong.
- 17      Q. But did you discuss strategy with Mr.  
18      Mauldin?
- 19      A. I discussed everything except what I  
20      was going to eat for lunch with Mr.  
21      Mauldin.
- 22      Q. Do you have any specific recollection  
23      of what he advised you on concerning  
24      your strategy?
- 25      A. He --- he thought our strategy was

1 fairly sound. He --- he --- frankly  
2 the part that he played the most  
3 significant part of the case was in the  
4 picking of the jury. He lectures on  
5 that all the time, and he was --- he  
6 really was teaching us how to do it on  
7 the fly, because it was --- I thought I  
8 understood it before we started, and I  
9 clearly did not. It was something you  
10 really had to do to appreciate the  
11 nuance of the issues.

12 Q. I want to go back to what you had  
13 mentioned about the ex-wife's  
14 testimony, that that was conducted in  
15 two parts. I believe that you said  
16 that you weren't extraordinarily happy  
17 with the first part.

18 A. I was miserable.

19 Q. What about the second part?

20 A. The second part I thought went --- went  
21 really well, and that it was a very  
22 succinct get the points in and get out.  
23 And at the time of the trial --- and I  
24 didn't really look at it in the  
25 transcript, but I remember at the time

1           deposing people in a criminal case.

2           There wasn't any other way to go.

3       Q.   And you said that this was conducted in  
4           two parts. Did you ask for additional  
5           time?

6       A.   I read the transcript, and it looked  
7           like I was asking for time and calling  
8           it preparing for other people to rebut  
9           her, but in point of fact I wanted to  
10          keep her active and get another shot at  
11          her the next day because I really felt  
12          terrible about my cross-exam over that  
13          night.

14      Q.   Okay. And we went over today a few of  
15          the things that I had provided to you  
16          to review. In addition to the  
17          sentencing transcript pages requested  
18          did you have another request pertaining  
19          to Mr. Sigmon's statements?

20      A.   Oh, yeah, I asked you specifically for  
21          his diatribe at the end.

22      Q.   And you received that?

23      A.   I received it, and I reviewed it  
24          briefly.

25      Q.   And did you ---

1 MR. EHLIES: Are you talking about  
2 the portion of the transcript when  
3 he made the statement to the jury?

4 THE WITNESS: Yes.

5 Q. Actually both. I provided both phases.

6 A. You provided both. He did what I asked  
7 him to do the first time, so I wasn't  
8 as interested in that.

9 Q. And why were you interested in  
10 reviewing that particularly?

11 A. Because frankly that was the worse ten  
12 or 15 minutes of practicing law that I  
13 have ever had.

14 Q. And why is that?

15 A. Because he did exactly what I had  
16 begged him and screamed at him not to  
17 do for the --- however many months I  
18 had been representing him ---  
19 representing him. And during it the  
20 *Greenville News* said that I had my hand  
21 --- my head on my forearm, which is  
22 probably true for a good part of it,  
23 which --- well, it was awful.

24 Q. Do you have any specific recollection  
25 of what part was awful?



1           adaptation, or do you characterize that  
2           as conditions?

3       A.   I would call it conditions.

4       Q.   And also could you turn to page 2206?

5       A.   (Witness reviewing transcript.)   Yep,  
6           I'm there, and it's my closing.  It  
7           appears to be my closing argument.

8       Q.   Starting at line 11.

9       A.   Uh-huh.

10      Q.   And over the first few lines on 2207.  
11           Can you tell us the gist of your  
12           argument and what you intended to  
13           convey to the jury with this argument?

14      A.   "The penitentiary is a terrible place  
15           for mean, nasty people and that no one  
16           would want to spend an hour and a half  
17           hour there, much less the rest of their  
18           natural life."

19      Q.   And in particular did you --- did you  
20           have a particular theory or strategy to  
21           go in to referencing where they ---  
22           where they sleep, what the schedule is  
23           like?

24      A.   Well, I --- there's always this idea  
25           that life in prison is more punishment

1           than death that some people hang onto.  
2           And as I've said before I thought that  
3           --- I was not aware that all this stuff  
4           should have been excluded from the  
5           state's case.    If it should have at  
6           that time, I don't know.   I've read the  
7           Supreme Court's opinions on it now, and  
8           I know obviously it should have been  
9           under the laws that exist right now.  
10          I still have no knowledge of what the  
11          law was then.   But at that time the  
12          solicitor was surely talking about what  
13          a country club Lee County and other  
14          maximum security ones are, and they're  
15          just not.   They're hellish places.   And  
16          I wanted to convey that to the jury.  
17          That this is not a person who would  
18          have a pleasant life.   They would just  
19          be alive.

20        Q.   Okay.   If I can jump ahead.   Mr. Ehlied  
21              asked you to review 2187, and this is  
22              the solicitor and whether the death  
23              sentence is appropriate issue.

24        A.   Yeah.

25        Q.   And you said I believe it's highly

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 BRAD KEITH SIGMON, #6008, )  
 )  
 Applicant, )  
 )  
 vs. )  
 )  
 STATE OF SOUTH CAROLINA, )  
 )  
 Respondent. )  
 )

IN THE COURT OF COMMON PLEAS

C/A No.: 2006-CP-23-6547

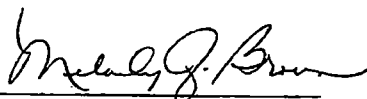
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Respondent's *Response in Opposition to Applicant's Motion for Summary Judgment, with attachments*, was served on counsel for Applicant by depositing same in the United States mail, postage prepaid, and addressed as follows:

Teresa L. Norris, Esquire  
 Post Office Box 11744  
 Columbia, South Carolina 29211

William H. Ehlires, II, Esquire  
 310 Mills Avenue, Suite 201  
 Greenville, South Carolina 29605

This 1<sup>st</sup> day of August, 2008.



Melody J. Brown  
 Assistant Attorney General

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 WICKENSIMER

2008 AUG -5 P 4: 24

John P. Abdalla

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1 STATE OF SOUTH CAROLINA )  
2 ) COURT OF COMMON PLEAS  
3 COUNTY OF GREENVILLE ) ORIGINAL  
4 BRAD KEITH SIGMON, #6008, )  
5 Applicant, ) 06-CP-23-6547  
6 vs. )  
7 STATE OF SOUTH CAROLINA, )  
8 Respondent. )

9

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10 Deposition of **JOHN P. ABDALLA**, taken by the  
11 Applicant, pursuant to notice and/or  
12 agreement, before Rachel H. Wood, Court  
13 Reporter and Notary Public, at the law  
14 offices of Eppes & Plumblee, P.A., 1225  
15 South Church Street, Greenville, South  
16 Carolina, on the 27th day of June, 2008,  
17 commencing at the hour of 2:15 o'clock, p.m.

18

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## 1 APPEARANCES:

2 **WILLIAM H. EHLIES, Esquire**

3 William H. Ehliès, P.A.

4 310 Mills Avenue

5 Building A, Suite 201

6 Greenville, South Carolina

7 **TERESA NORRIS, Esquire**

8 Blume, Weyble &amp; Norris, LLC

9 1247 Sumter Street, 2nd Floor

10 Post Office Box 11744

11 Columbia, South Carolina 29211

12 Attorneys for Applicant.

13 **MELODY J. BROWN, Assistant Attorney General**

14 Office of Attorney General

15 1000 Assembly Street,

16 Dennis Building, 5th Floor

17 Post Office Box 11549

18 Columbia, South Carolina 29211

19 Attorney for Respondent.

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## 21 STIPULATIONS:

22 1. The deposition was taken pursuant to the

23 South Carolina Rules of Civil Procedure.

24 2. All objections, except as to the form of

25 the question and responsiveness of the

1 STIPULATIONS: (Continued)

2 answer, will be reserved until the time of  
3 trial.

4 3. The Witness will waive the reading and  
5 signing of the deposition.

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14 THERE WERE NO EXHIBITS INTRODUCED.

15 - - - - -

16 (In the following transcript, a dash [---]  
17 is used to indicate an unintentional or  
18 purposeful interruption in a sentence, or to  
19 indicate halting speech or an unfinished  
20 sentence in dialogue.)

21 - - - - -

22

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24

25

1 MR. EHLIES: I'm obligated in  
2 taking your deposition to give you  
3 a heads up on who you can talk to  
4 and what you can do during the  
5 deposition. But, basically, it's  
6 real simple since you're not a  
7 party and you don't have a lawyer;  
8 is that correct?

9 MR. ABDALLA: Right. That's  
10 right.

11 MR. EHLIES: If there's any  
12 question about my question just  
13 stop me and ask me, but whatever.

14 MR. ABDALLA: Okay.

15 MR. EHLIES: You can't ask other  
16 people what I might be after or  
17 that sort of thing.

18 MR. ABDALLA: Okay. All right.

19 MR. EHLIES: You need to have a  
20 dialogue with me.

21 MR. ABDALLA: Okay.

22 MR. EHLIES: Okay.

23 MR. ABDALLA: I've got it.

24 MR. EHLIES: We're good.

25 MS. NORRIS: And you can take a

1 break at any point you want to.

2 MR. ABDALLA: Okay.

3 MR. EHLIES: Yeah. Anything you  
4 need you just let us know.

5 MR. ABDALLA: All right.

6 JOHN P. ABDALLA,

7 being first duly sworn/affirmed, was  
8 examined and deposed as follows:

9 DIRECT EXAMINATION

10 BY MR. EHLIES:

11 Q. Okay. Mr. Abdalla, will you give us  
12 your background, education and et  
13 cetera.

14 A. I graduated from USC with  
15 interdisciplinary studies, and I have a  
16 law degree from the University of South  
17 Carolina. As far as my employment, do  
18 you want that as well?

19 Q. Sure.

20 A. I went to work with Child Support  
21 Services after graduating from law  
22 school. I stayed there almost two  
23 years. I went to the Solicitor's  
24 Office in Spartanburg. I worked there  
25 six years until '97 when I went to the



John P. Abdalla

6

1 Spartanburg Public Defender Office from  
2 around the first --- the last of April  
3 until the last of February of 2001.  
4 Then I started working with Mauldin in  
5 Greenville beginning March 1st, 2001  
6 and just finished up that March 1st of  
7 2008, and I'm in private practice. I  
8 actually began private practice July  
9 1st of 2006, but I was doing a  
10 contract. So now it's just strictly  
11 private except for a few hanging --- a  
12 few stringer clients I still have from  
13 the Public Defender Office in Mauldin.  
14 Is that sufficient?

15 Q. Sure. Sure. Then you spent your  
16 professional lawyer career in criminal  
17 law pretty much?

18 A. Pretty much, yeah. And I didn't fill  
19 in --- I'm a lot older than that. I  
20 worked as a counselor for 12 years, is  
21 it? From '73 until '85 when I went off  
22 to law school at the young age of 35.

23 Q. Okay.

24 A. So I started late. Because I actually  
25 met --- first met you when I was a PTI

1 counselor.

2 Q. Okay. That's getting back in the dark  
3 ages now.

4 A. Yeah. The '70s, yes.

5 Q. This case was tried in July of 2002.

6 A. Two.

7 Q. And when you were first appointed to  
8 represent Brad Sigmon had you qualified  
9 as first chair at that time in capital  
10 ---

11 A. Yes.

12 Q. --- litigation work?

13 A. Well, I mean that was the first case in  
14 which I actually went to trial on. I  
15 was qualified because of my experienced  
16 trial work.

17 Q. Okay.

18 A. But this was the first case ---

19 Q. The five years experience ---

20 A. Oh, yeah.

21 Q. --- in serious felony charges?

22 A. Right.

23 Q. Okay. Had you ever done a capital  
24 murder trial prior to that?

25 A. No.

1 Q. Okay.

2 A. Murder cases, but, no.

3 Q. Okay. Had you ever served --- had you  
4 served --- had you ever served as a  
5 counsel in any capacity on a capital  
6 murder case?

7 A. No. The closest I came is I had a case  
8 that was going to become a death  
9 penalty case when I was in Spartanburg,  
10 but we pled it out before we were  
11 served the life --- I mean the death  
12 notice.

13 Q. Okay. Did you prior to July of '02  
14 ever take any intensive training  
15 program for serving as lead counsel in  
16 capital defense?

17 A. Yeah, I believe it was March of '02,  
18 Frank and I went to Kansas City for a  
19 seminar.

20 Q. Okay.

21 A. If that's what you're referring to.

22 Q. Sure.

23 A. That kind of thing. I could be off on  
24 the dates, but it seems like it was  
25 March of '02 we went for a death

1 penalty seminar.

2 Q. Okay.

3 A. And, actually, I had gone to one before  
4 the one in Spartanburg. It was in  
5 Tennessee. I'd have to guess the year.  
6 It was probably '96 or '97 maybe,  
7 because I left in '97, so.

8 Q. Okay.

9 A. And I did a seminar up there for  
10 capital cases.

11 Q. Do you remember when you were appointed  
12 on the Brad Sigmon case?

13 A. I mean I remember the time period. I  
14 don't --- do you want me to give you  
15 any background on that or just ---

16 Q. Well, right now I need the date.

17 A. No, I don't.

18 Q. Okay. Was it more than a year prior to  
19 trial?

20 A. No.

21 Q. He was tried in July of '02.

22 A. Right. July 15th, but, no, it was ---  
23 I'm almost certain it was in '02 that I  
24 was appointed to the case.

25 Q. Okay. So it was tried in seven months?

- 1 A. Yeah.
- 2 Q. From beginning to end?
- 3 A. Unless I'm wrong I think so.
- 4 Q. Okay.
- 5 A. My recollection.
- 6 Q. Right. And when you were appointed do
- 7 you remember the circumstances of the
- 8 appointment, how it came that you were
- 9 brought up?
- 10 A. John had a lot of ---
- 11 Q. John Mauldin?
- 12 A. Mauldin. I'm sorry. Yeah. John
- 13 Mauldin, the Public Defender in
- 14 Greenville, had a lot of pending death
- 15 cases.
- 16 Q. Sure.
- 17 A. You know death penalty cases. I
- 18 believe five at the time. I had
- 19 recently come to the Public Defender
- 20 Office and by happenstance John was
- 21 away --- Mauldin, in --- at a seminar
- 22 when Brad Sigmon was arrested. And
- 23 John had left word for me to just go
- 24 down and tell him, you know, the normal
- 25 things, to wait for his attorney, I'm

1 going to be representing him. I was  
2 actually representing --- I was John's  
3 surrogate. So I was the one who had  
4 first contact with Brad. I met him  
5 when he was first brought to  
6 Greenville. He was --- he had come  
7 back from Tennessee. And I don't know  
8 if I'd had a few meetings with him at  
9 that time subsequent to that, but at  
10 some point I did kind of step into it.  
11 I said to John, "I know you said that  
12 you do all the death penalty cases, but  
13 this is ridiculous. If you're going to  
14 get rid of one I'll be glad to handle  
15 it for you." So that's how I ended up  
16 with it.

17 Q. Okay.

18 A. And I'm sorry I can't remember when I  
19 was appointed though.

20 Q. Okay.

21 A. But at that time I didn't think it was  
22 ever really going to happen. It just  
23 came down to the crunch, and he maybe  
24 said, "Do you still want to do it?"

25 Q. Okay.

1 A. And I said yeah.

2 Q. All right. So that was something that  
3 you undertook voluntarily?

4 A. Yeah.

5 Q. And you had the time, and you felt you  
6 had the skills and expertise to handle  
7 the case as the lead counsel?

8 A. I felt like I did in one hand, and I  
9 feel like I don't know if anybody is  
10 ever qualified to do that. And I'm not  
11 being flippant when I say that.

12 Q. Okay.

13 A. But, of course, I had my insecurities  
14 about me thinking --- you know, it's  
15 always scary a bit going into a  
16 challenge like that. But, yeah, I did  
17 believe. I always feel that I'm going  
18 to come up to the task when most of the  
19 show starts. Yeah.

20 Q. Okay. Tell me, in preparation for this  
21 deposition here today, have you  
22 reviewed any documents?

23 A. No, just a couple of things that were  
24 sent to me, but they really didn't have  
25 anything that I thought were really

1 relevant and --- I mean that I really  
2 --- that helped me so I thought I  
3 either missed out on some stuff,  
4 because I asked Frank which way we were  
5 going so I thought maybe I could think  
6 about it, but, no, I didn't have a  
7 clue.

8 Q. Okay.

9 A. So, no.

10 Q. What was it that was sent to you? Who  
11 sent it and what was it?

12 A. Well, the only thing that I have is  
13 just this --- it's parts of the  
14 transcript.

15 Q. Okay.

16 A. The Amended Application for PCR Relief.

17 Q. I'm going to show you then what's  
18 previously been marked to Mr. Eppes'  
19 deposition --- let's see here --- as  
20 Exhibit-One, and ask you if that's the  
21 document ---

22 A. Yes.

23 Q. --- that you received? You've had that  
24 document?

25 A. Yes, I do.



1 Q. Have you read that document?

2 A. I haven't read it all, no. I looked at  
3 the other thing instead of this.

4 Q. And was the other thing, what is marked  
5 Plaintiff's Exhibit-Number-Two to Mr.  
6 Eppes' deposition?

7 A. Let me see if I have it. For whatever  
8 reason I don't have that with me.

9 Q. Is it a document that you've seen and  
10 read prior to your testimony here  
11 today?

12 A. No. And that doesn't mean I didn't  
13 receive it and set it somewhere, but I  
14 did not read it, no.

15 Q. Okay. All right. Let's go back then  
16 to how you got involved in this case.  
17 Did Judge Watson appoint --- Judge  
18 Watson was the trial judge ---

19 A. That's correct.

20 Q. --- and usually procedurally they  
21 handle all the things, but we have an  
22 administrative judge in criminal  
23 matters.

24 A. Okay.

25 Q. Did Judge Watson appoint you, do you

1 recall?

2 A. I don't recall which judge it was. I  
3 know Judge Watson --- I just know we  
4 had all our meetings with Judge Watson.

5 Q. Okay. When you --- did you pick Frank  
6 Eppes to work with you on this, or how  
7 did that come that you and Frank were  
8 the team?

9 A. I know I wanted Frank. John must have  
10 done it.

11 Q. Okay.

12 A. Or requested it. I'm not certain.

13 Q. Okay.

14 A. And whenever I say "John," for further  
15 reference, it's John Mauldin unless I  
16 otherwise specify.

17 Q. When you --- the two of you got  
18 together as the team to represent Brad  
19 did you divide up the duties and the  
20 workload?

21 A. Pretty much, yeah. We just went  
22 through some kind of --- yeah, we did.

23 Q. And how did that play out? Who had  
24 what responsibility, et cetera?

25 A. I don't recall. I'm sorry.

1 Q. Okay. Let's say, for example, who had  
2 the responsibility, if anyone, for the  
3 day-to-day contact with the client?

4 A. Me.

5 Q. Okay. And what is your estimate of how  
6 many times Mr. Eppes would have met  
7 with the client?

8 A. Mr. Eppes?

9 Q. Eppes.

10 A. I'm guessing ten times, but I really  
11 don't know.

12 Q. Okay. And that would have been prior  
13 to trial?

14 A. Yeah. And I could be wrong on that. I  
15 really don't know.

16 Q. Okay.

17 A. Because I know I had most of the  
18 dealings with him.

19 Q. You had most of the dealings with the  
20 client?

21 A. Yeah, that was my job.

22 Q. Okay. Your job was to take care of the  
23 client and answer his questions ---

24 A. Well, I mean I handled other jobs, but  
25 correct. I was --- I was ---

1 Q. --- and interview him?

2 A. Right.

3 Q. Who was it that made the decisions  
4 about strategy calls and where you were  
5 going to put the emphasis and how you  
6 were going to approach the case?

7 A. I'd say it was pretty much joint.  
8 There were times when I'm sure things  
9 were done unilaterally, but pretty much  
10 joint.

11 Q. Okay.

12 A. I think with Frank and me it was pretty  
13 much understood that we had a numerable  
14 logic and an irresistible force because  
15 we're both tend to be a bit on the  
16 strong-headed side and --- but I try to  
17 work it out and make sure we're on the  
18 same page for everything.

19 Q. Okay. All right. Do you have any  
20 current recollection now of other  
21 duties that broke out in the process of  
22 the case?

23 A. I might have handled the psychological  
24 stuff, but I can't swear to that.

25 Q. Okay. And tell me how that would have

1           been. What would you have considered  
2           within your realm of work?

3       A. Spoken to him about his psychological  
4           background, talked to probably Dr.  
5           Martin down at the jail. I did  
6           research to recover any records of  
7           Brad's encounters with any mental  
8           health facilities either at the  
9           Department of Corrections, because I  
10          know he had a lot of records, and I  
11          can't recite them right now, or any  
12          mental hospitals he may have been to or  
13          any doctors.

14       Q. Okay. And who was it that made the  
15           decisions about expert assistance,  
16           expert witnesses and consults?

17       A. I'm sure ---

18       Q. All right. Let me show you another  
19           thing on duties. This has been marked  
20           as Plaintiff's Exhibit-Number-Three to  
21           Mr. Eppes' deposition. And I'm trying  
22           really in the course of this line of  
23           questions to understand how the legal  
24           matters were handled as opposed to  
25           factual issues and that sort of thing.

1 And you're looking at a motion there.  
2 It has your name on it, but it doesn't  
3 have your signature on it. Do you  
4 recognize the motion?

5 A. Well, I --- I remember discussing the  
6 issue, and I'm sure I saw the document,  
7 but I don't have a specific  
8 recollection of every word in this  
9 document, if that's what you're asking.

10 Q. How did it come to be in existence, do  
11 you know?

12 A. We did all this stuff together. We ---  
13 I say "we," probably off the computer  
14 where we sat down and came up with  
15 stuff. It doesn't mean it wasn't done  
16 independently at times, I would do my  
17 motion, and he would do his motion.

18 Q. Okay.

19 A. But nothing to my recollection ever  
20 went to The Court without both of us  
21 reviewing it.

22 Q. Okay. Would you have considered this  
23 your motion or his motion?

24 A. I would have considered it our motion.

25 Q. Okay. And then did you ---

1 A. And I realize as lead counsel maybe I  
2 should answer that differently, but  
3 that's how I considered it.

4 Q. Okay. Can you tell me what the nature  
5 of this motion is? What was it?

6 A. Well, this was an expert as I recall  
7 who was going to testify from the state  
8 regarding --- in essence without saying  
9 it's future dangerousness. Because  
10 what --- what Sligh was going to  
11 testify to, as I recall, was the  
12 country club nature of the prison and  
13 we were trying to stay away from  
14 anything that made it sound like it was  
15 going to be an easy time.

16 Q. Okay. This motion really doesn't talk  
17 future dangerousness, does it? It  
18 talks more in keeping with what you had  
19 just said about prison conditions.

20 A. Right. And I --- and I guess I'm kind  
21 of merging those. Maybe that was  
22 incorrect, but I knew it had to do with  
23 housing conditions, but I --- I  
24 probably should have stuck with the  
25 first thing I said about country club

1 nature of the prison.

2 Q. Okay. And what is your understanding  
3 now about that kind of testimony?

4 A. Well, I mean I felt like it shouldn't  
5 have been --- I don't think it should  
6 come in.

7 Q. Did you feel that way at the time that  
8 the motion was filed?

9 A. Sure.

10 Q. Okay. Was it your opinion at the time  
11 that the motion was filed that  
12 testimony pertaining to prison  
13 conditions was inadmissible?

14 A. I remember we were fighting for that,  
15 but I can't remember what was actually  
16 said at the trial or at the hearing ---  
17 pretrial hearings.

18 Q. Okay.

19 A. Because we had several pretrial  
20 hearings.

21 Q. In fairness to you the transcript  
22 suggests that Mr. Eppes was making the  
23 motion and argued the motion. And  
24 that's why I'm trying to get you to  
25 recall, if you can, whether there was



1           some sort of division of work and this  
2           was something that would have fallen  
3           into his arena as opposed to yours?

4       A.   Yeah, and I wasn't meaning to be  
5           contrary to that.  If I said that I  
6           considered it our motion I considered  
7           that we were on the same page with  
8           believing that this was the right  
9           philosophy for the case or the theory  
10          of the case.  I didn't mean to suggest  
11          that I necessarily argued it or really  
12          briefed up on it.  That was probably  
13          part of his division.  He took on a  
14          lot.

15       Q.   Okay.  And would you consult with him  
16           on each of these steps?

17       A.   Most likely.  I can't say I did  
18           everything.  I really don't recall  
19           whether I went over every little ---  
20           every specific incident.  I'm --- I'm  
21           certain we discussed the fact that  
22           there were ten motions before The  
23           Court, and this was what each one was  
24           about.  Now to go every segment of it,  
25           probably not.

1 Q. Okay. If something was going wrong at  
2 the trial or in the argument would your  
3 relationship with Mr. Eppes have  
4 allowed you to point out to him at the  
5 time it was happening or to stand up  
6 and make an objection yourself?

7 A. I mean I could have. I mean my  
8 relationship is that I could have done  
9 so.

10 Q. Okay. And you were lead counsel?

11 A. Yes.

12 Q. Okay. (Counsel reviewing notes.) Do  
13 you --- I don't like surprising lawyers  
14 about case names. There's a state, the  
15 Woomer case and it addresses --- W-o-o-  
16 m-e-r. It addresses the solicitor's  
17 remarks to the jury. Do you have an  
18 understanding of what is permissible as  
19 regards the solicitor's personal  
20 statements of his views towards the  
21 death penalty to the jury in argument?

22 A. I have some, but I'm not sure where  
23 we're going.

24 Q. What is it? What is your understanding  
25 as to whether that would be an

- 1 appropriate argument?
- 2 A. Wait? What kind of argument? You said
- 3 personal comments? Personal comments
- 4 aren't allowed, but I don't know ---
- 5 Q. An argument to suggest to the jury that
- 6 he feels personally that the death
- 7 penalty is the correct --- is the
- 8 correct sentence in the case?
- 9 A. That would be improper.
- 10 Q. Okay.
- 11 A. And it's not important what he thinks.
- 12 Q. Okay.
- 13 A. Or it shouldn't be.
- 14 Q. Would it be inadmissible?
- 15 A. It should be, yes. My understanding is
- 16 it would be inadmissible.
- 17 Q. Correct. And was that your
- 18 understanding in 2002?
- 19 A. I would hope it was. I can't remember
- 20 ever not knowing that, but.
- 21 Q. And if that was happening would it have
- 22 been your responsibility to either
- 23 object or let Mr. Eppes know to object?
- 24 A. Certainly.
- 25 Q. There was another major work initially,

1 and it had to do with jury charges and  
2 the request to charge. Particularly as  
3 it pertains to the mitigation ---

4 A. Right..

5 Q. --- charge from the judge to the jury,  
6 and I'm going to show you what's been  
7 marked as Plaintiff's Exhibit-Four.  
8 And on the bottom of page two, we've  
9 been using this document, Plaintiff's  
10 Four to the Eppes' deposition, it  
11 starts the listing of mitigation,  
12 statutory mitigation charges. And can  
13 you tell me which of those you felt  
14 were appropriate and requested ,or do  
15 you not have a current recollection?

16 On the bottom of two ---

17 A. On the bottom. I'm sorry.

18 Q. The top are aggravated circumstances.

19 A. Yeah, that's why I was confused.

20 Q. The bottom of two is one.

21 A. Mitigating circumstances. I'm sorry.

22 Now I see it.

23 Q. And then you have to turn the page.

24 A. Right. I've got it. I've got it. I  
25 apologize. B-1 would be relevant.

1 "The defendant has no significant  
2 history of prior criminal convictions  
3 involving the use of violence against  
4 another person."

5 Q. I can tell you made that and argued  
6 that, and it was good.

7 A. Okay. I can't remember whether we  
8 argued number two, but that would be  
9 relevant. "The murder was committed  
10 while the defendant was under the  
11 influence of mental or emotional  
12 disturbance." (Witness reviewing  
13 exhibit.) Six is questionable, but I  
14 don't believe it would have been  
15 accurate. I'm not sure.

16 Q. Do you see ---

17 A. "The capacity of the defendant to  
18 appreciate the criminality or to  
19 conform his conduct to the requirements  
20 of the law was substantially impaired."  
21 That's --- that's a tough one for me to  
22 answer with certainty. Let me just go  
23 down the rest of the list to make sure.  
24 (Witness reviewing exhibit.) I guess  
25 that's it.

1 Q. Do you see a difference between six and  
2 seven?

3 A. Yeah, I see a difference, but I --- one  
4 is dealing with mental capacity. The  
5 other seems to be --- to me it doesn't  
6 say mental retardation, but number  
7 seven appears to be more mentally  
8 retarded because it's talking about age  
9 or mentality of the defendant, which  
10 would suggest somebody who was acting  
11 at an age that was beneath the age of  
12 the ability to be an adult.

13 Q. Okay.

14 A. A legal adult.

15 Q. Based on your recollection of the facts  
16 in Mr. Sigmon's case do, you find that  
17 six was a relevant request for a  
18 mitigation charge?

19 A. I'm five years from that point now, and  
20 I'm struggling with it. It's a close  
21 one, and I apologize that I can't say  
22 once again with certainty whether I  
23 think it would. I think it's close. I  
24 could see it going either way. I don't  
25 know what my thinking was enough now

1 five years ago.

2 Q. All right. Well ---

3 A. Because I knew the case better then. I  
4 mean obviously it would be the "or"  
5 section of it "to conform his conduct  
6 to the requirements of the law was  
7 substantially impaired." Since he had  
8 been using --- since he was intoxicated  
9 on probably both alcohol and drugs that  
10 night that is arguably a proper motion.

11 Q. All right. Would you agree with me  
12 that getting a judge's charge to the  
13 jury is effective with a jury more so  
14 than a lawyer's ---

15 A. Oh, no doubt about it. Yep, I would  
16 agree.

17 Q. And, in fact, if the charge is right  
18 it's a great help?

19 A. Yes.

20 Q. And if the charge is wrong it would be  
21 ---

22 A. Detrimental.

23 Q. --- a significantly detrimental impact  
24 on the jury? Is that your trial  
25 experience?

1 A. Of course.

2 Q. Okay. What is your understanding of  
3 the law of mitigation evidence as far  
4 as the charge is concerned? What is an  
5 appropriate mitigation charge?

6 A. You mean the theory of mitigation?

7 Q. Well, are you aware that --- can we  
8 assume that the jury makes the  
9 mitigation decision as to what  
10 mitigation evidence and when it's  
11 effective and when it's not?

12 A. Sure. Yes, we are.

13 Q. And were you aware at the time of this  
14 trial that the judge is obligated to  
15 give that charge that the jury should  
16 search the record over for any  
17 mitigation, anything that they perceive  
18 that may be mitigation in sentencing?

19 A. I would think I was, but ---

20 Q. Do you recall whether that request was  
21 ever made?

22 A. I don't recall.

23 Q. All right. And I really need to  
24 understand here because Mr. Eppes was  
25 on his feet on the record, whether or



1 not ---

2 A. Mr. Eppes was what?

3 Q. On the record it was Mr. Eppes that was  
4 doing the discussion with the judge  
5 over the jury charge and mitigation.

6 A. Oh, it was.

7 Q. Yes.

8 A. Okay.

9 Q. So I want to make sure that we  
10 understand whether that --- there was a  
11 division of work that would have made  
12 that appropriate, an appropriate issue  
13 for him to be dealing with with the  
14 judge more so than you.

15 A. I know we discussed them together.  
16 That wasn't one that was a division of  
17 labor as I recall. He may have argued  
18 them in the courtroom, but I don't  
19 remember that being his job at all.

20 Q. All right.

21 A. But if he said otherwise, and he  
22 remembers I'm not going to contradict  
23 that. I honestly don't recall.

24 Q. Okay.

25 A. I can't imagine something like

1 mitigation being the sole province of  
2 one. I think we must have done all  
3 that together, but.

4 Q. Even though he did the argument?

5 A. Right.

6 Q. All right.

7 A. I didn't even remember that he did the  
8 argument. I don't recall it.

9 Q. Would it have been fair to say had you  
10 perceived something was missing in his  
11 argument or the judge was making an  
12 error you would have scribbled a note  
13 to Frank Eppes?

14 A. I would have hoped I would have, yeah.

15 Q. Or spoke up on ---

16 A. Sure.

17 Q. --- somehow?

18 A. Yes.

19 Q. Even if it doesn't appear in the record  
20 you would have pulled him aside?

21 A. Yes.

22 Q. Okay. Since you had the charge of the  
23 records down at the LEC do you remember  
24 who Dr. Martin was?

25 A. Yeah.

1 Q. Okay.

2 A. I do.

3 Q. We had a little discussion about him  
4 here.

5 A. About Disney World?

6 Q. I don't know where he was planning on,  
7 but take a look at what's Five in the  
8 record to Mr. Eppes' deposition. It  
9 looks like a subpoena, and it looks to  
10 me, although I haven't seen the  
11 Affidavit of Service, that it was  
12 issued on July the 15th, the same date  
13 it was returnable. And do you recall  
14 who requested that subpoena?

15 A. No, I don't.

16 Q. Do you recall the purpose of the  
17 testimony of Dr. Martin?

18 A. Not specifically. I mean I know he's  
19 the psychiatrist down at the jail, and  
20 I know it was to Brad's mental  
21 condition or state, but I don't  
22 remember specifically what I wanted  
23 from --- from him because there was  
24 some mental issues that could have gone  
25 either way with Brad.

1 Q. Does clinical depression ring a bell?

2 A. I'm sure there was an allegation --- I  
3 mean there was talk of depression, but.

4 Q. Would it have been valid mitigation  
5 testimony?

6 A. If he was depressed. If there was  
7 sufficient evidence of depression it  
8 would have been valid, yes.

9 Q. Okay. And do you know whatever  
10 happened? Whether Dr. Martin ever  
11 honored the subpoena and appeared and  
12 testified?

13 A. I don't think he ever testified. We  
14 discussed it. I happened to see the  
15 part of the transcript where there was  
16 a bit of a dialogue with The Court and  
17 me, and we ended up not calling him.  
18 And I really don't remember that.

19 Q. Okay. And do you know why he wasn't  
20 called?

21 A. No, he seemed unavailable, but I don't  
22 know why. It seems you just pointed  
23 out to me the subpoena was served on  
24 him last minute, and I don't --- I  
25 can't sit here with any certainty ---

1           any degree of certainty and tell you  
2           why we decided to go ahead without  
3           pushing that. And there may have been  
4           a reason I don't recall.

5       Q.    Okay. Nonetheless it wasn't obtained?

6       A.    That's correct.

7       Q.    The testimony was not obtained?

8       A.    That's correct.

9       Q.    Okay. And these are two pages, we  
10           think the backside of the same piece of  
11           paper, Six and Seven. And I'll ask you  
12           to look at that to see if it helps  
13           refresh your recollection. You  
14           mentioned Disneyland. Excuse me,  
15           Disney World. I'm wondering if ---

16      A.    (Witness reviewing exhibits.) I'm  
17           sorry it doesn't help me more than it  
18           does right --- whatever I've told you.

19      Q.    Okay. Let me ask you what you recall  
20           about the videotapes from Gatlinburg.

21      A.    Oh, the videotape that never got  
22           played.

23      Q.    The videotape that never got played.  
24           Actually my understanding is there's a  
25           series of them.

1 A. There was a series of screw-ups on  
2 that. We had it --- we tried to get it  
3 transposed from VHS, I guess it was, to  
4 a DVD, because I have a friend who is  
5 in that type business. And that was  
6 accomplished. But for whatever reason  
7 we couldn't get the equipment in court  
8 to operate properly, if my recollection  
9 is correct. And The Court seemed to be  
10 getting impatient with us, and I don't  
11 think we ever got to play it. I don't  
12 know if part of it was played. I do  
13 remember Frank did the examination at  
14 that point because it was the officer  
15 from North Carolina. The one I'm  
16 thinking of anyway. Where he was in  
17 Gatlinburg and giving the videotape.  
18 Is that the same one you're discussing?

19 Q. Yes. And did you see those videos?

20 A. Yes, I did.

21 Q. Did you see the video depicting his  
22 call to his mother, Brad Sigmon's call  
23 to his mother?

24 A. I probably did, but I --- I --- I  
25 remember a lot of emotional stuff, but

1 I really can't remember.

2 Q. What is your recollection of its value,  
3 the videos as far as Brad Sigmon's  
4 remorse at the time that the video was  
5 made?

6 A. Oh, he was very remorseful. I mean I  
7 think it would be valuable.

8 Q. And was the VHS cassette destroyed in  
9 making the transition to DVD?

10 A. I would think not, but I don't recall.

11 Q. Was it available to you to play  
12 alternatively in the courtroom?  
13 Alternatively to the DVD?

14 A. Yeah, I understand.

15 Q. I'm sorry.

16 A. If it was I don't know why we --- I  
17 don't recall. I'm sorry that I'm so  
18 --- I'm not intentionally being  
19 evasive. I really don't remember a lot  
20 of this stuff.

21 Q. That's all right.

22 A. I remember the DVD. I remember all the  
23 breakdowns we had, and I remember Frank  
24 --- I'm saying "I remember." My  
25 recollection is Frank Eppes cross-

1 examined the officer and got everything  
2 that way through, "Do you remember him  
3 doing this? Do you remember him  
4 breaking down?" Blah, blah, blah, if  
5 I'm accurate in that.

6 Q. All right.

7 A. Because he got a lot of --- he tried to  
8 get as much as he could from the  
9 officer who pretty much went along with  
10 everything he said.

11 Q. Okay.

12 A. And he was crying when he did this?  
13 Yeah, blah, blah, blah.

14 Q. Okay.

15 A. But, no, very little of the actual tape  
16 was played as I recall.

17 Q. Okay. And that was a technical issue  
18 with the DVD ---

19 A. Yeah.

20 Q. --- or the CD, whatever the ---

21 A. My recollection is, yeah, it was a  
22 technical issue. Well, I don't know if  
23 it was the DVD itself, but regardless,  
24 yeah. With the equipment in the  
25 courtroom, because it seemed like



1 worked, but we couldn't get it to work  
2 in the courtroom.

3 Q. Okay. The --- sometimes there are  
4 things we wish we really could get  
5 back. Tell me how you-all strategized  
6 about the calling of Becky Lark's  
7 stream of husbands. I think there were  
8 three of them.

9 A. Uh-huh.

10 Q. What was the initiative there? What  
11 was the thought?

12 A. Well, I think the thought --- if I can  
13 recall how I thought back then was that  
14 --- without being cruel about it, Becky  
15 brought a lot of this crap on herself  
16 by --- it appeared to us that she was  
17 with A and she was fooling around with  
18 B. Then she'd moved in with B fooling  
19 around with C. There was a series of  
20 men that way. And when she reached  
21 Brad, once he became history he  
22 couldn't handle it. And so I --- my  
23 theory would have been, and I guess it  
24 was the way I thought then, that she  
25 set her up --- herself up for this kind

1 of thing. Again, I'm not blaming her,  
2 but I'm saying when you have somebody  
3 who is as emotionally sensitive as Brad  
4 he can't handle that.

5 Q. Okay.

6 A. And he had a woman, as you heard from  
7 his closing remark, that drove him  
8 crazy. And that was the theory.

9 Q. Okay.

10 A. Did that answer the question?

11 Q. Yes, it did except that I didn't read  
12 in the record where any of the charges  
13 involving Becky were tried to this  
14 jury. The only charges I recall were  
15 for John and Gladys Larke.

16 A. I believe ---

17 Q. L-a-r-k-e.

18 A. They withdrew them I think because of  
19 some of our strategy. If I'm not  
20 mistaken they decided to just trim down  
21 their case and go with the burglary and  
22 the murder. I'm not even positive that  
23 was --- yeah, burglary and murder,  
24 that's right.

25 Q. When that happened then did you make

1 the indicated adjustments in your  
2 strategies and thoughts about who would  
3 be called and who wouldn't?

4 A. I'm sure we did, but I don't remember  
5 how --- specifically what we did. I  
6 know we ended up having to streamline  
7 some things ourselves. And we tried to  
8 get into Becky's mental health stuff,  
9 and we were limited on that.

10 Q. I just want to know if you can  
11 articulate for me how Becky's provoking  
12 Brad excused Brad killing two people,  
13 other people. Brad killing Becky's mom  
14 and dad. What was the theory there?

15 A. I think the theory would go more to  
16 Brad's emotional state. Because,  
17 again, it's not like it's Becky fault  
18 that it happened. But I don't believe  
19 that the things we do in life we set  
20 certain things in motion, but sometimes  
21 we mistreat people too much. You  
22 mistreat the wrong person it's going to  
23 come back at you much greater than you  
24 could ever have anticipated. So his  
25 behavior wasn't a rational response to

1           what she did, but it was a response one  
2           could foresee if you understood you're  
3           dealing with somebody who's not like  
4           most of us that are normal. And I'm  
5           saying "normal" because he had some  
6           issues I guess. He was --- he was too  
7           emotional.

8       Q.   That was reflected in the videos that  
9           didn't get played? Is that a fair  
10          statement?

11       A.   Maybe so.

12       Q.   And do I understand then that what  
13           you're saying is that Becky's  
14           provocation then caused Brad to kill  
15           her parents to get back at her?

16       A.   No. I don't think so. That's ---  
17           that's a great unknown because the  
18           theory of the case was --- from our  
19           understanding the theory of our client  
20           was to go into the house to tie her  
21           parents up and wait for her. He had an  
22           accomplice whose name escapes me now.

23       Q.   Strube.

24       A.   The accomplice is with him until they  
25           literally get to the door. That's why

1 we didn't think it was a premeditated  
2 murder. Premeditated in the sense that  
3 he didn't plan to go in there and kill  
4 them is our belief. He gets to the  
5 door. The other guy apparently says,  
6 "I'm out. I can't do this." So Brad  
7 is now stuck with a very clumsy set of  
8 tools. He had extension cords and a  
9 baseball bat to go in there and try and  
10 subdue two people, restrain two people  
11 while he waits for their daughter.  
12 Well, not being very --- not having  
13 much foresight, Brad continued on with  
14 his mission in spite of what had just  
15 happened because he had waited there  
16 all night and was really obsessing over  
17 it. He goes into the house and  
18 responded by beating them with a hammer  
19 --- with a baseball bat and killing  
20 them obviously.

21 Q. The parents?

22 A. The parents.

23 Q. And Becky wasn't there at that time?

24 A. No. But ---

25 Q. Becky was living up the hill?

1 A. I believe so.

2 Q. Okay.

3 A. And she was returning home, and she did  
4 come back. But I don't think his  
5 intent was ever to kill the parents.

6 Q. Okay.

7 A. I mean they were in a cruel sense  
8 collateral damage. He was trying to go  
9 somewhere else.

10 Q. All right. Okay. I think that's about  
11 it.

12 A. Okay.

13 **CROSS-EXAMINATION**

14 **BY MS. BROWN:**

15 Q. Mr. Abdalla, I'm Melody Brown with the  
16 Attorney General's Office.

17 A. Yes, ma'am.

18 Q. I believe ---

19 A. I need you to speak up a little bit.  
20 I'm going deaf. I'm sorry. You're  
21 very soft.

22 Q. I just have a few questions for you.

23 A. Sure.

24 Q. When we began your deposition you made  
25 reference to some materials that you

1           had received.

2       A.    Yes, ma'am.

3       Q.    Was that by a letter from me?

4       A.    It could have been. I can't --- it

5           would have had to been from one of you

6           because I certainly don't have anybody

7           else I was communicating with.

8       Q.    Have you reviewed the entire

9           transcript?

10      A.    Yeah, it was from you.

11      Q.    Have you reviewed the entire

12           transcript?

13      A.    I glanced over it, and I just saw the

14           part that had my name on it, and I read

15           that part.

16      Q.    Okay. So not just the portions that

17           you received from me, but the entire

18           transcript from ---

19      A.    Oh, no, I didn't review the entire

20           transcript.

21      Q.    Okay.

22      A.    I'm sorry.

23      Q.    That's okay. You mentioned when you

24           were going over your qualifications

25           that you had been appointed on a case

1           in Spartanburg.

2       A.    Yes.

3       Q.    That was going to be a capital case.

4       A.    Uh-huh.

5       Q.    What case was that?

6       A.    I don't know. I could tell you all

7           about the case, but I wouldn't be able

8           to remember the name. I could tell you

9           who I pled it in front of, and I could

10          tell you a lot of facts, but to tell

11          you the name of the client. I know he

12          was a 17-year-old kid. It was four

13          black males, and they were all

14          juveniles I believe except for my

15          client. And he went to a car lot ---

16          no, to the guy who ran the car lot in

17          Greer. He went to the trailer. He

18          said, "Give it up" to the guy. He went

19          to the door at 12:30 in the morning.

20          The guy came to the door. He was a big

21          ex-Marine, and he was naked. And the

22          guy jumps on my client and my client

23          shot him in the head. And he was there

24          with the intention of a robbery. It

25          was an armed robbery that obviously



1           went bad.   And ---

2       Q.   Do you recall the year?

3       A.   No, probably --- I would guess around  
4           2000, '99.   Judge Clary was on the  
5           bench.

6       Q.   Okay.

7       A.   It was Spartanburg if I didn't tell you  
8           that already.

9       Q.   Thank you.   You'd also mentioned that  
10           this was tried approximately seven  
11           months from the time you received it?

12      A.   If I'm correct in my recollection.   You  
13           know I don't know for sure when I  
14           received it officially.

15      Q.   Do you recall needing additional time?

16      A.   At the time I didn't think I needed  
17           additional time.   During the trial I  
18           guess there's always a time you'd think  
19           "whoops."

20      Q.   Okay.   And you mentioned Mr. Mauldin.

21      A.   Yes.

22      Q.   Did you discuss strategy with Mr.  
23           Mauldin?

24      A.   Some.   Uh-huh.

25      Q.   Did he advise you during the trial?

1 A. Not during the trial. He wasn't there  
2 during the trial.  
3 Q. Okay.  
4 A. But before the trial we discussed  
5 things with him.  
6 Q. Okay.  
7 A. Or I did. I think we did.  
8 Q. (Counsel reviewing notes.) I think you  
9 discussed briefly with Mr. Ehliel State  
10 versus Woomer.  
11 A. Uh-huh.  
12 Q. And that certain statements would be  
13 objectionable. Would you please turn  
14 to 2187 in the record? And we have two  
15 volumes here. Let me see if I can get  
16 --- it's this one.  
17 A. That's good.  
18 Q. 2187.  
19 A. All right. What number?  
20 Q. Line 24 and then on over to the top of  
21 2188.  
22 A. Okay.  
23 Q. And I do not have a notation on the  
24 line where you can stop. It's just a  
25 few lines down. Do you see anything

1           improper about that comment or  
2           objectionable?

3       A.   Beginning with 23, "Mercy is an  
4           appropriate human nature responsible  
5           for the lives of those who deserve it."  
6           And then it goes on, "Now, when we ask  
7           for the death penalty, it's a fair and  
8           appropriate question for you to say  
9           back to me, Solicitor Ariail ---"

10       Q.   And that begins the part.

11       A.   Yeah, I think that's inappropriate.

12       Q.   You believe that is inappropriate?

13       A.   Yes, I do.

14       Q.   Did you believe it was inappropriate  
15           then?

16       A.   I don't recall. If I objected it was  
17           inappropriate. If I didn't I either  
18           missed it or was oblivious. I don't  
19           know. I don't recall.

20       Q.   What would be the basis of your  
21           objection?

22       A.   I don't believe he should be talking to  
23           the jury. He's in essence having a  
24           conversation with the jury, and it's  
25           not important what he thinks. He's

1 just to instruct them on a theory but  
2 not to tell them --- not to have a  
3 conversation with them where he's  
4 basically saying the question, "You say  
5 back to me, Solicitor Ariail, why do  
6 you think the death penalty is an  
7 appropriate punishment in this case?"

8 Q. Okay. Conversation would be  
9 inappropriate?

10 A. Right.

11 Q. Okay.

12 A. And discussing other jurors --- juries,  
13 evidence --- he's making statements  
14 that aren't in evidence, talking about  
15 a voir dire that he got from another  
16 juror. Yeah. I would say that's all  
17 inappropriate.

18 Q. Thank you. Going back to the selection  
19 of the mitigating factors or mitigating  
20 circumstances.

21 A. Uh-huh.

22 Q. You had mentioned that since he was  
23 intoxicated you thought that some of  
24 these factors would have been  
25 appropriate?

1 A. Possibly, yes.

2 Q. Was it your opinion that he was  
3 intoxicated, or was it your opinion  
4 that he was drinking, or exactly what  
5 did you believe the evidence supported?

6 A. I believe that he was doing alcohol and  
7 drugs that evening. And although  
8 voluntary intoxication generally is not  
9 an excuse, I do believe it exacerbates  
10 mental problems, and I think there's  
11 little doubt that he has some kind of  
12 mental problems.

13 Q. The videotape.

14 A. Uh-huh.

15 Q. You said was never played. Is there  
16 anything harmful in that tape to your  
17 case, to your strategy?

18 A. Not that I recall. I mean outside of  
19 the obvious that he admits to the  
20 killing. But it was all --- it was  
21 pretty much "weeping testimony" as I  
22 recall, so. But I haven't seen it in  
23 years, so.

24 Q. Okay. Would it be helpful to you to  
25 review it again?

1 A. Yeah, I guess I should review it before  
2 August 4th.

3 Q. I'm going to back up just a minute.  
4 You said that you were the primary  
5 contact with Mr. Sigmon.

6 A. Correct.

7 Q. You had multiple conversations with  
8 him.

9 A. Uh-huh.

10 Q. And in particular you previously  
11 testified that you spoke to him about  
12 psychological matters.

13 A. Yeah.

14 Q. One of the allegations references a  
15 history. Just a moment, please. One  
16 of the allegations is "Counsel  
17 subpoenaed Dr. Martin, a mental health  
18 examiner for the Greenville County  
19 Detention Center, who examined and  
20 treated the Applicant during pretrial  
21 confinement, but failed to call and  
22 present him as a witness to testify  
23 about Applicant's depressive disorder."  
24 What I want to know, Mr. Abdalla, what  
25 did your client tell you about a

1 depressive disorder?

2 A. I honestly don't recall. I --- he ---  
3 it was probably just in our daily --- I  
4 say "daily," whatever, our regular  
5 conversations he mentioned talking to a  
6 psychiatrist or talking to therapists  
7 or whatever, and then I went to the  
8 next step. I don't know that he ever  
9 said, "I'm depressed." I honestly  
10 don't recall.

11 Q. Okay. Do you remember a Dr. Morton  
12 testifying at trial?

13 A. Yeah. Specifics, no. But I remember  
14 Dr. Morton, yeah.

15 Q. Okay. Do you recall Dr. Morton  
16 referencing consultation with Dr.  
17 Schwartz-Watts?

18 A. Vaguely. I can't remember, no.

19 Q. Did you contact Dr. Schwartz-Watts  
20 during your investigation?

21 A. I believe I did.

22 Q. Is there any kind of record or report  
23 from Dr. Schwartz-Watts ---

24 A. No.

25 Q. --- that you recall?

1 A. No, there isn't.

2 Q. Any reason that you didn't call Dr.  
3 Schwartz-Watts?

4 MS. NORRIS: We're --- we're going  
5 to object to that as outside the  
6 scope of the allegations here.

7 A. I don't recall.

8 Q. The witness does not recall. Okay.

9 THE WITNESS: How do you handle  
10 objected information?

11 MR. EHLIES: In civil matters it's  
12 a very different rule. It's not at  
13 all like court because the rule  
14 says anything is discoverable that  
15 may tend to lead to admissible  
16 evidence. So it's got kind of a  
17 broad thing. But everything is  
18 fine. You don't remember. She  
19 can't force you to remember, and  
20 that's the end of that. So we'll  
21 move on unless there's some way for  
22 us to pour into your head, and I  
23 don't think that's going to work.

24 Q. And just a few more ---

25 A. But with regard to Dr. Schwartz-Watts I:



1 don't remember specifics. I remember  
2 having conversations with her, but it  
3 would have had to been determined that  
4 it wasn't going to be beneficial, so we  
5 didn't see any point in proceeding or  
6 we didn't think it was worth going down  
7 that track.

8 Q. Mr. Abdalla, you may have mentioned  
9 this when you first began your  
10 deposition, but what documents did you  
11 review in preparation for this  
12 deposition?

13 A. Pretty much just the Amended  
14 Application.

15 Q. Amended. Okay.

16 A. And the --- and I just looked at the  
17 Application itself.

18 Q. Okay.

19 A. But I didn't review the transcript  
20 except that one part that had my name  
21 in it regarding Dr. Martin. It was  
22 flagged, and so I looked at that.

23 Q. Okay. Have you reviewed anything from  
24 your file ---

25 A. No.

1 Q. --- in preparation? Where is your file  
2 at this time?

3 A. At the Public Defender Office.

4 Q. Public Defender Office. Have you  
5 maintained custody and control of your  
6 file?

7 A. I haven't but the Public Defender  
8 Office has.

9 Q. The Public Defender Office does. Okay.  
10 Thank you, sir.

11 MS. BROWN: I have no further  
12 questions.

13 MR. EHLIES: No questions.

14 (DEPOSITION CONCLUDED)

15

16

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18

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John P. Abdalla

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1 STATE OF SOUTH CAROLINA )

2 ) CERTIFICATE

3 COUNTY OF GREENVILLE )

4 I, RACHEL H. WOOD, a Notary Public, duly  
5 commissioned and qualified in and for the  
6 State of South Carolina, do hereby certify  
7 that the deposition of John P. Abdalla,  
8 called by the Applicant, was taken before me  
9 at 2:15 p.m. on June 27, 2008; that said  
10 Witness was duly sworn; that his deposition  
11 testimony was transcribed under my  
12 direction; and that this transcript is a  
13 true record of said testimony. I further  
14 certify that I am not of kin or counsel to  
15 the parties in this case, am not in the  
16 regular employ of counsel for any of said  
17 parties, nor am I interested in the results  
18 of this case.

19 IN WITNESS WHEREOF, I have hereunto set my  
20 hand and affixed my official seal this

21 8th day of July, 2008.

22 Rachel H. Wood

23 Notary Public for South Carolina

24 My Commission Expires: 04/15/09

1 STATE OF SOUTH CAROLINA )  
 2 ) COURT OF COMMON PLEAS  
 3 COUNTY OF GREENVILLE ) **COPY**  
 4 BRAD KEITH SIGMON, #6008, )  
 5 Applicant, ) 06-CP-23-6547  
 6 vs. )  
 7 STATE OF SOUTH CAROLINA, )  
 8 Respondent. )

9 - - - - -  
 10 Deposition of **FRANK L. EPPES**, taken by the  
 11 Applicant, pursuant to notice and/or  
 12 agreement, before Rachel H. Wood, Court  
 13 Reporter and Notary Public, at the law  
 14 offices of Eppes & Plumblee, P.A., 1225  
 15 South Church Street, Greenville, South  
 16 Carolina, on the 27th day of June, 2008,  
 17 commencing at the hour of 12:45 o'clock,  
 18 p.m.

19 - - - - -

## 1 APPEARANCES:

2 **WILLIAM H. EHLIES, Esquire**

3 William H. Ehlied, P.A.

4 310 Mills Avenue

5 Building A, Suite 201

6 Greenville, South Carolina

7 **TERESA NORRIS, Esquire**

8 Blume, Weyble &amp; Norris, LLC

9 1247 Sumter Street, 2nd Floor

10 Post Office Box 11744

11 Columbia, South Carolina 29211

12 Attorneys for Applicant.

13 **MELODY J. BROWN, Assistant Attorney General**

14 Office of Attorney General

15 1000 Assembly Street,

16 Dennis Building, 5th Floor

17 Post Office Box 11549

18 Columbia, South Carolina 29211

19 Attorney for Respondent.

20 - - - - -

## 21 STIPULATIONS:

22 1. The deposition was taken pursuant to the  
23 South Carolina Rules of Civil Procedure.24 2. All objections, except as to the form of  
25 the question and responsiveness of the

1 STIPULATIONS: (Continued)

2 answer, will be reserved until the time of  
3 trial.

4 3. Deposition will be submitted to the  
5 Witness for reading and signing.

6 - - - - -

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| 10 | is used to indicate an unintentional or      |      |
| 11 | purposeful interruption in a sentence, or to |      |
| 12 | indicate halting speech or an unfinished     |      |
| 13 | sentence in dialogue.)                       |      |
| 14 | - - - - -                                    |      |

1                   **FRANK L. EPPES,**

2           being first duly sworn/affirmed, was  
3           examined and deposed as follows:

4                   **DIRECT EXAMINATION**

5           **BY MR. EHLIES:**

6           Q.   Mr. Eppes, my name is Hank Ehlied, and  
7                you have done quite a bit of civil  
8                litigation work I'm sure, and this is a  
9                civil case actually. And you know that  
10              30(J) requires that I give you some ---  
11              some information about your testimony  
12              and whether you have questions and that  
13              sort of thing. But I am sure you're  
14              familiar with Rule 30(J), and I am  
15              going to dispense with all of that.

16          A.   I am familiar with the Rule, and if I  
17                don't understand a question I will tell  
18                you I don't understand it, and if I  
19                want a break I will take it.

20          Q.   Okay. And I don't think --- you're not  
21                a party, so you're probably not  
22                represented. Do you have a lawyer, or  
23                do you consider yourself represented?

24          A.   I do not have a lawyer. I do not have  
25                a lawyer, and I do not consider myself



1 represented.

2 Q. Okay.

3 MR. EHLIES: One other thing,  
4 Melody, before I go any further  
5 because I have --- the court  
6 reporter has Plaintiff and  
7 Defendant stickers. I have a  
8 couple of things to mark, and I  
9 told her we could agree that a  
10 Plaintiff's sticker meant Applicant  
11 and that a Defendant's sticker, if  
12 you have any, we'll use Respondent  
13 if that's okay with you.

14 MS. BROWN: I have no problem with  
15 that.

16 MR. EHLIES: Sure. That's all she  
17 brought. Okay.

18 Q. Mr. Eppes --- it's hard to call you  
19 "Mr. Eppes," but I'm going to call you  
20 "Mr. Eppes," and don't be offended by  
21 that; all right?

22 A. I'm not.

23 Q. Tell me a little bit of your practice  
24 history, please. When were you sworn  
25 in and ---

1       A.   I graduated the bar --- I graduated law  
2       school in 1986. I was sworn into the  
3       South Carolina Bar on November the 16th  
4       of 1986. I clerked for the Honorable  
5       Robert F. Chapman in the United States  
6       Court of Appeals for the Fourth Circuit  
7       from approximately Labor Day 1986 to  
8       Labor Day 1987. On October 26th, 1987  
9       I went to work at Cleary, Gottlieb,  
10      Steen and Hamilton in New York City. I  
11      worked there from October 26th, 1987  
12      until May 6th, 1996. I then took a  
13      year off. On May 23rd, 1997 my law  
14      partner and I, Lee Plumblee, started  
15      this firm, Eppes & Plumblee, P.A., and  
16      I have worked there ever since. When I  
17      was clerking for Judge Chapman I  
18      handled civil appeals. I did bench  
19      briefs and the typical things. The law  
20      clerks did not do any criminal work.  
21      When I was in New York at Cleary,  
22      Gottlieb, I worked primarily in the  
23      area of securities litigation, products  
24      liability litigation and corporate  
25      transactional litigation mostly in the

1 area of discovery and motion practice.  
2 I second chaired a couple of trials and  
3 appeared in a couple of trials, but did  
4 very little trial work. When I started  
5 working here in 1997, "here" meaning  
6 South Carolina, I began working ---  
7 about half my practice was civil  
8 litigation and about half my practice  
9 was criminal litigation. I did  
10 obviously trial work, plea work and  
11 everything. Over the years I have  
12 garnered a lot of trial experience, but  
13 up through Mr. Sigmon's trial I had  
14 actually what I'd consider a limited  
15 amount of trial experience.

16 Q. Criminal trial experience?

17 A. Criminal trial experience.

18 Q. Or total trial?

19 A. Or total trial experience, either one.

20 Q. Okay.

21 A. Because that was, you know, four years  
22 after I came back. I had a number of  
23 trials, but I hadn't been to court near  
24 as much as I have now.

25 Q. Okay. And when you were appointed on

1           Mr. Sigmon's case, can you tell me a  
2           little how that unfolded, how that came  
3           to happen?

4       A.   John Mauldin came to me and asked me to  
5           do it. I had told him that I would be  
6           happy to second chair him in a death  
7           penalty case when the time came. He  
8           had talked to me about it over a period  
9           of time, I can't say if it was months  
10          or years. There were several death  
11          penalty cases pending at that time, and  
12          John was really behind the eight ball.  
13          So when the Sigmon case came up,  
14          because of some other matters that were  
15          going on, he really wanted to kind of  
16          hand it off. Mr. Abdalla was death  
17          penalty qualified, and John told me,  
18          after he got me to agree to do it, that  
19          he wanted Abdalla --- Mr. Abdalla to be  
20          first chair on it since he was death  
21          penalty qualified and I was not. And  
22          we talked about it a good bit amongst  
23          ourselves, Mr. Mauldin, Mr. Abdalla and  
24          I. And then we went and talked about  
25          it, I believe with Judge Watson. But I

Frank L. Eppes

10

1           can't tell you if that was before or  
2           after Judge Watson appointed us. And  
3           then we were appointed and began work  
4           on it.

5       Q.   Okay. And up until that time had you  
6           ever worked with Mr. Abdalla before?

7       A.   I'm not sure. We --- I met Mr. Abdalla  
8           when I was in college, and he was  
9           working for Pretrial Intervention at  
10          the courthouse in Greenville. I've  
11          known him since --- since at least  
12          1981, and I believe I knew him before  
13          then because I hung out at the  
14          courthouse a lot.

15      Q.   All right.

16      A.   And so we've been friends. We were in  
17          law school together. He was one or two  
18          years behind me in law school, and we  
19          had always had a good relationship  
20          during the period of time I was in New  
21          York and he was in Spartanburg. And  
22          then when I came back he was in  
23          Spartanburg for a part of the time and  
24          then came back to Greenville. Whether  
25          or not we were ever co-counsel with co-

1 defendants I could not tell you.

2 Q. Okay.

3 A. But I don't have a memory of it.

4 Q. Prior to getting appointed on the  
5 Sigmon case had you worked at all to  
6 any extent in a capital murder case?

7 A. No.

8 Q. Okay. When you-all got going tell me  
9 how the work was divided, if at all.  
10 Was there some sort of understanding as  
11 to how that would happen?

12 A. When we took the case I told Abdalla  
13 that any disagreements we had, even if  
14 he was lead counsel, that I was going  
15 to be the final word on it. And he  
16 thought I was joking. I wasn't. And  
17 so in that regard I was kind of the  
18 final word on it, and I think he would  
19 verify that. As far as dividing up the  
20 work we --- we talked about it a good  
21 bit, and John had a really good  
22 relationship with Brad. He would go  
23 down and check on Brad and see what he  
24 needed. I had a decent relationship  
25 with Brad, but I'm not really good at

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1 small talk. And Brad, frankly after a  
2 couple of interviews, there wasn't much  
3 he could tell me that was going to  
4 affect how I tried the case.

5 Q. All right.

6 A. And so when we divided the work up John  
7 did a lot of interaction with Brad, and  
8 we decided that I would focus on the  
9 evidence in the case and the police  
10 reports and everything, and John  
11 focused on a lot of the personal  
12 history of Brad.

13 Q. Did it break out more in the context of  
14 the guilt phase/penalty phase? Do you  
15 remember whether ---

16 A. Not exactly.

17 Q. Is that a fair characterization?

18 A. Not exactly. We --- we went through  
19 the evidence, and we talked about it a  
20 lot, and at some point it came up ---  
21 we came up with the idea that we were  
22 going to effectively concede Mr.  
23 Sigmon's guilt, because he had  
24 confessed three different ways. He  
25 had confessed on tape or he had

1            confessed on video, and he had  
2            confessed pretty much to everybody  
3            that spoke to him from the time he was  
4            caught in Tennessee until the time he  
5            got back and met with John. One of the  
6            reasons John got the case, John met  
7            with him the first night he got back I  
8            believe. But he confessed to everybody  
9            that would listen to him. And so we  
10          felt like admitting guilt and asking  
11          for mercy was really going to have to  
12          be our strategy. So the guilt phase  
13          and the penalty phase to us were one  
14          fluid event.

15          Q. Okay. Okay. And did it go as you had  
16          planned? Excluding the end result.

17          A. A lot of it went about like we had  
18          planned. I have a hard time --- and I  
19          have mentioned this to Ms. Brown and  
20          I'll --- I'll just say it so we'll have  
21          it on the record. My father was sick  
22          during this, and I worked on this case  
23          for most of the summer, and then we  
24          tried it in late July. And then I took  
25          a week off, and my father went into the



1 hospital and he never came out. And he  
2 died the Thursday before Labor Day, and  
3 I took another week off. And that  
4 three- or four-month period was --- was  
5 a blur. It's hard for me to --- you  
6 know, a lot of times when you try a  
7 case you remember the highs and the  
8 lows of it and everything. Well,  
9 everything was a disaster then and,  
10 obviously, Mr. Sigmon's case was an  
11 important thing that I was doing, but I  
12 don't have specific memory of anything  
13 being bollixed. There's a couple of  
14 things that I remember.

15 Q. Excuse me. Let me interrupt for a  
16 second.

17 A. Sure.

18 Q. What was the date of your dad's death?

19 A. August 29th.

20 Q. 2002?

21 A. 2002. Yeah.

22 Q. And I think this case was tried in  
23 July?

24 A. Yeah.

25 Q. Of 2002?

1       A.   Yeah.

2       Q.   Okay.

3       A.   The things --- there's a couple of

4           things that I remember that didn't go

5           well. Number one, picking the jury.

6           John and I learned how to pick the jury

7           by doing it with John Mauldin's intense

8           supervision. And the first day,

9           honestly, we didn't --- I didn't think

10          --- John Mauldin sure didn't think we

11          did a very good job of it and, yet, the

12          jurors that got qualified the first day

13          we felt okay about. We did --- just

14          through the luck of the draw we did

15          pretty well. By --- and I don't

16          remember how many days we picked the

17          jury, but by the second or third day of

18          it --- and I don't think we had the

19          jury by the third day --- we started to

20          finally understand what we were doing,

21          and I thought we got a lot more

22          effective. So that didn't go as well

23          as I would have hoped in advance. The

24          other thing that at the time I remember

25          feeling like I had bollixed --- or I

1 read the transcript --- and I'm not  
2 sure how it played out, was when the  
3 --- Brad's wife that shot him, her  
4 cross-examination, you know, it was  
5 really divided into two parts. One on  
6 an afternoon in the penalty phase and  
7 another the next morning. And that  
8 afternoon's cross-examination that I  
9 did I remember at the time thinking,  
10 "Boy, that was terrible." And those  
11 are the --- frankly the two things that  
12 stand out as --- as going poorly.

13 Q. Okay. You've mentioned that you had  
14 available to you certain transcripts.  
15 Can you identify those?

16 A. I got from Ms. Brown a copy of the ---  
17 basically the sentencing phase  
18 transcript, which is --- I brought it  
19 down here. It's pages 1787 through  
20 2248. And I reviewed those quickly  
21 this morning.

22 Q. Okay. And you spoke with Ms. Brown  
23 about --- about the issues, did you?

24 A. Yeah, she and I have talked two or  
25 three times about the trial.

1 Q. Okay. Have you spoken to anyone else  
2 in preparation for the testimony? Did  
3 you speak with John?

4 A. I've talked --- I've talked to you a  
5 couple of times, and I've talked to  
6 John. John and I have talked in  
7 general terms two or three times.

8 Q. All right. And did you see the  
9 documents pertaining to the pleadings  
10 in the case?

11 A. I believe I have seen your Amended ---

12 Q. Okay.

13 A. --- Application.

14 Q. All right.

15 MR. EHLIES: Let's just put a  
16 sticker on it, Plaintiff's One, to  
17 make sure we're looking at the same  
18 thing.

19 MS. NORRIS: I've got one.

20 MR. EHLIES: I know you do.

21 (Thereupon the court reporter  
22 marked the pertinent documents as  
23 PLAINTIFF'S EXHIBIT-NUMBER-ONE.)

24 Q. All right. I'm going to show you  
25 Plaintiff's One.

1 A. Okay.

2 Q. And prior to your testimony here today  
3 have you seen that document and  
4 reviewed it?

5 A. Yeah.

6 Q. Okay.

7 A. Oh, there's one other thing.

8 (JOHN ABDALLA KNOCKS ON DOOR.)

9 (OFF RECORD COMMENTS)

10 A. One other thing I was tickled with ---  
11 and I'm sorry that I forgot it, but  
12 just seeing what the Applicant was  
13 indicted on, this exhibit, originally,  
14 there were several charges that related  
15 to Becky, the victim in the case whose  
16 parents were killed, and we raised a  
17 bunch of Cain about her psychiatric  
18 history and some other issues. And we  
19 --- we actually had some interesting  
20 cross-examination about her treatment  
21 of Brad, and we anticipated her being a  
22 big part of their case. And on the day  
23 of the trial Bob dropped --- Bob ---  
24 Solicitor Ariail dropped the charges  
25 --- and you can figure out what they

1           were. I don't remember, but I know the  
2           kidnapping was one of them, which was a  
3           qualifier for the death penalty. And,  
4           frankly, I was really tickled to get  
5           that out of the mix. He was going to  
6           open his trial with six witnesses about  
7           Brad chasing Becky across the field,  
8           but he did drop --- I want to say there  
9           were a couple of ABlix or something  
10          else as well that he dropped that I was  
11          very pleased at the time that he  
12          dropped from the case.

13                       (Thereupon the court reporter  
14                       marked the pertinent documents as  
15                       PLAINTIFF'S EXHIBIT-NUMBER-TWO.)

16       Q.   Uh-huh. I'm going to show you what's  
17           been marked now as Plaintiff's Exhibit-  
18           Two to your deposition and ask you if  
19           you had an opportunity to see that. Is  
20           that one of the documents that you  
21           reviewed prior to your testimony?

22       A.   Ms. Brown E-mailed me what I believe to  
23           be your Trial Brief, but I can't tell  
24           you by looking at it. If there's only  
25           one Trial Brief then this is it.

1 Q. Okay. This is the Applicant's Trial  
2 Brief?

3 A. Yes.

4 Q. Okay.

5 A. I don't think I looked at the AG's  
6 Trial Brief.

7 Q. All right.

8 A. If there is such a thing.

9 Q. All right. But you've seen Plaintiff's  
10 Exhibit-Two before?

11 A. Yes, I have.

12 Q. Okay. Anything else that you reviewed  
13 in preparation for your testimony here  
14 today? Any other documents or people  
15 you've talked to?

16 A. I have --- I have a nominal file  
17 upstairs that is a bunch of this and  
18 that from the Sigmon case that I didn't  
19 think was important enough to keep with  
20 the --- I put all my --- I took all of  
21 my files to the Public Defender's  
22 Office, and I didn't have anything  
23 other than the trial list that comes up  
24 after the trial that I put in there.

25 Q. Okay.

1       A.   And I looked at that, because I was  
2           wondering if there was anything in  
3           there that might be relevant to you-  
4           all.

5       Q.   Okay. All right. So have we covered  
6           basically the documents that you've  
7           reviewed, any information, the  
8           transcripts, and things on that order?

9       A.   Yeah.

10      Q.   Okay. Let me show you what's going to  
11           be marked as Plaintiff's Exhibit-  
12           Number-Three.

13                   (Thereupon the court reporter  
14                   marked the pertinent documents as  
15                   PLAINTIFF'S EXHIBIT-NUMBER-THREE.)

16      Q.   This is a document and you're probably  
17           familiar with --- with one of the  
18           issues in the case that's set forth in  
19           the Application, Applicant's Exhibit-  
20           One and Plaintiff's Exhibit-One, and  
21           Brief in Number-Two. This is a Motion  
22           to Limit Testimony of James Sligh.  
23           It's two pages, and on the last page it  
24           has your signature I believe; is that  
25           correct?



- 1 A. Yes.
- 2 Q. Do you recognize this motion?
- 3 A. I recognize the motion, and I recognize  
4 my signature although I'm not sure  
5 about the underlining on it.
- 6 Q. Okay.
- 7 A. Although that kind of looks like the  
8 way I underline stuff.
- 9 Q. Okay. Tell me where you got this  
10 motion. Do you remember where ---
- 11 A. John Mauldin has a big old computer  
12 file of motions. and I looked through  
13 it and purloined anything that I  
14 thought had the least bit of relevance  
15 to Mr. Sigmon.
- 16 Q. Okay. And this is one of the motions  
17 you found?
- 18 A. Yes. I was also --- and I can't  
19 remember --- yeah, this is one of the  
20 motions I found. I was also worried  
21 about this aspect of the case because I  
22 don't remember whether I saw it or read  
23 about it in the newspaper, but I was  
24 familiar with how Bob used Mr. Sligh's  
25 testimony to contrast living conditions

1 on life without parole and the Row.

2 And I --- and I just thought it was an  
3 unfair use of evidence. And so I ---

4 Q. Okay.

5 A. --- I felt like this was an important  
6 motion.

7 Q. All right. This motion I note --- is  
8 it fair to say at looking at this  
9 motion that it is particularized to the  
10 Sigmon case, the facts set out in one,  
11 two, three and four would be facts  
12 relevant to Sigmon; is that correct?

13 A. Oh, yeah. Yes.

14 Q. Okay. And it cites a code section at  
15 the end. Are you familiar with that  
16 code, 16-3-20?

17 A. I would assume that's the death penalty  
18 mitigation section, but I don't know  
19 right this second.

20 Q. Okay. And was it your understanding  
21 then --- did you do any research at all  
22 into the nature of this motion? Did  
23 you have any case law?

24 A. I had no case law. I would have --- I  
25 would have read that statute if I put

1           it in the motion.

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

4       A.    Uh-huh.   Yes.

5       Q.    And was that your intent?

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

18      Q.    The living conditions globally?

19      A.    Globally.   Plus --- plus we intended to  
20          offer a witness about that issue, which  
21          ---

22      Q.    Okay.

23      A.    --- obviously shows that I didn't know  
24          that it wasn't admissible.

25      Q.    Okay.   And who would that witness have

1           been?

2       A.   Mr. Aiken, I think is his name.

3       Q.   Okay. And, specifically, what --- what  
4           was it that you were wanting to get  
5           from Mr. Aiken?

6       A.   Well, Mr. Sigmon at that time was 46,  
7           47.

8       Q.   Forty-four I think, but close enough.

9       A.   Okay. He was in his 40s, and amongst  
10          the prison population that's older.  
11          And Mr. Aiken has a Department of  
12          Corrections background, and we wanted  
13          to show that, you know, in life without  
14          parole situation Mr. Sigmon would not  
15          be a predator. He would not be the big  
16          man on the block. He would be prey for  
17          the younger, stronger inmates, and as  
18          he got older the condition would get  
19          worse.

20       Q.   Okay. And did that conform to your  
21          understanding of adaptability to prison  
22          conditions?

23       A.   I can't say that I was trying to get it  
24          in as an adaptability or as --- I'm  
25          sure there's a good chance we were

1 coloring it as adaptability, but the  
2 fact I wanted to get to the jury was  
3 that he would be a victim not a  
4 perpetrator in the prison system.

5 Q. And what was it that would have stopped  
6 you from doing that? What was your  
7 understanding that stopped you from  
8 doing that if it related to  
9 adaptability?

10 A. I don't --- I'm not getting you.

11 Q. Okay.

12 A. I'm not understanding the question.

13 Q. If what you wanted to show the jury was  
14 that he would not be a predator, and he  
15 would be potentially a victim of  
16 predators, did that conform to your  
17 understanding of what adaptability  
18 testimony was all about to show that  
19 someone could conform to the  
20 circumstances of prison life?

21 A. Yes. And I'm --- I'm answering that  
22 way because of my review of the other  
23 testimony where I brought out from  
24 other people at the Greenville County  
25 Jail and others that he had been fairly

1            --- a pretty model prisoner. So I  
2            would say it fit within that story that  
3            ---

4        Q.    Okay.

5        A.    --- that we were telling.

6        Q.    It was distinguishable from the rules  
7            of the prison like you can go in the  
8            canteen duty and you can have visitors?

9        A.    Yes.

10       Q.    And you can have a television set if  
11            you have 200 bucks today?

12       A.    Yes, I would agree with that.

13       Q.    Is that fair? So it was more  
14            adaptability than it was prison  
15            conditions that you were working with  
16            with judge --- with Jim Aiken?

17       A.    I wish I could tell you what I was  
18            thinking at the time.

19       Q.    Okay.

20       A.    The thing that I can tell you that I  
21            was thinking at the time was that Jim  
22            Aiken could say that he would be a  
23            victim and not a --- not a perpetrator.

24       Q.    Okay.

25       A.    But I --- I can't tell you how that

1           ties in with adaptability looking at it  
2           from right here. It sounds right.

3       Q. Let me see. I'm going to show you, I  
4       think --- I'm going to show you a page  
5       on the Volume Five of Five at 2144 just  
6       because we're at this point. You can  
7       read that to yourself and let me know  
8       when you've finished 2144, and I think  
9       line 16.

10      A. (Witness reading document.) Well,  
11      there you go.

12      Q. Okay. Now for the record so the judge,  
13      who may not have this, I understand  
14      that you are asking Mr. Aiken a  
15      question about whether or not Brad  
16      would be a victim. Will you publish  
17      that part into this record for me?

18      A. Yeah, sure. I asked ---

19      Q. Identify the line.

20      A. Okay.

21      Q. Am I right about the page?

22      A. I'm going to start up a little higher  
23      than what you are.

24      Q. Okay.

25      A. 2144 starting with line 13 I asked a

1 question. "Would you have any problems  
2 with Mr. Sigmon in the South Carolina  
3 Department of Corrections?" "Yes."  
4 That was the answer. My question,  
5 "What would the problem be?" The  
6 answer, "My biggest problem would be  
7 keeping him from being harmed by  
8 predator inmates." "Why is that?"  
9 "Because people in a maximum security  
10 environment, as I explained earlier,  
11 are very --- are very methodically."  
12 "Mr. Ariail, "I'm going to object at  
13 this juncture. I think he's gone  
14 beyond adaptability." And The Court  
15 sustained the objection, and I said,  
16 "Thank you." Which would make clear  
17 that I was getting it under  
18 adaptability.

19 Q. Okay. You were attempting to get it  
20 in, but it didn't come in?

21 A. Well, I think the --- I think the fact  
22 of him being harmed by predators came  
23 in, but I think the reasons did not  
24 come in at this place. I don't  
25 remember if they came in somewhere else



1 or not.

2 Q. Okay. And do you remember what Jim  
3 Aikens --- Aiken was going to say the  
4 reasons were?

5 A. He was going to say that --- that 44 is  
6 old in prison, and as you got older  
7 you're not as strong. He's not a very  
8 big guy, and as you get older the other  
9 inmates come at you.

10 Q. All right.

11 A. And they're very aggressive, and he  
12 would be more likely to be a victim  
13 than he would ever be to be a predator.

14 Q. And do you recall whether Mr. Aiken  
15 would have testified that the  
16 adaptability issue was sort of a fluid  
17 situation? It's one thing when you  
18 first enter prison and over time and  
19 your age, especially if you're  
20 sentenced to life without parole, the  
21 adaptability issues keep changing; is  
22 that correct?

23 A. That --- that certainly would be part  
24 of our preparation. Whether it's  
25 actually in that transcript I can't

1 tell you.

2 Q. Okay. I didn't see any proffer,  
3 proffer of proof at the objection of  
4 that testimony. Do you recall whether

5 A. I probably did not make a proffer.

6 Q. You didn't. Okay. Is it fair to say  
7 though you at that time --- do you have  
8 a recollection whether at that time you  
9 remember what Aiken was going to say?

10 A. Oh, yeah.

11 Q. Okay.

12 A. Yeah, that was --- that was the thing  
13 with his whole --- with his being  
14 there.

15 Q. Okay. Now I believe that at a later  
16 time Jim Sligh apparently did not  
17 appear ---

18 A. No.

19 Q. --- in the penalty phase of the trial;  
20 is that correct?

21 A. That's correct.

22 Q. And then I think later in Mr. Aiken's  
23 testimony that Bob Ariail got into some  
24 prison condition testimony. Do you  
25 remember that?

- 1 A. He did.
- 2 Q. Yeah. And have you had a chance to
- 3 kind of read over it?
- 4 A. I skimmed it, but the thought I can
- 5 tell you on that is that I --- I can
- 6 say almost categorically that I had no
- 7 idea that I should object to that at
- 8 the time.
- 9 Q. Okay.
- 10 A. I thought it was admissible.
- 11 Obviously, since then the Supreme Court
- 12 has explained itself very clearly.
- 13 Q. Okay.
- 14 A. And my response to that today would be
- 15 much different than it was then.
- 16 Q. Okay. All right. Let's go on then to
- 17 another issue. There was some remark
- 18 at the closing arguments with Solicitor
- 19 Ariail concerning whether the jury had
- 20 any help or assistance in making the
- 21 decision of life or death and that it
- 22 would be fair for them to ask him. Do
- 23 you remember that? Did you ever have a
- 24 chance to read that testimony?
- 25 A. I don't remember that.

1 Q. Okay.

2 A. As I sit here right now I don't

3 remember that.

4 Q. Okay.

5 A. If you show it to me I would.

6 Q. (Counsel looking for testimony.)

7 A. Well, I say I would. I think I would.

8 Q. Okay. We're at 2184.

9 A. (Witness reviewing testimony.)

10 Q. Actually it's 2187.

11 A. Okay.

12 Q. Page 2187 and it over on to 2188.

13 A. Uh-huh. (Witness reviewing testimony.)

14 Q. And we didn't mark the line. I think

15 it's ---

16 A. Are you talking about lines 18 through

17 24?

18 Q. Where he says, "It's fair for you to

19 ask me, Solicitor Ariail, why do you

20 think the death penalty is an

21 appropriate punishment in this case?"

22 A. Oh. Yeah, I do see that.

23 Q. Okay. Do you know what was going on at

24 the table at that point? Were you able

25 to really --- is there anything that

1           you recall during Ariail's closing  
2           argument that might have distracted you  
3           or anything of that nature?

4           MS. BROWN: I'm sorry. May I  
5           interrupt for just a minute to get  
6           clarification where we are?

7           MR. EHLIES: Uh-huh.

8           MS. BROWN: I didn't catch the  
9           page and line.

10          THE WITNESS: 21 --- 2187 starting  
11          at line 25 and then going over to  
12          2188.

13          MS. BROWN: Thank you very much.

14          MR. EHLIES: Excuse me.

15          A. I'm reading it. Can I read it?

16          Q. Yeah, sure.

17          A. (Witness reading testimony.) Okay.  
18          I've read it.

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

21          A. You make me want to go look up the law  
22          and see if he can do that. My --- my  
23          thought right now would be that the  
24          solicitor cannot give them an answer of  
25          why he thinks the death penalty is

1           appropriate in that way. I think he  
2           can argue for the death penalty and,  
3           obviously, give reasons he thinks the  
4           death penalty is appropriate as part of  
5           his argument. The death penalty is  
6           appropriate because of blah, but I'm  
7           not sure that the solicitor is allowed  
8           to give his personal opinion.

9       Q.   How he arrived at the decision ---

10      A.   Yes.

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

13      A.   I would --- I would agree that I think  
14           --- in looking at that right now I  
15           think that's highly suspect.

16      Q.   Okay. And why would it not have  
17           appeared that way to you in July of  
18           2002?

19      A.   I have no idea.

20      Q.   Okay.

21      A.   I don't --- I don't remember --- I  
22           don't remember it. I don't remember  
23           any thought about it during the --- the  
24           hearing. I was --- typically when I  
25           --- when the solicitor is doing cross-

1 examination I'm trying to obviously  
2 listen for objectionable things, but  
3 also to take notes for things that I  
4 might want to use in my close. And I  
5 jot stuff down a lot. And in this  
6 particular case I don't have a memory  
7 of that.

8 Q. Do you routinely listen to the  
9 arguments, or do you write --- do you  
10 write down while you're listening?

11 A. I'll listen and write about what I'm  
12 listening to, not --- not try to  
13 prepare from other stuff. I --- I ---  
14 I think it's very important to listen  
15 to arguments and --- and try to  
16 determine what you're going to say. So  
17 when I'm --- if I'm sitting there  
18 scribbling along I'm scribbling along  
19 in the context of typically what the  
20 solicitor would be saying.

21 Q. All right. And at this point in that  
22 closing argument would you have been  
23 listening to his argument as opposed to  
24 attending to the client with some  
25 matter?

1       A.   I can't say what I was doing.  I can't  
2            tell you right now what I was doing,  
3            but typically in a case I will be  
4            shushing my client and listening to the  
5            argument.  And then if my client needed  
6            to tell me something I'd say, "Write it  
7            down or tell me as quick as it's over."

8       Q.   Okay.

9       A.   And I'd take time to listen to it when  
10           it was over.  I cannot tell you what I  
11           was doing there.  Brad --- I know when  
12           Brad talked because he would --- trust  
13           me, I'd listened to him.  But I have no  
14           memory of what was going on during  
15           this.

16      Q.   You were designated to do the closing  
17            argument immediately after this,  
18            weren't you?

19      A.   Yes.

20      Q.   And you did do the closing argument  
21            immediately afterward?

22      A.   Yes.

23      Q.   Would it be fair to say that if Brad  
24            had something going he'd be dealing  
25            with Abdalla?  Was Abdalla at the table



1 with you at the time?

2 A. He was at the table, but throughout  
3 most of that trial I sat between the  
4 two of them. So I don't --- I don't  
5 know the answer to that.

6 Q. Okay.

7 A. I mean, like I say, I typically listen  
8 to argument and --- and I'm not a  
9 person who's shy about objecting during  
10 the opposition's closing arguments.  
11 And reading this right now it strikes  
12 me as something objectionable, and at  
13 the time I have no memory of it  
14 striking me that way.

15 Q. Okay. Okay. The next couple of issues  
16 pertain to a variety of technical  
17 things in this request to charge. And  
18 just to assist a little bit I brought  
19 with me a copy of the statute, and I  
20 think it'll help us if we're looking at  
21 this.

22 MR. EHLIES: And we can mark that  
23 as?

24 COURT REPORTER: Four.

25 MR. EHLIES: Four. Do you want to

1 write Four on there?

2 MS. NORRIS: Okay.

3 (Thereupon the court reporter  
4 marked the pertinent documents as  
5 PLAINTIFF'S EXHIBIT-NUMBER-FOUR.)

6 Q. There are basically three --- at the  
7 time this case was tried three  
8 mitigation --- mitigating circumstances  
9 that are listed in the statute  
10 pertaining to voluntary intoxication,  
11 mental state, emotional problems and  
12 things of that nature. And I think  
13 they appear on page three of the  
14 exhibit. Mitigating circumstances  
15 actually begin on the bottom of page  
16 two, and they start listing those  
17 mitigating circumstances. And I  
18 noticed that there was a colloquy  
19 between you and the judge as pertains  
20 to number seven, which is a charge that  
21 you had apparently handed up. Do you  
22 recall that?

23 A. No.

24 Q. Okay. Do you feel now in retrospect  
25 that paragraph seven was indicated by

1           the evidence in the case? And seven  
2           was "The age or mentality of the  
3           defendant at the time of the crime."  
4           Mental state.  
5       A.   I don't know. It ---  
6       Q.   All right.  
7       A.   --- it certainly doesn't strike me as  
8           something I thought was a big deal at  
9           the time, but I don't know.  
10      Q.   All right. Let me ask you ---  
11      A.   He was --- he was wound up like a top.  
12           I mean that was obvious.  
13      Q.   Brad Sigmon?  
14      A.   Yes.  
15      Q.   Or the judge?  
16      A.   No, Brad Sigmon. The judge was fine.  
17           Brad Sigmon was wound up like a top  
18           when he committed this crime.  
19      Q.   Okay. All right. So, if you would  
20           accept my statement that you did, in  
21           fact, offer and request a charge on  
22           number seven, and the judge talked to  
23           you about that, and he offered to you  
24           that six embraced seven --- take a look  
25           at six and tell me if you see a

1           distinguishing feature if you --- in  
2           your legal capacity?

3       A.   Oh, yeah.

4       Q.   Okay.

5       A.   I see a difference.

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

10      A.   I do not.

11      Q.   And kind of develop a little record  
12           there about you were serious about  
13           that, and it was supported by the  
14           evidence, et cetera. As you sit here  
15           today then you say there is in your  
16           mind a distinction between six and  
17           seven?

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

23      Q.   Okay. Now there was another one that  
24           kind of played into this, and it was  
25           five. Excuse me. Let me back up on

1           what we just --- six and seven. Would  
2           your understanding have been the same  
3           about six and seven being distinctly  
4           different at the time of the trial as  
5           opposed to right now?

6       A.   (Witness hesitates.)

7       Q.   And what I'm getting at there is have  
8           you done any research or anything in  
9           light of the issues or whatever that  
10          ---

11      A.   I can't ---

12      Q.   --- from your current testimony that  
13           you didn't have available to you at the  
14           time of the trial?

15      A.   I have --- I have no knowledge or  
16           memory of distinction on these issues  
17           now or then. Although as I read the  
18           two things they strike me as  
19           substantially different.

20      Q.   Okay. Tell me how you were arguing for  
21           five if you'll assume for me that five  
22           was --- was a charge that you were  
23           seeking from the judge. Tell me what  
24           you understood about that.

25      A.   It was --- it was our theory of the

1 case that --- I don't remember arguing  
2 this to the judge first of all. But it  
3 was our theory of the case that ---  
4 that Becky basically tormented Brad as  
5 they were breaking up in a really cruel  
6 and malicious way, and that she created  
7 and exacerbated the situation by her  
8 actions, by tormenting him, and by  
9 being nice and then ugly, and --- and  
10 that she had put him in a situation  
11 where he was --- he became a stalker  
12 basically.

13 Q. Okay. Now in that context was she ---  
14 or were any charges pending against  
15 Brad Sigmon at that time with Becky as  
16 the victim?

17 A. Are you talking about the kidnapping  
18 and the assault and battery with intent  
19 to kill, which I think was there?

20 Q. I believe you testified that all the  
21 things involving Becky were dismissed,  
22 and it was the charges pertaining to  
23 John Larke and his wife, Gladys ---

24 A. Yeah.

25 Q. --- that were being tried; is that

1 correct?

2 A. Yeah, Bob didn't want to put her on the  
3 stand.

4 Q. Okay. So the theory of the case, as I  
5 understand what your testimony was,  
6 that Becky was aggravating Sigmon's  
7 condition and his anger?

8 A. Brad had a hard time with breakups.  
9 Brad had a hard time with abandonment  
10 because his momma had left him a lot as  
11 a kid, and that he --- he --- he had a  
12 hard time with it, and he reacted very  
13 poorly to it.

14 Q. All right.

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

22 Q. Okay.

23 A. And it exacerbated his problems with  
24 abandonment.

25 Q. All right. And I perceive the

1           significance of all of that as to the  
2           charges involving Becky, and I'm trying  
3           to get you to tell me how that becomes  
4           relevant in the charges against killing  
5           her parents.

6       A.   Well, that was --- and that was ---  
7           that was the catch-22 of us leaving  
8           Becky out of it, is it made it harder  
9           to get that part of the story in, which  
10          was Bob's, I believe, strategy for  
11          dismissing the charges vis-à-vis Becky.  
12          We were really trying to backdoor it,  
13          and --- and it was --- I had enough  
14          evidence in to talk about it. And,  
15          frankly, I don't know how hard I argued  
16          about that charge, but at that stage I  
17          really thought --- I really thought  
18          that the facts were the thing that was  
19          going to carry the day, not any charge  
20          that Judge Watson happened to give  
21          about mitigation.

22       Q.   Okay. The facts being that Becky was  
23           aggravating Sigmon?

24       A.   We got --- we got most of that in  
25           through his --- through his --- the



1 tape/transcript of his confession.

2 Q. I'm just having a hard time, and I'm  
3 --- I'm asking you to enlighten me as  
4 to how that helps you with Sigmon  
5 killing Gladys and John Larke.

6 A. Brad's plan was to tie up Gladys and  
7 John so that he could take Becky to  
8 talk to her or whatever, and ---  
9 because Becky wouldn't talk to him  
10 anymore. And his co-conspirator, who  
11 bailed out, verified that.

12 Q. Strube?

13 A. Yeah.

14 Q. Strube.

15 A. Had verified that. He had taken duct  
16 tape and rope and the things you'd use  
17 to tie somebody up over to the house.  
18 And then Mr. Larke had surprised him at  
19 the door I guess. This was our theory  
20 in the case. And Brad thumped him and  
21 from then it evolved into a double  
22 murder. And then he waited on Becky,  
23 and Becky came home, and the rest of it  
24 played out with her running through a  
25 field.

1 Q. Okay. Are you --- will you agree  
2 basically that a judge's jury charge is  
3 generally received with significant  
4 respect from the jurors?

5 A. Yes.

6 Q. And if you can get a judge to charge  
7 something you're saying as a trial  
8 lawyer it's very helpful?

9 A. It is helpful, yes.

10 Q. You subscribe to the theory then that a  
11 jury charge from a judge is something  
12 that can bootstrap an argument into  
13 real meaning?

14 A. Yes.

15 Q. Okay. Likewise it can have a downside,  
16 can it not, if the judge's charge is in  
17 error?

18 A. Oh, yeah.

19 Q. And if it turns out that what he is  
20 saying really isn't the law then would  
21 you agree as an expert trial lawyer,  
22 really wouldn't you concede that you've  
23 got an uphill battle going with the  
24 jury?

25 A. You always want the judge to try the

1 correct law.

2 Q. Okay. And there was some remarks in  
3 the charge from the judge about  
4 mitigation and the evidence and what it  
5 is and what it's for. And did you do  
6 anything yourself, personally, in  
7 preparing the mitigation charges? Were  
8 you the one that was responsible for  
9 going and pulling the ones that you  
10 wanted, or did someone else have that  
11 assignment?

12 A. As I sit here today I have no memory at  
13 all of the jury charge.

14 Q. And how the judge ---

15 A. Or how the charge is --- I have no  
16 memory of it. My --- my assumption  
17 would be that I went to John Mauldin  
18 and asked him, but --- and then took  
19 what he had and looked at it and  
20 studied on it and handed it up, but I  
21 have absolutely no memory of it.

22 Q. All right. If you had seen a charge to  
23 the effect that the jury has the  
24 responsibility and the duty to search  
25 the whole record for any evidence that

- 1           it may consider mitigation, would you  
2           have asked the judge to charge that?
- 3       A.   If I'd seen a charge like that I would  
4           have probably asked the judge for it.
- 5       Q.   Okay. Are you aware that that's the  
6           law of the state and was in '02?
- 7       A.   I have --- I have an understanding of  
8           it, but I don't --- I'm not going to  
9           sit here and tell you that it would pop  
10          into my head first or last. I don't  
11          remember that specific language as  
12          something that's part of my pool of  
13          knowledge right now, no.
- 14      Q.   Okay.
- 15      A.   But it sounds right.
- 16      Q.   And the jurors are the ones that decide  
17          what's mitigating and what isn't?
- 18      A.   No question about that.
- 19      Q.   And how mitigating it might be?
- 20      A.   There's no question about that as well.
- 21      Q.   Okay. We're getting there. We're  
22          getting there.
- 23      A.   I also would have ---
- 24      Q.   Okay.
- 25      A.   I mean I was going to say I think the

1 statute is front loaded to get juries  
2 to kill the people, but that's just my  
3 personal belief reading the statute.

4 Q. Okay.

5 A. And I think the charges frankly come  
6 out that way as well.

7 Q. All right. There were a couple of  
8 technical things that happened, and no  
9 trial goes perfectly and I'm really  
10 sympathetic. One of them involved what  
11 we have now as ---

12 A. Secret Service Agent Rick Kearns.

13 Q. Yeah, the tapes of Brad Sigmon. And  
14 you said he was wound up tight ---

15 A. Uh-huh.

16 Q. --- at the time of these crimes.

17 A. At the time of the crimes and at the  
18 time of his arrest.

19 Q. And I think that was your word I think  
20 "wound up"?

21 A. That's right. Yeah.

22 Q. So there were some tapes that were made  
23 to evidence just how tense he was and  
24 remorseful, too. I think he was  
25 tearful.

- 1 A. The Tennessee --- the Tennessee ---  
2 Q. Gatlinburg tapes.  
3 A. --- police taped him for hour --- for a  
4 long time, couple of hours maybe.  
5 Q. There were four CD loads.  
6 A. Okay.  
7 Q. So did you get a chance to see those  
8 tapes?  
9 A. I watched, I believe, every minute of  
10 them.  
11 Q. All right.  
12 A. Actually I know I watched every minute  
13 of them.  
14 Q. They involved bringing him into the  
15 Detention Center, and I think they also  
16 involved some interviews and  
17 statements, and a telephone call to his  
18 mother?  
19 A. Yes.  
20 Q. Can you characterize those for us?  
21 A. There was also --- there was also a  
22 Channel 4 interview that was there  
23 somewhere.  
24 Q. All right.  
25 A. He --- to characterize them he would

1           basically describe his relationship  
2           with Becky, how much he loved her, how  
3           well he treated her, the things that  
4           had gone right and wrong with the  
5           relationship, and the story itself of  
6           what happened. And periodically during  
7           all of this he would break down and cry  
8           and express his also friendship,  
9           kinship, love and devotion for the two  
10          victims, Mr. and Ms. Larke.

11       Q. All right. And did you get a chance to  
12          watch the call to his mom?

13       A. I did at the time, yeah.

14       Q. How would you characterize that if you  
15          have any independent recollection  
16          today?

17       A. It was tearful. "Mom, I'm sorry. I'm  
18          sorry. I don't know why I did this."

19       Q. Did it strike you as good mitigation  
20          remorse?

21       A. Yes.

22       Q. Evidence of remorse contemporaneous  
23          with the events themselves?

24       A. Yes, it --- I think it would have been.  
25          It shows the jury his emotions at the

1 time. Yeah.

2 Q. Did you consider his emotions at the  
3 time and the jury seeing that to be  
4 important at the time you were trying  
5 the case ---

6 A. Yeah.

7 Q. --- in July of '02?

8 A. Oh, yeah.

9 Q. Why didn't they get to see it?

10 A. It is hard to recreate my thought  
11 processes on this. John may have it.  
12 We talked about it. The problems with  
13 the tape were when he wasn't crying and  
14 he showed his anger it was bad. And I  
15 was a little scared of the ---  
16 particularly the Channel 4 tape. The  
17 Channel 4 tape was not a favorable ---  
18 to me didn't give a favorable  
19 impression of him.

20 Q. Okay.

21 A. And ---

22 Q. On that point, let me interrupt you for  
23 just a second. Who was offering the  
24 tapes potentially as evidence, you or  
25 the prosecutor?



1       A.   Well, we were offering them, but I felt  
2            like if we offered them the prosecutor  
3            would put parts --- other parts in.  
4            And I may frankly have been better  
5            versed in that than them, because of  
6            --- can I talk about the glitch, or do  
7            you want me to wait?

8       Q.   No, you can talk about anything.  I was  
9            just wondering:  Did the prosecutor  
10           ever offer them?

11      A.   No, because ---

12      Q.   Were they available to the prosecutor?

13      A.   Oh, yeah.

14      Q.   Okay.

15      A.   The tapes were long though, and he had  
16            a written confession that really got  
17            him where he wanted and he read that  
18            in.

19      Q.   Okay.

20      A.   In the dark with it up on a screen.

21      Q.   Okay.

22      A.   After I viewed the tapes there were  
23            nuggets in there that I really liked  
24            that had to do with the remorse and  
25            other things.  And I had a court

1 reporter transcribe the tapes in total.  
2 And then I picked out the portions that  
3 I thought were helpful to our case, and  
4 I --- because I thought Bob was going  
5 to put in the tapes, and I wanted to  
6 have my own mini-version to use.

7 Q. Okay.

8 A. And so I took the portions that I had,  
9 and we sent them to a service who put  
10 them on a compact disk, which you  
11 should have. And there was a  
12 transcript that was just a transcript  
13 of the parts we were going to use. I  
14 may not have transcribed the whole  
15 tape. I may have just transcribed the  
16 parts we were going to use. And we had  
17 that tape, and when we --- when we  
18 wanted to use it, which was I believe  
19 in the guilt phase during cross-  
20 examination of the officer that had  
21 been there for a good part of it, we  
22 tried it, and we tried it, and we tried  
23 it. And 30 minutes later we tried it  
24 some more, and we never got it to work.  
25 But by then we'd been in front of the

1 jury with it for so long that I felt  
2 like with reading my transcript, that  
3 Bob and them never questioned, into the  
4 record on each of the parts of the  
5 taped I wanted to use that --- that we  
6 got in what we got in. I honestly  
7 can't tell you that we talked about  
8 using the tape in the mitigation part  
9 of the trial. I don't remember, but I  
10 remember there were parts of the tape I  
11 was really scared of.

12 Q. Okay. There was nothing that prevented  
13 you then from attempting to get it to  
14 play in the mitigation phase?

15 A. There wasn't. I don't have a memory of  
16 thinking about it during the mitigation  
17 phase, and I frankly can't tell you why  
18 or why not.

19 Q. And do you remember very concisely what  
20 it was that was stopping this thing  
21 from working?

22 A. It was probably a formatting problem.  
23 I don't know. We got it to work when  
24 nobody was there, and then it wouldn't  
25 work.

- 1 Q. Was it a software and not a hardware  
2 issue?
- 3 A. I believe so, yeah.
- 4 Q. Okay. Along those lines, the emotional  
5 lines, and that they depicted Brad's  
6 mental state at the time, I think he  
7 was transported to the Law Enforcement  
8 Center; is that correct, here in  
9 Greenville?
- 10 A. Uh-huh.
- 11 Q. And the Law Enforcement Center provides  
12 medical care in cases of necessity; is  
13 that correct?
- 14 A. Yes.
- 15 Q. And I think they have a physician there  
16 by the name of Martin?
- 17 A. Uh-huh.
- 18 Q. And I believe actually his name is  
19 Ernest Martin. We got this off the  
20 medical network. Ernest Martin and not  
21 Eugene.
- 22 A. Uh-huh.
- 23 Q. Did you have a chance to talk to him  
24 about Brad?
- 25 A. I reviewed his records. I can't

1           remember if I talked to him or if John  
2           talked to him or not.

3       Q.   Okay.  Let's not mark these.  We'll  
4           wait for John to come in.  You think  
5           John did that, looked at the medical  
6           records and talked to the physician at  
7           the LEC, Martin?

8       A.   I don't have any idea.

9       Q.   Okay.  Do you remember?

10      A.   I don't remember doing it, no.

11      Q.   Okay.

12                   MR. EHLIES:  Let's mark that.

13                   (Thereupon the court reporter  
14                   marked the pertinent document as  
15                   PLAINTIFF'S EXHIBIT-NUMBER-FIVE.)

16                   MR. EHLIES:  Now, there's a  
17                   gremlin on this table because I  
18                   have 15 copies of that.

19      Q.   I'm going to show you what's marked as  
20           Number-Five.  I think this is a  
21           subpoena that was issued in this case,  
22           and although it says Eugene Martin, is  
23           this the Dr. Martin that was targeted  
24           from the LEC to testify about the  
25           mental condition of Mr. Brad Sigmon in

- 1           the LEC?
- 2       A.   Yes, I believe so.
- 3       Q.   And do you recall whether or not on
- 4           July 15th of 2002 if he appeared for
- 5           testimony in this case?
- 6       A.   He didn't.
- 7       Q.   Can you tell why he didn't and what the
- 8           circumstances were around that?
- 9       A.   He was out of town.
- 10      Q.   Okay.
- 11      A.   I think.
- 12      Q.   The date of the subpoena appears to be
- 13           July the 15th, '02 that it was issued
- 14           by Paul Wickensimer.
- 15      A.   Uh-huh.
- 16      Q.   And it's returned on July the 15th.
- 17           It's returned. So it looks like a
- 18           subpoena that would have come up pretty
- 19           quick.
- 20      A.   Uh-huh.
- 21      Q.   Can you tell me the circumstances about
- 22           how all of that worked and played out?
- 23      A.   I have absolutely no memory.
- 24      Q.   No recollection of that?
- 25      A.   No.

1 Q. And you have no recollection of what  
2 the medical record would have revealed  
3 had Dr. Martin shown up?

4 A. I ---

5 Q. Independent recollection currently?

6 A. Well, I've talked to you-all, and in  
7 talking to you-all I vaguely remember  
8 that Brad went to talk to him about  
9 depression, but it's a skim of a  
10 memory. It's not any real memory to  
11 speak of.

12 Q. Okay. In that regard let me show you  
13 what's marked as Six, and you may be  
14 able to help me.

15 (Thereupon the court reporter  
16 marked the pertinent document as  
17 PLAINTIFF'S EXHIBIT-NUMBER-SIX.)

18 Q. This is in the same issue. Does this  
19 help spur your recollection about what  
20 was going on with Dr. Martin at all?

21 A. Yeah. Do you know what was on the back  
22 of that phone message by the way?

23 Q. I was going to do it in a second. If  
24 you know.

25 A. That's my handwriting I'm pretty sure.

1 Q. This will be Number-Seven.

2 (Thereupon the court reporter  
3 marked the pertinent document as  
4 PLAINTIFF'S EXHIBIT-NUMBER-SEVEN.)

5 Q. You're looking at Six and Seven, and  
6 I've got them sort of like this, Mr.  
7 Eppes, so I don't know if this is the  
8 back side of the same page or if they  
9 are different messages or how that  
10 plays out. So I'm not representing to  
11 you that these are the same documents.

12 A. Well, that's my handwriting.

13 Q. Why don't you read it for us.

14 A. It says, "Tell him he will go to jail  
15 if he is not here. Tell him I will try  
16 to help him and to talk to me at  
17 lunch."

18 Q. Okay. And do you recall whether that  
19 ever happened? Whether you talked to  
20 him at lunch or ---

21 A. I have no memory of it.

22 Q. Did you have anybody that was chasing  
23 this guy down at all as a potential  
24 witness?

25 A. It looks like I did.



1 Q. And I was wondering if that's the name  
2 on the other side here, Rosa Jones? Do  
3 you know how that relates into this  
4 issue ---

5 A. No, I don't.

6 Q. --- or is this just one that happens to  
7 be pasted on the same piece of paper?

8 A. I do not know anything about how that  
9 relates to anything.

10 Q. Okay. It says Brad Sigmon subpoena,  
11 but you don't know what that means?

12 A. I don't remember it, no.

13 Q. Okay.

14 A. I don't remember Ms. Jones at all.

15 Q. Okay. How did it ultimately end with  
16 Dr. Martin? Do you recall whether he  
17 ever appeared or whether you ever had  
18 any contact with him at any time?

19 A. I don't recall it. I don't think he  
20 appeared.

21 Q. Did you have an Affidavit of Service  
22 for the subpoena?

23 A. I don't recall that either.

24 Q. The next two issues I really empathize  
25 with trial lawyers' positions greatly

1           on calling witnesses that just don't  
2           turn out, and I know that's a major ---  
3           a major risk when you're trying any  
4           case. But the record reflects that the  
5           defense team decided to call the  
6           husbands, the various husbands of Becky  
7           Barbare --- Larke Barbare as it  
8           progresses through marriages. Tell me  
9           what the strategy was really about  
10          that. About why those people were on  
11          the witness stand and how that  
12          benefited you and anticipated that  
13          might benefit Brad Sigmon.

14        A. We were --- we were trying to show that  
15          it was Betty's --- Becky's pattern of  
16          behavior to have a man, find another  
17          man. There would be some interim  
18          conflict, and then she'd leave one for  
19          the next one over and over again. And  
20          that was her pattern, and she'd done it  
21          three or four times, and we were trying  
22          to show that. And, in addition to  
23          that, her husband, I think he was her  
24          husband at the time, Mr. Barbare, said  
25          that, you know, Brad had mouthed off

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1           about threats to him, but --- but he'd  
2           always kind of treated their son okay  
3           and always kind of treated him okay.  
4           And so we thought that the story was  
5           useful. And then, frankly, the last  
6           husband, the guy that she met at the  
7           dry cleaners when she was going out  
8           with Brad, I really --- I thought it  
9           was useful for that same story. But  
10          the thing that I found most compelling  
11          about his testimony is that they went  
12          to live in the house where her mom and  
13          daddy were killed, which to me just  
14          seemed a little macabre.

15        Q.   So there again it was really fit into  
16              your strategy of the case because it  
17              reflected the character of Becky  
18              Barbare, Becky Larke Barbare?

19        A.   It showed that she was --- you know,  
20              that she liked to, you know, leave one  
21              man for another and kind of agitate the  
22              situation some, yeah, that would be ---  
23              that would be the reason for it.

24        Q.   And is that --- is that why you asked  
25              --- and I forget the number, Mr. Eppes,

1 but on that one, what is the number on  
2 that, Plaintiff's Exhibit?

3 A. Number-Four.

4 Q. Number-Four. If you would turn to page

5 ---

6 A. This is the jury charge.

7 Q. It's the statute I think.

8 A. Yeah.

9 Q. Yeah. On that page ---

10 A. Yeah.

11 Q. --- you asked for number eight, and  
12 actually you got it.

13 A. Yes.

14 Q. Is that the underpinning, is that Becky  
15 --- is that what you mean by asking for  
16 number eight and arguing number eight,  
17 is that Sigmon is operating under the  
18 dominion and duress and influence of  
19 Becky?

20 A. Yes.

21 Q. All right. I'm not going to ask you  
22 for hindsight as to whether you'd do  
23 that again.

24 MR. EHLIES: Could I take a little

25 ---

1 THE WITNESS: I don't know.

2 MR. EHLIES: (Counsel conferring  
3 with Counsel Norris.) Okay.

4 Q. Counsel points out --- I was thinking  
5 you got eight and five. Okay. Yeah.  
6 You had asked for five and got eight.

7 A. Okay.

8 Q. Okay.

9 A. I have no memory either way about that  
10 right now.

11 Q. And he charged eight. But my point and  
12 the question is, if I'm being clear,  
13 and I hope everybody will raise their  
14 hand if I'm not, but my question to you  
15 is you asked for, received and argued  
16 eight on the idea that Becky was  
17 provoking by her nature and conduct  
18 Brad Sigmon?

19 A. Yes.

20 Q. And your theory was the jury could then  
21 read into that some measure of excuse  
22 or justification, or leniency, or  
23 mitigation, or something?

24 A. Mercy, yeah.

25 Q. Mercy. All right.

1 MR. EHLIES: Could I have just a  
2 minute and talk with my lawyer?

3 MS. BROWN: I have no problem.

4 MR. EHLIES: Okay. Are we good to  
5 go? Let me look right here. I  
6 think I'm about to wind it up.

7 Q. Have I provoked you in any way to want  
8 to respond to something that you feel  
9 like has been unfair to you that you  
10 would --- you feel like you need  
11 justification you'd like to say?

12 A. No. I wish I'd --- you know, I'd had  
13 time to read the whole transcript and  
14 then try to recreate the whole thing in  
15 my mind, but I have not been able to do  
16 that.

17 MR. EHLIES: Gosh, I think that's  
18 all. Ms. Brown may have some  
19 questions for you.

20 MS. BROWN: Just a few.

21 (OFF RECORD COMMENTS)

22 CROSS-EXAMINATION

23 BY MS. BROWN:

24 Q. Ms. Eppes, I want to go back to what  
25 you had mentioned earlier that John

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1 Mauldin helped you with voir dire. Did  
2 he also help you with any other  
3 portions of the trial?

4 A. John Mauldin was very helpful from  
5 Monday to Friday. On Friday afternoon  
6 at 5:00 he scooted, and I couldn't find  
7 him all weekend. This is a point of  
8 contention that he and I have continued  
9 to discuss for the past six years. He  
10 referred to that as me being "Parteed",  
11 which Mr. Ehlires will understand. The  
12 former Public Defender before Mr.  
13 Mauldin was a Mr. Partee, who would  
14 frequently make himself unavailable at  
15 critical junctures in trials.

16 MR. EHLIES: He was famous for it.

17 THE WITNESS: Yes.

18 A. And John Mauldin throughout this trial  
19 was John Abdalla's and I's crutch.  
20 When we had questions that we just  
21 wanted to talk over we'd talk it over  
22 ourselves and typically talk it over  
23 with John Mauldin, too. And during  
24 this trial --- and during this trial we  
25 did that repeatedly. Over the weekend

1           he absconded the jurisdiction, and we  
2           didn't get to talk to him at all about  
3           the jury charge and very much about the  
4           mitigation part of the trial. In  
5           addition to that one, you just raised  
6           something because I don't --- it  
7           obviously didn't play out. We probably  
8           could have dragged the case on into  
9           Monday, and we went a little quicker  
10          than we might would have because I  
11          really felt like charging a jury on the  
12          death penalty on Sunday night gave us a  
13          little bit of an advantage because I  
14          really didn't think a jury would vote  
15          to kill somebody on a Sunday night. In  
16          retrospect that was obviously wrong.

17        Q. But did you discuss strategy with Mr.  
18           Mauldin?

19        A. I discussed everything except what I  
20           was going to eat for lunch with Mr.  
21           Mauldin.

22        Q. Do you have any specific recollection  
23           of what he advised you on concerning  
24           your strategy?

25        A. He --- he thought our strategy was



1           fairly sound. He --- he --- frankly  
2           the part that he played the most  
3           significant part of the case was in the  
4           picking of the jury. He lectures on  
5           that all the time, and he was --- he  
6           really was teaching us how to do it on  
7           the fly, because it was --- I thought I  
8           understood it before we started, and I  
9           clearly did not. It was something you  
10          really had to do to appreciate the  
11          nuance of the issues.

12        Q. I want to go back to what you had  
13          mentioned about the ex-wife's  
14          testimony, that that was conducted in  
15          two parts. I believe that you said  
16          that you weren't extraordinarily happy  
17          with the first part.

18        A. I was miserable.

19        Q. What about the second part?

20        A. The second part I thought went --- went  
21          really well, and that it was a very  
22          succinct get the points in and get out.  
23          And at the time of the trial --- and I  
24          didn't really look at it in the  
25          transcript, but I remember at the time

1 of the trial that we felt like when Mr.  
2 Sigmon's son, who was there during the  
3 shooting incident, when he testified I  
4 thought we really created a pretty  
5 compelling story that, in fact, this  
6 woman egged Brad on to get him to come  
7 over there so she could shoot him, and  
8 that he came over and that she  
9 absolutely intended to kill him when he  
10 walked in the door. And the fact that  
11 no charges were ever filed against him  
12 I felt like buttressed that, but. But  
13 that was --- she was a --- as you can  
14 see from the testimony, she was  
15 problematic the whole time. We had  
16 tried to get in touch with her any  
17 number of ways, which she denied on the  
18 stand. And we always knew she was a  
19 risk, and we had, frankly it was  
20 wishful thinking, hoped that she just  
21 wouldn't show up because we never could  
22 get a bead on her. And that was wrong.  
23 If I had to try the case now I would  
24 probably depose her or try to depose  
25 her, but that's and esoteric idea of

1           deposing people in a criminal case.

2           There wasn't any other way to go.

3       Q.   And you said that this was conducted in  
4           two parts. Did you ask for additional  
5           time?

6       A.   I read the transcript, and it looked  
7           like I was asking for time and calling  
8           it preparing for other people to rebut  
9           her, but in point of fact I wanted to  
10          keep her active and get another shot at  
11          her the next day because I really felt  
12          terrible about my cross-exam over that  
13          night.

14       Q.   Okay. And we went over today a few of  
15          the things that I had provided to you  
16          to review. In addition to the  
17          sentencing transcript pages requested  
18          did you have another request pertaining  
19          to Mr. Sigmon's statements?

20       A.   Oh, yeah, I asked you specifically for  
21          his diatribe at the end.

22       Q.   And you received that?

23       A.   I received it, and I reviewed it  
24          briefly.

25       Q.   And did you ---

1 MR. EHLIES: Are you talking about  
2 the portion of the transcript when  
3 he made the statement to the jury?

4 THE WITNESS: Yes.

5 Q. Actually both. I provided both phases.

6 A. You provided both. He did what I asked  
7 him to do the first time, so I wasn't  
8 as interested in that.

9 Q. And why were you interested in  
10 reviewing that particularly?

11 A. Because frankly that was the worse ten  
12 or 15 minutes of practicing law that I  
13 have ever had.

14 Q. And why is that?

15 A. Because he did exactly what I had  
16 begged him and screamed at him not to  
17 do for the --- however many months I  
18 had been representing him ---  
19 representing him. And during it the  
20 Greenville News said that I had my hand  
21 --- my head on my forearm, which is  
22 probably true for a good part of it,  
23 which --- well, it was awful.

24 Q. Do you have any specific recollection  
25 of what part was awful?

Frank L. Eppes

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1       A.   The part where he told the jury that he  
2           probably ought to be killed.  The part  
3           where he told the jury that he liked to  
4           control his women because it made him  
5           feel more like a man.  The part where  
6           he told the jury that if they would ---  
7           he had found Jesus while he was in the  
8           woods running from the law, that if  
9           they would let him out he would work to  
10          convert people --- if they would let  
11          him have life without parole he would  
12          work to convert people in the  
13          penitentiary and his reaction each and  
14          every time Ms. Strom stood up to  
15          object.  If you ask me the one thing I  
16          would have done different in the trial,  
17          if I'd have known how bad it was going  
18          to be I would have probably tripped  
19          him.  As he walked past me going up to  
20          give his speech I would have probably  
21          tripped him, which probably is against  
22          the rules.

23                   MS. NORRIS:  It's understandable  
24                   though.

25       Q.   Let me go back to Mr. Aiken's

1 testimony. You still have the record  
2 in front of you. Can you get to page  
3 2138? And if you would maybe begin at  
4 line 20, 2138 line 20 and read to 2139  
5 line one.

6 A. Question from me: "And that would be  
7 regardless of his classification or  
8 what his record showed; correct?"

9 Answer: "He'll be behind gun towers  
10 and fences for the remainder of his  
11 life because of his community  
12 behavior." Question: "Tell me a  
13 little bit about what the day is  
14 structured in a maximum-security  
15 facility." Answer --- how far did you  
16 want me to go?

17 Q. That's fine. And if you would ---  
18 you're certainly welcome to go ahead  
19 and read the answer, but if you could  
20 just summarize what Mr. Aiken was  
21 testifying to in response to your  
22 question.

23 A. He was responding to how unpleasant the  
24 penitentiary is.

25 Q. Do you characterize that as evidence of

1           adaptation, or do you characterize that  
2           as conditions?

3       A.    I would call it conditions.

4       Q.    And also could you turn to page 2206?

5       A.    (Witness reviewing transcript.)    Yep,  
6            I'm there, and it's my closing.  It  
7            appears to be my closing argument.

8       Q.    Starting at line 11.

9       A.    Uh-huh.

10      Q.    And over the first few lines on 2207.

11            Can you tell us the gist of your  
12            argument and what you intended to  
13            convey to the jury with this argument?

14      A.    "The penitentiary is a terrible place  
15            for mean, nasty people and that no one  
16            would want to spend an hour and a half  
17            hour there, much less the rest of their  
18            natural life."

19      Q.    And in particular did you --- did you  
20            have a particular theory or strategy to  
21            go in to referencing where they ---  
22            where they sleep, what the schedule is  
23            like?

24      A.    Well, I --- there's always this idea  
25            that life in prison is more punishment

1           than death that some people hang onto.  
2           And as I've said before I thought that  
3           --- I was not aware that all this stuff  
4           should have been excluded from the  
5           state's case.    If it should have at  
6           that time, I don't know.   I've read the  
7           Supreme Court's opinions on it now, and  
8           I know obviously it should have been  
9           under the laws that exist right now.  
10          I still have no knowledge of what the  
11          law was then.   But at that time the  
12          solicitor was surely talking about what  
13          a country club Lee County and other  
14          maximum security ones are, and they're  
15          just not.   They're hellish places.   And  
16          I wanted to convey that to the jury.  
17          That this is not a person who would  
18          have a pleasant life.   They would just  
19          be alive.

20        Q.   Okay.   If I can jump ahead.   Mr. Ehliel  
21              asked you to review 2187, and this is  
22              the solicitor and whether the death  
23              sentence is appropriate issue.

24        A.   Yeah.

25        Q.   And you said I believe it's highly



1           suspect and strikes you as  
2           objectionable at this time.

3       A.   Yes.

4       Q.   Would you have objected?

5       A.   I can't go back and put myself in my  
6           mind to tell you whether I didn't  
7           object out of ignorance or out of  
8           strategy at that point. I can't tell  
9           you. What I do --- I can tell you this  
10          though: If I try the case again I  
11          would certainly research that part of  
12          the argument and see whether it's  
13          something that's objectionable or not.

14      Q.   Okay.

15                           **(OFF RECORD COMMENTS)**

16      Q.   And I refer you back to Plaintiff's  
17           Six, which is a telephone message that  
18           referenced Rosa Jones.

19      A.   Yes.

20      Q.   Did you --- did you indicate that you  
21           knew Ms. Jones or did not know Ms.  
22           Jones?

23      A.   It just popped in my head, but this  
24           could be completely wrong, that she  
25           might have been one of the nurses down

1 at the Detention Center or a guard at  
2 the Detention Center, but I can't tell  
3 you for sure that that's who it is.

4 Q. Would you look at page 1965 in the  
5 record and see if that refreshes your  
6 memory or if you can tell us something  
7 about that notation?

8 A. Wrong record. Can someone hand me  
9 1965?

10 MR. EHLIES: Gosh, do I get any  
11 points for bringing this stuff with  
12 me? Careful this thing is  
13 splitting a part on me.

14 A. 1965. Rosa Jones. There you go. I  
15 guess she showed up and she was a  
16 nurse. Okay.

17 Q. Is there any significance to the fact  
18 that you had asked both people from the  
19 Detention Center and Ms. Jones to  
20 testify?

21 A. We wanted the people from the Detention  
22 Center because they could talk about  
23 the fact that Brad hadn't been too much  
24 trouble and that he was remorseful.  
25 Can I tell you that there was an

1 overlap between he and Dr. Martin? I  
2 have no --- she and Dr. Martin I have  
3 no memory of that at this point one way  
4 or the other.

5 Q. Okay. Those are all the specific  
6 questions I have. Is there anything  
7 that I've asked you or that you have  
8 now thought about that you wanted to  
9 elaborate on or clarify any answers?

10 A. There was something about Mr. Aiken  
11 that I thought about for a second and  
12 then I forgot about again. It must not  
13 have been very significant to have  
14 blown out of my mind.

15 Q. Okay. Thank you, Mr. Eppes.

16 MR. EHLIES: I don't have any  
17 redirect. Thank you.

18 (DEPOSITION CONCLUDED)

19

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9 SIGNATURE PAGE (SIGNATURE NOT WAIVED)

10 DEPOSITION OF FRANK L. EPPES

11

12 Frank L. Eppes

13 Sworn to and subscribed to before me this

14 \_\_\_\_\_ day of \_\_\_\_\_, 2008.

15

16 Notary Public for South Carolina

17 My Commission Expires:

18 (SEAL)

1 STATE OF SOUTH CAROLINA )

2 ) CERTIFICATE

3 COUNTY OF GREENVILLE )

4 I, RACHEL H. WOOD, a Notary Public, duly  
5 commissioned and qualified in and for the  
6 State of South Carolina, do hereby certify  
7 that the deposition of Frank L. Eppes,  
8 called by the Applicant, was taken before me  
9 at 12:45 p.m. on June 27, 2008; that said  
10 Witness was duly sworn; that his deposition  
11 testimony was transcribed under my  
12 direction; and that this transcript is a  
13 true record of said testimony. I further  
14 certify that I am not of kin or counsel to  
15 the parties in this case, am not in the  
16 regular employ of counsel for any of said  
17 parties, nor am I interested in the results  
18 of this case.

19 IN WITNESS WHEREOF, I have hereunto set my  
20 hand and affixed my official seal this  
21 \_\_\_\_\_ day of \_\_\_\_\_, 2008.

22

23 Notary Public for South Carolina

24 My Commission Expires: 04/15/09

B E F O R E:

THE HONORABLE J. C. NICHOLSON, JR., JUDGE.

A P P E A R A N C E S:

MELODY J. BROWN, ASSISTANT ATTORNEY GENERAL  
ANTHONY MABRY, ASST. ATTORNEY GENERAL  
Attorneys for the State

WILLIAM HANK EHLIES, ESQUIRE,  
Attorney for the Applicant

Donna Brady  
Circuit Court Reporter

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## EXHIBITS

## PLAINTIFF EXHIBITS

| <u>NO</u> | <u>DESCRIPTION</u> | <u>ID</u> | <u>EV</u> |
|-----------|--------------------|-----------|-----------|
| 1         | PHONE HOME DVD     | 9         |           |
| 1-A       | DVD                | 68        |           |
| 2-3       | Depositions        | 9         | 9         |
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\* \* \* \* \*

\* \* \*

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Monday, August 4, 2008

(Whereupon, Court convened with all parties present,  
when the following proceedings were had:)

THE COURT: Mr. Ehlied, I'll be glad to hear you.

MR. EHLIES: A couple of housekeeping matters. My  
client is present in the courtroom, Mr. Sigmon; and I  
believe they had a little problem getting here. As a  
consequence of some cuffs that he had on his wrists he  
inadvertently got too tight, needs to be -- his wrists are  
swollen up -- he needs to be able to write some notes to  
us, communicate with us. In that regard, we're going to  
ask that you allow them to take the cuffs off.

THE COURT: Can you loosen them up?

THE DEFENDANT: They're as loose as they can get.

OFFICER: I can take the box off. That will give him  
a little more freedom.

THE COURT: Fix it where he can at least write.

(Officer complies.)

All right. Mr. Ehlied, glad to hear you.

MR. EHLIES: Yes, sir. Judge, we prepared this case  
for hearing on the merits. And we have filed an  
application, an amended application, we have filed a trial  
brief, and we have filed a motion for summary judgment  
with brief and memorandum. We attached to the motion in  
reference evidence in the way of depositions. I have the



1 originals with me to hand up. And I have referenced and  
2 have with me a DVD disk of a telephone conversation that  
3 the applicant made from Gatlinburg, Tennessee, to his  
4 mother immediately upon his arrest.

5 The significance of that DVD, it evidenced  
6 substantial remorse, acceptance, responsibility, and did  
7 so in a very timely fashion. So we think it was adequate  
8 and appropriate in the mitigation case and you will hear  
9 about that later. We rely on all of the documents that  
10 we've submitted into the record in addition to these  
11 arguments that I'm going to make to you now.

12 THE COURT: Has that video been transcribed, the  
13 conversation been transcribed?

14 MR. EHLIES: It has been during the trial.

15 THE COURT: I would prefer if you would give me a  
16 copy of the transcription. My law clerk says I have the  
17 video.

18 MR. EHLIES: Portions of it have been. I think the  
19 State transcribed at the trial and read into portions that  
20 they played.

21 MS. BROWN: Your Honor, if I could briefly address  
22 that? Mr. Epps, one of the defense counsel, had a  
23 transcript of the entire tape made. As I understand what  
24 Mr. Ehlied represented at this point, is a disk that was  
25 actually made in anticipation of this litigation. It's

1 not something that originated at trial.

2 THE COURT: Oh, I'm sorry, I misunderstood.

3 MR. EHLIES: No, sir.

4 MS. BROWN: And that has not been admitted, your  
5 Honor. We would object to it being attached at this time.

6 MR. EHLIES: Your Honor, what has been submitted is  
7 what was available at trial. The transcript is the entire  
8 conversation, and this disk is the entire conversation.  
9 What happened at the trial was that the defense lawyers  
10 only wanted portions and they transcribed some portions.  
11 The judge ordered that the whole thing be played and put  
12 into evidence. But they couldn't get it to play.

13 This is the whole "phone-home," as we call it,  
14 conversation on video from the Gatlinburg Police  
15 Department. That's the one you have, it's the one that's  
16 in my hand that I want to put into the record. It's the  
17 one defense lawyers have seen and authenticated. This is  
18 the video that they were dealing with at trial.

19 THE COURT: Ms. Brown, my question is, do you have a  
20 transcription of that video?

21 MS. BROWN: Yes, sir.

22 THE COURT: Could I have a copy at some point?

23 MS. BROWN: However, nothing was ever submitted at  
24 trial. The only portions that were---

25 THE COURT: I understand. But just give me a copy of

1 the transcription, assuming I let it into at the evidence  
2 appropriate time. He wants to attach for purposes of his  
3 summary judgment motion.

4 MS. BROWN: Yes, sir. And that was one reason that  
5 we said it's not appropriate to go into summary judgment  
6 at this time. If Mr. Epps is allowed to testify, we go  
7 forward with the hearing today, I do intend to ask him  
8 about the transcript. I do intend to have him  
9 authenticate the transcript and identify it for this  
10 Court.

11 THE COURT: Do you deny this is the transcript that  
12 was used at trial he's attached to his summary judgment  
13 motion?

14 MS. BROWN: It is not, your Honor.

15 THE COURT: Pardon me?

16 MS. BROWN: It is not.

17 THE COURT: It's not the transcript? Not the video  
18 that was available at trial.

19 MS. BROWN: No, sir. I don't believe that's ever  
20 been noticed to the Court. It's not been attached to the  
21 depositions and I've not seen any indication it was  
22 attached to the motion for summary judgment.

23 THE COURT: Okay.

24 MR. EHLIES: The disk is part of the summary judgment  
25 that's been provided to you. The transcript that defense

1 counsel made is portions of the disk. Whether the whole  
2 disk has been transcribed at the time of trial, I don't  
3 know.

4 THE COURT: That's what I was asking, is the entire  
5 disk transcribed for trial?

6 MS. BROWN: What Mr. Epps has represented to me, your  
7 Honor, it has been and there is a copy available. He will  
8 need to authenticate it.

9 THE COURT: That's fine.

10 MR. EHLIES: We would offer into evidence this disk  
11 at this time as part of -- I would point out to you,  
12 Judge, we're relying on 17-27-80 which is the statute that  
13 controls this hearing, and it provides discretion to you  
14 in the manner in which the evidence is received and the  
15 substance of the evidence; that is, it can be in affidavit  
16 form and proof by affidavits, depositions, or testimony or  
17 other evidence and may order the applicant brought before  
18 it for the hearing.

19 Based on that, we would offer this in evidence.

20 THE COURT: All right. Has anybody identified it or  
21 anything?

22 MR. EHLIES: As far as the deposition testimony, they  
23 referenced it, but not seen it for the purposes of the  
24 deposition.

25 THE COURT: Okay. I'm not going to accept it until

1 at least somebody identifies what it is. Okay? Either  
2 you can do that by affidavit or live testimony.

3 MR. EHLIES: All right, sir. Can I mark this for  
4 identification only?

5 THE COURT: Mark it for identification only. But  
6 until somebody identifies it, I'm not going to accept  
7 anything. You can identify by affidavit or testimony.  
8 Once that's done, I'll be glad to receive it. Since she  
9 objects.

10 MR. EHLIES: Very good.

11 THE COURT: If she didn't object it may be a  
12 different story. I know you submitted to your briefs and  
13 everything. How about making part of the record  
14 everything you have submitted on summary judgment motion  
15 and let it get marked.

16 MR. EHLIES: Okay. This is for identification only  
17 at this point, the disk.

18 THE COURT: Get it marked everything that you want me  
19 to consider in ruling on your summary judgment motion.

20 MR. EHLIES: Plaintiff's Exhibit, the DVD.  
21 Plaintiff's two and three, Frank Epps, under seal  
22 disposition.

23 THE COURT: Okay.

24 MR. EHLIES: Mr. John Abdalla, under seal deposition.

25 THE COURT: Will be two and three. Anything else?

1 MR. EHLIES: I believe that's it.

2 (WHEREUPON, Plaintiff's Exhibit No. 1 is marked for  
3 identification.)

4 (WHEREUPON, Plaintiff's Exhibit No. 2-3 are marked  
5 for identification and received in evidence.)

6 MR. EHLIES: Are the transcripts in evidence,  
7 testimony of the record on appeal?

8 THE COURT: As far as this case is concerned, I don't  
9 think they are. Unless you, by agreement, want to  
10 stipulate the transcripts are part of the record.

11 MR. EHLIES: Your Honor, the State did attach a copy  
12 of the record on appeal, it has all the trial transcript,  
13 plus pretrial transcripts. So it is part of the return  
14 and will be properly before the Court.

15 THE COURT: I understand, looking what's in the  
16 courthouse file, it's not there. I have a copy of it.  
17 But the file I'm looking at -- is that it?

18 THE CLERK: Yes.

19 MR. EHLIES: Let's make sure that three, four, and  
20 five, Plaintiff's Exhibit.

21 THE CLERK: One of five, two of five. Then the  
22 return and motion to dismiss, three of five, four of five,  
23 and five of five. Mark those transcripts as, I guess,  
24 Plaintiff's Exhibit number four.

25

1 (WHEREUPON, Plaintiff's Exhibit No. 4 is marked for  
2 identification and received in evidence.)

3 THE COURT: Anything else?

4 MR. EHLIES: As far as the applicant, that's it.

5 THE COURT: I'll be glad to hear your arguments on  
6 the summary judgment motion.

7 MR. EHLIES: Your Honor, I want to start off with  
8 handing up the Burkhart case, State v. Burkhardt. The date  
9 of offense in this case is April 27, 2001. And the trial  
10 commenced July 15 of 2002. The first issue that we raised  
11 on the application, amended application, and summary  
12 judgment pertain to the admission of testimony from  
13 Mr. Aiken, who was a witness for the applicant. That  
14 amounted to conditions of imprisonment, visitation, cards,  
15 magazines, general life and conditions in prison. Just a  
16 small town, I think, is the reference the solicitor made.  
17 And it is important to note that the evidence and the  
18 testimony from Mr. Aiken was comprehensive about life and  
19 circumstances in prison and were again argued by the  
20 Solicitor in closing argument. So this is a violation  
21 that occurred twice. It occurred in questioning of  
22 Mr. Aiken and it occurred in closing argument.

23 Now, we take the position that the testimony itself  
24 was improper under the constitution, due process clause of  
25 the Fourteenth Amendment that arbitrary, and the Eighth

1 Amendment, arbitrary matters would not be injected into  
2 the jury in sentencing on capital murder, of course, was  
3 with the jury.

4 Second, we take the position that admitting evidence  
5 and testimony about prison conditions is a violation of  
6 the statute itself and the terms and conditions of the  
7 statute, which is 16-3-25 paragraph (C). And the statute  
8 specifically prohibits that type of testimony, independent  
9 of the constitutional -- of course, the statute predates  
10 this trial, been in for place for decades.

11 Third, we take the position that the bar was alerted  
12 to the inadmissibility of that testimony by reason of a  
13 history and line of cases starting as far back at least as  
14 1982 with State v. Copeland and again in 1987 with State  
15 v. Johnson and such determinations as time, place, manner,  
16 conditions of execution, incarceration. Those issues are  
17 reserved to agencies other than the jury, State v. Plath  
18 II, 1984. So prior to July 15 of 2002, there was quite a  
19 lineage of state authority present, alerting the bar that  
20 this particular type of testimony was not admissible.

21 The Burkhart case was tried before Bowman. Bowman  
22 Came up next in the sequence of matters. Specific  
23 testimony was not objected to. And the Supreme Court  
24 issued a warning in the Bowman decision that that was  
25 inadmissible. In this particular occasion they could not



1 reach -- because it was defaulted by trial counsel, again  
2 alerting that that was improper testimony on a long line  
3 of cases.

4 Then Burkhart was actually decided, and you have that  
5 in your hand, in 2007. And they reference this long line  
6 of precedent. And I want to take a few minutes to talk to  
7 you about Burkhart because it's important in assessing and  
8 evaluating this particular claim, which we believe is  
9 outcome determinative, mandates an order setting aside the  
10 sentence of death and ordering a new trial.

11 The Burkhart decision actually is very informative  
12 for four reasons. On page one you will see that the  
13 Burkhart case and its facts of aggravation, which is very  
14 important in analyzing whether or not the statements, if  
15 you get into a prejudice argument -- I'm going to address  
16 that in a minute -- you will see that in Burkhart the  
17 aggravators were just as bad, if not worse, than this  
18 particular case. This case, the Sigmon case before you,  
19 is two deaths, an elderly couple that were struck in the  
20 head with a baseball bat and died as a consequence of  
21 those injuries.

22 The applicant was in that house because his estranged  
23 girlfriend was coming to stay there and he knew she was  
24 going to be there; and he was waiting, lying in wait for  
25 her. He went to prepare to restrain the parents, who he

1 knew personally, with tape, duct tape, and other  
2 implements, not weapons. While there waiting on Becky  
3 Barbare to arrive, something went wrong. The long and  
4 short of it is he wound up striking both Mr. Larke and  
5 Mrs. Larke, Gladys Larke, in the head, and they died.  
6 Those are the deaths for which he was tried, convicted,  
7 and sentenced to death for.

8       Becky Barbare was injured subsequently, but she was  
9 not mortally wounded. The aggravators in the Burkhart  
10 case are three deceased under circumstances of -- there  
11 was no love lost. So often we see romance going wrong as  
12 precipitators of terrible consequences. This is a much  
13 more distant, cold killing in the Burkhart case as  
14 outlined in the facts of that case. And it's three people  
15 that are brutally murdered.

16       So the second point of Burkhart as far as prejudice  
17 is concerned, Burkhart case was worst in comparison to the  
18 Sigmon case, when they reach their prejudice in value of  
19 approach in the Burkhart case, they're dealing with a  
20 worse case than what we have here.

21       I'm reading now from the second paragraph on Page 3  
22 of the majority opinion, which is actually Justice Moore  
23 and Justice Waller. Now Justice Beatty is there in one of  
24 these writers places. So it is my position that the  
25 particularly the majority of the opinion, two joined by

1 Pleicones, actually supplemented and exchange language.

2 So I think three votes in the language appears here.

3 They say in the second paragraph, "The case was tried  
4 before our decision in Bowman. However, we apply that  
5 reasoning here because it is consistent with our  
6 long-standing rule that that evidence in the sentencing  
7 phase of a capital trial must be relevant to the character  
8 of the defendant or the circumstances of the crime."

9 I point that out not only to address concerns about  
10 how would we know about the Bowman and Burkhart rulings.  
11 It didn't happen overnight. Bowman and Burkhart are  
12 rulings of frustration is how I could characterize it.  
13 The other reason I point that out is that in this case --  
14 are you okay?

15 THE COURT: Yeah, this thing keeps buzzing.

16 MR. EHLIES: I know that's distracting.

17 THE COURT: Go ahead.

18 MR. EHLIES: Yes, sir. I'm in this thing about the  
19 long-standing nature of this testimony, long-standing  
20 precedent disallowing it. The second reason I'm pointing  
21 that out is the Sigmon case, this applicant has a very  
22 significant statement by the trial judge, Judge Watson, in  
23 the presence of defense counsel when they're arguing about  
24 the admissibility of Mr. Sligh when he's going to compare  
25 a life in prison for someone sentenced on the row and life

1 in prison for someone sentenced to death. Those  
2 circumstances, Judge Watson in talking to the solicitor,  
3 the solicitor says, Well, I didn't know that that's all  
4 they wanted was to go ahead and offer life in prison on a  
5 sentence of life in prison without parole; and if I had  
6 known that -- and they get into a dialogue about whether  
7 that's admissible.

8 And Judge Watson specifically says: "I'm not saying  
9 that any of that is admissible," prison conditions; and  
10 says, immediately after alerting everybody to that, he  
11 says, "But the defense isn't objecting."

12 So the trial judge alerted defense counsel before any  
13 of this happened with Mr. Aiken and before the closing  
14 arguments, that the trial judge was suspect as to whether  
15 any of this was admissible under the precedents  
16 preexisting Bowman, under the precedent of Burkhart. So  
17 you've got history and the lineage. You have the trial  
18 judge telling them this is highly suspect testimony.

19 And then Burkhart itself, tried before Bowman, and  
20 Burkhart decisions, had trial lawyers for the defense that  
21 objected because they knew on that long line of precedent  
22 that it was improper testimony. And so they interposed an  
23 objection, which in Burkhart made it ripe for review on  
24 direct appeal.

25 Another issue, just a little further down from that

1 in the majority opinion as to why Burkhart is dispositive  
2 in this case. "Although a panel attempted to counter the  
3 testimony of the state's witness regarding evidence of  
4 harshness of prison life, this entire subject matter  
5 injected an arbitrary factor into the jury's sentencing  
6 considerations. A capital jury may not impose a death  
7 sentence under the influence of any arbitrary factor."

8 That language you're going to see picked up by Judge  
9 Pliconnes to get into the prejudice prong analysis.  
10 Jumping back up, I want you to know why that particular  
11 section is relevant.

12 "We aware of the detention between evidence regarding  
13 the defendants adaptability to prison life, which is  
14 clearly admissible and this restriction on the admission  
15 of evidence regarding prison life in general." So you  
16 have already heard and are going to hear a lot of talk and  
17 argument about how this whole thing was opened by reason  
18 of Aiken getting up to testify about adaptability. Well,  
19 Aiken was testifying about adaptability. Everything he  
20 said was these are the conditions of prison and we are  
21 telling you that this prisoner will adapt to those and not  
22 be a risk to others in the community of prison or their  
23 supervisors. So that is clearly admissible. And that's  
24 what the initiative was by the adaptability testimony of  
25 Mr. Aiken.

1           When it went astray, it went astray suddenly with one  
2 question, and it was objected to by the prosecutor and  
3 sustained immediately. It never strayed beyond what was  
4 clearly admissible adaptability testimony, which the Court  
5 acknowledges is some tension in there about prison  
6 conditions, because Mr. Aiken says these are what a person  
7 generally lives under: He's got guards, he's got fences,  
8 he's got restraint devices, color-coded jackets, those  
9 sort of things. And, given that, my opinion is he will  
10 adapt sequentially over time. When you first come in you  
11 have a higher risk, then as he ages, has a lower risk,  
12 adaptability issues. So that's why I point out that  
13 language.

14           Now, I switch over to Pliconnes. Very important.  
15 Pliconnes says on Page 3 at the bottom, last full  
16 paragraph. He says once improper evidence -- this is  
17 direct appeal -- "Once improper evidence of any kind  
18 injects an arbitrary factor into the jury's consideration,  
19 this Court cannot uphold a death sentence. Moreover, a  
20 review for harmless error is unnecessary on direct appeal  
21 because it's a statutory violation and not a  
22 constitutional violation. And, remember, we're claiming  
23 all constitution, statute, and common law. A review for  
24 harmless error is unnecessary because by definition,  
25 evidence that implicates an arbitrary factor, keyword is

1 "prejudicial." He doesn't say prejudicial on direct  
2 appeal or prejudicial here but not there. When he is  
3 saying that the prejudice prong of any analysis, even  
4 harmless error, is by definition met and satisfied once  
5 you sentence a person to death on an arbitrary factor.  
6 You just can't have it.

7 And that is what happened in this particular case, is  
8 we had this testimony and argument about life in prison  
9 and conditions of life in prison. And we say that for  
10 those reasons, trial lawyers should have known, didn't  
11 know, and I will back up a second, Judge -- there is no  
12 dispute that the trial lawyers did not know. Their  
13 testimony in the depositions, they were unaware that  
14 prison conditions, life, was inadmissible testimony. And  
15 there's no dispute but that caught them by surprise.  
16 There can be no argument that there was a strategy  
17 involved here.

18 Now, as regards your approach on PCR. The Strickland  
19 standard, and it's a matter of how we frame the question,  
20 because how you frame the question controls the answer.  
21 and I want to propose to you that the question is a whole  
22 lot simpler than the case law would suggest. Excuse me,  
23 having brilliant people involved in this; but for me, I  
24 try to look at it as simple as possible. The question  
25 very simply is, was there a mistake? And did it hurt?

1 THE COURT: I'm sorry, what?

2 MR. EHLIES: Was there a mistake? And did it hurt?

3 THE COURT: Okay.

4 MR. EHLIES: That is the Strickland approach. As far  
5 as did it hurt, it was elicited on cross examination to  
6 the extreme. It was argued in closing argument and  
7 emphasized. Justice Pleicones tells us that arbitrary  
8 factors go into that jury sentencing to death cannot be  
9 tolerated. It is prejudicial by definition. Did it hurt?  
10 It hurt, plain and simple. Was it an error? We know that  
11 to be a fact.

12 Should they have known, which I think may be some  
13 raise, quickly you know Bowman and Burkhart do not come  
14 down until after this case was tried. Was the norm  
15 satisfied? You know, in Hart versus the State of South  
16 Carolina we adopted the ABA guidelines for capital  
17 litigation. And those guidelines provide that trial  
18 counsel shall investigate every aspect of the facts and  
19 the law. Be conversant not only with the law applicable  
20 to the case, but trends, suggestions, and posture of the  
21 case to take advantage of any new precedents that may come  
22 down later; that is, to condition and conform the record  
23 to take advantage of those things.

24 I want to comment here briefly on a couple of the  
25 issues as regards strategy. Strategy in the case law has



1 two parts: Number one, I know; and, number two, I think I  
2 can gain more than I give up. Strategy -- and ignorance  
3 is not strategy -- if I don't know what I'm giving up, it  
4 doesn't make any difference if I call it strategy, because  
5 it isn't. These lawyers, as good as they were, were  
6 unaware that life prison conditions are inadmissible.

7 So it cannot be couched in terms, well, it was a  
8 strategy in order to gain the adaptability testimony. And  
9 I think that reading between the lines of their testimony  
10 in deposition, had they had it to do today, they would  
11 have certainly been much more alert and suggested as much  
12 in their depositions, it was appropriate now, knowing what  
13 they know now, to object and to keep the testimony  
14 confined. So, it is not a strategy situation.

15 You're going to hear a lot about, well, it came out  
16 of their witness. Remember that Aiken is an adaptability  
17 witness. His testimony is clearly admissible. You must  
18 describe to some extent what the conditions are that the  
19 man's adapting to. And that's the tension referenced by  
20 the majority of opinions. In Burkhart it wasn't until the  
21 one question that it went awry, it was objected to and  
22 sustained.

23 As far as making -- and we've heard from the State,  
24 they made a concerted decision to get this testimony in.  
25 They wanted it, they wanted the jury to hear that it

1 wasn't going to be a walk in the park. If I had come to  
2 you and said, "Judge, and this is the reason there's so  
3 much tension, if you look at the case histories on present  
4 conditions, the reason is once you start talking about  
5 prison conditions, the defendants get to start playing  
6 videos of executions. "This is what he goes through in an  
7 execution." And that is why that thing is so strongly  
8 set, is none of it, what he suffers being executed, is not  
9 for the jury. What he suffers living life in prison for  
10 the remainder of his natural life is not admissible. So  
11 it's very strongly -- because they don't want any of that  
12 coming in. That's not proper testimony.

13 So if I come to you and said, "I've agreed with the  
14 State and we're going to play videos of executions, and  
15 they're going to play all the life in prison at the  
16 canteen, and we're going to have a jury -- you would have  
17 said, it is inadmissible. Regardless of what you consent  
18 to, regardless of what your strategies are, the law is  
19 clear, the statute is clear, it is not a function for this  
20 jury. And that's what happened in this case.

21 There is no relief in this case for this error. No  
22 way. A man sentenced is sitting here condemned to death  
23 and he's condemned to death based on clearly inadmissible  
24 testimony that our Supreme Court has told us cannot be  
25 tolerated. And that's the Burkhart decision. It cannot

1 be tolerated. Was there an error? Absolutely. Did it  
2 hurt? Certainly did. And what was the sentence? Death.

3 You're going to hear again a corollary to that  
4 position, that they agreed and strategized to do that.  
5 That somehow the decision of the trial lawyers to try and  
6 reach for what was admissible is excusable because they  
7 did that and it was fair reply. And that's what you're  
8 going to hear.

9 On the issue of fair reply, I would submit to you  
10 that you don't invite statutory errors of this dimension  
11 by allowing fair reply. It is not fair reply when the  
12 whole thing and the case law says that when the whole  
13 thing is inadmissible, there is no way to straighten that  
14 out. There's no remedial measure, especially for you now.  
15 There was no request, there was no objection at all, so it  
16 certainly wasn't requested that it be removed from the  
17 record and the jury charged by the Judge. The solicitor  
18 didn't request that. When it went beyond adaptability, he  
19 didn't request that the judge then charge the jury to  
20 strike that not only from the record but from their  
21 collective recollection. So, whether you are replying,  
22 and all that stuff is fair reply, is a two-part analysis.  
23 Number one, it isn't because the testimony they are  
24 replying to is the Aiken adaptability testimony, which was  
25 fairly presented; and, number two, it doesn't make any

1 difference because it's such a compelling violation,  
2 insidious violation, that the whole sentencing process is  
3 tainted. And we have, in the end, what this case law says  
4 is a lack of confidence in the outcome.

5 Some argue that's the real test. Did it hurt? And  
6 you start getting all of this lack of confidence in the  
7 outcome? Justice Pleicones saying that's the very  
8 definition of prejudice, when you're introducing arbitrary  
9 constraints. The State also would have you believe that  
10 the applicant has the burden to prove to you that but for  
11 this testimony, the sentence would have been life. And I  
12 argue, I submit to you that's not the test at all. The  
13 test isn't to read some magic tea leaves, whatever, and  
14 try to predict what the jury would have done had that  
15 testimony not occurred. The test is whether or not it was  
16 error to admit it and whether it taints the outcome to the  
17 point that you can't have the confidence the Judge needs,  
18 the judiciary needs, and the people of South Carolina need  
19 before they execute a man.

20 It doesn't make any difference how the defense plays.  
21 The system has to be appropriate it has to be consistent,  
22 and it has to operate according to the rule of law. So it  
23 is not faulty when it executes a man in light of the laws,  
24 as provided by the people through the legislature. In  
25 this case we cannot do that with this error looming in the

1 verdict and the sentence of death.

2 For those reasons I think that the Burkhart case is  
3 controlling in the outcome of this case, whether you rule  
4 ultimately by means of summary judgment or you take the  
5 testimony in satisfaction of the State's request, which I  
6 have, if I recall, no objections to that.

7 But if you could give me one minute, I may be winding  
8 down.

9 THE COURT: Okay.

10 MR. EHLIES: Counsel points out to me that we really  
11 do object to proceeding with the testimony. We're  
12 standing firm on the summary judgment motion with the  
13 depositions and all that have been identified and  
14 presented to you. We are relying on all the issues, seven  
15 or eight I think. There is one issue we did withdraw from  
16 the amended application pertaining to Dr. Martin and his  
17 lack of availability under subpoena. We withdrew that,  
18 but we are relying on all the issues which cumulatively  
19 have a weight when behind this that compels a finding of  
20 prejudice that the trial was not a result of effective  
21 assistance of counsel.

22 So we'd rely on all the issues as presented in the  
23 briefs, motion for summary judgment. I think I said that  
24 in the beginning. I'm repeating myself a little bit, but  
25 we're -- the point is, we're not abandoning anything.

1 THE COURT: I understand.

2 MR. EHLIES: But I have spent my energy on this issue  
3 because I wanted to be candid with the Court that the  
4 other issues are significant; but we believe firmly that  
5 the Burkhart issue, we refer to it as the Bowman/Burkhart  
6 issue, is compelling in this case whether you do by  
7 summary judgment or others. And we believe statute  
8 17-11-30 allows you do this hearing based on affidavits  
9 and depositions, however you want to conduct it.

10 So we await your direction how you want to conduct  
11 the hearing from this point if you deny the summary  
12 judgment.

13 THE COURT: Okay. Thank you very much. Miss Brown?

14 MS. BROWN: Your Honor, we've heard a lot about  
15 Burkhart and Bowman this morning, the evidence that was at  
16 issue in those cases. But there are a couple of things we  
17 cannot lose site of; that is, the issue as presented here  
18 is whether counsel was ineffective in failing to object to  
19 cross examination of their own witness.

20 To be able to put this in a little bit of context we  
21 have to go back and look at the testimony and how  
22 Mr. Aiken was qualified. Mr. Aiken was qualified as an  
23 expert in prison adaptability and prison conditions. That  
24 is what defense counsel requested. Prison conditions was  
25 absolutely at the forefront as well.

1           Now, what makes this important is because the issue  
2   is a failure to object. Your Honor, nobody has identified  
3   a valid basis for an objection to this testimony based on  
4   the fact that Mr. Aiken testified to prison conditions,  
5   the Solicitor asked Mr. Aiken about prison conditions. It  
6   was a fair response. We can't get around the fact  
7   Mr. Aiken was actually qualified in adaptability and  
8   prison conditions and the fact Mr. Aiken did give such  
9   testimony that was elicited in the direct. And I'm at  
10   record page 2130. Your Honor, fair response, that's the  
11   basic answer that we have.

12           I would like to address this notion that goes back to  
13   the quality of the evidence presented, that there was a  
14   long-standing prohibition. Well, there was not a  
15   long-standing line of precedent that required reversal.  
16   That was one thing that the chief justice pointed out in  
17   her dissent in Burkhart, why she didn't go with the  
18   majority; and that was that it's a new way of handling  
19   this. We have Plath from the 80's where prison conditions  
20   were introduced into testimony. The State responded, they  
21   said there's no prejudice there. There's an equality, a  
22   playing field equality and that's what we have here. That  
23   goes into the prejudice analysis.

24           THE COURT: Don't you think Burkhart sort of set a  
25   new standard for trial?

1 MS. BROWN: It did, your Honor. There was certainly  
2 not a reversible standard out there. They've talked about  
3 conditions, but also in the interim, this was very  
4 important. I think it was brought out in the solicitor's  
5 argument in the record, is that the reason this sort of  
6 got legs again, and the cases contemporaneous with this  
7 case, is that you have a lot of charging issues with of  
8 life without the possibility of parole.

9 THE COURT: Even in light of Bowman and even in light  
10 of Burkhart, from a trial standpoint, it's still,  
11 especially from the attorneys presenting the case, the  
12 State and the Defendant, presents a real dilemma on how do  
13 you limit it to the defendant's adaptability to the life  
14 without going into the details of what the conditions are?  
15 It's still a real dilemma for the attorneys that are  
16 presenting the information at trial. Even in light of  
17 Bowman and Burkhart.

18 MS. BROWN: Well, and Plath, your Honor, the Court in  
19 Plath says that's a fine line.

20 THE COURT: If you go to the individuals's  
21 adaptability, how can you explain the adaptability without  
22 explaining the conditions he's going to be experiencing in  
23 prison?

24 MS. BROWN: I rely on the discussion in Plath, your  
25 Honor. In Plath it makes pretty clear, how many times a



1 person gets to take a shower, what color clothes and  
2 whatever, those are things that are not going to go to  
3 adaptability. Such things do not need to go before the  
4 jury. Here we had that kind of evidence presented.

5 But let me also reference State v. Bryant. That's  
6 another contemporary case with Burkhart and Bowman. And  
7 in that case Bryant argued that it was error for his  
8 expert not to be allowed to opine that the death penalty  
9 was more merciful. Said that that was too far out. That  
10 was a part of the testimony within the condition  
11 testimony. The Bryant case goes through and talks about  
12 that. Conditions were coming in at this time.

13 That's not to say that it was correct or that Bowman  
14 and Burkhart are incorrectly decided. What this shows is  
15 a time line. We certainly had no reversible cases when  
16 this was presented and release conditions were presented  
17 here.

18 Bottom line, this was a defense witness. The defense  
19 were able to use their own witness and categorize their  
20 conditions the way they wanted to. And I'm sure that  
21 you'll remember from reading from the briefs that there  
22 was a motion to limit Mr. Sligh's testimony. Mr. Sligh  
23 was going to be the State's witness for prison conditions.  
24 They limited that because there was a difference between  
25 the way they consider testimony coming out reflecting on

1 prison conditions on death row as compared to life in the  
2 general population.

3 There are subtleties everywhere, your Honor. And in  
4 this case the defense opted to go into some conditions  
5 that prompted a response from the State. That's why it's  
6 important to go back to the issue itself. The issue is  
7 whether it was ineffective for failing to object.

8 I want to point out in Burkhart, which is a direct  
9 appeal issue and is under a different standard and was  
10 reversed on statutory grounds, not Sixth Amendment  
11 grounds, where we are here; but even in Burkhart they had  
12 their own witness that came in.

13 And there is another case that I referenced in my  
14 response in opposition, John Richard Wood, that was  
15 decided in circuit court, was the same thing. They didn't  
16 object to testimony coming in, in one place, but they had  
17 their own witness to qualify the conditions that they  
18 wanted to argue to show that life imprisonment was not  
19 going to be an easy sentence in and of itself.

20 So we had a lot of movement in this area. What we  
21 absolutely didn't have at that time, is a line of cases  
22 that would have allowed for reversal. That's true.  
23 There's no way to get over that particular hurdle when  
24 we're talking about that.

25 But we're not talking about reversal on direct

1 appeal. We have got to look at this issue through the  
2 lens of ineffective assistance of counsel, constitutional  
3 error, Sixth Amendment.

4 THE COURT: Let me ask you this. I understand what  
5 you're saying. And I'm not saying I disagree with you.  
6 But if under the present law as it stands now, Sigmon  
7 would be reversed on direct appeal?

8 MS. BROWN: I disagree, your Honor, for this reason.  
9 There's no objection.

10 THE COURT: So you think since it was not preserved,  
11 it would not even be reversed on today's standard under  
12 the Bowman and Burkhart?

13 MS. BROWN: I rely on Bowman, your Honor. In Bowman  
14 it was not a preserved issue. It was not reached. Bowman  
15 was affirmed on that particular issue.

16 THE COURT: All right. That answers my -- that tells  
17 me your position on the issue anyhow. Okay. Go ahead. I  
18 didn't mean to interrupt you.

19 MS. BROWN: Going back to how we're looking at this  
20 issue, it is very important because there are several  
21 issues that would be reversible error had they occurred in  
22 direct appeal that are not considered reversible error at  
23 this juncture. And I go back to Franklin versus Cato and  
24 the right to address the jury. Absolutely reversible  
25 error if happened in direct appeal. When it doesn't, you

1 look at it through Sixth Amendment lens, you look at error  
2 and prejudice.

3 And I want to go back to the definition of prejudice  
4 in this proceeding.

5 THE COURT: What about some of the arguments of the  
6 solicitor in this case, closing arguments?

7 MS. BROWN: The closing argument was based on the  
8 record. Again, there's no identifiable correct and proper  
9 objection.

10 THE COURT: Where the solicitor got into the  
11 personal, based his personal convictions, his argument,  
12 that's a particular one that sticks out, having read the  
13 pretrial brief.

14 MS. BROWN: And looking at those passages, what you  
15 see is that the solicitor requested the death penalty. He  
16 never said, "I expect the death penalty." He never said,  
17 "I've already made a"---

18 THE COURT: Never put it to a challenge to the jury,  
19 I agree with you.

20 MS. BROWN: He never did. He never suggested that he  
21 had already made the decision and he was waiting for them  
22 to come along with him. He never suggested that. And I  
23 think maybe one of the best pieces of evidence to support  
24 this is the way that defense counsel reacted to that  
25 argument. He didn't say that the solicitor expects, the

1     solicitor has already made his decision. Defense counsel,  
2     in reply to that argument, said that the solicitor asked  
3     you to return the death penalty. He said that is your  
4     duty.

5             So no matter that we're reading a cold record and it  
6     certainly doesn't appear to be any kind of a personal  
7     suggestion in those comments on the cold record. We have  
8     evidence in the record of an attorney at that time  
9     listening and responding to the arguments saying, "He's  
10    just requesting that a sentence be imposed."

11            Other than that, your Honor, there's absolutely no  
12    problem whatsoever in him mentioning that he has requested  
13    the death penalty. We already know that in Bell. We  
14    already know that in Woomer. The solicitor certainly has  
15    the right to say, "This is our case. This is something  
16    that supports a sentence of death." And the comments in  
17    there particular case did not overstep those bounds  
18    whatsoever. I would suggest to you it's clear from  
19    reading the comments in context. It is also clear from  
20    the response that those comments elicited from defense  
21    counsel. And, further, the depositions before you solely  
22    for the purposes of summary judgment motion at this time,  
23    suggest there was no problem with that or they would have  
24    objected.

25            So taken together, all the evidence leads to a

1 conclusion that applicant is not entitled to judgment as a  
2 matter of law on this particular issue.

3 THE COURT: Okay. Thank you very much. Anything  
4 briefly in rebuttal? Sorry, Miss Brown, are you through?  
5 If there's anything else you want to say, I'm sorry. I  
6 didn't mean to cut you off. If you're not, that's fine.

7 MS. BROWN: Your Honor, I did want to briefly talk  
8 about the tape. Of course, the tape is not in evidence.  
9 I think we established that earlier, that was something  
10 that I had argued in my response in opposition, that the  
11 facts on that issue are not settled as well as he's not  
12 entitled to relief based on the evidence that's before you  
13 and our response in the record and depositions that are  
14 presently before you. Otherwise, your Honor, I will rest  
15 on the brief that's before you in opposition.

16 THE COURT: Thank you very much.

17 Mr. Ehliès, anything you want to say in rebuttal?

18 MR. EHLIES: Yes, sir. Your Honor, the suggestion  
19 that because it's not preserved, the magnitude of this  
20 error was demonstrated in the Burkhart decision where it  
21 was, and Justice Pleicône's language. The suggestion to  
22 you, that that degree of error cannot be reached by post  
23 conviction relief, but by constitutional method,  
24 constitutional analysis, is clearly wrong.

25 What they're saying is, since Torrence, we don't go

1 beyond the record in favor of life because we want a more  
2 developed record in PCR on these issues. So you're  
3 defaulted. What we're telling you is a highly provocative  
4 issue and we are expecting, by reason of telling you, that  
5 as defaulted the PCR counsel, we're going to come up here  
6 with a record demonstrating the details of how all this  
7 occurred. It is a statutory violation fundamentally that  
8 is intolerable according to the language in the Burkhart  
9 decision. And it has been there a long time.

10 In her argument she made my case when she said what  
11 is not admissible are the colors of the clothes, canteens,  
12 in reading 2147:

13 "There's no disciplinary problem, it's a secure  
14 institution?"

15 "Canteen, he gets to go to the canteen, buy what's  
16 available in the canteen. It's done on a debit card?"

17 "Yes. Please understand---"

18 "All right. And he gets to shower everyday if he  
19 wants to?"

20 "Not necessarily. Sometimes, certain locations.

21 "Well, all right. But certainly he was required to  
22 get a shower and he could take a shower if he wants?

23 2148: Privilege, inmate populations, level of  
24 security, visitors, education classes. He goes through  
25 all, wholly inadmissible, clearly inadmissible prison

1 conditions for someone who's been convicted of a very  
2 brutal murder.

3 So drawing the line between what are the conditions  
4 he's adapting to and you'll see in Aiken's testimony there  
5 were serious statements of boundaries where you cannot go,  
6 control devices that he's educated about, what the rules  
7 are. That's what he's talking about. And that these are  
8 the conditions to which we must adapt. So, in this case  
9 the adaptability issue is pretty simple because the  
10 testimony elicited by the solicitor and argued is way  
11 beyond that.

12 I think that's all I have in reply.

13 THE COURT: Let me ask you one question. Bowman and  
14 Burkhart were not in existence at the time this case was  
15 tried. How can that be ineffective assistance of counsel?

16 MR. EHLIES: As demonstrated by the cases that I've  
17 cited since 1982, including Plath II. I think Plath went  
18 around about three times. And Plath II whether you're  
19 quoting from one or two is significant because Plath II  
20 clearly defines this is not admissible prison condition's  
21 testimony. And that lineage establishes a precedent  
22 predating.

23 And, more important, not only is that lineage there,  
24 but the lawyers in Burkhart objected prior to the decision  
25 in Bowman and Burkhart, because they knew it was



1 inadmissible. And they did object. And so the Burkhart  
2 decision came down on direct appeal as opposed to  
3 ineffective assistance of counsel.

4 So it is my position, Judge, in answer to your  
5 question, that the long line of precedent, this kind of  
6 thing regarding canteens, visitors, birthday cards,  
7 reading materials, day-in-the-life is totally inadmissible  
8 regardless who offers it and what circumstances. And that  
9 precedent existed at the trial of this case, which  
10 occurred in July of 2002. And admitting that testimony,  
11 your Honor---

12 THE COURT: How do you present adaptability of prison  
13 life without going into details on what the life consists  
14 of?

15 MR. EHLIES: That is the tension referenced in  
16 Burkhart. That is the tension referenced by Justice Moore  
17 in Burkhart.

18 THE COURT: How do you do that from a practical  
19 standpoint? How do you present that evidence?

20 MR. EHLIES: Get ahold of your witness ahead of time  
21 and you tell him, what are the stressors of prison life to  
22 which this man must adapt?

23 And he will tell you, "He's going to have to get on  
24 with the rules, you can't go over this yellow line, you  
25 have to walk in certain spots, you cannot reach for a

1 guard, you cannot" -- there's a whole laundry list of  
2 things -- and the conditions of restricted meal services,  
3 of prison guards that are armed in your presence if you  
4 react badly about that, towers, fence demarcations. Those  
5 conditions are going to be rules of your existence. And  
6 if you can't live with those and adapt to those, then  
7 you're going to be a risk to the guards and you're going  
8 to be a risk to the prison population.

9 Those conditions are much different from he gets to  
10 write home, doesn't he? He gets to go to the canteen. He  
11 gets to -- it's pretty clear, you'll see it when you read  
12 that.

13 THE COURT: You make a distinction between, I guess,  
14 the rules they have to live by versus privileges they  
15 have?

16 MR. EHLIES: Correct. Can you adapt to these rules?  
17 It's not just the printed rule, it's the circumstances of  
18 all of the depressive circumstances of prison on a highly  
19 structured, and that was his testimony, highly structured,  
20 because this man is going to prison for life without  
21 parole. He's much more structured in his life.

22 So what is admissible are the conditions to which he  
23 must adapt. If he cannot adapt, he's going to wind up in  
24 real trouble, somebody is going to get hurt as opposed to  
25 what his privileges are about this victim is dead, she

1 didn't get to say "goodbye." You can call home, can't  
2 you? You can have a birthday party, can't you? You can  
3 have a visitor, those kinds of things are clearly  
4 inadmissible.

5 THE COURT: Ms. Brown, you stood up, wanted to say  
6 something. I'll be glad to hear it.

7 MS. BROWN: Yes, sir, your Honor. From the argument  
8 you just heard, what comes through is that they would very  
9 much like to have every condition available to their  
10 condition to be heard; and if the solicitor and the State  
11 wants, out of fairness, to respond in any way whatsoever,  
12 that's always going to be bad. That is the distinction  
13 that's being made before you today.

14 Now, if they crossed the line and they talk about  
15 prison conditions, we have the right to respond. It is  
16 not simply just adaptability. It is not simply just  
17 security. The questions posed in this particular case on  
18 2138 at line 25, "Tell me a little bit about the way the  
19 day is structured in a maximum security facility."

20 And Mr. Aiken goes onto talk about how you're  
21 constantly monitored; and, by the way, there are people  
22 there that have the potential to inflict bodily harm and  
23 victimize you at any time. You can be searched at any  
24 time. You don't have the ability to ask for a search  
25 warrant, that sort of thing.

1           In other words, to create a theory of prison as being  
2           so incredibly structured and tight to adaptability so that  
3           the State cannot respond. The simple truth of the matter  
4           in this case is that they had their cake and ate it, too.  
5           If they get what they're arguing at this point, they  
6           presented evidence that would allow them to argue that  
7           life without parole was a horrible sentence in and of  
8           itself. As Mr. Epps stated in his deposition, that's what  
9           they wanted to do.

10           Well, to be able to make that argument, they  
11           certainly had to have evidence in the record to support  
12           it. They had evidence to support it. The solicitor also  
13           had evidence in to support his argument against it. And,  
14           your Honor, this is a level playing field and that's why  
15           we don't have prejudice in this case.

16           We're not on direct appeal. This is not Burkhart and  
17           it's not Bowman. This is a matter under the Sixth  
18           Amendment. And prejudice is defined as whether there's a  
19           reasonable probability that absent the error, absent the  
20           lack of objection in this case, the sentencer, including  
21           the reviewing court to the extent they're reweighing the  
22           evidence, would have concluded that the balance of  
23           aggravating and mitigating circumstances did not warrant  
24           death.

25           Your Honor, there is a paltry amount of mitigating

1 evidence in this case. There is a tremendous amount of  
2 aggravating evidence in this case. They are never going  
3 to be able to meet the burden under Jones. They are not  
4 entitled to judgment as a matter of law.

5 THE COURT: Okay. Thank you very much.

6 MR. EHLIES: Very quickly, Judge, because you're  
7 struggling with this issue. I come up with as good an  
8 example -- warrantless search. Aiken testifies if this  
9 guard suspects for any reason there's something going on,  
10 he stops you immediately, if you can't adapt to that, he's  
11 going to frisk you, he has a right to stop you, he has all  
12 those rights. Those are good examples. All of this is  
13 academic because the trial lawyers never knew he's subject  
14 to being taken out and so they didn't make a knowing  
15 decision. Thank you very much.

16 THE COURT: All right. Thank you.

17 Mr. Ehlied, based upon the evidence most favorable to  
18 the nonmoving party, I'm going to deny your summary  
19 judgment motion.

20 MR. EHLIES: All right, sir.

21 THE COURT: Now, you may present whatever testimony  
22 you want to present at this time concerning the merits of  
23 your case.

24 Do you need some time?

25 MR. EHLIES: Yes, sir.

1 THE COURT: How much time do you need?

2 MR. EHLIES: I think five minutes.

3 THE COURT: You can step through the door here. Just  
4 let me know when you're ready. Okay?

5 MR. EHLIES: Ready to start hearing on the merits.  
6 Move the same exhibits on hearing in merits, include all  
7 the trial transcripts, the depositions of the two trial  
8 lawyers.

9 THE COURT: Everything been marked, Plaintiff's  
10 Exhibit 1, 2, 3, and 4.

11 MR. EHLIES: Right now the one will only be marked  
12 for ID. We would at this time formally move them all in.  
13 I understand your ruling on number one. If you accept the  
14 depositions and the rest of the record, excepting your  
15 Honor's ruling on number one, we would rest. If they want  
16 to call a witness, whatever they want to do. You need to  
17 tell me, are you going to accept the depositions that were  
18 handed up and the evidence? Giving you caveat on number  
19 one, 17-27-80.

20 THE COURT: Yes, sir. That's what I'm looking at.

21 MR. EHLIES: Thank you, sir.

22 MR. EPPES: There are copies of the codes in various  
23 judges chambers.

24 THE COURT: Okay. I'm ready to hear your arguments.  
25 I assume you object to the depositions?

1 MS. BROWN: I object. The depositions that were  
2 taken were taken in discovery, either of the depositions  
3 were not taken with the understanding that they would be  
4 used in lieu of live testimony. Also Simpson I believe  
5 mentions the statute that we were just referring to, your  
6 Honor. And Simpson, of course, says that you have the  
7 discretion to accept depositions or affidavits. But I  
8 would suggest, your Honor, it goes no further than that;  
9 and to look at it to see if the depositions should be  
10 admitted.

11 THE COURT: Well, was Rule 32 versus 17-27-80 raised  
12 in the Simpson case, that each issue -- because the  
13 statute would take precedence over the rule. Don't  
14 statutes generally take precedence over rules?

15 MS. BROWN: Generally, your Honor. But it does  
16 say---

17 THE COURT: How does the statute relate back to rule  
18 32?

19 MS. BROWN: I believe it gives the guidelines for  
20 when it is within the discretion of the Court to accept  
21 that. Rule 32 goes into whether a deposition can be used  
22 in court. Obviously, depositions are not generally taken  
23 for the purposes to use in court. You generally have live  
24 testimony.

25 THE COURT: In civil court you're probably correct.

1 MS. BROWN: Your Honor, we are in civil court. This  
2 is a civil action.

3 THE COURT: I understand.

4 MS. BROWN: And we ask that the rules apply  
5 appropriately.

6 THE COURT: I understand we're in civil court by  
7 definition; but it's sort of a hodgepodge between criminal  
8 and civil court. And they have a lot of statutes that  
9 specifically apply to PCR's that don't apply to civil  
10 court. I'm going to allow it into evidence. But you can  
11 supplement them any way you want by live testimony.

12 MS. BROWN: Your Honor, do I understand that the  
13 Court's ruling is that it will be considered as a portion  
14 of that testimony; but that the deposition also is not  
15 complete?

16 THE COURT: Yes, ma'am. The deposition will be a  
17 portion of their testimony and anything you want to  
18 present to supplement in addition, that you think is not  
19 clear in the deposition, I will allow you to do that.

20 MS. BROWN: Thank you, your Honor.

21 THE COURT: So I'm accepting them, yes, but giving  
22 you some latitude in offering any live testimony you think  
23 needs to be bolstered, changed, or added to from the  
24 depositions. Okay?

25 MS. BROWN: Thank you, your Honor. As far as the



1 disk, your Honor, we do object without authentication.

2 THE COURT: I understand. I'm not going to allow  
3 that in until there's some type of an authentication.  
4 What I'm going to allow, 2, 3, and 4, which is the two  
5 depositions of the attorneys and the transcript.

6 MS. BROWN: Thank you, your Honor.

7 THE COURT: I'm not going to let you supplement the  
8 transcript, but you can supplement the depositions.

9 MS. BROWN: Yes, sir.

10 THE COURT: Anything else before we get started?

11 MS. BROWN: None from the State.

12 THE COURT: All right. I understand you're going to  
13 rest; is that correct?

14 MR. EHLIES: Yes, sir. We're resting.

15 THE COURT: Exhibit 2, 3, and 4 consists of your  
16 trial?

17 MR. EHLIES: We offered number one, proffered, but I  
18 understand your ruling is it's not in as far as your  
19 record is concerned. So we rest.

20 THE COURT: Thank you very much. Miss Brown, do you  
21 want to call your first witness?

22 MS. BROWN: First I'd like to move for a directed  
23 verdict on the issue regarding the tape. There's been no  
24 evidence submitted that the tape was necessary.

25 THE COURT: I haven't allowed that into evidence.

1 MS. BROWN: And that's my point, your Honor. There's  
2 nothing to support; and we are entitled to judgment as a  
3 matter of law on that particular issue.

4 THE COURT: On what issue?

5 MS. BROWN: Whether counsel was ineffective in  
6 failing to submit the tape to the jury. The tape at issue  
7 has never been submitted for your consideration in this  
8 action.

9 THE COURT: But there's portions of it in the  
10 transcript that was used. And there's testimony, portions  
11 of testimony in the transcript; and also I believe in the  
12 briefs.

13 MS. BROWN: The tape has never been played.

14 THE COURT: I understand. That motion is denied.

15 MS. BROWN: Thank you, your Honor.

16 The State would like to call Mr. Frank Epps, please.

17 THE COURT: Mr. Epps, come around and be sworn.

18 FRANK L. EPPES, being first  
19 duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MS. BROWN:

22 THE CLERK: State your full name for the record,  
23 please.

24 THE WITNESS: Frank Langston Epps.

25 Q Mr. Epps, could you briefly outline your law school

1 education and---

2 THE COURT: Before we get there, spell your last  
3 name.

4 THE WITNESS: E-P-P-E-S.

5 THE COURT: Not like Billy in Anderson?

6 THE WITNESS: No, it's not like Billy.

7 Q May I repeat? Briefly outline your law school  
8 education and where you were admitted to practice.

9 A Graduated Traveler's Rest High School '79, Washington  
10 Lee University in 1983, University of South Carolina  
11 School of Law in 1986. I graduated, first honor  
12 graduate in my class. I was admitted to the bar of  
13 the State of South Carolina November 16, 1986. I was  
14 admitted to New York state bar sometime thereafter.  
15 I'm also admitted in the District, Federal District,  
16 United States District Court of South Carolina,  
17 United States Court of Appeals for the Fourth  
18 Circuit, Eastern District of New York; United States  
19 District Court, Southern District Of New York; United  
20 States District Court, United States Court of Appeals  
21 for the Second Circuit; and the State of North  
22 Carolina, admitted to the bar to the State of North  
23 Carolina; and admitted to the United States District  
24 Court in the Western District of North Carolina.  
25 In addition, I think I'm still admitted in either

1           Mississippi or Arkansas United States District Court  
2           for some work I did out there. But I haven't checked  
3           on that in a while.

4   Q       Could you outline your legal work experience as far  
5           as category of law and trial experience?

6   A       I worked the first year I was out of school I was a  
7           clerk to the Honorable Robert F. Chapman, United  
8           States Court of Appeals for the Fourth Circuit from  
9           October of 1987 until May of 1996. I worked at  
10          Cleary, Gottlieb, Steen, and Hamilton in New York.  
11          My work there was primarily securities litigation,  
12          products liability, and general litigation work. I  
13          had absolutely no criminal experience at that time.  
14          In May of 1997 I started my law firm, Epps and  
15          Plumlee, which remains in existence. My first  
16          client, a criminal client, cut firewood for my  
17          father; and thereafter I began to practice criminal  
18          law on a regular basis. I do so to this day.  
19          At the time of the Sigmon trial I had trial  
20          experience, but I didn't have expansive felony trial  
21          experience. I've tried a number of more cases since  
22          then. This was in 2002, I believe.

23   Q       But you had felony trial experience prior to July of  
24           2002 at the time of trial?

25   A       I'm not sure. I mean, I had been -- I done a lot of

1           plea work. I done a lot of work -- I can honestly  
2           say now, right now, I tried felony cases before that  
3           time; I honestly don't remember, I'd have to go back  
4           and look.

5       Q     Were you first or second chair in the trial?

6       A     I was second chair.

7       Q     How did you come to be appointed to be second chair  
8           in the trial?

9       A     John Mauldin had been talking to me about second  
10           chairing a trial with him. There was a lot of death  
11           penalty work in Greenville, unfortunately; and  
12           Mr. Mauldin would ask people he thought would be  
13           helpful and he thought would be willing to do it, to  
14           periodically take a turn at it.

15           I had told him over the two or three years before  
16           that I would be willing to help him with one. And  
17           that time there was a lot going on. He had two or  
18           three that he was working on, and he asked me and  
19           Mr. Abdalla if we thought we could handle it by  
20           ourselves with his help, for lack of a better way to  
21           say it. And we agreed to do it.

22       Q     Was it your understanding Mr. Abdalla had felony  
23           trial experience?

24       A     Oh, yeah.

25       Q     Just for purposes of the record, could you explain

1           who Mr. Mauldin is?

2       A     The public defender now for the entire Thirteenth  
3           Circuit. At the time he was the public defender for  
4           Greenville County.

5       Q     Do you know if he had experience with death penalty  
6           trials at the time?

7       A     He has as much as anyone I know.

8       Q     Did you discuss your strategy with Mr. Mauldin?

9       A     Yeah. We talked to John Mauldin about this case  
10          constantly.

11      Q     Did you talk about your theory or about evidence?  
12          Can you tell us a little bit about your discussions?

13      A     I'm sure we talked about our theory. I can't  
14          specifically remember what evidence we did or didn't  
15          talk about; but the evidence in this case was  
16          damming.

17      Q     Do you recall how you came about selecting Mr. Aiken  
18          as a defense witness?

19      A     John Mauldin would have suggested him.

20      Q     What was the purpose of calling Mr. Aiken?

21      A     Mr. Aiken -- you know, it's hard for me to remember  
22          exactly what everything was about at the time because  
23          there's about a thousand things going on. But  
24          Mr. Aiken was called, in a nutshell, to say that  
25          Brad, because of his age, would be -- would more

1           likely be a victim or a person that would not cause  
2           any trouble in a prison situation, and he would adapt  
3           well to prison, I believe, are the two or three  
4           things.

5    Q    Do you recall asking Mr. Aiken about the conditions  
6           in prison?

7    A    Specifically, no. I'm sure we discussed it a little  
8           bit.

9    Q    When you were venting your theories with Mr. Mauldin,  
10           did you have any idea whether that would have been  
11           unreasonable to call Mr. Aiken and ask him any  
12           questions about prison?

13   A    You're kind of asking me two questions. I can give  
14           you a discourse or you can ask a different question.  
15           Your choice.

16   Q    Specifically, did you discuss presenting Mr. Aiken  
17           with Mr. Mauldin?

18   A    I feel fairly confident that I did.

19   Q    Did you have any indication that would have been an  
20           unreasonable strategy to present Mr. Aiken as a  
21           defense witness?

22   A    No.

23   Q    Do you recall Solicitor Aerial asking questions about  
24           prison conditions?

25   A    He asked what I call the "country club" questions.

1 Yes.

2 Q Had you done anything to prevent "country club"  
3 questions, as you define them, from coming into  
4 evidence?

5 A We had opposed Mr. Sligh's testimony on those  
6 subjects and we filed a motion on that, which had  
7 been denied by the judge.

8 When we put Mr. Aiken up, I believe that at that  
9 point I was so tickled that they hadn't called  
10 Mr. Sligh -- I was still worried they were going to  
11 call Mr. Sligh on rebuttal, I was hoping they  
12 wouldn't -- that I didn't think much about those  
13 questions coming in with Mr. Aiken.

14 I just kind of thought in my mind, "The Judge ruled  
15 on this already and let it on in." I don't think I  
16 objected to it.

17 Q What would have been the basis for objecting to cross  
18 examination on conditions?

19 A Well, if we objected to Mr. Sligh putting it in, in  
20 retrospect, it would seem like we would have  
21 objected. We could have raised the same objection in  
22 order to preserve the record on that point with  
23 Mr. Aiken.

24 Q And would you have raised it if in fact the witness  
25 had testified to conditions and there was brought



1           some conditions? You would have still objected as  
2           improper reply?

3       A     I -- standing here today, I would have done it. At  
4           the time I can't say whether it crossed my mind to do  
5           it or not. I don't think I did do it if he testified  
6           that way.

7       Q     Well, going back to your motion to limit Mr. Sligh's  
8           testimony, you argued against the admission of  
9           certain evidence. And the record bears out that you  
10          referenced the comparison between death row and life  
11          without parole in prison.

12      A     Uh-huh.

13      Q     Can you tell us a little bit about your theory of  
14          wanting that limitation, requesting that limitation,  
15          and the scope of the limitation?

16      A     Standing here right now, I can't tell you a doggone  
17          thing about it. I can't say what I was trying to  
18          limit, how I was trying to limit it. I know we filed  
19          it. If I read my oral argument, I might could tell  
20          you little more about it. But right now I have no  
21          idea.

22      Q     Clearly, right now there was a distinction in your  
23          mind between Mr. Sligh and Mr. Aiken?

24      A     Yes. Yes, there absolutely was.

25      Q     Okay. Can you describe how you approached the

1 argument stage at the penalty phase? In particular  
2 the breakdown for presentation and listening to  
3 objections?

4 A You'll have to explain that better. I'm not quite  
5 following you.

6 Q Sure. Do you recall the closing arguments in this  
7 particular case?

8 A I recall the closing argument in the penalty phase.  
9 I recall closing argument in the sentencing phase,  
10 too.

11 Q And the penalty phase?

12 A Yeah.

13 Q You were responsible for the argument?

14 A Yes.

15 Q Were you also responsible for objecting to the  
16 State's argument?

17 A I'm not sure Mr. Abdalla and I talked about it, but I  
18 would have expected to be.

19 Q If you heard anything that you considered was not  
20 supported by the record, would you have objected or  
21 would you have left it to Mr. Abdalla?

22 A If I heard anything jump out at me as not supported  
23 by the record, I probably would have objected,  
24 although I would have been very reluctant to object  
25 to the solicitor's close.

1 Q And why is that?

2 A There's, well, some lawyers are different about it;  
3 and I have, over the years, changed my mind. But I  
4 go back and forth on it. But there's a thought  
5 process amongst a lot of trial advocates objecting to  
6 your opponent's closing arguments is really bad form.  
7 I like, when somebody is doing a closing argument, I  
8 like to listen very closely to it and take notes  
9 because I tend to like to close, turn their closing  
10 arguments around on them. The solicitor, as an  
11 officer of the court, he's an elected official and  
12 jury's tend to think a lot of them. So, unless I  
13 caught Solicitor Aerial in what I would consider to  
14 be a whopper, I can't imagine that I would have  
15 objected for, you know, an editorial comment.

16 Q In your closing arguments, you mentioned life without  
17 the possibility of parole. And what Mr. Sigmon would  
18 face in prison. Did you argue the extent of what you  
19 wished to argue on that particular basis?

20 A I have absolutely no memory of that. I couldn't tell  
21 you.

22 Q And preparing your case for mitigation, did you  
23 consider the facts of the alcohol use and the drug  
24 use being evidence of intoxication at the time of the  
25 crime?

1 A We talked about drugs that Mr. Sigmon had been using  
2 and the drinking. I absolutely cannot tell you  
3 whether we considered intoxication or not. It  
4 doesn't spring out at me. I can tell you in my mind  
5 as I remember this case, I don't remember ever  
6 thinking that he was drunk.

7 Q You never thought he was drunk?

8 A I don't remember ever thinking that. He obviously  
9 had been drinking and smoking prior to that; but I  
10 don't remember thinking it. I just don't have a  
11 thought of that thought running through my head.

12 Q In regards to the charge and penalty phase, you given  
13 a written proposed charge?

14 A Judge Watson gave us a written proposed charged that  
15 I viewed.

16 Q You would have reviewed those in detail?

17 A I did review them, yes.

18 Q Did you see anything wrong with the charge that you  
19 perhaps, for whatever reason, did not want to object?

20 A If I seen anything wrong with the charge that I knew  
21 was wrong with the charge, I would have objected.

22 Q Okay. You may recall there was a taped confession  
23 and telephone call; and I think a TV station had  
24 taped some things that had been released to you prior  
25 to trial in preparation for trial?

1 A Yes.

2 Q What was your impression of these tapes? Were they  
3 good for you? Were they bad for you?

4 A I thought there were parts of the tape from Tennessee  
5 that was okay. The television tape I thought was  
6 terrible. I was frankly shocked that the solicitor  
7 didn't use it, because I just I thought it was very  
8 bad for our case.

9 Q And when you say bad, can you elaborate a little bit?  
10 Tell us exactly what your impressions were.

11 A I'd have to look at it to really tell you my  
12 impressions right now. I can't tell you what my  
13 impressions were. If I looked at it again, I could  
14 tell you. I just remember thinking the solicitor is  
15 going to use this tape from channel 4 and it's going  
16 to be bad.

17 Q Would you have wanted all of it to come in?

18 A The channel 4, I wouldn't want any of it to come in.  
19 The other tape, there were parts I wanted to come in;  
20 and I was, frankly, a little surprised the solicitor  
21 didn't run it all. It's, frankly, his way to beat  
22 the dead horse. I was a little surprised when they  
23 didn't use the tape.

24 Q Do you recall having the tapes transcribed in  
25 preparation for trial?

1 A I watched the tape and I had the sections of it I was  
2 interested in using transcribed. I had them edited  
3 into a disk that one of you all has, I think; and  
4 that we never could get to play. And then I had a  
5 court reporter transcribe those excerpts of the tape  
6 we intended to use in my cross examination of the  
7 woman from Tennessee, the officer who was in the room  
8 for the bulk, if not all, of that period of time.

9 Q Okay. So, video was never shown to anybody in the  
10 courtroom?

11 A The whole video, no. It was never shown.

12 Q Any portion of the video shown?

13 A No. We spent 45 minutes trying to get that tape or a  
14 copy of that tape you all have to play. Never could  
15 get it to play. The guy that was working for the  
16 public defender's office working on it is now a  
17 secret service agent, pretty smart guy. And I give  
18 him grief about it all the time. So we never got it  
19 to play; but by then the jury watched us fiddle with  
20 it so much. I was able to read off that transcript  
21 as if it was the tape and I could put the inflection  
22 where I wanted to. So I, frankly, was just as happy  
23 at the time to read off the transcript.

24 Q So the only portions of the transcript that you had  
25 prepared that were, that would have been used are

1           those portions that are already reflected in the  
2           record on appeal as being read into the record? You  
3           didn't otherwise submit it?

4       A     I would think so, yes, if they're in the record. I  
5           know I gave each of you all this morning a photocopy  
6           of that court reporter's transcript. And I'm not  
7           sure I read that entire thing into the record. I'm  
8           not sure I read all those excerpts in. I just know I  
9           had them prepared.

10      Q     This was trial prep, what was before the jury? We  
11           have the record what was before the jury, correct?

12      A     As far as I know.

13      Q     Do you recall if you have any thoughts as to the  
14           effectiveness of reading the transcript as opposed to  
15           playing the tape?

16      A     I don't remember. I remember that at the end of the  
17           day I was okay with the transcript; but the tape had  
18           its good parts, too.

19      Q     But you were well satisfied with what was before the  
20           jury?

21      A     Mr. Sigmon got sentenced to death. I can't say I was  
22           ever satisfied.

23      Q     As to sentencing. Just talking about evidence,  
24           however?

25      A     At the time, at the time I was not that interested --

1 I was not interested in putting the tape in.

2 Q Thank you. Do you recall Miss Barbare's husband.

3 THE COURT: We finished up on the tape. Before you  
4 go to new subject matter, we're going to take a lunch  
5 break at this time. It's 1:00 can you get started back  
6 around 2:30.

7 MS. BROWN: Yes, sir.

8 THE COURT: Does that give you enough time get your  
9 thoughts together, get a bite to eat and come back?

10 MS. BROWN: Yes, sir.

11 THE COURT: We'll adjourn until 2:30. You may step  
12 down. See you at 2:30.

13 (WHEREUPON, the proceedings are adjourned for the  
14 luncheon recess.)

15 AFTERNOON SESSION

16 (After the recess, the following proceedings were  
17 had:)

18 THE COURT: Miss Brown, you may proceed with cross.

19 MS. BROWN: Thank you, your Honor.

20 FRANK L. EPPES, having been previously  
21 sworn, further testified as follows:

22 BY MS. BROWN:

23 Q Epps, you called to offer Miss Barbere's ex-husband  
24 during the trial. Do you recall that?

25 A Yep. Yes.



1 Q Do you recall Troy Barbere testifying?

2 A I recall the fact that he did testify. Yes.

3 Q Would it help to look at the transcript to refresh  
4 your memory?

5 A Yes.

6 MS. BROWN: May I approach the witness, your Honor?

7 THE COURT: Yes, ma'am.

8 Q Mr. Eppes, the record, page 2035, record reflects  
9 that you asked Mr. Barbere about having words with  
10 Mr. Sigmon. Do you recall that?

11 A I see it on the page.

12 Q Okay. Were you aware that whatever he said could  
13 possibly be considered evidence in aggravation used  
14 against him?

15 A Ma'am?

16 Q Were you aware whatever he answered when he talked  
17 about the words that he had with Mr. Sigmon could  
18 elicit evidence in aggravation?

19 A I guess technically I was. I didn't think it rose to  
20 the level that it was aggravating.

21 Q Why did you ask that question?

22 A I was trying -- the specific question I can't tell  
23 you. I know with Mr. Barbere I was trying to show  
24 that Miss Barbere had a habit of hooking up with the  
25 next guy before she left the previous one, for lack

1 of a better way to describe it.

2 Q Okay. Do you recall calling Keith Merrill --

3 A I do.

4 Q -- to the stand? If you would turn to record  
5 Page 2039. The record reflects you asked a question  
6 about a phone call that Mr. Sigmon had with  
7 Mr. Merrill?

8 A I see that.

9 Q What was the reason for asking him that question?

10 A Again, it was a similar thought process, the fact  
11 that she had started dating somebody while she was  
12 dating Mr. Sigmon.

13 Q So you had interviewed both of these witnesses prior  
14 to trial; is that correct?

15 A I don't believe I had. I believe my investigator,  
16 Gerald Ravan had.

17 Q So you had selected these witnesses for what express  
18 purpose?

19 A Mr. Barbere to talk about the fact that Mr. Sigmon  
20 had started dating. I see in here I called her,  
21 Miss Larke, I apologize for calling her something  
22 else; but that Mr. Sigmon started dating her while  
23 she was still married to Mr. Barbere. And  
24 Mr. Merrill, I had two reasons for calling him; and  
25 one was to elicit the information that a relationship

1           between Miss Larke and Mr. Merrill had started prior  
2           to the end of Miss Larke's relationship with  
3           Mr. Sigmon.

4    Q    Okay. Mr. Epps, you received a charge on  
5           provocation, but you never argued a factual basis for  
6           provocation in your closing; is that correct?

7    A    I couldn't tell you.

8    Q    Couldn't tell?

9    A    I haven't reread my closing. I couldn't tell you.

10   Q    Okay. Well, we'll let the record speak for itself.  
11           Do you recall Mr. Sigmon addressed the jury in the  
12           penalty phase?

13   A    I do.

14   Q    Did you consider those remarks helpful in your  
15           trigger-defense theory? And if you would, explain  
16           the trigger-defense theory to us in that context.

17   A    You called it a trigger-defense theory. It was a  
18           little more complicated than that.

19   Q    Please explain.

20   A    Mr. Sigmon had confessed four ways from Sunday to  
21           these two horrible killings of the parents of  
22           Miss Larke, and there was no way around that. There  
23           was no defense effectively because he had confessed  
24           in Tennessee. He confessed when he got back. He  
25           about confessed on channel 4. And what we were

1       trying to show with the defense was that he had this  
2       cockamamie plan to try to get to talk to Becky, or  
3       kidnap her, and that the plan went awry almost  
4       immediately. And within the space of I believe less  
5       than two minutes, Mr. and Mrs. Larke had been killed.  
6       There's no, obviously, excuse for their killing;  
7       however, Mr. Sigmon is someone who was abandoned a  
8       good bit in his life and had real problems with  
9       people who left him or broke up with him. And a lot  
10      of Miss Larke's behavior kind of egged him on, for  
11      lack of a better way to say it. And we were trying  
12      to show that the stresses of the break up,  
13      particularly when he's living right next door to her  
14      and her parents, were such that he snapped and in an  
15      instant did a horrific thing; and he was somebody  
16      that ought to be given life instead of death.

17    Q    Mr. Sigmon spoke about his relationship with Becky at  
18          that closing?

19    A    Mr. Sigmon spoke against my advice. And I do not  
20          believe that his speaking helped him at all.

21    Q    Did you think it hurt him?

22    A    Oh, yeah. I told him ahead of time I didn't think it  
23          would help him in the most callous terms I could come  
24          up with.

25    Q    I have just two more questions on closing. May I

1 approach the witness, your Honor?

2 A Yes, ma'am.

3 Q If I could turn your attention to 2207, lines 11  
4 through 22, would you please read those aloud to the  
5 Court?

6 A Eleven begins with a, in the middle of a sentence.  
7 Do you want me to start at---

8 Q Whatever you're comfortable with.

9 A That sentence starts on line ten -- which line did  
10 you want me to go through?

11 Q Eleven through 22. Do you want to do 10 through 22?

12 A This is the second half of ten: "They wanted you to  
13 sleep the way you wanted to sleep. They wanted your  
14 schedule to be what you wanted your schedule to be.  
15 Prison ain't like that."

16 Q Pardon me. I might have given you 2207. I meant to  
17 have given you 2206. That may explain the  
18 discrepancy it's 11 through 22 on 2206.

19 A Starting on line 11: "Now, I want to stop. I want  
20 to close with two more points, and these two points  
21 are pretty simple. The first one is Brad Sigmon is  
22 not a very bad individual. He's not a very bad  
23 prisoner. His role in life may be -- well, his role  
24 in life to end his days as a prisoner and he's pretty  
25 accomplished at it. He's polite, treats the officers

1       with respect. He's not a threat to anyone. You  
2       heard from Mr. Aiken. He's not going anywhere. He's  
3       going to be in maximum security with the meanest,  
4       nastiest people in the State of South Carolina. He's  
5       going to be there until he draws his last breath."

6       Q     Was that argument solely based on Mr. Aiken's  
7       testimony?

8       A     Not totally.

9       Q     What else was it based upon?

10      A     The fact that we were entitled to tell the jury that  
11      life without parole meant life without parole. In  
12      addition to that, I believe that I called then  
13      Sergeant, now Captain, Melton of the Greenville  
14      County Detention Center to talk about Brad as a  
15      prisoner. I want so say I called somebody else from  
16      the Detention Center to talk about Brad as a  
17      prisoner. I can't honestly remember right now who  
18      that was. We had two or three people that he  
19      interacted with at the jail that said that he had  
20      been a very good inmate.

21      Q     So, you took a portion of Mr. Aiken's testimony that  
22      was favorable to you to make that argument; is that  
23      correct?

24      A     The sentence, yes. Absolutely. The sentence in  
25      there that says "You heard from Mr. Aiken. He's not

1           going anywhere." That was in relationship to  
2           Mr. Aiken's testimony that no one has ever escaped  
3           from a life without parole sentence in the South  
4           Carolina system.

5       Q     And was it also based on the fact that Mr. Aiken  
6           talked about the strict controls?

7       A     Oh, absolutely.

8       Q     And the movement controls, everything that would go  
9           along with those conditions?

10      A     Yes.

11      Q     Thank you. And the reference to being with the  
12           meanest, the nastiest people, that also came from  
13           Mr. Aiken's testimony?

14      A     I can't tell you if that was Mr. Aiken's testimony or  
15           my personal understanding of where you go when you  
16           get LWOP. But I've been to Lee County and a couple  
17           of other facilities where people go without parole,  
18           and that's a fair statement.

19      Q     What's the fair statement?

20      A     Some of the people there are some of the meanest,  
21           nastiest people.

22      Q     If I could have you return to the record, Page 2195.  
23           If you would read from 13 to 17 real quickly.

24      A     "Now, is this the appropriate punishment -- that's  
25           what the solicitor started with -- and I want to

1 start with this. Is this the proper punishment for a  
2 love-sick idiot that snapped and in less than two  
3 minutes ended the lives of two people?"

4 That doesn't finish the whole line.

5 Q You can read whatever you're comfortable with?

6 A "Destroyed one family and shook his own to the  
7 foundation. Because that's what's Brad Sigmon is."  
8 That was on line 9 that I stopped on.

9 Q Thank you, Mr. Eppes. Would you say that  
10 Mr. Merrill's testimony figured into that argument?

11 A Yes.

12 Q As a basis for that argument to make it a factual  
13 relevant argument?

14 A It was part of the reason that I called him, yes.

15 Q Thank you.

16 Court's indulgence just a moment.

17 THE COURT: Yes, ma'am.

18 MS. BROWN: No further questions, your Honor.

19 THE COURT: Cross examination?

20 CROSS EXAMINATION

21 BY MR. EHLIES:

22 Q Let me start -- Judge, is it all right if I float  
23 back and forth a little bit?

24 THE COURT: That's fine.

25 Q We have what has been marked as Plaintiff's Exhibit



1           number one for identification purposes, and it's  
2           somewhere up on the bench here. And I want to  
3           clarify. This whole thing is a little confusing, so  
4           I'm going to hope to straighten it out.

5           Show you now, we better mark this as an exhibit for  
6           identification purposes only.

7           THE COURT: Just mark it 1-A, if you would, Donna.

8           (WHEREUPON, Plaintiff's Exhibit No. 1-A is marked for  
9           identification only.

10          Q     Mr. Eppes, as I understand it, the Brad Sigmon case  
11                 developed and had with it a number of videotape  
12                 segments. Is that correct?

13          A     There was a Channel 4 videotape and there was a  
14                 videotape in Tennessee that had several parts to it.  
15                 Because different people went in, interrogated him,  
16                 he was with different people. He was allowed to call  
17                 his mom. Yeah, I'd say that's fair. It had about  
18                 four or five distinct sections to this extensive  
19                 tape.

20          Q     All right. So can we call them segments and be on  
21                 the same sheet of music --

22          A     Yes.

23          Q     -- here?

24          A     Sure.

25          Q     Not that it's relevant. How did you receive them?

1 Did you receive them from the Solicitor's Office in  
2 discovery or how did you come to have those tapes?

3 A The tapes from Tennessee I got from the solicitor's  
4 office. The tape from Channel 4 I'm not sure if I  
5 got from Channel 4 or the Solicitor's Office. I  
6 think I went and got it from Channel 4 because the  
7 Solicitor's Office wasn't being particularly  
8 forthcoming about it. But I don't remember now.

9 Q Now, let's talk about the tapes that came from  
10 Gatlinburg Tennessee Police Department and the  
11 segments, were they on one disk or separate disks?  
12 Or do you recall?

13 A I have no memory right now of that.

14 Q Is it fair to say, however, they were each in  
15 separate segments? Approximately four segments?

16 A I remember it as being a continuous tape, but I don't  
17 have a memory how it's set up. I don't -- I'm sorry.  
18 I have some notes downstairs I saw the other day  
19 would probably tell me. But I don't remember right  
20 now.

21 Q All right. Well, is it fair to say then you saw all  
22 the segments?

23 A I sat in Dan Butler's office downstairs here because  
24 they had the type -- whatever the type setup it was.  
25 I know it wasn't a VCR tape, I could have taken those

1           home with me; but they had whatever setup I needed to  
2           watch those tapes. I watched them down there in the  
3           courthouse.

4    Q       And one aspect of the tape, what we've settled to  
5           call segments, taped segments from Gatlinburg,  
6           Tennessee, was a phone home segment. Do you remember  
7           that?

8    A       Yes, I remember it fairly well.

9    Q       The phone home segment occurs at the time of  
10           Mr. Sigmon's arrest; is that correct process?

11   A       Happens after they caught him in Tennessee, yeah.

12   Q       And there was no violation associated with his  
13           arrest. Is that correct?

14   A       He surrendered peaceably.

15   Q       And the videos that we're talking about were all  
16           while he was in custody being processed. Is that  
17           correct?

18   A       Yes.

19   Q       And they were videos contemporaneous with his  
20           statement; is that correct?

21   A       Yes.

22   Q       And the statements he was making were free and  
23           voluntary and they were confessions, I think, is the  
24           word you used. Is that correct?

25   A       Yes.

- 1 Q And this one particular segment, the phone home  
2 segment I'm talking about, is where he calls on a  
3 phone in the room where he's being processed to his  
4 mother. Is that correct?
- 5 A That's correct.
- 6 Q Now, is that the segment you were interested in the  
7 jury seeing?
- 8 A I know he expressed a lot of remorse in that segment.
- 9 Q And he was tearful?
- 10 A He was very tearful, because he told his mother he  
11 didn't have anything against Mr. and Mrs. Larke.
- 12 Q He loved them?
- 13 A Have a specific memory of that right now; but if you  
14 tell me that, yeah.
- 15 Q This has been marked for identification purposes  
16 Plaintiff's Exhibit 1-A. Tell me what you did. Do  
17 you recognize that disk?
- 18 A Based on what was in the file, which is what that  
19 transcript I saw, I believe this to be one of two  
20 copies of the excerpts we wanted to show of the tape  
21 from Tennessee.
- 22 Q And when you say the tape from Tennessee, you mean  
23 the excerpts about phone home?
- 24 A Whatever is on that transcript that I gave you-all,  
25 that's the excerpts that I'm talking about. But it

1 included the phone call I believe or parts of the  
2 phone call.

3 Q Is it fair also to say that this case came with  
4 virtually no defense in the guilt phase?

5 A In my view we had no defense.

6 Q So it was a mitigation case?

7 A Completely.

8 Q And the theory at trial in July 15, it started  
9 July 15, '02, was that he was remorseful and accepted  
10 accountability, responsibility immediately. Is that  
11 correct?

12 A That's correct.

13 Q And would you agree with me that a jury, rather than  
14 hearing a lawyer say that, would be profoundly  
15 interested in seeing it actually unfolding as it was  
16 happening on the day of arrest?

17 A I would agree with that statement.

18 Q And isn't that why you made such an effort to get it  
19 drawn out into a form that you could play for the  
20 jury?

21 A That was part of my thinking in having it in a form  
22 that the jury could see.

23 Q Then I think when there was so much trouble about  
24 getting it to play, that Judge Watson ruled -- we  
25 have the page number if you want to refresh your

1           recollection, Judge Watson ruled on page 1505 if you  
2           don't recall. But didn't he rule, in fact, that they  
3           would admit the whole tape, 25 minutes?

4   A       I have no memory of that; but if you say so, that's  
5           true, I'm sure.

6           MR. EHLIES: Call the Court's attention to page 1505.

7           THE COURT: What line?

8           MR. EHLIES: Four. Commencing on Page 1505 and it  
9           runs -- sorry, commencing on page 1502. Actually better  
10          back up to 1501, where there's a dialogue from the  
11          solicitor about the tape, and it goes on for several  
12          pages; and the ultimate ruling is that they would admit  
13          and play the whole thing.

14   Q       Going to show you now a disk I showed you earlier  
15           today and asked you to look at another; and this is  
16           marked Plaintiff's Exhibit for identification only at  
17           the moment, Plaintiff's Exhibit 1.

18   A       Uh-huh.

19   Q       Ask if you had an opportunity to see the images and  
20           audio on that disk?

21   A       I saw the images, an excerpt of that disk.

22   Q       Was that the "phone home" dialogue you talking about?

23   A       Appeared to be a portion of the tape, was the phone  
24           home; although I did not see the entirety of that  
25           tape.

1 MR. EHLIES: Your Honor, we move Exhibit 1 into  
2 evidence.

3 MS. BROWN: Your Honor, we object. Mr. Epps just  
4 told us that this was a continuous tape. We do not object  
5 to the entire tape coming in from Tennessee, as Mr. Epps  
6 testified it was continuous. Rule of completeness would  
7 dictate the---

8 THE COURT: What's your objection to allow this  
9 excerpt? If you want to put the whole tape, you have that  
10 right; but what is your legal objection to the phone home  
11 segments? What's your legal objection to that.

12 MS. BROWN: First of all, we need to know whether the  
13 witness seen the whole thing.

14 THE COURT: He just testified he seen the portion  
15 about the phone home.

16 MS. BROWN: I don't know what's on the tape.

17 MR. EHLIES: We can play it.

18 MS. BROWN: I don't know what's on the tape. That's  
19 why I'm relying on completeness, which would, I assume---

20 THE COURT: Mr. Ehlied, what's on the tape.

21 MR. EHLIES: We served it on opposing counsel last  
22 week, the whole 25-minute segment of the phone home  
23 effort, the whole conversation.

24 THE COURT: That's the only thing on there?

25 MR. EHLIES: That's the only thing on there.

1 MS. BROWN: Still would move for the entire tape, to  
2 see it in context, this portion created for this  
3 particular proceeding.

4 THE COURT: Fine. You're entitled to do that. My  
5 question is to you, what is your legal objection to the  
6 excerpts of the phone home section to be admitted  
7 Plaintiff's Exhibit 1-A?

8 MS. BROWN: Rely on the rule of completeness, your  
9 Honor.

10 THE COURT: Overruled. Admit Plaintiff's Exhibit  
11 1-A. if you want to put the whole tape in, fine. I have  
12 no problem. If you want to put the whole tape in, I'll be  
13 glad to do that. Now, if you want to---

14 MS. BROWN: I'd like to.

15 MR. EHLIES: Appeared on 1505, the only thing  
16 offered, tendered, which makes the only thing relevant, in  
17 our opinion, the 25 minute segment offered by the defense  
18 at the time of trial.

19 MS. BROWN: I understand this is what defense trial  
20 reviewed, not exactly what was offered at this point.  
21 We're going into what defense counsel looked at why,  
22 relying on rule of completeness.

23 THE COURT: I let you put it in. His objection  
24 overruled where is it?

25 MS. BROWN: Defense counsel would have that in his



1 file.

2 THE COURT: I'll ask you where is it, Mr. Epps? Do  
3 you have it?

4 MR. EHLIES: Is that not it, 1.

5 THE WITNESS: No. This is just the excerpts I pulled  
6 out as part of that transcript you have.

7 MR. EHLIES: Very good.

8 THE WITNESS: The whole tape, be honest with you,  
9 Judge, there's four boxes downstairs. And I'm not---

10 THE COURT: That's his deal. If you want the whole  
11 tape in, find it. We'll admit it. Okay?

12 MS. BROWN: Thank you, your Honor. Appreciate it.

13 MR. EHLIES: Of course, the television tape agents  
14 suspects aren't in issue PCR object to the extent goes  
15 beyond phone home.

16 THE COURT: That's fine. Overrule your objection.  
17 Allow to put it in for completeness. I understand your  
18 issue on the PCR, just the phone call home as far as  
19 effective assistance of counsel. I understand that. But  
20 if she wants to put the whole tape in.

21 MR. EHLIES: I understand, goes to mitigation.

22 THE COURT: I don't understand what it has to do with  
23 your argument on the phone home; but I'll let her put it  
24 in.

25 MR. EHLIES: Okay. We're moving on now to another

1 issue.

2 THE COURT: Yes, sir. First of all, let me ask you  
3 this. If you couldn't get it operated and the treasury  
4 agent---

5 THE WITNESS: Secret service agent now.

6 THE COURT: How are you planning on getting me to get  
7 it to operate?

8 THE WITNESS: I have no idea, Judge. That one I bet  
9 you will work. This one I don't think ever worked right.  
10 I think if you had a Mac on 1-A, I think 1-A will work on  
11 a Mac. I see is the apple on here. At the time of the  
12 trial the apple didn't mean anything to me.

13 MR. EHLIES: The one you have with the summary  
14 judgment motion and I served on opposing counsel plays on  
15 any computer you want to plug it into.

16 THE COURT: I understand. But I'm talking about she  
17 wants that whole entire tape. My question to you, if they  
18 couldn't gets it to work, there's no way I'm going to get  
19 it to work.

20 MS. BROWN: Yes, sir. May I clarify just a minute?  
21 I was talking about the tape that was originally given to  
22 the defense from the solicitor's office' from which they  
23 took those portions.

24 THE COURT: What's it take to run that tape? Is it a  
25 DVD or what?

1 THE WITNESS: Sitting here today, I have no idea. I  
2 just know at the time -- and remember, that was six years  
3 ago. At the time---

4 THE COURT: I understand.

5 THE WITNESS: At the time the only thing I had to run  
6 it was downstairs in the courthouse; but I can't tell you  
7 now what it was.

8 THE COURT: I'm going to admit it. But when you find  
9 it, please give me some instructions on how to run it  
10 please, ma'am.

11 MS. BROWN: Yes, sir. Absolutely.

12 THE COURT: Please proceed.

13 MR. EHLIES: Yes, sir.

14 Q Mr. Epps, at the time your mitigation case---

15 THE COURT: Donna, the entire tape will be Number 5.  
16 Excuse me, will be Defense Number 1 whenever we locate it.

17 MR. EHLIES: Will be all four segments of the  
18 Gatlinburg police.

19 BY MR. EHLIES:

20 Q When you were approaching this mitigation case, which  
21 I think we established was the thrust of the whole  
22 defense. Is that correct? Mitigation was the thrust  
23 of the whole defense?

24 A Yes.

25 Q And you had consulted with Mr. Mauldin and settled on

1 Mr. Aiken as an adaptability witness?

2 A Yes.

3 Q A witness known to be capable of testimony on prison  
4 adaptability. Is that correct?

5 A Yes.

6 Q At the time that you prepared Mr. Aiken, were you  
7 aware that what you called country-club-type  
8 testimony was not admissible?

9 A We argued against it with Mr. Sligh, and as opposing  
10 Mr. Sligh. And Judge Watson ruled against us. But I  
11 did not anticipate the subsequent rulings in the  
12 trial, Burkhart case. That really shows that that  
13 stuff is just not admissible under any circumstances.

14 Q Knowing what you know today, would you have handled  
15 Mr. Aiken's testimony differently?

16 MS. BROWN: Objection, your Honor, going back to what  
17 counsel knew at the time of the trial.

18 THE COURT: I understand he's asking a hypothetical.  
19 Overruled. Go ahead.

20 BY MR. EHLIES:

21 Q Knowing what you know today about prison adaptability  
22 and prison conditions, distinguishing between the  
23 two, would you have structured Mr. Aiken's testimony  
24 differently?

25 A I can't remember how much came in with my part of --

1 with the direct examination or cross examination; but  
2 I would have kept the issues of the conditions in the  
3 jail out of Mr. Aiken's direct examination. And I  
4 would have objected over and over and over again  
5 should the solicitor have brought up those issues.

6 Q In cross examination?

7 A In cross examination.

8 Q And you would have objected, I presume, then, on his  
9 closing arguments about country club --

10 A I would.

11 Q -- evidence?

12 A I would have. In retrospect you asking me? In  
13 retrospect, correct? Looking at it today?

14 Q Yes, sir.

15 A Yes, I would have.

16 Q Now, I know that you're loathe on your current theory  
17 and I am with you a thousand percent. As a trial  
18 lawyer, things change. But under your current theory  
19 you may have one view about objecting during closing  
20 arguments that you didn't have before. At the time  
21 you tried this case and we took your testimony -- I  
22 want you to take a look at page 38 just a second and  
23 read that to yourself.

24 A That's true.

25 Q I just have a question for you. I didn't want to

1           blind side you?

2       A     No. I know what you're getting at.

3       Q     Is it fair to say at this time this case was being  
4           tried to the jury, had you known or thought that the  
5           solicitor's argument was improper, you would not have  
6           hesitated, would you, to have entered an objection?

7       A     That's a hard question. Because my opinion on  
8           objecting during closing arguments I have modified  
9           over the last decade. And I can tell you now that it  
10          is very likely had the Burkhart opinion been the law  
11          at the time of that closing argument, I would have  
12          objected. If I has been aware of the Burkhart  
13          opinion at the time, then I might would have jumped  
14          up and objected. But I was less likely to object  
15          during a closing argument then, than I am now. I've  
16          kind of changed my view on that, on objecting during  
17          closing arguments.

18      Q     When I was asking you about that, on page 3, your  
19           reluctance to object or propensity to object during  
20           closing arguments, do you remember what your answer  
21           was? And will you publish that to the judge, please?  
22           Page 3 of your deposition.

23      A     "I mean, like I say, I typically listen to arguments  
24           and -- and I'm not a person who's shy about objecting  
25           during the opposition's closing arguments and reading

1           this right now, it strikes me as something  
2           objectionable. At the time I have no memory of it  
3           striking me that way."

4       Q     What you were reading was the solicitor's argument to  
5           the jury; is that correct?

6       A     Yes.

7       Q     Show you for purposes of clarification, you testified  
8           you were aware of this comparison between life and  
9           death in prison conditions through Mr. Sligh, was a  
10          common problem in the trial of capital murder cases;  
11          is that correct?

12      A     Yes.

13      Q     And I think that you authored a motion. And I'm  
14          going to show you a two-page motion attached to your  
15          deposition as Exhibit 3. Is that your signature and  
16          do you recognize the motion?

17      A     I recognize the motion. That's my signature. I feel  
18          pretty sure that's my underlining, too.

19      Q     And is it fair to say also, you might take a look at  
20          that motion; but your position was that Mr. Sligh  
21          should not be allowed to compare the conditions for  
22          prisoners who were receiving life without parole with  
23          prisoners who have been sentenced to death?

24      A     That's correct.

25      Q     You were not objecting to life prison conditions

1 under life without parole? You were objecting to the  
2 comparison?

3 A That's certainly the way this reads. And I have no  
4 memory of it being otherwise.

5 Q Okay. Showing you now page 1823, line 4 of 5. And  
6 during not only the motion but the argument on the  
7 motion, I think you were talking with Judge Watson,  
8 and down towards around line 20, you made a specific  
9 reference as to what your actual objection was?

10 A There you go. You're absolutely right. I said,  
11 lines 20, 21: "If they want to consider the  
12 conditions in life without parole, that's fine.

13 MR. EHLIES: Thank you very much. That's all.

14 THE COURT: Redirect?

15 MS. BROWN: Just briefly, your Honor.

16 REDIRECT EXAMINATION

17 BY MS. BROWN:

18 Q Mr. Epps, let's go back to the, what I call the  
19 Tennessee tape, the tape you were given in discovery.  
20 I understood your testimony on cross, it was a  
21 continuous tape; is that correct? So you---

22 A I wish I could remember or see it and tell you. It  
23 seems to me it was -- when I say continuous, they cut  
24 on the camera when Brad walked in the room and he was  
25 there forever. I mean it was a long tape. But was



1           it divided into tapes, divided into disks, somehow  
2           given to me in segments? I don't have a memory of  
3           that. In my mind the tape started, it ran the whole  
4           time he was in the room, and it cut off when they  
5           left. So it was a continuous tape.

6           But I don't remember how it came to me. And I think  
7           that's kind of the miscommunication here. And in my  
8           mind, it was divided up into parts because there were  
9           different people in the room at different times.

10        Q    When you were given the tape in discovery, did I  
11           understand you to testify that you were given a tape  
12           that you were able to look at and you selected things  
13           off this tape?

14        A    I got a tape. I went to a room at the courthouse.  
15           In my mind I think the tape was something I couldn't  
16           have played anywhere else; but I might have gone  
17           there just because it was quiet. I don't know. But  
18           I think it was something I couldn't play anywhere  
19           else at the time.

20        Q    So you saw the entire tape?

21        A    And I sat down in that room and I would watch and  
22           take notes and tie my notes to the time stamp that  
23           was on the tape.

24        Q    And that was in order to allow you to---

25        A    I got to finish my answer, I'm sorry.

1 Q Please continue.

2 A I would sit there a while, then I would watch and I  
3 would get up and I would go steal crackers and soda  
4 from John Mauldin's office and I'd go back. I  
5 watched it, I couldn't tell you if I watched one day  
6 or four days; but over a period of time I watched  
7 that thing from start to finish. And I'd go back and  
8 forth to get my notes because I wanted notes where I  
9 could pick out what I wanted to use or if I wanted to  
10 use any of it. And I watched all the way through one  
11 time. And then I cherry picked what I wanted. And I  
12 got it put into an excerpt tape. That's how I  
13 watched the tape and pulled out this that's now been  
14 marked as Exhibit 1-A.

15 Q Your file. What is your file kept.

16 A Everything I have in Brad's case is downstairs in  
17 John Mauldin's office. There's four file boxes down  
18 there.

19 Q And have you retained custody and control of that  
20 file?

21 A The public defenders office has retained custody and  
22 control of that file.

23 Q Would you be able to obtain the original tape that  
24 was given to you in discovery so we could supplement  
25 the record in this case with that original tape?

1 A If it's down there. It should be there, but I didn't  
2 see it to my knowledge.

3 Q Let me just ask you about the tape itself. Was there  
4 anything on the tape that you did not want to come in  
5 as evidence against Mr. Sigmon?

6 A I thought the solicitor was going to play the tape  
7 because I thought on the whole the tape was bad for  
8 Mr. Sigmon.

9 Q Thank you. And moving on about Mr. Aiken and your  
10 argument against Mr. Sligh, you were asked would you  
11 have structured the presentation of prison condition  
12 evidence differently in hindsight? Isn't the truth  
13 of the matter you offered Mr. Aiken as an expert in  
14 prison conditions and you argued prison conditions to  
15 the jury?

16 A I honestly don't know. If you show me that I argued  
17 it, I argued it. I don't know. I do know that it's  
18 obvious from what Mr. Ehlied just showed me, I wasn't  
19 worried about my argument on life without parole  
20 because that's what I said in my argument to Judge  
21 Watson.

22 MS. BROWN: Court's indulgence just a moment, your  
23 Honor.

24 THE COURT: Yes, ma'am.

25

1 BY MS. BROWN:

2 Q Mr. Epps, part of the reason for offering Mr. Aiken  
3 as a witness was to establish that Mr. Sigmon would  
4 be a victim; is that correct?

5 A Yes. That is correct.

6 Q The fact that he's a victim, is that anything to do  
7 with adaptability?

8 A Unfortunately, probably not.

9 Q Pardon me?

10 A Probably not.

11 THE COURT: Recross?

12 MR. EHLIES: Nothing, Judge. Thank you so much.

13 THE COURT: You may step down. Any reason he can't  
14 be excused?

15 MS. BROWN: None from the State.

16 THE COURT: You're welcome to stay, otherwise  
17 excused.

18 MR. EPPES: Do they need me to see if I can find the  
19 tape? If I'm going to do this, to do that. If I do, I'll  
20 bring it right back up.

21 THE COURT: Like I said, if you couldn't and your  
22 best people in the courtroom couldn't, I don't know how  
23 you expect me to look at it.

24 A It wasn't the.

25 THE COURT: Call your next witness.

1 MS. BROWN: That is the State's case.

2 THE COURT: Okay. All right.

3 MR. EHLIES: Could I have just a second?

4 THE COURT: Yes, sir. I understand you rested. I  
5 gave you an opportunity to supplement Mr. Abdalla's  
6 deposition. He's here. Want to make sure you're clear on  
7 that. Do you have any reply?

8 MR. EHLIES: We might have some reply. Catch up with  
9 Mr. Epps, see if the tape is actually available. That's  
10 in the building, obviously, in this building on the first  
11 floor. Could we have about a ten-minute recess --

12 THE COURT: Fine. We'll take a 15-minute break.

13 (Brief recess taken.)

14 MR. EPPES: Judge, it was two VCR tapes. It wasn't  
15 anything sophisticated about it. I just apparently  
16 watched them in there because I wanted to be left alone.

17 THE COURT: Now we have to find an old antiquated VCR  
18 machine. I'm sure we have the tapes and the State would  
19 like to ask Mr. Eppes about the tapes. Mr. Eppes wants to  
20 talk about where he found them, et cetera, et cetera,  
21 because he getting ready to turn them over to the  
22 reporter.

23 Miss Brown?

24 REDIRECT EXAMINATION (Continues)

25

1 BY MS. BROWN:

2 Q Mr. Eppes, you provided to the Court with two tapes;  
3 is that correct?

4 A Yes. I went down to John Mauldin's office, went to  
5 the Sigmon files where they were kept in the public  
6 defender's office, and I found the two tapes that  
7 were the tapes I watched. They are VCR tapes, so it  
8 wasn't any special reason I watched at the courthouse  
9 except that I guess I wanted to be able to watch them  
10 without my phone ringing or anything.

11 They have my handwriting on them. "Sigmon, one of  
12 two and two of two from Gatlinburg." There's other  
13 handwriting on it. But the handwriting in the black  
14 Sharpie is mine. These are, I believe the two tapes  
15 of that extensive filming at the Chattanooga Police  
16 Station, wherever -- Gatlinburg Police Station or  
17 whenever it was.

18 Q And those tapes were from your file?

19 A Were from the file they were given to me as part of  
20 discovery.

21 Q And the file has never been released to us; is that  
22 correct? It stayed in your custody and control?

23 A It's been at John Mauldin's office. No one ever  
24 asked me for permission to release to it to you. I  
25 don't believe it has been. You always asked me for

1 materials in it you were interested in, and I  
2 provided.

3 Q You provided these tapes in the same fashion?

4 A I provided these tapes to the Court, advised John  
5 Mauldin's office they were going to be entered in  
6 evidence in this proceeding. That's why they're not  
7 in that file anymore.

8 THE COURT: The segment about call the Māma's on this  
9 tape?

10 THE WITNESS: Yes, sir. It's my belief that's part  
11 of these tapes.

12 THE COURT: Do you have any questions about these  
13 tapes?

14 MR. EHLIES: I do, sir. If you could indulge me?

15 THE COURT: Yes, sir.

16 RECROSS EXAMINATION

17 BY MR. EHLIES:

18 Q The tapes you now tendered to the Court are two  
19 cassettes, VHS cassette tapes? All the tapes we been  
20 talking about you saw in the context of this case?

21 A Yes. I remembered when I went down there to look,  
22 there's a series of VHS tapes of the excerpts I  
23 wanted to have put on that disk that we had  
24 transferred to these tapes, to tapes before they were  
25 transferred to disk.

1 Q My point, the two cassettes tapes contain 100 percent  
2 of the video evidence?

3 A From Gatlinburg, also a tape from Channel 4 down  
4 there.

5 Q Correct. Now the solicitor offered none of that as  
6 evidence?

7 A The solicitor offered not a minute of it.

8 Q None of it. This is our objection to coming inial.  
9 The only portion that was ever relevant in the trial  
10 of the case was the portion that you transferred from  
11 the VHS cassette onto an DVD disks?

12 A The only portion ever attempted to be offered in the  
13 case was the portion I transferred to the DVD disk,  
14 yes.

15 Q That's's Exhibit 1 and 1-A.

16 A Exhibit 1-A.

17 Q Exhibit 1-A never worked?

18 A That's Exhibit 1-A, never worked.

19 Q And Exhibit 1 I exhibited copy does work of 1-A,  
20 contains the phone-home segment?

21 A Exhibit one is not a copy of exhibit 1-A. Exhibit 1  
22 is an excerpt of these defendant's exhibit 1-A, and  
23 1-B. containing what you represent to me to be the  
24 entirety of Mr. Sigmon's phone call to his mother.

25 Q It is our position only thing left/refer for the



1 Court to review in this case is the portion of the  
2 phone home which is -- the whole phone home  
3 experience, which is on---

4 THE COURT: I've already admitted the tapes.

5 MR. EHLIES: Exhibits one.

6 THE COURT: If you're making an informal motion,  
7 motion denied.

8 MR. EHLIES: I just wanted the record to be clear  
9 what our position was.

10 THE COURT: I think you already made that motion.  
11 Overruled. Anything else you want to ask him about the  
12 times?

13 MR. EHLIES: That's about it.

14 THE COURT: Ms. Brown, anything in reply about the  
15 tapes?

16 MS. BROWN: No, sir. I think we've gone over it.

17 THE COURT: Mr. Eppes, thank you so very much.

18 MR. EPPES: Thank you, Judge.

19 THE COURT: If I need an eight track, I call you.

20 MR. EPPES: If you need me, I think both sides have  
21 my cell phone number. Be happy to come back.

22 THE COURT: All right. Do you have any reply  
23 testimony?

24 MR. EHLIES: No, sir.

25 THE COURT: Thank you very much. We'll conclude the

1 hearing unless you want to make very brief closing  
2 statements, I'll be glad to listen to you.

3 MR. EHLIES: I don't really see any need to do that.  
4 I'm not capable of being brief. Hate to turn loose to  
5 start with.

6 THE COURT: Ms. Brown, you want to make a brief  
7 closing statement?

8 MS. BROWN: No, Your Honor. I would like to ask if  
9 you are going to request post hearing briefs and if we  
10 need to order the transcript to be able to go back to  
11 that.

12 THE COURT: I'll deal with that this way. After I  
13 review what you presented to us, at least the law clerk  
14 has and we're together, if I want any particular point  
15 briefed, I'll notify you by email or letter.

16 MS. BROWN: Yes, sir.

17 THE COURT: I may very well do that. If I want any  
18 particular point briefed, I may do it by email or letter  
19 to you and ask you to submit some additional briefs after  
20 I sort of digested everything you've given me.

21 MS. BROWN: Yes, sir.

22 THE COURT: Now, if you want to get the transcript  
23 that's up to you. You got to make that decision. I'm not  
24 going to tell you whether to do that or not. If you want  
25 to get the transcript, submit that, because it's going to

1 take a while to go through what you all have submitted.  
2 This decision is not going to be made in the next couple  
3 of weeks. I'm going to have some time to look at all  
4 this.

5 MS. BROWN: Yes, sir.

6 THE COURT: And I don't know how long it would take  
7 the transcript I don't know how backed up she is. You'll  
8 have to talk to her about that if you want her to do that.  
9 Thank you very much.

10 MR. EHLIES: Thank you, sir.

11 \* \* \* \* \* END OF REQUESTED TRANSCRIPT OF RECORD \* \* \* \* \*

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1 CERTIFICATE OF REPORTER  
2  
34 STATE OF SOUTH CAROLINA )  
5 COUNTY OF GREENVILLE )  
6  
78 I, Donna M. Brady, Official Court Reporter for the  
9 Tenth Judicial Circuit of the State of South Carolina, do  
10 hereby certify that the foregoing is a true, accurate and  
11 complete Transcript of Record of the proceedings had and  
12 evidence introduced in the trial of the captioned case,  
13 relative to appeal, in the Court of Common Pleas for  
14 Greenville County, South Carolina, on the 4th day of  
15 August, 2008.16 I do further certify that I am neither of kin,  
17 counsel nor interest to any party hereto.  
1819 AUGUST 15, 2008  
2021  
22 Donna M. Brady  
23 Donna M. Brady  
24 Circuit Court Reporter  
25

|                           |   |                              |
|---------------------------|---|------------------------------|
| STATE OF SOUTH CAROLINA   | ) | IN THE COURT OF COMMON PLEAS |
|                           | ) |                              |
| COUNTY OF GREENVILLE      | ) | 06-CP-23-6547                |
|                           | ) |                              |
| BRAD KEITH SIGMON, #6008, | ) |                              |
| Applicant,                | ) |                              |
|                           | ) | AMENDED APPLICATION FOR      |
| vs.                       | ) | POST-CONVICTION RELIEF       |
|                           | ) |                              |
| STATE OF SOUTH CAROLINA,  | ) |                              |
| Respondent.               | ) |                              |

[Note: This application follows SCRCF Appendix of Forms, Form 5, as required by Rule 71.1(b), SCRCF.]

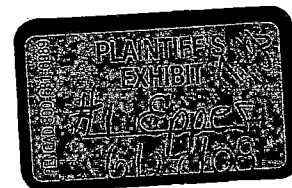
1. Applicant is detained at the Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, South Carolina, 29472.
2. He was convicted and sentenced in the Greenville County Court of General Sessions.
3. Applicant was indicted on November 20, 2001, as follows:

Burglary 01-GS-23-7629  
Murder 01-GS-23-7630 (David Larke)  
Murder 01-GS-23-7631 (Gladys Larke)

Applicant was convicted of all charges on July 19, 2002.

4. On July 21, 2002, Applicant was sentenced as follows:
 

Burglary (30 years)  
Murder (death)  
Murder (death)
5. A finding of guilty was made after a plea of not guilty.
6. The Applicant appealed from the judgment of conviction and sentence.
7. (a) The courts to which Applicant appealed:
  - (i) The South Carolina Supreme Court.



- (ii) The United States Supreme Court.
- (b) The result in each court to which Applicant appealed:
  - (i) Convictions and sentences affirmed.
  - (ii) Petition for Writ of Certiorari denied.
- (c) The date of each result:
  - (i) Convictions and sentences affirmed on December 19, 2005. Rehearing was denied on January 13, 2006.
  - (ii) Petition for Writ of Certiorari denied on June 26, 2006.
- (d) Citations of any written opinion or orders entered pursuant to such results:
  - (i) *State v. Sigmon*, 366 S.C. 552, 623 S.E.2d 648 (2005).
  - (ii) *Sigmon v. South Carolina*, 548 U.S. 909 (2006).

8. Not applicable.

9 & 10. **GROUND FOR RELIEF WITH SUPPORTING FACTS**

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(a) 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 circumstance 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 emotional nature of Sigmon's initial confession. *See* ROA 1501-12.

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

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

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



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

11 & 12. Applicant appealed directly to the South Carolina Supreme Court and petitioned the United States Supreme Court for a writ of certiorari. Applicant has not previously filed an application for post-conviction relief nor a petition for a writ of habeas corpus in state or federal court from these convictions and sentences.

13. None of the grounds set forth in (9) has been previously presented to this or any other Court, State or Federal.

14. Not Applicable.

15. These grounds rely on additional facts outside the record which was before the previous courts.

16. Applicant was previously represented by counsel.

17. Applicant was represented at trial by Frank Eppes, Jr., and John Abdalla, both of the Greenville County Bar. During the direct appeal and petition for writ of certiorari, Applicant was represented by Eleanor Duffy Cleary of the S.C. Office of Appellate Defense.

18. Applicant seeks the vacation of his convictions and sentences.

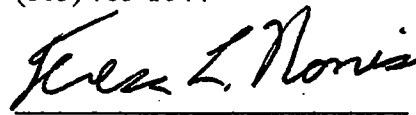
19. Not applicable.

Respectfully submitted,

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

Teresa L. Norris  
Blume Weyble & Norris, LLC  
P.O. Box 11744  
Columbia, SC 29211  
(803) 765-1044

By:



Teresa L. Norris

June 2, 2008.

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE )

06-CP-23-6547

BRAD KEITH SIGMON, #6008, )  
Applicant, )

CERTIFICATE OF SERVICE

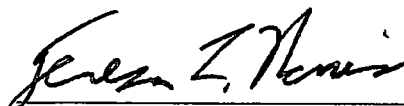
vs. )

STATE OF SOUTH CAROLINA, )  
Respondent. )

I do hereby certify that I have served the Amended Application for Post-Conviction Relief, in the above-referenced case, on the attorney for the Respondent by electronic mail and by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

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

This the 2nd day of June, 2008, in Columbia, South Carolina.

  
TERESA L. NORRIS

June 2, 2008.

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE )

06-CP-23-6547

BRAD KEITH SIGMON, #6008, )  
Applicant, )

APPLICANT'S TRIAL BRIEF

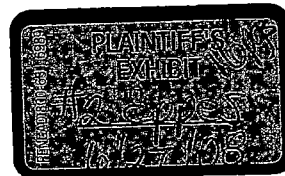
vs. )

STATE OF SOUTH CAROLINA, )  
Respondent. )

Applicant files this trial brief to apprise the Court of the relevant record-based facts and legal principles relevant to the grounds for relief raised in the amended application for post-conviction relief.

All of the grounds for relief involve claims of ineffective assistance of counsel, which must be examined under the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* standard is satisfied if an applicant establishes both that his attorney's representation "fell below an objective standard of reasonableness," *id.* at 688, and that the applicant was "prejudiced" by his attorney's substandard performance, *id.* at 692.

In assessing whether counsel's conduct was reasonable under the *Strickland* standard, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. Attorneys in capital cases "must be conversant with constantly new interpretations of constitutional law by not only the United States Supreme Court, but by courts of all jurisdictions, both Federal and State." *Bailey v. State*, 309 S.C. 455, 460, 424 S.E.2d 503, 506 (1992). See also *United States v. Mooney*, 497 F.3d 397, 404 (4<sup>th</sup> Cir. 2007) (Counsel in criminal cases are charged with the



responsibility of conducting “appropriate investigations, both factual and legal, to determine if matters of defense can be developed”).

If counsel fails to object to prejudicial legal errors at trial, a valid strategy cannot be found where “counsel . . . fail[s] to object to comments which constitute an error of law and are inherently prejudicial.” *Matthews v. State*, 350 S.C. 272, 276, 565 S.E.2d 766, 768 (2002). See also *Von Dohlen v. State*, 360 S.C. 598, 613, 602 S.E.2d 738, 746 (2004) (counsel’s conduct deficient in failing to object to improper argument asking the jurors to place themselves in the victim’s shoes); *Hall v. Catoe*, 360 S.C. 353, 364, 601 S.E.2d 335, 341 (2004) (counsel’s conduct deficient and prejudicial in failing to object to the solicitor’s improper comparison between the worth of the defendant’s life and the lives of the victims). Likewise, a valid strategy cannot be found when the professed strategy is invalid under an objective standard of reasonableness. *Roseboro v. State*, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1995). Finally, when counsel’s conduct is based on an erroneous understanding of the law “counsel made no tactical ‘choice.’” *Luchenburg v. Smith*, 79 F.3d 388, 392-93 (4<sup>th</sup> Cir. 1996).

A finding of prejudice under *Strickland* requires that an applicant “must show that there is a reasonable probability that, but for counsels’ 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).

### Grounds for Relief

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.*

During the trial and sentencing phase, Applicant’s counsel failed to adequately preserve various issues for appellate review, including failing 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. Counsel also failed to ensure appropriate instructions to the jury in sentencing by failing to adequately request a charge on the statutory mitigating circumstance of age or mentality, by failing to object to the restrictive definition of mitigating circumstances as evidence that “simply lessens the degree of one’s guilt,” and by denigrating non-statutory mitigation evidence as only evidence the “defendant claims serves the same purpose” as statutory mitigating circumstances.

**(i) Improper evidence concerning the day to day circumstances of prison life.**

Prior to opening statements in the sentencing phase, defense counsel moved to limit the anticipated testimony of James Sligh, an employee of the South Carolina Department of Corrections. Record on Appeal (ROA) 1823. The state asserted an intent to have him testify concerning “the day in the life of a prisoner in – serving life without parole, what privileges, what amenities [sic], what advantages this individual will have.” ROA 1823. The solicitor even categorized prison, in argument on admissibility of this testimony, as “nothing more than a small little town that’s got a

restaurant and all that." ROA 1825. The court expressed some doubt about the admissibility of this testimony because "aggravating circumstances are limited to statutory aggravating circumstances with the addition of character of the defendant, with the addition of victim impact." ROA 1826-27. Nonetheless, because the court noted that defense counsel were "not objecting to it," ROA 1826, the court restricted only the intended evidence about the day to day conditions on death row, ROA 1827.

While the state did not present the testimony of Mr. Sligh, the state pursued this line of evidence and argument in cross-examination of Jim Aiken, the defense expert on Applicant's adaptability to confinement. During this examination, the solicitor elicited information that an individual serving a sentence of life imprisonment without parole would "have regularly scheduled visitors" and "contact visitation or non-contact visitation . . . at the discretion of the administrator." ROA 2146, 2149-50. He would also have access to television; recreation; "a library to work on law materials, or to check out books and read books"; telephone to "call home, call friends, call whoever he wanted to, call as long as it was a collect call"; canteen; showers at least "three times a week"; "educational classes"; mail, including magazine subscriptions such as "Sports Illustrated"; and a "personal locker in his bunk area where he can keep his own personal effects." ROA 2146-49. The solicitor also implied that "if a family member[] dies, he gets to go to the funeral." ROA 2146. Defense counsel posed no objection to any of this testimony and had no strategic reason for the failure to do so.

The solicitor further extended this line with his closing argument asserting that "life imprisonment is not the appropriate sentence in this case." ROA 2190.

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.

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."

ROA 2191. Still defense counsel posed no objection.

Counsel's failure to object was deficient because the evidence and argument by the solicitor violated both S.C. Code § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution.

As the South Carolina Supreme Court recognized long ago:

Such determination as the time, place, manner, and conditions of execution or incarceration . . . are reserved by a statute . . . to agencies others than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and the characteristics of the individual defendant.

*State v. Plath*, 281 S.C. 1, 15, 313 S.E.2d 619, 627 (1984).

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 no concern of theirs.

*State v. Atkinson*, 253 S.C. 531, 535, 172 S.E.2d 111, 112 (1970) (quoting *State v. White*, 142 A.2d 65, 78 (N.J. 1958)).



The conditions of incarceration do not reflect the circumstances of the crime or the characteristics of the defendant. As the court said in *Plath*, "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]." 281 S.C. at 15, 313 S.E.2d at 627.

As subsequently explained in more detail:

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. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole.

*State v. Bowman*, 366 S.C. 485, 498, 623 S.E.2d 378, 385 (2005). Thus, it is clearly error to elicit testimony about the "privileges" or "benefits" of an inmate given a life without parole sentence, such as "access to the yard, work, education, meals, canteen, phone, library, recreation, mail, television, and outside visitors." *State v. Burkhardt*, 371 S.C. 482, 487, 640 S.E.2d 450, 452-53 (2007). Furthermore, this type of evidence is extremely prejudicial and requires reversal because "this entire subject matter inject[s] an arbitrary factor into the jury's sentencing considerations" in violation of S.C. Code § 16-3-25(C)(1). 371 S.C. at 488-89, 640 S.E.2d at 453. Likewise, the Eighth Amendment's prohibition against cruel and unusual punishment 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.'" *Johnson v. Mississippi*, 486 U.S. 578, 585 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 884-85, 887 n.24 (1983)).

While this case was tried before *Bowman* or *Burkhardt*, counsel's conduct was still deficient in failing to be familiar with the constitutionally mandated requirement and "long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant

or the circumstances of the crime,” *Burkhart*, 371 S.C. at 488, 604 S.E.2d at 453, as well as the clear statements in *Plath* and *Atkinson*. Prejudice is clear where much of Applicant’s case for life was his adaptability to confinement, which would have been viewed possibly as aggravating evidence in conjunction with arbitrary and irrelevant information.

(ii) **Improper closing arguments expressing the Solicitor’s personal opinions.**

During the solicitor’s closing argument in sentencing, the solicitor asserted that “the State has asked for the death penalty and we think it’s appropriate in the case,” ROA 2184, and reminded the jury that the State of South Carolina “is represented through me and my staff,” ROA 2187. The Solicitor went further, however.

Now, when we asked for the death penalty, it’s a fair and appropriate question for you to say back to me, Solicitor Arial, 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 [sic] 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 the world that do not deserve to continue to live with us.

ROA 2187-88. 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.

ROA 2194. Defense counsel did not object to any of this argument and did not have a reasonable strategic reason for the failure.

The Solicitor's argument was improper because it related the solicitor's private decision to seek and personal opinion that the death penalty is appropriate in this case. "Such reference could divert the attention of jurors from the evidence before them to an improper consideration of the solicitor's personal views." *State v. Smart*, 278 S.C. 515, 517, 299 S.E.2d 686, 687 (1982). In short, this argument injected an arbitrary factor in the proceedings in violation of S.C. Code § 16-3-25(C)(1) and the Eighth and Fourteenth Amendments to the United States Constitution. *State v. Woome*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 (1981); *State v. Butler*, 277 S.C. 543, 290 S.E.2d 420 (1982).

Trial counsel's failure to object to this improper evidence and argument was both deficient and prejudicial. *Strickland, supra*.

**(ii) Failure to request a charge on the statutory mitigating circumstance of age or mentality.**

The trial evidence established that around 8:00 p.m. on April 25, 2001, Applicant arrived at the home of his employee, Charles Hall, and Mr. Hall "could tell he had been drinking," although he "seemed coherent." ROA 1696. Applicant had also reported earlier at work that he had been drinking since 8:00 a.m. ROA 1698.

On April 26, 2001, Applicant reported that he had used approximately fifty dollars worth of crack cocaine and drank two mixed drinks and a half a bottle of Peppermint Schnapps. ROA 2105. Around 9:00 p.m. Applicant met up with Eugene Strube. The two bought some beer before going to Applicant's former home, which was next door to the victims' home. ROA 1660-61. In the house, according to Strube, Applicant "drank a six-pack" of beer, ROA 1675, and the two were "smoking some crack" ROA 1663. While Strube got sick off "the first hit," ROA 1671, they each

smoked "a couple hundred dollars worth" of crack, ROA 1676, "through the evening" until they ran out. Strube went to sleep around 1:00 a.m. while Applicant remained awake throughout the night. ROA 1664, 1675. Ultimately, Strube abandoned his agreement to assist Applicant as Applicant entered the victims' home prior to 8:30 a.m. and the crimes ensued. ROA 1326.

With respect to the statutory mitigating circumstances to be charged, defense counsel sought a charge on "[t]he age or mentality of the defendant at the time of the crime,"<sup>1</sup> based only on "testimony about his mental state." ROA 2177. 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 law was substantially impaired."<sup>2</sup> The court's expressed reasoning was that "mentality would be like education level, or mental retardation, or something like that." ROA 2177. Defense counsel did not pursue the point further and conceded the issue. ROA 2177. The court, thus, did not instruct on "age or mentality," ROA 2232, and defense counsel posed no further objection, ROA 2237.

Counsel's failure to correct the trial court's misunderstanding of the law and obtain the instruction or, alternatively, to preserve the issue for appeal was deficient because evidence of alcohol and drug use and intoxication requires instruction on the statutory mitigating circumstances 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

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<sup>1</sup>S.C. Code § 16-3-20(C)(b)(7).

<sup>2</sup>S.C. Code § 16-3-20(C)(b)(6).

of crime. *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002); *State v. Pierce*, 289 S.C. 430, 346 S.E.2d 707 (1986).

The failure to allow the jury to properly consider this mitigating circumstance was both state law error and a violation of the Eighth and Fourteenth Amendment requirements that the jury be allowed to consider any relevant mitigating circumstances concerning the circumstances of the crime and the character of the defendant. *Lockett v. Ohio*, 438 U.S. 586 (1978). Sigmon was prejudiced by this error.

**(iii)&(iv) Failure to object to the trial court's instructions improperly narrowing the scope of mitigating circumstances.**

During the sentencing phase instructions to the jury, the trial court improperly charged the jury that a mitigating circumstance is one which "simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable." ROA 2232. Likewise, the trial court instructed the jury that a non-statutory mitigating circumstance "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." ROA 2232-33.

The trial court's penalty phase instructions impinged upon the jury's ability to properly consider all mitigating evidence offered by Applicant by erroneously suggesting that only circumstances directly related to the offense, such as Applicant's mental status at the time of the offense, were relevant to the jury's sentencing calculus. Part of Applicant'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 Applicant'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.

One of the most well-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 v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *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. *Lockett, supra*. The trial court's instructions improperly precluded the jury from contemplating all relevant evidence to make an individualized sentencing decision.

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).

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 by failing to play the videotape made of Applicant's confession call to his mother shortly after his arrest and by failing to present the available evidence that Applicant was diagnosed and treated for major depression by a consultant of the Greenville County Detention Center.

**(i) Failure to play the emotional, videotaped confession.**

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

**(ii) Failure to present the testimony of Dr. Martin.**

Counsel subpoenaed Dr. Eugene 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. After learning that Dr. Martin was scheduled for vacation, counsel expressed a desire to depose him or to stipulate his testimony and the court left the matter open for discussion with the solicitor. ROA 1442. Counsel never again addressed this matter on the record, however, and did not call Dr. Martin to testify. Instead, counsel attempted to present hearsay testimony that "Dr. Martin diagnosed him as having major depressive disorders" and "it's very recurrent in nature depression." ROA 2103. The trial court sustained the state's objection "without the proper foundation," ROA 2103, which counsel never attempted to establish. Instead, counsel abandoned this line of questioning without establishing either a diagnosis of depression or an expert explanation of depression for the jury.

Counsel's conduct was deficient and not based on strategy. Counsel's conduct was also prejudicial even though the Greenville County Detention Center medical records were admitted into evidence. ROA 1969; Defense Exhibit 10. Even assuming that the jury reviewed the records, which were not even presented in the context of a witness' testimony or admitted while the jury was present

in the courtroom, the jury would have learned only that Applicant was diagnosed with “depressive disorder recurrent, currently in remission” within several weeks of the time of trial and throughout his pretrial confinement. *See, e.g., Turpin v. Lipham*, 510 S.E.2d 32 (Ga. 1998). The jury was provided no information, however, on Applicant’s previous history of depressive disorder and treatment or the significant emotional and behavioral impact of depressive disorder, which will be presented in the hearing before this Court.

Counsel’s omissions were both unreasonable and prejudicial in sentencing. *Strickland, supra.*

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.*

Counsel’s conduct was deficient in presenting 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.

Specifically, 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. ROA 1950. Counsel then called Troy Barbare, who was Rebecca Barbare’s second husband, to testify briefly that she began dating Barbare while she was separated but not divorced from Sims. After a sidebar following the state’s objection about “the course” of their relationship, ROA 2032, counsel elicited no relevant information other than the fact that she had been dating Applicant during a separation from Barbare, but then continued the marriage with Barbare. ROA



2034. The State's objection to testimony about possible orders of protection or the basis for Barbare's divorce from her were then sustained. ROA 2036.

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 Sigmon and Sigmon was leaving him threatening messages on his voice mail. ROA 2039-40. The threats were specific that if Barbare "didn't stay away from her" Applicant would "kill" him. ROA 2040. 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." ROA 2041.

During the course of instructions on mitigation, however, defense counsel sought and obtained an instruction on the statutory mitigating circumstance of provocation by the victim, which the court agreed to give based on "the action of Mr. Larke saying he was going to get his gun" when Applicant entered the victims' home. ROA 2178.

During closing arguments, however, counsel focused on Applicant's relationship with Rebecca Barbare as the provocation.

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.

ROA 2196. Counsel then mentioned the testimony of Barbare's second and third husbands and Applicant's confession that included "two and half pages" about his relationship with her and

detailed the information from the confession. ROA 2196-98. Counsel made no mention of the provocation mitigation factor or of Mr. Larke mentioning a gun when Applicant 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," ROA 2232, would have understood this to mean that Ms. Barbare provided the provocation or, in the words of defense counsel, "the trigger," ROA 2196.

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).

Respectfully submitted,

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

Teresa L. Norris  
Blume Weyble & Norris, LLC  
P.O. Box 11744  
Columbia, SC 29211  
(803) 765-1044

By:

  
Teresa L. Norris

June 16, 2008.

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE )

06-CP-23-6547

BRAD KEITH SIGMON, #6008, )  
Applicant, )

CERTIFICATE OF SERVICE

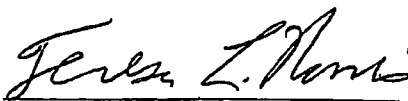
vs. )

STATE OF SOUTH CAROLINA, )  
Respondent. )

I do hereby certify that I have served the Applicant's Trial Brief, in the above-referenced case, on the attorney for the Respondent by electronic mail and by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

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

This the 16th day of June, 2008, in Columbia, South Carolina.

  
TERESA L. NORRIS

June 16, 2008.

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|-------------------------|---|---------------------------|
| STATE OF SOUTH CAROLINA | ) |                           |
|                         | ) | COURT OF GENERAL SESSIONS |
| COUNTY OF GREENVILLE    | ) |                           |
|                         |   |                           |
| STATE OF SOUTH CAROLINA | ) |                           |
|                         | ) | MOTION to LIMIT TESTIMONY |
| v.                      | ) | OF JAMES SLIGH            |
|                         | ) |                           |
| BRAD KEITH SIGMON,      | ) |                           |
| Defendant.              | ) |                           |

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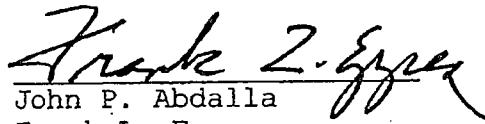
Defendant, Brad Keith Sigmon, by and through his undersigned counsel, hereby moves this Court in limine restricting the testimony of James Sligh of the South Carolina Department of Corrections. This motion is made for the following reasons:

1. Mr. Sligh is an employee of the Department of Corrections that is expected to testify about the conditions of the maximum security facilities and of death row, one of which will house Mr. Sigmon for the duration of his life.
2. It is expected that Mr. Sligh will provide information that Death Row provides more security, and tougher living conditions than maximum security facilities.
3. This testimony is unfair and prejudicial to Mr. Sigmon because it may lead the jury to conclude that Mr. Sigmon will have a tougher punishment or less likelihood of escape if he is on Death Row.



4. The question before the jury is whether Mr. Sigmon lives or dies. It would be improper for them to consider his housing conditions on death row as a part of his punishment. It is neither proper under either the South Carolina or United States Constitutions, nor is it in compliance with the law of South Carolina. S.C. Code Section 16-3-20.

Respectfully submitted,

  
John P. Abdalla  
Frank L. Eppes  
Attorneys for the Defendant  
Greenville County Courthouse  
Greenville, S. C. 29601

Greenville, South Carolina  
20 day of July 2002

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## LEXSTAT SC CODE ANN § 16-3-20

## SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

\*\*\* THIS DOCUMENT IS CURRENT THROUGH ALL LEGISLATION ENACTED IN 2007 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH FEBRUARY 25, 2008 \*\*\*

TITLE 16. CRIMES AND OFFENSES  
CHAPTER 3. OFFENSES AGAINST THE PERSON  
ARTICLE 1. HOMICIDE

## GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

*S.C. Code Ann. § 16-3-20 (2007)*

§ 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.

(A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years. If the State seeks the death penalty and a statutory aggravating circumstance is found beyond a reasonable doubt pursuant to subsections (B) and (C), and a recommendation of death is not made, the trial judge must impose a sentence of life imprisonment. For purposes of this section, "life imprisonment" means until death of the offender without the possibility of parole, and when requested by the State or the defendant, the judge must charge the jury in his instructions that life imprisonment means until the death of the defendant without the possibility of parole. In cases where the defendant is eligible for parole, the judge must charge the applicable parole eligibility statute. No person sentenced to life imprisonment pursuant to this section is eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory life imprisonment required by this section. No person sentenced to a mandatory minimum term of imprisonment for thirty years pursuant to this section is eligible for parole or any early release program, nor is the person eligible to receive any work credits, education credits, good conduct credits, or any other credits that would reduce the mandatory minimum term of imprisonment for thirty years required by this section. Under no circumstances may a female who is pregnant be executed so long as she is pregnant or for a period of at least nine months after she is no longer pregnant. When the Governor commutes a sentence of death to life imprisonment under the provisions of Section 14 of Article IV of the Constitution of South Carolina, 1895, the commuttee is not eligible for parole, community supervision, or any early release program, nor is the person eligible to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the mandatory imprisonment required by this subsection.

(B) When the State seeks the death penalty, upon conviction or adjudication of guilt of a defendant of murder, the court shall conduct a separate sentencing proceeding. In the proceeding, if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years. The proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant. If trial by jury has been waived by the defendant and the State, or if the defendant pleaded guilty, the sentencing proceeding must be conducted before the judge. In the sentencing proceeding, the jury or judge shall hear additional evidence in extenuation, mitigation, or aggravation of the punishment. Only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible. This section must not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of South Carolina or the applicable laws of either. The State, the defendant, and his counsel are permitted to present arguments for or against the sentence to be imposed. The defendant and his counsel shall have the closing argument regarding the sentence to be imposed.



(C) The judge shall consider, or he shall include in his instructions to the jury for it to consider, mitigating circumstances otherwise authorized or allowed by law and the following statutory aggravating and mitigating circumstances which may be supported by the evidence:

(a) Statutory aggravating circumstances:

(1) The murder was committed while in the commission of the following crimes or acts:

(a) criminal sexual conduct in any degree;

(b) kidnapping;

(c) burglary in any degree;

(d) robbery while armed with a deadly weapon;

(e) larceny with use of a deadly weapon;

(f) killing by poison;

(g) drug trafficking as defined in *Section 44-53-370(e)*, *44-53-375(B)*, *44-53-440*, or *44-53-445*;

(h) physical torture;

(i) dismemberment of a person; or

(j) arson in the first degree as defined in *Section 16-11-110(A)*.

(2) The murder was committed by a person with a prior conviction for murder.

(3) The offender by his act of murder knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which normally would be hazardous to the lives of more than one person.

(4) The offender committed the murder for himself or another for the purpose of receiving money or a thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, solicitor, former solicitor, or other officer of the court during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The murder of a federal, state, or local law enforcement officer or former federal, state, or local law enforcement officer, peace officer or former peace officer, corrections officer or former corrections officer, including a county or municipal corrections officer or a former county or municipal corrections officer, a county or municipal detention facility employee or former county or municipal detention facility employee, or fireman or former fireman during or because of the performance of his official duties.

(8) The murder of a family member of an official listed in subitems (5) and (7) above with the intent to impede or retaliate against the official. "Family member" means a spouse, parent, brother, sister, child, or person to whom the official stands in the place of a parent or a person living in the official's household and related to him by blood or marriage.

(9) Two or more persons were murdered by the defendant by one act or pursuant to one scheme or course of conduct.

(10) The murder of a child eleven years of age or under.

(11) The murder of a witness or potential witness committed at any time during the criminal process for the purpose of impeding or deterring prosecution of any crime.

(12) The murder was committed by a person deemed a sexually violent predator pursuant to the provisions of Chapter 48, Title 44, or a person deemed a sexually violent predator who is released pursuant to *Section 44-48-120*.

(b) Mitigating circumstances:

(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.
- (3) The victim was a participant in the defendant's conduct or consented to the act.
- (4) The defendant was an accomplice in the murder committed by another person and his participation was relatively minor.
- (5) The defendant acted under duress or under the domination of another person.
- (6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (7) The age or mentality of the defendant at the time of the crime.
- (8) The defendant was provoked by the victim into committing the murder.
- (9) The defendant was below the age of eighteen at the time of the crime.
- (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 statutory instructions as to statutory aggravating and mitigating circumstances must be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of death, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances which it found beyond a reasonable doubt. The jury, if it does not recommend death, after finding a statutory aggravating circumstance or circumstances beyond a reasonable doubt, shall designate in writing, and signed by all members of the jury, the statutory aggravating circumstance or circumstances it found beyond a reasonable doubt. In nonjury cases the judge shall make the designation of the statutory aggravating circumstance or circumstances. Unless at least one of the statutory aggravating circumstances enumerated in this section is found, the death penalty must not be imposed.

Where a statutory aggravating circumstance is found and a recommendation of death is made, the trial judge shall sentence the defendant to death. The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor. Where a statutory aggravating circumstance is found and a sentence of death is not recommended by the jury, the trial judge shall sentence the defendant to life imprisonment as provided in subsection (A). Before dismissing the jury, the trial judge shall question the jury as to whether or not it found a statutory aggravating circumstance or circumstances beyond a reasonable doubt. If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years under this section is eligible for parole or to receive any work credits, good conduct credits, education credits, or any other credits that would reduce the sentence required by this section. If the jury has found a statutory aggravating circumstance or circumstances beyond a reasonable doubt, the jury shall designate this finding, in writing, signed by all the members of the jury. The jury shall not recommend the death penalty if the vote for such penalty is not unanimous as provided. If members of the jury after a reasonable deliberation cannot agree on a recommendation as to whether or not the death sentence should be imposed on a defendant found guilty of murder, the trial judge shall dismiss such jury and shall sentence the defendant to life imprisonment as provided in subsection (A).

(D) Notwithstanding the provisions of *Section 14-7-1020*, in cases involving capital punishment a person called as a juror must be examined by the attorney for the defense.

(E) In a criminal action in which a defendant is charged with a crime which may be punishable by death, a person may not be disqualified, excused, or excluded from service as a juror by reason of his beliefs or attitudes against capital punishment unless such beliefs or attitudes would render him unable to return a verdict according to law.

**HISTORY:** 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361; 1977 Act No. 177 § 1; 1978 Act No. 555 § 1; 1985 Act No. 104, § 1; 1986 Act No. 462, § 27; 1990 Act No. 604, § 15; 1992 Act No. 488, § 1; 1995 Act No. 83, § 10; 1996 Act No. 317, § 1.



# SUBPOENA IN A CRIMINAL CASE

2841

|                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|--------------------------------------------------------------------------------|
| SOUTH CAROLINA <u>GENERAL SESSIONS</u> COURT                                                                                                                                                |                                                                                                                                                                                                                                                                                                                      | COUNTY<br><div style="text-align: center;">GREENVILLE</div>                                                                                                    |                                                                     |                                                                                |
| STATE<br><br><div style="text-align: center;">V.</div><br><br>BRAD KEITH SIGMON                                                                                                             |                                                                                                                                                                                                                                                                                                                      | CASE NO.<br>02-GS-23-7627, 02-GS-23-7632<br><br>SUBPOENA FOR<br><input checked="" type="checkbox"/> PERSON <input type="checkbox"/> DOCUMENT (S) OR OBJECT (S) |                                                                     |                                                                                |
| TO: DR. EUGENE MARTIN, DETENTION CENTER                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| <input checked="" type="checkbox"/> YOU ARE HEREBY COMMANDED to appear in the above named court at the place, date, and time specified below to testify in the above-entitled case.         |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| PLACE<br>Greenville County Courthouse<br>305 East North Street<br>Greenville, SC 29601                                                                                                      | <table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="padding: 5px;">COURTROOM<br/><div style="text-align: center;">To Be Announced</div></td> </tr> <tr> <td style="padding: 5px;">DATE AND TIME<br/><div style="text-align: center;">July 15, 2002 @ 9 a.m.</div></td> </tr> </table> |                                                                                                                                                                | COURTROOM<br><div style="text-align: center;">To Be Announced</div> | DATE AND TIME<br><div style="text-align: center;">July 15, 2002 @ 9 a.m.</div> |
| COURTROOM<br><div style="text-align: center;">To Be Announced</div>                                                                                                                         |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| DATE AND TIME<br><div style="text-align: center;">July 15, 2002 @ 9 a.m.</div>                                                                                                              |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| <input type="checkbox"/> YOU ARE ALSO COMMANDED to bring with you the following document (s) or object (s).<br><div style="border: 1px solid black; height: 150px; margin-top: 5px;"></div> |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| LIST DOCUMENT (S) OR OBJECT (S)                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.                                                     |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| CLERK OF COURT<br><i>Paul B. Wachsmen</i>                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                      | DATE<br><div style="font-size: 24pt; font-family: cursive;">7-15-02</div>                                                                                      |                                                                     |                                                                                |
| (BY) DEPUTY CLERK<br><i>[Signature]</i>                                                                                                                                                     |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |
| THIS SUBPOENA IS ISSUED UPON APPLICATION OF THE:<br><br><input type="checkbox"/> SOLICITOR <input checked="" type="checkbox"/> DEFENDANT                                                    |                                                                                                                                                                                                                                                                                                                      | ATTORNEY'S NAME AND ADDRESS<br>John P. Abdalla, Public Defender<br>Rm 123, Greenville County Courthouse<br>305 East North Street<br>Greenville, SC 29601       |                                                                     |                                                                                |
| Upon receipt of this subpoena please call the Public Defender Office (864) 467-8522.<br>We will do our best to accommodate your schedule.                                                   |                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                |                                                                     |                                                                                |

SCCA 253 (JULY 1, 1993)



2842

FOR John / Frank ☐ Urgent

DATE 7/18 TIME 10:05 ☐ A.M. ☐ P.M.

**While You Were Out**

M. Rosa Jones

OF \_\_\_\_\_

PHONE 235-4982

AREA CODE NUMBER EXTENSION

|                    |                  |
|--------------------|------------------|
| TELEPHONED         | PLEASE CALL      |
| CAME TO SEE YOU    | WILL CALL AGAIN  |
| RETURNED YOUR CALL | WANTS TO SEE YOU |

MESSAGE \_\_\_\_\_

Subpoena RE Brad Sigmon

Dated for 7-22-02

Debbie talked to her

SIGNED  9711

Jim Doriety  
467-2321

Cell #  
350-6105

FOR John / Frank ☐ Urgent

DATE 7/18 TIME 10:00 ☐ A.M. ☐ P.M.

**While You Were Out**

M. Dr. Martin

OF Detention Center

PHONE 880-6566

AREA CODE NUMBER EXTENSION

|                    |                  |
|--------------------|------------------|
| TELEPHONED         | PLEASE CALL      |
| CAME TO SEE YOU    | WILL CALL AGAIN  |
| RETURNED YOUR CALL | WANTS TO SEE YOU |

MESSAGE \_\_\_\_\_

Tell him he will

He said he will be on

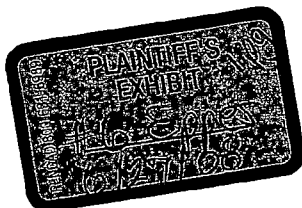
for trial tomorrow and

will not be able to

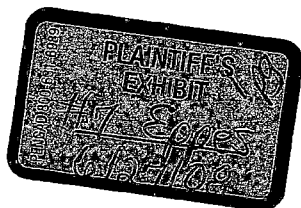
comply with subpoena

wants you to call him

SIGNED  9711



go to jail  
if he is not  
here - tell  
him I will  
try to help  
him & to talk  
to me at  
Lunch



STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

Brad Keith Sigmon, 6008

Applicant,

-vs-

C.A. No. 06-CP-23-6547

State of South Carolina,

Respondent.

### APPLICANT'S SUPPLEMENTAL POST TRIAL MEMORANDUM

The applicant was sentenced to death in a proceeding that included irrelevant and prejudicial information in violation of *S.C. Code Ann.*, §§ 16-3-20(c), and 16-3-25(c)(1).<sup>1</sup>

The error occurred without objection from the applicant's trial counsel.<sup>2</sup>

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<sup>1</sup> *S.C. Code Ann.* § 16-3-20(c) provides in relevant part; "The trial judge, before imposing the death penalty, shall find as an affirmative fact that the death penalty was warranted under the evidence of the case and was not a result of prejudice, passion, or any other arbitrary factor." Emphasis added. Likewise, *S.C. Code Ann.*, § 16-3-25(c)(1) provides that the [Supreme Court] shall determine; "Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." Emphasis added. The language of these statutes was the same when the Supreme Court reversed prison condition testimony and arguments in the 1984 case of *State v Plath*, 281 SC 1, 313 SE2d 619 (1984). In *Plath*, the Court stated unequivocally "In the sentencing phase of a capital case, the function of the jury is not to legislate a plan of punishment but to make the "either/or" selection called for by the language of 16-3-20(A), Code, which in pertinent part provides: "A person who is convicted of or pleads guilty to murder shall be punished by death or by imprisonment for life. Such determinations as the time, place, manner, and conditions of execution or incarceration, as well as the matter of parole are reserved by statute and our cases to agencies other than the jury. As we have repeatedly stated, the sole function of the jury in a capital sentencing trial is the individualized selection of one or the other penalty, based upon the circumstances of the crime and characteristics of the individual defendant." Emphasis added. This case was tried eight years after *Plath* and many years after enactment of the statute restricting sentencing phase testimony to circumstances of the crime and characteristics of the defendant.

<sup>2</sup> Trial counsel knew at the time this case was tried that testimony concerning "prison conditions" was inadmissible. They filed a Motion to Limit the Testimony of James Sligh and in his deposition testimony trial counsel John Abdalla stated that the motion was

**THE QUESTION PRESENTED BY THIS COURT IS WHETHER THE APPLICANT'S RIGHT TO A SENTENCING TRIAL FREE OF ARBITRARY AND PREJUDICIAL INFORMATION MAY NOW BE LIBERATED BY ANY EQUITABLE REMEDY.**

The answer is no because equitable remedies are limited to those circumstances where there is no, or an inadequate remedy at law. In this case there is a clearly deserving, applicable and appropriate remedy at law which is to grant the application and remand for a new sentencing proceeding. The case law (*State v. Bowman*, *State v. Burkhardt*) are cases enforcing the statutory prohibition against irrelevant and arbitrary information in the sentencing phase of the trial. The statute and *Plath* pre-date the trial of this case. Therefore it makes no difference that *Bowman/Burkhardt* were decided after the applicant's trial. The statute excluding arbitrary and irrelevant information and *Plath* existed prior to the trial of this case and trial counsel testified that he knew the arbitrary and irrelevant prison condition testimony should not have been admitted.

January 20, 2009.




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TERESA L. NORRIS  
WILLIAM H. EHLIES, II  
ATTORNEYS FOR THE APPLICANT  
Building A, Suite 201  
310 Mills Avenue  
Greenville, South Carolina 29605  
864-232-3503  
hank@ehlieslaw.com

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attempting to address the "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." Further, Abdalla testified regarding whether prison condition testimony should be admitted: "Well, I mean I felt like it shouldn't have been ----I don't think it should come in." He was correct and trial counsel should have entered timely objections. Depo Abdalla pps 20-21.

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

## IN THE COURT OF COMMON PLEAS

BRAD KEITH SIGMON, #6008, )  
Applicant, )

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

vs. )

STATE OF SOUTH CAROLINA, )  
Respondent. )

ORDER OF DISMISSAL WITH PREJUDICE

ENTERED COMPUTER  
FILED  
CLERK OF COURT  
GREENVILLE  
SOUTH CAROLINA  
JUN 20 2008

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).<sup>1</sup> 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,

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<sup>1</sup> "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).<sup>2</sup> 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

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<sup>2</sup> 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 Larke<sup>3</sup> (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. <sup>4</sup> (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.

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<sup>3</sup> 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.

<sup>4</sup> 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. Ehlied, 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 14<sup>th</sup> and 8<sup>th</sup> 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*.<sup>5</sup> (PCR Transcript, p. 11). Finally, Applicant argued that the *Strickland v. Washington*<sup>6</sup> analysis was not applicable as the issue of prejudice was settled by *Burkhart*, and that prejudice must

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

<sup>6</sup> *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 (4<sup>th</sup> 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.<sup>7</sup>

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

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<sup>7</sup> 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 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 car, 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*,"<sup>8</sup> (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. Burkhardt*, 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

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<sup>8</sup> *State v. Bowman*, 366 S.C. 485, 623 S.E.2d 378 (2005), and *State v. Burkhardt*, 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.<sup>9</sup> According to *Plath*

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<sup>9</sup>This 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

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"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.<sup>10</sup> Lastly, given the overwhelming

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<sup>10</sup> *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*

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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 (8<sup>th</sup> 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 1<sup>11</sup>), 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. Vazquez*, 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

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<sup>11</sup> 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

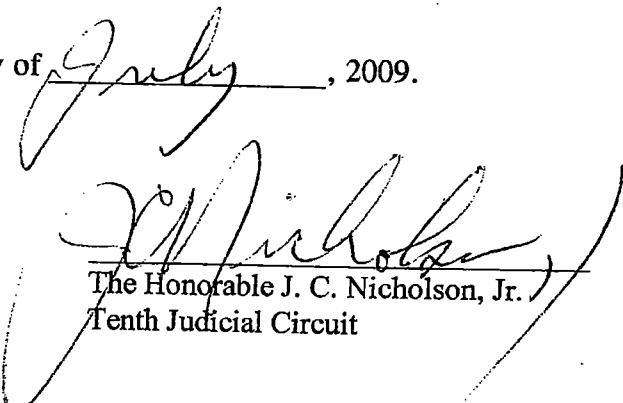
Based on the foregoing, the application for post-conviction relief is denied in its entirety. Applicant has failed to show error, or if he established error, he failed to show prejudice such as would support the granting of either a new guilt proceeding, or a new sentencing proceeding.

## 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