RECEIVED

JUN 21 2010

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

BRAD KEITH SIGMON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

SUPPLEMENTAL APPENDIX

ROBERT M. DUDEK
Chief Appellate Defender

ELIZABETH A. FRANKLIN-BEST
Appellate Defender

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

WILLIAM H. EHLIES, II
Attorney at Law

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

ATTORNEYS FOR PETITIONER.

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

MELODY J. BROWN
Assistant Attorney General

J. ANTHONY MABRY
Assistant Attorney General

P.O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

INDEX

INDEX i

RESPONDENT'S TRIAL BRIEF 1

MEMORANDUM OF LAW ON THE AVAILABILITY OF EQUITY RELIEF
IN POST CONVICTION RELIEF PROCEEDINGS 19

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.)
) RESPONDENT'S TRIAL BRIEF
STATE OF SOUTH CAROLINA,)
)
Respondent.)
)

Pursuant to the amended scheduling order signed November 15, 2007, and filed November 20, 2007, the parties were directed to file and serve trial briefs in the above captioned capital post-conviction relief action in anticipation of the evidentiary hearing scheduled to begin August 4, 2008. Applicant served Respondent with a copy of his trial brief on June 16, 2008. This brief by Respondent follows.

Allegations

Applicant's trial brief sets out only the issues of the amended application dated June 2, 2008. Two issues were previously raised in the initial application:

> 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.

(Application dated October 13, 2006, p. 3).

These issues have been abandoned. Only the following allegations were alleged in the

amended application, and only these allegations were addressed in the trial brief prepared for this Court:

9(a) *Applicant was denied the effective assistance of counsel during the sentencing phase of his trial in violation of South Carolina law and the Sixth and Fourteenth Amendments to the United States Constitution.*

(10)(b) During the trial and sentencing phase, Applicant's counsel failed to adequately preserve various issues for appellate review, including, but not limited to, the following:

(i) Counsel failed to object to the improper cross-examination of James Aiken, an expert presented to testify concerning Applicant's adaptability to confinement, about the day to day circumstances of prison life, Record on Appeal (ROA) 1823-1827, 2146-49, and improper argument about Applicant becoming part of the "power structure" in prison, ROA 2191.

(ii) Counsel failed to object to the Solicitor's improper closing arguments expressing his personal opinions as an elected official on why he believed death was the appropriate punishment. *See* ROA 2188.

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

(iv) Counsel failed to object to the trial court's instructions defining mitigating circumstances as evidence that "simply lessens the degree of one's guilt. That is it makes the defendant less blameworthy, or less culpable, ROA 2232, which improperly narrowed the mitigation evidence to exclude evidence of Applicant's adaptability to confinement and other mitigation.

(v) Counsel failed to object to the trial court's instruction that non-statutory mitigation evidence is only evidence the "defendant claims serves the same purpose" as statutory

mitigating circumstances, which improperly denigrated non-statutory mitigation evidence that is equally as significant under the law as statutory mitigating circumstances.

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

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

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

(i) Counsel sought to play the videotape made of Applicant's call to his mother shortly after his arrest during the cross-examination of Gatlinburg Police Officer Carrie Harbin, but incurred errors in playing the tape. Although the court offered to allow the playing of the tape later, counsel never addressed the issue again and the jury was never allowed to hear the actual statements or shown the very 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 Application, pp. 2-5).

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 render counsel's assistance constitutionally ineffective. *Strickland*, 466 U.S. at 689. *Bell v.*

Evatt, 72 F.3d 421, 429 (4th Cir. 1995). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *Drayton v. Evatt*, 312 S.C. 4, 9, 430 S.E.2d 517, 520 (1993). To effect a fair review of counsel's performance, a reviewing court must "eliminate the distorting effects of hindsight" and attempt "to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *Butler v. State*, 286 S.C. 444-45, 334 S.E.2d 815 (1985). "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment," *Strickland*, 466 U.S. at 690; *Butler*, 286 S.C. at 455, 334 S.E.2d at 815-16, and an applicant claiming error bears the burden of showing counsel's conduct did not constitute reasonable assistance, *Strickland*, 466 U.S. at 689; *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

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, 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.

The issues will be addressed individually in light of the above standards and requirements with the caveat that most of the allegations require the testimony of counsel, especially on informed strategic decision which are not, by their nature, evident in the trial transcript or pleadings. Respondent submits that additional briefing will be required after all evidence has been received by the Court.

Discussion of the Issues

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.

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.

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). When the issue is review in context, however, the record supports there was no basis for an objection as 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).

Respondent would also note that Applicant concedes that "this case was tried before *Bowman* or *Burkhart*,"[1] (Applicant's Trial Brief, p. 6), cases which clearly prohibit defense counsel (as well as the State) from presenting such testimony in the penalty phase. *See State v. Burkhart*, 371 S.C.

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

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 capital cases before the instant trial before the Supreme Court reversed *Burkhart*, which is also well supported by the fact that the issues exist in *Bowman* and *Burkhart*. Here, as in *Plath*, and without the guidance specifically given in *Bowman* and *Burkhart*, the defense 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. 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.

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*

v. Northcutt, 372 S.C. 207, 222, 641 S.E.2d 873, 881 (2007), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868 (1974). Comments reflecting the solicitor's specific decision to seek a death sentence in a given case in an attempt to lessen the jury's responsibility or role are improper. *Id. See also Smart v. State*, 278 S.C. 515, 526, 299 S.E.2d 686, 692-693 (1982). Here, however, neither comment at issue suggested "the solicitor attempted to minimize the jurors' own sense of responsibility for appellant's fate by stressing that he had himself already made the same decision that he was now asking them to make." *State v. Woomer*, 277 S.C. 170, 175, 284 S.E.2d 357, 359 - 360 (1981). Mere mention of the solicitor's involvement in the process to seek the death penalty is not improper. *See State v. Bell*, 302 S.C. 18, 34, 393 S.E.2d 364, 373 (1990). Thus, these comments did not offend the prohibition.

Moreover, the comments are not inflammatory or otherwise improper on their face. *Compare Northcutt, supra.* (solicitor's statement in child murder case that there would be an "open season on babies in Lexington County" if death sentence was not recommended improper as "[t]he sole purpose of this statement was to inflame the jury"). Further, the arguments are clearly tailored to the specific crime and to Applicant himself, and again, are not improper on the face of the record. *See Smart*, 278 S.C. at 526, 299 S.E.2d at 692-693 (cautioning such comments must be case specific and defendant specific). *See also Kinder v. Bowersox*, 272 F.3d 532, 552 (8th Cir. 2001)(finding no unreasonable application of federal law where state supreme court did not reverse on the following argument, "*Evil stares at you in the courtroom... We don't want to share our streets one day with evil. We cannot risk one day sharing our lives and our world with evil*" but found "the statements were proper argument because they addressed [the individual defendant's] character and the appropriate punishment for his crime.")(emphasis in original). Moreover, "[g]eneral deterrence

arguments are admissible in the penalty phase of a capital trial." *See State v. Shuler*, 353 S.C. 176, 189, 577 S.E.2d 438, 444 (2003). Again, the comments do not appear objectionable. As such, counsel could not be ineffective in failing to object. There is no error.

9(a)(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.

To the extent that Applicant argues intoxication, he lacks factual support to establish same. Here, 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[2]), but does not support an allegation of intoxication during the crime. *See generally State v. Vazsquez*, 364 S.C. 293, 301, 613 S.E.2d 359, 363 (2005), *abrogated on different grounds State v. Evans,* 371 S.C. 27, 637 S.E.2d 313 (2006)("the evidence indicated that Appellant may have had drinks, but this is not enough to warrant a charge to the jury for the mitigating factors outlined in § 16-3- 20(C)(b)(2), (6), and (7)."). Therefore, it would appear that Petitioner counsel not prove the prejudice prong of his ineffective assistance of counsel claim, even he could prove error. *Strickland, supra.*

---

[2] 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. Respondent would further note that 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), and 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).

Even so, counsel must request the charge, though clearly the trial judge may reject a request that is not supported by the record. *Id.* To fully and fairly address this issue as to counsel's request or lack of request to charge, the issue would require consideration of counsel's testimony on this issue.

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). 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. There is no error. Therefore, Petitioner could not prove prejudice such that would entitle him to relief under *Strickland*. Even so, Respondent submits that testimony from counsel is necessary for the fair and full resolution of this issue.

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.

Respondent respectfully submits that additional testimony from trial counsel is necessary for the fair resolution of this issue. However, Respondent notes that counsel referenced in his cross-examination 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 11 - 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 was before the jury; thus, Applicant could not prove prejudice under *Strickland*. Even so, Respondent submits that testimony from counsel is necessary for the fair and full resolution of this issue.

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.

Respondent notes the record reflects that Dr. Morton testified that Dr. Martin, of the Greenville County Detention Center, had diagnosed Applicant with "major depressive disorders." (R. p. 2103, lines 5-13). (See also R. p. 2099, lines 9-25). Further, medical records, including treatment records, from the detention center were introduced at trial. (R. p. 1963, lines 21 - p. 1964, line 11; p. 1968, line 1 - p. 1969, line 18). Therefore, the medical evidence at issue was before the jury, and Applicant could not prove prejudice under *Strickland*. Even so, Respondent respectfully submits that testimony from trial counsel is necessary for the fair and full resolution of this issue.

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).

Even so, Respondent respectfully submits that testimony from counsel is necessary for the fair and full resolution of this issue.

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. *See infra.* 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 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 content 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. 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.

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). Respondent notes that 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). It is not clear, without testimony from counsel, if, or to what extent, this affected the selection of the instant charge in mitigation, or the accompanying argument. 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, consistent with Applicant's own statements. Even so, Respondent submits that testimony from trial counsel is necessary for the fair resolution of this issue.

CONCLUSION

Respondent submits that many of the issues may be rejected on the record. However, as noted above, several issues require the testimony of counsel to adequately and fairly assess the allegations of ineffective assistance of counsel. Respondent, therefore, submits that additional briefing will be necessary after the evidentiary hearing and respectfully requests the opportunity to submit a post-trial brief after all the evidence has been received by the Court.

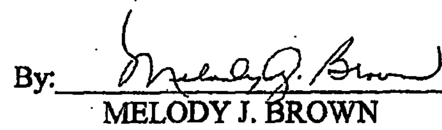
Respectfully submitted,

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

July 14, 2008.
Columbia, South Carolina.

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,	)	
v.	)	CERTIFICATE OF SERVICE
State of South Carolina,	)	
Respondent.	)	

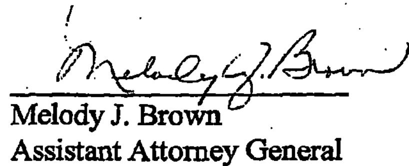
2008 JUL 21 A 10: 00
CLERK OF COURT

The undersigned certifies that on the 14th day of July, 200, a copy of ***Respondent's Trial Brief*** 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. Ehlies, II, Esquire
310 Mills Avenue, Suite 201
Greenville, South Carolina 29605

This 14th day of July, 2008.



Melody J. Brown
Assistant Attorney General

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
BRAD KEITH SIGMON, #6008,	)	C/A No.: 2006-CP-23-6547 (CAPITAL PCR)
Applicant,	)	
vs.	)	MEMORANDUM OF LAW ON THE AVAILABILITY OF EQUITY RELIEF IN POST-CONVICTION RELIEF PROCEEDINGS
STATE OF SOUTH CAROLINA,	)	
Respondent.	)	

This memorandum addresses the following questions posed by the PCR Court: 1) whether equity relief is available in post-conviction relief proceedings; and, (2) if such relief is available, whether such relief is warranted in the instant case. The parties are to consider whether such relief is warranted in the instant case only as to the issue of whether counsel was ineffective in failing to object to the cross-examination of Mr. James Aiken regarding prison conditions. Respondent submits that equity relief is not available, and even if it was available, it would not be warranted in the instant case.

Equity Relief is not Available in Post-Conviction Relief Actions

The Supreme Court of South Carolina has recently reiterated that the Uniform Post-Conviction Relief Act, first adopted in 1969, "was to encompass the relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ, and the relief available by collateral attack under any common law, statutory or other writ, motion, petition, proceeding, or remedy." *Williams v. Ozmint*, 2008 WL 5273092, at p. 1 (S.C.Sup.Ct. Filed December 22, 2008). *See also Al-Shabazz v. State*, 338 S.C. 354, 365, 527 S.E.2d 742, 748 (2000)(goal of PCR act is to consolidate all available remedies); *Simpson v. State*, 329 S.C. 43, 45-46, 495 S.E.2d 429, 430-431

(1998)("Uniform Act encompassed the relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ, and the relief available by collateral attack under any common law, statutory or other writ, motion, petition"); S.C. Code Ann. § 17-27-20(b)("remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them."). Without doubt, the PCR remedy is meant to be all encompassing. Respondent has found no reference to relief in equity as a basis for relief in a post-conviction relief action.[1] However, the right to seek a writ of habeas corpus under the State Constitution remains an option for addressing "the very gravest of constitutional errors, 'which in the setting, constitute[] a denial of fundamental fairness shocking to the universal sense of justice.'" *Williams,* p. 2, *quoting Green v. Maynard*, 349 S.C. 535, 538, 564 S.E.2d 83, 84 (2002). *See also McWee v. State*, 357 S.C. 403, 406, 593 S.E.2d 456, 457 (2004)(same). Our State Supreme Court has said that state habeas "acts as an ultimate ensurer of fundamental constitutional rights." *Williams*, at p. 2. It is of note that habeas actions are historically regarded as actions based on equitable principles. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 672 (2006)(Scalia, Thomas & Alito, JJ. dissenting); *Fay v. Noia*,

[1] In fact, the only reference to equity found relates to fairness in having the issue heard, not in a grant of relief on the merits. *Whitehead v. State*, 352 S.C. 215, 574 S.E.2d 200 (2002) (recognizing equitable doctrine of laches applicable in PCR actions where statute of limitation is otherwise applicable); *Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct.App. 2008)(considering the availability of equitable tolling of one-year statute of limitations in PCR).

372 U.S. 391, 438 (1963); *Nowaczyk v. Warden, New Hampshire State Prison*, 299 F.3d 69, 81 (1st Cir. 2002).

Respondent concludes that it would be inappropriate to grant relief when Applicant has failed to show he is entitled to relief under the appropriate legal standard in the appropriate forum. Further, it would be inappropriate to resort to equity where there is at least one additional action available for review of the issue. *See generally Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007)("equitable relief is generally available where there is no adequate remedy at law"); *Santee Cooper Resort, Inc. v. South Carolina Public Service Com'n*, 298 S.C. 179, 185, 379 S.E.2d 119, 123 (1989)("Equitable relief is generally available only where there is no adequate remedy at law" and a remedy is adequate where it "certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity.")(internal citations omitted). Equity relief in this forum is not available.

Moreover, it is clear that the principles of equity do not apply in regard to the issue at hand. Here, Applicant seeks relief on an issue on cross-examination when the cross-examination at issue was prompted by his own questions on direct examination of his own witness. To resort to equity relief for counsel error is to give relief on acts or omissions imputed to Applicant. *See* 7A C.J.S. *Attorney & Client* § 261 (updated June 2008)("As a general rule, in criminal proceedings, an attorney is authorized to act for his or her client and to determine for the client all procedural matters, as well as trial strategy and tactics. Accordingly, the management of the defense is controlled by the attorney, and not by the client, and the accused is bound by counsel's conduct of the defense, if he or she is present in the courtroom and counsel is competent."). This offends the equitable

notion that to invoke equity, one must come to the court with clean hands. *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984)("The doctrine of 'unclean hands' precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant."). Additionally, to reach the question of equity relief assumes that Applicant has lost on the merits of the case as a matter of law. However, equity does not allow courts to overlook the law. *Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 485 (1997). To grant relief after ruling that an applicant is not entitled to relief according to the case law actual works an injustice - - the antithesis of equity's function. 30A C.J.S. *Equity* § 97 ("Equity seeks to do justice and equity between all parties.").

In sum, relief in equity on the merits is not contemplated by the post-conviction relief statute, or case law. Further, the principles of equity would bar relief based on the facts and circumstance of the particular ineffective assistance of counsel claim presented, and the lack of a meritorious claim. Again, Respondent concludes equity relief is not available.

Even if Available, Equity Relief is Not Warranted on the Facts of this Case

The nub of the issue presented is whether defense counsel should have objected to the solicitor's cross-examination of their witness, Mr. Aiken. Because the cross-examination responded to evidence elicited by the defense on direct, there was no proper objection to be made. *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"). Moreover, the evidence presently before the Court conclusively shows 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:

> ...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). Respondent notes that the *Plath* case is cited in the majority opinion in *State v. Burkhart*, 371 S.C. 482, 487-488, 640 S.E.2d 450, 453 (2007), for the principle that general conditions of confinement are not proper considerations for the jury.[2] However,

[2] The Court also acknowledged a difference between evidence of adaptability (i.e. evidence tending to show the defendant's behavior in prison, and "narrowly tailored" evidence of prison conditions to show personal behavior in those conditions), and general evidence of prison conditions, for example, simply showing the harshness of life in prison. 371 S.C. at 488, 640 S.E.2d at 453. However, here, counsel admitted his goal was to show the harshness of prison life in general. Given that strategic decision was made (albeit before *Burkhart* made clear there was a distinction in the type of evidence dividing what is currently admissible and not admissible in regard to prison conditions),

in *Burkhart,* a distinct difference is evident. The defense objected to the evidence. Such a difference is also present in *State v. Bowman*, 366 S.C. 485, 498-499, 623 S.E.2d 378, 385 (2005). Comparing *Burkhart* and *Bowman* shows a differing treatment of preserved issues on appeal. In *Bowman*, the Supreme Court of South Carolina found the issue of whether the trial court erred in allowing the State to ask Mr. Aiken about prison conditions on its re-cross of the witness was not preserved for review and affirmed the conviction. *See also Burkhart*, 371 S.C. at 488, 640 S.E.2d at 453. Contrastingly, in *State v. Burkhart*, 371 S.C. 482, 487, 640 S.E.2d 450, 452 (2007), the Court noted appellant objected to the testimony by the State's witness. The preserved issue was found to have "injected an arbitrary factor into the jury's sentencing considerations" and, pursuant to S.C. Code Ann § 16-3-25, the death sentence was reversed. 371 S.C. at 489, 640 S.E.2d at 453. In sum, this precedent instructs that not all errors regarding the reception of such evidence affect the fundamental fairness of the trial such that they must be addressed regardless of procedural posture. *Bowman, supra; State v. Bryant,* 372 S.C. 305, 316-318, 642 S.E.2d 582, 589 (2007)(acknowledging admission of prison conditions evidence but affirming on direct appeal). *See also Williams v. Ozmint*, 2008 WL 5273092, at p. 3 (denying relief in state habeas on closing argument issue noting that "unlike *Northcutt* which was a direct appeal, this case reaches the Court in the posture of a claim for a writ of habeas corpus. Petitioner therefore bears a much higher burden in challenging his conviction."). The procedural posture is inescapably one of the defining elements as to the treatment of the error. Here, because Applicant is in post-conviction relief, Applicant is bound to show both error and prejudice to be entitled to relief.

---

and the evidence elicited, the focus remains on what, if any, objection could have been properly made to the cross-examination.

Strickland v. Washington, 466 U.S. 668, 694 (1984). As noted above, error may not be shown as there was no legitimate objection to be made when the cross-examination was in response to the direct. 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. Though irrelevant to the issue of sentencing, the prison conditions evidence was presented by *both* parties from *both* perspectives. Applicant received as much benefit as Respondent, consequently, there could be no reasonable probability that, if error did exist as to the cross-examination issue, the error adversely affected the sentencing decision. *See Burkhart*, 371 S.C. at 491, 640 S.E.2d at 455 (Toal, CJ. dissenting)("though this evidence was irrelevant and improper, Appellant used the evidence quite effectively to argue against imposing the death penalty").

Lastly, as to any assumption that *Burkhart* would entitle Applicant to relief, such assumption is not warranted. *Williams* instructs that not every violation, nor every intervening decision, will justify relief in a collateral action, as not every showing of a violation or intervening precedent will equate to proof of a fundamentally flawed proceeding. *Williams*, at p. 2. For example, the petitioner in *Williams* sought relief based on *State v. Northcutt*, 372 S.C. 207, 641 S.E.2d 873 (2007). Relief in *Northcutt* was premised on a finding that the State's closing argument "infused the sentencing proceeding with 'passion and prejudice' in violation of S.C. Code § 16-3-25(c)(1)(2003)." *Williams*, at p. 3. The *Williams* Court noted that this finding did not

equate with finding the solicitor's argument "constituted a denial of fundamental fairness shocking to the universal sense of justice" and ultimately denied relief. *Id.* Here, like the petitioner in *Williams* relied on the subsequent *Northcutt* case, Applicant relies on the subsequent *Burkhart* case to insist that relief is warranted. And, again like the argument in *Northcutt*, the evidence in *Burkhart* was found to have injected an arbitrary factor in violation of the statute. 371 S.C. at 488-489, 640 S.E.2d at 453. However, in light of *Williams*, there can be no legitimate assumption that relief is even warranted in this case based on *Burkhart* alone in any subsequent action.

In sum, based on the facts of record, Applicant has failed to show he is entitled to relief as a matter of law on the issue presented. He is likewise not entitled to relief in equity, even if equity relief should be available in this action.

CONCLUSION

Based on the foregoing, Respondent submits that equity relief is not available, but even if it should be available, relief is not warranted on the facts of this case.

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

s/Melody J. Brown
By:__________________________
MELODY J. BROWN

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
Telephone: (803) 734-6305

ATTORNEYS FOR RESPONDENT

January 20, 2009.
Columbia, South Carolina.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

RECEIVED
JUN 21 2010
S.C. SUPREME COURT

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

BRAD KEITH SIGMON,

PETITIONER,

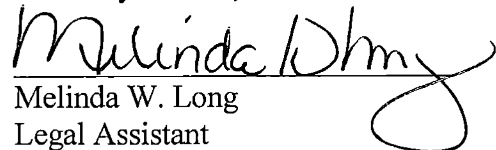
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

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



Melinda W. Long
Legal Assistant

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

(L.S.)

Notary Public for South Carolina
My Commission Expires: August 23, 2014.