

## Hopkins, Debbie

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**From:** Shealy, Brenda  
**Sent:** Friday, October 03, 2014 4:27 PM  
**To:** Hopkins, Debbie  
**Subject:** Fwd: Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State 2013-CP-23-05190

Sent from my iPad

Begin forwarded message:

**From:** "Hayes, J. Mark" <[mhayesj@sccourts.org](mailto:mhayesj@sccourts.org)>  
**Date:** October 3, 2014 at 11:52:35 AM EDT  
**To:** "Garrett, Tracy" <[tgarrett@sccourts.org](mailto:tgarrett@sccourts.org)>, "Verdin, Letitia H." <[lverdinj@sccourts.org](mailto:lverdinj@sccourts.org)>  
**Cc:** "Wickensimer, Paul" <[clerkofcourt@greenvillecounty.org](mailto:clerkofcourt@greenvillecounty.org)>, "Zelenka, Don" <[agdzenka@ag.state.sc.us](mailto:agdzenka@ag.state.sc.us)>, "Shearouse, Daniel" <[DShearouse@sccourts.org](mailto:DShearouse@sccourts.org)>, "Shealy, Brenda" <[BShealy@sccourts.org](mailto:BShealy@sccourts.org)>, "elizabeth.a.franklin@gmail.com" <[elizabeth.a.franklin@gmail.com](mailto:elizabeth.a.franklin@gmail.com)>, "emily@deathpenaltyresource.org" <[emily@deathpenaltyresource.org](mailto:emily@deathpenaltyresource.org)>, "Hayes, J. Mark Law Clerk (Monier Abusoft)" <[mhayeslc@sccourts.org](mailto:mhayeslc@sccourts.org)>, "Hayes, J. Mark Secretary (Sharyn M. Walker)" <[mhayessc@sccourts.org](mailto:mhayessc@sccourts.org)>  
**Subject:** RE: Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State 2013-CP-23-05190

Thank you Ms. Garrett

Can the Greenville Clerk of Court or the parties send my office a copy of all the filings that have been made in this PCR case. Since I have to conduct a hearing within 30 days, the sooner the better I get these will be appreciated.

Thank you

If my law clerk can be of assistance in securing these documents, please reach him at the email address above or call my office at 864-562-4144.

Again, thank you

Mark Hayes

---

**From:** Garrett, Tracy  
**Sent:** Thursday, October 02, 2014 4:29 PM  
**To:** Hayes, J. Mark; Verdin, Letitia H.  
**Cc:** Wickensimer, Paul; Zelenka, Don; Shearouse, Daniel; Shealy, Brenda; 'elizabeth.a.franklin@gmail.com'; 'emily@deathpenaltyresource.org'  
**Subject:** Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State 2013-CP-23-05190

Dear Judges,

Attached is a special order regarding the above-referenced case.

Thank you,

Tracy Garrett  
Judge Scheduling Coordinator  
SC Court Administration  
1015 Sumter Street, Suite 200  
Columbia, SC 29201  
[tgarett@sccourts.org](mailto:tgarett@sccourts.org)  
803-734-1861  
803-734-0269 (fax)

## Hopkins, Debbie

---

**From:** Shealy, Brenda  
**Sent:** Friday, October 03, 2014 4:13 PM  
**To:** Hopkins, Debbie  
**Subject:** Fwd: Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State 2013-CP-23-05190  
**Attachments:** Wood John R. application for post-conviction relief (00456162xD2C78).pdf; ATT00001.htm; FILED copy of return and mtn to dismiss 11-18-13 (00122685xD2C78).pdf; ATT00002.htm

Begin forwarded message:

**From:** "Don Zelenka" <[DZelenka@scag.gov](mailto:DZelenka@scag.gov)>  
**To:** "Hayes, J. Mark" <[mhayesj@sccourts.org](mailto:mhayesj@sccourts.org)>, "Garrett, Tracy" <[tgarrett@sccourts.org](mailto:tgarrett@sccourts.org)>, "Verdin, Letitia H." <[lverdinj@sccourts.org](mailto:lverdinj@sccourts.org)>  
**Cc:** "Wickensimer, Paul" <[clerkofcourt@greenvillecounty.org](mailto:clerkofcourt@greenvillecounty.org)>, "Shearouse, Daniel" <[DShearouse@sccourts.org](mailto:DShearouse@sccourts.org)>, "Shealy, Brenda" <[BShealy@sccourts.org](mailto:BShealy@sccourts.org)>, "[elizabeth.a.franklin@gmail.com](mailto:elizabeth.a.franklin@gmail.com)" <[elizabeth.a.franklin@gmail.com](mailto:elizabeth.a.franklin@gmail.com)>, "[emily@deathpenaltyresource.org](mailto:emily@deathpenaltyresource.org)" <[emily@deathpenaltyresource.org](mailto:emily@deathpenaltyresource.org)>, "Hayes, J. Mark Law Clerk (Monier Abusoft)" <[mhayeslc@sccourts.org](mailto:mhayeslc@sccourts.org)>, "Hayes, J. Mark Secretary (Sharyn M. Walker)" <[mhayessc@sccourts.org](mailto:mhayessc@sccourts.org)>  
**Subject: RE: Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State 2013-CP-23-05190**

Judge Hayes –

Attached in the application for post-conviction relief filed September 26, 2013 and the State's Return and Motion to Dismiss filed November 18, 2013. We can also forward you materials from the initial PCR materials which were attachments to the application.

Sincerely,

Don Zelenka

Donald J. Zelenka  
Senior Assistant Deputy Attorney General  
South Carolina Attorney General's Office  
P.O. Box 11549  
Columbia, S.C. 29211  
803-734-3601  
[dzelenka@scag.gov](mailto:dzelenka@scag.gov)

From: Hayes, J. Mark [<mailto:mhayesj@sccourts.org>]  
Sent: Friday, October 03, 2014 11:53 AM  
To: Garrett, Tracy; Verdin, Letitia H.  
Cc: Wickensimer, Paul; Don Zelenka; Shearouse, Daniel; Shealy, Brenda; '[elizabeth.a.franklin@gmail.com](mailto:elizabeth.a.franklin@gmail.com)'; '[emily@deathpenaltyresource.org](mailto:emily@deathpenaltyresource.org)'; Hayes, J. Mark Law Clerk

(Monier Abusaft); Hayes, J. Mark Secretary (Sharyn M. Walker)  
Subject: RE: Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State  
2013-CP-23-05190

Thank you Ms. Garrett

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Again, thank you

Mark Hayes

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To: Hayes, J. Mark; Verdin, Letitia H.  
Cc: Wickensimer, Paul; Zelenka, Don; Shearouse, Daniel; Shealy, Brenda;  
'[elizabeth.a.franklin@gmail.com](mailto:elizabeth.a.franklin@gmail.com)'; '[emily@deathpenaltyresource.org](mailto:emily@deathpenaltyresource.org)'  
Subject: Special Order (Circuit) Dated October 2, 2014 Re: John Richard Wood v State 2013-CP-23-05190

Dear Judges,

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Thank you,

Tracy Garrett  
Judge Scheduling Coordinator  
SC Court Administration  
1015 Sumter Street, Suite 200  
Columbia, SC 29201  
[tgarett@sccourts.org](mailto:tgarett@sccourts.org)<<mailto:tgarett@sccourts.org>>  
803-734-1861  
803-734-0269 (fax)

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 JOHN R. WOOD, # 6005 )  
 ) Applicant, )  
 vs. )  
 State of South Carolina, )  
 ) Respondent. )

IN THE COURT OF COMMON PLEAS

APPLICATION FOR  
 POST- CONVICTION RELIEF

2013-CP-23-05190

FILED IN COURT OF COMMON PLEAS  
 GREENVILLE COUNTY, S.C.  
 PAUL W. WILSON, CLERK  
 2013 SEP 26 A 8:34

1. Place of Detention: Lieber Correctional Institution, Campbell Thicket Road, Ridgeville, SC 29472.
2. Name and location of Court which imposed sentence: Greenville County Court of General Sessions.
3. Name(s) of co-defendant(s) (if any): Not applicable.
4. The indictment number or numbers upon which and the offense or offenses for which sentence was imposed: 01-GS-23-003106.
5. The date upon which sentence was imposed and the terms of the sentence: February 16, 2002 (Death Sentence).
6. A finding of guilty was made after a plea of not guilty.
7. The applicant did appeal from judgment of conviction and sentence.
8.
  - (a) The name of each Court to which applicant appealed:
    - (i) The Supreme Court of South Carolina.
    - (ii) The Supreme Court of the United States.
    - (iii) The Court of Common Pleas of Greenville County.
    - (iv) The Supreme Court of South Carolina.
  - (b) The result in each Court to which applicant appealed:
    - (i) Appeal dismissed.
    - (ii) Petition for writ of certiorari denied.
    - (iii) Application for Post-Conviction Relief dismissed with prejudice.
    - (iv) Petition for writ of certiorari denied.
  - (c) The date of such result:

- (i) December 6, 2004.
  - (ii) June 20, 2005.
  - (iii) December 19, 2007.
  - (iv) October 31, 2012.
- (d) Citations of opinions and orders:
- (i) *State v. Wood*, 362 S.C. 135, 607 S.E.2d 57 (2004).
  - (ii) *John Richard Wood v. South Carolina*, 125 S.Ct. 2942 (June 20, 2005).

9. Not applicable.

#### GROUND FOR RELIEF WITH SUPPORTING FACTS

10(a): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial as a result of trial counsel’s acts or omissions set forth below in section 11(a). Trial counsel’s performance was both unreasonable and prejudicial as outlined below. *See Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

11(a): Trial counsel’s acts or omissions included:

- (i) Counsel failed to object to comments by Solicitor Ariail during summation, which inaccurately and improperly stated that the prosecution “can only seek it [the death penalty] where the murderers are mean and evil people based on the circumstances of the crime.” (Trial Tr. 2187).
- (ii) Counsel failed to object to comments by Solicitor Ariail during summation which inaccurately and improperly stated that imposition of the death penalty was warranted, because prison life is simply “a change of address and nothing more,” because “prison is like being in a city. You’ve got a restaurant, you’ve got a medical center [ . . . ] [you] watch ball games on TV.” (Trial Tr. 2192).
- (iii) Counsel failed to object to comments by Solicitor Ariail which improperly asserted that applicant deserved the death penalty for systemic reasons beyond the facts of applicant’s case: “It’s a tragedy, potentially, if not properly addressed, on a much greater level, and that is how it effects law enforcement and the very foundation of a free society.” (Trial Tr. 2194).
- (iv) Counsel failed to object to Solicitor Ariail’s implication that the jury’s decision would have long-term consequences on the community and which injected larger societal issues into the proceedings beyond the facts of applicant’s case. Solicitor Ariail improperly urged the jury “on behalf of [ . . . ] the people of this community to let that bell ring, to let them know that anyone who is involved in the killing of

a law enforcement officer in the line of duty who is there to protect the rest of us, that such conduct will not be tolerated and will receive the ultimate punishment under the law.” (Trial Tr. 2194).

- (v) Counsel improperly shifted the burden to the defense to prove why a life sentence was appropriate, rather than argue that the State carries the burden, and a sentence of life is in fact the default presumption. Counsel stated: “I know that you believe that John Wood deserves to die for what you convicted him of. I know that just the crime itself is enough.” Counsel merely requested that the jury listen to mitigating evidence, and “if you keep listening in spite of these feelings that I really believe you have and you had, even though it’s perhaps impossible to imagine that you could justify not executing John Wood, I would hope that you would find a reason to choose life—even for John Wood.” (Trial Tr. 1851-59).
- (vi) Counsel failed to object to pre-printed names of jurors on the aggravating circumstances/death verdict form provided to the jury foreperson which clearly implied that it was the proper and expected role of each juror to sentence applicant to death.

10(b): Applicant was denied the right to effective assistance of counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution – during the sentencing phase of his capital trial as a result of trial counsel’s failure to adequately develop and present the full range of mitigating evidence as set forth below in section 11(b). Trial counsel’s performance was both unreasonable and prejudicial as set forth below. See *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

11(b): Trial counsel’s acts or omissions included:

- (i) Counsel failed to adequately investigate mitigation evidence, including the failure to call any member of applicant’s family, despite the fact that applicant’s sister was available and willing to testify at trial. (App. 2790). Counsel failed to do a complete, or even adequate, social history investigation, speaking with only applicant’s girlfriend (and co-defendant) and sister, and gathering virtually no institutional records. See *Wiggins v. Smith*, 539 U.S. 510, 523 (2003) (determining that counsel should investigate and consider presenting, among other things, “medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences”).
- (ii) Counsel failed to adequately develop and present evidence that applicant has significant mental impairments, including cognitive deficits, learning disabilities and brain damage, autism spectrum disorder and temporal lobe epilepsy. A pretrial neuropsychological evaluation revealed that applicant has significant indicators of brain damage, including: (1) a statistically significant split between

verbal and non-verbal IQ; (2) visual perceptual deficits; (3) increased brain power in certain areas coexisting with decreased brain power in other areas in a pattern consistent with dementia; and, (4) excessive numbers of coherence abnormalities, which is a condition often seen in cases of brain damage where, to help compensate for brain damage, brain function has come to involve mass action rather than more normal, differentiated action. However, trial counsel unreasonably failed to present this powerful mitigating evidence or investigate further. Additionally, based on initial investigation and research, applicant exhibits many symptoms of autism spectrum disorder (ASD) and temporal lobe epilepsy (TLE). TLE usually manifests itself with scarring on the temporal lobe that causes neurons to misfire, ultimately resulting in seizures. The incidence of TLE in violent criminals is surprisingly high. *See EVE LAPLANTE, SEIZED 215 (2003)*. Applicant's symptoms and indicators of TLE include: (1) parasthesias, which is a condition, commonly associated with seizures, where the patient experiences a sensation of tingling, burning, pricking or numbness. (2) memory difficulties, (3) auditory and visual hallucinations, (4) hyper-religiosity (5) abnormal EEG results; and, (6) a neuropsychological test battery indicating significant brain damage.

- (iii) Trial counsel also failed to investigate and present evidence that applicant has suffered from sexual abuse.

10(c): Applicant was denied the right to effective assistance of appellate counsel – guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution – when appellate counsel committed the acts or omissions set forth below in Section 11(c). Appellate counsel's performance was both unreasonable and prejudicial set forth below. *See Strickland v. Washington*, 466 U.S. 668 (1984).

11(c): Appellate counsel failed to raise the improper presentation of victim impact evidence issue on direct appeal, as the effects of the crime on police officers were presented as a "glimpse" into the life of the victim. This issue was preserved and well litigated at trial, as counsel objected to the testimony as "essentially [. . .] professional victim impact presentation as opposed to a personal family presentation." (Trial Tr. 1799). Trial counsel's motion was denied, and the officer subsequently testified that many "young troopers have come to me because their spouses [. . .] come to them and say 'Hey, I want you out [of law enforcement].'" This testimony is unduly prejudicial, as it improperly broadens the scope of "victim" impact to include effects on the entire law enforcement community. *See Payne v. Tennessee*, 501 U.S. 808 (1991).

10(d): Applicant's Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair sentencing proceeding were violated by the solicitor's improper closing argument during the penalty phase of applicant's capital trial.

11(d): Solicitor Ariail made the following improper statements during the penalty phase summation:

- (i) He inaccurately and improperly stated that the prosecution “can only seek it [the death penalty] where the murderers are mean and evil people based on the circumstances of the crime.” (Trial Tr. 2187).
- (ii) He inaccurately and improperly stated that imposition of the death penalty was warranted, because prison life is simply “a change of address and nothing more,” because “prison is like being in a city. You’ve got a restaurant, you’ve got a medical center [. . .] [you] watch ball games on TV.” (Trial Tr. 2192).
- (iii) He improperly asserted that applicant deserved the death penalty for systemic reasons beyond the facts of applicant’s case: “It’s a tragedy, potentially, if not properly addressed, on a much greater level, and that is how it effects law enforcement and the very foundation of a free society.” (Trial Tr. 2194).
- (iv) He improperly implied that the jury’s decision would have long-term consequences on the community and which injected larger societal issues into the proceedings beyond the facts of applicant’s case. Solicitor Ariail improperly urged the jury “on behalf of [. . .] the people of this community to let that bell ring, to let them know that anyone who is involved in the killing of a law enforcement officer in the line of duty who is there to protect the rest of us, that such conduct will not be tolerated and will receive the ultimate punishment under the law.” (Trial Tr. 2194).

10(e): Applicant’s Eighth and Fourteenth Amendment rights guaranteeing a fundamentally fair sentencing hearing were violated by the trial court’s admission of victim impact evidence which improperly portrayed “law enforcement” as the “victim.” *See Payne v. Tennessee*, 501 U.S. 808 (1991).

11(e): At trial, the court improperly permitted testimony that portrayed the broader law enforcement community as a victim of the crime. This issue was preserved and well litigated at trial, as counsel objected to the testimony as “essentially [. . .] professional victim impact presentation as opposed to a personal family presentation.” (Trial Tr. 1799). The defense pointed to *Payne v. Tennessee*, 501 U.S. 808 (1991), and its narrow holding that only permits “a brief glimpse of the life [of the victim].” Trial counsel’s motion was denied, and the officer subsequently testified that many “young troopers have come to me because their spouses [. . .] come to them and say ‘Hey, I want you out [of law enforcement].’” Moreover, the officer testified to the broader psychological impact of the crime, saying that “[t]his particular situation has opened a lot of eyes to a lot of people within the law enforcement community simply because you never know whether it could be a tractor trailer or it could be a moped. You don’t know what you’re dealing with anymore.” (Trial Tr. 1870). This testimony is unduly prejudicial, and improperly broadens the scope of “victim” impact to include effects on the entire law enforcement community. *See Payne v. Tennessee*, 501 U.S. 808 (1991). Furthermore, the prejudicial effect of this testimony was exacerbated when, during closing arguments at the penalty phase, the solicitor argued that failing to impose a death sentence would detrimentally

affect law enforcement as a whole and the ability of law enforcement officers to do their jobs. (Trial Tr. 2194).

10(f): Applicant's right to Due Process, guaranteed by the Fourteenth Amendment to the United States Constitution, was violated by the State's failure to disclose material, exculpatory evidence that would have undermined the credibility of a key prosecution witness, and by the State's presentation of testimony it knew to be false.

11(f): At applicant's Greenville County trial in February 2002, the State called Karen McCall, applicant's co-defendant. McCall testified that as she and applicant were being pulled over by a police officer, applicant "stomped his foot on the gas," saying "I shot the son of a bitch [*sic*]" and waving a gun at her so that she would continue to drive. App. 1441-42. She said that applicant "reached over [her] and pushed the [rear window] button himself" in order to open the rear window during the subsequent shoot out. App. 1443. McCall testified that she was "afraid to die, and . . . didn't want [her] baby to die," saying that she "thought [applicant] was going to kill [her and her baby] and then kill himself." App. 1445-46. When asked what she was doing during the chase and shootout, McCall said she was praying. App. 1443. During his closing argument, the solicitor repeatedly referred to McCall's testimony to illustrate applicant's "meanness." App. 1741-42. Shortly thereafter, during applicant's Anderson County trial held in May 2002, SLED agent Gene Donohue testified that he and another agent investigated McCall's jeep to assess whether her account of the events was even possible, in other words, "if it was possible to . . . commandeer the vehicle from the passenger seat" and "if you could control the driving, control the gas, control the brakes." Anderson App. 413. Agent Donohue testified that "[y]ou can't reach th[e] accelerator from the passenger side *at all*" due to the configuration of the car model and the console that was installed in the car at the time. Anderson App. 417 (emphasis added). Agent Donohue went on to say that "in order to reach the [rear window] switch, . . . you actually have to lay across the dashboard and the steering wheel to even reach over it." Anderson App. 419. All of these SLED experiments relating to the passenger's access to the rear window control and the accelerator were conducted on December 15, 2000, Anderson App. 420, more than a year before applicant's Greenville trial—the trial where the State portrayed McCall as a devout and pregnant hostage coerced by someone who was "mean and rotten to the core." App. 1743. Thus, well before the Greenville trial, the solicitor knew or should have known that SLED agents had assessed the plausibility of McCall's account and already determined that multiple aspects of the account were implausible. The State's failure to disclose this exculpatory, material evidence within its possession violated applicant's right to due process. See *Kyles v. Whitley*, 514 U.S. 419, 432 (2002); *Brady*, 373 U.S. at 87-88; cf. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (holding that *Brady* suppression occurs even if favorable evidence is known only to police investigators and not prosecutor). Moreover, the State presented evidence that it knew to be false in violation of applicant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

12:

- (a) Yes, applicant has filed a mandatory appeal to the State Supreme Court, an application for post-conviction relief to the Greenville County Court of General

Sessions, and a petition for writ of certiorari from denial of his application for post-conviction relief to the State Supreme Court.

- (b) Yes, applicant has previously filed an application for post-conviction relief in State court. Applicant is currently filing a petition for habeas corpus in Federal court.
  - (c) No, applicant has not filed any petition in the United States Supreme Court other than for certiorari already specified in (8).
  - (d) No, no other petitions, motions or applications in this or any other court.
13. (a) Specific nature of other petitions:
- (i) Application for post-conviction relief.
  - (ii) Application for writ of certiorari following denial of post-conviction relief.
- (b) Name and location of the Court in which each was filed:
- (i) Greenville County Court of General Sessions
  - (ii) The Supreme Court of South Carolina.
- (c) Disposition thereof:
- (i) Application denied.
  - (ii) Cert denied.
- (d) Date of such disposition:
- (i) December 19, 2007.
  - (ii) October 31, 2012.
14. Have the grounds set forth in Sections 10 and 11 been previously presented to this or any other Court, State or Federal? No.
15. Not applicable.
16. Reason why grounds set forth in (10) have not previously been presented to any Court:
- Applicant's trial, appellate and post-conviction counsel failed to provide competent, reasonable representation.
17. Applicant was previously represented by counsel.
- Applicant was represented at trial by John Mauldin, P.O. Box 10264, F.S., Greenville, SC 29603, James Bannister, 401 Pettigru Street, P.O. Box 10007, Greenville, SC 29601, and Rodney Richey, 24 Vardry Street, Suite 301, Greenville, SC 29601.

On direct appeal, applicant was represented by Robert Dudek of the Office of Appellate Defense, 1330 Lady Street, Columbia SC 29201.

In his initial application for post-conviction relief, applicant proceeded *pro se*. At hearing, applicant was represented by Michael J. Brown, Jr. P.O. Box 1025, Rock Hill, SC 29731, and William Godfrey, 10 East Ave., Greenville, 29601 (Mr. Godfrey replaced Symmes Culbertson, 9 Toy Street, Greenville SC 29601, who withdrew for personal reasons).

In his petition for writ of certiorari from denial of his application for post-conviction relief, applicant was represented by Robert M. Dudek and Joseph L. Savitz III of the South Carolina Commission on Indigent Defense, Division of Appellate Defense, 1330 Lady Street, Columbia SC 29201.

18. Applicant seeks relief from his conviction and sentence. Applicant further seeks the appointment of two attorneys to represent him in this action, at least one of whom is properly qualified to represent a death-sentenced inmate in a state post-conviction relief proceeding. S.C. Code § 17-27-160. Applicant also requests a hearing on the merits, an opportunity to file a funding motion for expert and investigative services, and sufficient time and access to discovery and other fact development tools necessary to develop the facts in support of his claims before the application is ruled upon. *Id.*
19. Applicant is not under sentence from any other court that he has not challenged.

Respectfully submitted,

**EMILY C. PAAVOLA**

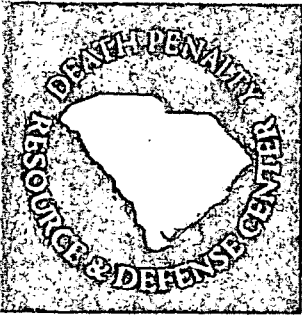
Death Penalty Resource & Defense Center  
900 Elmwood Ave., Suite 101  
Columbia, South Carolina 29201  
(803) 765-1044

**ELIZABETH FRANKLIN-BEST**

Blume, Weyble & Franklin-Best  
900 Elmwood Ave., Suite 101  
Columbia, South Carolina 29201  
(803) 765-1044

BY: Emily C. Paavola

September 18, 2013



September 18, 2013

2013-CP-23- 05190

The Honorable Paul B. Wickensimer  
Greenville County Clerk of Court  
305 E. North Street, Suite 232  
Greenville, SC 29601

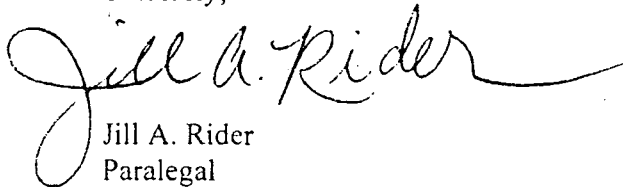
RE: *John R. Wood, SK6005 v. State of South Carolina*

Dear Mr. Wickensimer:

Please find enclosed for filing the original and one copy of the Application for Post-Conviction Relief in the above captioned case. Please clock-in the copy and return it to me in the enclosed self-addressed stamped envelope.

If you should have any questions, please do not hesitate to contact me.

Sincerely,

  
Jill A. Rider  
Paralegal

Enclosure

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )  
STATE OF SOUTH CAROLINA )  
v. )  
JOHN RICHARD WOOD )  
DEFENDANT. )

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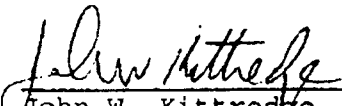
IN THE COURT OF GENERAL SESSIONS  
THIRTEENTH JUDICIAL CIRCUIT

**SENTENCE**  
2001-GS-23-3106

Defendant has been found by the jury to be guilty of the offense of murder. The jury has recommended that Defendant should be sentenced to death.

It is, therefore, the judgment and sentence of the court that Defendant, John Richard Wood, be taken to the Greenville County Detention Center, and thence to the State Department of Corrections, henceforth to be kept in close and safe confinement until the fifteenth day of August, 2002, upon which day between the hours of six o'clock P.M. and six o'clock A.M. on August sixteen, 2002, or upon an Order of Execution issued by the South Carolina Supreme Court, Defendant, John Richard Wood, shall suffer death in the manner provided by law.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
John W. Kittredge  
Circuit Court Judge

Greenville, South Carolina  
February 16, 2002

*Cosm*

|                         |   |                                      |
|-------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF GENERAL SESSIONS     |
|                         | ) | THIRTEENTH JUDICIAL CIRCUIT          |
| COUNTY OF GREENVILLE    | ) |                                      |
|                         | ) |                                      |
| STATE OF SOUTH CAROLINA | ) |                                      |
|                         | ) |                                      |
| v.                      | ) |                                      |
|                         | ) | <b>AFFIRMATION OF DEATH SENTENCE</b> |
|                         | ) |                                      |
| JOHN RICHARD WOOD       | ) | 2001-GS-23-3106                      |
|                         | ) |                                      |
| DEFENDANT.              | ) |                                      |
|                         | ) |                                      |

As the trial judge in the above entitled action, and prior to the imposition of the death sentence upon Defendant, I find as an affirmative fact that the evidence of this case warrants the imposition of the death penalty and its imposition is not a result of prejudice, passion, or any other arbitrary factor.

AND IT IS SO ORDERED.

  
 \_\_\_\_\_  
 John W. Kittredge  
 Circuit Court Judge

Greenville, South Carolina  
 February 16, 2002

STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

STATE OF SOUTH CAROLINA )

v. )

JOHN RICHARD WOOD )

DEFENDANT. )

IN THE COURT OF GENERAL SESSIONS  
THIRTEENTH JUDICIAL CIRCUIT

2001-GS-23-3106

UNANIMOUS FINDING OF AN AGGRAVATING CIRCUMSTANCE

We, the jury, find beyond a reasonable doubt the following statutory aggravating circumstance: The murder of a federal, state, or local law enforcement officer, peace officer, or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

Foreperson Norma B. Pitts ✓  
Norma B. Pitts

Juror Will M. Sharpe ✓  
Will M. Sharpe

Juror Terry B. Marshall ✓  
Terry B. Marshall

Juror Anne C. Smith ✓  
Anne Casey Smith

Juror Pracilla A. Goodman ✓  
Pracilla A. Goodman

Juror Raymond E. Starnes ✓  
Raymond E. Starnes

Juror Linda D. Pressley ✓  
Linda D. Pressley

Juror Jacob M. Campbell ✓  
Jacob M. Campbell

Juror Stephanie D. Haselwander ✓  
Stephanie D. Haselwander

Juror James R. Chancellor ✓  
James R. Chancellor

Juror Petra M. Lackey ✓  
Petra M. Lackey

Juror Amy J. Kessler ✓  
Amy J. Kessler

Greenville, SC  
February 14, 2002

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS  
THIRTEENTH JUDICIAL CIRCUIT

v.

JOHN RICHARD WOOD  
DEFENDANT.

2001-GS-23-3106

UNANIMOUS RECOMMENDATION OF SENTENCE FOR DEATH PENALTY

We, the jury, having found beyond a reasonable doubt the existence of the following statutory aggravating circumstance, to wit:

The defendant, John Richard Wood, murdered a South Carolina State Highway Patrol Officer on the line of his duty.

now recommend to the court that the Defendant be sentenced to death.

Foreperson Norma B. Pitts  
Norma B. Pitts

Juror Carol D. Marshall  
Carol D. Marshall

Juror Bracilla A. Goldman  
Bracilla A. Goldman

Juror Linda D. Presslow  
Linda D. Presslow

Juror Stephanie D. Haselwander  
Stephanie D. Haselwander

Juror Petra M. Lackey  
Petra M. Lackey

Juror Will M. Sharpe  
Will M. Sharpe

Juror Anne Casey Smith  
Anne Casey Smith

Juror Raymond E. Starnes  
Raymond E. Starnes

Juror Cocob M. Campbell  
Cocob M. Campbell

Juror James K. Chancellor  
James K. Chancellor

Juror Amy J. Kessler  
Amy J. Kessler

Greenville, SC  
February 14, 2002

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

INDICTMENT FOR  
COUNT ONE - MURDER  
COUNT TWO - POSSESSION OF A WEAPON DURING  
THE COMMISSION OF OR THE ATTEMPT TO  
COMMIT A VIOLENT CRIME

At a Court of General Sessions, convened on           MAY 8, 2001           the Grand  
Jurors of Greenville County present upon their oath:

COUNT ONE - MURDER

That JOHN RICHARD WOOD did in Greenville County, on or about the 6th day of December, 2000,  
unlawfully and with malice aforethought kill Eric Nicholson by means of shooting him, and that Eric  
Nicholson died as a proximate result thereof. This is in violation of §16-3-10 of the South Carolina Code  
of Laws (1976) as amended.

COUNT TWO - POSSESSION OF A WEAPON DURING THE COMMISSION OF OR THE  
ATTEMPT TO COMMIT A VIOLENT CRIME

That JOHN RICHARD WOOD did in Greenville County, on or about the 6th day of December, 2000,  
possess or visibly display a pistol during the commission or attempted commission of a violent crime, to  
wit: Murder. This is in violation of §16-23-490 of the South Carolina Code of Laws (1976) as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and  
provided.

  
SOLICITOR

WITNESSES

INV. PAUL SILVAGGIO / 5

GCSO

12/09/00

ARREST WARRANT NUMBER

G 453839

G 453840

ACTION OF GRAND JURY  
**TRUE BILL**

FOREMAN GRAND JURY

Foreperson of Grand Jury

VERDICT

Count I Guilty

Count II Guilty

Norma Pitts  
Foreperson of Petit Jury

2-11-02

Date:

DOCKET NO. 2001-GS-23-<sup>BCS</sup>003106

The State of South Carolina

County of Greenville

COURT OF GENERAL SESSIONS

MAY TERM 2001

THE STATE

vs.

**GUILTY**

JOHN RICHARD WOOD

Indictment for

0116 MURDER

VIOLATION § 16-3-10

0549 POSSESSION OF A WEAPON DURING  
THE COMMISSION OF OR THE ATTEMPT TO  
COMMIT A VIOLENT CRIME

VIOLATION § 16-23-490

118

DESK 1

ARREST WARRANT

833

00-146522

G-453839

12-09-00

STATE OF SOUTH CAROLINA

County/  Municipality of GREENVILLE

0116

THE STATE against

JOHN RICHARD WOOD

Address: 1209 N. TAMiami TRAIL (LAST KNOWN) N. FORT MYERS, FLORIDA 33909

SSN: [REDACTED]

Sex: M Race: W Height: 5'10" Weight: 147

DL State: FL DL #: W300476671280

DOB: [REDACTED] Agency ORI #: 0230000

Prosecuting Agency: GCSO

Prosecuting Officer: INVESTIGATOR SILVAGGIO

Offense: MURDER OF A POLICE OFFICER IN THE LINE OF DUTY

Offense Code: [REDACTED]

Code/Ordinance Sec. 16-3-10

This warrant is CERTIFIED FOR SERVICE in the  County/  Municipality of [REDACTED]

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge (L.S.) [REDACTED]

Date: [REDACTED]

RETURN

A copy of this arrest warrant was delivered to defendant JOHN RICHARD WOOD on 12-09-00

Signature of Constable/Law Enforcement Officer [REDACTED]

RETURN WARRANT TO:

REID [REDACTED]

STATE OF SOUTH CAROLINA

County/  Municipality of GREENVILLE

AFFIDAVIT

S.C. Atty. Gen. July 26, 198 SCCA 518

Personally appeared before me the affiant Investigator Paul A. Silvaggio being duly sworn deposes and says that defendant John Richard Wood did within this county and state on 12-06-00 violate the criminal laws of the State of South Carolina (or ordinance of  County/  Municipality of Greenville) in the following particulars:

DESCRIPTION OF OFFENSE:

MURDER OF A POLICE OFFICER IN THE LINE OF DUTY

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts: Affiant has statements which implicate the above defendant and co-defendant, KAREN MCCALL, in this case. That on the above date, the defendant did willfully and knowingly, while armed with a deadly firearm, shoot TROOPER ERIC NICHOLSON of the South Carolina Highway Patrol, multiple times about his body with malice and aforethought. According to medical personnel, TROOPER NICHOLSON did die as a result of this incident. TROOPER NICHOLSON was on duty at the time of this incident and effecting a traffic stop upon the defendant at the time of the shooting. This incident occurred on the Frontage Road at Woodruff Road and Interstate 85, within Greenville County. This case is filed with the Greenville County Sheriffs Office under case# 00-146522.

Sworn to and subscribed before me on 12-06-00

Signature of Affiant [REDACTED] Affiant's Address 4 McGee Street Greenville, SC 29601 Affiant's Telephone 467-5107

Signature of Issuing Judge (L.S.) [REDACTED]

STATE OF SOUTH CAROLINA

County/  Municipality of GREENVILLE

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 12-06-00 defendant John Richard Wood did violate the criminal laws of the State of South Carolina (or ordinance of

County/  Municipality of Greenville

) as set forth below:

DESCRIPTION OF OFFENSE:

MURDER OF A POLICE OFFICER IN THE LINE OF DUTY

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the [REDACTED] or as soon thereafter as is practicable.

Signature of Issuing Judge (L.S.) [REDACTED]

Judge's Address 4 McGee Street Greenville, SC 29601 Judge's Telephone 467-2402

Judge Code: 636

Issuing Court:  Magistrate  Municipal  Circuit

COMPUTER ENTERED

DEC 10 2000

GREENVILLE COUNTY SHERIFFS OFFICE

ORIGINAL

08/24/11

ARREST WARRANT

00-146522 G-453840

STATE OF SOUTH CAROLINA

County/  Municipality of GREENVILLE

THE STATE against

JOHN RICHARD WOOD

Address: 1209 N. TAMiami TRAIL (LAST KNOWN) N. FORT MYERS, FLORIDA 33909

Sex: M Race: W Height: 5'10" Weight: 147

DL State: FL DL #: W300476671280

DOB: Agency ORI #: 0230000

Prosecuting Agency: GCSO

Prosecuting Officer: INVESTIGATOR SILVAGGIO

Offense: POSSESSION OF A FIREARM DURING THE COMM OF A VIOLENT CRIME

Code/Ordinance Sec.

This warrant is CERTIFIED FOR SERVICE in the County/ Municipality of

The accused is to be arrested and brought before me to be dealt with according to law.

Signature of Judge (L.S.)

Date:

RETURN

A copy of this arrest warrant was delivered to defendant JOHN RICHARD WOOD on 12-09-00

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO: 23 9 000 0002

REID

RECEIVED GREENVILLE COUNTY SHERIFFS OFFICE

STATE OF SOUTH CAROLINA )  
 County/  Municipality of )  
GREENVILLE )

AFFIDAVIT

Form Approved by S.C. Attorney General July 26, 1990 SCCA 518

Personally appeared before me the affiant Investigator Paul Silvaggio who being duly sworn deposes and says that defendant John Richard Wood did within this county and state on 12-06-00 violate the criminal laws of the State of South Carolina (or ordinance of  County/  Municipality of GREENVILLE ) in the following particulars:

DESCRIPTION OF OFFENSE:

POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME  
I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts: Affiant has statements which implicate the above defendant and co-defendant, KAREN MCCALL, in this case. That on the above date, the defendant did willfully and knowingly with malice and aforethought, repeatedly shoot TROOPER ERIC NICHOLSON of the South Carolina Highway Patrol while TROOPER NICHOLSON was on duty and effecting a traffic stop upon the defendant. According to medical personnel, TROOPER NICHOLSON did die as a result of this incident. The defendant was armed at the time of the incident with a semi-automatic Pistol. This incident occurred on the Frontage Road at Woodruff Road and Interstate 85, within Greenville County. This case is filed with the Greenville County Sheriffs Office under case# 00-146522.

Sworn to and subscribed before me on 12-06-00 Signature of Affiant  
Affiant's Address 4 McGee Street Greenville, SC 29601  
Signature of Issuing Judge (L.S.) M.T. Stokes  
Affiant's Telephone 467-5107

STATE OF SOUTH CAROLINA )  
 County/  Municipality of )  
Greenville )

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on 12-06-00 DEC 07 2000 defendant John Richard Wood did violate the criminal laws of the State of South Carolina (or ordinance of

County/  Municipality of GREENVILLE GREENVILLE ) as set forth below:

DESCRIPTION OF OFFENSE: POSSESSION OF A FIREARM DURING THE COMMISSION OF A VIOLENT CRIME

Now, therefore, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Signature of Issuing Judge (L.S.) M.T. Stokes  
Judge's Address 4 McGee Street Greenville, SC 29601  
Judge's Telephone 467-2402  
Judge Code: 636  
Issuing Court:  Magistrate  Municipal  Circuit

ORIGINAL

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )  
 John Richard Wood, #6005 )  
 Applicant, )  
 v. )  
 The State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 C/A No. 2013-CP-23-5190  
 RETURN AND MOTION TO DISMISS  
 (Capital Case)

FILED-CLERK OF COURT  
 GREENVILLE CO. S.C.  
 PAUL B. WICKENSIMMER  
 2013 NOV 18 PM 3 08

Respondent, above-named, here by make a Return to this successive application for post-conviction relief ("APCR2"), filed by death row inmate John Richard Wood ("Applicant") on September 26<sup>th</sup>, 2013. Applicant has already litigated one PCR to completion, and then filed a federal habeas corpus action. He then filed a motion to stay the federal habeas corpus action in order to pursue the instant successive PCR, which United States Magistrate Judge Paige Gossett granted on October 23, 2013. No Judge has yet been assigned continuing jurisdiction over this successive capital PCR.

**I. PROCEDURAL HISTORY**

**A. Trial and direct appeal.**

At the May 2001 term, the Greenville County Grand Jury indicted Applicant, John Richard Wood, for murder and possession of a weapon during the commission of a violent crime, for the murder of a South Carolina Highway Patrolman (01-GS-23-3106). {R. 2516-17}. The state gave notice of intent to seek the death penalty, and served its notice of evidence in aggravation.

*Voir dire* in the case began before the Honorable John W. Kittredge on February 4<sup>th</sup>, 2002. Public Defender John I. Mauldin, Attorney James Bannister, and Attorney Rodney

**RECEIVED**  
 NOV 22 2013  
 STATE GRAND JURY-  
 PROS SECTION  
*into say 11/22/13*

Richey represented Applicant at his jury trial. Solicitor Robert M. Arial, Deputy Solicitor Betty C. Strom, and Assistant Solicitor Mindy Hervey were the prosecutors at trial. On February 11<sup>th</sup>, 2002, Applicant's jury convicted him of both charges.

Applicant exercised his right to the 24-hour cooling-off period in subsection 16-3-20(B) of the Code of Laws for South Carolina. The sentencing phase of his trial began on February 13<sup>th</sup>, 2002. Judge Kittredge submitted the following aggravators to the jury:

The murder of a federal, state, or local law enforcement officer, peace officer or former peace officer, corrections employee or former corrections employee, or fireman or former fireman during or because of the performance of his official duties.

**{R. 2221-22}**. The following mitigating factors were submitted to the jury:

(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 capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

(4) The age or mentality of the defendant at the time of the crime.

**{R. 2223-24}**.

On February 16<sup>th</sup>, 2002, Applicant's jury found the existence of the aggravating factors and recommended a sentence of death on the murder count. That same day, Judge Kittredge sentenced Applicant to death for murder. **{R. 2259}**.

A timely Notice of Appeal was filed and served with the South Carolina Supreme Court. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, was appointed to represent Applicant during his direct appeal. On July

22<sup>nd</sup>, 2004, Dudek filed with the state supreme court a Final Brief of Appellant, in which he asserted the following issues on behalf of Applicant:

(1) Whether the judge erred by excusing Juror Smith for cause, where she testified she could vote for the death penalty, and sign the form imposing the death sentence, since Smith was a qualified juror?

(2) Whether the court erred by refusing to instruct the jury on the law of voluntary manslaughter where there was evidence the trooper engaged in an "aggressive" traffic stop which endangered appellant, who was on a motorcycle, while the trooper was in a patrol car, since this created the heat of passion and legal provocation necessary for an instruction on voluntary manslaughter?

(3) Whether the judge erred by ruling South Carolina's death penalty statute was constitutional where it mandated that appellant, seeking the mitigating evidence attendant to pleading guilty, and accepting responsibility, must waive jury sentencing, since this procedure denied appellant his right to present mitigating evidence to a sentencing jury?

(4) Was the court without subject matter jurisdiction to sentence appellant to death, pursuant to Jones v. United States, Apprendi v. New Jersey, and Ring v. Arizona where the indictment issued by the Greenville County Grand Jury did not allege an aggravating circumstance?

The State, through Assistant Attorney General S. Creighton Waters, filed its Final Brief of Respondent on July 22<sup>nd</sup>, 2004. Dudek followed with a Final Reply Brief of Appellant also dated July 22<sup>nd</sup>, 2004.

Oral argument in the case was held before the state supreme court on October 5<sup>th</sup>, 2004. The South Carolina Supreme Court issued an opinion affirming the convictions and death sentence on December 6<sup>th</sup>, 2004. State v. Wood, 607 S.E.2d 57 (S.C. 2004). {App. 2575}. A petition for rehearing was denied by that court on January 20<sup>th</sup>, 2005, and a death warrant issued on January 21<sup>st</sup>, 2005. {App. 2585}.

Applicant filed a stay request with the state supreme court on January 25<sup>th</sup>, 2005,

to pursue review by the United States Supreme Court. The State filed a Return to the stay request on February 1<sup>st</sup>, 2005. The South Carolina Supreme Court granted a stay by Order dated February 2<sup>nd</sup>, 2005. {App. 2587}

Applicant through counsel Dudek filed a Petition for Writ of Certiorari with the United States Supreme Court on April 15<sup>th</sup>, 2005, in which he raised the following issue:

Whether the South Carolina Supreme Court erred by holding that the trial judge's disqualification of a black juror who stated she could impose the death penalty was justified under Wainwright v. Witt, 469 U.S. 412 (1985), since an appeal for a cross-section of the community was not condemned in Wainwright v. Witt, and the trial court did not rule the potential juror was not credible?

The State, through Assistant Attorney General Waters, filed a Brief in Opposition to the Petition for Writ of Certiorari on May 19<sup>th</sup>, 2005. The United States Supreme Court denied the Petition for Writ of Certiorari on June 20<sup>th</sup>, 2005.

**B. Intervening Action Prior To First PCR Filing.**

Applicant then filed with the South Carolina Supreme Court a second Petition for Stay of Execution on July 1<sup>st</sup>, 2005, so he could seek his state post-conviction relief (PCR) remedies. The State filed a Return to the Petition for a Stay of Execution on July 11<sup>th</sup>, 2005. By Order dated July 21<sup>st</sup>, 2005, the South Carolina Supreme Court granted a stay and appointed the Honorable Larry R. Patterson to preside over the case.

In accordance with In Re: Stays of Execution, 471 S.E.2d 140 (S.C. 1996), the South Carolina Supreme Court's October 18, 2000 Order, and S.C. Code Ann. § 17-27-160 (Supp. 1999), Judge Patterson convened a hearing at the Greenville County Courthouse on September 30<sup>th</sup>, 2005. {App. 2636}. Applicant was present at this hearing,

as were James A. Brown, Jr., Esquire, and Symmes Culbertson, Esquire. Assistant Attorney General S. Creighton Waters represented the State at the hearing. The Court ascertained that Applicant wished for counsel to be appointed so that he may could pursue state PCR; and that both Mr. Brown and Mr. Culbertson met qualifications set forth in S.C. Code Ann. § 12-27-160(B). On October 14, 2005, an Order Appointing Counsel was filed, by which Mr. Brown and Mr. Culbertson were appointed to represent Applicant.

### **C. Proceedings In the First PCR**

Applicant filed his first Application for Post-Conviction Relief on July 28<sup>th</sup>, 2005.<sup>1</sup> {App. 2589}. The State filed a Return dated August 29, 2005. {App. 2597}. Mr. Culbertson was subsequently replaced by Bill Godfrey, Esquire.

At the initial hearing of January 8<sup>th</sup>, 2007, Applicant served on the State at the hearing a First Amended Application for Post-Conviction Relief, in which he asserted the following claims:

#### **Ground A.**

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-13-26(B)(1) and 17-23-60 by trial counsels' failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

#### **Ground B.**

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.

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<sup>1</sup> This was thirty-eight (38) days after his convictions became final on direct review with the United States Supreme Court's denial of certiorari on June 20, 2005.

C. Code Sections 16-3-26 (B)(1) and 17-23-60 by trial counsels' failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground C.**

As an alternative ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code 16-3-26 (B)(1) and 17-23-60 by trial counsels' failure to concede guilt during the verdict phase of the proceedings. *Florida v. Nixon*, 543 U.S. 175, (2004) and *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground D.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to accept the trial court's offer to instruct the jury that the defendant is required to plead not guilty in order to obtain jury sentencing. *Strickland v. Washington*, 466 U.S. 688 (1984).

**Ground E.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health. *Estelle v. Smith* 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (6801989), *Hudgins v. Moore*, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4<sup>th</sup> cir. 1995); and *Strickland v. Washington*, 466 U.S. 688 (1984).

**Ground F.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. *Estelle v. Smith*, 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (1989), *Hudgins V. Moore*, 524 SE2d 105 (SC1999);

*Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4<sup>th</sup> cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground G.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground H.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith* 539 US 510 (2003), *Rompilla V. Beard*, 125 S. Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 688 (1984).

**Ground I.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object to improper closing argument of the prosecutor. *Strickland v. Washington*, 466 U.S. 668 (1984).

**{Supp. App. 1}.**

As testimony was beginning on January 8<sup>th</sup>, 2007, Applicant stood up and requested to waive his PCR and any further appeals. A recess was taken for Applicant to discuss this with his attorneys and place a phone call to his sister. Applicant held firm to this desire, so this Court issued an Order requiring an evaluation of Applicant on his competence to waive his PCR. **{App. 2636}.**

Prior to the evaluation, Applicant changed his mind and through counsel indicated

he wished to go forward with his PCR. The evaluation proceeded, however, without Applicant's cooperation, but no mental issues were noted.

On February 9<sup>th</sup>, 2007, Applicant filed a Second Amended Application for Post-Conviction Relief, in which he raised the following issues:

**Ground A.**

Applicant was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to investigate, challenge and present evidence impeaching the testimony of Karen A. McCall, a witness for the prosecution during the verdict or penalty phase of the trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground B.**

Application was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26 (B)(1) and 17-23-60 by trial counsel's failure to present sufficient evidence and sufficiently articulate a request for an instruction for voluntary manslaughter. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground C.**

As an alternative ground to Ground B, Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to concede guilt during the verdict phase of the proceedings. *Florida v. Nixon*, 543 U.S. 175, (2004) and *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground D.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to accept the trial court's offer to instruct the jury that a defendant is required to plead not guilty

in order to obtain jury sentencing. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground E.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to object to the testimony of from medical providers of the South Carolina Department of Mental Health, *Estelle v. Smith* 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680(1989), *Hudgins v. Moore*, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4<sup>th</sup> cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground F.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to prevent access to Mr. Wood by the South Carolina Department of Mental Health. *Estelle v. Smith*, 451 US 454 (1981); *Buchanan v. Kentucky*, 483 US 402 (1987); *Powell v. Texas*, 492 US 680 (1989), *Hudgins v. Moore*, 524 SE2d 105 (SC 1999); *Thomas-Bey v. Nuth*, 67 F3d 296 (Unpublished, 4<sup>th</sup> cir. 1995); and *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground G.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26 (B)(1) and 17-23-60 by trial counsels' failure to expose the incorrect diagnosis of the medical providers from the South Carolina Department of Mental Health. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground H.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S. C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to present mitigating evidence at the penalty phase of the trial. 1 ABA Standards for Criminal Justice (2d ed. 1982 Supp.), *Wiggins v. Smith* 539 US 510 (2003), *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) *Strickland v. Washington*, 466 U.S. 688 (1984).

**Ground I.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including S.C. Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsels' failure to object improper closing arguments of the prosecutor. *Strickland v. Washington*, 466 U.S. 668 (1984).

**Ground J.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to object to the prosecution introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984) and *State v. Burkhardt*, —S.E. 2d—, 2007 WL 80036 (SC 2007).

**Ground K.**

Applicant was denied the effective assistance of counsel, as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1, Section 14 of the South Carolina Constitution and South Carolina law including SC Code Sections 16-3-26(B)(1) and 17-23-60 by trial counsel's failure to object to the equal protection violation created by the aggravating circumstances making Mr. Wood death eligible. *Strickland v. Washington*, 466 U.S. 668 (1984).

**{Supp. App. 9}.**

An evidentiary hearing in the case was held from March 6<sup>th</sup> to 8<sup>th</sup>, 2007. Applicant was present and represented by his counsel Brown and Godfrey; the State was represented by Assistant Attorney General S. Creighton Waters. Applicant called psychiatrist Dr. Thomas Cobb, his sister Connie Jantz, computer expert Jeffrey Naylor, psychiatrist Dr. Donna Schwartz-Watts, Dr. John Steedman, psychologist Dr. Camilla Tezza, social worker Carlos Torres, Investigators Paul Silvaggio and Tim Jones, United

States Probation Agent Bryan Bowen, psychiatrist Dr. Pratep Narayan, and the trial attorneys: John Mauldin, Jim Bannister, and Rodney Richey. Applicant also called his Anderson county trial counsel Bruce Byrholdt. The State called no witnesses. **{App. 2697}**.

Following briefing from both sides, Judge Patterson filed on December 19, 2007, an Order of Dismissal with Prejudice, in which rejected Applicant's various claims for relief. **{App. 3633}**. In a document dated December 31, 2007, Applicant filed a Motion to Reconsider Order Denying Post-Conviction Relief. **{Supp. App. 19}**. The State filed a response on January 24, 2008. **{Supp. App. 45}**. On January 28, 2009, Judge Patterson signed an Order in which he denied the motion to reconsider. **{Supp. App. 53}**.

#### **D. Appeal of first PCR**

Applicant timely filed and served a notice of appeal with the South Carolina Supreme Court. Chief Appellate Defender Robert M. Dudek, and Senior Appellate Defender Joseph L. Savitz, III, represented Applicant on PCR appeal. On November 5<sup>th</sup>, 2010, Applicant filed a Petition for Writ of Certiorari, in which he raised the following claims:

(1) Whether the post-conviction relief court erred by ruling that defense counsel was not effective for failing to object to general prison conditions evidence purporting to show that prison was like "a city" with many amenities, since this evidence was inadmissible and improper because it did not focus on Petitioner's character or the circumstances of his crime, and this Court years ago held such prison conditions evidence and circumstances of execution evidence were improper in State v. Plath?

(2) Whether defense counsel were ineffective at sentencing when they failed to object to the Solicitor's closing argument that, if the jury sentenced Petitioner to life imprisonment, he would "rise in the hierarchy of the prison" and be the "leader" and "king" of a prison gang, as this argument was not supported by the evidence or any reasonable inference drawn therefrom and so infected the proceeding with unfairness as to make the resulting death

sentence a denial of due process?

(3) Whether defense counsel were ineffective at sentencing by failing to secure the testimony of Petitioner's sister, Connie, who would have pleaded for mercy on his behalf and for the sake of his infant son, and would have corroborated the limited expert mitigation testimony counsel did present?

On March 9<sup>th</sup>, 2011, the State, through Senior Assistant Attorney General S. Creighton Waters, filed a Return to the Petition for Writ of Certiorari.

On November 16<sup>th</sup>, 2012, the South Carolina Supreme Court denied the petition for writ of certiorari, and the remittitur was issued on November 26, 2012.

**E. Stay of Applicant's execution date for federal habeas action.**

On December 7, 2012, the South Carolina Supreme Court filed an Order setting Applicant's execution date for the fourth Friday following the date of service. Applicant filed in federal court a Motion to Stay for appointment of counsel for his federal habeas corpus action, and following response by the State, United States District Judge David C. Norton granted that motion to stay by order dated December 14<sup>th</sup>, 2012.

**F. Federal Habeas Petition and Stay of Federal proceedings**

On September 19, 2013, Applicant filed his Petition for Writ of Habeas Corpus and a motion to stay and abey the habeas proceedings so that he could litigate the current successive state PCR action. In his Petition for Writ of Habeas Corpus, Applicant raised the following claims:

I. Petitioner's right to an impartial trial before an impartial jury, guaranteed by the fifth, sixth, and fourteenth amendments to the United States Constitution, was violated as a result of the trial court's decision to excuse a potential juror for cause.

II. Petitioner's right to a fair and reliable determination of the appropriate punishment in a capital case, guaranteed by the fifth, sixth, eighth, and

fourteenth amendments to the united states constitution, was violated as a result of the trial court's ruling that south carolina's death penalty statute was constitutional in mandating that defendants must forego their right to jury sentencing if they plead guilty to the charged offenses.

III. Petitioner's right to the effective assistance of counsel as guaranteed by the sixth amendment to the united states constitution was violated when trial counsel failed to object to the prosecution's introduction of evidence relevant to an arbitrary factor during the penalty phase of the trial.

IV. Petitioner's sixth, eighth, and fourteenth amendment rights were violated by the solicitor's improper closing argument during the penalty phase of petitioner's capital trial.

V. Petitioner's right to the effective assistance of counsel as guaranteed by the sixth amendment to the united states constitution was violated when trial counsel unreasonably failed to object to multiple comments in the solicitor's closing argument.

VI. Petitioner's right to the effective assistance of counsel as guaranteed by the sixth amendment to the united states constitution was violated when trial counsel failed to adequately investigate and present the full range of mitigation evidence.

VII. Petitioner's rights to the effective assistance of counsel and due process as guaranteed by the fifth, sixth, and fourteenth amendments to the united states constitution were violated when defense counsel's opening statement at the penalty phase improperly shifted the burden to the defense to prove why a life sentence was appropriate and when defense counsel failed to object to the improper preprinting of juror names on the death sentencing sheet.

VIII. Petitioner's due process right to a fair trial was violated by the trial court's admission of victim impact evidence, where "law enforcement" was portrayed as the "victim."

IX. Petitioner's right to the effective assistance of appellate counsel as guaranteed by the sixth amendment to the united states constitution was violated by appellate counsel's failure to raise the issue of whether the trial court erred in denying the defense's motions to bar and limit the admission of victim impact evidence and overruling defense's objection to the state's victim impact evidence.

X. Petitioner's right to due process as guaranteed by the fourteenth amendment to the united states constitution was violated by the state's

failure to disclose material, exculpatory evidence that would have undermined the credibility of a key prosecution witness, and by the state's presentation of testimony it knew to be false.

Following response in opposition from the State, on October 23, 2013, United States Magistrate Judge Paige Gossett stayed the federal habeas proceedings pending resolution of the current successive PCR, reasoning that on occasion the state courts have let successive PCR applications proceed, and the state courts should decide if this case falls within one of those rare exceptions. As will be seen, this case is patently not one of those special cases.

#### **F. Successive PCR action**

On September 26<sup>th</sup>, 2013, Applicant filed with the Greenville County Clerk of Court this successive PCR action. This filing was received by the Attorney General's Office on October 3<sup>rd</sup>, 2013. In this action, Applicant has raised the following claims:

(10)(a): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial as a result of trial counsel's acts or omissions set forth below in section 1 1 (a). Trial counsel's performance was both unreasonable and prejudicial as outlined below. See *Strickland v. Washington*, 466 U.S. 668 (1984), *Wiggins v. Smith*, 539 U.S. 510 (2003), *Von Dohlen v. State*, 360 S.C. 598, 602 S.E.2d 738 (2004).

11(a): Trial counsel's acts or omissions included:

(i) Counsel failed to object to comments by Solicitor Ariail during summation, which inaccurately and improperly stated that the prosecution "can only seek it [the death penalty] where the murderers are mean and evil people based on the circumstances of the crime." (Trial Tr. 2187).

(ii) Counsel failed to object to comments by Solicitor Ariail during summation which inaccurately and improperly stated that imposition of the death penalty was warranted, because prison life is simply "a change of address and nothing more,"

because "prison is like being in a city. You've got a restaurant, you've got a medical center [ . . . ] [you] watch ball games on TV." (Trial Tr. 2192).

(iii) Counsel failed to object to comments by Solicitor Ariail which improperly asserted that applicant deserved the death penalty for systemic reasons beyond the facts of applicant's case: "It's a tragedy, potentially, if not properly addressed, on a much greater level, and that is how it effects law enforcement and the very foundation of a free society." (Trial Tr. 2194).

(iv) Counsel failed to object to Solicitor Ariail's implication that the jury's decision would have long-term consequences on the community and which injected larger societal issues into the proceedings beyond the facts of applicant's case. Solicitor Ariail improperly urged the jury "on behalf of [ . . . ] the people of this community to let that bell ring, to let them know that anyone who is involved in the killing of a law enforcement officer in the line of duty who is there to protect the rest of us, that such conduct will not be tolerated and will receive the ultimate punishment under the law." (Trial Tr. 2194).

(v) Counsel improperly shifted the burden to the defense to prove why a life sentence was appropriate, rather than argue that the State carries the burden, and a sentence of life is in fact the default presumption. Counsel stated: "I know that you believe that John Wood deserves to die for what you convicted him of. I know that just the crime itself is enough." Counsel merely requested that the jury listen to mitigating evidence, and "if you keep listening in spite of these feelings that I really believe you have and you had, even though it's perhaps impossible to imagine that you could justify not executing John Wood, I would hope that you would find a reason to choose life-even for John Wood." (Trial Tr. 1851-59).

(vi) Counsel failed to object to pre-printed names of jurors on the aggravating circumstances/death verdict form provided to the jury foreperson which clearly implied that it was the proper and expected role of each juror to sentence applicant to death.

10(b): Applicant was denied the right to effective assistance of counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina Constitution - during the sentencing phase of his capital trial as a result of trial counsel's

failure to adequately develop and present the full range of mitigating evidence as set forth below in section 11 (b). Trial counsel's performance was both unreasonable and prejudicial as set forth below. See Strickland v. Washington, 466 U.S. 668 (1984), Wiggins v. Smith, 539 U.S. 510 (2003), Von Dohlen v. State, 360 S.C. 598, 602 S.E.2d 738 (2004).

11(b): Trial counsel's acts or omissions included:

(i) Counsel failed to adequately investigate mitigation evidence, including the failure to call any member of applicant's family, despite the fact that applicant's sister was available and willing to testify at trial. (App. 2790). Counsel failed to do a complete, or even adequate, social history investigation, speaking with only applicant's girlfriend (and co-defendant) and sister, and gathering virtually no institutional records. See Wiggins v. Smith, 539 U.S. 510, 523 (2003)(determining that counsel should investigate and consider presenting, among other things, "medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experiences, and religious and cultural influences").

(ii) Counsel failed to adequately develop and present evidence that applicant has significant mental impairments, including cognitive deficits, learning disabilities and brain damage, autism spectrum disorder and temporal lobe epilepsy. A pretrial neuropsychological evaluation revealed that applicant has significant indicators of brain damage, including: (1) a statistically significant split between verbal and non-verbal IQ; (2) visual perceptual deficits; (3) increased brain power in certain areas coexisting with decreased brain power in other areas in a pattern consistent with dementia; and, (4) excessive numbers of coherence abnormalities, which is a condition often seen in cases of brain damage where, to help compensate for brain damage, brain function has come to involve mass action rather than more normal, differentiated action. However, trial counsel unreasonably failed to present this powerful mitigating evidence or investigate further. Additionally, based on initial investigation and research, applicant exhibits many symptoms of autism spectrum disorder (ASD) and temporal lobe epilepsy (TLE). TLE usually manifests itself with scarring on the temporal lobe that causes neurons to misfire, ultimately resulting in seizures. The incidence of TLE in violent criminals is surprisingly high. See EVE LAPLANTE, SEIZED 215 (2003). Applicant's symptoms and indicators of TLE include:

(1)parasthesias, which is a condition, commonly associated with seizures, where the patient experiences a sensation of tingling, burning, pricking or numbness. (2)memory difficulties, (3) auditory and visual hallucinations, (4) hyper-religiosity(5) abnormal EEG results; and, (6) a neuropsychological test battery indicating significant brain damage.

(iii) Trial counsel also failed to investigate and present evidence that applicant has suffered from sexual abuse.

10 (c): Applicant was denied the right to effective assistance of appellate counsel - guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article I, §§ 3 and 14 of the South Carolina constitution - when appellate counsel committed the acts or omissions set forth below in Section II (c). Appellate counsel's performance was both unreasonable and prejudicial set forth below. See *Strickland v. Washington*, 466 U.S. 668(1984).

11 (c): Appellate counsel failed to raise the improper presentation of victim impact evidence issue on direct appeal, as the effects of the crime on police officers were presented as a "glimpse" into the life of the victim. This issue was preserved and well litigated at trial, as counsel objected to the testimony as "essentially [ ... ] professional victim impact presentation as opposed to a personal family presentation." (Trial Tr. 1799). Trial counsel's motion was denied, and the officer subsequently testified that many "young troopers have come to me because their spouses [ ... ] come to them and say 'Hey, I want you out [of law enforcement].'" This testimony is unduly prejudicial, as it improperly broadens the scope of "victim" impact to include effects on the entire law enforcement community. See *Payne v. Tennessee*, 501 U.S. 808 (1991).

10(d): Applicant's Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair sentencing proceeding were violated by the solicitor's improper closing argument during the penalty phase of applicant's capital trial.

11(d): Solicitor Ariail made the following improper statements during the penalty phase summation:

(i) He inaccurately and improperly stated that the prosecution "can only seek it [the death penalty] where the murderers are mean and evil people based on the circumstances of the crime." (Trial Tr. 2187).

(ii) He inaccurately and improperly stated that imposition of the

death penalty was warranted, because prison life is simply "a change of address and nothing more," because "prison is like being in a city. You've got a restaurant, you've got a medical center [ ... ] [you] watch ball games on TV." (Trial Tr. 2192).

(iii) He improperly asserted that applicant deserved the death penalty for systemic reasons beyond the facts of applicant's case: "It's a tragedy, potentially, if not properly addressed, on a much greater level, and that is how it effects law enforcement and the very foundation of a free society." (Trial Tr. 2194).

(iv) He improperly implied that the jury's decision would have long-term consequences on the community and which injected larger societal issues into the proceedings beyond the facts of applicant's case. Solicitor Ariail improperly urged the jury "on behalf of [ ... ] the people of this community to let that bell ring, to let them know that anyone who is involved in the killing of a law enforcement officer in the line of duty who is there to protect the rest of us, that such conduct will not be tolerated and will receive the ultimate punishment under the law." (Trial Tr. 2194).

10(e): Applicant's Eighth and Fourteenth Amendment rights guaranteeing a fundamentally fair sentencing hearing were violated by the trial court's admission of victim impact evidence which improperly portrayed "law enforcement" as the "victim." See *Payne v. Tennessee*, 501 U.S. 808(1991).

11(e): At trial, the court improperly permitted testimony that portrayed the broader law enforcement community as a victim of the crime. This issue was preserved and well litigated at trial, as counsel objected to the testimony as "essentially [ ... ] professional victim impact presentation as opposed to a personal family presentation." (Trial Tr. 1799). The defense pointed to *Payne v. Tennessee*, 501 U.S. 808 (1991), and its narrow holding that only permits "a brief glimpse of the life [of the victim]." Trial counsel's motion was denied, and the officer subsequently testified that many "young troopers have come to me because their spouses ... come to them and say 'Hey, I want you out [of law enforcement].'" Moreover, the officer testified to the broader psychological impact of the crime, saying that "[t]his particular situation has opened a lot of eyes to a lot of people within the law enforcement community simply because you never know whether it could be a tractor trailer or it could be a moped. You don't know what you' re dealing with anymore." (Trial Tr. 1870). This testimony is unduly prejudicial, and improperly broadens the scope of "victim" impact to include effects on the entire law enforcement community. See *Payne v. Tennessee*, 501 U.S. 808 (1991). Furthermore, the

prejudicial effect of this testimony was exacerbated when, during closing arguments at the penalty phase, the solicitor argued that failing to impose a death sentence would detrimentally affect law enforcement as a whole and the ability of law enforcement officers to do their jobs.(Trial Tr. 2194).

10(f): Applicant's right to Due Process, guaranteed by the Fourteenth Amendment to the United States Constitution, was violated by the State's failure to disclose material, exculpatory evidence that would have undermined the credibility of a key prosecution witness, and by the State's presentation of testimony it knew to be false.

11(f): At applicant's Greenville County trial in February 2002, the State called Karen McCall, applicant's co-defendant. McCall testified that as she and applicant were being pulled over by a police officer, applicant "stomped his foot on the gas," saying "I shot the son of a bitch [sic]" and waving a gun at her so that she would continue to drive. App. 1441-42. She said that applicant "reached over [her] and pushed the [rear window] button himself" in order to open the rear window during the subsequent shoot out. App. 1443. McCall testified that she was "afraid to die, and ... didn't want [her] baby to die," saying that she "thought [applicant] was going to kill [her and her baby] and then kill himself." App. 1445-46. When asked what she was doing during the chase and shootout, McCall said she was praying. App. 1443. During his closing argument, the solicitor repeatedly referred to McCall's testimony to illustrate applicant's "meanness." App. 1741-42. Shortly thereafter, during applicant's Anderson County trial held in May 2002, SLED agent Gene Donohue testified that he and another agent investigated McCall's jeep to assess whether her account of the events was even possible, in other words, "if it was possible to ... commandeer the vehicle from the passenger seat" and "if you could control the driving, control the gas, control the brakes." Anderson App. 413. Agent Donohue testified that "[y]ou can't reach th[e] accelerator from the passenger side at air' due to the configuration of the car model and the console that was installed in the car at the time. Anderson App. 417 (emphasis added). Agent Donohue went on to say that "in order to reach the [rear window] switch, ... you actually have to lay across the dashboard and the steering wheel to even reach over it." Anderson App. 419. All of these SLED experiments relating to the passenger's access to the rear window control and the accelerator were conducted on December 15, 2000, Anderson App. 420, more than a year before applicant's Greenville trial-the trial where the State portrayed McCall as a devout and pregnant hostage coerced by someone who was "mean and rotten to the core." App. 1743. Thus, well before the Greenville trial, the solicitor knew or should have known that SLED agents had assessed the plausibility of McCall's account and already determined that multiple aspects of the account were implausible. The State's failure to disclose this exculpatory, material evidence within its possession violated applicant's right

to due process. See *Kyles v. Whitley*, 514 U.S. 419, 432 (2002); *Brady*, 373 U.S. at 87-88; cf. *Youngblood v. West Virginia*, 547 U.S. 867, 869-70 (2006) (holding that *Brady* suppression occurs even if favorable evidence is known only to police investigators and not prosecutor). Moreover, the State presented evidence that it knew to be false in violation of applicant's right to due process. *Napue v. Illinois*, 360 U.S. 264, 269 (1959).

This Return follows. Attached herewith and incorporated herein by reference are the following documents:<sup>2</sup>

- (1) PCR Appendix containing six (8) volumes;
- (2) Order Denying Certiorari by US Supreme Court, 6-25-05;
- (3) Order granting Stay, 7-21-05;
- (4) Second Amended PCR Application;
- (5) Applicant's PCR post-trial Brief;
- (6) Respondent's Post-Trial Brief;
- (7) Petition for Writ of Certiorari to the South Carolina Supreme Court;
- (8) Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of South Carolina;
- (9) Final Brief of Appellant;
- (10) Final Brief of Respondent;
- (11) Final Reply Brief of Appellant;
- (12) Motion to Reconsider Order Denying PCR;
- (13) Response to Motion to Reconsider;
- (14) Order on Motion to Reconsider;
- (15) Petition for Writ of Certiorari (PCR appeal);

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<sup>2</sup> Counsel for Applicant has received these attachments already in the habeas action.

- (16) Return to Petition for Writ of Certiorari (PCR appeal);
- (17) Order Denying the Petition for Writ of Certiorari (PCR Appeal); and
- (18) Remittitur.
- (19) Execution Order, dated December 7, 2012;
- (20) Order of United States District Court staying execution;
- (21) Federal Habeas Corpus Petition (0:12-CV-3532-DCN-PJG); and
- (22) Order of United State Magistrate Judge Granting Motion to Stay.

**II. THE CURRENT PCR ACTION SHOULD BE SUMMARILY DISMISSED AS IT IS UNTIMELY UNDER THE STATUTE OF LIMITATIONS AND ALSO VIOLATES THE BAR AGAINST SUCCESSIVE APPLICATIONS.**

The current application is patently successive and untimely. In his grounds for relief, Applicant identifies various freestanding claims or claims of ineffective assistance that undoubtedly were not presented to the state courts in either the direct appeal or the PCR. His only explanation in the application for this is the bare unsupported claim that his "trial, appellate, and post-conviction relief counsel failed to provide competent, reasonable representation".

**A. Successive bar**

However, South Carolina has very strict prohibitions against successive and untimely PCR applications which would preclude the action here. First, as to successive applications, South Carolina Code Ann. § 17-27-90 (2003) provides:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the

basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If Applicant could have raised these allegations in a previous application, then Applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Applicant's mere allegations of ineffective assistance of PCR counsel do not provide "sufficient reason" to overcome the prohibition against successive PCR applications. In Aice, the South Carolina Supreme Court specifically rejected ineffectiveness of PCR counsel as a sufficient reason for a successive PCR, noting that the court "will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not". The Aice court specifically rejected what Applicant is trying to do here today, stating:

**It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view.**

\* \* \*

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. See *Butler v. State*, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17 27 90.** This Court has implied such a holding in the past. See *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id. at 451, 409 S.E.2d at 394. (Emphasis added).

Admittedly, there are exceptions to the rule; however, there is nothing to show applicability here. While successive PCRs are allowed for belated direct appeals where a person did not fairly get their "one bite at the apple", see *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), there is no possible application of that decision here as Applicant clearly litigated his direct appeal in this case. In another situation, the South Carolina Supreme Court heard a successive application, but only because it was one of the "rare cases" where "so many procedural irregularities occurred during the course of [the inmate's] judicial process that he has not received due process". *Washington v. State*, 324 S.C. 232, 478 S.E.2d 833, 835 (1996).

There is no evidence much less even a contention here that Applicant's process on the whole was so broken that he did not receive due process; indeed, to the contrary the extensive procedural history set forth above makes it clear that Applicant has had his one full bite at the apple on both direct appeal and PCR, in which multiple claims were

preserved and ruled upon throughout the process. All we have now is new collateral counsel, with the unerring benefit of hindsight as to what was unsuccessful the first time through, now trying a second bite at the apple with new issues that they happen to favor. See generally Jones v. Barnes, 463 U.S. 745, 751 (1983) (stating that appellate counsel may make reasonable strategic choice not to appeal every non-frivolous argument requested by defendant, and noting "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible"); Smith v. Stewart, 140 F.3d 1267, 1274 n. 4 (9<sup>th</sup> Cir. 1988) (Counsel is not ineffective for failing to file a "kitchen sink" brief.).

Indeed, the point that supposed ineffective assistance of PCR counsel does not justify a successive PCR is confirmed by the South Carolina Supreme Court's recent conclusion that "the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). In Martinez, the United States Supreme Court set forth a "narrow exception," only addressed to overcoming procedural bars in federal habeas corpus:

Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

132 S.Ct at 1315, 1320. Thus does not create a new substantive claim of ineffective assistance of PCR counsel applicable in state court, nor does it create a procedural mechanism for overcoming our clear PCR rules against successive and untimely applications. The South Carolina Supreme Court made this clear in Kelly.

The current application is impermissibly successive.

## **B. Period of Limitations**

As a separate and independent basis, South Carolina's PCR statute of limitations also would preclude this new PCR as well. Section 17-27-45 provides for a one-year statute of limitations on the filing of a post-conviction relief action, and Applicant is clearly out of time.

As shown above, the United States Supreme Court filed an Order denying certiorari on June 20<sup>th</sup>, 2005. Wood v. South Carolina, 545 U.S. 1132 (2005). Therefore, Wood had until June 20<sup>th</sup>, 2006 to file the current Application. He did not file the current Application until September 26, 2013. See Gary v. State, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is over seven years after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

Admittedly, the section also provides:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

In this case, the basis for all of the claims in Applicant's six grounds for relief would have been apparent from the trial and appellate records, and there is no reason why they could not have been previously raised with the exercise of due diligence (and also no sufficient reason under Aice why they could not have been raised).

Indeed, in his first ground for relief in this successive application, Applicant primarily

complains about counsel's failure to object to portions of the solicitor's closing argument. At the first PCR, Applicant also raised but the court rejected claims regarding the solicitor's closing argument – the issues there were just aimed at different portions of the argument than current counsel favor. **{App. 3654}**. In this first ground in the successive application, Applicant also complains counsel was ineffective for recognizing to the jurors the natural inclination to sentence him to death given the horrible crimes he committed. In the original PCR, though, the claim was that counsel was ineffective for not conceding guilt given the overwhelming case. **{App. 3654}**. This about face by new lawyers starkly illustrates the what our Supreme Court expressly rejected in Aice – that “the number of successive PCR applications to be entertained by our judicial system in a given case [is] limited only by the imagination and creativity of skilled attorneys”.

But it does not end there. In Ground 10(b) of the successive application, Applicant contends his counsel did not call his sister Connie Jantz, and failed to develop evidence of specific mental impairments. But in the first PCR, Applicant presented and the court rejected a precise claim that trial counsel failed to present Ms. Jantz and other family members. **{App. 3701}**. As to the mental health claims, again Applicant at the first PCR raised the issue that counsel failed to sufficiently challenge the State's mental health presentation and “correct the diagnosis”. **{App. 3692}**. Moreover, this is the all-too-typical claim of failure to present mitigating mental health information, despite the fact that trial counsel called a social worker and psychiatrist at trial **{App. 2013; 2102}**, and multiple mental health professionals testified in PCR **{App. 2816; 3134; 3141; 3161; 3195}**. Merely finding a new expert or family member who will say something new or different is

typically insufficient to find trial counsel ineffective in PCR when extensive information on the subject was presented at trial, and the same would hold true for PCR counsel as well. See, e.g. Poyner v. Murray, 964 F.2d 1404, 1419 (4<sup>th</sup> Cir. 1992) (Petitioner cannot establish ineffective assistance because counsel did not “expert shop” until one could be found who would testify favorably); Byram v. Ozmint, 339 F.3d 203 (4<sup>th</sup> Cir. 2003) (where counsel hired a psychologist, psychiatrist, social worker, and investigator for mitigation, and prepared extensively, investigation was reasonable despite claim counsel failed to present evidence of background, fetal alcohol syndrome, and brain damage; moreover, case was different from Wiggins on the prejudice prong in that here the jury did hear testimony about the background, and this was not a case where the jury was “completely in the dark as to the defendant’s alleged mental problems); Wilson v. Ozmint, 352 F.3d 847 (4<sup>th</sup> Cir. 2004) (counsel not deficient in investigating family members, given their substantial investigation into the defendant’s family life and the large amount of evidence introduced at the plea hearing); Jones v. State, 332 S.C. 329, 504 S.E.2d 822 (1998) (a “fancier” mitigation case is insufficient for PCR relief).

Indeed, there is no contention nor evidence that original PCR counsel would not have been able to discover these claims in the exercise of due diligence, and the mere fact that new lawyers with new experts can create new mental health diagnoses is patently not only insufficient reason for a new PCR, but also substantively insufficient for relief anyway.

Applicant next complains in the successive PCR that *appellate* counsel was ineffective for failing to challenge the solicitor’s reference to the effect of Applicant’s murder of a trooper on the law enforcement community. He also makes similar free standing claims in allegations 11(d) and 11(e). Aside from the fact that freestanding claims are

improper in PCR, see Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993) (issues that could have been raised at trial or on direct appeal cannot be raised in an APCR absent a claim of ineffective assistance of counsel), again we have a new permutation on supposed issues with the solicitor's argument by Applicant's current lawyers, after Applicant's original lawyers were unsuccessful with raising issues as to *other* parts of the solicitor's argument. Regardless, the South Carolina Supreme Court would approve of such testimony and arguments. See State v. Bixby, 388 S.C. 528, 698 S.E.2d 572 (2010) ("[T]he videotape [of the police officer's funeral] was relevant to show the uniqueness of the victim, the harm committed by Appellant, and the impact of the victim's death on his family and society").

Similarly, Applicant currently makes in 11(d)(ii) a freestanding claim about the solicitor's arguments regarding conditions of confinement. Again, aside from the problem of a freestanding claim, conditions of confinement were already raised and rejected in the ineffective assistance context during the first PCR, and South Carolina Supreme Court denied certiorari. **{App. 3712}**. Thinking up a new way to raise the same old rejected claim is not sufficient reason, and shows the lack of due diligence.

Finally, Applicant in the successive PCR raises a Brady claim as to Applicant's girlfriend and codefendant, Karen McCall, despite the fact that in the first PCR Applicant raised a claim that counsel was ineffective for failing to attack the testimony of McCall, particularly on her attempts to place most of the blame on Applicant. **{App. 3644}**. Again, we have a new permutation of the same issue from information that has been available from the beginning.

The bottom line is that Applicant's bare and unsupported claims, and new

permutations on the same or similar issues that would have been apparent with due diligence, do nothing to demonstrate the rare and extreme circumstances in which a successive or untimely PCR is allowed. Indeed this case *highlights* the very concerns expressed by the South Carolina Supreme Court, by allowing new lawyers with the benefit of hindsight to come up with new claims in successive applications. Accordingly, under the clear rules for PCRs as set forth by the General Assembly and interpreted by our South Carolina Supreme Court – most recently this year in Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) – the current application should be summarily dismissed.

**CONCLUSION**

Each and every allegation in the Application not hereinabove either expressly admitted, denied, qualified or explained is hereby denied. In the event this Court disagrees the case should be dismissed as a matter of law, Respondents request an evidentiary hearing to resolve any questions of fact. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

WHEREFORE, Respondent submits that the Application for Post-Conviction Relief should be dismissed as a matter of law.

Respectfully submitted,

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October 28, 2013.

CERTIFICATE OF SERVICE

I, S. Creighton Waters, counsel for the Respondent, certify that I have served the *Return and Motion to Dismiss*, by depositing one (1) copy of same in the United States mail, postage prepaid, addressed to:

Emily C. Paavola, Esquire  
Elizabeth Franklin-Best, Esquire  
900 Elmwood Ave, Suite 101  
Columbia, SC 29201

This 28th day of October, 2013.

FILED-CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL B. WICKENSIMER  
2013 NOV 18 PM 3 08



S. CREIGHTON WATERS