

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

RECEIVED

JUN - 5 2012

**Appeal From Dorchester County
The Honorable Diane S. Goodstein, Circuit Court Judge**

S.C. Supreme Court

TIMOTHY DION ROGERS,

Respondent,

vs.

STATE OF SOUTH CAROLINA,

Petitioner.

APPENDIX

DIANA HOLT, ESQ.
P.O. Box 6454
Columbia, South Carolina 29260
ATTORNEY FOR RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit
Post Office Box 1525
Orangeburg, SC 29116-1525
(803) 533-6252

ATTORNEYS FOR PETITIONER

INDEX

INDEX	i
Transcript of Record - January 25 th and 27 th , 1994	1
Record on Appeal - The Honorable Luke N. Brown, Jr.	27
Notice of Intention to Appeal - March 3, 1994	1377
Final Brief of Appellant - July 26, 1995	1380
Final Brief of Respondent - July 7, 1995	1410
South Carolina Supreme Court Opinion No.: 24366 filed January 22, 1996	1478
Remittitur - February 7, 1996	1484
Record on Appeal - The Honorable Charles William Whetstone, Jr.	1485
Notice of Appeal - December 6, 1996	2625
Final Brief of Appellant - June 17, 1998	2633
Final Brief of Respondent - June 17, 1998	2649
South Carolina Supreme Court Affirmed Opinion No.: 25032 filed December 6, 1999	2668
Petition for Rehearing - December 20, 1999	2674
South Carolina Supreme Court Order granting Petition for Rehearing dated January 24, 2000	2677
South Carolina Supreme Court Affirmed Opinion No.: 25032 filed January 24, 2000	2678
Petition for Stay of Execution - February 7, 2000	2684
Remittitur - February 9, 2000	2687

Application for Post-Conviction Relief [2000-CP-18-575] - June 12, 2000	2688
Return to Application for Post-Conviction Relief [2000-CP-18-575] - July 13, 2000	2693
First Amended Application for Post-Conviction Relief - August 27, 2004	2704
Post-Conviction Relief Transcript of Record	2719
Second Amended Application for Post-Conviction Relief - March 31, 2005	3947
Post-Conviction Relief Hearing Transcript - March 25, 2005	3966
Post-Conviction Relief Hearing Transcript - Cont. - August 23, 2005	3985
Applicant's proposed Order - June 11, 2007	4068
Respondent's proposed Order - May 11, 2007	4209
Third Amended Application for Post-Conviction Relief dated May 31, 2007	4412
Motion to Strike Third Amended Application for Post-Conviction Relief - June 7, 2007 ...	4436
Order granting applicant to amend Third Application for Post-Conviction Relief dated September 22, 2008	4461
Revised Third Amended Application for Post-Conviction Relief - September 29, 2008	4464
Return to Motion to Amend Third Amended Application for Post-Conviction Relief dated October 15, 2008	4492
Order granting Applicant's Motion to Amend - June 19, 2009	4513
Respondent's proposed Order - Grounds 9 (G-H) - July 20, 2009	4523
Applicant's proposed Order - Grounds 9(G-H) - July 24, 2009	4541
South Carolina Supreme Court Order - June 17, 2010	4556
Order Granting New Sentencing, etc. - September 2, 2010	4558
Applicant's Motion to Alter or Amend - September 13, 2010	4732
Respondent's Motion to Alter or Amend - September 13, 2010	4750

Transcript of Hearing on Rule 59(e), SCRC motions - October 8, 2010 4818
Amended Order Granting New Sentencing, etc. - December 10, 2010 4858
Notice of Appeal dated January 7, 2011 5009

improper in South Carolina:

We take this opportunity ... to caution the State and the defense that the evidence presented in a penalty phase of a capital trial is to be restricted to the individual defendant and the individual defendant's actions, behavior, and character. Generally, questions regarding escape and prison conditions are not relevant to the question of whether a defendant should be sentenced to death or life imprisonment without parole. We emphasize that how inmates, other than the defendant at trial, are treated in prison; and whether other inmates have escaped from prison, is inappropriate evidence in the penalty phase of a capital trial. We admonish both the State and the defense that the penalty phase should focus solely on the defendant and any evidence introduced in the penalty phase should be connected to that particular defendant.

Bowman, 366 S.C. at 498-99, 623 S.E.2d at 384.

Subsequent to *Bowman*, the South Carolina Supreme Court addressed a case in which the Solicitor *preemptively* called a witness who extensively testified as to the conditions of confinement for an inmate serving life without parole. The defense objected to the State's evidence, although it later presented its own evidence of "bad" prison conditions. *State v. Burkhart*, 371 S.C. 482, 640 S.E.2d 450 (2007).

Justice Moore, who was joined by Justice Waller, wrote the Opinion of the Court in *Burkhart*. Justice Moore cited *Plath* and other cases from the 1980s and 1990s for the proposition that evidence outside of the circumstances of the crime and the characteristics of the defendant was inadmissible in a sentencing phase. This included conditions of incarceration, the process of execution, or the deterrent effect of capital punishment. *Burkhart*, 371 S.C. at 487-88, 640 S.E.2d at 453.

Justice Moore's decision took the position that, even though *Burkhart* was tried before the decision in *Bowman*, its result was consistent with the "long-standing rule that evidence in the sentencing phase of a capital trial must be relevant to the character of the defendant or the circumstances of the crime". *Id.* Thus, Justice Moore concluded that reversible error had occurred, since the evidence of conditions of confinement "invited the jury to speculate about irrelevant matters" and injected an arbitrary factor in the proceedings in violation of S.C. Code Ann. § 16-3-

25(C)(1) (2003). *Burkhart*, 371 S.C. at 488-89, 640 S.E.2d at 453.

In a concurring decision, Justice Pleicones wrote that he did not believe that the Court should apply the normal harmless error standard for constitutional violations to this issue, concluding that “once improper evidence of any kind injects an arbitrary factor into the jury’s consideration, [the] Court cannot uphold the death sentence under § 16-3-25(C)(1).” *Burkhart*, 371 S.C. at 489-90, 640 S.E.2d at 454 (Pleicones, J., concurring). Justice Pleicones saw no prejudice component once a statutory violation was established.

In dissent, Chief Justice Toal, joined by Justice Burnett, applied the normal rule that the introduction of evidence will not result in reversal unless it prejudiced the defendant.³¹ The dissent concluded that the issue was fully joined by both sides and that the defendant had used it to his advantage. Finally, the dissent noted that the standard in § 16-3-25(C)(1) was merely a recitation of the Eighth Amendment requirements,³² and coextensive with the Eighth Amendment – which is subject to a harmless error analysis. *Burkhart*, 371 S.C. at 493-95, 640 S.E.2d at 454-57 (Toal, C.J., dissenting).

Subsequent to *Burkhart*, the South Carolina Supreme Court decided *State v. Bryant*, 372 S.C. 305, 642 S.E.2d 582, 589 (2007). There, the defense called an expert that testified in great detail as to the “dismal conditions of prison life in general.” Like *Bowman*, the Court in *Bryant* reiterated that defense evidence on conditions of confinement was just as improper as State evidence on the subject. *Id.*

Unlike *Burkhart*, *Bowman*, or *Bryant*, this case is in PCR. The Court finds that because this is a collateral attack on his conviction, Applicant must establish his claims through the constitutional vehicle of ineffective assistance of counsel. Thus, although the Court has allowed him to amend the

³¹ The dissent “would not reach the question of whether the trial court’s error in admitting the above described evidence was harmless because I would find no constitutional violations occurred.” *Id.* at 492, 640 S.E.2d at 455 (Toal, C.J., dissenting).

³² “[T]he Eighth Amendment’s requirements are primarily concerned with the ultimate result in capital cases, which is ‘preventing the imposition of excessive and disproportionate punishment upon the individual prisoner.’” 371 S.C. at 493, 640 S.E.2d at 456 (Toal, C.J., dissenting).

Application, the Court finds that his proposed Ground 9(H) is not proper for Post-Conviction Relief, since any erroneous evidence or argument by the prosecution could have been objected to at trial and an adverse ruling challenged on appeal. *See* S.C. Code Ann. § 17-27-20(b) (1986) (“This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction”); *Drayton v. Evatt*, 312 S.C. 4, 8-9, 430 S.E.2d 517, 520 (1993) (issues that could have been raised at trial or in direct appeal cannot be asserted in PCR application absent a claim of ineffective assistance of counsel); *Hyman v. State*, 278 S.C. 501, 299 S.E.2d 330 (1983) (same). Also, he cannot take advantage of any error by counsel or invited error. *State v. Stroman*, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984) (a party “cannot complain of an error which his own conduct has induced”) (citation omitted); *State v. Robinson*, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991); *State v. Washington*, 315 S.C. 108, 432 S.E.2d 448 (1993); *State v. Logan*, 279 S.C. 345, 306 S.E.2d 622 (1983); *Wilson v. Lindler*, 995 F.2d 1256 (4th Cir. 1993); *Drayton*, 312 S.C. at 10-11, 430 S.E.2d at 521.

Indeed, Applicant admits in Ground 9(G) that “*trial counsel failed to preserve the error for appellate review.*” **Third Amended Application, p. 18. (Emphasis added).** Thus, he cannot raise a direct appeal issue in PCR. Further, and assuming that he could do so, he cannot prevail because he concedes that the issue was not preserved for appellate review. As a result, to the extent he is permitted to raise an allegation related to a supposed error under *Burkhart*, he may only do so in the context of an allegation that he received ineffective assistance of trial counsel.

The Court further finds that trial counsel was not ineffective for failing to anticipate a change in the law that did not occur until over twelve years after Rogers’ December 1996 resentencing proceeding. Again, *Burkhart* is inconsistent with the result reached in post-*Skipper* cases dealing with the current allegation. The Court rejects Applicant’s position because he would have this Court hold that trial counsel was ineffective based upon counsel’s failure to utilize a crystal ball or have Periclean foresight.

However, Applicant’s suggested standard is inconsistent with *Strickland v. Washington*, 466

U.S. 668 (1984), where the Court expressly mandated that a reviewing court must eliminate the effects of hindsight to reconstruct the circumstances of counsel's challenged conduct and evaluate the conduct from counsel's perspective at the time. 466 U.S. at 689. Therefore, an attorney is never required to anticipate or discover changes in the law or facts that did not exist at the time of trial. E.g., *Gilmore v. State*, 314 S.C. 453, 445 S.E.2d 454 (1994) (attorney is not required to be clairvoyant or anticipate changes in the law which were not in existence at time of trial), *overruled on other grounds*, *Brightman v. State*, 336 S.C. 348, 520 S.E.2d 614 (1999); *Thornes v. State*, 310 S.C. 306, 426 S.E.2d 764 (1993) (even though victim changed her mind by the time of the PCR hearing and testified for defendant, counsel was not ineffective for encouraging defendant to plead guilty without first interviewing the victim because he had her written statement against defendant); *Robinson v. State*, 308 S.C. 74, 417 S.E.2d 88 (1992) (finding counsel not ineffective for failing to use a defense that would not receive acceptance until several years after the trial). See also *United States v. McNamara*, 74 F.3d 514, 515-17 (4th Cir.1996) (counsel cannot be considered ineffective for failing to anticipate changes in law); *Kornahrens v. Evatt*, 66 F.3d 1350, 1360 ("Skipper was on appeal to the Supreme Court at the time of Kornahrens's trial, and Runyon testified that he was aware of that fact. Nevertheless, the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law").

Indeed, to explain his failure to present Grounds 9(G) and (H) to this Court in earlier pleadings, Applicant has claimed that he could not have discovered these allegations in time to assert them in any of his earlier Applications. The Court finds that, if Applicant could not have anticipated this change in the law, then trial counsel certainly was not ineffective for failing to anticipate that the South Carolina Supreme Court would reach the result it did in *Burkhart*.

The Court further finds that Applicant's claim 9(G) must also be rejected because he failed to present any evidence at the evidentiary hearing on this allegation. He had the burden of proof as to any allegations raised by him but he did not present any evidence on this allegation. See *id* at 687-

96; *Bannister v. State*, 333 S.C. 298, 509 S.E.2d 807 (1998).³³ His failure to present any such testimony means that the allegation is a conclusory claim that will not support Post-Conviction Relief. *E.g. Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) (conclusory statement that discrimination occurred in selecting the jury was not enough), *abrogated on other grounds, Trest v. Cain*, 522 U.S. 87 (1997) (Court of Appeals is not required to raise issue of procedural default *sua sponte*); *Ellis v. Lynaugh*, 873 F.2d 830, 838-39 (5th Cir. 1989) (habeas petitioner's "mere conclusory allegations of discrimination" in grand jury selection were "insufficient to entitle an individual to relief"). *See also Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991) ("a petitioner is *not* entitled to an evidentiary hearing, however, when his claims are merely conclusory allegations unsupported by specifics or contentions that in the face of the record are wholly incredible") (internal quotations omitted) (emphasis in original).

Finally, the Supreme Court in *Strickland* held that "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies," and "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, ... that course should be followed." 466 U.S. at 687. Here, Applicant cannot meet his burden of proving that he was prejudiced by counsel's error, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also Florida v. Nixon*, 543 U.S.175 (2004). In the context of a capital sentencing proceeding, he must prove that "there is a reasonable probability that ... the sentencer--including an appellate court, to the extent it independently reweighs the evidence--would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695; *see also Wiggins v. Smith*, 539 U.S. 510, 537 (2003); *Jones v. State*, 504 S.E.2d 822, 829-30 (S.C. 1998) (petitioner did not meet burden). "A

³³ His argument that it was unnecessary to present any evidence in connection with his Ground 9(G) ignores that trial counsel may have had a valid strategy for his presentation of evidence concerning Applicant's confinement.

reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Jones*, 504 S.E.2d at 823-824. *Accord Plath v. Moore*, 130 F.3d 595 (4th Cir. 1997) (“given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and hence, the sentence imposed.”).

There are only limited exceptions where prejudice is presumed – none of which apply here. In *Nance v. Ozmint*, 367 S.C. 547, 626 S.E.2d 878 (2006), our state supreme court outlined these limited exceptions:

In [*United States v. Cronin*, 466 U.S. 648 (1984)], the [United States Supreme] Court identified three distinct situations in which a presumption of prejudice is appropriate. First, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." *Cronin*, 466 U.S. at 659. Second, per-se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." *Id.* Third, the Court identified certain instances "when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* (citing *Powell v. Alabama*, 287 U.S. 45 (1932)). A finding of per-se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." *Brown v. French*, 147 F.3d 307, 313 (4th Cir.1998).

The Supreme Court in *Nance* pointed out that these situations of presumed prejudice are rare, and concluded with this instruction:

Absent these narrow circumstances of presumed prejudice under *Chronic*, defendants must show actual prejudice under *Strickland*.

Nance, 367 S.C. at 552, 626 S.E.2d at 880.

Obviously these limited exceptions of presumed prejudice do not apply here. Counsel was present at all critical stages of Applicant’s trial, so the first exception is inapplicable. The third exception is clearly not viable either, since it applies *only* when extreme circumstances external to

counsel would prevent anyone from providing effective representation. The classic case, discussed in *Chronic*, is *Powell v. Alabama*, 287 U.S. 45 (1932), where in 1930's Alabama black youths were charged with a horrible crime. Hostile sentiment pervaded the community, and the defendants had to be kept under guard of soldiers. Only on the day of trial was a lawyer appointed, and he was not only unprepared but also was from a different state and unfamiliar with local procedure. Obviously, Applicant's trial nowhere approaches the inherently prejudicial circumstances of *Powell*.

Finally, the second *Cronic* exception, where counsel "entirely fails to subject the prosecution's case to adversarial testing," is also inapplicable. An example of this exception is *Nance* itself – where lead counsel was hampered by alleged alcoholism, drug intake, and health issues affecting his memory, and co-counsel was a new lawyer who had only been practicing for eighteen months. The lawyer told the jury in opening argument that he did not ask for the case. The defense sentencing phase case only lasted seven minutes, and during closing co-counsel did not plead for his client's life, but instead described him as a "sick" man who did "sick" things. *Nance*, 367 S.C. at 554-58, 626 S.E.2d at 881-84.

This is not a *Nance*-type situation where counsel "entirely failed to subject the prosecution's case to any meaningful adversarial testing." Thus, where, as here, there was some meaningful effort overall, the individual mistakes are properly adjudged through *Strickland*'s normal process, which includes the prejudice analysis.


This conclusion is consistent with the language of *Strickland* itself, despite the majority view in *Burkhart* of conditions of confinement evidence as an arbitrary factor for which it did not perform a prejudice analysis on direct appeal. Unlike a case on direct appeal – where the conviction is not yet considered final – during collateral attack concerns of finality are of "profound importance". See

generally Strickland, 466 U.S. at 693-94 (discussing concerns of finality when deciding the appropriate standard for prejudice). *See also Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Hence, on collateral attack, it is appropriate and, indeed, necessary to filter claims through a prejudice analysis to ensure that setting aside of final convictions and sentences occurs only where the alleged error had a reasonable probability of affecting the result of the proceedings.

IV. CONCLUSION.

With regards to the result herein, the court specifically denies the Applicant's ground for Post-Conviction Relief on the basis of *Burkhart*. Other than the corrections and other stylized changes that the court has made in the body herein, the Court's prior order in terms of determinations remains. Hence, Applicant's convictions for CSC 2nd with a minor are vacated and the application is granted with regard to the sentencing phase and denied with regard to the guilt phase.

AND IT IS SO ORDERED.


Honorable Diane Schafer Goodstein
Circuit Court Judge
Presiding by Order of the Supreme Court

December 10, 2010

St. George, South Carolina

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Honorable Diane Schafer Goodstein

Case No. 00-CP-18-575

**Jon E. Ozmint, Director, South
Carolina Dept. of Corrections,**

Petitioner,

vs.

Timothy Dion Rogers, #4883,

Respondent.

NOTICE OF APPEAL

The Petitioner, Jon E. Ozmint, Director, South Carolina Department of Corrections, appeals from the Order of the Honorable Diane Schafer Goodstein granting a new sentencing trial and vacating applicant's CSC 2d convictions dated December 10, 2010, and received in this office via email from the Dorchester County Clerk's office the same date.

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

WILLIAM EDGAR SALTER, III
Senior Assistant Attorney General

P.O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

By: _____
ATTORNEYS FOR PETITIONER

January 7, 2011.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Dorchester County
Honorable Diane Schafer Goodstein

Case No. 00-CP-18-575

**Jon E. Ozmint, Director, South
Carolina Dept. of Corrections,**

Petitioner,

vs.

Timothy Dion Rogers, #4883

Respondent.

PROOF OF SERVICE

I, William Edgar Salter, III, Senior Assistant Attorney General, Office of the Attorney General, do hereby certify that I have this date served Petitioner's Notice of Appeal, in the foregoing action, on counsel for Respondent both electronically and by depositing one copy of the same in the United States mail, first class postage prepaid, and addressed as follows:

Jeffrey P. Bloom, Esquire
1911 Pickens Street
Columbia, SC 29201

Diana Holt, Esquire
Post Office Box 6454
Columbia, SC 29260

This 7th day of January, 2011.

WILLIAM EDGAR SALTER, III
ATTORNEY FOR PETITIONER